

2009

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Mark S. Ellis

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Recommended Citation

Mark S. Ellis, *Transcript: Jurisdictional and Trigger Mechanisms*, 41 Case W. Res. J. Int'l L. 397 (2009)

Available at: <https://scholarlycommons.law.case.edu/jil/vol41/iss2/8>

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TRANSCRIPT: JURISDICTIONAL AND TRIGGER MECHANISMS

*Mark S. Ellis**

The Frederick K. Cox International Law Center at Case Western Reserve University sponsored a symposium, “The International Criminal Court and the Crime of Aggression,” on September 26, 2008. The purpose of the conference was to assist the ICC Assembly of State Parties’ Special Working Group on the Crime of Aggression create a workable definition of aggression and the conditions under which the Court could exercise its jurisdiction over it. This transcript contains the remarks of Mark Ellis, who moderated a panel discussion featuring Professor David Scheffer, former U.S. Ambassador at Large for War Crimes Issues, and Elizabeth Wilmshurs, former Deputy Legal Advisor for the Foreign & Commonwealth Office (U.K.).

INTRODUCTION

I’ve never been a strong proponent of including the crime of aggression within the Court’s jurisdiction. My fear has been that by including the crime, it will unnecessarily dilute the important and current focus on the crimes of genocide, crimes against humanity, and war crimes. I simply do not feel that these key crimes are sufficiently rooted in the mindset of the international community to add yet another complicated distracting crime. We should instead assist the Court in ensuring that the current three core crimes remain the central focus for the Court so that we can advance the goal of putting an end to impunity for the perpetrators of these crimes and contribute to the prevention of such crimes. The Court is seven years old and has only recently started its first trial (The Prosecutor v. Thomas Lubanga Dyilo). The Court’s recent decision to indict and issue an arrest warrant against a sitting head of state (The Prosecutor v. Omar Hassan Ahmad Al-Bashir) also places enormous pressure on the perceived legitimacy of the Court. And yet, we are spending an extraordinary amount of time on possibly burdening the Court with a new crime that will be controversial and likely unworkable. Finally, I disagree with the argument that the crime of aggression is the ultimate international crime. Genocide, crimes against humanity, and gross violations of the international humanitarian law remain, for me, the “ultimate” international crimes. Unless the crime of

* Executive Director, International Bar Association, London, England.

aggression leads to one of these “associated” crimes, then I simply do not see the crime as having reached this same egregious level of criminality.

OUTLINE OF THE TRIGGER MECHANISM DEBATE

What I will do is very briefly frame the trigger/filter mechanism debate as presented within the Special Working Group on the Crime of Aggression (SWGCA). The SWGCA has focused on three topics (baskets): (1) the crime of aggression—defining the individual’s conduct/the leadership clause;¹ (2) the definition of the act of aggression—defining the act of the state;² and (3) the conditions for the exercise of jurisdiction.³

It is this third basket that is the focus of discussion for this panel. We need to bear in mind that definitional issues and jurisdictional conditions are inter-related; that is, the agreed upon definition may impose a threshold requirement, thereby limiting the Court’s jurisdiction to cases.

WHO SHOULD DETERMINE WHEN AN ACT OF AGGRESSION HAS OCCURRED?

The main debate in negotiations over the conditions for the exercise of jurisdiction focuses on who should determine whether an act of aggression has been committed, and whether this must be determined by an outside body before the Court may proceed.

The Trigger mechanisms of Article 13 include: (1) State Party referrals to the Prosecution; (2) referral to the Prosecution by the U.N. Security Council under Chapter VII of the U.N. Charter; and (3) the Prosecutor’s own initiation of an investigation and prosecution.⁴

Do these mechanisms apply to the crime of aggression? Many states have said “yes.”⁵ However, other states have said that Article 13 would not fully apply to the crime of aggression due to the “special nature” of the crime;⁶ these states have called for the exclusive competence of the U.N. Security Council in determining whether an act of aggression has been committed before the Court can proceed with an investigation. Professor Mark Stein has argued that additional powers should be granted to the Secu-

¹ International Criminal Court, Assembly of State Parties, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/5/35 (Jan. 29–Feb. 1, 2007), annex II, ¶ 6, available at http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Report_SWGCA_English.pdf.

² *Id.* ¶¶ 14–15.

³ *Id.* ¶¶ 23–29.

⁴ Rome Statute of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁵ See Irina Kaye Muller-Schieke, *Defining the Crime of Aggression Under the Statute of the International Criminal Court*, 14 LEIDEN JOURNAL OF INTERNATIONAL LAW 409 (2001).

⁶ See *id.* at 420.

rity Council allowing it to call for a permanent halt to proceedings or even to vacate charges and expunge corrections set by the Court. These approaches would certainly be regarded as a “major filter.”

The issue of prior determination has been central to the debate on the exercise of jurisdiction and the trigger/filter mechanism. One of the main reasons advanced for the necessity of prior determination by an outside body is that it would avoid the politicization of the Court.

Thus, determining the relationship between the Security Council and the Court is the most perplexing challenge in adopting a trigger mechanism. To date, there has been no sign of compromise by the permanent members of the Security Council on this issue. The Permanent five members continue to view the Council as having exclusivity to trigger the Court’s jurisdiction by determining that a state has committed an act of aggression.

SHOULD THE SECURITY COUNCIL EXCLUSIVELY DETERMINE WHEN
AGGRESSION HAS OCCURRED?

Taking into account Article 5(2), which states that the crime of aggression must be determined in accordance “with the relevant provisions of the Charter of the United Nations,”⁷ raises the issue as to whether the ICC depends on a prior Security Council finding of an act of aggression in order to proceed with the investigation and prosecution of a crime. As Ambassador Scheffer has stated, “the Security Council must act before any alleged crime of aggression can be prosecuted against an individual by the ICC.”

The argument is that under Article 39 of the U.N. Charter, the Security Council has exclusive competence to determine an act of state aggression, and the Court cannot proceed with a case without this determination by the Security Council.⁸ Again, as Ambassador Scheffer argues, Article 39 “gives clear, perhaps sole authority for the Security Council to decide on aggression.” Once a determination is made, the ICC Prosecution could investigate any individual who might be responsible in a criminal context.

As concluded by Ambassador Scheffer, the Council would simply not accept a situation in which “the ICC moves forward without deference to the Council’s overall authority with respect to threats to peace.”

However, others argue that Article 5(2) does not require a prior determination by the Security Council and the relationship between the Court and the Security Council is regulated in other parts of the Statute. The argument is that the Security Council has primary, but not exclusive authority to determine an act of aggression; the absence of a prior Security Council determination would not preclude the Court from proceeding with a case.

⁷ Rome Statute, *supra* note 4, art. 5(2).

⁸ U.N. Charter art. 39.

A counter argument is that since the Security Council may already refer a situation to the Court under Article 13, and also defer an investigation by the Court under Article 16, an additional provision for a prior determination of an act of aggression is unnecessary.

For the sake of argument, let us accept that the preferred way for the Court to proceed is to exercise jurisdiction over the crime of aggression after a determination of state aggression has been made by the Security Council. This exclusivity mandate is based on Article 39 of the U.N. Charter: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression . . ." ⁹ It is argued that this exclusive prior determination by Security Council prevents the politicization of the Court, which could occur if the work of the Court becomes closely linked to the work of the Security Council.

Others argue that all existing crimes under the Statute have a political element. As a treaty-based obligation, the Rome Statute is not binding on third parties, unless they have agreed to cooperate with the Court.

DOES THE SECURITY COUNCIL REFERRAL AUTHORITY *PER SE* BLUR THE
DISTINCTION BETWEEN STATE PARTIES AND NON-STATE PARTIES ON THE
DETERMINATION OF AGGRESSION?

Still others have suggested that Article 39 does not say the Security Council has exclusive power to make the determination. Furthermore, if the Security Council had to trigger the Court to proceed, it would erode the sovereign equality of states and place the Security Council in an inappropriate judicial role. Is it permissible to allow permanent members of the Security Council to exclusively make a determination for or against criminal proceedings that may be of interest to them? In essence they become the judge and jury in their own case. In the words of John Dugard, such an exclusive scheme is "unduly deferential to the veto power of the five permanent members of the Security Council."¹⁰ Claus Kress has argued that any rule that would subject legal proceedings for an alleged crime of aggression to the veto power of each of the five permanent members should be rejected as fundamentally flawed.

SHOULD THE GENERAL ASSEMBLY DETERMINE WHEN AGGRESSION HAS
OCCURRED?

Another issue that has been raised is whether other bodies should hold the competence to determine whether or not a state has committed an

⁹ U.N. Charter art. 39.

¹⁰ John Dugard, *Obstacles in the Way of an International Criminal Court*, 56 CAMBRIDGE L.J. 329, 336 (1997).

act of aggression. For instance, would it be appropriate for the General Assembly to possess this responsibility? The General Assembly has, in six situations, declared certain acts as “aggression.” For example, China against Korea in 1951,¹¹ the occupation of Namibia by South Africa in 1963,¹² and Israel against Iran, Lebanon, and the Palestinian People.¹³ Resolutions of the U.N. General Assembly are non-binding but are considered highly persuasive. Most issues are decided by a simple majority, but designated important issues would require a two-thirds vote, which likely would be the case in determining act of aggression. Of course, some experts (e.g., Ben Ferencz) believe that the General Assembly would be more politically driven than the Security Council.¹⁴

SHOULD THE INTERNATIONAL COURT OF JUSTICE DETERMINE WHEN
AGGRESSION OCCURS?

Another judicial body that could hold decision-making authority is the International Court of Justice (ICJ). The ICJ’s role would be to determine whether or not a state has committed an act of aggression—both in the form of judgements, and in the form of advisory opinions (e.g., Nicaragua case, DRC case). It could also play a role by providing an advisory opinion at the request of the General Assembly or the Security Council. The ICJ would reach a preliminary decision on state aggression following a determination by the Security Council that a threat to or breach of peace has occurred. This approach has been advocated by Ambassador Scheffer.

¹¹ G.A. Res. 498 (V), ¶ 3, U.N. Doc. A/327 (Feb. 5, 1951).

¹² G.A. Res. 14/1, ¶ 3, U.N. Doc. A/RES/S-14/1 (Sept. 20, 1986).

¹³ G.A. Res. 36/27, ¶ 2, U.N. Doc. A/56 (Nov. 13, 1981).

¹⁴ See Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression*, 6 WASH. U. GLOBAL STUDIES L. REV., 551, 563 (2007).