28 November 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

Proposal submitted by Greece and Portugal*

1. For the purposes of the present Statute, aggression means the use of armed force, including the initiation thereof, by an individual who is in a position of exercising control or directing the political or military action of a State, against the sovereignty, territorial integrity or political independence of a State in violation of the Charter of the United Nations.

2. The Court shall exercise its jurisdiction with regard to this crime subject to a determination by the Security Council, in accordance with Article 39 of the Charter, that an act of aggression has been committed by the State concerned.

3. When a complaint related to the crime of aggression has been lodged, the Court shall first seek whether a determination has been made by the Security Council with regard to the alleged aggression by the State concerned and, if not, it will request, subject to the provisions of the Statute, the Security Council to proceed to such a determination.

4. If the Security Council does not make such a determination or does not make use of article 16 of the Statute within 12 months of the request, the Court shall proceed with the case in question.

Explanatory note

1. Definition

The proposal follows the "generic" approach, as opposed to that containing a list of acts constituting aggression. The reason is to make it easier to reach agreement on the definition stricto sensu, since (a) an illustrative list is not suited for the purposes of attributing criminal responsibility to individuals owing to the

* Previously issued as document PCNICC/1999/WGCA/DP.1.

generally recognized principles of legality and (b) an exhaustive list would entail a protracted negotiation on whether a very extensive variety of acts should be included or not and on the particular elements of each such act. It goes without saying that, were the second approach to be taken, the list contained in General Assembly resolution 3314 (XXIX) would be extremely useful. However, it should be taken into account that the list contained in that resolution being illustrative, it would, presumably, not be considered sufficient to encompass the variety of situations or acts mentioned above. On the other hand, resolution 3314 (XXIX) would remain extremely relevant even under a "generic" definition, since the Court would in any case have to take it into account in order to reach a decision on whether a particular act or course of action by an individual did indeed constitute aggression if, under paragraphs 2, 3 and 4 of the proposal, this decision were to be taken by the Court.

The "generic" definition of aggression finds its precedent in the Nuremberg Charter under the name of "crimes against peace". However, the Greek/Portuguese proposal has employed a different wording which, we believe, on the one hand reflects the changes that have taken place in the last 50 years in international law and which are relevant to the question, and on the other the placement of the particular provision in the context of the Statute of the International Criminal Court. Thus, there is no reference to the notions of "planning and preparation of war of aggression" as these phases of aggression are envisaged in article 25 of the Statute, which provides that criminal responsibility attaches not only to the commission of any crime under the jurisdiction of the Court, but also to those ordering, soliciting, inducing, etc. the commission of the crime, or attempting its commission. The notion of "initiation" of aggression has, however, been kept, mainly for historical reasons, since it is separately mentioned in the Charter of the Nuremberg Tribunal as well as in all subsequent documents referring to the matter. It must be said, nonetheless, that the mentioning of the initiation of aggression is only adding emphasis to this type of action, which is included anyway.

The definition is all-inclusive, that is, it covers all the forms of aggression[1] which are provided for by international law, provided that the following conditions, which are set out in the definition are cumulatively met: (a) use of armed force has taken place; (b) such use of armed force is attributed to a person who holds such a position within the State undertaking the action as to exercise control or direct the political or military action of that State. Heads of State or Government, ministers in charge of military matters, or other high political or military authorities may be in such a position (leadership crime). Other officials could not be covered by this

[1] There have been suggestions that the use of the phrase "war of aggression" instead of "aggression" would limit the jurisdiction of the International Criminal Court to full-fledged war alone. However, until now the words "war of aggression" and "aggression" seem to have been rather indiscriminately used in the relevant texts. Thus, the Nuremberg Charter (art. 6) and the Charter of the Tokyo Tribunal (art. 5) refer to "war of aggression", as does the Control Council for Germany Law No. 10. Conversely, neither General Assembly resolution 3314 (XXIX) (with the sole exception of art. 5 (2)), nor the draft code of crimes speaks of war of aggression, but only of aggression (to which they attribute potentially the gravest consequences — see the fifth preambular paragraph of the annex to resolution 3314 (XXIX). The non-existence of a substantial difference between the above-mentioned terms is also maintained by Grant M. Dawson in "The ICC and the Crime of Aggression", New York Law School Journal of International and Comparative Law, vol. 19, 2000: "the terms 'war of aggression' and 'aggressive war' are synonymous with the term 'aggression'".

requirement; (c) the use of armed force is consciously directed against the sovereignty, territorial integrity or political independence of a State; (d) the use of force which has taken place violates the Charter of the United Nations. Such violation cannot, therefore, take place where the right of legitimate defence is being exercised in accordance with Article 51 of the Charter of the United Nations as well as where the action is taken, on the basis of Chapter VII of the Charter, in the exercise of collective security.

2. Relationship with the Security Council

According to the Greek/Portuguese proposal, any decision taken by the Security Council under Article 39 of the Charter of the United Nations that there has indeed been aggression by a State against another State has to be taken into account by the Court.

If, however, such a decision or determination of the Security Council does not exist — and this has been the case until now — then the Court, when seized on a case involving aggression, will, according to the proposal,[2] have to take certain steps in order to make sure that such a determination (a) does not exist; (b) the Security Council does not intend to proceed on such a determination; and (c) the Security Council does not request the Court to defer an investigation or prosecution, in accordance with article 16 of the Statute. Once these steps have not produced any results, then the Court is free to proceed to judge on the case. We think, indeed, that there is nothing to preclude the Court from doing so.

The argument that the power of the Security Council to decide on aggression is exclusive has not been confirmed by the International Court of Justice which, in its advisory opinion on the case of Certain Expenses of the United Nations,[3] has found that, although under Article 24 the responsibility of the Security Council in the matter was "primary", it was not, however, exclusive.[4]

On the other hand, the International Court of Justice has not itself been precluded from deciding whether aggression has been committed in a specific case, as is shown by the case concerning military and paramilitary activities in and against Nicaragua,[5] where the Court found that certain facts constituted use of force prohibited by the Charter of the United Nations and customary international law. In

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[2] In its current wording, the proposal takes account only of a referral of a situation to the Court by a State Party and not of an investigation initiated by the Prosecutor proprio motu. The proposal should therefore be completed in this regard by adding words to this effect, such as "or when an investigation has been initiated by the Prosecutor" after the phrase "when a complaint related to the crime of aggression has been lodged" in para. 2 of the proposal.

[3] International Court of Justice Rep. 1962.

[4] In this connection see M. Bedjaoui, Un contrôle de la legalité des actes du Conseil de Securité est-il possible? SFDI (Colloque des Rennes, 1995), Le Chapitre VII de la Charte des Nations Unies, pp. 255-297. Also, A. Pellet, Rapport Introductif, Peut-on et droit-on controller les actions du Conseil de Securité?, ibid., pp. 221-238. In his report, A. Pellet refers not only to the powers of the International Court of Justice to estimate the validity of the resolutions of United Nations organs but to that of other international tribunals to do so as well. He refers in particular to the International Tribunal for the former Yugoslavia. He says in this connection: "On peut penser par exemple au tribunal international pour l'ex-Yougoslavie qui ne saurait certainement se dérober si, à l'occasion d'un procès, un accusé conteste la validité des résolutions 808 et 827 l'instituant ...".

[5] International Court of Justice Rep. 1986.

that same case, the International Court of Justice pronounced itself on the question whether certain activities were undertaken in the exercise of self-defence. Clearly, the Court thought that the powers of the Security Council on aggression did not prohibit the Court from judging on a case involving that same question.[6] [7]

Concerning the argument that, were the solution of the proposal to be adopted, the Security Council would find itself bound by an obligation which did not derive from the Charter, that is, an obligation to respond whether an act or course of action has been aggression; it should be pointed out that this is an option, not an obligation, which is offered to the Security Council. Such options have been repeatedly offered, by way of international agreements, to the organs of the United Nations, and the Security Council itself has been expressly offered one in the context of the Statute itself, namely article 13 (b), which provides for the referral of a situation by the Security Council to the Court.

Finally, the proposal mentions a period of 12 months after the lapse of which the Court may proceed with the case if there is no determination by the Security Council. Obviously, this period is purely indicative and may be shortened.

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[6] See also A. Pellet, Le glaive et la balance, Rémarques sur le rôle de la C.I.J. en matière de la paix et de la securité internationales, International Law at a time of perplexity, Essays in honour of Shabtai Rosenne, 1989, pp. 539-566.

[7] In this regard, see also the Case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Judgement of 27 February 1998 on preliminary objections.