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The Crime of Aggression after Kampala –

Some Personal Thoughts on the Way Forward

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Thank you Professor Ferencz,

Maybe I am allowed to begin with a question – a question which shows the dilemma with which speakers sometimes are faced, and now also myself. The question is:

What do you say when all has been said? When all has been said on the crime of aggression after Kampala?

Well, the short answer is: you say it again – but , but , but - in a different manner!

On a more serious note, permit me, however, to clarify, at the outset of these remarks:

- I will not speak about the process which led to the Kampala compromise or the main factors which made this breakthrough possible;
- Nor will I speak about the juridical details and the many legal issues, if not ambiguities or limitations of the Kampala amendments to the Statute.

With regard to the latter, there is already a vast and growing array of academic and other contributions, many very good articles and analyses from, in particular, Roger S. Clark, Stefan Barriga, Jennifer Trahan, Kai Ambos and Claus Kress, Bill Schabas, and others. I recommend all these contributions to you.

As you know, I did not have the chance to be in Kampala. Given my long-standing interest for the legal and other questions regarding the crime of aggression, it was, therefore welcome, that already in October of last year, I was

invited together with Judge Liu Daqun, the distinguished Chinese Judge from the International Criminal Tribunal for the former Yugoslavia, to give a lecture on the crime of aggression in Oslo in February of this year. Judge Liu had kindly agreed to make comments on my lecture. What made this invitation particularly interesting was that our Norwegian host, Morten Bergsmo, explicitly encouraged me to focus on the legal policy issues related to the Kampala outcome. The fundamental question was and continues to be: which legal policy shall be followed until 2017, and beyond when the Rome Statute with its new article 8bis and articles 15bis and 15ter on the crime of aggression will enter into force, will be in force.

Well, by now you should be aware of the two publications which were published immediately after the Oslo Conference on 8 February 2011 - Mr. Clark had promised to send the link containing the publications to all participants. Some reserve copies should also be available in this conference room including my Oslo speech, "Is it Possible to Prevent or Punish Future Aggressive War-Making?".

It was also in Oslo that I proposed a new international NGO or a new international network for the special purpose of making the criminalisation of aggression as strong, efficient and credible as possible. It is my hope that the Global Institute for the Prevention of Aggression, which is our host today, will be the nucleus, maybe the catalyst of an international network against aggression as efficient as possible. Don, our wholehearted congratulations, our appreciation for your work and initiative! It is also highly welcome that you continue to cooperate with Parliamentarians for Global Action (PGA), as PGA will have to play such an indispensable role.

That said, let me admit that I have a natural inclination or bad habit to quote myself – and Elisabeth, my wife is certainly aware of this. With regard to my Oslo speech I will try courageously to suppress this habit to quote myself, at least to the best of my abilities.

Instead, let me simply share with you some personal thoughts on two questions:

One. Where do we stand today in May 2011 with regard to the crime of aggression?

Two. Where do we go from here to make the Kampala amendments on the crime of aggression a genuine reality in international law, as strong and effective as possible?

Needless to say, when we look at the current situation, the natural starting point must be the Kampala consensus on the crime of aggression amendments. It is, in my view, difficult not to acknowledge this consensus decision as a great breakthrough in international law. 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, it was a highly emotional moment. 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. 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.

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 a key component of the substantive definition of the crime of aggression. This 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 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.

Apart from this, the current situation, the overall situation in the world is not really encouraging. Let us be straight and honest with ourselves: Hopes that the Kampala breakthrough would trigger a new comprehensive international debate on limits of the use of armed force, on the vital importance of the prohibition of the use of force as reaffirmed in article 2(4) of the Charter, have not been fulfilled. On the level of leading statesmen all over the world, Heads of States or

Governments, Foreign or Justice Ministers or others, there are no indications that they really have taken note of or that they are really aware of the Kampala breakthrough on the crime of aggression.

Just an illustration of this reality: there is, at least to my knowledge, not a single statement from a really high-ranking politician who has welcomed that in the future crimes of aggression may be prosecuted by the International Criminal Court. It is only today that I learnt about the positive statement of the Foreign Minister of Brazil – very encouraging!

Why do I mention this? It is my assumption that most, if not all present here sincerely wish to see that the ICC is indeed equipped after 2017 with jurisdiction over the crime of aggression, to the largest extent as made possible by Kampala. If we want to achieve the criminalisation of aggression, we should today, and in the future, have a realistic picture of the world around us. To put it simply: for the time being, there is inertia, business as usual and no real form of awareness of this unique chance to criminalise illegal war-making.

This is not really surprising. 2017 seems far away. But if we look at the news, at the television, at the reality of today, we see and hear, day after day, huge international problems, tensions, even catastrophes such as Fukushima, Libya, Iraq, Afghanistan, energy crisis, economic crisis, ongoing arms race and ongoing activities of the international military – industrial complex, mass poverty, under-development, and widespread inequality; not to forget terrorism which is nurtured by all these injustices. To a certain extent, it is understandable that all these unresolved problems consume and absorb the attention and energy of States and of those who carry political responsibility.

There is, however, another factor: three generations after the Second World War, three generations after the Nuremberg trials, one has the impression that many have forgotten, or do not find it necessary any longer to bear in mind the lessons learnt out of the deadliest war ever, with than 50 million dead and untold suffering for so many all over the world.

We all are aware that the principles of the UN Charter, among them the prohibition of the use of force in Article 2(4), with the sole exception of the right to self-defence as confirmed by article 51, and the development of crimes against peace as a new principle of international law are the cornerstones of the lessons learnt from the apocalypse of the Second World War which was brought about by the wars of aggression waged by Adolf Hitler and his followers against many nations.

Now, if we step back, if we analyse state practice since 1945 in a sober and impartial manner, we cannot fail to see:

- Time and again, there are so many examples that the letter and spirit of article 2(4) of the Charter have been ignored, set aside and gradually eroded by the use of armed force and interventions which were highly questionable.
- Time and again, the right to self-defence pursuant to article 51 of the Charter was used or abused as a pretext for far-fetched "justifications" for war-making – justifications with big question marks!

Needless to say, also in our time, there continue to be forces who persistently want to downplay or to undermine the vital importance of the prohibition of the

use of force in Article 2(4) of the Charter, which is so essential for the international community.

These and other factors belong to the reality which we are facing today, when we endeavour to outlaw the crime of aggression.

- II -

Now, where do we go from here? What needs to be done to turn the Kampala breakthrough on the crime of aggression into a new regime of international law as strong and efficient as possible?

This task, this challenge ahead of us, until 2017 – and we all know this – is demanding, if not momentous. Much work, many coordinated efforts from many sides and States and Governments will be needed.

But it can be done. It will be done. It will be achieved!

There is absolutely no reason to be pessimistic. As I see it, time is on our side. The logic of history is on our side. On 30 October 2006, at the Conference commemorating the 60th Anniversary of the Nuremberg Judgement held in St. Louis, I was there, Ben, when you spoke about the task of "Enabling the ICC to punish aggression". You said, and I quote:

> *"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."*

Yes, it must be sustained. It was effectively sustained in Kampala. It will be further sustained after 2017. There is, in my view, little doubt that until 2017, at least 30 States Parties will have ratified the amendments on the crime of aggression, and that at least two thirds of the State Parties will confirm the Kampala consensus by a further vote.

Let me share with you why I believe that all those who have joined and supported the Kampala breakthrough continue to be in a strong position.

First: There is the careful balance, the consolidation and the maturity of the Kampala amendments, which are the results of serious and profound negotiations, taking into account the positions of all interested parties.

Second, and above all: there is the power, the overwhelming power of the great idea that crimes against peace are the evil per se.

> As the Judgement of the International Military Tribunal of Nuremberg in 1946 stated:
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> *"… a war of aggression is the supreme international crime … differing from*
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> *other war crimes only in that it contains within itself the accumulated evil of the*
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> *whole."*

65 years later, after the adoption of the Kampala amendments by consensus, Bill Schabas took up this judgement by stating:

"The message that the amendments helps to deliver is that war is the supreme evil, lying at the hear of the human rights violation set out in the provisions on genocide, crimes against humanity and war crimes."

Third reason: There is the fundamental truth, confirmed time and again - people around the world agree that the highest value and best protection for human dignity and human rights is the absence of war.

It is in full awareness of these elements, it is in this spirit that the criminalisation of aggression after 2017 should be completed, must be completed. As I see it, there are at least three essential tasks which must be tackled in the years to come, with the necessary steadfastness and determination.

One: All necessary means must be exhausted to really bring home to governments, parliaments, the media and to the civil society the crucial necessity to complete the effective criminalisation of aggression in 2017. They must undertake in good time all work and efforts required for this objective.

Two: All necessary means must be exhausted to bring about as soon as possible, a comprehensive ratification campaign. This campaign should have the objective that not only the 30 States Parties required but if possible all or the largest possible number of States Parties will have ratified before 2017 the agreed amendment proposals for the crime of aggression in the Rome Statute. We must hope that when the time comes, also for example the United Kingdom and France, 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 strengthening of its authority: the Security Council will, in the future, have the power to refer aggressions as a crime to the International Criminal Court.

Three, and last: All necessary means should also be used to prevent, if necessary, that those who may be interested in maintaining the unfavourable status quo with regard to the crime of aggression, get a chance to re-open the Kampala compromise.

With regard to the last point, it is therefore even more important that many States start the ratification procedures of the Kampala amendments as soon as possible. I do know that Germany is currently in an intensive preparation of ratification proceedings. Last week I was told again that the ratification shall be concluded before 2012 and that all parties in the German Bundestag are in favour. I will soon travel again to Berlin to emphasise how important it will be that Germany sets a positive example in this regard.

Ben, if I am not mistaken, you are the only person present today who has seen it all: the horrors of the Second World War, the victims of the terrible crimes committed by the Nazis under the cover of aggressive war-making, the Nuremberg trials, the *Einsatzgruppen* trial, Robert H. Jackson, the adoption of Resolution 3314 by the General Assembly, the adoption of the Rome Statute in 1998, with only a place-holder provision for the crime of aggression. In contrast

to myself, you and Don were also present in Kampala when the amendments were adopted.

It is not a secret that Kampala has not really met your expectations, in particular that the delayed entry into force of the Kampala texts on aggression only after 2017 was not satisfactory to you. Given this situation, it was a great encouragement for many of your friends, including myself, that in November last year, on Veterans Day, you sent out this message, thoughtful message, on the crime of aggression. It is entitled "**We have come a long way from Nuremberg, and have miles to go before we sleep** ". It ends with these words: "It will be up to today's youth and tomorrow's visionaries to propagate and hold high the banner of truth that law is always better than war. It is a message that many leaders have yet to learn."

Yes, I believe that most, if not all of those present here today fully agree with your view and vision.

As a last point maybe I can once make a cut, or a personal flash-back:
We are in February 1999, twelve years ago, in New York, in the Preparatory Commission for the International Criminal Court. It is on 22 February 1999 that the delegate of Germany takes the floor on the question how to make progress with regard to the crime of aggression pursuant to Article 5(1)(d) of the Statute and to settle the unfinished business of the Rome Conference. In his statement – it is here - there is also the following paragraph:

> *"… the task to solve the outstanding issues concerning the crime of aggression – enormous as it may be – is not beyond our capabilities. As one of the well-known American supporters of the ICC, a steadfast fighter for the inclusion of the crime*

*of aggression in the Statute, former Nuremberg Prosecutor Prof. Benjamin Ferencz, always says: "Never give up! Always try again" Always try harde*r!".

Yes, Ben, we have heard, learned from you and also often quoted your famous saying "*Never give up! Never ever give up!".*

The conclusion is obvious: you have taught us, you have often reminded us about our obligation not to give up in our quest for a more just and more peaceful world. You should know: There are so many who will not give up, who will do their best to make the crime of aggression a crime within the effective jurisdiction of the Court in which I serve.

Ladies and gentlemen, let me suggest that we all may rise to honour Professor Benjamin Ferencz – an outstanding pioneer and fighter for peace and justice in the world.

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