

Annex II.C

Discussion paper 2 The conditions for the exercise of jurisdiction with respect to the crime of aggression

The Working Group still has some work to do before it gets close to a consensus. Consequently, it may not be advisable to discuss concrete drafting proposals; while everything is still on the table, all of the texts have been thoroughly discussed. Instead, it is proposed to continue on the road taken at Princeton, namely to clarify the issues involved, in order to set the stage for a later agreement. Therefore, it would be most useful to:

1. try to analyse the legal parameters (*de lege lata*, existing international law) and
2. set out the possible options including the legal implications of these options.

Below is an outline of the issues which appear to be involved. This scheme should imply no preference for any particular view or solution.

The Group had a good discussion on the rights of the accused (D, below) in Princeton (see paras 60-62 of the Princeton report). Further, the questions listed under C are slightly more technical (though by no means uncontroversial). Consequently, discussions on points A and B seem to be most urgent. Those two clusters contain between them the important and controversial issue whether the UN Security Council has the exclusive right to determine that an act of aggression has occurred. That, of course, entails a discussion about Article 39 of the UN Charter, but hopefully the Group will deal with other issues, too.

A few words about the distinction between the issues under A and B, which is a bit tricky. The issues under A concern the option that the ICC should be able to exercise jurisdiction only after some other organ has made a decision to that effect; such a decision could consist of either a determination that an aggression has occurred or an explicit consent for the ICC to proceed (with or without a determination of aggression by that organ). The questions under B, on the other hand, do not assume that a decision of another body is necessary for the ICC to start exercising jurisdiction, for instance by starting an investigation. Nevertheless, B asks whether it should be for another body to determine the state act of aggression; if so, it would be for the ICC to accept such determination as prejudicial in cases involving individual acts of aggression.

Hence, the “go ahead” for the ICC to proceed and the judicially relevant determination of an act of aggression are not necessarily the same thing. On the one hand, one could imagine a solution whereby the OTP could initiate investigations even without a decision by another organ, but that any judgment (and, perhaps, any prosecution), would have to build on a determination of the state act by someone else. On the other hand, there is also the converse possibility, i.e., that a decision by some other organ is necessary for an investigation or a prosecution to be initiated, but that it is for the ICC only to determine whether an act of aggression – as a necessary element of the crime of aggression -- has occurred. The two approaches (A and B) could, of course, also be combined, in which case the ICC could not exercise jurisdiction without a decision by another organ, and a determination by another organ would be prejudicial.

This line of reasoning assumes that it is necessary to determine that a state act of aggression has occurred before it can be determined that an individual crime of aggression is at hand. It is on

that assumption that the Group has based its discussions, and that assumption seems never to have been challenged.

- A. Conditions for the exercise of jurisdiction
1. Should the ICC exercise jurisdiction of the crime of aggression only after another organ has accepted such exercise?
 2. If so, what sort of decision would be required?
 - (a) A determination that a state act of aggression has occurred?
 - (b) An explicit “go ahead” (consent) for the ICC to exercise jurisdiction?
 3. Which organ would make that decision? (The Security Council? The General Assembly? The ICJ? Any one of the above?)¹
- B. Prejudicial decision
1. Should the determination of the state act be made by another organ prejudicially?
 2. If so, which organ? (The Security Council? The General Assembly? The ICJ? Any one of the above?)
- C. Procedural questions regarding decisions made by other organs
1. If UNSC:
 - (a) Should the decision be taken under Chapter VII of the UN Charter?
 - (b) Could it be regarded as a procedural question under Article 27(2) of the UN Charter?
 - (c) Should the decision or the determination be made only in an operative or also, alternatively, in a preambular paragraph?
 - (d) *Comment:* This subquestion seems to be most relevant as regards determinations. A “go ahead” would most likely be given in an operative paragraph. Several alternatives could, theoretically, be envisaged:
 - a) It is necessary that the Council make a decision binding on all states under Article 25 UNC, in which case it should probably use the word “decide” in an operative paragraph (this would be a very strict view);
 - b) It is necessary that the Council make an explicit decision in an operative paragraph, but without using the verb “decide”, but rather words like “determine”;
 - c) The Council must make its finding in an operative paragraph, but could do so either explicitly or implicitly, “en passant”, for instance by using an adjective such as “aggressive” to characterize the behaviour of a state;
 - d) The Council could make an explicit characterization, like in b), but could do so in either a preambular or an operative paragraph;
 - e) It would suffice if the Council made the determination in any form (explicit or implicit), in a preambular or an operative paragraph.

¹ Of course, the ICJ would not be a likely candidate if option A.2.b is chosen.

2. If the ICJ:
 - (a) Only in an advisory opinion after an explicit request or also, alternatively, in any other final decisions (advisory opinions or judgments)?
 - (b) Only in the operative decision (dispositif) or also, alternatively, in the reasons?
Comment: If an operative decision is necessary, that means that the Court would have to vote on the determination of the act. In addition, the Group would have to discuss whether the characterization should be explicit or implicit (cf the comment to 3.1.3, *supra*).

3. If the GA:
 - (a) $\frac{1}{2}$ or $\frac{2}{3}$ majority?
 - (b) Should the decision or the determination be made only in an operative or also, alternatively, in a preambular paragraph? (See comments to C.1(c).)

D. Other issues

1. How to protect the rights of the accused according to the Rome Statute and international human rights law, particularly in the determination of the state act?