

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 the crime of aggression, the ICC cannot prosecute individuals for this crime until states parties to the Statute agree on a definition. Unlike genocide, crimes against humanity and war crimes, all three of which are core crimes that are clearly defined and unquestionably within the Court's jurisdiction, aggression is a crime that has stirred considerable debate among states parties to the Rome Statute.

In 1998, when the Rome Statute was formally adopted, states did not agree on a definition of the crime of aggression or 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 Special Working Group 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*

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.

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.
- 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 is necessary.

Overall, many delegations have expressed 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.

The Coalition for the International Criminal Court is a global network of over 2,000 civil society organizations supporting a fair, effective and independent International Criminal Court.

International Co-Secretariats

The Hague, Netherlands, Tel: +31-70-363-4484

New York City, U.S.A., Tel: +1-212-687-2863

Regional Representatives

Buenos Aires, Argentina • Brussels, Belgium • Cotonou, Benin

Mexico City, Mexico • Abuja, Nigeria • Quezon City, Philippines • Sana'a, Yemen

THE DEFINITION OF THE CRIME OF AGGRESSION

The Leadership Requirement

The Special Working Group 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.

Defining the Individual's Conduct

The other crimes in the Rome Statute have a separate article (*article 25, para 3*) describing different kinds of participation that leads to individual criminal responsibility for these crimes. States need to decide whether this approach can apply also to the crime of aggression (“differentiated approach”) or whether the particular nature of this crime provides that the participation is being dealt in the definition of the crime itself (“monistic approach”). The differentiated approach has been favored by the majority of states. Criminal conduct under this definition requires the “planning, preparation, initiation or execution” of the collective act of aggression/armed attack.

Defining the State Act of Aggression

How to describe the acts constituting aggression?

The debate continues as to whether the definition should be generic or specific, or a combination thereof:

- A generic definition does not include a list of acts constituting aggression.
- A specific definition includes such a list.
- A combination of the generic and specific approach would include a generic description of the act of aggression and a non-exhaustive, illustrative list of specific acts of aggression.

How to refer to the definition of acts of aggression as agreed to by the United Nations 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. So far, states' opinions differ as to whether reference should be made to the resolution as a whole, or only to certain articles of the resolution. Some states have taken the position that resolution 3314 does not apply to the Court and therefore 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.

Threshold Requirements

Discussions on the definition of the act of aggression have also addressed how to ensure a high threshold in order 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 fewer would take into account the object or result of an act of aggression or refer to a “war of aggression.” Some also 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 Special Working Group is mandated to submit proposals on the crime of aggression to the Assembly of States Parties (ASP) at a review conference meant to consider amendments to the Rome Statute. The Rome Statute holds that the earliest a review conference could occur is 2009. The Special Working Group has decided to submit its proposals on the crime of aggression to states parties at least 12 months prior to the start of the conference. The Special Working Group will have two more occasions to meet in 2007, at the inter-sessional meeting at Princeton University from 11 – 14 June 2007, and at the sixth ASP session in New York from 30 November – 14 December 2007. The work is set to continue into 2008.

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