THE KENYAN SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ Kenya)

ICJ KENYA POSITION PAPER on the Crime of Aggression and Articles 8 & Article 124 of the Rome Statute and the Stocktaking issues at the ICC Review Conference[1]

[1] Held at 31st May to 11th June 2010 in Kampala, Uganda.

THE CRIME OF AGGRESSION

1. The Definition of Crimes of Aggression as Crimes within the Jurisdiction of the Court as provided for in Article 5 (1) (d) and (2) of the Statute which still remains undefined;

The definition of the crime of aggression was not agreed upon in Rome and therefore discussion of the crime of aggression was postponed to the first review conference. The crime of aggression revolves around the initiation of war through attacks by one state on another in contravention of international law established by treaties. It encompasses the possibility of prosecution for the planning and initiation of aggressive wars between states-'crimes against peace'.

Under the United Nations Charter, the Security Council has competence to determine whether an act of aggression has been committed. It is provided in the Statute that the final text on the crime of aggression must be consistent with the relevant provisions of the UN Charter.

The ICC's Assembly of State Parties deferred the issue of defining this category of crimes and created the Special Working Group on Crimes of Aggression "(SWGCA)" for that purpose. It submitted its final report to the ASP in February 2009. The report proposes the deletion of Article 5 (2) of the Rome Statute and the insertion of an Article 8 (b) to read as follows[2] :

1. For the purpose of this Statute, "crime of aggression" 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.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The **invasion or attack** by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) **Bombardment** by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

[2] International Criminal Court ICC-ASP/7/SWGCA/2 Seventh session (second resumption) New York 9-13 February 2009

(c) The **blockade** of the ports or coasts of a State by the armed forces of another State;

(d) An **attack by the armed forces** of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

ICJ Kenya's position on the definition of the Crime of Aggression

ICJ Kenya considers that it is important to define the crime of aggression within the Rome Statute at this stage for norm setting and give the Court a predetermined period within which the crime of aggression shall come into effect. During this period, the Court, can lay the groundwork; develop expertise and support needed for enforcing the expansion of the jurisdiction of the Court.

a) *On the issue of whether the aggressor should have accepted the Court's jurisdiction over the crime of aggression.*

The purpose for establishment of the Court was to seek accountability and thus fight impunity for crimes. In an ideal situation, all the states worldwide would be parties to the ICC to ensure that international crimes do not occur. However, it is not realistic and reasonable to expect that an aggressor State that will potentially stand accused of the crime of aggression shall willingly accept the jurisdiction of the Court.

Grave international crimes invoke the conscience of humanity and therefore should not escape justice just because they do not fall under the ambit of the ICC. As such, there are other international mechanisms that exist in international law that address these crimes such as the establishment of criminal ad hoc tribunals.

The question that we should be asking ought not to be based on the aggressor's interests but rather the victim State interests. Once a State is a party to the Rome Statute, they should receive protection from and redress for the crime of aggression visited upon it.

For this reason, ICJ Kenya considers that the jurisdiction of the crimes of aggression should only apply to acts of aggression that are either committed **by** State Parties, committed **on** State Parties or committed by a third state that is **directly or indirectly linked** to a State Party. The only

exception being one where a non–state party refers the situation to the court on consideration that the crime of aggression has occurred.

b) *On the issue of whether there should be an alternative jurisdictional filter for determination of a crime of aggression.*

Exercise of the jurisdiction of the Crime of aggression

Article 13 establishes the three trigger mechanisms for the Crimes defined in Article 5 of the Rome Statute which involve state referral of a situation, the *proprio motu* power of the Prosecutor and a referral by the UN Security Council. The existence of three mechanisms for invoking the exercise of jurisdiction by the ICC is to ensure that access to the Court is available for all State Parties irrespective of the political climate in a particular state party at the time when grave international crimes are being committed. For instance, if genocide or crimes against humanity are being committed by the government forces of a state party, it is unlikely that they would refer a situation to the ICC. However, because there are two mechanisms through which a situation can be referred to the Court, the citizenry and victims from that State can still fall under the purview of the Court through the Prosecutor or a UN Security Council referral.

In the same vein, it is appropriate that protection and redress for the crime of aggression should be readily available and not limited to one trigger mechanism. It cannot for instance, be a just and rational position that, where a State considers that it is the victim of a crime of aggression, that they cannot refer the situation to the Court especially where that State is a party to the Rome Statute. For this reason, the trigger to invoke the crime of aggression should be encompass all three mechanisms to make the Court accessible to those who need it.

Jurisdictional filter

ICJ Kenya having considered the four options available as a filter mechanism on whether the crime of aggression has occurred[3], ICJ Kenya opines that the jurisdiction filter should only be the purview of the Pre – Trial Chamber.

The objective of establishing a permanent international court is that it would enjoy independence, free from political and economic manipulation, with the ability and competence to make independent determinations as to international crimes that fall under its jurisdiction. It is argued that the UN Security Council should be the mechanism to determine whether a crime of aggression has occurred under the Security Council mandate to maintain international peace and security. Such a position would deny the Court independent deliberation and consideration as to whether a crime of aggression has occurred which is tantamount to political interference with a judicial process. If there is sufficient and credible evidence before the Prosecutor or that Court that such a crime has occurred, it does not make sense to then refer the situation to the Security Council which is a political entity to determine if that crime has occurred. The filter mechanisms for the crime of aggression should be internal to the court and the exercise of jurisdiction should not be the subject of vested political interests that have been witnessed at the Security Council on several occasions.

[3] Jurisdictional filter for determination of a crime of aggression by the UNSC, the UN General Assembly, the ICC Pre – trial chamber or the International Court of Justice

Moreover, the obligation to ensure the maintenance of international peace and security does not lie exclusively with the UN Security Council, and therefore if we adopt a resolution where the jurisdiction of the crime of aggression is subject to the UN Security Council, we will compromise our duty to protect and ensure accountability to victims of acts of aggression.

ICJ Kenya supports the adoption of the definition and exercise of jurisdiction of the crime of aggression with a *caveat* that investigation and prosecutions for crimes of aggression would not be conducted for several years following such enactment. The reasons for this lies herein that, the Court currently faces significant political and capacity challenges including hostility by various State Parties and regional blocs which requires a measure of time to overcome. Starting to prosecute crimes of aggression at this stage, given its controversial nature, would leave the court susceptible to even more political hostility in addition to the existing challenges and antagonism the court faces in various aspects. The Court is still a nascent court that is involved in realizing its jurisdiction, powers and its relationship with State Parties. To date, the Court has not yet to make its first determination as to acquittal or convictions of any cases brought before it and has yet to crystallize its jurisprudence in international law. All these factors make it doubtful that the Court and in particular the Office of the Prosecutor has the capacity to effectively engage with this expansion of jurisdiction at this time.

2. <u>Amendment of Article 8 to include the Criminalization of the use of chemical and biological weapons within the ambit of war crimes</u>

The laws of armed conflict as enshrined in the Geneva Convention regard some weaponry as so barbaric that their use cannot be sanctioned under any circumstances. These include poisonous liquids and gases as well as other equally hazardous armaments. However these were envisioned within the laws of armed conflict which traditionally cover international armed conflict. It has become clear that similar provisions need to be made for purposes of internal armed conflict, the realm within which international criminal justice has mostly dealt with in the recent past.

The Review Conference will consider a proposed amendment which was originally put forward by Belgium at the Rome Conference to the effect that weapons which are not acceptable in international conflict are equally unacceptable in civil war. Belgium supported by a number of other countries also proposes additional amendments to prohibit[4] :

(a) **chemical weapons**: banned by the Convention on the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 1974 *United Nations Treaty Series* 45 (1993) and the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare

(b) **biological weapons**: prohibited under the 1925 Geneva Protocol, *supra* note 43, along with asphyxiating and poisonous gases. There are further structural

[4] Clark R.S *Review Conference of the Rome Statute of the International Criminal Court* Rutgers Law School Occasional Paper January 2010 State University of New Jersey

provisions dealing with them in the 1972 Convention on the Prohibition of the development, production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction, 1015 *United Nations Treaty Series* 163 (1972).

(c) **anti-personnel land mines**: prohibited under the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction (the "Ottawa Convention").

(d) **non-detectable fragments**: prohibited in Protocol I (Non-Detectable Fragments) to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, 1324 *United Nations Treaty Series* 137 (1980).

(e) **blinding laser weapons and cluster munitions**: Protocol IV to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons on Blinding Laser Weapons was adopted in 1995.

ICJ Kenya's Position on the Amendment of Article 8

ICJ Kenya supports the amendment of Article 8 to criminalize the use of chemical and biological weapons within the ambit of war crimes. The criminalization of this weaponry provides added protection for combatants and civilian communities who may fall within or under the line of fire.

3. Review of Article 124, an optional protocol and transitional provision, which allows States to choose not to have their nationals subject to the Court's jurisdiction over war crimes for a period of seven years after the coming into force of the Statute for the concerned State Party.

Article 124 of the Rome Statute, however, permits States Parties to refuse ICC jurisdiction over war crimes committed on their territory or by their own nationals for a period of up to seven years. Article 124, also known as the "transitional provision" or "opt-out provision," (1) reads[5]:

> Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1. (2)

ICJ Kenya's position on Article 124

[5] Tabak, Shana *Article 124, war crimes, and the development of the Rome Statute* Georgetown Journal of International Law Volume 40 Number 3 (2009)

ICJ Kenya supports the proposal by the Assembly of State Parties for the deletion of Article 124 in keeping with the principle of *pacta sunt servanda* due the controversy it creates and the possibility of states using article 24 provisions to escape culpability for war crimes when the attention of the Court shifts to particular countries in contradiction of their commitments under international law.

It is significant that only been two countries (France and Columbia) that have used this declaration under Article 124 and thus it is evident that this provision, which is transitory in nature, does not hinder States that wish to ratify the Statute.

STOCKTAKING ISSUES

1. State Cooperation

The Court relies on international cooperation, in particular from States. States Parties are obliged to cooperate fully with the Court in its investigations and prosecutions. States Parties may cooperate in, inter alia, arresting persons wanted by the Court, providing evidence for use in proceedings, relocating witnesses, and enforcing the sentences of convicted persons. The Court may also receive cooperation from non-States Parties, and may enter into arrangements or agreements to provide cooperation.

The Court may request States Parties to arrest and surrender persons to the ICC, identify and provide information as to the whereabouts of items and individuals, question persons being investigated and assist in the service of documents.

The issue of cooperation is not being treated as seriously as it should by State Parties to the Rome Statute. A case in point being, the relationship between Kenyan governemnt (a State Party to the Rome Statute) and the Sudanese authorities :

> On 4th March, 2009, the ICC issued an arrest warrant against Sudan President Omar al-Bashir to face trial on charges for war crimes and crimes against humanity on suspicion of being criminally responsible for intentionally directing attack against an important part of the civilian population of Darfur, Sudan, murdering, exterminating, raping, torturing and forcibly transferring large numbers of civilians, and pillaging their property.
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> In March, 2010, the Kenyan Foreign Affairs Minister, Moses Wetangula, personally travelled to the Sudan to hand deliver an invitation to Omar Al-Bashir to attend the 14th extra ordinary summit of the Inter-Governmental Authority on Development "(IGAD)" taking place in Nairobi, Kenya. The Kenyan government's position/policy is further exemplified by the presence of the Kenyan Vice – President Kalonzo Musyoka at the inauguration of President Al-Bashir, who in addition paid a courtesy call on Al-Bashir at the Presidential Villa in Khatoum despite the pending ICC arrest warrants.
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> The Ministry of Foreign Affairs formulates and implements foreign policy and through its actions, the international community is able to gauge a country's foreign policy. The action by our minister goes against the spirit of the Rome Statute which encapsulates the desire by

the international community to secure justice for victims of the worst forms of human rights abuse. Kenya as a State Party to the Rome Statute which has also domesticated the treaty through the International Crimes Act of 2008 placed legal obligations on state authorities to cooperate with the ICC including obligations to effect ICC arrest warrants.

Other State Parties to the Rome Statute have been clear on their obligations under the treaty in relation to the ICC's arrest warrants against al-Bashir. South Africa and Uganda expressly stated they would be obliged to arrest President al-Bashir were he to set foot on their territory, and likewise the Kenyan government need to affirm in ***both*** word and deed of their obligation to cooperate with the ICC and consequently act in a consistent and responsible manner.

2. Complementarity

The system of international criminal justice relies upon the various principles including complementarity which places primary responsibility for the prosecution of international crimes at the domestic level (national legal systems) with ICC jurisdiction only kicking in at when national legal systems are unable and/or unwilling to prosecute.

The preamble to the statute states that the effective prosecution of these crimes must be ensured by taking measures at the national level and by enhancing international cooperation. It is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.

A self referral of a situation to the ICC in itself is not enough to deal with the issue of justice, impunity and accountability. The ICC does not have jurisdiction to try all perpetrators of crimes committed as it can only deal with those holding the greatest responsibility for international crimes committed. It is also manifestly clear that the ICC does not have the capacity to investigate and prosecute all persons involved in committing these crimes and thus if national mechanisms for dealing with mid-low level perpetrators are not instituted, an impunity gap is created which comes with its own associated repercussions. A national state must take genuine steps to investigate and prosecute perpetrators of crimes either using a domesticating legislation of the Rome Statute or by use of national penal crimes against perpetrators. Complementary judicial mechanisms go a long way in creating lasting peace in post – conflict communities, ensures a decline and/or end of a culture of impunity and secures non-repetition of crimes.

In situations where judicial and prosecutorial institutions remain weak, State Parties should take firm steps to increase the capacity of national jurisdictions to deal with these perpetrators. The ICC should foster closer relationships with state parties that are situations countries before it, to further emerging jurisprudence on positive complementarity to support national accountability efforts.

3. Peace and Justice

ICJ Kenya views peace and justice as mutually reinforcing. However in order to achieve lasting and sustainable peace in a post conflict setting, justice must be pursued for gross human rights abuses conducted in the course of the conflict. In order to achieve stable peace, there must be a mechanism of deterrence against the use of violence. The rule of law and human rights must be observed and enforced. Without these additional components, the absence of war is fragile and violence may recur.

The situation in Northern Uganda is a case in point. Despite the fact the LRA refuses to demobilize, it is the threat of prosecution which brought them to the negotiating table in the first place. Alternative justice mechanisms should be viewed as playing a complementary role to international justice in the search for lasting peace. In the midst of increasing calls for recognition and primacy of peace building mechanisms, we must be vigilant that these mechanisms are not used a tool for escaping accountability.

Article 16 - deferral of cases by the United Nations Security Council

The discussion around the amendment to Article 16 has been deferred to the next Assembly of State Parties meeting. However, it is considered that debate about the use of Article 16 to defer ICC investigations in certain situation countries will be deliberated at both the general debate and stock taking issues and thus has been included in the ICJ Kenya Position Paper on the Review Conference.

Article 16 speaks to the power of the United Nations Security Council to cause an investigation or prosecution to be deferred for a period of 12 months. There is no indication in the statute on the basis for which the Security Council can exercise this power. However, it is implicit that the Security Council would exercise such power when it considers that the pursuit of an investigation or of a prosecution would impede its primary responsibility under the UN Charter which is the maintenance of peace and security as set out in Chapter VII of the Charter.[6]

ICJ Kenya is of the view that the wider purpose of transitional justice is to deter impunity and in so doing prevent further conflicts characterized by international crimes. This means that the role of international prosecution correlates to that of preserving peace and security. The onus for the exercise of Article 16 lies with the Security Council as the peace and security organ of the United Nations.

There is a push by African Union States sympathetic with Sudanese President Omar Al Bashir to amend article 16 to make it procedurally easier to bring a deferral request to the Security Council which currently contains no prescribed procedure for bringing a deferral request to the UNSC and it is assumed that a member of the UNSC would generate a request. The group of AU member states proposes that the method be prescribed in the Rome Statute through an amendment to the effect that:

> "Any country with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court".[7]

Secondly, the AU group seeks a further amendment to article 16 to the effect that:

> "Where the Security Council fails to decide on the request by the State concerned within six (6) months of the receipt of the request, the requesting Party may request

[6] Berman F QC Head of United Kingdom Delegation to the Rome Conference in *Reflections on the International Criminal Court –Essays in Honour of Adriaan Bos* (1999) TMC Asser Press, The Hague.

[7] Clark R.S *Review Conference of the Rome Statute of the International Criminal Court* Rutgers Law School Occasional Paper January 2010 State University of New Jersey

> the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (V) of the UN General Assembly."[8]

ICJ Kenya views the possibility of these two proposed amendments as having the potential to over-politicize the role of the court and leave the situations under investigation and prosecution by the Court open to manipulation by political actors under the guise of maintaining peace and security. The Preamble to the Rome Statute reaffirms the Purposes and Principles of the Charter of the United Nations in which the role of the Security Council is founded. The proposed amendments would seriously compromise the role of the UNSC is preserving peace and security as envisaged under the Charter.

Candidly, the use and existence of Article 16 which applies to all situations as opposed to situations referred to the Prosecutor by the UNSC is a violation the independence of the Court and the ICC Prosecutor. The purpose of the Rome Statute is to establish an independent court, whose jurisdiction allows the court to be seized of a matter in three ways under Article 13. However, once the Court has been seized of a situation in a particular country, discretion in the conduct and timing of investigations should only be the purview of the Office of the Prosecutor. ICJ Kenya would recommend the limitation of Article 16 to situations that are referred to the ICC Prosecutor by the UNSC which is in converse to discussions to expand the application of Article 16 from the UNSC to the UN General Assembly.

4. <u>Impact of the Courts work on Victims and Communities</u>

The Rome Statute is innovative in that it provides for victim participation throughout the proceedings. The Court has established within the Registry the Victims Participation and Reparations Section (VPRS), the Victims and Witnesses Unit (VWU) and an independent office, the Office of Public Counsel for Victims (OPCV). The Outreach Unit of the Registry is also charged with sensitizing communities about the work of the Court. The Court also engaged with Non-Governmental Organizations with grassroots presence and has field offices in most of the situation countries.

On the positive side the ICC has succeeded in deterring the escalation of violence in Northern Uganda. The ICC's work has also given limelight to the issue of child soldiers, the recruitment of which is almost universally recognized as unlawful. Sufficient attention has been given to sexual and gender based violence in the course of conflict. Closer collaboration between the ICC, non-governmental organizations and community based organizations will help close the gaps witnesses so far.

However, there is more to be done with regard to enhancing the impact of the Court's work on victims and Communities. There include: reaching victims in remote areas, providing accurate information to manage expectations, generation of more information about international criminal justice in non situation countries. Slow and limited investigative and prosecutorial progress has led to disenchantment among communities particularly in the DRC.

END
ICJ KENYA

[8] *Ibid*