

PREPARATORY COMMITTEE ON THE ESTABLISHMENT
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Working Group on Definitions
and Elements of Crime

Proposal by Germany

Article 20

The Crime of Aggression

An Informal Discussion Paper

1. What is the purpose of this paper?

In accordance with its heading, this paper is an attempt to provide some "food for thought" for the continued opinion-building process among members of the United Nations. This process is, in the German view, indispensable for a more consolidated and more consensual definition of the crime of aggression in article 20 of the draft Statute of the International Criminal Court.

Being fully aware of the complexity and the many difficult aspects involved in a definition of the crime of aggression for the purpose of the Statute, the German delegation would be grateful if delegations of Member States could reflect upon the ideas and elements contained in this informal paper and take them into consideration when, at a later stage, we come back to a further debate on the draft consolidated text on the crime of aggression of February 1997 (as contained in UN Doc A/AC.249/1997/L.5, pages 14/15).

2. What is the German approach and position with regard to a definition of the crime of aggression?

Germany continues to support the inclusion of the crime of aggression in the Statute.

Not to include this crime would, in our view, be a regression behind the Nuremberg Charter of 1945, the ILC's Nuremberg Principles of 1950, the ILC's Draft Statute (Art. 20) of 1994 and the ILC's Draft Code of Crimes against the Peace and Security of Mankind of 1996. It would also amount to a refusal to draw an appropriate conclusion from recent history. The German side believes that we need the inclusion of this crime for reasons of deterrence and prevention, and in order to reaffirm in the most unequivocal manner that **the waging of an aggressive war is a crime under international law.**

We continue to favour a **viable self-sustained definition, as short as possible, containing - in accordance with the principle of "nullum crimen sine lege" - all the necessary elements and precise criteria of a full international criminal norm which establishes individual criminal responsibility** for this extremely serious crime of concern to the international community as a whole.

In accordance with historic precedents the definition in question should focus on and try to cover **only the obvious and indisputable cases of this crime** (such as the aggressions committed by Hitler and the one committed against Kuwait in August 1990*). This limitation seems indispensable, in particular for the following reasons:

- **It is of utmost importance that the definition does not lend itself to possible frivolous accusations of a political nature against the leadership of a Member State.**
- **It must be avoided that the definition somehow negatively affects the legitimate use of armed force in conformity with the Charter of the United Nations whose necessity - maybe unfortunately - cannot be ruled out in the future.**

At the same time, the inclusion of the crime of aggression should leave unimpaired the primary responsibility of the Security Council for the maintenance of international peace and security in accordance with Articles 24 and 39 of the Charter. Therefore, **the inclusion of Article 23 para. 2 of the ILC draft statute ("A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint") remains an integral part of the German position.** In our view, this provision could also be described as a merely declaratory clarification of the existing legal situation under the Charter.

On the other hand, we firmly believe that the inclusion of the formulation proposed in February "as determined by the Security Council" (see UN Doc./A/AC.249/1997/L.5, p. 14) in the definition of the crime of aggression itself is inappropriate and not acceptable. It would ruin the concept of a self-sustained, autonomous definition of the crime of aggression.

We share the view expressed by many delegations that **the armed attack on the territorial integrity of another State without any justification represents indeed the very essence of the crime of aggression.** While criminal norms concerning genocide, war crimes and crimes against humanity aim at protecting human life or physical integrity, a provision on the crime of aggression protects basically the territorial integrity of states from flagrant and wilful violations through means of war even if genocide, war crimes or crimes against humanity should not occur. In (the probably more frequent) cases where aggression entails war crimes and crimes against humanity, the importance of such a provision lies in the individual criminal responsibility it establishes for the political and/or strategic military leadership of a state: **While war crimes or crimes against humanity committed in the field will often be difficult to be imputed to leaders in the centres of command, a provision on aggression aims exclusively and directly at those responsible for the war as such. In such a situation, it may prove to be the only basis for holding them responsible. Aggression is, in our view, by definition a "leadership crime".**

* It should be noted that the Security Council, while reacting very strongly to the invasion and annexation of Kuwait upon the orders of Saddam Hussein, in its relevant resolutions did not use the specific term "act of aggression" as contained in Article 39 of the UN Charter.

Within the general framework of these parameters, the German delegation remains open and flexible with regard to any further suggestions concerning the definition of the crime of aggression. In the end, what will be decisive, is to achieve a consensus as broad as possible on a definition that will be included in the Statute.

3. Why do we need further discussions and consolidation efforts with regard to the enclosed "draft consolidated text" on the crime of aggression?

In the German view, the progress achieved at the February 1997 session of the PrepCom in the direction of a more consensual and consolidated definition on the crime of aggression was significant and encouraging.

Nevertheless, the draft consolidated text still contains numerous brackets and many unresolved issues. In general, the current situation might be described as follows:

- There continue to be some States which seemingly have reservations and concerns with regard to the inclusion of aggression in the Statute;
- Within the group of those States supporting the inclusion of aggression in the Statute there continue to be some differences of view concerning specific elements of the definition in question.

The German side believes that in this particular situation it will be significant and helpful if those supporting the inclusion of aggression in the Statute continue and intensify their efforts to narrow down existing differences of view with regard to specific elements of the draft definition of aggression. Such progress in the direction of a more consolidated and more consensual text will also lead to greater clarity with regard to the essential elements of such a definition. Consequently, this may also alleviate some concerns on the side of those Member States which for the time being still have reservations with regard to the question of inclusion of the crime of aggression.

In this sense, we would like to bring about, if possible, a situation

- in which, ideally, the definitional problem as such is solved or is as close as possible to a viable solution;
- in which the sole remaining issue to be solved would be the question of the inclusion of Article 23 para 2 of the ILC Draft Statute concerning the responsibility of the Security Council (see section 2 above).

4. Should the definition of the crime of aggression include a full enumeration of the acts constituting aggression as contained in General Assembly resolution 3314 (XXIX) of 14 December 1974?

In our view this is a crucial question. It should not be left open and pending for too long as the decision on this question - as it seems - may influence the extent of general acceptance of the inclusion of the crime of aggression in the draft Statute.

In 1974, the German side joined and welcomed the consensus with regard to General Assembly resolution 3314. We continue to attribute great importance to this resolution.

On the other side, we have not failed to note some of the **critical arguments** against the use of the enumeration contained in res. 3314 for the purpose of defining aggression in a norm establishing individual criminal responsibility. We believe that these arguments need serious consideration, in particular with regard to the following questions:

- What about the argument that resolution 3314 was adopted in a different context, of a political nature, for a different purpose, as a political compromise achieved after long and painful debates?
- At the adoption of resolution 3314, was the possibility taken into consideration that this text, in particular the wide-ranging enumeration contained in article 3 of the annex of resolution 3314, might later be used for a criminal norm establishing individual criminal responsibility for the crime of aggression?
- Should a norm establishing individual criminal responsibility fulfill stricter standards of legal precision, clarity and certainty than a political resolution of the General Assembly?

A thorough debate of these questions would seem appropriate.

5. How might a consolidated definition of the crime of aggression - as outlined in this paper - eventually look?

For illustrative purposes, we would like to present tentatively a further amended version of the draft definition of the crime of aggression indicating - in accordance with our current thinking - the possible content of such a definition (follows text):

"Crime of aggression

1) For the purpose of the present Statute, the crime of aggression means either of the following acts committed by an individual who is in a position of exercising control or capable of directing political or military action of a State:

- (a) initiating or
- (b) carrying out

an armed attack directed by a State against the territorial integrity or political independence of another State when this armed attack was undertaken in manifest contravention of the Charter of the United Nations and resulted in the effective occupation by the armed forces of the attacking State or in the annexation by the use of force of the territory of another state or part thereof.

2) Where an act under paragraph (1) has been committed, the

- a) planning
- b) preparing or
- c) ordering

thereof by an individual who is in a position of exercising control or capable of directing political or military action of a State shall also constitute a crime of aggression."

Explanatory remarks:

- It should be noted that the formulation beginning with the words "and resulted..." is drawn from resolution 3314, annex, article 3 a). The incorporation of this additional element would be in line with the view expressed by many delegations that the deliberate armed attack on the territorial integrity of another State in contravention of the United Nations Charter represents indeed the essence of the crime of aggression. The qualifying requirement that the armed attack in question must have resulted in an effective occupation or an annexation seems to be therefore quite appropriate and is also in line with historic precedents of the crime of aggression. It is a compromise that singles out the most important example without specifically incorporating each illustration listed in the definition of 1974.

- The new structure of the provision, now consisting of two paragraphs, emphasizes that the acts of planning, preparing or ordering are punishable only when the armed attack in question has occurred.