

CICC Backgrounder on Crime of Aggression Princeton Meetings, June 8-11, 2006

26 May 2006

Background:

While Article 5(1) of the Rome Statute lists the crime of aggression as one of the crimes under the jurisdiction of the Court, the Court cannot yet exercise jurisdiction over this crime because of the lack of a definition and the need for a clarification of the conditions that would govern the Court's exercise of jurisdiction (Article 5(2)).¹

Although the Rome Diplomatic Conference could not agree on a definition, Resolution F of the Final Act requested that the subsequent Preparatory Commission prepare draft provisions to be presented to the Assembly of States Parties (ASP) for consideration at a review conference. The Preparatory Commission, and now the Special Working Group on the Crime of Aggression (SWGCA), were both given the task of "prepar[ing] proposals for a provision on aggression, including the definition ... and the conditions under which the ICC shall exercise jurisdiction with respect to this crime."² The Preparatory Commission concluded its work in the form of a [Coordinator's Discussion Paper](#)³ which has served as the basis of current discussions.

The SWGCA was established in 2002 by the ASP to continue discussions on the definition, elements and jurisdictional conditions of the Crime of Aggression.⁴ Ambassador Christian Wenaweser, Deputy Permanent Representative of the Principality of Liechtenstein to the UN, serves as Chairperson of the Special Working Group. The Working Group is open to all States on an equal footing, and both States Parties and non-Parties participate in the meetings.

In the last ASP session, the SWGCA held three meetings from 30 November and 1 December 2005.⁵ The ASP recognized the need of the Special Working Group to conclude its work at least 12 months prior to the Review Conference to be held in 2009 in order to be able to submit proposals for a provision on aggression to the ASP for its consideration. The ASP also decided that the SWGCA would be allocated at least 10 exclusive days of meetings in NY during resumed sessions from 2006 to 2008, and hold intersessional meetings as appropriate.⁶ However, as the calendar of the ASP does not reflect the full amount of meeting time of the SWGCA,

¹ Article 5(2): "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

² Resolution F of the Final Act of the Rome Diplomatic Conference.

³ Discussion paper on the definition and elements of the crime of aggression prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the International Criminal Court, http://www.un.org/law/icc/asp/2ndsession/report/french/annex_ii_f.pdf [hereinafter Coordinator's Discussion paper].

⁴ Resolution ICC-ASP/1/Res.1, *Continuity of work in respect of the crime of aggression*, adopted at the 3rd plenary meeting, on 9 September 2002, by consensus.

⁵ ICC Website, Intersessional Meeting of the Special Working Group on the Crime of Aggression, <http://www.icc-cpi.int/asp/aspaggression.html>.

⁶ Resolution ICC-ASP/4/Res.4, *Strengthening the International Criminal Court and the Assembly of States Parties*, Adopted at the 4th plenary meeting on 3 December 2005, by consensus.

suggestions were raised to prepare a decision on the next formal meetings of the SWGCA at the next ASP.

Upcoming Meeting Agenda:

The upcoming meeting will continue in particular discussions held at the previous intersessional meeting in June 2005, at the Assembly of States Parties in November/December 2005, and in the context of points raised in the “Virtual Working Group” (VWG). Three questions have emerged as the main issues which the work in Princeton will focus on and are elaborated in three discussion papers:

Questions:

Item 1: The Crime of Aggression and Article 25(3))⁷ [[Discussion Paper 1](#)]

A. **Individual participation:** How will the proposed definition of the **individual’s conduct** square with the provisions of **Article 25 (individual criminal responsibility), paragraphs 3(a) to (d)** in the Statute⁸, which describe the **forms of participation** in a crime? Two approaches have been identified:

- (1) the **“monistic”** approach, as adopted in the Coordinator’s Discussion Paper, where the **individual’s conduct** includes already the description of different forms of **“participation”** which would otherwise be addressed by Article 25(3), suggesting that the application of that paragraph be excluded with regard to the crime of aggression.⁹ In this approach the crime is committed by ordering, aiding, etc. in the state/collective act.
- (2) the **“differentiated”** approach applies Article 25(3)(a) to (d) with all the different forms of participation listed therein to the crime of aggression, with a new

⁷ Discussion paper 1, The Crime of Aggression and Article 25, paragraph 3, of the Statute, http://www.icc-cpi.int/library/asp/Discussion_paper_1-annex_II_B_-_English.pdf.

⁸ Article 25(3): “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime.”

⁹ Paragraph 1 and 3 of the Coordinator’s Discussion Paper must be read concurrently for the monistic approach. Paragraph 1 states that the crime of aggression is committed by a person: “being in a position effectively to effectively exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.” Paragraph 3 states that “[t]he provisions of articles 25, paragraphs 3, 28 and 33 of the Statute do not apply to the crime of aggression.”

overarching conduct element in the definition of the crime.¹⁰ During the 2005 intersessional, participants favored this approach. In the differentiated approach, Article 25(3) would be qualified to recognize the **leadership character** of the crime: Only leaders could be participants.

- B. **Attempt**: Paragraph 3 of the Coordinator’s Discussion Paper excludes the application of Article 25(3)(f) [attempt] to the crime of aggression. There will also be further discussions on the question of “attempt” as its exclusion has received mixed reactions.¹¹ The 2005 meeting made a distinction between the attempt of the state/collective act and attempt on the individual level. Only the latter is discussed in the context of the paper on Article 25(3), the former is dealt with in the discussions on the definition of the state/collective act.

Item 2: The Conditions for the Exercise of Jurisdiction¹² [[Discussion Paper 2](#)]

Under Article 5(2) of the Statute, the crime of aggression provision should define the crime and set out the “conditions under which the Court shall exercise jurisdiction with respect to this crime.” The next meeting will explore existing international law to clarify all options:

A. Conditions for the exercise of jurisdiction:

- Should the ICC exercise jurisdiction over the crime of aggression only after receiving and explicit/implicit approval from another organ?
- If so, what sort of decision would be required? A procedural go-ahead or a determination that an act of aggression was committed by the state concerned?
- Which organ should make that decision? Security Council, GA, ICJ (or combination)?

B. Prejudicial decision:

- Would such a decision be a prejudicial determination for the ICC?
- What are the consequences for the rights of the accused?
- Do the prejudicial effect and the due process consequences depend on the organ making the decision (Security Council, GA, ICJ (or combination) and on the type of decision?
- Could a prior determination of the act be merely treated as a procedural precondition?

C. Procedural questions regarding decisions made by other organs:

¹⁰ This approach may lead to a revision of the individual’s conduct definition in the Coordinator’s text.

¹¹ Article 25(3)(f): “Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.”

¹² Discussion paper 2, The conditions for the exercise of jurisdiction with respect to the crime of aggression, http://www.icc-cpi.int/library/asp/Discussion_paper_2-annex_II_C_-_English.pdf.

- What are the various procedural requirements for such a decision by the SC, GA or ICJ (or combination)?

D. What are the **consequences for the rights of the accused** under any of these approaches?

Item 3: Definition of Aggression in the Context of the ICC Statute¹³ [[Discussion Paper 3](#)]

The 2005 meeting discussed again whether the definition of the state/collective act of aggression (an element of the individual crime of aggression) should be accompanied by a list of specific acts¹⁴, i.e. the “**specific**” approach, or whether to define the act of aggression in a more “**generic**” way, which would not include a list. The generic option was preferred in 2005, but it would have to be further clarified with concrete proposals.

Other questions under this item:

- How should aggression by a State be described in the **context of the ICC Statute**?
 - Use of force? Armed attack? Act of aggression? Use of armed force? “War of aggression”?
- Whether aggression should be **qualified** as being in “**flagrant**” or “**manifest**” violation¹⁵ of the UN Charter? Does flagrant or manifest cover different situations?
- Should the **object** or **result** of aggression be relevant? [Could military occupation or the annexation of the territory of another State be such an object or result?]
- Should **attempt** of aggression by a state be included in the text?

Item 4: Other substantive concerns

- Applicability of **Article 121(4) vs. 121(5)**: Should the definition of the crime of aggression enter into force for all States Parties (SP) once ratification by 7/8 of SPs is reached [Article 121(4)]¹⁶ or should it enter into force for those SPs which have accepted such an “amendment” [Article 121(5)]?¹⁷ Are other options available?

¹³ Discussion paper 3, Definition of Aggression in the context of the Statute of the ICC, http://www.icc-cpi.int/library/asp/Discussion_paper_3-annex_II_D_-_English.pdf.

¹⁴ The specific definition would contain such a list or refer to an existing one, such as the list contained in GA Resolution 3314/74.

¹⁵ The requirement of a violation of the Charter ensures that use of force undertaken in application of Article 51 of the Charter (the exercise of legitimate defense) or the application of Chapter VII of the Charter, would be excluded. The requirement of a “manifest” or “flagrant” violation of the Charter provides a threshold that relates either to the gravity/magnitude of the action or possibly to other considerations where there may be a level of uncertainty (legality of the action).

¹⁶ Article 121(4): “Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after the deposit of their instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.”

¹⁷ Article 121(5): “Any amendment to article 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment 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 crimes covered by the amendment when committed by that State Party’s nationals or on its territory.”

- Discussion of the **elements of crime**

Item 5: Future work of the SWGCA (Special Working Group on the Crime of Aggression)

The 2005 session of the Assembly of States Parties (ASP) decided that the SWGCA would be allocated at least 10 exclusive days of meetings in NY during resumed sessions from 2006 to 2008, and hold intersessional meetings as appropriate. However, as the calendar of the ASP does not reflect the full amount of meeting time of the SWGCA, suggestions were raised to discuss this and prepare a decision on the next formal meetings of the SWGCA at the next ASP. Further issues such as the usefulness of continuing the “Virtual Working Group” may also be discussed.