

Implications of the Criminalisation of Aggression

LI Haopei Lecture Seminar

Judges Hans-Peter Kaul and LIU Daqun

FICHL Policy Brief Series No. 2 (2011)

In his 2011 LI Haopei Lecture, **ICC Vice-President and Judge Hans-Peter Kaul** made, *inter alia*, the following remarks:

In the 20th century, the horrors of the First and Second World Wars led to significant international efforts to ban war-making and later to criminalise aggressive war-making by states against other states. This is demonstrated in particular through the following:

- In 1928, states renounced in the Kellogg–Briand Pact (officially known as General Treaty for the Renunciation of War) on war as a means of politics. Almost all states existing at that time ratified the Pact.
- In 1945, after the aggressive wars waged by National Socialist Germany in Europe and by Japan in the Far East, the Allied victors established in Article 6(a) of the London Charter, also known as the Nuremberg Charter, the concept of crimes against peace. The main architect of this new development in international law was Robert H. Jackson, the US Chief Prosecutor of the International Military Tribunal of Nuremberg.
- In October 1945, the newly founded United Nations adopted in San Francisco the UN Charter, which sets out a general prohibition of the threat or use of force in Article 2(4) of the Charter.
- In 1950, the United Nations adopted the Nuremberg Principles which reaffirm in Article 6 the concept of crimes against peace.
- In 1974, the UN General Assembly approved Resolution 3314 (XXIX) on the crime on aggression as a non-binding guide for the Security Council, which was given wide discretion in determining whether an act of aggression had indeed occurred.
- In 1996, a code for international crimes was completed by the International Law Commission of the United Nations which included the original definition as provided by Article 6(a) of the Nuremberg Charter for the crime of aggression.
- In 1998, the Rome Statute of the International Criminal Court was adopted, during a United Nations Conference of Diplomatic Plenipotentiaries held in the Italian capital (the Rome Conference). While consensus on the definition of crime of aggression was out of reach, it was possible to recognise the concept of crime of aggression with a placeholder position as a most serious crime of concern to the international community as a whole in Article 5(1) of the Statute. The Rome Conference also decided to pursue further work and effort through the Assembly of States Parties' Special Working Group on the Crime of Aggression to eventually codify the crime of aggression.

On 11 June 2010, the Review Conference of the International Criminal Court, held in Kampala/Uganda, adopted a full and complete package proposal on the crime of aggression. The amendments to the Rome Statute contain a definition of the crime of aggression and set out the conditions under which the Court will have, from 2017 onwards, jurisdiction with regard to this crime. There is little doubt that after 2017, the Rome Statute will have an Article 8*bis*, an Article 15*bis* and an Article 15*ter* incorporating the crimes of aggression.

It is against this background that on 8 February 2011, a seminar was organised by the Forum for International Criminal and Humanitarian Law (FICHL) in co-operation with the Norwegian Centre for Human Rights (University of Oslo) and the Peace Research Institute Oslo (PRIO) to consider possible implications of the criminalisation of aggression. The seminar was held as part of the LI Haopei Lecture series, in memory and honour of Judge LI Haopei, the distinguished Chinese jurist, diplomat and academic. Judge Dr. jur. h. c. Hans-Peter Kaul, Second Vice-President of the International Criminal Court gave a lecture entitled "Is it Possible to Prevent or Punish Future Aggressive War-Making?". Judge LIU Daqun, from the International Criminal Tribunals for the former Yugoslavia and Rwanda, commented on the issues raised by this lecture. Morten Bergsmo acted as moderator of the seminar.

The speaker opened the lecture with the question: “Is it the natural right, the inherent right of States to make war? Is war-making a national right?”. Even nowadays, it seems quite evident that certain states, powerful states, continue to reserve for them, openly or more discreetly, the option of going to war for their interests. The question, however, has to be addressed against the backdrop of the successful conclusion of the ICC Review Conference in Kampala, adopting by consensus a full proposal on the crime of aggression. This is a further decisive step towards the criminalisation of aggression. Until 2017, at least 30 States Parties of the Rome Statute must ratify these significant amendments to the Statute and 2/3 of the States Parties have to confirm the solution found in Kampala by a further vote thereafter.

With regard to the main factors leading to the Kampala breakthrough, it was recalled that it was essentially the intolerable phenomenon of multiple aggressive wars waged by Nazi Germany against many states, which led to the development of the concept of crimes against peace in the Nuremberg Charter. It was the vision of, in particular, Robert H. Jackson who was one of the drafting fathers of Article 6(a) of the Nuremberg Charter. The judgement of the International Military Tribunal at Nuremberg expressed this concept in the following terms:

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.

A further consequence of the horrors of the Second World War was the prohibition of the threat or the use of force set out in Article 2(4) of the UN Charter adopted in 1945. In the end, general abhorrence and rejection of aggressive war-making provided also the ground for the inclusion of the crime of aggression in the Rome Statute and further efforts to codify this crime in international law. Ultimately, it was the overwhelming power of the great idea that crimes against peace are the evil *per se*, some kind of a universal “colère publique” against aggressive war-making which eventually gave rise to the significant progress achieved in Kampala on the crime of aggression.

It must, however, be borne in mind that neither the Nuremberg Principles nor the prohibition of unilateral force as enshrined in Article 2(4) of the UN Charter have had the consequence of preventing further wars. Among international armed conflicts since the Second World War with the highest casualties, there are, *inter alia*, the war in Korea, the Vietnam War and also the American-British invasion of Iraq in 2003. Among the many uses of military force against other states, the invasion of Kuwait of 2 August 1990 by Saddam Hussein is almost universally regarded as yet another classical case of a crime of aggression.

Furthermore, according to “A World Study on Con-

flicts, Victimisation and Post-Conflict Justice” submitted in March 2010 by Professor Cherif Bassiouni, some 313 conflicts took place between 1945 and 2008 world-wide, causing an estimated 92 to 100 million people killed. These conflicts were of an international and non-international character, as differentiated in international humanitarian law, as well as purely internal conflicts, civil wars, and regime victimisation.

With regard to the use of force by states against other states as prohibited by Article 2(4) of the UN Charter, one should be aware of a specific political phenomenon: since 1945, the use of military force is regularly accompanied by an official legal justification, quite often a far-fetched interpretation of the right to self-defence against an armed attack as provided by Article 51 of the UN Charter. These “justifications” which often are the subject of massive propaganda campaigns carry along a significant risk for international peace and stability: if *de facto* all kinds of questionable arguments to justify war-making are indeed accepted by international public opinion, this acquiescence diminishes the respect for the general prohibition of the use of force under international law pursuant to Article 2(4) of the Charter. Furthermore, there are other forces and actors who may have an interest in keeping open the option to go to war. This includes risks emanating from the military-industrial complex and tendencies to a partial permanent war economy existing not only in the US, but also in other powerful states. According to SIPRI, the Stockholm International Peace Research Institute, the total world spending on military expenses in 2009 amounted to 1.531 trillion US Dollars.

It is against this background that the implications and significance of the Kampala breakthrough on the crime of aggression have to be evaluated and understood by all concerned in the international community. The previously dominating excuses against the criminalisation of aggression – namely the absence of an accepted definition of the crime and the alleged impossibility to regulate the relationship between the Security Council and the International Criminal Court – have been eliminated. For the first time, the world has a text of international criminal law defining clearer limits for the *jus ad bellum*. For the first time in the history of mankind, there is now a concrete perspective, a unique chance, if sustained and fully implemented, to criminalise aggression and illegal war-making.

With regard to the legal policy to be followed in the years to come, one should consider in particular the following seven suggestions for the way forward:

- (i) There is a necessity for an international awareness campaign to draw public attention to the Kampala compromise and the necessity to criminalise aggression. What is needed is a meaningful and comprehensive international discourse on the implications and consequences of this major step in the development of

international criminal law. Not only political and military leaders, but also others, including the civil society, are called upon to discuss which conclusions they may draw from the adoption of the amendments to the Rome Statute on the crime of aggression by consensus. Leaders all over the world must understand that we now have new and significant limitations complementing the corpus of *jus ad bellum*.

- (ii) There is a further necessity to explain to the world at large that there exists, since the Kampala Conference, a yardstick, a measurement, an agreed standard to determine whether a crime of aggression was committed or not. It is important that international public opinion is fully aware of this new standard. One may hope or expect that, in the future, the soft power of international public opinion will use this standard in order to determine whether a crime of aggression has taken place or not and thereby also deter and prevent future aggression.
- (iii) There is an obvious necessity for a comprehensive ratification campaign with the objective that the largest possible number of the currently 114 States Parties of the Rome Statute, including for example France and the United Kingdom, both permanent members of the Security Council, will ratify these amendments. Permanent members of the Security Council should understand that the amendments agreed in Kampala are no infringement on the powers of the Security Council but a further proof of strengthening its authority: the Security Council will, in the future, have the power to refer aggressions as a crime to the International Criminal Court.
- (iv) Non-Governmental Organisations (NGOs) and human rights organisations (such as Human Rights Watch, Amnesty International and others) should reconsider, after the Kampala breakthrough, their position with regard to the crime of aggression. While aggressive war-making has led in the last century to the most serious violations of human rights through international crimes, the absence of war is in all likelihood the best protection against future atrocities and the best guarantee for life in “freedom of fear” as envisaged by the Universal Declaration of Human Rights.
- (v) It seems worthwhile that civil society may establish a new international NGO or a new international network for the special purpose of making the criminalisation of aggression through the Rome Statute as strong, efficient and credible as possible.
- (vi) Parliamentarians, public opinion and civil society, in the last instance the citizens of the world, could also assume a quite positive responsibility to prevent, as far as possible, that States Parties to the Rome Statute submit an opt-out declaration pursuant to future article 15*bis* of the Statute. One must hope that submit-

ting such an opt-out declaration will not be too easy, but will mean a high political price for those who want to eliminate ICC jurisdiction over the crime of aggression for the state concerned.

- (vii) The world should use the current chance, this historic opportunity for a new impetus to promote a culture of peace and non-use of force in international relations. As legendary former US Nuremberg Prosecutor Benjamin Ferencz has often said, “You have to begin very early to educate young minds that war is not glorious. War is an abominable crime, no matter what the cause”. One way of achieving this is to incorporate the reasons and necessity of the common task to repress the waging of aggressive war in the curricula of schools, universities and all kinds of educational institutions.

With regard to the future, there is a further challenge, a further task that appears on the horizon: the international community should, in the years to come, explore all possible ways and means to make the criminalisation of aggression part of international law applicable to all. It is necessary to overcome the limitations of the criminalisation of aggression still existing in the Kampala amendments on this crime. What will be needed one day, if further progress towards lasting peace and grounds for a life without fear of war shall be achieved, is to make the criminalisation of aggression universally accepted in international law, binding all member states of the United Nations. This would be in full conformity with the famous promise of “Equal law for all, Equality before the law” which Robert H. Jackson made in his opening statement before the International Military Tribunal on 21 November 1945 in Nuremberg:

But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.

ICTY and ICTR Appeals Chamber Judge LIU Daqun commented on Judge Kaul’s lecture, by first acknowledging the historic achievement made at the ICC Review Conference on 11 June 2010 in the adoption of the package proposal on the crime of aggression. However, the consensus reached in Kampala raised almost as many questions as it resolved. The response to Judge Kaul’s address focused on three principal issues which demonstrate the complexities and concerns created by the compromise. These include: (i) The State Requirement; (ii) The Role of the Security Council; and (iii) The Conditions for Exercising Jurisdiction.

- (i) The State Requirement

The conservative formulation of the crime of aggression

adopted in Kampala threatens to undermine the progress achieved in international criminal law. In particular, the exclusion of non-state parties from the compass of the crime renders it largely obsolete in an age in which the armed violence of non-state parties abounds. Recent history is replete with examples of non-state violence: the Al Qaeda attacks in New York and Madrid; armed attacks by Chechen separatists in Russia; and the incursions of Uganda's Lord's Resistance Army in Sudan and Congo – to name but a few. If the purpose of international law is to protect the world community from serious breaches of the peace, it is difficult to justify why individuals operating for non-state entities should be immune from criminal liability for aggressive conduct.

(ii) The Role of the Security Council

The power of the Security Council to refer a situation involving the allegation of a crime of aggression to the ICC was, in itself, uncontroversial. However, before Kampala, the question of whether the Security Council should be granted the monopoly of deciding which cases to refer to the ICC for investigation was a subject of distinct sensitivity and much debate. In any event, the imposition of such monopoly was avoided by the adoption of all three trigger mechanisms listed under Article 13 of the ICC Statute.

Article 15*bis*(8) provides an additional safeguard which prevents the Security Council from unduly delaying investigations into the crime of aggression. Pursuant to this provision, after an interval of six months of having notified the Security Council, the Prosecutor – with the authorisation of the Pre-Trial Chamber – may investigate alleged crimes of aggression in the absence of any determination. This accommodation represents distinct progress – particularly in light of the Security Council's lamentable record in recognising acts of aggression over the past half-century.

In the absence of the Security Council's determination as to whether an act of aggression has occurred, a number of questions and concerns are raised. For example, if there is no Security Council determination that an act of aggression has occurred, should the Pre-Trial Chamber make such a finding before it authorises the Prosecutor to investigate the crime of aggression? Moreover, will such a finding require the Pre-Trial Chamber to evaluate any factors which suggest that the use of force was justified? Arguably military actions based on self-defence, humanitarian intervention or any other legitimate purpose consistent with the

UN Charter will need to be evaluated by the Pre-Trial Chamber before it can determine whether an act of state aggression has occurred.

(iii) The Conditions for Exercising Jurisdiction

In many respects, the convoluted and counterintuitive conditions for exercising jurisdiction exemplify the complexities and sensitivities that have attended the crime of aggression since its inception. Any prospect of developing the crime has been hindered by the decision to postpone its temporal jurisdiction until at least 2017.

Moreover, the various conditions for exercising jurisdiction have, broadly speaking, engendered an asymmetrical three-tier system of international justice for the crime of aggression, consisting of: (i) contracting parties not lodging a declaration; (ii) contracting parties that have opted out of the Court's jurisdiction; and (iii) non-party states to the Statute – where the bad boys to all intents and purposes remain outside the law.

An obvious and unfortunate consequence of this arrangement is that the ICC will only have the jurisdiction to prosecute nationals in states least likely to commit acts of aggression. Meanwhile, states most likely to commit acts of aggression will doubtless prefer to remain non-party states to the Statute, or will opt out of the jurisdiction of the ICC if they have already become a contracting party to its Statute. Such a system can hardly be described as progressive – particularly as it allows states to protect their belligerent leaders from prosecution, undermining the credibility of international criminal justice.

In conclusion, Judge LIU noted that the amendments agreed at Kampala are not the benchmark for the highest standards of codification of international law. Moreover, it is quite possible that the compromises reached will merely serve to deepen the gaps between states and leave gaping loopholes in criminal liability. Yet, despite these shortcomings, the consensus forged at Kampala represents a considerable breakthrough for international criminal justice and international security law. Whether this development will break down or break through the remaining obstacles that confront the crime of aggression, only time will tell.

This FICHL Policy Brief was edited by Alf Butenschøn Skre. It is based on the first FICHL LI Haopei Lecture Seminar in Oslo on 8 February 2011. Work on this Policy Brief was completed on 8 February 2011. It is available at <http://www.fichl.org/policy-brief-series/>. ISBN 978-82-93081-43-2.