

Annex II.D

Discussion paper 3 Definition of Aggression in the context of the Statute of the ICC

Aggression as an act of State

1. **Should the definition be generic or specific? If specific, should the list be that of Resolution 3314/74 ?**

Commentary

A generic definition is one which does not include a list of acts which would constitute acts of aggression. Conversely, a specific definition is one which does contain such a list or refers to an existing one, such as the one contained in General Assembly Resolution 3314/74.¹

With respect to a specific definition, it should be noted that the list attached to Resolution 3314 is illustrative. This does not seem to combine with the need to respect the criminal law principle *nullum crimen nulla poena sine lege*.

It is possible to avoid this difficulty by making the list exhaustive. However, this would in effect interfere, perhaps impermissibly, with the definition of Resolution 3314 and could, furthermore, generate a need or a wish to include new cases of aggression which are not actually provided for in Resolution 3314.

It is for these reasons that it has been rather clear in Princeton but also in sessions of the Prep Com that a generic approach to the definition would be preferable.

2. **How do you think that aggression by a State should be described in the context of the ICC Statute?**

- **Use of force²?**
- **Armed attack³?**
- **Act of aggression⁴?**
- **Use of armed force⁵**

Commentary

There are different degrees of specificity and width in each one of the above terms. "Armed attack" and "use of armed force" might be interpreted to be narrower than "use of force". "Act of aggression" would combine with a "specific" definition as it might be considered as an implicit reference to article 3 of the Annex to Resolution 3314.

¹ Reference to Resolution 3314 (without mentioning each particular case) is made in the "Discussion paper proposed by the Coordinator", (PCNICC/2002/WGCA/R.T.1/Rev. 2), 1.2 .

² Article 2 para. 4 of the U.N. Charter, Preamble of Resolution 3314.

³ Article 51 of the U.N. Charter, language of Resolution 3314 (Article 3,a,d).

⁴ Article 39 of the U.N. Charter, language of Resolution 3314 (Articles 2,3).

⁵ Article 1 of Resolution 3314.

- 3. Should there be a qualifier of the aggression, e.g. should it be in "flagrant" or "manifest" violation of the Charter of the United Nations ? Do you think that "flagrant" and "manifest" cover different situations?**

Commentary

The need for aggression to be in violation of the Charter stems from the fact that we need to exclude use of force undertaken in application of article 51 of the Charter, i.e. in the exercise of legitimate defence, or in application of Chapter VII of the Charter.

The requirement for a flagrant and manifest violation purports to provide a threshold relating either to the magnitude or gravity of the action (e.g. exclude border skirmishes) or possibly (?) to other considerations where there might be a degree of uncertainty (legality of the action).

- 4. Do you think that such violation should amount to a "war of aggression"?**

Commentary

During the PrepCom discussions, the idea has had the support of some delegations, on the basis of the Nuremberg precedent. Others, however, found it extremely restrictive.

- 5. Should the object or result of the aggression be relevant? If so, could military occupation or the annexation of the territory of another State or part thereof be such object or result ?**

- 6. Should attempt of aggression by a state, be also included in the text?**

Commentary

In connection with attempt, it should first be asked whether attempt of aggression is conceivable (this irrespective of whether attempted aggression by a State is reprehensible under international law). It would indeed seem so, particularly, if not exclusively, in cases of naval or air attacks which can be neutralized before the aggressor reaches national territory.

It is understood that attempt of aggression by an individual will be addressed in the "basket" related to the crime of aggression and general principles of criminal law.