



REPORT ON THE RESUMED SIXTH SESSION OF THE ASSEMBLY OF STATES PARTIES, NEW YORK, JUNE 2008: UPDATE ON THE CRIME OF AGGRESSION

At the resumed sixth session of the Assembly of States Parties (ASP) of the ICC, held in New York on June 2-6, 2008, the Special Working Group on the Crime of Aggression (SWGCA) continued its efforts to agree on a definition of the crime and conditions for the exercise of jurisdiction in anticipation of the Review Conference, to be held in 2010. The SWGCA discussed several issues relevant to the United States as a country with widely deployed military forces and as a permanent member of the UN Security Council. The work done by the SWGCA at this session will be of particular interest to the US if it decides to participate in the Review Conference. The following is an update of the aggression issues discussed at the ASP session in June 2008. More in depth analysis on the crime of aggression and the US can be found in AMICC's paper: *The Crime of Aggression and the United States: Negotiations of the International Criminal Court*, available at <http://www.amicc.org/docs/Crime%20of%20Aggression%20and%20the%20US.pdf>.

Entry into Force of the Amendment on the Crime of Aggression

The SWCGA considered how the amendments on aggression should be incorporated into the Rome Statute. Specifically, it discussed how States Parties would ratify the amendments and if they could choose whether to be subject to the Court's jurisdiction over the crime of aggression. The two main options considered by the SWGCA were Article 121(4) and 121(5). An argument has been raised that the definition for aggression could come into effect simply through action taken at the Review Conference, but this avenue seems unlikely for legal and political reasons. At earlier negotiations it was assumed that Article 121(5), which states that any amendments to Articles 5, 6, 7 and 8 of the Rome Statute enter into force only for States Parties which accept the amendment, was the article that would govern the entry into force for amendments on the crime of aggression. Some delegations argued that because the provision on the crime of aggression would be a new article defining the crime, and not actually an amendment to Article 5, 6, 7 or 8, Article 121(4) should apply.

Amendment procedure under Article 121(4)

Under Article 121(4) amendments (except for those amending Articles 5, 6, 7 and 8) enter into force for all States parties one year after seven-eighths of the States Parties ratify them. Proponents of 121(4) feel that this approach would reinforce the universal application of the crime of aggression. They pointed out that States Parties had already decided to accept the Court's jurisdiction over aggression and that it was unnecessary to treat aggression as a new crime. If the ASP decides to use this method for entry into force it could have a significant effect on the reach of the Court's jurisdiction over the crime of aggression, since the citizens of non-States Parties could come under the jurisdiction of the ICC on the crime of aggression even if they do not ratify the amendment or join the ICC.

The US is not likely to favor using 121(4) for both strategic and ideological reasons. Strategically, the US is involved in many different military operations in other countries, which could potentially involve crimes under the jurisdiction of the ICC. Absent an exception in the Rome Statute, citizens of the US could fall under the jurisdiction of the Court without the US ratifying the amendment or becoming a State Party to the Rome Statute, as is the case with the crimes currently under the Court's jurisdiction. Article 121(5) specifies that States Parties must accept an amendment to Articles 5, 6, 7 or 8, meaning that States Parties that do not ratify





an amendment are not bound by it. Article 121(4) does not require such acceptance and thus does not permit a State Party to “opt out” of the Court’s jurisdiction with respect to an amendment.

Ideologically, the US has a commitment to state sovereignty. If 121(4) is the method used to ratify the amendments on aggression, US personnel could be held accountable to amendments that the US did not ratify or even participate in drafting. This lack of state consent could be seen as undermining US sovereignty.

Amendment procedure under Article 121(5)

Under Article 121(5), amendments on the crime of aggression would apply only to States Parties that accept the amendment. If a State Party does not accept the amendment, the Court cannot exercise its jurisdiction regarding that amendment over the citizens of that State. Proponents of Article 121(5) argued during the SWGCA meeting that the article deals with amendments to the core crimes under the Statute which include aggression. Delegations arguing in favor of this approach felt it would respect the sovereignty of States Parties. They further argued that it would be difficult to get seven-eighths of the States Parties to ratify the amendment, as required by Article 121(4), which would delay and hinder enforcement of the crime of aggression. States Parties at the Review Conference may decide to specify in the amendment on the crime of aggression that a State Party which joins the Court after the amendment has entered into force may decide whether to accept the amendment. This would affect the US if it decides to become a State Party to the Rome Statute after amendments on aggression were adopted because there is some question under Article 121 about whether the US would be able to choose not to ratify the amendment or be forced to accept it if it wants to become a State Party at a later date. Being forced to accept the Court’s jurisdiction over the crime of aggression could cause the US to decide not to ratify the Rome Statute in the future.

Deletion of Article 5(2)

The SWGCA discussed the deletion of Article 5(2), which states that the Court will exercise jurisdiction over the crime of aggression once a provision defining the crime is adopted in accordance with Article 121 and 123 of the Rome Statute and consistent with the Charter of the United Nations (UN). Most of the States were in agreement that 5(2) could be deleted from the Statute once a definition of the crime had been adopted.

Definition of the Individual Crime

Concerning the definition of the individual crime, there was discussion and apparent consensus on Draft Article 8 *bis* (1)¹ and a discussion about the applicability of Article 28 to the crime of aggression.

Draft Article 8 bis (1)

The first paragraph of Draft Article 8 *bis* describes the components of committing the crime of aggression and the category of persons who are in the position to commit the crime of aggression. Most countries seemed to agree that aggression means planning, preparing, initiating or executing an act. This agreement is a new development since the June 2007 meeting at Princeton. The current variation reflects a compromise between

¹ The draft articles under discussion by the SWGCA can be found in the Chairman’s Discussion Paper on the Crime of Aggression, available at http://www.icc-cpi.int/library/asp/ICC-ASP-6-SWGCA-2_English.pdf.



states that want the definition to be more inclusive and those that want it to more closely reflect the definition used at Nuremburg. These two approaches have been discussed in earlier meetings and in the last AMICC paper. Delegations also agreed that potential perpetrators of the crime must be in a position to exercise control over or to direct the political or military action of a State. Agreement on Draft Article 8 *bis* (1) should calm American fears that ICC action could be directed at individual soldiers engaged in humanitarian activities in other countries. The chapeau of Draft Article 8 *bis* makes it clear that for the purposes of the Rome Statute, aggression is a crime that consists mostly of planning or preparing the military action and that the only people who can be tried are those in leadership positions. There was also discussion and consensus by the SWGCA that Draft Article 25(3) *bis*, which ensures that the leadership requirement applies to all forms of participation. This ensures that only leaders and not regular soldiers would be tried for aggression. This also helps rule out routine military undertakings of the US abroad which are usually in accordance with the UN Charter.

Application of Article 28

There was discussion on whether Article 28 should be explicitly excluded with respect to the crime of aggression. Article 28 outlines the responsibility of both political and military commanders and superiors. Article 28 indicates that military commanders and superiors could be held responsible for crimes with the jurisdiction of the Court if they do not prevent people under their command from committing them. Some felt that Article 28 would never be applicable to aggression because it is an active, rather than a passive, crime that would only be committed by the highest commanders; therefore many said there is no need to specifically exclude Article 28 from the amendments. Others felt that Article 28 should be explicitly excluded because the mental element for the other crimes deal with negligence and recklessness, rather than intent and knowledge, which is the mental state required for committing aggression. Proponents of this view felt that it was not essential to explicitly exclude Article 28 from the amendments on aggression. For observers concerned about military personnel not directly involved in committing a crime being potentially brought before the ICC, such as some in the US, it would be helpful to explicitly exclude this Article from the amendments on aggression. It would be likely that the US would argue for the exclusion of Article 28 from the amendments concerning the crime of aggression.

Definition of Aggression as an Action by a State

In discussing the state act of the crime of aggression the SWGCA considered the threshold clause at the end of Draft Article 8 *bis* (1) and references to General Assembly Resolution 3314.²

Threshold clause

The end of Draft Article 8 *bis* (1) states that an act of aggression must by its character, gravity and scale, constitute a manifest violation of the UN Charter. At the ASP meeting, some delegations felt that this threshold clause appropriately limits the jurisdiction of the Court and would be able to gain the widest possible support when deciding to ratify the amendments. Others felt that the clause was unnecessary because any act of aggression would be a violation of the UN Charter. Some delegations indicated that they did not object to the

² More information regarding definition of the state act of aggression can be found in AMICC's paper, *The Crime of Aggression and the United States: Negotiations of the International Criminal Court*, by Gergana Halpern, October 1, 2007, available at <http://www.amicc.org/docs/Crime%20of%20Aggression%20and%20the%20US.pdf>.





threshold clause, but did not feel that it added much to the Article. The inclusion of the threshold clause could help protect American military personnel who participate in wide ranging international activities because presumably all American interventions are done in accordance with the UN Charter. Based on the SWGCA's discussions it appears that the threshold clause will remain in Draft Article 8 *bis* (1).

References to General Assembly Resolution 3314

There was some discussion regarding whether the amendments relating to aggression should include a reference to General Assembly Resolution 3314. Resolution 3314, adopted in 1974, was designed to guide the Security Council when determining if a state act of aggression has occurred. At earlier meetings of the SWGCA proposals were made to include Resolution 3314 as an annex to the Rome Statute. At this meeting there seemed to be a consensus that including the Resolution as an annex would not contribute to the amendments on aggression and may have an uncertain legal effect. Some States indicated that they would not oppose the inclusion of Resolution 3314 as an annex but also would not mind if it were left out. At this point the issue has been settled and Resolution 3314 will not be included as an annex.

Paragraph two 2 of Draft Article 8 *bis* contains a list of seven acts that qualify as an act of aggression. The list includes acts such as invasion, blockade or bombardment of a country regardless of a declaration of war. Some states indicated that they would like to see a reference to Resolution 3314 in the list of acts in Draft Article 8 *bis* (2). These delegations favor this reference because it may give the Security Council the same authority to determine a new act of aggression that it has under paragraph 4 of Resolution 3314. This proposal was put forth to help resolve the issue of whether or not the list of acts in Draft Article 8 *bis* (2) is exhaustive. From an American perspective, a reference to Resolution 3314 could reinforce the role of the Security Council in determining new acts of aggression.

Conditions for the Exercise of Jurisdiction

One of the most contentiously debated topics at the recent ASP meeting was the conditions for the exercise of jurisdiction, currently presented in Draft Article 15 *bis*. The main issue is what role, if any, the UN Security Council should play in determining a state act of aggression or authorizing an investigation into the crime of aggression.³ The main schism between States on this issue is whether Security Council action is required to permit an investigation into the crime of aggression to proceed. As in previous sessions, debates centered around how possible Security Council actions could affect the early stages of an investigation and procedural alternatives in the absence of a Security Council determination.

Early stages of the investigation

The paragraphs concerning the early stages of the investigation include how a formal investigation into the crime of aggression is initiated and directs the Prosecutor (if he or she determines that there is a reasonable basis to proceed with the investigation) to conclude whether the Security Council has made a determination of aggression in the case. There seemed be consensus on paragraph 1 of the Draft Article 15 *bis*. These paragraphs

³ More information regarding conditions for the exercise of jurisdiction can be found in AMICC's paper, *The Crime of Aggression and the United States: Negotiations of the International Criminal Court*, by Gergana Halpern, October 1, 2007, available at <http://www.amicc.org/docs/Crime%20of%20Aggression%20and%20the%20US.pdf>.



state that an investigation of aggression can be initiated by all three mechanisms found in Article 13 of the Rome Statute.⁴ There was also broad support for paragraph 2 which concerns the Prosecutor establishing whether the Security Council has made a determination of aggression. Some suggestions were made to include the form that the Security Council's determination of aggression will take. Other delegations requested that the paragraph reflect past agreement by the SWGCA that the determination of aggression by a body outside of the Court was not binding for the purposes of criminal prosecution. This particular suggestion could affect the US view of the amendments on aggression because it concerns the Security Council's position with regard to the prosecution of aggression. As a member of the Security Council, the US is unlikely to agree that a Security Council finding of aggression is not binding on the Court.

Procedural alternatives in the absence of a Security Council determination

The procedural alternatives in the absence of a Security Council determination of aggression are covered by Draft Article 15 *bis* (3). The States have yet to come to a conclusion on which alternatives should be used in the amendments. The most divided debate was over whether the investigation could proceed if the Security Council does not act. States which hold veto power on the Security Council seem to favor stopping the investigation if the Security Council is silent. Some States favor only allowing an investigation into aggression if the Security Council requests an investigation. Other States felt that the investigation could proceed without any type of outside authorization if the Security Council did not act for six months. Several States would favor having the Pre-Trial Chamber authorize the investigation after six months of inactivity from the Security Council. A few States felt that a six month waiting period was too long. Most of the States seemed to agree that allowing outside bodies such as the General Assembly and the ICJ make a determination of aggression would be confusing and limit the independence of the Court.

A compromise proposal, known as the “red light” proposal, was offered. It would allow the Security Council, under Chapter VII of the UN Charter, to stop an ongoing investigation by issuing a resolution stating that an act of aggression had not taken place. If no such resolution were presented, the investigation could proceed. If a resolution was issued, the investigation would be halted indefinitely. Some delegations welcomed the compromise; however, others felt it would undermine the exclusive power of the Security Council to determine aggression because the burden to stop the investigation would be on the Security Council and an attempt to stop an investigation could be vetoed. Still others felt that it did not protect the Court's judicial independence from the Security Council. This proposal is likely to be studied and considered further at the next ASP meeting in November 2008. It could provide a way forward for the amendments on aggression. Observers in the US may find that this proposal allows the Security Council to retain some power in determining aggression, and could help safeguard US personnel who could be accused of aggression.

⁴ The three mechanisms for triggering ICC jurisdiction with respect to a crime are: 1) referral by a state party in which one or more of the crimes is committed; 2) referral by the UN Security Council; 3) the Prosecutor initiating the investigation *proprio motu*—by his or her own motion.





Elements of Crime

The Chairman raised the question of drafting the elements of the crime of aggression and pointed out that the previous elements that had been drafted appeared to be out of date compared with the progress made in other areas on the amendments. Most delegations were in agreement that Article 9 of the Rome Statute and Resolution F of the Final Act of the Rome Conference required them to develop elements of the crime. There was some discussion about whether to develop those elements concurrently with the definition or to wait until an agreement had been reached on the definition. Some felt that both the elements and the definitions should be presented to the Review Conference as a package, and that they should be working on the elements right now, in accordance with Article 9. Others pointed out that Article 9 does not refer to aggression, so it is unclear whether or not the procedure applies to aggression. Some discussion was held on whether or not Article 9 should be amended. A compromise was reached that providing that the elements could be developed after the SWGCA concluded its work in the 12 month period leading up to the Review Conference. Some procedural elements may be a part of the discussions on the elements. US observers concerned with the clarity of crimes in the Rome Statute would be reassured that elements will be developed, and if compromise is reached on the other provisions related to aggression, submitted to the Review Conference.

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