On June 11, 2010, in Kampala, Uganda, in a completely unexpected turn of events, the States Parties to the Rome Statute of the International Criminal Court (ICC) reached a consensus on the details of the crime of aggression. Initially, the expectations for a compromise in this process were extremely low. The divide between the permanent UN Security Council members, insisting on their ‘exclusive’ powers under the UN Charter to determine whether an act of aggression has taken place, and the remaining States, desiring an independent ICC, appeared to be too great. It is almost a miracle that in the end a compromise was nevertheless reached, even though the result has legal as well as political downsides.

The following analysis of the Conference’s outcome, its strengths and weaknesses, is dedicated to Rüdiger Wolfrum, who kindly gave valuable advice and insights before the author set off for Kampala.

A. FROM NUREMBERG TO KAMPALA VIA ROME: AGGRESSION DISPUTE

Criminal proceedings concerning the crime of aggression were conducted for the first time in Nuremberg and Tokyo after World War II—thereafter little was heard about this particular international crime. This seems all the more astonishing, given the fact that by the
foundation of the United Nations (UN) in 1945, the UN Charter outlawed the use of armed force in inter-State relations. Art. 2, para. 4 UN Charter, in its predominant interpretation, prohibits any use of armed force by a State, unless such force is justified as an act of self-defence or authorized by the Security Council.2 The general prohibition of the use of force is complemented by the competence of the UN Security Council to determine that an act of aggression has occurred (Art. 39 UN Charter) and, if necessary, to impose coercive measures against the aggressor, pursuant to Chapter VII of the UN Charter. Whether every violation of the prohibition to use force necessarily constitutes an act of aggression can be inferred neither from the UN Charter, nor from the practice of the Security Council. The latter does not use its authority to stigmatize acts of aggression but prefers the label “threat to the peace” or “breach of the peace” (Art. 39 UN Charter). The Security Council’s general inactivity during the Cold War had provoked the UN General Assembly in 1974 to specify in a legally non-binding3 resolution what must be considered an act of aggression.4 The Resolution has been repeatedly cited by the International Court of Justice, but has generally been ignored by the Security Council. Without doubt, after the end of the east-west divide, the continuing unwillingness of the Security Council to call a spade a spade had political reasons among others:5 after all, excessively sharp legal contours of the term “aggression” could restrict the military latitude of eager-to-intervene Security Council members. The undisputed (albeit unutilized) task of the Security Council to determine what constitutes aggression under Art. 39 UN


5 E.g. the SC Res. 660 of 2 August 1990 refers to the invasion of its neighbouring country Kuwait by Iraq--a classical act of aggression--merely as a “breach of international peace and security”; the distinction between "a breach of international peace" and "an act of aggression" in Art. 39 of the UN Charter carries no legal consequences.