



QUESTIONS & ANSWERS ON THE CRIME OF AGGRESSION AND THE UNITED STATES: NEGOTIATIONS OF THE ICC

Why is the crime of aggression included in the Rome Statute?

Many early ICC supporters believed that the Nuremberg Tribunal after World War II had established aggression as an international crime. They saw it as the “mother of all crimes” or the first cause of many atrocities. Many countries, organizations and individuals therefore urged passionately that it must be in the Court’s jurisdiction. (See pages 2-3 of the AMICC paper *The Crime of Aggression and the United States: Negotiations of the International Criminal Court*, by Gergana Halpern, and *Update on the Crime of Aggression from the Resumed Sixth Session of the Assembly of States Parties, June 2008*, by Lucy Betteridge, available at www.amicc.org.)

What needs to happen for the ICC to be able to exercise jurisdiction over it?

The ICC has not had jurisdiction over the crime of aggression since it began its work in 2002. Under the Rome Statute, the ICC can only exercise jurisdiction over the crime when the Assembly of States Parties (ASP) amends the Statute to include a definition of the crime and the conditions for the exercise of jurisdiction which need to be met for the Court to take up a case. The first opportunity to amend the Statute will be in early 2010 when the ASP will hold its first Review Conference. In preparation for the Review Conference, the Special Working Group on the Crime of Aggression is negotiating a proposal for an amendment. (See Halpern pages 1-2; Betteridge pages 4-6.)

What is the Special Working Group on the Crime of Aggression?

The SWGCA is an international working group open to all nations on an equal basis and to representatives of civil society. Since 2003 the SWGCA has met at ASP sessions and at informal inter-sessional meetings to continue efforts to reach agreement on the definition of the crime and the conditions for the exercise of Court’s jurisdiction. During each session, participating states introduce and debate various proposals. The Chairman of SWGCA has the task of narrowing down the list of options and incorporates those with largest support into a working paper to be presented at subsequent sessions. The SWGCA is mandated finish its work at least 12 months before the first Review Conference, after which time the ASP will develop the elements of the crime of aggression to be applied by the judges. The most recent meeting of the SWGCA was held at the Resumed Sixth Session of the ASP in New York in June 2008. (See Halpern pages 14-21; Betteridge pages 1, 6.)

How is an “act of aggression” different from the “crime of aggression”?

An act of aggression is always attributed to a collective entity, such as a state. The crime of aggression, on the other hand, is a crime committed by an individual. If the Rome Statute is amended to include the crime, there would need to be a finding of a state act of aggression before the ICC could prosecute a national of that country for the crime of aggression. In addition, it would be necessary to establish a link between the act of the state and the individual criminal conduct. Under the most recent proposals considered by the SWGCA, the link would be established by proving that an individual with political or military decision making power was responsible for the planning, preparation, initiation, or execution of an act of aggression. (See Halpern pages 15-19; Betteridge pages 2-3.)





What are the challenges to adding aggression as a crime that can be prosecuted by the ICC?

The Rome Statute requires that a future provision on the crime of aggression be consistent with the UN Charter. According to the Charter, the Security Council has “primary responsibility for the maintenance of international peace and security.” The Charter also says that “the Council shall determine the existence of any ... act of aggression.” However, there is disagreement over whether the Security Council should determine the existence of aggression for the purposes of prosecutions by the ICC, an independent court. Some nations are concerned that one of the five permanent members of the Council could veto legitimate prosecutions of the crime of aggression by the ICC. As alternative proposals, members of the SWGCA have discussed whether it would be enough for the ICC to notify the Security Council of an aggression investigation so that it could decide whether to make an independent determination, or whether the International Court of Justice, the UN General Assembly, or the ICC itself could determine the existence of a state act of aggression. (See Halpern pages 11, 18-19; Betteridge pages 4-5.)

Is it necessary to add the crime of aggression to the Court’s jurisdiction?

Aggression involves all crimes committed in the course of war including war crimes, crimes against humanity, and genocide. Thus, prosecuting aggression may deter the commission of the rest of the crimes within ICC’s jurisdiction. (See Halpern pages 31-32.)

How will the Review Conference address aggression?

During the Review Conference states will likely consider a proposal on aggression prepared by the SWGCA. States Parties will debate and decide whether they want to adopt the conclusions of the report and amend the Rome Statute. (See Halpern pages 1-2, 14.)

What is required to amend the Rome Statute?

Article 121 describes the process for amending the Rome Statute. Article 121(5) applies to amendments to articles 5, 6, 7, and 8, and requires the agreement of a two-third’s majority of States Parties. Under Article 121(5) any amendment to the provisions defining the crimes within the Court’s jurisdiction will only apply to those States Parties which accept the amendment. Therefore, the Court would not exercise jurisdiction over aggression with respect to States Parties which have not accepted the amendment. As a result, the nationals of a State Party not accepting an amendment will not be subject to the Court’s jurisdiction over aggression even if committed on the territory of another State Party. However, the amendment would apply to nationals of non-States Parties such as the US who commit crimes subject to the amendment on the territory of a State Party or to nationals of a country which becomes a State Party after the amendment goes into effect. Article 121(4) is the other method for amending the Rome Statute. It requires that seven-eighths of States Parties ratify the amendment before it goes into effect. Unlike 121(5), the amendment would apply to every State Party, not just those who have ratified the amendment. The SWGCA is currently debating which method of amending the Rome Statute to use. Proponents of Article 121(5) argue that it will be easier to get two-thirds of States Parties to ratify the amendment, and that 121(5) was the intended method at the time the Rome Statute was signed. Proponents of 121(4) argue that 121(5) does not apply because the proposed definition of aggression is not an amendment of Article 5, 6, 7, or 8 and that the definition of aggression should apply evenly so that no country could be able to opt out. (See pages Halpern 1-2, 11; Betteridge pages 1-2.)





What are the main US concerns regarding the crime of aggression?

In addition to its general concerns about the ICC, the US has particular concerns about the definition of the crime of aggression and the Court's exercise of jurisdiction. The US apparently considers that the Security Council has the sole responsibility to determine the existence of state acts of aggression. In addition, the US fears that as a major military power it is more exposed to prosecution than other nations and that the ICC would question legitimate use of force by the US. The US is also troubled that as a non-State Party it would be subject to prosecutions for the crime of aggression while States Parties could effectively opt out of the Court's jurisdiction for the crime by not accepting a future amendment. (See Halpern pages 8-13.)

Should the United States participate in the Review Conference negotiations on aggression?

The United States is entitled to participate in the Review Conference with all privileges except the vote. However, many countries are angry at the United States for its active hostility to the Court. The United States should not go to the Review Conference if its current policy then would require it to attack the Court or to try to change it fundamentally. Such actions could not succeed there. However, if a new policy valued the ICC, the US would be able to have considerable influence on the Conference within the limits the Statute imposes. This would be particularly true in the vigorous and many-sided debate on aggression. (See Halpern pages 22-31.)

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