

THE ICC AND THE CRIME OF AGGRESSION: RESUMED SIXTH SESSION 2008

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 jurisdictional conditions. 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. In 2002, the subsequent Preparatory Commission concluded its work with a Discussion Paper proposed by the Coordinator of the Working Group on the Crime of Aggression which reflected the status of the negotiations. In September 2002, the Assembly of States Parties (ASP) 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. Since 2003, the SWGCA has met both formally during ASP sessions and informally at Princeton University. A revised Discussion Paper was proposed by the Chairman in January 2007 and new version was issued for the resumed sixth ASP session in June 2008.

TIMETABLE FOR THE SPECIAL WORKING GROUP

The SWGCA is mandated to submit proposals on the crime of aggression to the ASP for consideration at a Review Conference for the Rome Statute that the UN Secretary-General may convene 7 years after the Statute's entry into force. The ASP 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. At the upcoming resumed session, the SWGCA will meet from 2 to 6 June 2008 in New York. Two days have been allocated at the seventh ASP session in The Hague in November 2008 and 5 days at a resumed seventh session in 2009. Reflecting the approach of the Review Conference, the revised Discussion Paper includes technical instructions for the incorporation of the crime's provisions into the Statute.

ITEMS UNDER DISCUSSION AT RESUMED SIXTH SESSION

While the main topics of discussion have been the definition of the crime and the conditions for the exercise of jurisdiction, the SWGCA has also examined substantive and procedural questions arising with regard to the incorporation of the provisions on the crime into the Statute, such as the technical 'fit' of the definition with the general principles of the Statute and the entry into force of the new provisions. Since the SWGCA has been mandated as well to draft a proposal for the Elements of Crime, States have considered the most logical and useful timeline with regard to this task. With the Review Conference drawing closer, these additional items will receive special attention at the resumed sixth session. In the 2008 Discussion Paper, the definition is covered in Article 8 *bis* and the jurisdictional conditions in Article 15 *bis*.

CONDITIONS FOR THE EXERCISE OF JURISDICTION

Under its most challenging item, the SWGCA will again examine whether the exercise of the Court's jurisdiction over the crime of aggression demands special conditions, due to any requirements under the United Nations Charter and concerns about politicized prosecutions. The 2008 Discussion Paper outlines under Article 15 *bis* the main options that have been debated. The core question concerns the role of the Security Council. The Discussion Paper provides requirements for the Prosecutor to ascertain whether the Security Council has made a determination of an act of aggression under the United Nations Charter and sets out notification and information requirements.

The 2008 Discussion Paper lists the following ***options as to whether the Prosecutor may proceed in the absence of a prior Security Council determination of a State act of aggression:***

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- 1) The Prosecutor may not proceed.
- 2) The Prosecutor may not proceed unless requested to do so under a Chapter VII resolution.
- 3) The Prosecutor may proceed when no determination is made within [6] months after notification.
- 4) The Prosecutor may proceed if the Pre-Trial Chamber provides authorization.
- 5) The Prosecutor may proceed if the UN General Assembly has made a determination of a State act of aggression.
- 6) The Prosecutor may proceed if the International Court of Justice has made a determination of a State act of aggression

In the course of the negotiations, States have discussed different configurations, sequences and details with regard to the various options. Different combinations may again be discussed at the upcoming session. The task of the SWGCA is to find a solution that is in harmony with the authority, independence and effectiveness of the Court, with the divergent interpretations of the United Nations Charter, with the principle of equality, with policy concerns about politicized prosecutions, and with the challenges of international security.

In the context of the discussions on the jurisdictional conditions and in the context of the definition of the State act, States arrived in 2006 at an agreement essential for the requirement of due process. A prior determination by the Security Council or another UN organ, required or not under the jurisdictional conditions, 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.

THE DEFINITION OF THE CRIME OF AGGRESSION

Leadership Requirement

The SWGCA has long agreed that the crime of aggression is a leadership crime. According to the various discussion papers, 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. At the sixth ASP session in December 2007, the SWGCA reexamined whether the current drafting is sufficient to cover the required leadership position adequately in the context of the general principles under the Statute, specifically article 25(3). In light of the leadership nature of the crime of aggression, the question has also been raised whether article 28 on command responsibility needs to be expressly excluded.

Individual Conduct

In the course of last year, the SWGCA has been in agreement on the conduct clause of the definition: criminal conduct requires the "***planning, preparation, initiation or execution***" of the collective State act of aggression. The clause is reflected in the 2008 Discussion Paper and represents a choice for the '*differentiated*' approach. Under this approach, the definition describes the conduct of the primary perpetrator. With regard to participation in the crime, the general principles under article 25(3) remain applicable. This is the same approach taken for the other three crimes under the Court's jurisdiction.

Under the current draft, the leadership requirement would not only be reflected in the definition, but also in a new article 25(3) *bis* to 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.

State Act of Aggression

In the past, the SWGCA discussed whether to use a *generic* or *specific* definition centered on a list of acts to describe the State act of aggression. The SWGCA has also debated whether and how to make use of or refer to General Assembly Resolution 3314.

The 2008 Discussion Paper sets out a generic definition of an act of aggression followed by a list of acts of aggression taken from Resolution 3314. As the generic definition does not refer to the Resolution and is therefore more self-contained. It centers on the “**use of armed force by a State against [...] another State, or in any manner inconsistent with the Charter of the United Nations**”. The Discussion Paper proposes in this regard the insertion of an annex of Resolution 3314 in the Statute.

At the upcoming session, States are likely to examine the adequacy of the generic definition, the interplay between the generic definition and the list of acts, and whether the open-endedness of Resolution 3314 might not only affect the list but the definition itself. Since the State act is defined for the purpose of the definition of the individual crime under the Statute, States have frequently reiterated that the definition must be in accordance with the principle of legality.

Threshold

The 2008 Discussion Paper requires an act of aggression “**which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations**”. This threshold requirement is intended to ensure that marginal or borderline cases are excluded from the definition of the crime. The proposal has been evaluated since the early days of the Preparatory Commission and gained increasing support. A small number of States would also take into account objects or results such as annexation or refer to a “war of aggression.” Others have argued 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.”

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