Live from Kampala: From the Shores of Lake Victoria
A perspective on the ICC Review Conference

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(this is written in my personal capacity and reflects neither the views of the International Law Association, my formal accreditation to this conference, nor the views of any government).

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The first few days of the Kampala Review Conference have now ended, and an opportunity to begin to assess the Conference is upon us. And what has Kampala wrought?

As I wrote in a recent essay published in the AFLA Quarterly for Africa Legal Aid, the African venue is itself quite significant. Just as the Rome conference was special in quality and outcome because of the Roman venue, Kampala is likely to influence the outcome of this conference as well. The seven hills of Rome have become the seven hills of Kampala (although Kampala actually has 20 hills, at least), and at least for this observer, flying in from Amsterdam and seeing the gorgeous reflection of the full moon on Lake Victoria as my aircraft coasted in for a landing, it was hard not to think about the historic dimension of the meeting to come.

For one thing, victims and African NGOs can attend in numbers unheard of at ASP meetings held in The Hague or New York. The dust, the pollution, the beauty, the charm, the significance of having the meeting in an ICC situation country – all of these factors have intensified the emotions of this meeting, its symbolism to Africans, particularly Ugandans, and rendered the conversations during the so-called “stocktaking” exercise much more meaningful than one could have imagined. This is true not only for non-Africans who have been confronted – some for the first time – with a peace and justice conversation that is real rather than abstract; but for Africans, who have quite vociferously claimed this Court as “their” Court for their victims.

It was sobering to hear Barney Afako note during the stocktaking session on peace and justice yesterday that the “jubilation” that was felt by Northern Ugandans when the ICC issued the arrest warrants for Joseph Kony turned to disbelief when Northern Ugandans learned that the ICC had no police force to arrest him and his compatriots, but was obliged under the Statute to send in the same folks that had been unable to arrest him for years. It was sobering too, for me to attend a showing of The Reckoning screened by Africa Legal Aid last Saturday to a packed room full of Ugandan law students, and watch them grill the ICC Prosecutor himself (who graciously gave up his afternoon to be there)
as to what he was doing to get Joseph Kony and why he hadn’t pursued government troops for their alleged crimes. Justice sans police is what the ICC States Parties wanted in Rome in 1998, and that is what we got. Risking lives to arrest foreign war criminals just doesn’t seem worth it (although the new legislation just signed by President Obama is a hopeful start), and the past two days of this Conference have been about trying to think of ways to get ICC States Parties to live up to the promise of Rome, not just in words and slogans (no peace without justice) but in committing themselves to making this indirect enforcement system work.

I would be remiss in this first posting not to mention the other major business of this Conference, the amendments. Two are not terribly controversial – a Belgian proposal to amend the war crimes provision of the Statute and the issue of article 124 – the 7 year opt out for war crimes. The Belgian proposal is supported by the ICRC and was sent to the Conference by consensus, so it presumably will present little difficulty. The article 124 opt out was a compromise proviso designed to allow States Parties to ratify but exempt their nationals from the war crimes jurisdiction of the Court for 7 years. ICC aficionados will remember that the U.S. objected to this position because it wanted a 10 year opt out for war crimes and crimes against humanity. (Human rights organizations and many States wanted no opt out at all). As it turns out, only two States – France and Colombia – availed themselves of this provision when ratifying, and France revoked their opt out some time later. So the guess of this writer is that after reconsideration, States will probably keep it in the Statute, as a nod to new States Parties who might wish to have the same options as the 111 now members of the Court and as having little impact on the operation of the Court itself. But, of course, that is just a guess.

The major task of Kampala, of course, is discussion and possible adoption of the crime of aggression. The Special Working Group on Aggression has been working on this through the Princeton process for years, and it took up a great deal of time and energy prior to the Rome Conference. Human rights groups and many States took the position in 1998 that a Security Council filter would be a disaster for the Court – in part because in 1998 the real risk was that the filter would creep into all the crimes within the ICC’s jurisdiction. Human Rights Watch and Amnesty, among others, still maintain that view. The P-5 and many other States took the position in 1998 that any determination of an act of aggression was the sole prerogative of the Security Council. The stalemate threatened to derail the overriding objective of the Rome Conference, which was the establishment of the Court, and article 5(2) of the Statute was a compromise position asserting the crime’s rightful place within the core crimes of the ICC, but leaving implementation to a later date.

That time seems to have come. Many thoughtful observers have argued to the contrary, suggesting that the Court is still too fragile to accommodate the inclusion of the crime of aggression, and/or that inclusion of the crime would politicize the Court (more than indicting Heads of State for genocide?). This, of course, is the U.S. position, which was forcefully articulated by Ambassador Stephen Rapp in a speech that was generally well-received by other delegations during the opening Plenary Session. In a subsequent posting I will take up the legal issues surrounding the amendment which are fascinating
in and of themselves. But for now, I will content myself to a couple of preliminary observations about the crime of aggression.

First, having sat on the fence myself on this one for many years, especially as the Chair of the ABILA ICC Committee which was divided on the question, I find myself now agreeing with the majority of States Parties to the ICC that the time has come to include aggression within the jurisdiction of the Court. While I respect the “politicization” argument, a major threat to the Court’s legitimacy is the perception that it is still nothing more than victor’s justice — targeting African States and exempting rich and powerful States from its reach. The perception that the Court is biased is already politicizing it, and so the “politicization” argument levied against inclusion of the crime lacks much resonance given the strong political considerations on the other side. One had only to listen to the Opening Plenary session to hear this argument loud and clear, from African States, as well as many others. Indeed, there is a clear consensus on the part of the States Parties to the ICC Statute to include the crime of aggression within the Court’s jurisdiction (in principle — disagreement remains as to the pre-conditions for the exercise of the Court’s jurisdiction).

The other major argument is legal in the sense that it suggests either that the work done thus far leaves too many open questions, is incomplete, or is otherwise problematic from a largely technical point of view. Here, I have a feeling of déjà vu, for, of course, all these arguments (and variants thereof) were levied against adoption of the Rome Statute by the U.S. (and others) during that Conference. Too soon, too complex, give it more time, can’t be done — that was the mantra in 1998 of States wishing to prevent the Court’s establishment. But the legal and technical arguments pretty much miss the point. In Rome, 165 States had 5 weeks to negotiate 128 articles — starting from a text that had 1300 bracketed provisions — and managed to come to a conclusion. (Of course, draft texts had been floating around for more than 75 years, and the International Law Commission had authored a very fine draft text in 1994 that was worked on for four years prior to Rome, so the 5 weeks was really just the final push). With aggression, delegates to the Kampala conference have two weeks to finalize the text of one or two admittedly difficult provisions, and much work has been done to whittle down the issues over the past 7 years. So is adoption of the crime of aggression an insurmountable legal or technical challenge? Absolutely not. It is, however, a question of political will.

I will leave it to you, dear reader, to decide whether delegates to Kampala should adopt the definition and the triggering mechanism for the crime of aggression, having, I hope, convinced you that they certainly can.

But what many are asking here, in this hot and steamy African venue, is, if not now, when? Years of preparatory work have been undertaken, extraordinary expense and inconvenience has been incurred to bring hundreds of delegates to Kampala and this, in the view of many States here, is one of the most important unfinished elements of the Rome Statute.
We shall see what transpires as the Conference continues, but there is no doubt that we have certainly been having difficult and important conversations by the shores of Lake Victoria. And there are undoubtedly more to come.