

Informal inter-sessional meeting on the crime of aggression 8-10 June 2009

Non-paper by the Chairman on the conditions for the exercise of jurisdiction

I. Introduction

1. The present non-paper is aimed at facilitating discussions at the Princeton Club with respect to the major outstanding issues regarding the “conditions for the exercise of jurisdiction” over the crime of aggression. These outstanding issues are primarily reflected in draft article 15 bis, paragraph 4, of the proposals for a provision on aggression, elaborated by the Special Working Group on the Crime of Aggression (hereinafter “the Group”).¹ The February 2009 report of the Group notes in this respect that this paragraph requires “further discussion, including on the basis of new ideas and suggestions”.² The issue of the entry into force procedure (article 121, paragraph 4 or 5) is directly linked to this question.

2. It is suggested that delegations use the inter-sessional meeting to exchange views on possible ways of finding an acceptable solution for the outstanding issues, including on the basis of such new ideas and suggestions. Due to the very complex nature of the issue and the numerous variables related to the discussion, the Chairman suggests that participants address specific *questions (printed in italics below)*, dealing with specific scenarios and based on a number of considerations that can be extracted from the previous work of the Group.

II. Some underlying considerations for a discussion on outstanding issues

3. **All three existing trigger mechanisms** apply to the crime of aggression. Based on draft article 15 bis, paragraph 1, the Prosecutor could conduct a preliminary investigation into a crime of aggression after the use of any of the three existing trigger mechanisms: State referral, Security Council referral, or *proprio motu*. The trigger mechanism needs to be distinguished from the question of a **jurisdictional filter** that arises only at a later stage, as envisaged by draft article 15 bis, paragraphs 2-4.

¹ See February 2009 SWGCA report, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

² *Ibid.*, paragraph 19.

4. In case of a **Security Council referral**, the Court could exercise jurisdiction over the crime of aggression **irrespective of the consent of the State concerned**. This follows from article 13 (b) of the Statute, and this has also been the clear understanding in the Group.³ The issue of the territoriality or nationality requirement (article 12, paragraph 2) does not arise in the context of a Security Council referral.

5. In case of a **State referral or *proprio motu* investigation**, the **territoriality or nationality requirement of article 12, paragraph 2**, of the Statute applies. In these two cases, jurisdiction is based on the consent (i.e. consent to be bound by the Rome Statute and the amendment on aggression) of either the State of nationality or territoriality. In this context, it is important to note that a crime of **aggression is typically committed on the territory of both the aggressor and the victim State**.⁴ For the sake of clarity in discussions relating to questions of territoriality, it is therefore useful to refer to an alleged aggressor State (usually the State of nationality and territoriality of a crime of aggression) and to an alleged victim State (usually the State of territoriality of a crime of aggression).

III. Suggested structure for a discussion on outstanding issues

6. The Chairman suggests that the outstanding issues be discussed in a clear and substantive manner, in order to facilitate a full understanding of all delegations' positions and to explore ways toward an acceptable solution. At this stage, it would appear useful to focus that discussion on the substantive concerns of delegations, rather than on the technical language intended to address these concerns. The following remarks, as well as the questions contained in the annex, are aimed at structuring and facilitating such an open discussion. Two central topics are identified in this context: the question of **consent by the alleged aggressor State** (an issue closely related to the choice of either paragraph 4 or 5 of article 121 of the Statute); and the question of **jurisdictional filters** (reflected in draft article 15 bis, paragraph 4).

7. It is important to note that the issue of consent by the alleged aggressor State and the issue of jurisdictional filters are strongly interlinked, and that the options for each issue should be discussed with the various options for the other issue in mind. The interplay of both issues has far-reaching consequences for the Court's jurisdiction in a given case.

IV. Consent of the alleged aggressor State as condition for the exercise of jurisdiction

8. The question of consent by the alleged aggressor State needs to be addressed only with respect to State referrals and *proprio motu* investigations. No such consent would be required in case of a Security Council referral based on the Council's authority under Chapter VII of the United Nations Charter.⁵

³ Ibid., paragraphs 28 and 29.

⁴ The Group has addressed the issue of territoriality of the crime in previous reports, see February 2009 SWGCA report, paragraphs 38 and 39, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II; and November 2008 SWGCA report, paragraphs 28 and 29, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I, annex III.

⁵ November 2008 SWGCA report, paragraphs 28 and 29, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I, annex III.

a) **Acceptance of the amendment on the crime of aggression by the alleged aggressor State**

9. One manner in which a State could express its consent to the Court's exercise of jurisdiction with respect to any future investigation relating to an act of aggression allegedly committed by that State would be the acceptance of the amendment on aggression itself. Currently, the Group's proposals reflect two approaches to this question:

- i) **The alleged aggressor State's acceptance of the amendment on aggression would not be required** in the following two cases: First, if **article 121, paragraph 4**, of the Statute would govern the entry into force of the amendment on aggression; and second, if **article 121, paragraph 5**, of the Statute would govern the entry into force, combined with a **"positive" understanding** of its second sentence.⁶ In both cases, the victim State's acceptance of the amendment on aggression would suffice to establish the territorial link required by article 12, paragraph 2 (a), of the Statute. This is the approach taken by the Rome Statute with respect to other crimes where a situation involves more than one State.
- ii) **The alleged aggressor State's acceptance of the amendment on aggression would be required** if **article 121, paragraph 5**, of the Statute would govern the entry into force, combined with a **"negative" understanding** of its second sentence.⁷ In this case, the aggressor State's acceptance of the amendment on aggression would be required to establish either the territoriality or nationality link of article 12, paragraph 2, of the Statute.

b) **Other ways of addressing the issue of consent by the alleged aggressor State**

10. Irrespective of the issue of acceptance of the amendment on aggression, the Group's proposals and reports contain some options that would, under some circumstances, effectively introduce a requirement of direct or indirect consent by the alleged aggressor State.

11. The Group's reports refer to the idea of requiring that the alleged aggressor State has accepted the Court's jurisdiction over the crime of aggression by way of an **opt-in declaration**. The requirement of such a declaration would effectively limit the Court's jurisdiction on the basis of State referrals and *proprio motu* investigations to cases of alleged aggression by States Parties that have accepted the amendment on aggression and have made a declaration accepting the amendment.⁸ As a consequence, the difference in the application of either paragraph 4 or 5 of article 121 to the amendment on aggression would be strongly diminished: Either way, no State Party could be subject to the Court's jurisdiction on aggression against its will.

⁶ Such as an understanding to be contained in the enabling resolution stating that "article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment". See February 2009 SWGCA report, paragraphs 34-37, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

⁷ Such as an understanding to be contained in the enabling resolution stating that "article 121, paragraph 5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment". See February 2009 SWGCA report, paragraphs 34-37, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

⁸ February 2009 SWGCA report, paragraph 9, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

12. The idea of a declaration could be further adapted in order to increase the likelihood that the Court would indeed have jurisdiction over the crime of aggression in future cases. Instead of requiring an opt-in declaration, States could be given the possibility of making an **opt-out declaration** regarding the crime of aggression similar to article 124 of the Statute. In order to fully address sovereignty concerns, such a declaration could possibly be renewable, and possibly be open for non-States Parties as well.

13. A role for the International Court of Justice (ICJ) as a jurisdictional filter could also be regarded as a requirement of indirect consent by the alleged aggressor State: The determination of an act of aggression by the ICJ under draft article 15 bis, paragraph 4, alternative 2, option 4, could be made in **contentious ICJ proceedings**, which are consent-based.

V. Jurisdictional filters

14. The various options for jurisdictional filters contained in draft article 15 bis, paragraph 4 (Security Council, Pre-Trial Chamber, General Assembly, International Court of Justice), would each constitute a condition for the exercise of jurisdiction and should be looked at in connection with the issue of consent addressed above.

15. During previous discussions in the Group, delegations voiced different preferences regarding the alternatives and options contained in draft article 15 bis, paragraph 4. In order to deepen those discussions, it is suggested to address some specific scenarios separately:

a) Self-referral by the aggressor State

16. A situation could arise in which a State, that has committed aggression against another State, would be willing to refer the situation to the Court, e.g. following a change of government in the aggressor State.⁹ The aggressor State might, for practical reasons, be unable to carry out the investigation and prosecution, while having all domestic laws in place to prosecute its former leader(s) for the crime of aggression.

b) Referral by the Security Council

17. The Security Council could refer a situation to the Court without making a determination of aggression. It could appear that only other crimes under article 5 of the Statute have been committed, or there could be other reasons why the Security Council did not make a determination of an act of aggression. If the Court would nevertheless be allowed to prosecute a crime of aggression on the basis of such a general Security Council referral, then the Security Council might choose not to make such a referral at all.

c) *Proprio motu* investigation and referral by the victim State

18. The alternatives and options contained in draft article 15 bis, paragraph 4, have so far been mainly discussed with *proprio motu* investigations and referrals by the victim State or by third States in mind. It is suggested to discuss the various options with specific regard to their respective potential as part of a compromise solution.

19. The above discussion (paragraphs 8-13) on the requirement of consent by the alleged aggressor State could usefully be taken up in the context of the jurisdictional filter again, with the benefit of just having discussed the latter issue in detail.

⁹ Possibly through a declaration in accordance with article 12, paragraph 3, of the Statute.

Annex

Questions for discussion

I. Consent of the alleged aggressor State as condition for the exercise of jurisdiction

Security Council referral	State referral and <i>proprio motu</i>
<p><i>(Consent of the alleged aggressor State not required)</i></p>	<p>Acceptance of the amendment on the crime of aggression by the alleged aggressor State</p> <p>1. <i>Should the Court be able to exercise jurisdiction with respect to a crime of aggression on the basis of a State referral or proprio motu investigation where the alleged aggressor State has not accepted the amendment on aggression, or is not a State Party to the Rome Statute?</i></p> <p>2. <i>Could the concerns of those delegations that prefer, in principle, a requirement that the alleged aggressor State has accepted the amendment on aggression be addressed differently through other consent-based elements or through the jurisdictional filter?</i></p> <p>Other ways of addressing the issue of consent by the alleged aggressor State</p> <p>3. <i>Could the idea of requiring an opt-in declaration, in addition to the requirement that the alleged aggressor State be bound by the amendment on aggression, address the concerns of those delegations that have expressed difficulty with using the entry into force procedure of article 121, paragraph 4, of the Statute?</i></p> <p>4. <i>Could the idea of an opt-out declaration be further explored to serve as a bridge between the wish for a broad base of Court jurisdiction over the crime of aggression and the wish to respect sovereignty concerns?</i></p> <p>5. <i>Could a link to the ICJ's consent-based contentious jurisdiction address concerns regarding the consent by the alleged aggressor State, at least in an indirect way?</i></p>

II. Jurisdictional filters

Security Council referral	State referral and <i>proprio motu</i>
<p>1. Where the Court is seized with a situation only because of a Security Council referral, could it be argued that the Security Council should retain the priority right to determine an act of aggression – as the Council might otherwise simply choose not to make a referral at all?</p>	<p>2. If the prior consent of an alleged aggressor State were required (e.g. through acceptance of the amendment, or a declaration, or indirectly via contentious ICJ proceedings), would there still be a need for a jurisdictional filter in case of State referrals and <i>proprio motu</i> investigations?</p> <p>3. If a State would refer a situation to the Court specifically for the purpose of prosecuting its own former leader(s) for a crime of aggression committed by that State, would there still be a need for a jurisdictional filter?</p> <p>4. Which of the elements contained in draft article 15 bis, paragraph 4, could serve as part of a compromise solution? Where exactly does the compromise lie in each of these elements? Which other suggestions relating to the jurisdictional filter could be helpful in the search for a compromise?</p> <p>5. Would any of the jurisdictional filters contained in draft article 15 bis, paragraph 4, have to be combined with a requirement of consent by the alleged aggressor State?</p>
