

AGGRESSION, AFFECTED STATES, AND A RIGHT TO PARTICIPATE: A RESPONSE TO KOH AND BUCHWALD

*Sarah Williams**

Introduction

At the review conference in Kampala, States Parties adopted three new provisions on the crime of aggression for inclusion in the Rome Statute,¹ as well as consequential amendments to the Elements of Crimes.² However, states parties did not consider revisions to the procedural arrangements that may be required to accommodate the crime of aggression. The crime of aggression requires a link to states, being limited to acts of aggression by one state against another state. The individuals that can be charged with the crime of aggression are persons “in a position effectively to exercise control over or to direct the political or military action of a State.” The crime is also connected to the international security framework, in particular the UN Charter. Given that aggression is intrinsically linked to state acts, it is “likely that the ICC [International Criminal Court] would need relevant states to cooperate, present evidence, and argue the case.”³ Yet the existing framework does not include an adequate right of participation for affected states. This contribution suggests one possible revision to provide a clearer legal basis for states to participate directly in ICC proceedings in respect of the crime of aggression.

There are a number of reasons why an aggressor state will seek to make submissions before the ICC. For one thing, the court will have to make a determination about the legality of the acts of the state. Also, it cannot be assumed that the defence trial strategy will align with the interests of the state (for example, an accused may choose to dispute their level of control over the state, rather than the legality of the conduct itself). Given the nature of the crime, the ICC may need to hear from the state as to its strategy and any legal justifications advanced in a way that is not necessary for other crimes. Moreover, while the Assembly of States Parties, as the “legislative” body of the ICC system, provides the main avenue for state input into the ICC legal framework, it is limited, often post-hoc, and does not (and should not) necessarily allow for legal submissions on issues raised in discrete cases.

While state participation must be balanced against the risk that a state would attempt to influence proceedings and the right of the accused to a fair trial, given the broader issues at stake there is a legitimate need for some measure of state participation in ICC proceedings on aggression. It is therefore timely to consider whether a

* Associate Professor, Faculty of Law, UNSW Australia, and Associate, Australian Human Rights Centre. This research was supported under Australian Research Council's Discovery Projects funding scheme (project DP 140101347). The views expressed are those of the author and are not necessarily those of the Australian Research Council.

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¹ Assembly of States Parties, *The Crime of Aggression*, ICC Res RC/Res.6, Annex 1, Art 8bis, 15bis and 15ter (June 11 2010).

² Assembly of States Parties, *The Crime of Aggression*, ICC Res RC/Res.6, Annex II.

³ Bing Bing Jia, *The Crime of Aggression as Custom and the Mechanisms for Determining an Act of Aggression*, 109 AJIL 569, 578 (2015).

clearer legal basis for allowing states to participate in proceedings is necessary and, if so, what the scope and limits of such participation should be.

Existing Rights of State Participation in ICC Proceedings

Unlike other international justice institutions, for example the International Court of Justice (ICJ), states are not the main players in ICC proceedings. That role is reserved for the prosecution and defence and, to a more limited extent, victims. States can perform an important function in triggering the ICC's jurisdiction via a state referral of a situation (Article 14) or by establishing jurisdiction pursuant to an Article 12(3) declaration. States may also provide information to the Prosecutor under Article 15, have obligations to cooperate with the Court under Part IX, and can provide or assist the ICC with the provision of evidence.

However, despite the importance of states in the operations of the Court, they enjoy few opportunities to participate directly in ICC proceedings. These include:

- Challenges to jurisdiction and admissibility in respect of a situation or case under Article 19.
- A state referring a situation to the ICC under Article 14 may trigger a review of a decision of the Prosecutor not to investigate or prosecute in accordance with Article 53(3)(a).
- Where the Prosecutor seeks authorization from the Pre-Trial Chamber to take investigative steps in a state's territory without the state's cooperation under Article 57(3)(d) and Rule 115.
- In relation to a request for cooperation with a request for assistance, the requested state may apply to the Chamber for a ruling and the Chamber may hear from participants to those proceedings (Article 93 and Regulation 108). Similarly, there is a right for a state to be heard in hearings concerning a request for a finding of noncooperation (Article 87(7) and Regulation 109).

Absent a specific right to participate, the main avenue for state participation in ICC proceedings is to apply to a Chamber to be accepted as *amicus curiae* under Rule 103, which provides that: "At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate." Rule 103 also refers to "other submissions," which allows the chamber some discretion to accept submissions not classed as "*amicus*," but the extent and nature of this discretion has not been examined.

ICC Chambers have exercised the discretion provided by Rule 103 on several occasions to allow a state to participate as *amicus curiae*. The standard applied by Chambers when determining whether to accept an *amicus* submission has varied from the *amicus* being accepted "only on an exceptional basis"⁴ or "as an indispensable aid"⁵ to whether the brief "may assist"⁶ or "will be useful."⁷ It appears that the Chambers may be more receptive

⁴ *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Decision on the application by the Redress Trust to submit Amicus Curiae observations, para 3 (Mar. 18, 2014).

⁵ *Prosecutor v. Katanga*, ICC-01/04-01/07, Decision on the motion filed by the Queen's University Belfast Human Rights Centre for leave to submit an *amicus curiae* brief on the definition of crimes of sexual slavery, para 7 (April 7, 2011).

⁶ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence, para 8 (Apr. 22, 2008).

⁷ *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Order authorising the submission of observations, para 8 (Nov. 15, 2011).

to *amicus* briefs from states than from civil society or other actors seeking to appear as *amicus curiae*, although applications from states have been rejected.⁸

A study of the existing practice reveals three possible categories of state applications. First, an applicant state may be directly involved in the crimes before the court, such as the territorial state or state of referral. For example, Chambers confirmed on several occasions that although Kenya was not a party to proceedings it could make submissions on issues concerning securing witness testimony, the safety of witnesses, the status of and arrangements for cooperation with the Court within Kenya, and “how issues of fairness and expeditiousness of trial play out in the national Kenyan context and legal system.”⁹

A second category is where states are not directly concerned in proceedings, but seek to make submissions on an issue before the court, which may involve an issue of public international law. For example, several states sought to make submissions concerning the right to be present at trial under Article 63.¹⁰

Finally, there have been attempts by states to participate in proceedings where the state is directly concerned by a particular issue that has arisen in the course of proceedings. For example, the Netherlands sought to appear (although as a party, not an *amicus*) in relation to claims for asylum made in the Netherlands by ICC witnesses.¹¹ While the Chamber held that the Netherlands was not a party, it was granted leave to participate “on an exceptional basis,” although the legal basis for this was not clear.¹²

Most recently the Appeals Chamber has accepted submissions from the African Union concerning the amendment and interpretation of Rule 68.¹³ The application argued that

a more flexible, open door approach to Rule 103(1) requests on weighty issues, such as those on appeal in the present cases, is reasonable and warranted and consistent with the ICC practice. This more compelling approach takes seriously the centrality of States in the adoption of the RPE [Rules of Procedure and Evidence] at the ICC, as well as amendments to them under Article 51 of the Rome Statute.¹⁴

⁸ For example, a request by the Kenyan government to file an *amicus* brief regarding its participation in the process of amending Rule 68 “was neither necessary or appropriate”: *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on the Government of the Republic of Kenya’s Request to File *Amicus Curiae* Observations (May 29, 2015).

⁹ *Prosecutor v. Ruto*, ICC-01/09-01/11, The Government of the Republic of Kenya’s Request for Leave Pursuant to Rule 103 (1) of the ICC Rules of Procedure and Evidence to join as *Amicus curiae* and make Observations in the Applications by the Ruto and Sang Defence Teams for Leave to Appeal the Decision on the Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, para 17, (May 12, 2014) accepted in *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on defence applications for leave to appeal the “Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Part Cooperation” and the request of the Government of Kenya to submit *amicus curiae* observations, para 35 (May 23, 2014); *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on the Request of the Government of Kenya to Submit *Amicus Curiae* Observations, (Oct. 8, 2013); *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on the Government of Kenya’s application for leave to file observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence, (Apr. 24, 2013).

¹⁰ *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on the requests for leave to submit observations under rule 103 of the Rules of Procedure and Evidence (Sep. 13, 2013) (United Republic of Tanzania, Republic of Rwanda, Republic of Burundi, State of Eritrea and Republic of Uganda).

¹¹ *E.g.*, *Prosecutor v. Lubanga*, ICC-01/04/-01-06, Application for Leave to Appeal the Trial Chamber’s “Decision on the request by DRC-D01-WWWW-0019 for special protective measures relating to his asylum application” (ICC-01/04-01/06-2766-Conf) dated 4 July 2011 (July 13, 2011).

¹² *Prosecutor v. Lubanga*, ICC-01/04/-01-06, Urgent Request for Directions (Aug. 17, 2011).

¹³ *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on applications for leave to submit *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence, (Oct. 12, 2015).

¹⁴ *Prosecutor v. Ruto*, ICC-01/09-01/11, Registry Transmission of a submission received from the African Union Commission, represented by Prof. Charles Chernor Jalloh, para 23 (Oct. 7, 2015).

However, while the Appeals Chamber granted leave to the African Union, it rejected similar requests from three member states of the African Union as being “duplicative,”¹⁵ and noted that the receipt of the African Union’s submissions was “without prejudice to the weight, if any, to be accorded to them in the determination of this appeal.”¹⁶

As this overview demonstrates, the mechanism of the *amicus curiae* has its limits for facilitating state participation. In addition to the discretionary nature of the mechanism, there are other restrictions, including:

- There is no right of appeal from a decision not to accept a state as an *amicus*.
- The scope of submissions is limited to those issues dictated by the Chamber (i.e., only those submissions the Chamber considers will assist) and to a particular decision and stage of proceedings.
- A state acting as *amicus curiae* is not a party to proceedings, so there is no right of appeal and no general right to respond to the submissions of other parties or to participate in subsequent stages of proceedings.
- The Chamber is not required to take into account or give any weight to the submissions made by an *amicus*, so the impact of submissions is uncertain.

Thus acting as *amicus curiae* is not a particularly reliable mechanism for enabling state participation in ICC proceedings. State *amici curiae* may also be contrary to the traditional understanding of the role, which developed in the English common law as a neutral and impartial adviser or “friend of the court.” For example, one international tribunal has held that, while “a requirement of ‘absolute’ impartiality is practically unattainable” when fulfilling “the *amicus* function of assisting the court it is still preferable that person’s or entity’s motives in making submissions lie rather in an abstract interest in a particular question than in promoting or producing any particular outcome in relation to the criminal case.”¹⁷ This is clearly at odds with state *amici curiae*, which in most situations have a clear interest in the outcome of the proceedings and are not neutral.

Participation of Affected States Regarding Aggression

While an aggressor state could seek to use an *amicus curiae* submission under Rule 103 to provide “expert” advice on legal justifications and national law and policy, this would move the concept of an *amicus* far from that of an independent, neutral advisor that it was originally conceived to be. Furthermore, the *amicus* role is subject to limits discussed above.

An alternative option would be to recognize a right of intervention, as found in other international legal institutions such as the ICJ and in some national systems. In contrast to the *amicus*, a right of intervention exists *because* the person or entity has a legal interest that will be affected by the outcome of the proceedings. The Special Court for Sierra Leone recognized a right of intervention in relation to the validity of the Lomé Amnesty.¹⁸ Similarly, defence counsel in the Extraordinary Chambers in the Courts of Cambodia argued for a right of intervention where their client would be affected by a decision in proceedings concerning the availability

¹⁵ Kenya, Uganda and Namibia, see *Prosecutor v. Ruto*, ICC-01/09-01/11, Decision on applications for leave to submit *amicus curiae* observations pursuant to rule 103 of the Rule of Procedure and Evidence, para 17 (Oct. 12, 2015).

¹⁶ *Id.* at para. 16.

¹⁷ *Prosecutor v. Samphan*, 002/19-09-2007-ECCC/SC, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, para. 9, (Apr. 8, 2015); though a broader approach was taken at the Special Court for Sierra Leone in *Prosecutor v. Kallon*, SCSL-2003-07, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions (Nov. 1, 2003).

¹⁸ *Prosecutor v. Kallon*, SCSL-2004-15-AR72(e), Decision on Constitutionality and Lack of Jurisdiction (Mar 13, 2004).

and application of joint criminal enterprise in another case.¹⁹ The Supreme Court Chamber, although not allowing a right of intervention in the circumstances, did suggest that interventions before international criminal courts might be permissible.²⁰

How might such a right of intervention operate in the context of aggression? The aggressor state has a legal interest that would be affected by the outcome of the ICC proceedings. After all, the findings of the ICC will include an express finding that the aggressor state has violated the UN Charter. Any violation of the state's obligations under the UN Charter could be the subject of parallel or subsequent legal proceedings, for example before the ICJ. While the ICC's determination is not binding on another institution (and it is not suggested that it would directly bind any participating state), in practice it would be expected to have a significant influence and will have effectively decided the issue of state responsibility. Contentious proceedings in the ICJ for aggression could not proceed without the consent of the aggressor state and allowing its participation. However, while ICC jurisdiction for the crime of aggression is (other than in the case of a Security Council referral) dependent on the consent of the aggressor state to the Rome Statute, there is no right to participate. A right of intervention would address that potential participation gap.

The position of the "victim state" also needs to be considered. The definition of victim (and hence the scope of victims' participation) is limited to natural persons or specified types of organizations or institutions, thus excluding states (Article 68 and Rule 85). Therefore, in relation to aggression, individual victims could participate, but the state that was the target of the act of aggression cannot be considered a victim and has no right to participate. A victim state is also likely to seek to make submissions as an *amicus* and/or to call for a right of intervention, as it too has a legal interest that will be affected by the outcome of ICC proceedings. It is easy to think of scenarios where the argument of the defence, or the alleged aggressor state, relates to actions allegedly taken by the "victim state." For example, it might be argued that the "victim state" was in fact the aggressor or potential aggressor, or that it was committing gross violations of international law such that the use of force by the alleged aggressor was not manifestly unlawful.

Given the likely interest of other states in aggression proceedings, two rights of participation may be required: a right of intervention for states with a direct interest in the proceedings and retaining a discretionary right of participation for those states not directly concerned but which wish to provide information that may assist the Chamber. As with Rule 103 itself, such opportunities for participation would not be limited to States Parties to the ICC Statute.

Conclusion

The existing practice surrounding state use of the *amicus curiae* mechanism suggests that we must anticipate that states will seek to participate in proceedings concerning the crime of aggression and their participation may be essential. Moreover, given that aggression is intrinsically linked to the UN Charter, and that all states have an interest in how the Charter is interpreted and applied, not only the aggressor and victim states may wish to be involved. As noted above, the *amicus curiae* mechanism is not best suited to the task of managing these requests, the type and extent of participation that may be required and the effect of such participation. Further, its use by a state with a clear interest in proceedings is contrary to its purpose, that of a neutral and impartial advisor.

¹⁹ *E.g.*, Case 003, 002/19-09-2007-ECCC/SC, Defence Request to Intervene in the Appeal Proceedings in Case 002/01 for the Purpose of Addressing the Applicability of JCE III at the ECCC or, in the alternative, Request for Leave to Submit Amicus Curiae Brief on JCE III Applicability (Jan. 12, 2015).

²⁰ Prosecutor v. Samphan, 002/19-09-2007-ECCC/SC, Decision on Requests to Intervene or Submit *Amici Curiae* Briefs in Case 002/01 Appeal Proceedings, para. 12 (Apr. 8, 2015).

Creating rights to participate in the procedural framework of the ICC will assist the Court in its operations and may provide greater comfort for those states concerned about ICC jurisdiction for aggression. However, recognizing a right of participation for a state with an interest in the proceedings risks the judicial independence of the ICC and creates the possibility that a trial becomes the substitute forum for determining state responsibility. Considering how this tension is to be addressed, and the scope and limits of any right of participation, *before* ICC jurisdiction for aggression is approved is essential.