

NOTES AND COMMENTS

RESPONSE TO KOH AND BUCHWALD'S ARTICLE: DON QUIXOTE AND SANCHO PANZA TILT AT WINDMILLS

*By Alain Pellet**

In their eagerness to justify the “United States perspective” on the Kampala definition of the crime of aggression¹ and on the International Criminal Court (ICC), Koh and Buchwald² tend to invent imaginary enemies and to ascribe to them views that they do not actually hold. In so doing, the authors weaken a thesis that, in some respects, is not devoid of interest. From at least two points of view, however, their article is paradoxical, if not pathetic—exactly like the U.S. position.

First, they are obsessed with avoiding the prosecution of U.S. nationals before any court other than those of the United States. This position amounts to recognizing that U.S. citizens (and leaders) are likely to be accused of having committed acts of aggression (or other international crimes), while maintaining that it would be intolerable to have them judged as common Chadian, French, or Japanese criminals. The insistence of the authors³ that only “wars” (and not mere “acts”) of aggression should be indicted clearly also aims to protect the leaders of the United States—and of other big countries—given that they are more apt to be indicted for planning, preparing, initiating, or executing an *act* of aggression than a full-scale *war* of aggression.⁴ Yet it bears noting that if one excludes the prospect of liability for aggression by a private actor,⁵ the United States likely can be seen as the author of one of the rare wars of aggression, properly understood, during the last fifty years.⁶

* Emeritus Professor, University Paris Ouest, Nanterre-La Défense. I wish to express my deep appreciation to Alina Miron, Associate Professor, Université Paris-Nord, for her assistance in preparing this opinion piece.

¹ International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Res. RC/Res.6 (June 11, 2010). The resolution on the crime of aggression, as well as the other resolutions from the Kampala conference, is contained in the Review Conference's Official Records, ICC Doc. RC/11 (2010). Part I includes the proceedings, and Part II the resolutions, declarations, and various annexes. The Web page for the Assembly of States Parties, http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx, provides access to all official records, general debates, and other records and documentation.

² Although Koh and Buchwald explain that “[t]his article is written in their personal capacities and does not necessarily represent the views of the . . . U.S. government,” Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AJIL 257, 257 n.* (2015), they do not distance themselves from the U.S. government's views in any manner.

³ Given that the views of the authors substantially coincide with those of the U.S. government, I find it unnecessary to repeat the locution “the authors *and the United States*”; both are implied here and elsewhere in this Note.

⁴ A *war* of aggression contemplates a more massive action than a mere *act* of aggression.

⁵ See *infra* notes 23–24 and accompanying text.

⁶ I have in mind the attack by the United States and a handful of allies on Saddam Hussein's Iraq in 2003. See Alain Pellet, *L'agression*, LE MONDE, Mar. 23–24, 2003, at 1. The armed attacks of Iraq against Iran in 1980 and

Second, Koh and Buchwald proclaim, at the end of their article, that the “main message of [their] article is that the international community should take advantage of the time it has left, before 2017, to address [the] crucial issues in a cooperative and constructive way that contributes to the long-term success of the Court.”⁷ This declaration of good faith bears witness to their extraordinary ability to ease their conscience precisely when they should question their positions. The U.S. approach is reminiscent of the pyromaniac fireman: after having done everything in its power to weaken the ICC and render a decent compromise impossible, the United States, through its representatives at the Kampala Review Conference, now introduces itself as one of the “countries of good will” that will “tackle” the “many difficult issues left,”⁸ thereby rescuing the Court from the unfortunate position into which, more than any other country, the United States itself has contributed to put it.

On both the substance of the Kampala amendments and the procedure selected for their adoption and entry into force, Koh and Buchwald raise interesting technical points. In the rest of this Note, I will endeavor both to comment on arguments of theirs that I find to be valid, and to point out regrettable, chauvinistic elements that in my view strongly weaken the persuasiveness of their approach.

I. THE DEFINITION OF “AGGRESSION”

Should the ICC Statute⁹ criminalize “acts of aggression” or only “wars of aggression”? In spite of U.S. pressures, the Kampala negotiators wisely chose the former position. This choice was the better one if only for the sake of consistency with the language of the UN Charter,¹⁰ yet there are also more substantial reasons for adopting a broader definition that targets *acts* rather than merely *wars*.

Let us suppose that, in accordance with U.S. wishes (which sometimes look more like *diktats*), the Kampala Review Conference had limited the scope of the crime of aggression to full-scale wars. In that case, the masked armed action led by Russia in Eastern Ukraine in 2014 would fall outside the definition. Although it manifestly constitutes an act of aggression, it likely could not qualify as a “war of aggression.” Similarly, it is doubtful that the designation “war of aggression” would be applicable in the rare cases in which the Security Council identified the existence of an “act of aggression”¹¹ or “aggressive act.”¹²

then against Kuwait in 1990, along with the ensuing first and second “Gulf wars,” are among the other rare examples of real “wars of aggression.”

⁷ Koh & Buchwald, *supra* note 2, at 295.

⁸ *Id.*

⁹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 (1998) [hereinafter Rome Statute].

¹⁰ See UN Charter, Arts. 1(1), 39. The word “aggression” is used in isolation only in reference to regional arrangements. *Id.*, Art. 53. In the French text, Article 51 mentions “agression armée,” whereas the English text speaks of “armed attack.” See *id.*, Art. 51 (French and English versions).

¹¹ See SC Res. 387 (Mar. 31, 1976) (Angola–South Africa); SC Res. 447 (Mar. 28, 1979) (same); SC Res. 454 (Nov. 2, 1979) (same); SC Res. 577 (Dec. 6, 1985) (same); SC Res. 405 (Apr. 15, 1977) (Benin); SC Res. 411 (June 30, 1977) (Mozambique–Southern Rhodesia); SC Res. 573 (Oct. 4, 1985) (Israel–Tunisia).

¹² See SC Res. 527 (Dec. 15, 1982) (South Africa–Lesotho). In Resolution 667 (Sept. 16, 1990), however, the Security Council used this same expression to characterize the aggression of Iraq against Kuwait, which certainly should qualify as a “war of aggression.”

Even given the broader definition, only certain illegal uses of force rise to the level of acts of aggression. As preambular paragraph 5 of General Assembly Resolution 3314 (XXIX) clearly states, “aggression is the most serious . . . form of the illegal use of force.”¹³ This specification has been repeated in paragraph 6 of the “Understandings” annexed to the Kampala conference’s Resolution RC/Res.6 on aggression;¹⁴ indeed, an act of aggression is to the use of force what genocide is to crimes against humanity. Thus, the concerns described by Koh and Buchwald about criminalizing “acts of aggression” rather than “wars of aggression” appear to be unfounded. Likewise, paragraph 1 of the new Article 8 *bis*¹⁵ creates criminal liability only for “an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.” The requirements of “gravity,” “scale,” and “manifest” character give ample guarantee that “brief skirmishes of relatively little real consequence,” “relatively minor violations of bilateral agreements,”¹⁶ or “the firing of a single bullet that flies across a border”¹⁷ cannot constitute an act of aggression within the meaning of Article 8 *bis*.

Two passages contained in the Understandings underscore the lack of merit of Koh and Buchwald’s concern. Paragraph 7, included *upon the request of the United States*, provides:

It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.

Finally, paragraph 6 of the Understandings makes clear “that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.”

Granted, these Understandings, which are included in Annex III to Resolution RC/Res.6 on the crime of aggression, are not part of the Statute and do not constitute hard treaty law. Yet, since Annex III was adopted by consensus at the Review Conference, there is no doubt that the annex, along with the Understandings, is an “instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.” As such, it forms part of the “context for the purpose of the interpretation” of the Rome Statute as amended.¹⁸ It is unconceivable that the Court would not take Understandings 6 and 7 fully into consideration when interpreting Article 8 *bis*.

Koh and Buchwald nevertheless bemoan that

the Kampala Review Conference failed to include a further Understanding proposed by the United States to address questions related to humanitarian intervention more explicitly The language that the United States put forward would clearly have excluded the

¹³ Definition of Aggression, GA Res. 3314 (XXIX), annex (Dec. 14, 1974).

¹⁴ The “Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression” are included as Annex III of ICC Resolution RC/Res.6, *supra* note 1.

¹⁵ ICC Res. RC/Res.6, *supra* note 1.

¹⁶ Koh & Buchwald, *supra* note 2, at 267.

¹⁷ *Id.* at 270.

¹⁸ See Vienna Convention on the Law of Treaties, Art. 31, para. 2, May 23, 1969, 1155 UNTS 331.

use of force to *prevent the very atrocity crimes that the Rome Statute itself aims to prevent: genocide, crimes against humanity, and war crimes.*¹⁹

I, too, regret that the Kampala conference did not accept this attractive and apparently reasonable proposal. Yet four observations are in order. First, the very fact that this proposal was made by the United States—a country surpassed by none (except perhaps France) in championing military intervention—probably made the other participants understandably suspicious. Second, the United States’ refusal to accept any role for the Court in identifying acts of aggression and its insistence on leaving it exclusively to the Security Council could only aggravate such a suspicion. Third, Kampala might not have been the right forum to decide on the limits or lawfulness of humanitarian interventions, which would require amending the UN Charter. Finally, the fact that “character” is a necessary component of the act of aggression implies that the humanitarian nature of the use of force must—or at least can—be taken into consideration by the Court when called to exercise jurisdiction over the crime of aggression.²⁰ The same would certainly hold true if force is used in self-defense. However, it must be admitted that the exclusion of an act of self-defense from the category of acts of aggression is indeed *lex lata*, whereas military humanitarian interventions still belong in this respect to the indistinct domain of the *lex ferenda*.

Significantly, Koh and Buchwald’s article does not even mention the term “self-defense” once.²¹ This omission is regrettable: discussing this central notion would have prevented them from providing what in my view are misplaced “examples” of conduct that, according to them, could be seen as acts of aggression under Article 8 *bis*. One such example is “the Allied occupations following World War II.”²² Indeed, Article 51 of the Charter recognizes “the inherent right of individual or collective self-defence” in case of an “armed attack,” or in the French text, “*agression*.” Anyway, it derives from Article 51 that measures taken by states in the exercise of their right of self-defense do not qualify as acts of aggression. These considerations make it untenable to argue that the Kampala amendments create the “risk that a broad or vague definition will over-chill by *discouraging* states from using force in cases where they should.”²³ Moreover, discouraging states (including powerful states) from using (military) force is an important goal. Even more important is to prevent states from having a free hand to ascertain when they should use force. The outraged remarks by the International Court of Justice (ICJ) in the *Corfu Channel* case remain fully relevant: the alleged right of intervention can only be regarded

as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization,

¹⁹ Koh & Buchwald, *supra* note 2, at 273 (emphasis added).

²⁰ Koh and Buchwald accept that “[o]ne can argue that this principle is implicit in the other elements of paragraph 6 of the Understandings, but the Kampala conference’s reluctance to address explicitly such an important concern leaves the issue in an unfortunate ambiguity that may make it harder to prevent atrocity crimes in the future.” *Id.* I respectfully suggest that the U.S. insistence on trying to “legalize” the concept of humanitarian intervention and that the way the United States proceeded might be a cause for the Review Conference’s reluctance.

²¹ Except in a citation. *See id.* at 272 n.45 (citing William H. Taft, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 291, 299–300 (2004)).

²² *Id.* at 267.

²³ *Id.* at 272.

find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.²⁴

Although I find several of Koh and Buchwald's objections to be without merit, I nonetheless agree that the definition of an act of aggression in Article 8 *bis*, mainly borrowed from Resolution 3314, is not entirely satisfactory—including for some of the reasons (not all) given by Koh and Buchwald. For instance, the relationship between paragraphs 1 and 2 is ambiguous, and the exhaustiveness *vel non* of the list in paragraph 2 is debatable. However, contrary to Koh and Buchwald, I deem these weaknesses less unfortunate than similar ambiguities in Resolution 3314—which Koh and Buchwald, unexpectedly,²⁵ seem to find acceptable (if not particularly virtuous), given that they strongly criticize Article 8 *bis* for not following it word for word.²⁶ The General Assembly's resolution is an imperfect and optional guideline addressed to the Security Council for determining the existence of an act of aggression in accordance with Article 39 of the Charter—under the threat of a veto.²⁷ Article 8 *bis*, as explained and clarified by the (rather unhelpful) Elements of Crimes and the (more substantial) Understandings, is compulsory and provides substantive rules that are to be interpreted and applied by an independent judicial body. But it is precisely such a prospect that the authors, apparently leery of international judges' wisdom or skill, cannot (or do not want to) envisage.

However, before turning to another major point of disagreement, I wish to make an additional remark on the definition of aggression promulgated at Kampala. Despite the fact that, contrary to Koh and Buchwald, I endorse the decision of the Review Conference to target "acts" rather than "wars" of aggression and find the definition eventually agreed upon acceptable if not perfect, I join them in regretting a very unfortunate restriction: the exclusion of non-state actors as potential authors of acts of aggression. As they rightly note,

the list seemed woefully out-of-date with respect to the modern threat posed by international terrorism. Paragraph (f) applies to a state's action in putting its territory at the disposal of another "state" for perpetrating an act of aggression against a third state, but never addresses the possibility of a state putting its territory at the disposal of non-state actors.²⁸

²⁴ Corfu Channel (UK v. Alb.), 1949 ICJ REP. 4, 35 (Apr. 9).

²⁵ Even though General Assembly Resolution 3314, *supra* note 13, was adopted by consensus, the United States at the time did not show great enthusiasm for it. *See, e.g.*, UN GAOR, 26th Sess., 1480th mtg., paras. 66–75, UN Doc. A/C.6/PV.1480 (1974); UN GAOR, 26th Sess., 2319th mtg., paras. 96–100, UN Doc. A/C.6/PV.2319 (1974). Moreover, the United States resisted a definition based on the General Assembly's 1974 resolution defining aggression. *See* Sean D. Murphy, *U.S. View of Crime of Aggression*, 95 AJIL 400, 400–01 (2001).

²⁶ *See, e.g.*, Koh & Buchwald, *supra* note 2, at 264–69.

²⁷ GA Res. 3314 (XXIX), *supra* note 13, para. 4, reads as follows: "The General Assembly . . . *Calls the attention* of the Security Council to the Definition of Aggression, as set out below, and recommends that it should, as appropriate, take account of that Definition as guidance in determining, in accordance with the Charter, the existence of an act of aggression." The Definition of Aggression is annexed to this resolution.

²⁸ Koh & Buchwald, *supra* note 2, at 267. They also note: "Similarly, having drawn from a list that had been finalized in 1974, there was understandably no mention or even hint of how Resolution 3314's definition might apply in the cases of cyberwarfare that have recently emerged as one of the greatest potential security threats facing

But this remark is itself too narrow: it must be accepted that the nonstate actors themselves, not only the states hosting them, are potential aggressors. This position has, in effect (although somewhat ambiguously), been accepted by the Security Council in Resolution 1368 (September 12, 2001), which recognizes the inherent right of individual or collective self-defense in accordance with the UN Charter following “the horrifying terrorist attacks which took place on 11 September 2001.” Thus, Resolution 1368 assimilates nonstate actors to those capable of carrying out an “armed attack” within the meaning of Article 51.²⁹

II. THE INTERNATIONAL CRIMINAL COURT’S JURISDICTION AND THE ROLE OF STATE CONSENT

Taking into account this regrettable omission, we are left with state-authored acts of aggression—which, naturally, has consequences for the Court’s jurisdiction and the role of state consent. Various assertions by Koh and Buchwald, such as “Unlike a prosecution for those other crimes, a prosecution of an individual for the crime of aggression must necessarily turn on a prior determination that a *state* act of aggression has been committed,”³⁰ are sustainable only insofar as acts of aggression are defined exclusively as the use of armed force *by a state*. Therefore, even if a state accused of committing an act of aggression that amounts to an international crime cannot be prosecuted before the ICC as a formal matter, some entity will have to decide whether or not the act in question has been committed and is attributable to the state. I share the authors’ view³¹ that this determination should belong to the Security Council—not so much because it would be “too political” to be appraised by a judicial body, but precisely because it is not the ICC’s function to judge sovereign states. Indeed, the same objection could be made when the ICC is called upon to judge an individual accused of genocide if the crime is imputable to the state,³² but with a significant difference: the Charter expressly confers on the Security Council the responsibility to determine the existence of an act of aggression, whereas it does nothing of the kind concerning genocide.³³

During the International Law Commission (ILC) discussions of the Draft Code of Crimes Against the Peace and Security of Mankind and the Draft Statute of the ICC, I was already advocating the exclusive competence of the Security Council to determine if an act of aggression has been committed by a state. At the time, however, I was mainly concerned with the risk

the international community.” *Id.* I do not here take a position on this most sensitive issue, a serious analysis of which would fall much beyond the scope of the present Note.

²⁹ See *supra* note 10; see also SC Res. 1373 (Sept. 28, 2001). *But see* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136, para. 139 (July 9, 2004).

³⁰ Koh & Buchwald, *supra* note 2, at 262.

³¹ *Id.* at 262–63.

³² See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), Preliminary Objections, 1996 ICJ REP. 595, para. 32 (July 11, 1996).

³³ The Security Council is not deprived of such a competence, however, *if* it finds that a genocide is a threat to the peace. See, e.g., SC Res. 935 (July 1, 1994) (requesting the secretary-general to establish a Commission of Experts to examine violations of international humanitarian law committed in Rwanda); SC Res. 955 (Nov. 8, 1994) (establishing the international tribunal and adopting its statute).

of having a multiplicity of *national* courts claiming to have jurisdiction to determine whether an act of aggression had been committed.³⁴

As is well known, the Kampala amendments rather clumsily split the difference.³⁵ Absent a referral by the Security Council,³⁶ the initiative to investigate a situation that might involve a crime of aggression belongs formally to the prosecutor, with the proviso that he or she shall first notify the UN secretary-general in order to “ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned.” If so, then “the Prosecutor may proceed with the investigation in respect of a crime of aggression.” By contrast, “[w]here no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation.”³⁷

Even more curiously, the Kampala amendments state that “[a] determination of an act of aggression by an organ outside the Court [i.e., in effect, the Security Council] shall be without prejudice to the Court’s own findings under this Statute.”³⁸ This drafting is either unacceptable or incredibly bad. If one takes this provision literally, it would mean that the Security Council could, while acting under Chapter VII of the Charter, expressly determine that a particular situation involved an act of aggression, but that the ICC could nevertheless determine otherwise. Such an action by the ICC would clearly run afoul of Article 103 of the Charter. The only way to reconcile Article 15 *bis*, paragraph 9, with the Charter is to twist its natural meaning and to interpret it as meaning that when the Security Council has determined that a particular situation constitutes an act of aggression, it belongs to the ICC to decide whether an individual accused is guilty of such a crime.

However, while I broadly concur with Koh and Buchwald concerning the central matter of the role that the Security Council should play, we differ on two other important, related points. First, I do not accept that the principle of state immunity can be an obstacle to holding individuals responsible for an international crime.³⁹ At the very least, my objection holds when it is a “crime against the peace and security of mankind”⁴⁰ or—to use the terminology of Articles 40 and 41 of the 2001 ILC Draft Articles on State Responsibility—“a serious breach . . . of an obligation arising under a peremptory norm of general international law.”⁴¹ In spite of the

³⁴ Summary Records of the 2384th Meeting, [1995] 1 Y.B. INT’L L. COMM’N 3, 34, UN Doc. A/CN.4/SER.A/1995 (statement of Pellet) (“A prior determination of aggression by the Security Council was not the ideal solution, but the Commission should resist the temptation of trying to decree a kind of world governance by judges, and above all national judges.”).

³⁵ For a clear account of the negotiations having led to this unsatisfactory compromise, see Jennifer Trahan, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT’L CRIM. L. REV. 49 (2011).

³⁶ See ICC Res. RC/Res.6, *supra* note 1, Art. 15 *ter*.

³⁷ *Id.*, Art. 15 *bis*(6–8).

³⁸ *Id.*, Art. 15 *bis*(9); see also *id.*, Art. 15 *ter*(4).

³⁹ Koh & Buchwald, *supra* note 2, at 274–75 (quoting the ILC with approval).

⁴⁰ Code of Crimes Against the Peace and Security of Mankind, *in* Report of the International Law Commission on the Work of Its Forty-Eighth Session, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996).

⁴¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 26, UN Doc. A/56/10 (2001), reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002).

most unfortunate ICJ judgment in the *Arrest Warrant* case,⁴² I maintain that in such a situation, the state becomes “transparent,” so that the officials who acted in its name cannot take refuge behind their “immunities.”⁴³ Nonetheless, the question is irrelevant when the ICC is called to exercise its jurisdiction.⁴⁴ Second, I strongly disagree with the idea that only “the State whose leaders participated in the act of aggression . . . could determine the responsibility of such a leader for the crime of aggression.”⁴⁵ To the contrary, I am of the opinion that the victim’s interest in holding leaders responsible is more pressing than that of the aggressor in exorcizing its demons *ex post*. But here again, this matter is irrelevant insofar the ICC’s jurisdiction is concerned. Ergo, “tilting at windmills” . . .

The main issue lies elsewhere: namely, in the U.S. fixation on an absolute consensual approach. I personally approve (with some quibbles as to the summary nature of its enactment) the (rather summary) justice rendered by the U.S. government against Osama bin Laden. Moreover, as stated above, I generally endorse the idea that a moderate use of force may be tolerated to prevent “unimaginable atrocities that deeply shock the conscience of humanity.”⁴⁶ However, this position, which Koh and Buchwald purport to share,⁴⁷ is tenable only if one accepts that the interest of humanity as a whole trumps any notion that sovereignty is sacrosanct and subject to qualification only upon a state’s consent to be bound by international obligations. If the interests of humanity trump, there is an imperative duty “to put an end to impunity for the perpetrators of [‘the most serious crimes of concern to the international community as a whole’] and thus to contribute to the prevention of such crimes.”⁴⁸ But this is not Koh and Buchwald’s position: they pick and choose what they deem most appropriate for U.S. interests. According to them, you can freely decide to intervene in another country. You alone may determine whether it is an act aggression or not, given the circumstances. You alone—and not the aggressed state—can prosecute (or not) the individual accused of committing a crime of aggression against another state. If such a prosecution occurs, it would result in trial before your own tribunals. Finally, of course, you alone may decide to ratify (or not) the Rome/Kampala Statute. All of this is despite the fact that, as Koh and Buchwald seem to accept,⁴⁹ the crime of aggression is “the supreme international crime.”⁵⁰

Among the items mentioned above, the last proposal, at least, is undisputable: it is for the United States alone to determine whether it is in its best interest to become a party to the ICC Statute. But—and here is the core issue—it is not for *any* country to impose upon the rest of

⁴² Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, 22–25 (Feb. 14).

⁴³ See, e.g., Alain Pellet, *Conclusions*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 417, 422–23 (Christian Tomuschat & Jean Marc Thouvenin eds., 2005); Alain Pellet, *La responsabilité de l'état pour la commission d'une infraction internationale*, in DROIT INTERNATIONAL PENAL 607, 620–22 (Hervé Ascensio, Emmanuel Decaux & Alain Pellet eds., 2012).

⁴⁴ Cf. Rome Statute, *supra* note 9, Art. 27(2) (“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”)

⁴⁵ Koh & Buchwald, *supra* note 2, at 19 (emphasis omitted).

⁴⁶ Rome Statute, *supra* note 9, pmb., para. 2.

⁴⁷ Koh & Buchwald, *supra* note 2, at 271–72.

⁴⁸ Rome Statute, *supra* note 9, pmb., paras. 4–5.

⁴⁹ Koh & Buchwald, *supra* note 2, at 271.

⁵⁰ *Judicial Decisions: International Military Tribunal (Nuremberg): Judgement and Sentences*, 41 AJIL 172, 186 (1947) (judgement of September 30, 1946).

the world a culture of punishment for others that is combined with impunity for its own leaders. The interests of the whole community of states, not to mention the peace and security of humanity, are at stake. Unfortunately, Article 15 *bis*, paragraph 5, of the Statute, adopted at Kampala in conformity with the U.S. position, reflects the contrary pre-1945 view: “each is lord in his own manor” (even when the superior interests of mankind are concerned).⁵¹ To bolster this position, Koh and Buchwald misleadingly assert, “The jurisdiction of an international court . . . can easily cover particular acts committed by the nationals of one state, but not those of another, when all states agree that that is the way that the Court’s jurisdiction should operate.”⁵² It should first be noted that the authors’ argument from analogy to the ICJ⁵³ is awkward: the ICJ has jurisdiction to settle disputes *between states*, not to judge their nationals. More substantively, however, there is no reason why international criminal justice—which is concerned with judging *individuals* accused of *international* crimes, not sovereign states—should countenance impunity for a criminal because of his or her nationality. The assumption that states have a monopoly on judging their own nationals in this context has no legal ground whatsoever and is refuted by practice.⁵⁴

Nonetheless, it has to be accepted that Koh and Buchwald are right when they write that

the Kampala amendments clearly proceed on the basis that the Court cannot exercise its jurisdiction with respect to an act of aggression committed by a state that has not consented to the Court’s aggression jurisdiction.

Absent such consent, the Kampala amendments do not treat the territorial nexus with the victim state, standing alone, as a sufficient basis to confer jurisdiction on the Court.⁵⁵

This is both true and deplorable. But then, what can Koh and Buchwald (and the United States) complain of?

⁵¹ Far be it from me to compare the United States, which I obviously hold for a real democracy, admirable in many respects, to Nazi Germany. Nevertheless, the reasoning behind this isolationist approach is not without similarities with that inspiring Goebbels following the petition addressed by Franz Bernheim to the League of Nations: “Gentlemen, a man’s home is his castle. We are a sovereign State: nothing that this individual has said concerns you. We will do what we want with our Socialists, our pacifists, our Jews; we will not accept the control of either humanity or the League of Nations.” PAUL RICOEUR, *TOLERANCE BETWEEN INTOLERANCE AND THE INTOLERABLE* 93 (1996). In reality, this text is apocryphal, but the episode is nevertheless symbolic and edifying. See, e.g., Greg Burgess, *The Human Rights Dilemma in Anti-Nazi Protest: The Bernheim Petition, Minorities Protection, and the 1933 Sessions of the League of Nations* 56 (Contemporary Eur. Research Ctr., Working Papers Series No. 2, 2002); Jan Herman Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 *HUM. RTS. Q.* 447, 455–59 (1992). The real text of the Goebbels speech, which was read to journalists (and not before the Assembly of the League of Nations) was published in German. See Joseph Goebbels, *SIGNALE DER NEUEN ZEIT [MESSAGES FROM THE NEW ERA]* 457 n.2 (1934). For a pious, legendary version, see MARC AGI, *DE L’IDÉE D’UNIVERSALITÉ COMME FONDATRICE DU CONCEPT DES DROITS DE L’HOMME D’APRÈS LA VIE ET L’ŒUVRE DE RENE CASSIN* 354 (Antibes, Editions Alp’Azur 1980), and MARIO BETTATI, *LE DROIT D’INGÉRENCE. MUTATION DE L’ORDRE INTERNATIONAL* 18 (1996). See also René Cassin, *Les droits de l’homme*, 140 *RECUEIL DES COURS* 324 (1974 IV).

⁵² Koh & Buchwald, *supra* note 2, at 281.

⁵³ *Id.* at 281 n.72 (“under which all parties to the ICJ Statute have agreed that the Court will have compulsory jurisdiction only over those states that make a declaration under Article 36”).

⁵⁴ The principle of universal jurisdiction over international crimes is now well established, even if its particular conditions of application still give rise to some debate.

⁵⁵ Koh & Buchwald, *supra* note 2, at 276 (footnote omitted).

III. PROCEDURAL ISSUES: THE ADOPTION AND ENTRY INTO FORCE OF THE AMENDMENTS

I can be brief on Koh and Buchwald's long discussion⁵⁶ on the "issues" related to the entry into force of the Kampala amendments and the interpretation of Article 121(4) and (5)⁵⁷ and of Article 5(2) in its relation with Article 12: these issues, which are mainly artificial, might raise some excitement among academics but have virtually no practical consequences. The authors devote a full six pages⁵⁸ to discussing the utterly fanciful "Article 5(2)/Article 12 Theory," according to which all states parties to the Statute that have not ratified or accepted the amendments related to aggression are nevertheless bound by them. Such a clearly ill-founded argument does not deserve that much attention. A sufficient answer to it could have been summed up in one sentence (itself drawn from Koh and Buchwald's discussion): "if this theory were true, there would not, insofar as the Rome Statute is concerned, be any need for the aggression amendments to be ratified at all."⁵⁹ Why go beyond this statement—unless it is to frighten decision makers and encourage their rejection of both the Kampala amendments and the ICC Statute?⁶⁰ Their discussion of the opt-out possibility offered in Article 15 *bis*(4)⁶¹ calls for the same kind of response. The text of this provision clearly establishes that the opt-out declaration must be made by the time that the Court is called to exercise jurisdiction. This view is confirmed and clarified in Resolution RC/Res.6, adopted by the Review Conference, in which it "notes that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance"⁶² (paragraph 1). It could hardly have been made clearer.⁶³

In light of the foregoing, the states parties—and a fortiori nonparties—to the ICC have precisely nothing to "fear" from the Kampala amendments. Indeed, the conditions for the entry into force of the amendments are such that neither the United States nor any other country has legitimate grounds to be nervous. Notwithstanding this fact, Koh and Buchwald devote substantial energy to denouncing the negotiators' reasonable choice to submit all the Kampala amendments to the regime provided for in Article 121, paragraph 5. They write that "[a]t least on their face, each of [these amendments] would appear to present different issues in terms of the 121(4)/121(5) regime,"⁶⁴ and they undertake a rather long discussion denouncing the "intellectual . . . quagmire"⁶⁵ constituted by this decision. Yet after all this, they eventually

⁵⁶ *Id.* at 277–90.

⁵⁷ See Alain Pellet, *Entry into Force and Amendment of the Statute*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 145 (Antonio Cassese, Paolo Gaeta & John R. W. D. Jones eds., 2002).

⁵⁸ Koh & Buchwald, *supra* note 2, at 284–90. This theory has been ably refuted elsewhere. See Andreas Zimmermann, *Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties*, 10 J. INT'L CRIM. JUST. 209, 212–15 (2012).

⁵⁹ Koh & Buchwald, *supra* note 2, at 285.

⁶⁰ While reading Koh and Buchwald's article, one often gets the impression that this is the intention.

⁶¹ Koh & Buchwald, *supra* note 2, at 290–92.

⁶² ICC Res. RC/Res.6, *supra* note 1.

⁶³ Admittedly, however, the question remains open whether such a declaration can be made at any posterior time (but before the seizing of the Court). But the main point is that a state can opt out, and there is nothing unusual in having to do so when ratifying or accepting the treaty.

⁶⁴ Koh & Buchwald, *supra* note 2, at 280.

⁶⁵ *Id.* at 282.

conclude that the “tactical costs of pressing to revisit this issue appeared to outweigh the benefits,” especially since their complaint is only a question of bringing “greater . . . intellectual order to the issue”—much ado about little!

The frivolity of their concern is underscored by the fact that recourse to the regime of Article 121(5) offers the advantage⁶⁶ of entirely preserving the will of each state party to the ICC Statute. As a result of using this regime, the amendments

shall enter into force *for those States Parties which have accepted [them]* one year after the deposit of their instruments of ratification or acceptance. *In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party’s nationals or on its territory.*⁶⁷

As the italicized passages make crystal clear, for the United States and any other state that wishes to prevent its nationals accused of crimes of aggression being prosecuted before an international court, there is nothing to worry about: these individuals are not exposed to prosecution before the ICC. Moreover, this point is superfluously repeated in Article 15 *bis*, paragraph 5: “In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory.” The opt-out provision in Article 15 *bis*, paragraph 4, hits the nail on the head by authorizing a state party to declare that it does not accept the Court’s jurisdiction for the crime of aggression by simply lodging a declaration to that effect with the registrar.⁶⁸ Indeed, contrary to what has been suggested,⁶⁹ such a declaration, which is expressly envisaged by the treaty, cannot be treated as a prohibited reservation.⁷⁰

The litany of assurances and guarantees given to the United States (a nonparty state!) and to the minority of like-minded countries does not even stop here: the Review Conference added two other guardrails that merit brief consideration. The first one is classic, although arguably irrational under the circumstances: paragraphs 2 of Articles 15 *bis* and 15 *ter* provide, “The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.”⁷¹ The other precaution is rather mysterious and could even be seen as offensive: paragraphs 3 of the same provisions make the exercise of the Court’s jurisdiction over the crime of aggression conditional on the adoption of “a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute”—that is, failing to reach a consensus, by a two-thirds majority of states parties.⁷² This delaying, or Penelope,

⁶⁶ In terming it an “advantage,” I speak from Koh and Buchwald’s viewpoint as intellectual protectionists regarding state consent.

⁶⁷ Rome Statute, *supra* note 9, Art. 121 (emphasis added).

⁶⁸ As noted above, the moment when this declaration must be made is not entirely clear.

⁶⁹ See Jennifer Trahan, *The Rome Statute’s Amendment on the Crime of Aggression: Negotiations at the Kampala Review Conference*, 11 INT’L CRIM. L. REV. 49, 66 n.68 (2011).

⁷⁰ See Report of the International Law Commission on the Work of Its Sixty-Third Session, UN GAOR, 66th Sess., Supp. No. 10, Add. 1, at 55–62, UN Doc. A/66/10/Add.1; see also Pellet, *supra* note 57, at 155–57.

⁷¹ Although the rhythm of new ratifications or acceptances is rather slow, this number should be reached in a relatively near future; at the time that this Note was written (June 1, 2015), twenty-three states had accepted or ratified the Kampala amendments. See United Nations Treaty Collection, Chapter XVIII: Penal Matters, at <https://treaties.un.org/pages/Treaties.aspx?id=18&subid=A&lang=en>.

⁷² Rome Statute, *supra* note 9, Art. 121(3).

clause threatens the entry into force of the text as adopted in 2010, creating a window of opportunity for the active minority led by the United States to reopen the negotiations from scratch and nip the (arduously negotiated) amendments in the bud. Koh and Buchwald's article leaves no doubt that, quite regrettably, the United States will work for that result. But the first author—then acting in his role as U.S. legal adviser—telegraphed this strategy when he declared, at the end of the Kampala conference:

We also believe that at such a [post-January 1, 2017] Review Conference, the States Parties should be allowed to consider any related amendments proposed for the Statute with the aim of strengthening the Court. We read the wording of paragraphs 3 of new articles 15 *bis* and 15 *ter* to allow for this sensible approach.⁷³

IV. KISS OF DEATH OR TILTING AT WINDMILLS?

Indeed, the Kampala compromise is far from ideal, and I partly share Koh and Buchwald's reservations (in particular, on the important point concerning the role of the Security Council in the triggering process). I also find it regrettable that nonstate actors are excluded from the list of potential aggressors. But I find it even more outrageous that the perpetrator of a truly *international* crime can be exempt from any threat of trial, given that the jurisdiction of the ICC is expressly excluded—especially when a trial by the tribunals of the perpetrator's own state is not a serious alternative.⁷⁴

I have myself never shown great enthusiasm for the ICC;⁷⁵ nonetheless, the fact is that it exists. So, rather than continuously trotting out inefficient criticisms against the foundational principles of international criminal law, the United States—which in the past did so much to lay the groundwork for a better international system—and its spokespersons would be better served to help reinforce these principles and thereby improve the functioning of the Court. Unfortunately, in spite of the pledges of good will that it sometimes gives, the U.S. government and its few allies keep fighting to undermine not only the Court's jurisdiction over the crime of aggression but, more deeply and since the very beginning, the Court itself as a tool against the impunity of the most heinous international crimes, including those that, like genocide or aggression, undermine the very foundations of the international order.

Koh and Buchwald conclude their article with protestations of good will.⁷⁶ Although I have no doubt that these statements are—subjectively—made in good faith, when considered from

⁷³ ICC Doc. No. RC/11, *supra* note 1, at 127; see also Koh & Buchwald, *supra* note 2, at 293 (quoting the same passage).

⁷⁴ For evidence that this alternative is not likely—at least in the United States—one need look no further than the U.S. response to the abuses at Abu Ghraib and the relatively light sentences received by the torturers. See *Al Shimari v. CACI Premier Tech., Inc.*, Case No. 1:08-cv-00827-GBL-JFA (E.D. Va. June 18, 2015) (“[The court] finds that Defendant [a private company collaborating with the military at Abu Ghraib] was under the ‘plenary’ and ‘direct’ control of the military and that national defense interests are so ‘closely intertwined’ with the military decisions governing Defendant’s conduct, such that a decision on the merits would require this Court to question actual, sensitive judgments made by the military. Additionally, the Court finds that even were the Court to find jurisdiction on those grounds, Plaintiffs’ claims could not be adjudicated because the case lacks judicially manageable standards.”).

⁷⁵ See Alain Pellet, *Pour la Cour pénale internationale quand même!—Quelques remarques sur sa compétence et sa saisine*, 1 INT’L CRIM. L. REV. 91 (2001).

⁷⁶ Koh & Buchwald, *supra* note 2, at 293–95.

an objective view, they are belied by all of the above. I see the article as no more than a continuation of the attitude that the United States has displayed toward the ICC since its inception. The tactics are not those of someone wanting to reach a compromise (nor do I see any concrete sign of real openness in the article). Rather, the United States seems intent on preventing a compromise while simultaneously imposing its views on the negotiations. The end result is remarkable: notwithstanding that the United States obtained huge concessions from other participants, its sole goal seems to be to call into question the overall positive results of the Kampala Review Conference. This presages hard times for the post-2016 negotiations.

Koh and Buchwald's article leaves me with a recurring question: to what extent is their engagement—and that of the United States as a whole—rightly characterized as a “kiss of death” versus pure “tilting at windmills”? I have ultimately come to the conclusion that it is a bit of both. The authors mainly tilt at windmills in raising artificial or ancillary questions, and in proceeding to give them very serious consideration. In the process of doing so, they give substance to doubts about the acceptability of the Kampala amendments, and beyond that, of the ICC as a whole. One sees here hints of the “kiss of death” ambition: seizing upon and inflating side questions of minor or superficial importance is a common tactic of those who do not want to let the positive side appear.

THE CRIME OF AGGRESSION AS CUSTOM AND THE MECHANISMS FOR DETERMINING ACTS OF AGGRESSION

*By Bing Bing Jia**

The fallout from the 2010 Kampala Review Conference for the United States has been explained by Harold Koh and Todd Buchwald, who were officially involved in the negotiations at the conference.¹ The concerns they enumerate serve to implicate, inter alia, two issues of broad importance for the international community: the definition of the crime of aggression, and the clear divide between the positions of the permanent members of the UN Security Council and the rest of the Kampala participants with respect to the Council's role in implementing the Rome Statute's new provisions on the crime of aggression. This Note, which focuses on those two issues, is partly a response to some of their criticisms and partly an independent assessment of the consequences of the Review Conference. It also evaluates the Kampala amendments to the Rome Statute²—in particular, Articles 8 bis, 15 bis, and 15 ter—from

* Professor of International Law, Law School, Tsinghua University, Beijing, China.

¹ Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AJIL 257 (2015).

² Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90 [hereinafter Rome Statute]; International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Res. RC/Res.6 (June 11, 2010) (adopting by consensus the “Amendments to the Rome Statute of the International Criminal Court on the crime of aggression,” contained in the resolution's Appendix I). The resolution on the crime of aggression, as well as the other resolutions from the Kampala conference, is contained in the Review Conference's Official Records, ICC Doc. RC/11 (2010). Part I includes the proceedings, and Part II the resolutions, declarations, and various annexes. The Web page for the Assembly of States Parties, http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx, provides access to all official records, general debates, and other records and documentation. The Rome Statute itself and other legal texts are available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/Pages/legal%20tools.aspx.