

THE ICC AND THE CRIME OF AGGRESSION

Although article 5(1) of the Rome Statute, the founding treaty of the International Criminal Court (ICC), includes in its jurisdiction the crime of aggression as one of the core crimes, the ICC cannot exercise its jurisdiction with regard to this crime until the adoption of a definition and of conditions for the exercise of the jurisdiction. The negotiations in this regard have stirred considerable debate among States.

In 1998, when the Rome Statute was formally adopted, States decided to continue with the outstanding work on a definition of the crime of aggression and the jurisdictional conditions under which the Court may deal with the crime. The subsequent Preparatory Commission for the ICC led to proposals for a provision on aggression in the form of a 2002 Coordinator's Discussion Paper, which was updated in early 2007. In September 2002, the Assembly of States Parties to the ICC established a Special Working Group on the Crime of Aggression (SWGCA) (open to all States including non-States Parties) to continue discussions on the crime. The SWGCA has met both formally and informally from 2003 through 2007.

The discussions of the SWGCA have focused primarily on two components of the crime of aggression:

- The conditions for the Court to exercise its jurisdiction: Under what circumstances can the Court address the crime of aggression? Must an outside body such as the Security Council make a determination of a state act of aggression before the Court may exercise its jurisdiction over the crime?
- The SWGCA has focused on three elements of the definition of the crime of aggression:
 - The leadership requirement
 - The individual's conduct
 - The state act of aggression

The Chair's Discussion Paper of 2007 clearly separated the definition from the jurisdictional conditions, although still within one provision for the Statute (article 8*bis*). At the sixth ASP session, two non-papers of the Chair were welcomed for creating separate provisions in the Statute (articles 8*bis* and 15*bis*). A new structural non-paper by Belgium suggested further placement and additional separation ideas.

CONDITIONS FOR THE EXERCISE OF JURISDICTION

Who should determine whether a state act of aggression has been committed?

The main debate in negotiations on the conditions for the exercise of jurisdiction is whether an outside body must determine if the State concerned has committed an act of aggression before the Court may proceed. Some have argued that a prior determination of the state act of aggression is necessary in order to preclude the politicization of the Court. Proposals provide that the Court's exercise of jurisdiction would depend on a prior determination by the Security Council, the General Assembly or the International Court of Justice. Another proposal would allow an expanded Pre-Trial Chamber to determine whether the Court may proceed, while yet another allows the Security Council to provide a declaration that it does not object to the Court proceeding ('green light' option).

Relationship between the United Nations Security Council and the ICC

The most contentious issue relates to the relationship between the Security Council and the Court, in particular in situations where the Security Council has not (yet) determined that the state concerned has performed an act of aggression:

- Some delegations have expressed the view that under article 39 of the UN Charter, the Security Council has exclusive competence to determine a state act of aggression. Under this view, the Court would not be able to proceed with a case in the absence of a Security Council determination.
- Others have argued that the Security Council has primary, but not exclusive authority to determine an act of aggression, and that the absence of a Security Council determination should not preclude the Court from proceeding with a case.

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- Under the revised 'green light' option, the Security Council could make a decision not to object to the investigation of the crime of aggression instead of making a determination of an act of aggression.
- Still others have expressed that since the Security Council may already refer a situation to the Court and defer an investigation in accordance with article 13 and 16 of the Rome Statute respectively, no additional provision on a prior determination of an act of aggression or other prior decision is necessary.

Overall, many delegations have expressed the view that the conditions for the exercise of jurisdiction must reflect a careful balance between the independence of the Court as a judicial body and the fundamental role of the Security Council in maintaining peace and security under the UN Charter.

In 2006, States clarified their agreement on due process. A prior determination by the Security Council or another UN organ would not be prejudicial to the Court's own determination on substance. The Court has to make its determination in accordance with the definition under the Statute and in accordance with the rights of the accused.

During the sixth ASP session in 2007, States welcomed the clarification in the Chair's non-paper that the jurisdictional triggers of article 13 of the Rome Statute would remain applicable independently of the question of additional preconditions. With regard to other preconditions, the SWGCA focused in particular on the revised 'green light' option and on the option to enlarge the role of the Pre-Trial Chamber. Both proposals were met with more reluctance than support.

THE DEFINITION OF THE CRIME OF AGGRESSION

The Leadership Requirement

The SWGCA has agreed that the crime of aggression is a leadership crime. The perpetrator must be "in a position effectively to exercise control over or to direct the political or military action of a State" while committing the crime of aggression. Despite this agreement on the definition, States remain concerned as to whether the current drafting is sufficient to cover *all* forms of leadership. This discussion is pursued in the context of the general principles under the Statute (see below).

Defining the Individual's Conduct

The SWGCA also achieved agreement on the conduct clause of the definition where individual criminal conduct requires the "*planning, preparation, initiation or execution*" of the collective state act of aggression. This concluded a debate between the '*differentiated*' or the '*monistic*' approach. Under the differentiated approach, the definition specifies the conduct characteristic for the crime and relies with regard to basic forms of participation in article 25(3) of the general principles of the Statute. Under the monistic approach, the definition of the conduct clause would cover all forms of participation, making the application of article 25(3) superfluous. The conduct clause now follows the differentiated approach, the same used for the other three crimes under the Court's jurisdiction.

Thus, the general principles on participation in article 25(3) remain applicable. Under the current draft, the leadership requirement would be reflected not only in the definition but also in a new article 25(3)*bis*. The new article would clarify that the leadership requirement does not only apply to the principal perpetrators, but to all relevant forms of participation in article 25. Many delegations expressed support or flexibility with regard to the new article, but questions persisted with regard to the exact wording.

Defining the State Act of Aggression

How to describe the acts constituting aggression?

The debate focused initially on the question whether the definition should be generic or specific, or a combination thereof:

- A generic definition uses general characteristics common to various forms of the crime and does not include a list of specific acts constituting aggression.
- A specific definition consists of or includes such a list.

- Some States speak of a 'combined' definition when both a generic description of the act and a list of specific acts are used, but others treat combinations as a specific definition or refer to a combined definition only when the included list is non-exhaustive.

How to make use of or refer to the definition of an act of aggression as agreed to by the UN General Assembly?

United Nations General Assembly Resolution 3314 (XXIX) on the definition of an act of aggression was adopted in 1974 after many years of negotiations. While broad support was given to using Resolution 3314 as the basis of the definition of an act of aggression for the purposes of the Statute, views continue to diverge on the extent of incorporation and/or form of reference, in particular, whether reference should be made to the Resolution as a whole or only in part. Some States have taken the position that Resolution 3314 should not be referenced in the definition of the state act of aggression given that the Resolution was intended as a recommendatory guideline for the Security Council and not as an element for a criminal law provision. In particular, States expressed concerns over Resolution 3314's possible interference with the principle of legality. In terms of incorporating wording from Resolution 3314, States have given wide support for the inclusion of a list of acts taken from article 3 but views continue to differ on whether the acts should be exhaustive (closed) or non-exhaustive (open) and on the nature of the list.

Threshold Requirements

Discussions on the definition of the act of aggression have also addressed how to ensure a high threshold to exclude marginal or borderline cases from the Court's jurisdiction. An increasing number of States would require a "manifest" violation of the United Nations Charter while a small number would take into account the object or result of an act of aggression or refer to a "war of aggression." Others argue that it is not necessary to add threshold requirements because the Rome Statute already limits the jurisdiction of the Court to the "most serious crimes of international concern."

TIMETABLE FOR THE SPECIAL WORKING GROUP

The SWGCA is mandated to submit proposals on the crime of aggression to the Assembly of States Parties (ASP) for consideration at a review conference for the Rome Statute and the Statute holds that the UN Secretary General may convene a review conference in 2009, seven years after its entry into force. The ASP has decided that the review conference will be held in 2010. The SWGCA has committed itself to conclude its work at least 12 months prior to the conference. The SWGCA met most during the sixth ASP session in New York from 30 November – 14 December 2007. The SWGCA is scheduled to meet again at a resumed sixth session from 2 to 6 June 2008 in New York. Two days have been allocated to the SWGCA at the seventh ASP Session in The Hague in November 2008, and five days at a resumed seventh session in 2009, approximately 12 months before the review conference.

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