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THE TRAVAUX PRÉPARATOIRES OF
THE CRIME OF AGGRESSION

EDITED BY STEFAN BARRIGA
AND CLAUD KREß

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THE TRAVAUX PRÉPARATOIRES OF THE CRIME OF AGGRESSION

The Travaux Préparatoires of the Crime of Aggression contains a complete documentation of the fifteen years of negotiations which led up to the historic adoption of the amendments to the Rome Statute of the International Criminal Court at the 2010 Review Conference in Kampala. Arranged chronologically, it includes all relevant official Chairman's drafts, non-papers, country proposals, meeting reports and summary records, as well as selected unpublished materials and transcripts from the dramatic negotiations at the Review Conference. Three introductory articles, each written from the perspective of insiders, put the Kampala compromise into context and explore the amendments on the crime of aggression, their negotiation history and the intentions of the drafters.

STEFAN BARRIGA served as the principal legal adviser to the chief negotiators on the crime of aggression from 2003 to 2010, and is widely acknowledged as the main expert in charge of the drafting of the Working Group's proposals, papers and reports during that period. He is now the Deputy Permanent Representative of the Principality of Liechtenstein to the United Nations in New York.

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Foreword

A historic achievement of the Review Conference of the Rome Statute of the International Criminal Court held in Kampala in June 2010 was the adoption of amendments to the Rome Statute defining the crime of aggression and how the Court would exercise jurisdiction over this crime. Defining the crime of aggression had been on the international agenda for nearly a century and there was scepticism leading up to the Conference about whether delegates would be able to agree on proposed amendments given their divergent positions on many issues.

This volume chronicles the evolution of the crime of aggression: from its historic roots in 1919 and its promulgation at Nuremburg, to its inclusion in the Rome Statute, the lead-up to the Review Conference and ultimately the adoption of the aggression resolution at Kampala. More importantly, the volume provides a comprehensive account of the negotiating and drafting history of the amendment proposals put before the Review Conference and the subsequent negotiations that took place. The authors are to be commended for compiling the *travaux préparatoires* into one resource and giving the reader direct and unfettered access to the original sources, which include selected unpublished documents.

As instrumental figures in the drafting and negotiation process, the authors have drawn from their unique perspectives to outline and index the work in a way that will best assist the reader in understanding the long and complex road to Kampala; the context in which the compromises were reached and how they were concluded.

This volume will be greatly appreciated by practitioners, scholars, government officials, parliamentarians and others who seek to better understand the compromises reached at Kampala and generate scholarly comment within the framework of international criminal justice. Looking ahead to 2017, this volume will also benefit the preparatory work carried out ahead of the ratification and activation processes.

Adoption of the definition of the crime of aggression and its jurisdictional regime at Kampala demonstrates the progressive acceptance of States Parties to give meaningful effect to the commitment that was made in Rome back in 1998: to bring

perpetrators of the 'supreme international crime' to justice before the Court. As we move into the critical period of ratifying these amendments to the Statute, it is my sincere hope that this commitment continues to mature and that this volume will be monumental in achieving that end.

*President Sang-Hyun Song
President of the International Criminal Court
October 2011*

Preface

During the opening ceremony for signing the treaty on the establishment of an International Criminal Court on 18 July 1998 in Rome, M. Cherif Bassiouni rightly observed that the event ‘marks both the end of a historical process that started after World War I as well as the beginning of a new phase in the history of international criminal justice’. In one fundamentally important respect, however, the Rome regime remained incomplete. It had proven impossible to reach agreement about the definition of that which, on 1 October 1946, was declared the ‘supreme international crime’ by the International Military Tribunal at Nuremberg. Negotiators in Rome disagreed on the definition of the crime and the role of the Security Council in the Court’s exercise of jurisdiction, with some delegations objecting to the Court’s jurisdiction over this crime altogether. As a compromise, the crime of aggression was added to the subject-matter jurisdiction of the first permanent international criminal court in history, but the Court’s exercise of that jurisdiction was postponed. For many observers, this was a postponement *ad calendas graecas*. States, however, took seriously their mandate to define the crime and formulate conditions for the Court’s exercise of jurisdiction over it. The work intensified after 2003 in the framework of the Special Working Group on the Crime of Aggression, established by the Assembly of States Parties to the Rome Statute (ASP). These negotiations proved extremely complex legally and highly sensitive politically.

Against this backdrop, a cloud of cautious scepticism hovered over the opening of the first Review Conference of the Rome Statute on 30 May 2010 in Kampala, Uganda. The time to ultimately settle the matter had arrived. After two weeks of intense consultations, the endgame was as dramatic as anyone could have imagined. After the President of the Conference had tabled his last attempt to reach consensus shortly before midnight on the final day of the Conference, delegates held their breaths as one delegation raised its flag to voice a number of concerns. A collective sigh of relief filled the room as it became clear that, despite these concerns, no delegation was willing to stand in the way of consensus. Moments later, thunderous applause erupted as the President declared the Kampala compromise on the crime of aggression adopted. That night, the terrace of the vast Munyonyo Commonwealth Resort, with its splendid view of Lake Victoria, was transformed into the place where delegates from the world over celebrated the conclusion of an almost century-long process of trying to define the crime.

The purpose of this volume, with which the Cambridge Library of the Crime of Aggression is opened, is to document the road to the Kampala compromise on the crime of aggression. This compromise includes a resolution, amendments to the Rome Statute, the corresponding amendments to the Elements of Crimes and seven interpretive understandings adopted by the States Parties to the Rome Statute. Part I of this volume contains three introductory articles written by negotiators describing the main strands of the negotiation process, beginning with the adoption of the Rome Statute, the challenges encountered, the compromises struck and the reasons underlying them. Part II contains the resolution on the crime of aggression as adopted in Kampala. The amendments contained in annex I to the resolution were circulated by the UN Secretary-General in his capacity as depositary of the Rome Statute and are open for ratification or acceptance by States Parties. Part III contains a number of relevant historical documents covering the long journey to Kampala. With this historical documentation, we do not claim to be comprehensive. As far as the interwar period is concerned, we have, above all, selected those documents to which the Nuremberg Tribunal referred in its judgment. As regards the post-Second World War era, we have placed emphasis on assembling those documents to which reference was repeatedly made during the subsequent negotiations on the crime of aggression. For a more exhaustive documentation of efforts to define aggression up until 1974, interested readers may wish to (re)turn to Benjamin Ferencz's two-volume landmark collection, *Defining International Aggression: The Search for World Peace* (Dobbs Ferry, NY: Oceana Publications, 1975).

Finally, and perhaps most importantly, Part IV contains a chronological compilation of documents relating to the intergovernmental negotiations on the crime of aggression from 1995 to 2010. At this juncture, we have striven for (near) comprehensiveness. This part therefore includes all documents of that period that have been issued as *official* documents of the United Nations and the Assembly of States Parties of the International Criminal Court, including country proposals; consolidated texts of proposals; meeting reports; papers and non-papers authored by the chief negotiators; and resolutions that could, in their entirety, be considered the *travaux préparatoires* of the amendments on the crime of aggression. The compilation also includes a very limited number of *unofficial* documents, in particular from the final two weeks of the negotiations in Kampala. These provide important context for the way in which the negotiations progressed, such as the transcripts of the Chairpersons' statements introducing the latest versions of the negotiation texts. Part IV assembles the documents in a strictly chronological order, based on the timing of their introduction to the negotiations, rather than in the order in which they may have subsequently been published. For example, almost all of the reports of the Special Working Group have in their annexes non-papers or other documents that were issued in preparation for the discussions reflected in the reports. These appear

prior to the reports themselves, in order to facilitate understanding and analysis of how the negotiations unfolded in real time. The lists of participants at the Princeton meetings, which were included as annexes to the Special Working Group reports, are not reprinted here. Furthermore, we considered very few documents to be either duplicative or otherwise not relevant enough to be reprinted in this volume. These have, however, been included in the table of documents, which strives to reflect the entire *travaux préparatoires*.

The documents in Parts II, III and IV have, as a general rule, been printed as originally published (with their original footnotes). However, to produce a graphically coherent compilation, some minimal formatting was necessary, such as removing original headers and footers (usually containing document symbols, dates, page numbers and so on). Furthermore, we have attempted to make the compilation user-friendly by assigning short titles to all printed documents. The full titles of all documents, as well as full citations, can be found in the table of documents. All documents have been assigned an individual number for easy identification in the table. Where documents are printed as excerpts, in particular in Part III, as well as in Part IV, during the period of 1995 to 1998 (when the crime of aggression was but one of the issues under negotiation), the omitted parts are marked by the editors with { . . . }. This distinct sign is necessary to distinguish omissions made by the editors from omissions that may already have been marked in the original document using the common forms of the ellipsis without or with square brackets: . . . and [. . .]. Part V contains a full thematic index.

It is hoped that this volume will prove useful to government officials and parliamentarians involved in the preparation of their country's ratification of the Kampala compromise, to representatives of non-governmental organisations (NGOs) engaged in the matter, to scholars in international law and politics and to all other interested readers worldwide. We would have reached an important goal if this volume were to contribute to a better understanding of the complexities of the Kampala compromise. While the book stands on its own and can be used as such, it is also meant to prepare the ground for a comprehensive scholarly commentary on the Kampala compromise and its place in the international legal order. Work on this second volume of the Cambridge Library of the Crime of Aggression has begun and its publication will follow in due course.

In preparing this volume we have received precious assistance from various people to whom we are greatly indebted. The President of the Review Conference, H. E. Ambassador Christian Wenaweser of the Principality of Liechtenstein, and the Chairman of the Working Group for Aggression in Kampala, H. R. H. Prince Zeid Ra'ad Zeid Al-Hussein of Jordan, encouraged us to embark upon this endeavour and we were able to count on their support throughout. In the process of selecting the

historical documents, we have received most valuable advice from former Nuremberg prosecutor and professor Benjamin Ferencz, as well as Dr Kirsten Sellars. The Director of the Secretariat of the Assembly of States Parties, Renan Villacis, most kindly provided us with assistance regarding the documentation of the latest stage of the negotiations. And Jutta Bertram-Nothnagel and Roger Clark repeatedly lent us their very considerable expertise to refresh our memories in the course of writing the introductory chapters. We are also very grateful to Denise Fuchs, Georg Kerschischnig, Alexandra Herr and Claudia Gerner for their meticulous help, which they provided to us in Cologne and New York during the compilation of the documents. Our final and special thanks go to our editorial assistants Leena Grover and Leonie von Holtendorff. They have been as professional, dedicated and good-humoured in supporting the preparation of this book as they were in Kampala as members of the delegation of Liechtenstein.

Stefan Barriga, New York
Claus Kreß, Cologne

Table of documents

Short title	Full citation	No.
2010 Resolution on the Crime of Aggression	Review Conference RC/Res.6, 'The Crime of Aggression', 11 June 2010, in <i>Review Conference Official Records</i> , RC/11, part II, 17. The amendments to the Rome Statute were circulated by the UN Secretary-General in Depositary Notification C.N.651.2010 Treaties-8, 29 November 2010, available at http://treaties.un.org	1
1919–1996: Select historical documents on aggression		
1919 Commission Report on War Responsibility	Paris Peace Conference, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report Presented to the Preliminary Peace Conference', 29 March 1919, in <i>AJIL</i> , 14 (1920), 117–20	2
1919 Covenant of the League of Nations	Covenant of the League of Nations, 28 April 1919, in Clive Parry, ed., <i>Consolidated Treaty Series</i> , Vol. 225 (Dobbs Ferry, NY: Oceana Publications, 1969–81), 195	3
1919 Treaty of Versailles	Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, in Clive Parry (ed.), <i>Consolidated Treaty Series</i> , vol. 225 (Dobbs Ferry, NY: Oceana Publications, 1969–81), 189	4
1923 Draft Treaty of Mutual Assistance	League of Nations, Treaty of Mutual Assistance, 1923, in <i>League of Nations Official Journal</i> , Spec. Supp. No. 16, Records of the Fourth Assembly, Minutes of the Third Committee, 203	5
1924 Protocol for the Pacific Settlement of International Disputes	League of Nations, 'Protocol for the Pacific Settlement of International Disputes', 2 October 1924	6
1927 Declaration Concerning Wars of Aggression	League of Nations, 'Declaration Concerning Wars of Aggression',	7

	24 September 1927, in <i>League of Nations Official Journal</i> , Spec. Supp. No. 53, 22	
1928 Havana Resolution	Sixth International Conference of American States, 'Resolution Aggression', 28 February 1928, in <i>Final Act. Motions, Agreements, Resolutions and Conventions</i> (Havana: 1928), 179; reprinted in James Brown Scott (ed.), <i>The International Conferences of American States 1889–1928</i> (New York: Oxford University Press, 1931), 441	8
1928 Kellogg-Briand Pact	League of Nations, General Treaty for Renunciation of War as an Instrument of National Policy, 27 August 1928, in <i>League of Nations Treaty Series</i> , XCIV (1929), 58	9
1933 Soviet Draft Definition	M. Litvinoff, Union of Soviet Socialist Republics, 'Definition of "Aggressor": Draft Declaration', Doc. Conf D/C.G.38, <i>Monthly Summary of the League of Nations</i> , XIII: 2 (1933), Annex	10
1945 UN Charter	Charter of the United Nations and Statute of the International Court of Justice, 26 June 1945	11
1945 London Charter	'Charter of the International Military Tribunal', in <i>Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis</i> , 8 August 1945, 82 UNTS 284, Annex	12
1945 Control Council Law No. 10	'Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity', 20 December 1945, in <i>Official Gazette of the Control Council for Germany</i> , 3 (1946) 50–5; and T. Taylor, <i>Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council Law No. 10</i> , Washington, DC, 15 August 1949, Appendix D, 250	13

1946 Tokyo Charter	Charter of the International Military Tribunal for the Far East, General Orders No. 1, 19 January 1946, Tokyo, as amended, General Orders No. 20, 26 April 1946, TIAS No. 1589, 4 Bevans 20	14
1946 Nuremberg Judgment	International Military Tribunal (Nuremberg), Judgment, 1 October 1946, in <i>AJIL</i> , 41 (1947), 172 (printed excerpts at 216)	15
1946 GA Resolution 95	General Assembly, 'Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal', 11 December 1946, GA Res. 95 (I)	16
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