

**Review Conference of the International Criminal Court:
A Brief Report on Outcomes**

Adam Bower
PhD student, UBC

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Note: As part of his doctoral dissertation research, Adam Bower recently attended (as an accredited observer), the first Review Conference of the International Criminal Court, held in Kampala, Uganda, between May 31 and June 11, 2010. Bower's research trip was funded, in part, through a small grant from UBC's SDF Program. What follows is a brief review of the outcomes of the Conference. Of particular interest to those in Canada's security and defence communities is the incorporation of a definition of aggression into the Rome Statute.

The views expressed are Bower's. He may be contacted at asbower@interchange.ubc.ca (Brian Job, Director, UBC SDF Program, Liu Institute, UBC)

As part of my doctoral dissertation research, I recently travelled to Kampala, Uganda, in order to attend the first Review Conference of the International Criminal Court, held between 31 May and 11 June 2010. The Review Conference represented an important milestone in the development of the ICC, as it was the first opportunity for States Parties to amend the Rome Statute since its creation in 1998. The decisions reached at Kampala will have a profound effect on the trajectory of the Court going forward. In recognition of its legislative and symbolic importance, the Review Conference brought together the largest collection of senior political figures and civil society representatives since the 1998 Rome Conference.

Attending the Review Conference facilitated my doctoral research. As an accredited member of the NGO Coalition for the International Criminal Court delegation, I had access to all formal conference sessions, as well as the parallel civil society events. This provided a unique opportunity to observe diplomatic negotiations up-close, and to engage with practitioners and researchers in a dynamic international forum.

So what was achieved at the Kampala conference? The Review Conference began with a four-day "stocktaking" exercise, which included substantive discussions on cooperation, complementarity, peace and justice, and the Court's impact on victims. While interesting and at times informative, the stocktaking sessions produced only limited tangible outcomes in the form of declarations and resolutions.

The primary purpose of the Review Conference was to consider amendments to the Rome Statute. Ultimately, *three resolutions were passed* concerning the three proposed amendments. After some discussion, delegates ultimately decided to retain Article 124—the seven-year optional opt-out for war crimes—in the Rome Statute. As per the terms of the agreement, the article will be reviewed again in five years' time, at the 14th meeting of the Assembly of States Parties. Delegates also agreed to amend Article 8 of the Rome Statute, by making the use of "poison or poisoned weapons", "asphyxiating, poisonous or other gases and all analogous liquids, materials or devices", and the use of "bullets that expand or flatten easily in the human body" as war crimes in *non-international conflicts*. A sentence inserted in the understandings to the amendment notes that the new text does not apply to domestic policing operations (where, for example, so-called "dum-dum" bullets are sometimes employed). The amendment was useful in closing an odd gap in the



THE UNIVERSITY OF
BRITISH COLUMBIA

6476 NW MARINE DRIVE
VANCOUVER BC
CANADA V6T 1Z2

www.ligi.ubc.ca

law of international and non-international armed conflict. However, the real impact of the change may be minimal.

Undoubtedly the most highly anticipated and dramatic aspect of the Review Conference was the *debate surrounding whether and how to incorporate the crime of aggression into the Rome Statute*. The amendment agreed in Kampala does “operationalize” the crime under the Court’s jurisdiction, though it does so with a number of important caveats. A new Article 8*bis* lays out the *definitional content of the crime of aggression in two parts*. The first paragraph defines the individual criminal act of aggression, which “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.” The second paragraph details the State act of aggression as per the main elements of the earlier UN General Assembly Resolution 3314 of December 14 1974. So, while the ICC will have jurisdiction—eventually—over the criminal actions of individuals, the Resolution recognizes that the acts of aggression themselves necessarily involve states.

The amendment sets out two general conditions which must *both* be fulfilled before the Court can consider a case of aggression. First, jurisdiction may only be exercised over alleged acts of aggression “committed one year after the ratification or acceptance of the amendments by thirty States Parties.” Second, jurisdiction over the crime must be activated by a further affirmative vote, *after* January 1 2017, by a two-thirds majority of States Parties. Until that time, the Court cannot consider any alleged crimes of aggression. This latter hurdle should be relatively easily achieved, though it is certainly conceivable that some States Parties may seek to further delay the exercise of jurisdiction beyond 2017.

Three different modalities are envisioned for how this jurisdiction may be exercised. Article 15*bis* concerns State referrals and *proprio motu* (that is, Prosecutor-initiated) investigations. In order for these to proceed, the Prosecutor must first notify the UN Security Council of his/her intention to begin an investigation. If the UNSC has already determined an act of aggression has occurred, the Prosecutor may proceed immediately. If no determination is forthcoming, after a period of six months the Prosecutor may proceed, provided that he/she receives authorization from the ICC Pre-Trial Division, and the UNSC has not voted to block the process. Article 15*ter* concerns UNSC referrals. As with the other “core crimes,” a Security Council referral can apply to non-party states. This is the only means by which the nationals of non-parties may be subject to the jurisdiction of the Court for the crime of aggression.

The amendment thus will apply to all States Parties to the Rome Statute, irrespective of whether they have individually ratified the new text, provided they have not lodged a declaration opting-out of the provision. However, unlike the other “core crimes” in the Rome Statute, the nationals of non-party states are completely exempted from the Court’s jurisdiction and cannot be prosecuted for crimes of aggression (except in the case of a UN Security Council referral).

Views on the outcomes of the Review Conference, and the inclusion of the crime of aggression in particular, are divided. Many NGOs and states were deeply disappointed with the result. The Resolution entrenches a relatively weak legal regime on aggression, especially since it exempts non-parties from the Court’s jurisdiction, and allows existing States Parties to remove themselves by declaration. The delay of jurisdiction is also problematic for those who would like to see the Court actively take-up aggression as a matter of urgency. Finally, many felt that the final outcome gave too much to the powerful “P5,” with little in return for the large majority of states which favoured a strongly independent ICC authority over the crime. There was a palpable sense that negotiations had largely ignored the wishes of smaller, less powerful nations,

and this sense may well have poisoned much of the goodwill otherwise associated with the achievement

On the other hand, many have argued that the outcome is a good deal more positive. First, the amendment expands the legal regime governing the crime of aggression, for the first time instituting an individual criminal liability in treaty law. This is itself significant, and may provide the basis for further extension of the law in the future. The failure to agree a final text in Kampala would likely have had significant (negative) implications for the legal status of the aggression regime, and state commitment to it. Though imperfect, the inclusion of aggression can also serve as a focal point for political pressure at the domestic level, and can influence future parliamentary inquiries, domestic lawsuits, and even the decision to engage in hostilities in the first place. And the processes of ratifying the amendment and reviewing the provision in seven years time present important opportunities for civil society to engage states in promoting the aims of the Court. Much as joining the ICC has served as a demonstration of “good guy” status for many states, so too can accepting the jurisdiction of the Court over the crime of aggression.