



**The International Criminal Court –  
Perspectives after the Kampala Review Conference**

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This treaty, the Rome Statute, the founding treaty of the International Criminal Court is nowadays regarded by many as the most important treaty since the adoption of the Charter of the United Nations in San Francisco in October 1945. I am glad to make this statement in St. Petersburg, this beautiful city of Fyodor Fyodorovich Martens, who himself is one of the founding fathers of modern international law.

The Rome Statute, which established the first permanent International Criminal Court in the history of mankind, entered into force on 1 July 2002 with 66 ratifications. Today, nine years later, the Rome Statute has 115 States Parties. The Rome Statute contains a comprehensive codification of genocide, crimes against humanity, war crimes and the crime of aggression. This comprehensive codification is based – and this is significant if not revolutionary – on the free and voluntary consent of the international community. Our Court will prosecute these crimes if and when national criminal systems fail. The ICC is the first permanent, general, future-oriented court that is based on the general principle of law ‘equality before the law, equal law for all’.

The ICC Statute was adopted in Rome on 17 July 1998. It is known that the Russian Federation was together with Germany, my home country, among the 120 States which voted in favour. This conference entitled “Martens Readings – 65 years after Nuremberg” is a welcome and very suitable opportunity to pay tribute to the many constructive contributions Russia made to the Rome Statute. As I was the German Chief Negotiator and Head of the German delegation in Rome, I am able to share with all present at this conference, on the basis of my memory, that the Russian and the German delegation maintained friendly and cooperative contacts with each other throughout the Rome Conference. I also followed with great attention that

Ambassador Kyril Guevorgian, my distinguished Russian colleague and friend, indicated after the Rome Conference that the Russian Federation would sign the Rome Statute. The Rome Statute was indeed signed by Russia on 13 September 2000.

As you are aware, the signing of an international treaty by a State is the formal notification that this State has the intention to become a State Party. We have heard that the Duma, the Russian Parliament, has undertaken much preparatory work for a possible ratification of the Rome Statute by Russia. Maybe we can come back to this issue during this conference, which is so timely and important.

In this presentation I will deal with three sets of questions:

One: What are some of the most important key features of the ICC?

Two: What is the current situation of the Court? Which situations are before the Court and which cases are currently underway?

Three: What are the perspectives after the Kampala Review Conference?

As you certainly know, the main outcome of the Kampala Conference was a significant, if not historic breakthrough on the crime of aggression, the fourth international crime listed in article 5(1)(d) of this treaty.

I will conclude with some remarks on the role, which Russia played in the development of the concept of crimes against peace and in the upholding of the respect for the Nuremberg principles.

## I. Key Features

With regard to substantive criminal law, the jurisdiction of the International Criminal Court is limited to the most serious crimes of concern to the international community as a whole, namely, genocide, crimes against humanity, war crimes and the crime of aggression, pursuant to articles 5-8 of the Statute. It is worthwhile to take a personal look to the long list of 5 forms of genocide, 15 forms of crimes against humanity, the more than 50 different war crimes and the new provision concerning the crime of aggression. This is the first comprehensive codification of international criminal law which is based on the free consent of the international community (and is not imposed by the Security Council as, for example, the statutes of the ad hoc-tribunals). At the same time our Court must now be regarded as one of the most important guardians of international humanitarian law (IHL), indeed as some kind of watchtower against violations of IHL.

As a judge of the ICC, I am often asked what is the most important aspect of this new world court which one should be aware of, which one should really know. My answer is always the same.

In order to understand the ICC, it is in my view necessary to be fully aware of the limited reach of the jurisdiction and admissibility regime of this court. The Court's jurisdiction is not universal. It is clearly limited to the most well-recognized bases of jurisdiction.

The Court has jurisdiction over:

- Nationals of States Parties;

It is undisputed under international law that each State has the right to prosecute its own nationals when they commit crimes.

- Offences committed on the territory of a State Party.

It is likewise undisputed under international law that each State has the right to prosecute crimes committed on its own territory regardless of the nationality of the perpetrators.

- In addition, the Security Council can refer situations to the ICC independent of the nationality of the accused or the location of the crime.
- The Security Council also has the power to defer an investigation or prosecution for one year in the interests of maintaining international peace and security.

The ICC is a court of last resort. This is known as the principle of complementarity as contained in article 17 of the Statute. What does it mean?

- In normal circumstances, States will investigate or prosecute offences.
- The Court can only act where States are unwilling or unable genuinely to investigate or prosecute offences. The primary responsibility to investigate and prosecute crimes remains with States.
- Furthermore, cases will only be admissible if they are of sufficient gravity to justify the Court's involvement.

The principle of complementarity, as provided for in particular in article 17 of the Rome Statute, is the decisive basis of the entire ICC system. Once more, complementarity entails that judicial proceedings before the ICC are only admissible if and when States which normally would have jurisdiction are either unwilling or unable genuinely to exercise their jurisdiction. The Rome Statute recognizes the primacy of national prosecutions. It thus reaffirms state sovereignty and especially the sovereign and primary right of States to exercise criminal jurisdiction.

Numerous safeguards in the Statute also ensure that politically-motivated prosecutions will not take place. As you are aware, the so-called risk, alleged risk of politically motivated prosecutions was one of the main criticisms of the hostile campaign of the Bush administration against the Court which took place between 2002 and 2005.

The Pre-Trial Chamber is one example of such a safeguard and also an important innovation in this regard. The basic principle is that generally the Prosecutor is under the control of the Pre-Trial judges. In particular before launching an investigation on his own initiative, the Prosecutor must first obtain authorization from the Pre-Trial Chamber.

Another key feature is the fact that the Court is 100% dependent on effective criminal co-operation, on the support of States Parties. As the Court generally has no executive powers and no police force of its own, it is totally dependent on full, effective and timely co-operation from States Parties. This is true in particular with regard to arrests and surrender of suspects to the Court which must be performed by States Parties, not by ICC personnel. As foreseen and planned by its founders, the Court is characterized by the weakness, structural weakness that it does not have the competencies and means to

enforce its own decisions. Also in this respect it was the wish of the Court's creators that States' sovereignty should prevail. Once again, the Rome Statute fully respects the sovereignty of States.

## **II. Current situation**

What is the Court's current situation; what progress has been made since its establishment in 2003? Some of the following is quoted from the statement delivered to the United Nations in New York on 28 October 2010 by the current President of the ICC, Judge Song, my colleague from Korea. Judge Song presented the ICC's 6<sup>th</sup> Annual Report to the General Assembly of the United Nations and said *inter alia*:

The International Criminal Court has come a long way since 2003. The complete administrative infrastructure of the Chambers, the Office of the Prosecutor and the Registry had to be developed from scratch. Five "field offices" and a UN liaison office in New York were opened. In the past few years the focus of activity has steadily shifted from establishing the Court to concrete action in prosecution and judicial proceedings. Employee numbers have grown from 5 to 1100.

The Office of the Prosecutor, Pre-Trial, Trial and Appeals Chambers are nowadays all fully functional and cope with a heavy work load. Three "situations" have been referred to the Prosecutor by States Parties (Uganda, the Democratic Republic of the Congo, and the Central African Republic), two (Darfur/Sudan and Libya) have been referred by the UN Security Council, the Libya situation, recently, not least because of the positive vote of Russia in the Security Council. One investigation (Kenya) was started by the Prosecutor *proprio motu*. The Prosecutor has very recently stated that he has the intention

of submitting, to my Chamber - Pre-Trial Chamber II - a request for opening an investigation in the Ivory Coast. The judges have issued 14 arrest warrants and 9 summonses to appear. There have been 3 new arrest warrant applications in the Libya situation. Four cases are currently in the Pre-Trial stage. Four criminal cases are now being heard by the Court against five accused persons currently being detained by the Court.

I do not need to go into too much detail, because the 6<sup>th</sup> annual ICC report to the United Nations is available to you in Russian.

### **III. The Kampala Review Conference**

Let me now turn to the third part of my address: the Kampala Review Conference and its main results.

The founders of the ICC Statute have foreseen that seven years after the entry into force of the Rome Statute, a Review Conference should be held. The Review Conference took place from 31 May to 11 June 2010 in Kampala, Uganda. About 4000 delegates from more than 100 States, non-State Parties and members of civil society took part to both discuss amendments to the Rome Statute and to take stock of achievements and weaknesses of the system governing the International Criminal Court.

Unfortunately I myself was not able to attend the Conference. I will still try to sum up the most important achievements of the conference.

The stocktaking dealt with 4 central issues, namely: international cooperation, complementarity, impact of the Rome Statute system on victims and affected



communities, and peace and justice. All four issues were already addressed in the first resolution of the Conference, the Kampala Declaration, which was adopted on the second day of the conference.

These four issues were discussed further in panels devoted to each of the stocktaking topics.

Concerning the topic of complementarity the discussions focused on practical opportunities that are available to States in order to strengthen and enable other States capabilities. Great emphasis was placed on the obligations of actors at the national level to undertake capacity-building for criminal justice systems.

No resolution was adopted as a result of the discussion on the relationship between peace and justice. This is not surprising given how highly complex and difficult the matter is. There is still the argument that justice should step back in some cases to promote peace processes and that negotiators in particular should be able to use the promise of impunity in exchange for an agreement to lay down arms. But it is a promising result that while previously, the debate was often phrased as “peace versus justice”, the predominant view now is to see peace and justice as allies which sustain one another. It seems that amnesties are no longer considered to be an option to deal with the most serious crimes as enshrined in the Rome Statute.

Finally some words on, what I like to call, the Court’s lifeblood and Achilles’ heel: the cooperation of States Parties. The whole success of the ICC rests on the level of cooperation that the Court and States Parties achieve. There is still substantial need to improve the means of “vertical” cooperation and judicial assistance between the Court and national authorities. Particularly emphasized - in the debate, as well as in the declaration adopted

subsequently - was the crucial role that national authorities play in the execution of arrest warrants.

### **The Crime of Aggression**

Now let me turn to a development which was to me, not so much as a Judge of the ICC, but as a German citizen born during the Second World War and as the former German Chief Negotiator before and during the Rome Conference, a highly emotional moment. Coming back to a debate we had this morning on the origins of the Second World War, I would like to confirm what Mr. Bugnion said this morning: there is nowadays no question, there is general agreement also in Germany that the core responsibility for the Second World War rests with Adolf Hitler and the Nazis, who waged many wars of aggression against many nations, including the attack on the Soviet Union on 21 June 1941.

At the Kampala Review Conference, States Parties, indeed the international community, agreed on the most important, most awaited but also the most difficult amendment proposal, namely the amendment concerning the crime of aggression. For the first time, we now have international criminal law defining clear limits for the *jus ad bellum*. For the first time in the history of mankind, there is a concrete perspective, a unique chance – if sustained and fully implemented – to criminalise aggression and illegal war-making.

This breakthrough did not happen over night. Russia, together with other States, has been working on the development of the crime of aggression for the last decades. Russia's commitment to make the crime against peace punishable under international criminal law has already started in 1945, when the London Charter of the International Military Tribunal was drafted by Robert H. Jackson and Iona Nikitchenko. The London Charter of the

International Military Tribunal defined three categories of crimes, including crimes against peace. In 1950, the International Law Commission reaffirmed Crimes against Peace as international crimes in the Nuremberg Principles.

Russia has always held the position that the definition contained in the Nuremberg Charter should be the foundation of the definition of the crime of aggression. Without Nuremberg, without the continuous work of Russia, without the work and vision of people like Robert Jackson, Roman Rudenko and Iona Nikitchenko, this revolution of international criminal law would not have been possible. I share the view that the most important achievement of the Nuremberg Trial was the confirmation that war-making is no longer a national right, but has instead become an international crime. That great historical step forward in the law must be sustained.

This conference is about the lessons to be drawn from Nuremberg. It was in Nuremberg in November of last year that I had the chance to meet and to shake hands with Russian Foreign Minister Sergey Lavrov, whom I know from common work in the UN Security Council. Nuremberg and Germany had invited Russia, the US, the United Kingdom and France to attend the inauguration of the museum and Memorium Nuremberg Trials. We were all in historic courtroom 600, where the trial against Hermann Goering and the 21 other major German war criminals was held. It was in this courtroom that Professor Benjamin Ferencz, the eminent and sole surviving US Nuremberg Prosecutor reminded all present that the Judgment of the International Military Tribunal has described the crime of aggression as the “supreme international crime” which “contains in itself the accumulated evil” of all other war crimes.

As I said before, we now have for the first time a concrete chance to criminalise aggression and illegal war making. For the first time since the Second World War, there will be after 2017 with the ICC an independent world court, independent from the Security Council, which will examine possible crimes of aggression.

The political stakes of criminalizing the waging of war were high and self-evident. But finally, a package proposal which includes both a definition of the crime of aggression and the conditions under which the Court may exercise its jurisdiction related thereto was adopted. This text is available also in Russian.

While I do not want to go into the details or intricacies of the Kampala text – the amendments are already included in this version of our Statute –, I would like to highlight two key components of the substantive definition of the crime of aggression.

The first key component of the new definition of the crime of aggression is, that it clearly distinguishes between an act of a State, which would trigger state responsibility and an act of an individual, who exercises effective control over the political or military action of a State, which would trigger individual criminal responsibility.

The second issue I would like to address is the so-called threshold requirement which is set out in future article 8bis(1) of the Rome Statute. According to this requirement, the State act of aggression must constitute, by its character, gravity and scale a manifest violation of the UN Charter. As German Professor Claus Kress has said, *“the function of this threshold is twofold: First, it implies a magnitude test by referring to the gravity and scale of the act of aggression. Second, by referring to the character, the threshold poses a qualitative*

*requirement: The State use of force must be unambiguously illegal.*" Furthermore, the three components, "character, gravity and scale" of the act of aggression – not only one, not only two of them – must simultaneously be present to satisfy the manifest standard of the violation of article 2(4) of the UN Charter. This high threshold requirement characterises, in my view, the realism of the Kampala text. Therefore, this text cannot be denounced as the product of "naïve or pacifist dreamers". At the same time, this inherent and characteristic realism probably enhances the chances that the Kampala amendments will be ratified before 2017 by a number of States as large as possible.

With regard to the legal policy to be followed in the years to come, one should consider in particular the following suggestion. There is a necessity for an international awareness campaign to draw public attention to the Kampala agreement 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. Political and military leaders all over the world, but also others, including academics and 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 strengthening the prohibition of the use of force as set out in article 2(4) of the UN Charter.

I am enormously grateful for the opportunity to speak for the first time in Russia about the ICC and to explain the system of the ICC. We all continue to be aware of the war of aggression waged on 21 June 1941 by Hitler and the Nazis against the Soviet Union and Russia. As a German, I am also painfully

aware that this has caused untold suffering and the loss of more than 20 million Russian lives alone.

It is therefore of utmost importance and our hope that Russia will play a constructive role in the international debate on the criminalizing of aggressive war-making. As we are in St. Petersburg, this fascinating city, where Fyodor Fyodorovich Martens has made his unforgotten contributions to international law, let me add the following: I am certain that all the 115 State Parties of the ICC will welcome Russia as a partner and State Party in the ICC.

And I look forward to having, in the future, a judge colleague from Russia on the bench of the International Criminal Court, bringing with him or her the legal traditions and also the experiences and wisdom of this great Russian nation.