

Footnotes

1 The first part of this essay follows parts of C. Kreß, 'Introduction: The Crime of Aggression and the International Legal Order', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2 vols, Cambridge University Press, 2017) 1–18. This earlier part of the international conversation about the subject has received a magnificent monographic treatment in K. Sellars, *Crimes Against Peace' and International Law* (Cambridge University Press, 2013).

2 For a colourful account of this 'first attempt', see K. Sellars, 'The First World War, Wilhelm II and Article 227: The Origin of the Idea of "Aggression" in International Criminal Law', in Kreß and Barriga (eds), *supra* note 1, at 19–48.

3 This famous citation is taken up by Martti Koskenniemi in his reflections 'A Trap for the Innocent ...', in Kreß and Barriga (eds), *ibid.*, at 1359–1385.

4 O.A. Hathaway and S.J. Shapiro, *The Internationalists. How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster, 2017).

5 For a comprehensive analysis of the Nuremberg judgment on 'crimes against peace', see C. McDougall, 'The Crimes against Peace Precedent', in Kreß and Barriga (eds), *supra* note 1, at 49–112.

6 It should not be forgotten that the Tokyo judgment, unlike Nuremberg, was not unanimous and that the 'Tokyo Dissents' form part of the long debate about the crime of aggression. For a comprehensive analysis, see K. Sellars, 'The Legacy of the Tokyo Dissents on "Crimes against Peace"', in Kreß and Barriga (eds), *supra* note 1, 113–141.

7 General Assembly, 'Definition of Aggression', GA Res. 3314 (XXIX), 14 December 1974.

8 For a detailed account, see T. Bruha, 'The General Assembly's Definition of the Act of Aggression', in Kreß and Barriga (eds), *supra* note 1, at 142–177.

9 'Amendments Submitted by the Movement of Non-Aligned Countries to the Bureau Proposal (A/CONF.183/C.1/L.59)', 14 July 1998, UN Doc. A/CONF.183/C.1/L.75, as repr, in S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression* (Cambridge University Press, 2012) 315. It bears recalling that Arab States (and among their distinguished delegates, Professor Mohammed Aziz Shukri from the University of Damascus deserves a special mention) have been particularly active in support of this last minute, and very important, diplomatic activity. And now Arab States will hopefully remember that they have repeatedly stated that the absence of the Court's power to exercise its jurisdiction over the crime

of aggression constitutes an important obstacle for them to ratify the ICC Statute. For a detailed analysis of the policy positions of Arab States, see M.M. El Zeidy, 'The Arab World', in Kreß and Barriga (eds), *supra* note 1, 960–992.

10 In addition, § 7 of the of Final Act of the Rome Conference (UN Doc. A/CONF.183/13, 17 July 1998, as repr. in Barriga and Kreß, *supra* note 9, at 331) entrusted the Preparatory Commission with the mandate to prepare 'an acceptable provision on the crime of aggression for inclusion in this Statute'.

11 For a detailed account of the negotiations at the Rome conference, see R.S. Clark, 'Negotiations on the Rome Statute', in Kreß and Barriga (eds), *supra* note 1, at 244–270. For a documentation of the discussion and the proposals submitted between 1995 and 1998, see Barriga and Kreß, *ibid.*, at 201–331.

12 No significant progress was achieved between 1998 and 2002. The work during these years is recounted by R.S. Clark, 'Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for the International Criminal Court', 15 *Leiden Journal of International Law* (2002) 859–890, and it is documented in Barriga and Kreß, *ibid.*, at 334–419.

13 B.B. Ferencz' monumental documentation *Defining International Aggression – The Search for World Peace: A Documentary History and Analysis* (2 vols, Oceana Publications, 1975) is well known. For his moving personal memoir, see B.B. Ferencz, 'Epilogue. The Long Journey to Kampala: A Personal Memoir', in Kreß and Barriga (eds), *supra* note 1, at 1501–1519. It should also be noted that Ben's son, Professor Donald Ferencz, the founder of the Global Institute for the Prevention of Aggression, has carried the flame forward and made numerous dedicated contributions to the negotiations, especially in their final phase. For Don's account of the activation of the ICC's jurisdiction over the crime of aggression, see D.M. Ferencz, *Aggression Is No Longer a Crime in Limbo*, FICHL Policy Brief Series No. 88 (2018).

14 Jordan has continued to play an active and constructive role in the negotiations, including those in New York in December 2017.

15 The remarkably substantial (and at the same time transparent) discussions during 2003 and 2009, which, in important parts, took place in the splendid grounds of Princeton University (and have therefore often been referred to as the 'Princeton Process'), and which were greatly facilitated by the hospitality of the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School, are documented in Barriga and Kreß, *supra* note 9, at 422–724. For a rather critical scholarly assessment in the form of a monographic treatment, see O. Solera, *Defining the Crime of*

Aggression(Cameron May, 2007); for a monographic treatment of the subject in French, see M. Kamto, *L'agression en droit international* (Editions A. Pedone, 2010).

16 The draft substantive definition was soon complemented by draft elements of the crime of aggression. Australia and Samoa deserve particular credit with respect to the formulation of this document in view of the submission of their 'March 2009 Montreux Draft Elements'. For a detailed account of the negotiations, see the chapter written by the Australian negotiators F. Anggadi, G. French, and J. Potter, 'Negotiating the Elements of the Crime of Aggression', in Barriga and Kreß, *ibid.*, at 58–80.

17 In Kampala, the substantive definition became the subject of discussion (only) to the extent that the US delegation proposed certain 'Understandings' regarding this definition (for the formulation of the US proposal, see Barriga and Kreß, *ibid.*, at 751–752). The fact that the last open issue was resolved at the end of a conversation, which had pitted the US against Iran, is just another remarkable element in the long journey described in this essay. For a detailed account, see C. Kreß et al., 'Negotiating the Understandings on the Crime of Aggression', in Barriga and Kreß, *ibid.*, at 81–97. For negotiators' perspectives from Iran and the USA, see D. Momtaz and E.B. Hamaneh, 'Iran', in Kreß and Barriga (eds), *supra* note 1, at 1174–1197, and H.H. Koh and T.F. Buchwald, 'United States', in Kreß and Barriga (eds), *supra* note 1, at 1290–1299.

18 For a detailed legal analysis of this element, see C. Kreß, 'The State Conduct Element', in Kreß and Barriga (eds), *ibid.*, at 412–564.

19 The *Journal* devoted its 10th Anniversary Special Issue to the topic: 'Aggression: After Kampala', 10 *Journal of International Criminal Justice (JICJ)* (2012) 3–288 (ed. by C. Kreß and P. Webb). For an excellent monographic treatment of the Kampala outcomes, see C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013). For a collection of essays, including a number of Belgian perspectives, see G. Dive, B. Goes, and D. Vandermeersch, *From Rome to Kampala: The First 2 Amendments to the Rome Statute* (Bruylant, 2012).

20 For a detailed account of the Kampala negotiations in the *Journal*, see C. Kreß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression', 8 *JICJ* (2010) 1179–1217. For a meticulous account of the negotiations from 1998 to 2010, see S. Barriga, 'Negotiating the Amendments on the Crime of Aggression', in Barriga and Kreß, *supra* note 9, at 3–57.

21 For an analysis of the jurisdictional regime established in Kampala in the *Journal*, see A. Zimmermann, 'Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression

and the Law of Treaties', 10 *JICJ* (2012) 209–227. For a comprehensive analysis of the same subject from a different perspective, see S. Barriga and N. Blokker in their three closely intertwined chapters 'Entry into Force and Conditions for the Exercise of Jurisdiction: Cross-Cutting Issues', 'Conditions for the Exercise of Jurisdiction Based on Security Council Referrals' and 'Conditions for the Exercise of Jurisdiction Based on State Referrals and *Proprio Motu* Investigations', in Kreß and Barriga (eds), *supra* note 1, at 621–674.

22 It is just another noteworthy element of the long journey described in this essay that it was Palestine that deposited the 30th instrument of ratification. One felt tempted to feel relieved that more ratifications were to follow soon thereafter, so that the legal complexities surrounding the question of Palestine's statehood would not constitute a further hurdle to the activation of the ICC's jurisdiction over the crime of aggression. The distinguished Palestinian delegate Majed Bamyá will be remembered by all participants in the December 2017 New York negotiations for his outstanding eloquence. For a thoughtful Israeli perspective on the overall negotiations, see R.S. Schöndorf and D. Geron, 'Israel', in Kreß and Barriga (eds), *ibid.*, at 1198–1216.

23 *Report on the Facilitation on the Activation of the Jurisdiction of the International Criminal Court over the Crime of Aggression (ICC-ASP/16/24)*, 27 November 2017, §§ 11–22 ('*Report on the Facilitation ...*').

24 Canada's strong support before and in New York for the 'restrictive position' was more than a little astonishing because in Kampala this state had, after having made a proposal based on the 'restrictive position', worked together with Argentina, Brazil and Switzerland to pave the way towards a compromise; see Kreß and von Holtzendorff, *supra* note 20, at 120–124.

25 Norway had adopted a comparatively sceptical attitude towards the negotiations on the crime of aggression more broadly; for the thoughtful reflections of the long-standing Norwegian head of delegation, Ambassador Rolf Einar Fife, on the subject, see 'Norway', in Kreß and Barriga (eds), *supra* note 1, at 1242–1263.

26 *Report on the Facilitation ...*, *supra* note 23, Annex II A. A few other states, including, in particular, Australia, Denmark, and Poland also went on record by adhering to the restrictive position.

27 In New York, Argentina continued the active role that this state had already played in Kampala (on that role, see Kreß and von Holtzendorff, *supra* note 20, at 1202–1204) and before. The fact that the President of the ICC, the eminent former Argentinian diplomat Silvia Fernández de Gurmendi, was one of the early two Coordinators (the other being Tuvako Manongi from Tanzania) of the Working Group of the Crime

of Aggression should not be forgotten and this includes the fact that her 'Coordinator's Discussion Paper' of 11 July 2002 (Barriga and Kreß, *supra* note 9, at 412–414) was an important point of reference in the subsequent negotiations.

28 Botswana's important role throughout the negotiations on the crime of aggression constitutes only one of many facets of this state's leading role in support of the establishment of a system of international criminal justice. In particular, Ambassador Athalia Molokomme's numerous principled (and thus powerful) interventions during the negotiations on the crime of aggression will be remembered.

29 Slovenia's constructive role during the negotiations on the crime of aggression bears emphasizing. The distinguished Slovenian delegate Danijela Horvat will be remembered for an entire series of thoughtful, dedicated and eloquent interventions during the New York Assembly meeting in December 2017. A similar note of recognition is due to the distinguished delegates Shara Duncan Villalobos from Costa Rica, Vasiliki Krasa from Cyprus, Päivi Kaukoranta from Finland, James Kingston from Ireland and Martha Papadopoulou from Greece for their valuable contributions to the New York, December 2017 negotiations. In the case of Greece, the important role played, over many years, by the distinguished delegate Phani Dascalopoulou-Livada will be remembered.

30 Switzerland continued the active role that this state had already played in Kampala (on that role, see Kreß and von Holtzendorff, *supra* note 20, at 1202–1204). In New York, Switzerland took a leading role in support of the 'simple activation approach'.

31 *Report on the Facilitation ... supra* note 23, Annex II B and C.

32 Letter of 7 December 2017 by the Permanent Representative of Switzerland to the United Nations to all Permanent Representatives of States Parties to the Rome Statute, on file with the author.

33 The two distinguished Austrian diplomats received knowledgeable advice from Dr Astrid Reisinger-Coracini from the University of Salzburg who had participated in the overall negotiations since 1999 and had made numerous important scholarly contributions since then.

34 Professor Dapo Akande and this author had formulated a joint draft encapsulating this legal position. This was done in the hope that it would be considered a genuine bridge-building attempt in view of the fact that Professor Akande and this author had taken opposite views regarding the underlying legal controversy. The draft was transmitted to the Austrian Facilitator by Germany without adopting it. This proposal has occasionally been referred to as the 'Non-German Non-Paper' and, to a certain extent, it was reflected in the 'Discussion Paper, Rev. 1, 11 December 2017', as

presented by the Facilitator. During the New York negotiations, this author had reformulated the core of the Akande/Kreß joint draft proposal as follows: ‘Confirming that any statement made by a State Party, individually or collectively, that *it subscribes to the view noted in preambular paragraph 4 shall (‘when made in writing and communicated to the Registrar’)* be regarded as *also* fulfilling the conditions required for a declaration referred to in article 15 bis, paragraph 4, while recognizing that the issuance of any such statement would be without prejudice to that State maintaining its view that, in the absence of its own ratification or acceptance of the amendments, no declaration referred to in article 15 bis paragraph 4, is necessary to preclude the Court from exercising jurisdiction over the crime of aggression, arising from an act of aggression allegedly committed by that State Party.’ (Emphasis in the original).

35 Brazil had already played an important role in Kampala (Kreß and von Holtzendorff, *supra* note 20, at 1202–1204). In New York, this state, through its distinguished delegate Patrick Luna, worked tirelessly to build a final bridge. For the Brazilian policy perspective on the overall negotiations, see M. Biato and M. Böhlke, ‘Brazil’, in Kreß and Barriga (eds), *supra* note 1, at 1117–1130.

36 New Zealand’s association with this bridge-building attempt is noteworthy for its constructiveness as this state had made it clear that it believed the ‘restrictive position’ to be the correct legal view. So these three delegations lent further credit to the idea that it was possible to find a bridge. Sweden, it should be noted, took a position similar to that of New Zealand. Sweden’s constructiveness in New York was in line with the helpful role this country had played during the ‘Princeton Process’, in particular through the contributions of its distinguished delegate, Pal Wränge.

37 See ‘Additions by Brazil, Portugal and New Zealand to the Discussion Paper’, 11 December, 13:00 (on file with the author). See also ICC-ASP/16/L.9, 13 December 2017, OP 1, and the explanations provided by the distinguished Swiss delegate Nikolas Stürchler in his blog entry, ‘The Activation of the Crime of Aggression in Perspective’, EJIL: Talk! Blog of the European Journal of European Law, 26 January 2018, available at <http://www.ejiltalk.org/the-activation-of-the-crime-of-aggression-in-perspective/> (visited 28 January 2018).

38 On those uncertainties, see Stürchler, *ibid.*

39 The point is clearly articulated by Stürchler, *ibid.*

40 For the first articulation of this demand in the form of a text, see *Report on the Facilitation ... supra* note 23, Annex III *sub* A.

41 While Switzerland took the step to formally oppose the proposal, this state was certainly expressing the sentiment of a great many delegations

present when it criticized the French proposal in question. This author recalls Cyprus and South Africa, in particular, voicing their lack of comprehension regarding France's move.

42 South Africa, especially through its distinguished delegate André Stemmet, had consistently supported the idea of the Court exercising its jurisdiction over the crime of aggression (for South Africa's policy position on the overall negotiations, see A. Stemmet, 'South Africa', in Kreß and Barriga (eds), *supra* note 1, at 1271–1284). It is particularly noteworthy that South Africa did not change course even at the New York 2017 Assembly of States' meeting where the same state again contemplated the possibility of leaving the community of States Parties.

43 Samoa is another smaller state that has been making important contributions to the negotiations on the crime of aggression. In particular, the countless thoughtful (and good-humoured!) interventions by the distinguished Samoan delegate, Professor Roger S. Clark, constitute a precious part of the *travaux préparatoires*. Samoa's ultimate contribution to the success of the negotiations, expressed through its distinguished head of delegation, Ambassador Aliioaiga Feturi Elisaia, consisted of adopting a non-lawyer's perspective of a world citizen reminding delegations at a most critical juncture of the negotiations what really is at stake.

44 Portugal has been an important voice in the negotiations from an early moment in time (see, for example, the '1999 Proposal by Greece and Portugal', as repr. in Barriga and Kreß, *supra* note 9, at 343). In New York, the interventions by the distinguished Portuguese delegate Mateus Kowalski stood out for their wisdom, fairness and elegance. This author would not wish to let pass this occasion to recall the important contributions made over many years by the late Professor and Legal Advisor of the Portuguese Ministry of Foreign Affairs Paula Escarameia.

45 The 'Draft resolution proposed by the Vice-Presidents of the Assembly. Activation of the Jurisdiction of the Court over the Crime of Aggression', ICC-ASP/16/L.10, 14 December 2017 became Resolution ICC-ASP/16/Res.5. One of the leading negotiators, Nikolas Stürchler in his blog, *supra* note 37, who recalls that consensus had emerged 'at around Friday 0:40 AM'.

46 It bears recording that, at this critical juncture of the New York 2017 negotiations, many distinguished civil society representatives made their voices heard in support of a final concession, which many of them found painful as well. This constructive role is noteworthy in light of the fact that the 'NGO community' has been playing a less active role with respect to the negotiations on the crime of aggression than it did with respect to the ICC Statute in general (for a detailed analysis, see N. Weisbord, 'Civil Society', Kreß and Barriga (eds), *supra* note 1, at 1310–1358. This author wishes to

take this opportunity to pay tribute to the distinguished non-state delegates, Dr David Donat Cattin, Professor Donald Ferencz, Jutta Bertram Nothnagel, Professor Jennifer Trahan and Professor Noah Weisbord, for the substantial contributions to the success of the negotiations they have made, in one form or the other, over the long years of the discussions.

47 Perhaps understandably, many of those states confined their concession to what they felt was the necessary minimum and maintained their legal view in their explanations of vote. In Liechtenstein's explanation of position (on file with the author), for example, Ambassador Christian Wenaweser stated: 'we are of the firm view that the Court, in exercising its jurisdiction over the crime of aggression, must and will apply the law contained in the Kampala amendments'.

48 In Liechtenstein's explanation of its position, Ambassador Wenaweser powerfully articulated sentiments subsequently echoed, in one way or the other, by many other delegations. In some particularly noteworthy parts, Liechtenstein's statement reads as follows:

'The historic significance of the decision we have taken today to activate the Court's jurisdiction over the crime of aggression cannot be overstated. Never has humanity had a permanent international court with the authority to hold individuals accountable for their decisions to commit aggression — the worst form of the illegal use of force. Now we do. ... We are disappointed that a few States conditioned such activation on a decision that reflects a legal interpretation on the applicable jurisdictional regime over the crime of aggression that departs from the letter and spirit of the Kampala compromise, and which aims to severely restrict the jurisdiction of the Court and curtail judicial protection for States Parties. Our reasons for joining the decision are twofold: Second, we believe that the importance of the activating jurisdiction has to be our overriding goal.'

In the same vein, the distinguished Swiss delegate Stürchler's blog, referenced *supra* note 37, wisely concludes:

'In all of this, let us not forget that the activation of the crime of aggression is meant to be a contribution to the preservation of peace and the prevention of the most serious crimes of concern to the international community as a whole. More than 70 years after the Nuremberg and Tokyo trials, the ICC has received the historic opportunity to strengthen the prohibition of the use of force as enshrined in the UN Charter and completed the Rome Statute as originally drafted. This is the perspective we should preserve.'

49 At the Rome conference, Germany was an unequivocal supporter of the inclusion of the crime of aggression into the jurisdiction of the ICC. Germany was accordingly quick to applaud the NAM proposal which inspired the original Art. 5(2) of the ICC Statute (*supra*note 9) and Germany

was then instrumental in formulating paragraph 7 of the Final Act of the Rome Conference (UN Doc. A/CONF.183/13, 17 July 1998, *supra* note 10). At this juncture, one would be remiss not to acknowledge the outstanding role that the late eminent German diplomat Hans-Peter Kaul, the first German judge at the ICC, has played also in the course of the negotiations on the crime of aggression. In a personal memoir, which this author hopes will also be published in English in due course, Judge Kaul, recalls his memory of the crucial moments of the Rome Conference (Hans-Peter Kaul, 'Der Beitrag Deutschlands zum Völkerstrafrecht', in C. Safferling and S. Kirsch (eds), *Völkerstrafrechtspolitik* (Springer, 2014) 51–84, at 67–68). During the 'Princeton Process', a German delegate acted as one of the three sub-coordinators. In Kampala, Germany was designated Focal Point for the consultations on the US proposals for certain understandings. The head of the German delegation in Kampala, Ambassador Susanne Wasum-Rainer, has offered a German policy perspective on the negotiations in her chapter 'Germany', in Kreß and Barriga, (eds), *supra* note 1, at 1149–1157. Regarding the legal controversy underlying the New York negotiations, Germany had taken the position not to express a position. This was done with a view not to overemphasize the practical importance of the question and in order to be available, if need be, to serve as an 'honest broker' for a final bridge-building effort. During the final hours in New York, Germany's head of delegation, Ambassador Michael Koch, before and behind the scenes, demonstrated that his country's promise to be of assistance in making the activation of the Court's jurisdiction a reality had not been an empty one. Germany's contribution to the negotiations on the crime of aggression since the lead up of the Rome conference and until shortly after the Kampala conference is recounted and documented by this author in C. Kreß, 'Germany and the Crime of Aggression', in S. Linton, G. Simpson, and W.A. Schabas (eds), *For the Sake of Present and Future Generations. Essays on International Law, Crime and Justice in Honour of Roger S. Clark* (Brill/Nijhoff, 2015) 31–51.

50 Japan's sceptical perspective on the historic Tokyo trial is well known and Hathaway and Shapiro, *supra* note 4, at 133 *et seq.* provide their readers with a fascinating account of the broader background to Japan's perspective. It is all the more important to state that Japan has unambiguously supported the idea that the ICC would exercise its jurisdiction over the crime of aggression. Regarding the legal controversy underlying the New York 2017 negotiations, Japan, perhaps most consistently of all states, has been defending the 'restrictive position' as the correct legal view (see the chapter 'Japan' written by the head of Japanese delegation at Kampala, the late Ambassador Ichiro Komatsu, in Kreß and Barriga (eds), *supra* note 1, at 1217–1233 and, in particular, at 1231–1232). Against this background, Japan's role during the New York 2017 negotiations is particularly noteworthy. While not leaving a shadow of doubt

regarding Japan's legal position, Japan's head of delegation at New York, Director-General Masahiro Mikami, displayed great sensitivity for the perspective of the opposing side and ultimately also indicated Japan's readiness to consider crossing a final bridge. The Republic of Korea is another Asian state which has continuously supported the idea that the ICC should exercise its jurisdiction over the crime of aggression (for the perspective of a scholarly advisor to various South Korean delegations, see Y.S. Kim, 'Republic of Korea (South Korea)', in Kreß and Barriga (eds), *supra* note 1, at 1234–1241). During the December 2017 New York negotiations, the Republic of Korea stayed silent, however.

51 Italy has been supportive of the process since the beginning of the negotiations (see, for example, the proposal submitted by Egypt and Italy as early as in 1997 (repr. in Barriga and Kreß, *supra* note 9, at 226–227) and the contributions by the former distinguished Italian diplomat and Judge at the ICC, Mauro Politi, in the early phase of the negotiations should be remembered (for a useful collection of short comments on the negotiations by influential voices before the beginning of the Princeton Process, see M. Politi and G. Nesi (eds), *The International Criminal Court and the Crime of Aggression* (Ashgate, 2004)). While it is probably fair to say that Italy has not been playing a leading role during the 'Princeton Process' and in Kampala, the country, when the New York December 2017 negotiations had reached their final part, through its distinguished delegate Salvatore Zappalà, was among the first delegations to support the Austrian facilitation in its bridge-building effort. Eventually, and one is tempted to see a providence of destiny at work, it was an Italian Vice President of the Assembly of States Parties, Ambassador Sebastiano Cardi, who co-presided over the consensual adoption of the activation resolution.

52 The story is powerfully told by Hathaway and Shapiro, *supra* note 4, at 131 *et seq.*

53 Those in charge within the Court will wish to turn to the comprehensive analysis provided by E. Chaitidou, F. Eckelmans, and B. Roche, 'The Judicial Function of the Pre-Trial Division', in Kreß and Barriga (eds), *supra* note 1, at 752–815.

54 This author does not find it easy fully to appreciate why France, led in New York by Ambassador Francois Alabrune and the UK, led in New York by Ambassador Ian MacLeod, have remained unprepared to cross a final bridge in the New York, December 2017 negotiations. He even wonders whether those two states would not have achieved greater legal certainty to their benefit (as they perceived it) had they crossed the bridge built for them by Professor Akande and this author (for certain potential legal ambiguities surrounding operative § 2 of the Activation Resolution, not to be explored in this editorial, see Stürchler, *supra* note 37). But this author does appreciate why quite a few states involved in military activities in grey legal area

scenarios, instead of ratifying the Kampala amendments, appear to have adopted a position of 'wait and see' how the Court will interpret the substantive definition of the crime. This author also believes that it should be acknowledged that France and the UK are the only permanent members of the Security Council that have, until now, ratified the ICC Statute and that those two states have eventually accepted a jurisdictional regime that does not provide the Security Council with a monopoly over proceedings regarding the crime of aggression before the ICC. This author wishes to take this opportunity to acknowledge the important contribution made by the eminent former British diplomat Elizabeth Wilmshurst to the negotiations. In a number of very noteworthy statements (for some references, see Kreß, *supra* note 18, at 515–516, citations accompanying note 570), Ms Wilmshurst had reminded the negotiators of the need to ground firmly the substantive definition of the crime of aggression in customary international law. For British and French negotiators' perspectives on the Kampala amendments, see E. Belliard, 'France', and C. Whomersley, 'United Kingdom', both in Kreß and Barriga (eds), *supra* note 1, 1143–1148, and 1285–1289. The intensity of the controversy over the proper role to be attributed to the Security Council when it comes to proceedings before the ICC involving the crime of aggression, gives any observer a vivid idea of how much constructive spirit had to be shown to make the ultimate breakthrough possible. Just compare the vigorous pleading for a Security Council monopoly by the eminent Chinese diplomat L. Zhou, 'China', in Kreß and Barriga (eds), *supra* note 1, 1133–1138, with India's fierce opposition to a strong Security Council role, as recounted and documented by the eminent Indian diplomat N. Singh, 'India', in Kreß and Barriga (eds), *supra* note 1, 1164, 1165–1168, 1171.

55 For the increasingly intensive debate, see, most notably, the recent speeches delivered, first, by the UK and, subsequently, by the Australian Attorney-General, as repr. in EJIL Talk! Blog of the European Journal of International Law, available online at, respectively: <http://www.ejiltalk.org/the-modern-law-of-self-defence/> and in <http://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law/#more-15255> (visited 28 January 2018). For an analysis of 'anticipatory self-defence' in the context of the State Conduct Element of the crime of aggression, see Kreß, *ibid.*, at 473–479.

56 For example, the legal intricacies with respect to the use of force against the 'Islamic State' that many states have been carrying out in Syria at Iraq's request, were very much in the minds of decision makers when the crime of aggression has been discussed recently. For an analysis of 'The Use of Force in Response to an Armed Attack by Non-State Actors Emanating from the Territory of Another State' in the context of the State Conduct Element of the crime of aggression, see Kreß, *ibid.*, at 462–467.

57 The intriguing question of the use of force in a case of dire need to avert a humanitarian catastrophe, but without a Security Council authorization, has loomed large in the background to all the negotiations. For an analysis of ‘The Use of Force to Avert a Humanitarian Catastrophe’ in the context of the State Conduct Element of the crime of aggression, see Kreß, *ibid.*, at 489–502, and at 524–526.

58 If seen in the context of Russia’s important role in the long journey described in this essay, one cannot be but even more saddened by this state’s manifest violation of the prohibition of the use of force in the case of Crimea. The fact that politics and law have always been inextricably intertwined in Russia’s contributions to the century-long conversation is no distinctive feature of Russia’s approach to the subject and does not constitute a reason not to acknowledge that Russia has made noteworthy text proposals from 1933 on, when Maxim Litvinov submitted a Soviet ‘Definition of “Aggressor”’: Draft Declaration’ to the Disarmament Conference (repr. in Barriga and Kreß, *supra* note 9, at 126–127). Russia’s role before Nuremberg is usefully recalled by Hathaway and Shapiro, *supra* note 4, at 257. Stalin had supported a trial at a critical juncture and, in that respect, he formed ‘an odd couple’ together with Stimson. (The meeting of minds of Stalin and Stimson did not go much further, though, in light of Stalin’s preference for a show trial). In this historic context, it bears recalling that it was the Russian professor A.N. Trainin, who coined the Nuremberg and Tokyo term ‘crime against peace’ (in A.Y. Vishinsky (ed.), *Hitlerite Responsibility Under Criminal Law*, transl. by A. Rothstein (Hutchinson & Co., 1945), at 37). For Russia’s active role during the Cold War, see, for example, Sellars, *supra* note 6, at 119–126, 130–138, and Bruha, *supra* note 8, at 150–154. The ‘1999 Proposal of the Russian Federation’ (repr. in Barriga and Kreß, *supra* note 9, at 339) is as succinct as it has been incapable of securing a consensus in its insistence on both the old Nuremberg and Tokyo language of ‘war of aggression’ and the idea of a Security Council monopoly. Yet, it is as noteworthy as it is promising, that the two distinguished Russian diplomats Gennady Kuzmin and Igor Panin state (in ‘Russia’, in Kreß and Barriga, *supra* note 1, at 1264), that ‘Russia is satisfied with the outcome of the Review Conference with regard to the definition of the crime of aggression’.

59 The identical Turkish letters addressed to the Secretary-General and to the President of the Security Council (S/2018/53) makes reference to the right of self-defence as recognized in Art. 51 UN Charter, but does almost nothing to present facts in order to substantiate this legal claim. Instead, the letters make a dangerously vague reference to the ‘responsibility attributed to Member States in the fight against terrorism’ as if such a ‘responsibility’ could serve as a legal basis for a use of force on foreign territory without the consent of the territorial state and absent a Security Council mandate.

