



REPORT ON INFORMAL ICC MEETINGS ON THE CRIME OF AGGRESSION, NEW YORK, JUNE 8-10, 2009

On June 8-10, 2009 representatives of governments and NGOs, including AMICC and one of its members the American Bar Association, met at the Princeton Club in New York City to continue negotiations on activating the ICC's jurisdiction over the crime of aggression. The United States did not send a representative. Prince Zeid Ra'ad Zeid Al-Husseini, Jordan's ambassador to the US and former president of the ICC's Assembly of States Parties (ASP), chaired the meetings which were hosted by the Liechtenstein Institute on Self-Determination at Princeton University. These meetings, authorized by the Assembly of States Parties, were a continuation of the Princeton process, a series of informal intersessional meetings held in Princeton in 2005, 2006 and 2007 to complement the work of the ASP's Special Working Group on the Crime of Aggression (SWGCA). The SWGCA concluded its work in February 2009, though interested governments and civil society have continued working on aggression as part of the preparations for the 2010 Review Conference to be held in Kampala, Uganda.

The two main issues under discussion were the elements of the crime of aggression and outstanding issues regarding the conditions for the exercise of the Court's jurisdiction over the crime of aggression. The objectives of the meeting were to agree on a draft set of elements for the crime of aggression and to explore possible compromises on the most controversial issue, namely on the role of the UN Security Council in determining the occurrence of a state act of aggression.

Elements of the Crime of Aggression

Article 9 of the Rome Statute states that "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8", the provisions on genocide, crimes against humanity and war crimes. The Elements of Crimes document was adopted by the Assembly of States Parties in 2002 with the encouragement, assistance and agreement of the US. The elements are to guide the judges in their deliberations, consistent with the Rome Statute, as to whether the prosecution has proven its case.

If the Review Conference adopts a provision on the crime of aggression, now referred to as draft Article 8 bis, the States Parties would amend Article 9 to include this provision. States decided to use this latest Princeton meeting to consider draft elements for the crime of aggression. The governments of Australia and Samoa drafted a proposal which was first discussed at an informal meeting in April 2009 in Montreux, Switzerland and was included in the Chairman's paper on the elements as a starting point for the Princeton negotiations.

The discussions on the elements of crimes were uncontroversial in part because the SWGCA, in completing its work, for the most part agreed on a draft definition of the crime. The elements only specify what the prosecution must prove with respect to a specific crime and do not deal with jurisdictional issues. Most of the negotiations centered on fine-tuning the text of the draft elements and ensuring consistency with the other elements. Some governments, however, suggested changes to the elements based on their dissatisfaction with the SWGCA's agreed-upon definition. For example, some governments insisted that any act of aggression is a manifest violation of the UN Charter, while the SWGCA had agreed that the Court should only hear cases that reach the threshold of a "manifest" violation of the UN Charter. Thus, some argued against the inclusion of elements 5 and 6 even though they accurately reflect the current agreed-upon definition. The draft elements





agreed to by the participants of the meeting follow a pattern similar to the elements of the crimes currently under the Court's jurisdiction, as summarized below:

- Element 1: conduct element – planning, preparing, initiating or executing an act of aggression;
- Element 2: leadership clause – the perpetrator was in a position of authority to carry out the act of aggression;
- Element 3: establishing that a state act of aggression was committed;
- Element 4: establishing the perpetrator's knowledge of the state act of aggression;
- Element 5: threshold requirement – manifest violation of the UN Charter;
- Element 6: threshold requirement – the perpetrator's knowledge of the manifest violation.

The complete version of the elements will be available, along with the full report, at:
<http://www.icc-cpi.int/Menus/ASP/Crime+of+Aggression/>.

Based on the favorable response of delegations to the draft elements, including permanent members of the Security Council, the US would not likely have any major problems with the elements as such in their current form.

Outstanding Issues Regarding the Conditions for the Exercise of Jurisdiction

The Chairman also produced a paper on the conditions for the exercise of jurisdiction in order to facilitate the discussion. The outcome of the SWGCA discussions made clear that the Security Council's role in determining whether a state act of aggression occurred for the purpose of the Court's jurisdiction is the major issue to be resolved at the 2010 Review Conference. There was a sense at the latest Princeton meetings that governments would not be willing to compromise on this key issue until Kampala and thus they did not attempt to resolve it. Instead, the Chairman sought to explore areas of agreement among governments as well as possible compromises.

One area of discussion, in investigations triggered by a State Party referral or on the Prosecutor's own initiative with approval of the Pre-Trial Chamber – but not those triggered by the Security Council – focused on whether the consent of the alleged aggressor state, that is, the acceptance of the amendment by that state, would be required for the Court to exercise jurisdiction. There has been some discussion in recent aggression meetings over the reach of the Court's jurisdiction with respect to aggression since the conduct would likely occur in both the victim state and the aggressor state. If only one of the two states were bound by the aggression amendment, the Court would have to decide whether it had jurisdiction.

This would be especially important if the States Parties amended the Rome Statute using Article 121(5) since its second sentence specifies that the Court may not be able to exercise jurisdiction without the consent of that state: "In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory." (Under Article 121(4), the alternative amendment mechanism, all States Parties would be bound by an amendment once seven-eighths of all States Parties ratified the amendment.).





Regarding this consent requirement, a majority of states agreed that the ICC should not be able to exercise jurisdiction unless the aggressor state has accepted the aggression amendment. Some states also argued that the Court should not exercise jurisdiction over a non-State Party with respect to aggression in order to treat States Parties and non-States Parties equally with respect to the aggression amendment. Some also argued that non-States Parties should be able to decide whether to accept the aggression amendment upon ratification of the Rome Statute. States recognized that aggression should be dealt with in a practical way that does not overreach the Court's jurisdiction, irrespective of the argument of some governments and scholars that Article 12 may bind all states to any amendment.

There were references in the meeting and on its margins to a potential compromise proposal on consent. In cases other than Security Council referrals, the potential proposal would require that both the aggressor state and the victim state had accepted the amendment, thereby consenting to it, in order to proceed. This would ensure that all parties to the conflict could be investigated by the Court and that those states not accepting the amendment would not be subject to the Court's jurisdiction with respect to the crime of aggression. No state circulated the proposal for discussion during the meeting.

The meeting also addressed the consent issue by either (1) the possibility of requiring an opt-in declaration of a state in order to be bound by the amendment or (2) the possibility of an opt-out declaration similar to Article 124 with respect to war crimes. These could be used in conjunction with the Article 121(4) amendment procedure. The discussion on these options was limited. Some states favored an opt-in provision over the Article 121(5) procedure since the amendment would enter into force for all states at the same time, provided that they opted in to the amendment. Some delegations supported the idea of a renewable opt-out provision – the current war crimes provision is for seven years and is not renewable – since it would require a positive step in order not to be bound. However, some states were concerned that this additional step would complicate matters in terms of which states would be bound. There was also a limited discussion on consent based on a state's consent to the International Court of Justice's (ICJ) contentious jurisdiction.

The Chairman also raised the question of jurisdictional filters and, in particular, whether they would be necessary if a state referred a situation on its own territory to the Court, a self-referral, or if the situation was referred to the Court by the Security Council. Jurisdiction filters, as set out in the SWGCA's draft Article 15 bis, refer to an authorization by the Security Council or Pre-Trial Chamber to proceed with an aggression investigation or a determination by the UN General Assembly or the ICJ that an act of aggression has been committed. There was limited discussion on this issue and states did not agree on whether to maintain the jurisdictional filters in cases of self-referrals or Security Council referrals. The SWGCA in its final report was unable to reach consensus on which of these filters to use.

There was a general sense in the meeting that few states wanted to negotiate compromises, especially on the jurisdictional issues and including the potential dual consent proposal. Regarding implications of these latest Princeton meetings for the US, there were no significant developments which would either bring the US closer to the Court or push it away. While the other permanent members of the Security Council and some of their allies present at the meetings maintain that the Security Council should be the sole jurisdictional filter with respect to the crime of aggression, the current direction of the negotiations indicates that the Security Council may not maintain that role. However, a consent requirement for the aggressor state coupled with the Article



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121(5) amendment procedure may mean that the aggression amendment will have limited reach and will not bind those states that do not wish to be bound. Any proposal which would not bind non-States Parties and provide options to future States Parties would likely find favor with the US.

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