

29 March 2000

Original: English

**Preparatory Commission for the International
Criminal Court**

Working Group on the Crime of Aggression

New York

13-31 March 2000

12-30 June 2000

27 November-8 December 2000

**Preliminary list of possible issues relating to the crime
of aggression**

Discussion paper proposed by the Coordinator

A possible checklist of issues to be addressed in developing proposals for a provision on aggression in accordance with article 5, paragraph 2, of the Rome Statute and resolution F, paragraph 7, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court

N.B. This preliminary list of possible issues is based on an initial review of the Rome Statute with a view to determining the provisions that may in some way be related to the definition of the crime of aggression. This non-exhaustive list is intended to facilitate a thematic discussion of possible issues most of which are closely interrelated.

I. Possible issues relating to the Rome Statute

• Definition

- (i) Whether the definition should be more general in nature referring to what may be the essential characteristics of the crime of aggression.
(Possible instruments of reference: Charter of the United Nations; Nürnberg Charter; Draft Code of Crimes against the Peace and Security of Mankind; case law and other documents)
- (ii) Whether the definition should include a more specific list of acts which could constitute the crime of aggression.
(Possible instrument of reference: General Assembly resolution 3314 (XXIX))

- (iii) Whether it would be possible to identify some acts listed in resolution 3314 (XXIX) and add them to the general definition of the crime of aggression.

- **Conditions under which the Court shall exercise jurisdiction**

- (i) What role should be played by the Security Council in relation to the jurisdiction of the Court over the crime of aggression?
- (ii) What action, if any, could be taken in the event that the Security Council fails or otherwise declines to determine that an act of aggression has occurred?
- (iii) What are the legal effects on the functions of the Court arising from a determination by the Council that an act of aggression was committed by a State?

- **Consistency with the relevant provisions of the Charter of the United Nations**

- **Complementarity and admissibility**

How would the provisions of the Statute on complementarity (admissibility, challenges to the Court's jurisdiction) be applicable to the crime of aggression. (This could include issues dealt with in preambular paragraphs 6, 10, article 1 as well as articles 12-19 of the Rome Statute.)

- ***Ne bis in idem***

Applicability of exceptions to the crime of aggression (Rome Statute, art. 20 (3) only refers to crimes in arts. 6, 7 and 8)

- **General Principles of Criminal Law**

Consider the relationship between the definition of the crime of aggression and the articles on general principles of criminal law:

- (i) *Nullum crimen sine lege* (art. 22)
- (ii) *Nulla poena sine lege* (art. 23)
- (iii) Non-retroactivity *ratione personae* (art. 24)
- (iv) Individual criminal responsibility (art. 25)
- (v) Exclusion of jurisdiction over persons under eighteen (art. 26)
- (vi) Irrelevance of official capacity (art. 27)
- (vii) Responsibility of commanders and other superiors (art. 28)
- (viii) Non-applicability of statute of limitations (art. 29)
- (ix) Mental element (art. 30)
- (x) Grounds for excluding criminal responsibility (art. 31)

- (xi) Mistake of fact or mistake of law (art. 32)
- (xii) Superior orders and prescription of law (art. 33)

- **Investigation and prosecution**

Consider the provisions concerning the investigation and prosecution of crimes with respect to the crime of aggression (e.g., Initiation of an investigation (art. 53))

- **National security information**

Consider the provisions concerning the protection of national security information in relation to the crime of aggression (art. 57 (3) (c), art. 72, art. 93 (4) and 99 (5))

- **International cooperation and judicial assistance**

These provisions may require further consideration depending upon the applicability of the principle of complementarity to the crime of aggression.

The following parts of the Rome Statute do not appear to raise possible issues regarding the definition of the crime of aggression:

- Part 4. Composition and Administration of the Court;
- Part 7. Penalties (The penalties set forth in article 77 are applicable to all crimes referred to in article 5.);
- Part 8. Appeal and Revision;
- Part 10. Enforcement;
- Part 11. Assembly of States Parties;
- Part 12. Financing;
- Part 13. Final Clauses (The provision on aggression is to be adopted in accordance with articles 121 and 123 pursuant to article 5 of the Rome Statute.)

II. Possible issues relating to the Elements of Crimes

- The elements of the crime of aggression are provided for in resolution F rather than article 9 of the Rome Statute.
- Consider the structure and general provisions of the elements of the other crimes prepared pursuant to article 9 of the Rome Statute to ensure consistency.

III. Possible issues relating to the Rules of Procedure and Evidence

- Review the final text of the Rules of Procedure and Evidence prepared by the Preparatory Commission to determine whether there are provisions that require consideration in relation to the definition of the crime of aggression.

IV. Other possible issues

- What are the legal effects of a decision of the International Court of Justice concerning aggression on the ICC?
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