
**THE CRIME OF AGGRESSION UNDER THE JURISDICTION
OF THE INTERNATIONAL CRIMINAL COURT**

SPEECH OUTLINE

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By WANG, Xiumei¹

According to Articles 121 and 123 of the *Rome Statute*: “After the expiry of seven years from the entry into force of this statute, any State Party may propose amendments thereto... the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute.”² This means the Assembly of the State Parties of the International Criminal Court (ICC) has to complete the amendments to the crimes of aggression enumerated in Article 5 Paragraph 2 of the Statute by its plenary session in 2009. Although the international community has accumulated certain judicial experiences in international trials of crimes of endangering world peace and aggression, and there has been *Definition of Aggression* (UN General Assembly Resolution 3314, 1974) as the customary international law, the consultations on the terms of the crime of aggression seem even more difficult than the ones on the Statute itself, and this has affected ICC’s development to a certain degree. The difficulty could be found from the consultation process of the Statute, and from the negotiations on the definition of the crime of aggression, and on the conditions for the Court to exercise jurisdiction after the Statute came into force in recent years. The definition of the crime of aggression and the conditions for the Court to exercise jurisdiction have become impediments for the Court to exercise substantive jurisdiction over the crime of aggression.

I. On the Definition of the Crime of Aggression

There are two critical aspects within the definition of the crime of aggression: the first one is whether to directly absorb the existing customary international law on aggression crimes into the Statute, or to create new laws on the crime of aggression. The United States prefers the provisions in the 1974 UN General Assembly Resolution of the *Definition of Aggression*,³ so does China. This position was comparatively prevalent during the operations of the Preparatory Committee on the establishment of the Court. However, from the current development of aggression crime definition, the discussions in creating a new law on the basis of UN Resolution *Definition of Aggression* are prevailing. The discussion calls on governments and interested individuals to provide advice on aggression crime definition by way of international treaties or legislation, and several proposals have already been raised. The second critical aspect is about certain terminology in aggression crime definition. The individual act in the aggression crime should be to launch or wage a war of aggression, to conduct an act of aggression, or to use armed force unlawfully, and the individual has to bear the criminal responsibility. Meanwhile, this does not affect the prosecution on the state act of aggression for its international responsibility. From the aspects mentioned above, certain countries raised relevant proposals,⁴ but these proposals were not unanimously agreed upon.

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² The *Rome Statute*, Article 121 and Article 123.

³ Sean D. Murphy, “Contemporary Practice of the United States Relating to International Law International Criminal Law”, *American Journal of International Law*, April, 2001.

⁴ <http://www.chinaembassy.nl/chn/gif/t136059.htm>

1.1 Models in Differentiating Aggression Crime Definition

The bilateral and multilateral treaties forbidding one country's act of aggression over another have been long-existing in the history of international law. After the end of WWI, the Allied Powers attempted the trial of Kaiser Wilhelm II according to the *Versailles Treaty* on his crime of launching the war and endangering peace. Although the trial did not materialise, the definition of aggression was first introduced into international legal documents such as the *Covenant of the League of Nations*, which was part of the *Versailles Treaty*.⁵ Two legal documents relating to the crime of aggression were created during the interwar period, namely the *Treaty of Mutual Guaranty (Treaty of Locarno)* of October 16, 1925, and the *Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Peace Pact, or the Pact of Paris)* of August 27, 1928. The provisions on the act of aggression in those legal documents have been superficial and could not be regarded as international treaties systematically stipulating the crime of aggression. According to the international law principles, the crime of aggression should be regarded as a specific type of international crime,⁶ and the accused state is obliged to bear the international liability of conducting the unlawful act. After WWII, the Nuremberg Trials and Tokyo Trials were the first judicial form in incriminating the act of aggression as an international crime, and the individuals accused of conducting the act of aggression were tried to bear individual criminal responsibilities. The *Definition of Aggression* was passed as the UN General Assembly Resolution 3314 in 1974, and the *Draft Code of Crimes against the Peace and Security of Mankind* was passed by the International Law Commission in 1996. However, the provisions in those international conventions and treaties and the experiences from the judicial practices were not accepted unanimously by the international community. One of the focuses of debates has been the model in differentiating the definition of the crime of aggression: whether it has to be general or specific.

1.2 Elements of Crimes of Aggression

1.2.1 Act Element (actus reus)

Whether the approach of monism or differentiation has to be adopted in demarcating the act element of aggression crime, remains one of the focuses of current debates.

1.2.2 Mental Element (mens rea)

The mental elements of the crime of aggression should only include the acts that are committed with intent and knowledge. As to such serious international crime, it would be difficult to explain that a war of aggression was launched due to negligence and recklessness. However, whether special intent has to be required as the mental element of the crime of aggression has to be further discussed.

⁵ See Article X of the *Covenant of the League of Nations*: "the Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." See *Selected Materials on International Law*, by WANG, Tieya and TIAN, Ruxuan, p. 809.

⁶ See Article 6 (a) of the *Charter of the Nuremberg International Military Tribunal*.

II. Preconditions to the Exercise of Jurisdiction over the Crimes of Aggression

With regard to the conditions for the court to exercise jurisdiction, from the PrepCom to the Preparatory Commission, this issue all along remains as the major difference between the five Permanent Members of the Security Council and the other states. The five Permanent Members all along insist that the determination of the Security Council is the prerequisite for the court to exercise jurisdiction over the crime of aggression and that this content should become an indispensable part of the definition of the crime of aggression. At the 6th session, the positions of some states were rather close to that of the five Permanent Members whereas the other states opposed it to different degrees. China stressed in its intervention that since the precondition for an individual to bear the criminal responsibility is that the state commits an act of aggression, in the absence of a determination by the Security Council on the situation of aggression, the court lacks the basis to prosecute the individual for his criminal liability. Besides, allowing the court to exercise jurisdiction before the Security Council makes the determination was practically bestowing on the court the right of determination on the state act of aggression. This runs counter to the provisions of the Charter. As for the proposal of making the determination by the General Assembly or the International Court, there is no relevant foundation in the Charter. Though the General Assembly could discuss affairs related to international peace and security, on the question of the determination of aggression, the exclusive power the Charter confers on the Security Council is explicit.⁷

2.1 General Conditions to the Exercise of Jurisdiction by ICC

The general conditions to ICC's jurisdiction should comply with the provisions of Article 12 of the Statute.

2.2 Specific Conditions to the Exercise of Jurisdiction by ICC

The specific conditions are divided into two aspects: one aspect is an eligible institution to determine the existence of an act of aggression; the other is the criteria the eligible institution adopts to determine the existence of an act of aggression.

2.2.1 The Exclusive Authority of the Eligible Institution in Determining the Existence of Act of Aggression

Whether the UN Security Council, the UN General Assembly, the International Court of Justice, or even some sovereign states themselves could become an exclusive institution in determining the occurrence of an act of aggression? The author believes that the UN Security Council's determination on the existence of an act of aggression is the specific condition to the exercise of jurisdiction by the ICC, and the Security Council's authority of determination is exclusive and absolute.

First of all, in determining the existence of an act of aggression, the Security Council has the absolute authorisation with the UN Charter and the reinforcement of the Statute.

⁷ <http://www.chinaembassy.nl/chn/gjf/t136059.htm>

Secondly, the Security Council's exclusive authority in determining the existence of an act of aggression could avoid the inconsistency of the determination criteria, therefore it could avoid red tapes among numerous authorised institutions if there are any.

Finally, the Security Council's determination authority is as well subject to the limitation of the Charter and the prescription of the Statute, and is therefore conducive to the independence of ICC. Meanwhile, the Security Council's determination authority plays a supervisory role towards ICC in its judicial operations on acts of aggression, so as to avoid the excessive concentration of power to a single institution.

2.2.2 Elements the Eligible Institution Determines (determination on the existence of state act of aggression, and acceptance of ICC in exercising jurisdiction)

It has been undeniable that the Security Council is itself a political institution, and its decisions not only bear an aspect of justice, but with strong political tints as well. Therefore, perimeters should be set for Security Council's determination on acts of aggression, to keep the nature of justice and to avoid political interference at the same time.