



The Kampala Amendments on the Crime of Aggression

Towards 2017: Moving forward and preparing the International Criminal Court

Presentation by
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Conference

***„The Kampala Amendments on the Crime of Aggression: A Promise for the
End of Illegal Use of Force in International Relations”***

Organized by

Helmut Scholz
Member of the European Parliament
Spokesman PGA / Member of Friends of the ICC
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Final version.

It is a pleasure to speak after you, Mr Scholz, as you have already given a good overview over the state of the on-going ratification process and have covered so many important points for the ICC. Needless to say it is most welcome that a distinguished member of the European Parliament has taken the initiative to this timely and important meeting.

Now, at the outset, let me convey to you, on behalf of the Judges of the International Criminal Court, our main message. This is a message which is quite simple and clear. What is needed is: ratifications, ratifications, and more ratifications!

It is of the utmost importance, it is crucial, there is, in my view, a compelling necessity that as many EU States as possible ratify as soon as possible the crime of aggression amendments to the Rome Statute, adopted in Kampala in June 2010.

Furthermore, it is highly desirable that the European Union incorporates in its Common Position on the International Criminal Court a strong call to ratify the Kampala amendments as soon as possible.

Fortunately, from our perspective, the current situation is generally positive and encouraging:

- As we have heard, already 12 States Parties have ratified to date, with many more on the way.
- We are pleased that already six EU States have ratified namely Luxembourg, Estonia, Germany, Cyprus, Slovenia and Belgium – Belgium only on 26 November – more EU States to come.

Maybe I am allowed to mention that German Foreign Minister Westerwelle was kind enough to invite me to participate in the German ratification event on 3 June 2013, at the United Nations in New York, in recognition of my long-standing work for the criminalisation of the aggressive use of armed force – here is a picture of this event. As a German, I am, of course, fully aware that the concept of crimes against peace or crimes of aggression was developed after the aggressive wars

waged by Adolf Hitler and his followers against so many nations. Therefore, it was a special moment for me to participate in this occasion, after the German Bundestag had unanimously approved the treaty law on the crime of aggression amendments to the Statute. Maybe I should also mention that the German Government has, as an additional measure, produced a special brochure in English, namely this “Explanatory Memorandum” on the German ratification act, possibly as inspirational material or model for others who also want to ratify.

This presentation is entitled “Towards 2017: Moving forward and preparing the International Criminal Court”. In the following, I will, from the point of view of an ICC Judge, deal essentially with two sets of issues:

First, and once again: why is it so important to ratify the crime of aggression amendments, as part of a future-oriented and constructive legal policy?

Second: what are some of the considerations and preparations of the International Criminal Court itself with regard to its future jurisdiction on the crime of aggression?

I shall conclude with some general thoughts on the way forward towards achieving as many ratifications as possible, in any case more than 30 until 2017.

I will speak for only 20 minutes approximately, so that afterwards we may have a full dialogue and discussion.

Why Ratify?

As a Judge of the ICC, I firmly believe that the future jurisdiction over the crime of aggression will strengthen international peace and security, and the respect for the rule of law. It is obvious that the crime of aggression is a particular dangerous threat to peace, security and well-being of the world.

Secondly, to permanently criminalise aggressions will be, in my view, a decisive step in strengthening the protection of human rights. Why? Well, aggressions, illegal war-making, illegal uses of armed force continue to be the root cause of the most serious and massive violations of human rights in many parts of the world.

Why is the Kampala breakthrough so important with regard to human rights? Well, experience shows that aggressive war-making regularly begets, regularly leads to massive war crimes and crimes against humanity. There is no war without war crimes; war crimes are an odious consequence, an inevitable and an inescapable consequence of the ruthless use of armed force. As an ICC Judge, I have seen this in practically all African situation states with which the ICC is currently seized.

On the other side, the absence of war, the absence of the use of aggressive military force is, in my view, the best protection, the most important pre-condition that human rights will be respected.

Thirdly, this ratification will close an important gap in the Rome Statute. Future jurisdiction of the ICC will mean that States Parties will enjoy, at least to a certain extent, the protection that the ICC and its Judges can grant to a State against an aggression committed by another State.

Furthermore, the ratification by as many States as possible and the future jurisdiction of the ICC against the Court will be a highly significant and highly visible international public commitment not to engage in aggressive acts or aggressive war-making. It will strengthen the role of the ICC and also all the principles that are enshrined in the Charter of the United Nations.

If we continue on the current course, if we make further progress with ratifications, we will have the full benefit to build on the breakthrough achieved in Kampala. We will, thus, have the chance to contain and to reduce the risk of aggressive war-making in the future. Finally, we will also have the chance in the future to prevent and ban, to the extent possible, illegal uses of armed force and all the human suffering that usually comes along with it.

Preparing the International Criminal Court

As you know, on 11 June 2010, a breakthrough, something unexpected occurred; surprising progress was achieved: against all odds, against most expectations, the Review Conference of the International Criminal Court held in Kampala, Uganda adopted a full and complete package proposal on the crime of aggression.

At that time, I was Second Vice-President of the Court. As one of the first measures that we took after this breakthrough, we decided that from now on, in all copies of this treaty, the Rome Statute, the crime of aggression should already be included in three new articles, namely:

- Article 8 *bis*, Crime of Aggression
- Article 15 *bis*, Exercise of jurisdiction over the crime of aggression (in the case of a State referral or a *proprio motu* exercise).
- Article 15 *ter*, Exercise of jurisdiction over the crime of aggression (in the case of a Security Council referral).

When we took this decision, we knew, of course, that between 2010 and 2017, tens of thousands of copies of this treaty would be distributed all over the world; tens of thousands of times, the text of this treaty would be downloaded from our website. Thus, we wanted to familiarise the international community with the perspective that the Court will have, in the foreseeable future, jurisdiction over the crime of aggression.

As a Judge and international lawyer, I am also convinced that the text of the amendments adopted in Kampala will be a sound basis for the future exercise of jurisdiction over the crime of aggression. This is because the definition of the individual element of the crime follows almost word for word the definition of “crimes against peace” established in the Charter of the Nuremberg Military Tribunal. Also the following is very positive: in order to counter the risk that this definition of the crime might be politicised, first, the definition of what constitutes an “act of aggression” follows word for word the definition of aggression annexed to resolution 3314(XXIX) of the United Nations General Assembly of 14 December 1974. Second, and most important, the existence of an act of aggression does not give *per se* rise to the crime of aggression. Instead, the act of aggression must “by its character, gravity and scale constitute a manifest violation of the Charter of the United Nations”. I firmly believe that this threshold clause is highly important and very useful for the Judges: it will make it possible for the Judges to focus only on clear cases of aggressions. At the same time, it will save them from dealing with uses of armed force which are below this threshold. It will thus provide more legal certainty for the Judges concerned and also for the international community.

Sceptics have sometimes used the argument that to deal with crimes of aggression would allegedly overburden the Court and its Judges. I do not share this view: What about Nuremberg? is it not correct that the Judges of the International Military Tribunal in Nuremberg were able to apply correctly the provisions on crimes against peace? Furthermore, why shall it be more difficult to examine a crime of aggression than to examine, for example, a crime of genocide?

I believe that my Judge colleagues, despite all their work with the cases currently before our Court, are more and more aware of the necessity to prepare ourselves for the jurisdiction on the crime of aggression. Concrete preparations are already on-going. There exists already a small study group at the Court which includes Eleni Chaitidou, my Legal Officer, and whose work I follow with great attention.

This study group is currently examining whether the existing procedural provisions in the Court's instruments are adequate or whether, instead, new amendments are necessary so as to enable the Judges of the ICC to deal with referrals of situations involving the crime of aggression. In this regard, the study group has already considered several questions for which the Court must soon provide an answer, such as

- What are the consequences on the procedure to be followed depending on whether the situation was referred by the Security Council or, in the alternative by a state? What if the Prosecutor decides to commence the investigation by herself?
- New article 15 *bis* of the Statute requires that the entire Pre-Trial Division must authorize the commencement of the investigation, if the Security Council has not made any determination in relation to the act of aggression. What are the necessary procedural preconditions which will facilitate such a decision-making process?

The identified procedural avenues and options will be presented to the Judges of the ICC for their further consideration. This will enable the Judges to determine whether legislative amendment proposals to the Rules of Procedure and Evidence or the Regulations of the Court are necessary. I am hopeful that this study will be concluded in good time before the activation of the ICC's jurisdiction over the crime

of aggression.

Conclusions

After all this, you will not be surprised about my view that further efforts are necessary, all possible ways and means must be exhausted to effectively criminalise aggressive war-making, to outlaw the crime of aggression. Once again, it is of the utmost importance that all EU States ratify the crime of aggression amendments as soon as possible.

It is also my hope that I have managed to explain why I look to the next months and coming years with hope and anticipation, yes, with optimism. The current ratification campaign, which I fully support, is well on track. I expect 2014 to be a very good year for the campaign. Likewise, efforts to prepare the Court itself for its future jurisdiction on the aggression are on-going and promising.

All-in-all, we are currently engaged in a development which is big, promising and of fundamental importance. All EU States that have not yet ratified still have the chance to be among the first 30 States or plus, or in any event, to ratify before the end of 2015.

As I said before, I am available for any questions.
