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The art of compromise

An analysis of the discourse that led to the creation of article
15*bis* of the Rome Statute.

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Abstract

This Sociology of Law thesis looks at the negotiation process that took place within the Special Working Group on the Crime of Aggression between 2004 and 2009 and which led to the creation of article 15*bis* of the Rome Statute. The article sets out the rules regarding the International Criminal Court's jurisdiction over crime of aggression cases, referred to it by States or initiated by the Prosecutor of the Court. Foucauldian theories on the effects of power on the production of knowledge and the productivity of discourse were used to analyse the process, in order to gain an understanding for how the debate on this issue developed in the way it did. It was found that the negotiation process contained many conflicting views on what the Court's jurisdiction should be. Power was used in a strategic way by delegations to work towards their specific aim, and the visibility of different institutions shaped the way in which the discourse could be conducted. This meant that many compromises had to be made throughout the process in order to finally be able to reach an agreement regarding the Court's jurisdiction on the crime, in time for the Review Conference held in 2010.

Key words: International Criminal Court, Rome Statute, crime of aggression, jurisdiction, power-knowledge, discourse, archaeology

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Abbreviations

ASP Assembly of State Parties

ICC International Criminal Court

ICJ International Court of Justice

SWGCA Special Working Group on the Crime of Aggression

UN United Nations

UNGA United Nations General Assembly

UNSC United Nations Security Council

Terms used in this thesis

For the purpose of this thesis, a 'crime of aggression' is to be understood as:

“the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”¹

A *proprio motu* investigation refers to investigations initiated by the Prosecutor of the International Criminal Court “on the basis of information on crimes within the jurisdiction of the Court received from individuals or organisations”².

A case brought to the attention of the Court by State referral describes the situation where a case is referred to the Court by a State Party of the International Criminal Court (ICC)³.

The Special Working Group on the Crime of Aggression (SWGCA) describes a group which was set up as a result of the Preparatory Commission of the International Criminal Court failing to arrive at a decision regarding the definition and jurisdiction of a crime of aggression in 1998. It was open to all United Nations Member States, as well as to civil societies, and held several debates between 2004 and 2009, the results of which were debated at the Review Conference held in Kampala, Uganda in 2010.

¹ UN General Assembly, *op. cit.*, article 8bis, paragraph 1, p. 9

² The International Criminal Court. Situations and cases. Accessed 11-08-2013.

³ *Ibid.*

1. Introduction

1.1 The jurisdiction of the International Criminal Court on the crime of aggression

The International Criminal Court (ICC) was established on the 1st of July 2002. The Court was set up with the aim of prosecuting “the perpetrators of the most serious crimes of concern to the international community”⁴, and became the first independent, permanent, international criminal court. The Court’s rules were set out in its Rome Statute, which stated that the Court had jurisdiction to investigate and prosecute crimes of genocide, crimes against humanity, war crimes, and the crime of aggression⁵. Cases regarding these crimes could be referred to the Court in one of three ways: either through State referral, through initiation by the Prosecutor (*proprio motu* investigations) and lastly via referral from the United Nations Security Council (UNSC). Regarding the first two methods of referral, at least one of the parties involved had to be a member state of the ICC in order for the Court to proceed with the case. This was due to the understanding that the Court should respect the sovereignty of States, and thus could only exercise jurisdiction over those States which had accepted its Statute. Cases referred to the Court via the UNSC did not require the consent of those under investigation, and referrals could be made against or on the behalf of States that were not members of the ICC. This provision had been inserted to reflect the special position the UNSC had in maintaining world peace, as set out in its Charter.

Despite being included in the original Statute, the Court did not actually have jurisdiction over the crime of aggression when it was established in 2002 – this because the Preparatory Commission of the ICC had not been able to arrive at a decision regarding the definition of the crime, nor reach an agreement on when the Court’s jurisdiction would apply. Nevertheless, it was agreed that the Court should work towards including this crime in its Statute, and a paragraph was inserted stating that the Court would:

“exercise jurisdiction over the crime of aggression once a provision [was] adopted [...] defining the crime and setting out the conditions under which the Court [should] exercise jurisdiction”⁶.

A special working group – the Special Working Group on the Crime of Aggression (SWGCA) – was set up to fulfil this aim. The group was to arrive at a solution one year before the Court’s first Review Conference, which was to be held in 2010.

After several years of debate a definition on the crime was adopted. Furthermore, two new articles concerning the Court’s jurisdiction over the crime (article 15*bis* and article 15*ter*) were inserted. These articles set out rules regarding when the Court could exercise its jurisdiction over crime of aggression cases, which differed from the ones that applied for the other crimes under the Court’s jurisdiction. Article 15*bis* – which dealt with the Court’s jurisdiction regarding crimes referred to it by States or started by the Prosecutor – was especially different. The article limited

4 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, article 5, p.3

5 Ibid.

the Court's jurisdiction in that it could not proceed with cases concerning a crime of aggression committed by a State Party if said State had declared that it did not accept the Court's jurisdiction over this crime⁷. Furthermore, the Court did not have jurisdiction over a crime of aggression committed by a national from a non-member State, as well as not having jurisdiction over a crime of aggression committed on the territory of a non-member State⁸. The Prosecutor would also have to ascertain whether the UNSC had "made a determination of an act of aggression"⁹ before proceeding with a certain case. If the UNSC did not make such a determination within six months, the Court could still proceed with the case, provided that its Pre-Trial division had "authorized [*sic*] the commencement of [an] investigation in respect of a crime of aggression"¹⁰. The rules governing cases brought to the Court via UNSC referrals (included in article 15*ter*) remained the same.

The amendments regarding the crime of aggression will enter into force following a decision taken by State Parties to activate the jurisdiction. This decision is to be taken after the 1st of January 2017¹¹. Furthermore, the amendments will only begin to apply one year after thirty State Parties have ratified or accepted them. So far, six States have ratified the amendments, specifically: Liechtenstein, Samoa, Trinidad and Tobago, Luxembourg, Estonia and Germany¹².

1.2 Relevance, aim and research questions

The above introduction shows that the article governing the Court's jurisdiction when it comes to State and Prosecutor referrals of crimes of aggression (article 15*bis*) is markedly different from the jurisdiction that applies to the other crimes included in the Court's Statute. Because of this, the article has been met with much debate, where the debate can be split into two main camps. On the one side, there are those who view the article as suspicious due to the fact that it limits the ICC's jurisdiction whilst at the same according the UNSC a higher level of involvement in these cases. On the other side, there are those who view the Kampala amendments as an important step towards ending impunity for the crime of aggression, and which praise the Court for finally having arrived at an agreement that was adopted by consensus. However, when reading the discussions around this article I found that there was a lack of any research based arguments. There was specifically no research which looked at the negotiation process within the group (namely the Special Working Group on the Crime of Aggression) responsible for the creation of the article. I believe that this is a relevant field of research, as it could help in gaining a further understanding for the International Criminal Court and the challenges faced by it, as well as shedding some light on a part of the Court that as of yet has not been looked at in detail. In

6 Ibid., see footnote, p.3

7 UN General Assembly, *op. cit.*, article 15*bis*, paragraph 4, p. 12

8 Ibid., article 15*bis* paragraph 5, p. 12

9 Ibid., article 15*bis* paragraph 6, p. 12

10 Ibid., article 15*bis* paragraph 8, p. 12

11 Ibid., article 15*bis*, paragraph 3, p. 12

12 The global campaign for the ratification and implementation of the Kampala amendments on the crime of aggression. Status of ratification and implementation. Accessed 05-07-2013

looking at the discourse which led to the creation of this controversial article, I hope to be able to add to the discussion surrounding its merits and limitations, by providing an understanding for how it came to be.

The aim of the thesis is therefore to gain an understanding for the debate which took place within the SWGCA, particularly regarding discussions that led to the paragraphs which:

- 1) limit the Court's jurisdiction regarding the crime of aggression to cases where all parties involved have ratified the amendment (article 15*bis*, paragraphs 4 and 5), and,
- 2) state that the Court must ascertain whether the UNSC has made a determination before it can proceed with an investigation, and if such a determination is not made, proceed with an investigation as long as the Pre-Trial Chamber of the ICC consents (article 15*bis*, paragraph 6 to 8)

This will be done by conducting an archaeological discourse analysis of the documents from the negotiation process within the "Special Working Group on the Crime of Aggression", which took place between 2004 and 2009.

I will be answering the following research questions:

1. How did the discourse around these paragraphs develop within the SWGCA?
2. How can Foucault's theory on power-knowledge be used to explain this development?
3. In what way can Foucault's theory on the productivity of discourse and the interaction between discourse and visibilities, help in understanding how the final paragraphs were produced?

The material will then be analysed using Foucault's theory on power-knowledge, which describes the dual relationship between power and knowledge, and his theory on the productivity of discourses.

2. Theory

In this section I will describe the two theories that I have used to analyse the material collected. Both theories were developed by the French historian and philosopher Michel Foucault.

2.1 Choice of theory

Although Foucault was not a sociologist of law, and mostly did not concern himself with accounts of the law and its effects¹³ I found him to be relevant for a Sociology of Law thesis. His theories account for ways in which society and its institutions are produced, by accounting for power relations within society and their effect on the production of knowledge, as well as accounting for the way in which discourse is involved in shaping the world around us. These theories are suited to Sociology of law, as they offer another way of analysing the relationship between societies and law which concerns itself with looking more at the effects of history and the past on the present.

In writing this thesis, I wished to steer away from the usual discussion around the ICC, which in general concerns itself with discussing to what extent it is controlled by certain countries or by the UNSC. Although these are valid discussions, I would like to offer an account of the development of the article which does not centre on these ideas but which would try to remain more neutral. Because of this, Foucault's theories seemed a perfect fit.

The theories were further selected as they concern themselves with explaining discourse and its ability to produce the visible elements of society. The theories are not specifically developed to be used in explaining how laws are shaped; however, as laws are part of the visible elements of society in that they impact our behaviour and our relation to our selves, others and the surrounding world, I believe that the theories are well suited nonetheless.

The remaining part of this section offers an account of the theories that I will be using.

2.2 Discourse and Power-Knowledge

2.2.1 Discourse

Discourse generally describes "written or spoken communication or debate"¹⁴. Foucault adds more depth to this definition by presenting the view that the discourses that occur have the ability to produce or change the subject they are discussing¹⁵. Furthermore, different types of discourse (termed "discursive formations") exist, and these can be separated from one another based on that the objects which the discourse produces "finds in it [the discourse] its place and law of emergence"¹⁶.

13 Wickham, Gary (2010) "Foucault and law", in R. Banakar & M. Travers (Red.) An introduction to law and social theory, p. 248

14 Definition found in Oxford Dictionaries

15 Kendall, Gavin & Wickham, Gary (1999) Using Foucault's methods. Thousand Oaks, California: SAGE Publications Inc., p. 34

16 Foucault, Michel (1972) The archaeology of knowledge. Great Britain: Tavistock Publications Limited, p. 44

When discussing discourse and its effects, Foucault speaks of the interplay between the sayable and the visible, where the visible refers to those “non-discursive” elements of society (such as our bodies and different institutions) which we can observe, and which we perceive as being tangible; and the sayable denotes the discourse. By saying that the two terms are connected to one another, Foucault is stating that, not only are visibilities produced by the sayable (the discourse), but that these in turn have an effect on discourses in that they define what can be spoken about and in what way. The fact that discourse produces the subject of discussion does not however mean that the visible, “non-discursive” elements did not exist prior to them being spoken about – simply that the way in which they are viewed and their meaning, stems from the discourse surrounding them – nothing exists in a “discursive vacuum”¹⁷.

Foucault also presents the understanding that there is “no inside” to discourse – meaning that there is no deeper meaning hidden behind what is said, a meaning that can be tied to a certain person or that person’s thought process. Thought is not to be understood as some higher thing – instead, it is simply a term used to denote the “material surfaces of appearances”¹⁸, which result from the operations of discourse.

2.2.2 Power-Knowledge

”There are two major effects of power: first, that power draws out and induces the conditions under which it increasingly comes into play, and second the increasingly dense relation between power and the production of truth”¹⁹.

Foucault's understanding of power differs from the more “traditional” view in the way that power is not only seen as something negative, or as something that is used repressively. Instead, Foucault's notion of power states that power, in much the same way as discourse, is productive (it produces knowledge) and a strategy employed to “keep things going”²⁰. It is not a thing in itself, but simply the term “that one attributes to a complex strategical situation in a particular society”²¹. Power is a strategy which maintains “a relation between the sayable and the visible”²², which, as well as being the two components of discourse, constitutes the two “poles” of knowledge. There is therefore a relationship between power, discourse and knowledge, where power acts on discourse and controls what is said and produced and what is adopted as knowledge. “A power relation is a discursive relation”²³.

The sayable within a society bears more weight than the visible – there are more statements made than visibilities. If taken like this, it would seem that visibilities would be in danger of exhaustion. This is however not the case. Foucault's understanding of power and knowledge

17 Kendall, Gavin & Wickham, Gary, op. cit., p. 38

18 Ibid., p. 37

19 Barker, Philip (1998) Michel Foucault: an introduction. Edinburgh: Edinburgh University Press, p. 28

20 Kendall, Gavin & Wickham, Gary, op. cit., p. 48

21 Barker, Philip, op. cit., p. 27

22 Kendall, Gavin & Wickham, Gary, op. cit., p. 48

23 Ibid., p. 48

serves in trying to explain how the visible is not exhausted by the sayable, despite the latter's "primacy" over the other²⁴. Foucault states that the two poles of knowledge – the visible and the sayable – find themselves in a state of constant conflict. They "insinuate themselves inside the relation between the other and its conditions"²⁵ and are therefore involved in a "double relation". In this way, the visible is not exhausted by the sayable, as the two are influenced by each other in terms of the ability for them to exist.

Furthermore, power does not belong to a certain group of people; it is not the "prerogative of 'masters'"²⁶. Instead, "power comes from everywhere"²⁷, and circulates between all individuals in society²⁸. Because of this, all individuals both experience and exert power at the same time. We are therefore all involved in the production and maintenance of power, whilst at the same time the way in which we view ourselves and the world around us is shaped by the power in society. Power occurs via forces, where forces are understood as the "actions upon actions of others"²⁹. It requires that all parties to the power relation are "recognised and sustained as a person who can act"³⁰. In this way, power is not something that one can be repressed by, as power existing between two individuals assumes that both can act freely – whether this be in agreement with each other or not. In fact, Foucault states that power can only exist in situations where there is resistance to it³¹, this because resistance creates a new form of discourse, which therefore sets out new forms of knowledge, which in turn influence the forces of power.

Power is intentional, as individuals use power as a strategy to drive a certain action in society and therefore calculate the aims they wish to achieve. However, power is unreliable in that you cannot predict its exact effects – this because the effects of power are related to the knowledge available, which is constantly changing³². Power is not constant, but instead changes with time. This offers an optimistic view of power, as it suggests that all knowledge and power can be changed and innovated by subjects. However, these subjects are never fully in control of power, and seeking to find the meaning of power by searching for the individuals responsible for the power is not possible according to Foucault, as no one individual or organisation controls it³³.

24 Ibid., p. 48

25 Kendall, Gavin & Wickham, Gary, op. cit., p.50

26 Ibid.

27 Barker, Philip, op. cit., p.27

28 Ibid., p. 28

29 Kendall, Gavin & Wickham, Gary, op. cit., p. 48

30 Ibid.

31 Ibid., p. 50

32 Barker, Philip, op. cit., p. 38

3. Method

3.1 Choice of method

The choice to use Foucault for theory and method came from the fact that whilst reading his works it became clear that his theories and methods are dependent on one other. His understanding of discourse influences how his method for discourse analysis is used and his theory on power and its relationship with knowledge and discourse gives a further understanding on how to apply certain parts of the method. For example, part of the method of archaeology deals with describing how certain statements are possible within a discourse and this can be explained by using his theory on power and how it controls what is said. Because of this, the method is not just used to collect material which is then later analysed – instead, analysis was done throughout the whole process.

Foucault did not write at great length on how he intended for his theories and methods to be used. This leaves a lot of room for interpreting how they should be used, to accommodate the specific research being done. My understanding is based on Foucault's works and method books by other authors, but is in no way a complete representation of everything that he stood for. I chose to use his method of "archaeology" as I thought it suited the material that I was investigating, seeing as I was planning to look at archives of discourse.

The remaining part of this chapter is split into two sections, where the first part deals with the definition and explanation of the method of archaeology, and the second part describes how this method was used together with the theories for the purpose of this thesis.

3.2 Archaeology

Archaeology is a method developed by Foucault in order to analyse discourse – more specifically, to analyse how discourses from the past have led to and shaped the present. It looks at statements as they occur in "the archives of discourse"³⁴, where archive is defined as "the collection of all material traces left behind by a particular historical period and culture"³⁵. Archaeology is characterised as a non-interpretive method, one which does not look for the "thoughts, representations, images, themes, preoccupations that are concealed or revealed in discourses"³⁶, but which instead concerns itself with viewing the "material conditions of thought and knowledge"³⁷ – or, the elements that have made the discourse possible. This stems from Foucault's critique of analysis and research "lend[ing] speech to those traces which [...] are not verbal"³⁸. The method builds on the principle that "*everything* is never said"³⁹, and therefore aims

33 Ibid.

34 Kendall, Gavin & Wickham, Gary, op. cit., p. 24

35 www.michel-foucault.com. Accessed 17-07-2013

36 Foucault, Michel, op. cit., p. 138

37 Kendall, Gavin & Wickham, Gary, op. cit., p. 35

38 Foucault, Michel, op. cit., p. 7

39 Ibid., p. 118

at explaining why only certain statements emerge and what the relationship between different statements is⁴⁰, as well as how the particular statements are reproduced and changed over time⁴¹. As discourses act upon the visible elements of society, archaeology also concerns itself with trying to understand how these visibilities are shaped by the discourse, and how they in turn make statements possible.

Lastly, archaeology tries to avoid seeking “meaning in human beings”⁴² and therefore does not account for the author behind the particular statement being investigated.

3.3 The process for this thesis

The archive analysed in this thesis is the Special Working Group on the Crime of Aggression’s archive which contains reports, non-papers and discussion papers issued by the group at different meetings, held between 2004 and 2009.

As archaeology is aimed at explaining the present by referring to past discourse, I began by indentifying the statements within article 15*bis* that I would be investigating and that make up the present understanding (or knowledge) of when the Court has jurisdiction regarding crime of aggression cases referred to it by States or initiated by the Prosecutor. These were paragraphs 4 to 8 of article 15*bis*. These paragraphs were selected after having read through the SWGCA documents on the basis that the highest amount of discussion had occurred surrounding the issues addressed by these paragraphs. The remaining paragraphs, however interesting, were not as fiercely debated and were thus excluded from this thesis as there would have been very little material to analyse.

The paragraphs selected can be split into two categories, where the first two paragraphs deal with limitations on Court jurisdiction over certain States regarding crime of aggression cases referred by States or initiated by the Prosecutor (category 1), and the remaining three paragraphs deal with the Court’s relationship with the UNSC for crime of aggression cases brought to the Court’s attention via these methods of referral (category 2).

The collection of statements was done in chronological order, from the oldest document to the latest one. For each document, I read through and highlighted the sections that had to do specifically with jurisdiction (the SWGCA also held talks on what the definition of the crime should be, so I sorted out discourses regarding this). I then went through this text and searched for statements that seemed relevant for the two categories that I had established previously (described above). I determined which statements were relevant based on if they made any reference to either jurisdiction over States (for category 1) or the UNSC (for category 2). I compared each document to previous ones, to see which statements were repeated, which disappeared, or if any new statements appeared. The findings from this are presented in the

40 Kendall, Gavin & Wickham, Gary, *op. cit.*, p. 33

41 *Ibid.*

42 *Ibid.*, p. 26

material section, and give an understanding on the development of the article over the years (this answers my first research question).

I then applied Foucault's theories to try to gain an understanding for why these specific statements emerged and certain statements changed over time, and why certain ones disappeared, by using his theory on the effects of power on the production of knowledge. This answers my second research question. I also analysed the effects of any visibilities on the discourse, in order to answer my third research question. I took the visibilities that were relevant for this research as being the ICC, the UNSC and the ICJ, as these were the three institutions that were referred to throughout the discourse, and for which I could gain an understanding on how their structure and role was perceived by those involved in the discourse.

4. Material

This section describes the development (in chronological order) of the discourse which led up to the creation of article 15*bis*, paragraphs 4 to 8. I refer to those involved in the discourse as “delegations”, as this is how they are referred to in the documents. The documents do not specify which delegation represented which country – something which could be perceived as negative as it prevents any discussions around which country or countries governed the debates. However, seeing as the method and theory used in this thesis both aim at not searching for hidden meanings and authors behind particular statements, and seeing as I wanted to avoid that type of discussion, this did not pose a problem.

4.1 Chronological account of the discourse around the Court’s jurisdiction

4.1.1 The discourse in 2004

The first document available is a report from an informal inter-sessional meeting of the SWGCA, held between the 21st and the 23rd of June 2004⁴³. The meeting was set up with the aim to discuss around the issues surrounding the definition of the crime of aggression, as well as the jurisdiction of the Court over this crime. These issues had emerged during the work of the Preparatory Commission of the International Criminal Court, back when the Rome Statute was first being drafted. These issues were summarised in a Discussion Paper dating from July 2002⁴⁴. Regarding jurisdiction, the discussion paper stated that:

“Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned”⁴⁵.

If no determination had been made, the Prosecutor must contact the UNSC, so that it could “take action, as appropriate, under Article 38 of the Charter of the United Nations”⁴⁶. Different options were given regarding what the ICC should do if the UNSC determined that no act of aggression had occurred: the Court could proceed with the case anyway, the Court should dismiss the case, the Court could ask the General Assembly of the United Nations (UNGA) to “make a recommendation”⁴⁷ regarding whether or not an act had occurred, or it could ask that either the UNSC or the UNGA contact the ICJ and ask them to make a determination⁴⁸.

It was further argued that any decision on the Court’s jurisdiction must complement the power that the UN already had in working against the crime of aggression. Certain delegations felt that

43 ICC-ASP/3/SWGCA/INF.1

44 PCNICC/2002/WGCA/RT.1/Rev.1

45 PCNICC/2002/WGCA/RT.1/Rev.1, p. 1

46 Ibid.

47 Ibid., p.2

48 Ibid., p.2

the UN, and particularly the UNSC, retained exclusive right in determining whether an act of aggression had occurred, as article 39 of its Charter stated that the UNSC was responsible for determining “the existence of any threat to the peace, breach of the peace or act of aggression”⁴⁹. “This exclusive competence [had to be] respected in the provisions on the crime of aggression”⁵⁰. However, other delegations felt “strong reservations”⁵¹ regarding any level of UNSC involvement, on the basis that it might “undermine the autonomous definition of the crime of aggression”⁵², particularly with regards to the permanent members of the UNSC, as these could “veto a proposed determination that an act of aggression had occurred and thus block criminal investigations”⁵³.

At the inter-sessional meeting, discussion was held on whether the new provision on the crime of aggression should automatically apply to all States that were party to the Rome Statute, or whether they could choose to “opt out”. The difference of opinion occurred due to different understandings on how to interpret article 121 of the Statute, which deals with how amendments to the Statute come into effect. There was a split regarding whether amendments should start to apply for all signatories one year after seven-eighths of State Parties had accepted the amendment, as was stated in article 121 paragraph 4; or whether each country would have to declare its acceptance of the Court having jurisdiction to prosecute its nationals or acts on its territory regarding the crime, as was given in article 121 paragraph 5. Some delegations meant that paragraph 5 should be used, as this paragraph had been “drafted with the issue of aggression in mind”⁵⁴. Those who called for the use of paragraph 4 stated that this was the better option, as it would keep States from “opting-out” of jurisdiction over solely the crime of aggression – something that was not desirable as it was felt that the crime of aggression needed to be “treated in the same manner as the other crimes”⁵⁵.

4.1.2 The discourse in 2005

A second informal inter-sessional meeting was held between the 13th and 15th of June 2005. Much the same debate as in the previous meeting took place regarding if States should be allowed to “opt out” of Court jurisdiction over the crime of aggression. States had been aware upon signing the Rome Statute that the crime of aggression was to be included, and had therefore already “accepted [the Court’s jurisdiction over it] by becoming parties thereto”⁵⁶. Therefore, they should not have the option to “opt out” of this crime. It was again argued that the crime of aggression “should not be treated differently from the other crimes within the jurisdiction of the Court”⁵⁷. In retaliation, it was stated that it had not at the time of the drafting of the Rome Statute been

49 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII, article 39

50 ICC-ASP/4/SWGCA/INF.1, p. 368

51 Ibid.

52 Ibid.

53 Ibid.

54 ICC-ASP/3/SWGCA/INF.1, p. 6

55 Ibid.

56 ICC-ASP/4/SWGCA/INF.1, p. 360

57 Ibid

understood “what specific problems”⁵⁸ were posed by the crime of aggression – therefore, States should be allowed to choose whether they accepted jurisdiction over this crime or not, without needing to withdraw from the Statute completely.

4.1.3 The discourse in 2006

Debate continued regarding whether or not the UNSC should be involved in determining whether an act of aggression had occurred, before the Court was allowed to proceed with the case. Some delegations felt that it was not “within the jurisdiction of the Court to decide whether an act of aggression had occurred”⁵⁹ – therefore, another organ needed to be responsible for this step. Others were opposed to increasing the involvement of the UNSC, as they already had the possibility “to request the deferral of an investigation or prosecution by the Court”⁶⁰, and that article 13(b) of the Statute “dealt sufficiently with the role of the Security Council”⁶¹. Furthermore, it was questioned whether the UNSC should be involved in Court proceedings to that extent, as the UNSC and the ICC had different “prerogatives”⁶², when it came to the crime of aggression; the UNSC made determinations of whether an act of aggression had occurred, in order to take action and stop the situation from developing; whereas the ICC’s purpose was to prosecute individuals responsible.

Because of the disagreement surrounding UNSC involvement, it was suggested that other organs could be responsible for determining whether an act of aggression had occurred. The ICJ was offered as an alternative, as they had a similar function to the ICC and had previously made rulings concerning acts of aggression (although only against States and not individuals). The UNSC on the other hand, had rarely “used the term ‘aggression’ in its past”⁶³. This idea was also met with resistance, as the ICJ applied “different standards of proof than the Court”⁶⁴, which would slow down proceedings and lead to “duplication of effort”⁶⁵.

Because certain delegations were opposed to the UNSC having to make determinations of whether an act of aggression had occurred when they had never done so in the past, it was suggested that the UNSC would not need to make such a determination for the Court to proceed with an investigation, but instead could just give the Court a “green light”⁶⁶, i.e. show that they approved of a case being opened.

There was also discussion regarding whether or not a determination of an act of aggression by the UNSC should be binding on the Court, or if it should just be taken as a recommendation.

58 ICC-ASP/4/SWGCA/INF.1, p.360

59 ICC-ASP/5/SWGCA/INF., p. 13

60 Ibid., p. 11

61 Ibid., p. 10

62 Ibid.

63 Ibid., p. 12

64 Ibid., p. 11

65 Ibid.

66 Ibid., p. 12

“Many participants voiced a strong preference for a determination that was open for review by the Court”⁶⁷, whilst others felt that the Court should not be allowed to proceed with a case, if the UNSC determined that no act of aggression had occurred. This was in keeping with opinions that had already been stated in the 2002 discussion paper⁶⁸.

The working group met again between the 23rd of November and the 1st of December 2006. The report issued from these meetings stated that opinions continued to differ:

“as to whether the exercise of jurisdiction over the crime of aggression should be conditioned on a prior determination of the act of aggression by the Security Council or another body outside the Court”⁶⁹.

It was suggested that the Pre-Trial Chamber could review cases brought to the Court by a state referral or via the *proprio motu* powers of the Prosecutor, in situations where the UNSC had not made a prior determination on an act of aggression concerning the case. This was suggested in order to provide an “additional filter against politically motivated action”⁷⁰. The suggestion was met with some concern as it felt that this would “involve the Court in political determinations which should be left to the Security Council”⁷¹.

There was no discussion regarding the Court’s jurisdiction over States.

4.1.4 The discourse in 2007

By the third inter-sessional meeting, held between the 30th of November and the 14th of December 2007, statements regarding UNSC involvement in determining whether an act of aggression had occurred as a prerequisite for the Court to proceed with a case, had evolved into discussing the UNSC as only one out of several options. However, statements were still issued maintaining the view that the Security Council should have “exclusive competence”⁷², as this would “protect the Court from accusations of political bias”⁷³. This was in contrast to earlier statements, which had expressed doubts over involving the UNSC as they were a political body whose involvement could thus politicise the ICC.

Furthermore, it was stated that any such determination should not be required for the Court to proceed with a case. “Organs outside the International Criminal Court should get an opportunity to express themselves”⁷⁴, however, the Court should still be able to continue with its work if “this opportunity [was] not taken.”⁷⁵ The statements had evolved from describing the involvement of

67 Ibid., p. 13

68 PCNICC/2002/WGCA/RT.1/Rev.1

69 ICC-ASP/5/SWGCA/1, p. 2

70 Ibid.

71 Ibid.

72 ICC-ASP/6/SWGCA/INF.1, p. 6

73 Ibid.

74 Ibid., p. 19

75 Ibid.

the UNSC as something that was necessary for the Court to begin its investigations, to describing it as an involvement that was based on expressing courtesy.

The discussion regarding a “green light” option was continued. It was stated that this option had been “put forward in order to explore a possible middle ground”⁷⁶ in the debate around whether or not UNSC determination of an act of aggression was a prerequisite for the Court proceeding with a case or not. The support for this idea had however dwindled by this point, and it was stated that the suggestion “found limited support”⁷⁷. Some delegations felt that it would be a positive provision as it would allow the UNSC “to act quickly, by providing it with a further option [...]”⁷⁸, whilst others maintained that it was not desirable as it would “expand the powers of the Security Council [...] and undermine the Court’s independence”⁷⁹. Despite the limited support for this proposal, the Chairman presented a discussion paper⁸⁰ which included the “green light” suggestion as a possible option.

There was no discussion regarding the Court’s jurisdiction over States.

4.1.5 The discourse in 2008

The SWGCA held seven meetings between the 2nd and the 6th of June 2008. At these meetings, discussion was resumed regarding whether the Court should have jurisdiction over its current member States regarding the crime of aggression after seven-eighths had ratified the amendment (as understood in article 121, paragraph 4) or whether the jurisdiction should only apply to those member States which accepted the jurisdiction (article 121, paragraph 5). The last time discussion was held around the subject (back in 2005), it had been discussed whether States should be able to “opt out” of the Court’s jurisdiction regarding the crime. This suggestion had been met with a lot of debate, and a new proposal was thus made at this point: instead of having the option to “opt out” of the jurisdiction, States would have to “opt in”. Proponents of this view felt that this approach would respect the “sovereign decisions of States to be bound by [an] amendment [...]”⁸¹, and that it would allow the Court to exercise jurisdiction “immediately regarding those States that accepted the amendment [...]”⁸², instead of having to wait for seven-eighths of the State Parties to give their consent to the amendment, which could take many years.

Previously, statements had been issued stating that all member States would automatically fall under the jurisdiction of the Court concerning the crime of aggression, as they had agreed to this indirectly when ratifying the Rome Statute. This understanding was repeated during the 2008 meetings, and similar statements were made regarding it being “unwarranted to treat the crime

76 ICC-ASP/6/SWGCA/1, p. 7

77 Ibid.

78 Ibid.

79 ICC-ASP/6/SWGCA/INF.1, p. 6

80 ICC-ASP/6/SWGCA/2

81 ICC-ASP/6/20/Add.1, p. 2

82 Ibid.

of aggression as a new crime”⁸³, when it had all along been understood that the crime of aggression would be included in the Rome Statute⁸⁴. If States did not wish to accept the Court’s jurisdiction over the crime of aggression, then they would have to “withdraw from the Statute”⁸⁵ completely. This proposal was met with resistance, as certain delegates felt that States withdrawing from the Statute was “undesirable”⁸⁶ and should be avoided.

Regarding the involvement of the UNSC, a new proposal was made. This proposal suggested that the UNSC would be allowed to “stop an ongoing investigation”⁸⁷ (the “red light” proposal). The UNSC already had the right to do so via article 16 of the Rome Statute, but whilst the halting of procedures was temporary according to article 16, the new proposal would allow the UNSC to halt the procedures indefinitely. The proposal was based on the understanding that the UNSC held the “right to determine that a situation did not amount to an act of aggression”⁸⁸, and stemmed from the discussion around to what extent they should be involved in Court proceedings. The proposal was opposed by those delegations which did not see the UNSC as having exclusive power in determining acts of aggression, and it was stated that the proposal would have a “detrimental effect on the independence of the Court.”⁸⁹

The SWGCA held a further five meetings between the 17th and the 20th of November 2008. Discussion centred on the second sentence of article 121, paragraph 5, which stated:

“In respect of a State Party which has not accepted [an] amendment, the Court shall not exercise its jurisdiction regarding a crime covered by [this] amendment when committed by the State Party’s nationals or on its territory.”⁹⁰

A split occurred regarding how to interpret this sentence, specifically concerning what type of consent was required for the Court to have jurisdiction. The matter was only discussed for cases referred to the Court by States or *proprio motu*. Regarding UNSC referrals, it was stated the idea of consent was “irrelevant”⁹¹ as the UNSC could begin cases against any State, regardless of whether they had consented to the Court having jurisdiction over a particular crime or not.

Some delegations felt that the paragraph prevented the Court from having jurisdiction in cases which involved “at least one State Party that had not accepted the amendment on aggression”⁹². This view differed from the current jurisdiction for the other crimes under the Court’s Statute, in that it required that all those involved in a case of aggression had to have consented to the amendment which would give the Court jurisdiction over the crime, in order for an investigation

83 Ibid.

84 Ibid.

85 ICC-ASP/6/20/Add.1, p. 2

86 Ibid.

87 Ibid., p. 8

88 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII

89 ICC-ASP/6/20/Add.1, p. 8

90 ICC-ASP/7/20, p. 1

91 Ibid., p. 48

92 Ibid., p. 49

to occur. It therefore called for a “double acceptance of jurisdiction by both the aggressor and the victim State”⁹³. This view was met with resistance, and even those who advocated it “acknowledged that [it] could lead to illogical results”⁹⁴. In particular, it was stated that such a provision on double acceptance would lead to “differential treatment”⁹⁵ between non-State Parties and State Parties that had not accepted the amendment, as the Court would still have jurisdiction to begin cases where the aggressor was a non-State Party (if the crime of aggression was directed at a State Party), but it would not have jurisdiction over those cases where the aggressor State had not ratified the amendment. Furthermore, if the provision of “double consent” was adopted, then the Court would not have jurisdiction over cases where a State Party which had not ratified the amendment on the crime of aggression was attacked by another State Party, even if this Party had ratified the amendments.

Some delegations argued that the provision of “double acceptance” should be avoided as it would create “different categories of State Parties”⁹⁶. Nevertheless, the fact that the Court was built on States having to consent to its Statute in order for it to exercise jurisdiction meant that statements supporting this view were still relevant and could still be produced. Therefore it was decided that this issue would be discussed again at a later date.

During the meetings of November 2008, discussion was continued regarding the “red light” proposal, first discussed during the meetings held in June of the same year. There was still limited support for the idea, mainly because it was stated that article 16 of the Statute which already gave the UNSC the power to halt proceedings was already controversial enough, and no further competence should therefore be given to the UNSC as this would threaten the view of the Court as an independent institution⁹⁷. This was similar to the argument that had been present at the previous meetings which had also included statements that questioned this proposals effect on the Court’s independence.

4.1.6 The discourse in 2009

A revised discussion paper⁹⁸, based on discussions from the meetings of November 2008 was presented by the Chairman of the SWGCA, and discussed at the Group’s meetings held between the 8th and the 13th of February 2008. The discussion paper stated that the ICC must ascertain whether the UNSC had made a determination of aggression regarding a State that the ICC wished to investigate. If a determination that no act of aggression had occurred was made, then the ICC should either stop proceedings, or ask its Pre-Trial Chamber, the UNGA or the ICJ to make another determination instead⁹⁹. These are the same statements that were made in the 2002 discussion paper. A new statement concerning the meaning of such determinations emerged at this point,

93 Ibid.

94 ICC-ASP/7/20, p. 49

95 Ibid.

96 Ibid., p. 50

97 Ibid., p. 51

98 ICC-ASP/7/SWGCA/INF.1

99 Ibid., p. 3-4

reflecting the previous discussion around the need for the Court to remain independent. This new statement described the fact that determinations of acts of aggression by “an organ outside the Court shall be without prejudice to the Court’s determination of an act of aggression under its Statute”¹⁰⁰. This statement should negate the above mentioned statement which stated that the Court may not proceed if the UNSC had made a determination that no act of aggression had occurred, however, the statement remained.

The question regarding the level of consent required for the Court to exercise its jurisdiction over the crime of aggression was discussed further at these meetings. It was reiterated that:

“the application of article 121, paragraph 5, second sentence, should not lead to differential treatment between non-State Parties and State Parties that [had] not accepted the amendment on aggression”¹⁰¹

By this point, discussion around which paragraph of article 121 (specifically paragraphs 4 and 5) should be used when implementing the amendments, had mostly moved towards considering paragraph 5 as the option that would be used. Debates still occurred regarding how to interpret the second sentence of this paragraph: should the sentence be taken as meaning that the Court could not exercise jurisdiction over aggressor State Parties that had not accepted the amendment to the crime of aggression, even if the victim State had ratified the amendment; or should it be viewed as implying that the Court could exercise jurisdiction in those cases where a victim State that was party to the Rome Statute had accepted the amendments, even if the aggressor State Party had not?

An informal inter-sessional meeting was held between the 18th and the 26th of November 2008. This was the last meeting of the SGWCA before the Review Conference the following year, during which the definition on the crime of aggression, and the jurisdiction of the Court regarding it, was adopted. During this final meeting, there were still disagreements regarding whether or not the Court should be allowed to exercise jurisdiction over crime of aggression cases involving a member State that had not ratified the amendment on the crime of aggression. Some felt that the aggressor State had to have accepted the amendment. It was stated that this would “differ from the approach taken in the Rome Statute with respect to other crimes”¹⁰², but that this was “justified by the nature of the crime of aggression and by the need to find a politically acceptable solution”¹⁰³. Others felt that the Court should have jurisdiction in these cases, as it would otherwise lead to victim States that had accepted the amendment being left unprotected against aggression¹⁰⁴. There was also an understanding that certain States “would have the privilege of shielding their nations from the Court”¹⁰⁵, which should be avoided. It was stated that the Court should be allowed to exercise jurisdiction on behalf of a victim State that had accepted the amendments, even if the aggressor State had not, as it might otherwise “never be able to exercise

100 ICC-ASP/7/SWGCA/INF.1, p. 4

101 ICC-ASP/7/20/Add.1, p. 34

102 ICC-ASP/8/INF.2, p. 2

103 Ibid.

104 Ibid.

105 Ibid., p. 8

jurisdiction, except in case of Security Council referrals.”¹⁰⁶ It was further stated that the Court’s jurisdiction was “delegated to it by [...] victim State[s]”¹⁰⁷ and so it could not ignore this delegation simply because the aggressor had not accepted the Court’s jurisdiction over one particular crime.

4.1.7 Decisions reached at the Review Conference

After many years of deliberation, the Special Working Group on the Crime of Aggression adopted “proposals for amendments on the crime of aggression by consensus”¹⁰⁸. The proposals were presented at the Review Conference held in Kampala, Uganda, between the 31st of May and the 11th of June 2010. The proposal still contained different options regarding how the Court should proceed if the UNSC determined that no act of aggression had occurred, however, it was finally agreed that any determinations by outside organs (including the UNSC) should not prejudice the Court, and a determination that no act of aggression had occurred would therefore not halt proceedings. If the UNSC did not determine whether an act of aggression had occurred or not within six months, the Prosecutor could proceed with a case, “provided that the Pre-Trial division had authorized [*sic*] the commencement of [an] investigation”¹⁰⁹. This provision gave the UNSC less competence, than had been discussed during the SWGCA meetings.

It was further decided that the Court would only be allowed to exercise jurisdiction over conflicts involving member States. Furthermore, the aggressor State involved in the conflict had to have ratified the amendment on the crime of aggression and thus accepted the Court’s jurisdiction, in order for an investigation to begin. In this case, the more limited suggestion regarding the Court’s jurisdiction was adopted, at the expense of the suggestion calling for the same type of jurisdiction that applied to the other crimes under the Rome Statute.

106 Ibid.

107 ICC-ASP/8/INF.2, p. 8

108 RC/5, p. 1

109 Ibid., p. 9

5. Analysis

5.1 The creation of paragraphs 4 and 5

5.1.1 The effects of power on the production of knowledge

The above account shows that many different discussions and suggestions were presented during the SWGCA's meetings regarding when the Court should have jurisdiction over States for cases involving the crime of aggression. The final provision adopted – which stands as the current knowledge on when the Court has jurisdiction over this crime – was only one of several options presented during the course of the debates. Statements that called for the jurisdiction to be the same as for the other crimes fell away by the time of the Review Conference, despite having been present throughout much of the debate. This suggests that something must have caused these statements to “disappear”, and keep them from becoming part of the knowledge regarding when the ICC has jurisdiction over crime of aggression cases referred to it by States or initiated *proprio motu* by the Prosecutor. Foucault's theory on power and its effects on the production of knowledge can be applied to analyse this development.

According to Foucault, power is a strategy employed by individuals to drive actions in society towards a particular aim¹¹⁰. The general aim of the SWGCA was to arrive at a definition on the crime of aggression, as well as reach an agreement on the Court's jurisdiction over this crime. Regarding the aim of reaching an agreement on jurisdiction, different “discursive formations” developed that held different views on the type of jurisdiction that should be agreed upon. Discursive formation describes different types of discourses, which can be separated from one another based on the object that they create through the statements included in the discourse¹¹¹. When referring to these different views as discursive formations, I therefore mean that they are different in that they are aiming at producing a different type of jurisdiction for the Court than the other formations were. These formations therefore employed power in different ways, to help in reaching their specific aim. The first formation wanted the same provisions as those that applied to the other crimes under the Court's jurisdiction to apply to the crime of aggression. This view was based on the understanding that the Court should not treat the crime of aggression differently than the other crimes. In trying to achieve this aim, the proponents of this view left out any statements which would work against their aim – so any statements that brought attention to the fact that a different treatment of the crime of aggression could be warranted. Statements highlighting the importance of the Court being viewed as a united front, and statements that brought attention to the fact that State Parties had already “accepted [the Court's jurisdiction over it] by becoming parties thereto”¹¹² were presented instead. Those striving for this aim also suggested that the amendments to the Rome Statute regarding the crime of aggression should apply automatically to all its signatories, once seven-eighths of the States had declared their acceptance. This form of ratification would help in achieving the aim of maintaining a unified Court, as it would require that all signatories of the Rome Statute accept the crime of aggression.

110 Barker, Philip, op. cit., p. 38

111 Foucault, Michel, op. cit., p. 44

In this case, power was used strategically by stating that the relevant provision on the adoption of amendments regarding the crime of aggression was the one given in article 121, paragraph 4. Statements which aimed at promoting the article as the correct choice were repeated throughout the process: it would lead to a unified Court and States would not be given as much of a chance to opt out of the Statute.

In contrast, the second formation – which aimed at working towards a limitation of the Court’s jurisdiction – used statements that would support the view that the jurisdiction as it stood now was not acceptable due to the “specific problems”¹¹³ associated with crimes of aggression. What these problems were was never brought up, however the statement still managed to create enough doubt for the formation to continue advocating working towards a new type of jurisdiction. Ultimately, it is the suggestion made by this formation that “wins”. If a more traditional view on power and its effects had been employed to analyse this, the explanation that followed could have been that the formation advocating this “winning” view held more power than the other, and had used this power to quash the thoughts and views of the opposition. However, according to Foucault, power is not something that is possessed by anyone, let alone by a specific group¹¹⁴. The fact that this suggestion was the one that won out – despite that it was more controversial as it questioned the then-current knowledge regarding when the Court had jurisdiction and when it did not – must therefore have been due to something other than repression of the opposite side’s views and opinions.

The fact that the more “controversial” view won out reflects on Foucault’s understanding that no knowledge is constant, and that all things can be changed. Instead of being a negative form of control and repression possessed by a select few, power is everywhere and flows freely between individuals. Because of this, discourse held by one group would influence that of other groups which are involved in the same discourse. Within the discussions of the SWGCA, discourses (which are composed of statements that have been issued to work towards a specific aim) within one of the two formations, impacted on the discourse conducted by the other formation, in that it allowed new statements to be produced in answer to whatever had been previously said. The fact that the formation calling for the same jurisdiction to be used stated that any State which did not approve of the jurisdiction could be given the chance to “withdraw from the Statute”¹¹⁵, was offered in retaliation to the opposing formations’ argument that consent over the Court’s jurisdiction on the crime of aggression could not simply be expected from all States just because they were party to the Rome Statute, as the crime of aggression posed new problems that had not been previously understood. This statement reflects the fact that the debate that occurred was two-sided, as statements made by one side were considered by the other when it came to future discussions.

112 ICC-ASP/4/SWGCA/INF.1, p. 360

113 ICC-ASP/4/SWGCA/INF.1, p.360

114 Kendall, Gavin & Wickham, Gary, *op. cit.*, p. 50

115 ICC-ASP/6/20/Add.1, p. 2

The statement that States who did not approve of the Court's jurisdiction over the crime of aggression should "withdraw from the Statute"¹¹⁶, gave the opposing formation a further statement to retaliate against in order to move the debate towards accepting their view. The formation could continue working towards their aim of limiting the Court's jurisdiction, by using this statement from the opposing formation to show that their viewpoint would be "undesirable"¹¹⁷ – thus lending more strength to their own suggestion, which would not require that States withdrew from the Statute in its entirety.

As well as producing knowledge, power is also affected by knowledge. The knowledge present at the start of the SWGCA discussions regarding the Court's jurisdiction was that the Court could exercise its jurisdiction in situations involving at least one member State, in accordance with article 12 of the Rome Statute. There was a further understanding which held that the Court should not exercise its jurisdiction over a State concerning a crime covered by an amendment, if this amendment had not been accepted by the State:

"In respect of a State Party which has not accepted [an] amendment, the Court shall not exercise its jurisdiction regarding a crime covered by [this] amendment when committed by the State Party's nationals or on its territory."¹¹⁸

This knowledge came to direct the way in which power could be used, as it limited the discussion regarding jurisdiction to be held in a way that did not completely negate this knowledge. Bringing this knowledge into the discussions meant that future statements had to in some way acknowledge the fact that the Court should not exercise jurisdiction over a certain State without said State's consent. The two formations presented different interpretations of what this sentence meant with regards to determining the jurisdiction of the Court. The formation calling for a more limited jurisdiction and for each States rights to express whether or not they accepted the Court's jurisdiction over the crime of aggression, interpreted the sentence in a more literal way than the opposing side. Their arguments therefore came to be more grounded on knowledge, which may explain why their argument "won", despite having been the more controversial one at the beginning of the SWGCA's discussions. The fact that this particular sentence was brought into play had an effect on the discursive relation between the two formations, in that it allowed the formation which used its more literal interpretation to continue pushing their ideas forward, at the expense of the other formation's ideas, finally resulting in the former formation's interpretation of when and over whom the Court should have jurisdiction being adopted at the Review Conference.

5.1.2 The effects of the interaction between the visible and the sayable

Prior to the SWGCA beginning its discussions, the International Criminal Court's jurisdiction, regarding cases referred to it via States or *proprio motu*, was understood as applying to those cases where at least one of the states involved - be it the aggressor state or the victim state – was

116 Ibid.

117 ICC-ASP/6/20/Add.1, p. 2

118 ICC-ASP/7/20, p. 1

party to the Statute¹¹⁹. This shows that the Court is shaped around the idea that it can only exercise its jurisdiction when there is consent for it to do so, and that this consent is expressed by ratifying its Statute. The understanding of the Court as needing to be based on consent came to influence the discourse surrounding its jurisdiction for the crime of aggression, as it allowed statements and debates to emerge regarding the level of consent that should be sought after with regards to this particular crime. Statements questioning whether it was enough for only one of the states involved in a conflict to have ratified the Statute could emerge due to the Court being structured in this way. If the Court had been structured in a way that gave it the rights to exercise jurisdiction over any State, regardless of whether this State approved of the Court's Statute, then a discussion aimed at working towards a jurisdiction based on consent may not have found as much support as it did in this case.

5.2 The creation of paragraphs 6 to 8

5.2.1 The effects of power on the production of knowledge

In the 2002 discussion paper, statements had already been made which suggested giving the UNSC a larger level of involvement in cases concerning crimes of aggression, than it currently held with respect to the other crimes under the Court's Statute. It was suggested that the Prosecutor of the ICC should "ascertain whether the Security Council [had] made a determination of an act of aggression"¹²⁰, before beginning investigations. This statement is the one that came to be adopted as paragraph 6 of article 15*bis* of the Rome Statute, during the Review Conference in 2010. It therefore managed to remain relevant and to not be replaced by another provision, despite the many different counter-claims that were made. By applying Foucault's theory on power – specifically his understanding that power is exercised through resistance – an explanation for this longevity can be given.

The proposal that the ICC would have to turn to the UNSC before it could even begin investigations into a suspected crime of aggression was from the start met with much criticism. Delegations felt that current provisions of the Rome Statute "dealt sufficiently with the role of the Security Council"¹²¹, and that no further level of involvement was needed. In retaliation, it was stated that the UNSC held exclusive competence in determining whether acts of aggression had occurred, and that this competence needed to be respected by the ICC. Similar to the discussion surrounding the Court's jurisdiction over States, the discussion in this case can also be said to have occurred between different "discursive formations", although a few more can be found in this case. The views presented by these formations also evolved and changed more than those presented by the formations that grew out of the discussion surrounding the Court's jurisdiction over States. One formation called for a higher level of UNSC involvement; another called for the same level of involvement as was currently provided in the Rome Statute (i.e. the UNSC could refer cases to the Court); whilst a third called for an even smaller role (according to this view, the

119 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, article 12

120 PCNICC/2002/WGCA/RT.1/Rev.1, p. 1

121 ICC-ASP/5/SWGCA/INF., p. 10

Court should not even be allowed to refer cases concerning this crime, let alone have any say in whether the Court proceeded with a case or not). Those favouring a higher level of UNSC involvement used statements that described the UNSC as more competent than the Court. In doing so, arguments could be advanced which called for UNSC involvement as a means of ensuring that the ICC did not overstep its boundaries. Resistance was offered to these statements by those wishing to limit the UNSC's power, and those wishing to maintain it at its current level. Whereas the first formation questioned the Court's competence, these formations questioned the UNSC's competence, based on the fact that the UNSC was a political institution and therefore had different "prerogatives"¹²² to the ICC.

The level of resistance, and the amount of different opinions presented, meant that all views were given many statements to shape themselves around, which led to a more diverse discussion than the one concerning the Court's jurisdiction over States. In this way, all views were maintained within the SWGCA for the majority of the process, despite being so different from one another. The fact that resistance occurred at this level suggests that the power exerted by the formations was sufficient enough for all others to take note of. If no resistance had been given, this could have suggested that an idea was not viewed as important enough to be considered, which gives quite a positive view of the discussion within the SWGCA in that it suggests that it was conducted in a way that allowed for all views to be heard and considered.

When reading through the documents, it becomes clear that the provision adopted regarding UNSC involvement is one that calls for a considerably lower level of involvement than was suggested during the meetings of the SWGCA. The "green light" proposal, for example, would, if it had been adopted, have given the UNSC a further chance to involve itself in Court proceedings, as it would have had the added option to simply give its consent to proceedings, as well as the option to make a determination of whether or not an act of aggression had occurred. This proposal emerged out of the need to try to reach some sort of middle ground, to appease those delegations which called for UNSC involvement and those which questioned the UNSC's ability to make determinations on acts of aggression. Here we can see that the discourse which occurred between the two formations led to the creation of a new form of discourse, which would not have appeared had there been consensus regarding the level of involvement of the UNSC. This further illustrates what Foucault meant by stating that power could only be exercised when met by resistance.

The doubt felt by some delegations in making a UNSC determination of an act of aggression a prerequisite to the Court being able to proceed with a case, was based on the knowledge that the UNSC had rarely referred to acts of aggression in its past. The knowledge in this case came to influence the strategic use of power, as it helped to argue the idea of a lower level of UNSC involvement, based on the fact that they simply were not competent to be involved to the point where their determination would act as a prerequisite for the Court to begin an investigation.

122 ICC-ASP/5/SWGCA/INF., p. 10

As discussed above, many of the views expressed during early stages of the SWGCA meetings were present all throughout the process, up until the time of the Review Conference. However, one proposition was made that received very little support from the start and was subsequently abandoned quite quickly. This view suggested that the UNSC be given an extra right to halt proceedings indefinitely (the “red light” proposal). This proposal built on the current right of the Court to halt proceedings for a period of up to twelve months, as accorded to it by article 16 of the Rome Statute (this period could also be extended if needed). The proposal developed out of the debate regarding whether UNSC determination should be viewed as a prerequisite or not, and aimed at trying to offer a compromise by still including the UNSC in the process, as was desired by some delegations, but by removing their ability to halt proceedings before they had even started, as had been questioned by other delegations. This proposal met with much resistance which according to Foucault’s understanding that power operates when met with resistance, should have led to this particular understanding being pushed forward. However, this was not the case. This could suggest that the form of resistance here was the “wrong” type of resistance, in that it was so uniform that it did not allow for any discussion regarding the proposal, which could have led to the introduction of new statements.

5.2.2 The effects of the interaction between the visible and the sayable

The discussion in the previous section centres mostly on analysing how the discourse which led to the production of paragraphs 6 and 7 developed within the SWGCA. Regarding paragraph 8, Foucault’s theory on the interaction between the visible and the sayable – the two components that make up his notion of discourse – has more to offer in explaining how the discourse surrounding this paragraph was developed. This theory states that the visible elements influence the discourse that can be conducted regarding these visibilities. The visibilities relevant in this case are the ICC, the UNSC and the ICJ. The UNSC is the first organ outside of the ICC that is discussed as potentially having the right to be involved in cases involving potential crimes of aggression. The Charter of the UN, specifically article 39, describes the UN as being responsible for determining “the existence of any threat to the peace, breach of the peace or act of aggression”¹²³. This is a responsibility that has been associated with the UN since its Charter was adopted in 1945, and therefore the view of the UN as an organ that is heavily involved in the maintenance of peace influences the discourse that can be conducted around it and the merits or limitations which would come from including a certain part of its structure in ICC proceedings regarding determinations of acts of aggression. Of course, not all delegations were of the view that the UN was an institution that should have primacy of the ICC, and this is reflected in statements maintaining that the ICC should remain an independent Court. However, the discourse is still affected by the visibility in that the UN cannot completely be ignored, which invites discussions surrounding how it should be involved.

The UNSC is offered as the first alternative, but as discussed in the previous section, this suggestion is met with many counter-claims, mostly based on the wanting to keep UNSC involvement to a minimum due to it being a political organ. As a result of this, it was suggested

123 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Chapter VII, article 39

that another organ could be responsible for determining whether an act of aggression had occurred. The organ suggested was the ICJ, which had the merit of being a judicial body – thus any statements used by delegations opposed to UNSC involvement based on the fact that it is a political body – could not be presented. However, the structure of the ICJ posed other problems, in that it applied ““different standards of proof than the Court”¹²⁴”. The visibility here is of a court that is not compatible with the ICC. Discussions around this structure as a viable option are therefore abandoned.

124 ICC-ASP/5/SWGCA/INF., p. 11

6. Conclusion and discussion

6.1 Conclusion

This thesis aimed at gaining an understanding for the negotiation process that took place within the SWGCA, and how this negotiation process developed into paragraphs 4 to 8 of article 15*bis* of the Rome Statute, by analysing the discourse within the group concerning these paragraphs. Foucault's theory on the effects of power on the production of knowledge, as well as his theory on the productivity of discourse, was used in order to analyse how the discourse developed over time.

Regarding the development of paragraphs 4 and 5 of article 15*bis*, which restricted the Court's jurisdiction to only applying in those cases where: 1. all States involved in the conflict were State Parties to the Rome Statute and, 2. the aggressor State had not "opted out" of the Court's jurisdiction over this crime, the following was found:

The discourse within the SWGCA regarding this topic was from its start split into two opposing camps, where one side wished to keep the same jurisdiction that applied to the other crimes under the Court's Statute, whilst the other side wanted to limit the Court's jurisdiction in this case. The delegations calling for a more limited jurisdiction "won" in the end, as they were able to use power in a strategic way that proved useful to their aim. The fact that the Court was built on principles of consent meant that statements could be issued which called for the Court to consider this principle when deciding on its jurisdiction over States regarding the crime of aggression. Opposing views which built on stating that the Court needed to remain unified and not treat the crime of aggression differently from the other crimes under the Court's Statute remained as viable options for much of the discussions, however, they were not adopted into the Statute as the opposing view could present more statements that were based on prior knowledge and held a discourse that was more closely related to the structure of the ICC as an institution based on consent.

Regarding the development of paragraphs 6 to 8, which describe the relationship between the UNSC and the ICC in cases brought to the attention of the ICC via State referrals or *proprio motu* investigations, the following was found:

The idea that the UNSC should be involved in some way in State referral and *proprio motu* investigations regarding crimes of aggression, was based on the view of the UNSC as holding a special competence with regards to determination of such acts due to provisions set out in its Charter. The UNSC came to be constructed as being an organ that should be revered and deferred to in regards to these types of crimes, and this perceived visibility impacted the discourse in that it led to the production of statements which reflected this. However, the discussion within the SWGCA shows that the role given to the UNSC via these paragraphs is limited compared to what had been suggested by some delegations during discussions. The final decision stated that the Court should ascertain whether the UNSC had made a determination of whether an act of aggression had occurred or not, before proceeding with a case against a member State. If the UNSC had made such a determination, the Court could proceed – if no such decision had been made, the Court could proceed with a case anyway, provided that its Pre-Trial Chamber had

authorised an investigation. These provisions excluded statements that had called for UNSC determination to be a prerequisite to the Court's exercise of jurisdiction, thus reflecting the fact that one of the less controversial options came to be incorporated into the Statute.

The fact that the Pre-Trial Chamber came to hold such a strong role in cases involving crimes of aggression, was found to have been the result of this Chamber being presented as the best option, due to the structure of the other organs suggested as alternatives (the UNGA and the ICJ) being viewed as problematic.

In conclusion, it can be said that the discourse within the SWGCA was one filled with conflicting statements and views, regarding the type of jurisdiction that should be sought after by the Court in regards to the crime of aggression. These conflicting views were shaped by the visibilities of the institutions referred to in the discussion, as well as by the use of power to achieve specific aims, and the knowledge that existed prior to discussions commencing. The fact that so many opposing views were presented meant that compromises had to be made throughout the process, in order for some sort of progress to be made. By the time of the Review Conference, discussions were still being held regarding what the Court's jurisdiction should be, however, through the art of compromise, a consensus agreement was finally reached.

6.2 Discussion

6.2.1 Relevance of these findings and possible future research

The analysis conducted has given a slight glimpse into the discourse which led towards the creation of article 15*bis* of the Statute, and thus hopefully helped in gaining more of an understanding for the process which led to the adoption of this article. These findings could be relevant in discussing around the "pros and cons" of the article, as they may offer a deeper understanding for the complicated process that was involved in arriving at a suggestion that was acceptable to those involved in the process. The fact that so many different opinions were expressed meant that compromises had to be made, and future research could therefore aim at looking at these different compromises and assessing which one was the "best" one to make, and if the "right" compromise was made and so on. What would be perceived as "right" could be based on the researcher's own understanding of what the International Criminal Court should stand for, so for example, if the researcher was of the view that the Court should be as independent of the UNSC as possible, then an assessment of the compromise stated in article 15*bis*, paragraphs 6 and 7 which increased the involvement of the UNSC in cases referred by States or initiated by the Prosecutor, could be made based on this understanding. By incorporating an account for why this compromise was made, a deeper understanding could be gained on the "pros and cons" of the compromise.

Future research could also build on the discussion around why the debate developed in the way it did, by using different theories of analysis. The theories that I have used are based on the understanding that power is not necessarily a negative thing, and that discourse is productive and constantly working towards changing the world around us. This influenced the way in which I analysed the material, as I had to keep from making assumptions that power was possessed by a

certain group of delegates and that these delegates had used their power to repress delegates whom held different views. Research based on the same analysis of the same type of material but using a different theory to analyse the material would most likely lead to different findings, which could lend a further understanding of the discourse within the SWGCA by offering a different perspective on its development.

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