

Annex II

Report of the Special Working Group on the Crime of Aggression

I. Introduction

1. The Special Working Group on the Crime of Aggression of the Assembly of States Parties to the Rome Statute of the International Criminal Court held six meetings on 29, 30, 31 January and 1 February 2007. Ambassador Christian Wenaweser (Liechtenstein) served as Chair of the Special Working Group.
2. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Group.
3. The Special Working Group had before it a revised discussion paper¹ prepared by the Chairman (hereinafter “Chairman’s paper”) as a reflection of the discussions held over the past years, including at the informal inter-sessional meetings of the Group held at the Liechtenstein Institute on Self-Determination at Princeton University.
4. At the first meeting of the Group, the Chairman introduced the revised discussion paper, replacing the 2002 Coordinator’s paper.² He noted that the paper had been prepared in light of the progress made at Princeton, without excluding options reflecting views that may not necessarily have broad support. The Chairman also recalled that the Special Working Group had decided to conclude its work 12 months prior to the Review Conference. He indicated that the Group was entering a new phase in its work and that further discussions should be aimed at narrowing existing differences of opinion. Delegations were invited to present their views on the substantive parts of the revised discussion paper while leaving aside issues related to the elements of crime which were included for reference purposes only.

II. Consideration of the discussion paper proposed by the Chairman

5. Delegations welcomed the revised discussion paper which was widely acknowledged as reflecting the progress made since 2002 and the existing view, while providing a sound basis for further discussion.

The crime of aggression - defining the individual’s conduct

6. In the discussion on the two different options presented in variants (a) and (b) of the Chairman’s paper, broad support was expressed for the so-called “differentiated approach” contained in variant (a). It was argued that this variant would preserve consistency among the crimes contained in the Statute and with the “General Principles of Criminal Law” contained in Part 3 of the Statute, in particular article 25, paragraph 3. The main advantage of this approach was that the existing provisions of the Statute would be applicable to the greatest extent possible. Furthermore, it reflected the nature of aggression as a leadership crime. In this context, attention was drawn to footnote 4 of the Chairman’s paper, suggesting that a sub-paragraph should be added to article 25, paragraph 3, clarifying that the forms of participation described in sub-paragraphs (a) to (d) of article 25, paragraph 3, apply only to persons who are in a position to exercise control over or to direct the political or military action of a State.

¹ ICC-ASP/5/SWGCA/2.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November - 1 December 2006* (International Criminal Court publication, ICC-ASP/5/32), annex II, appendix II.

7. Different preferences were expressed regarding the verbs to describe the conduct in variant (a). Some delegations expressed flexibility on this question, while others suggested that none of the suggested options seemed to fit perfectly. The view was also held that conduct by omission should also be included in the definition, while others stated that this issue would be covered by article 28.

8. Some delegations voiced support for the “monistic approach” contained in variant (b), which presented a simple and pragmatic way of describing the individual’s conduct, while retaining the leadership character of the crime.

9. It was, however, also stressed that the difference between the two options was very limited in scope since both approaches pursued largely similar rationales. Many delegations indicated along those lines that they were flexible on this issue, although they had expressed a preference for one of the two variants.

10. It was argued that the language used at the beginning of paragraph 1 of the Chairman’s paper (under both variants (a) and (b)) should follow the drafting of articles 6, 7 and 8 of the Statute (“For the purpose of this Statute, “crime of aggression” means ...”). Attention was drawn to the proposed rewording for the chapeau of the 2002 Coordinator’s paper, contained in appendix I of the 2005 Princeton report.³ The point was made that such a reformulation might facilitate the choice of the relevant conduct verb, which required further discussion.

11. In reaction to these proposals, the Chairman presented proposals on the definition of the individual’s conduct, contained in the annex to the present report, which were discussed during informal consultations. The discussions revealed a broad preference for the new alternative text presented in that paper, while some delegations expressed caution and made it clear that they needed more time to reflect on the proposed text. The point was made that the new formulation seemed to link the leadership element to the scope of jurisdiction of the Court, and no longer to the definition of the crime of aggression itself. It was understood that the alternative text would reflect variant (a), and that therefore article 25, paragraph 3, would apply. It was suggested that the alternative text should be accompanied by a new sub-paragraph to be added to article 25 of the Statute, which would reconfirm the leadership nature of the crime (cf. footnote 4 of the Chairman’s paper; a wording to that effect suggested by the Chairman is also contained in the appendix to this report).

12. During informal consultations, delegations held a preliminary discussion regarding the reference to article 28 in paragraph 3 of the Chairman’s paper. There was broad support for the deletion of that reference in paragraph 3, while the opposite view was also expressed. The view was expressed that the application of article 28 to the crime of aggression would in any event be mainly theoretical.

13. It was suggested that the leadership clause in paragraph 1 should also capture persons outside the military and political leadership, who had the power to shape or influence the actions of a State.

The act of aggression – defining the conduct of the State

14. In the discussion on the choice of term used to describe the act of the State (“act of aggression” or “armed attack”), broad support was expressed for the term “act of aggression”, which reflects the “specific definition”. It was recalled that the notion of “act of aggression” was used in Article 39 of the United Nations Charter and was defined in General Assembly resolution 3314 (XXIX), which could provide guidance in the definition of the crime of aggression. The use of

³ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The Hague, 28 November to 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32), annex II.A, appendix I.

the term “act of aggression” was also necessary in order to link this part of the draft with the reference to General Assembly resolution 3314 (XXIX) in paragraph 2. The term “armed attack” (reflecting the “generic definition”), on the other hand, was specifically linked to the concept of self-defence under Article 51 of the United Nations Charter, and lacked a specific definition in the Charter or in other universal treaties.

15. Nonetheless, a view was expressed that the notion of “armed attack” should be retained as it reflected the idea that only gravest violations of the United Nations Charter are covered by the crime of aggression. These delegations were also of the opinion that paragraph 2 could then be deleted from the Chairman’s paper.

Qualifying the nature or object and result of the State act of aggression

16. The question whether the reference to the State act of aggression should be subject to a qualifier regarding its nature or its object and result (reflected as two sets of square brackets in paragraph 1 of the Chairman’s paper) was extensively discussed. Broad support was voiced for a threshold as reflected in the first set of brackets. It was stressed that such a qualifier (“manifest”) was necessary to exclude borderline cases from the jurisdiction of the Court.

17. Some delegations argued that there was no need to qualify the State’s act as a “manifest violation of the Charter of the United Nations”, as a certain threshold was inherent in the limitation of the jurisdiction of the Court to the “most serious crimes of international concern” (article 1 of the Statute) and in the restrictive use of the term of aggression under the United Nations Charter.

18. Different views were expressed concerning the usefulness of retaining the second set of brackets. While some support was voiced for the notion of “war of aggression”, mainly so as to utilize the Nuremberg precedent, other delegations emphasized that such a reference was not desirable as it was closely linked to the modalities of warfare in World War II and would unduly limit the scope of the crime of aggression. It was also pointed out that the non-exhaustive list of examples in the second set of brackets was difficult to reconcile with the principle of legality. Some delegations therefore called for the deletion of the content of the second set of brackets.

The reference to General Assembly resolution 3314 (XXIX)

19. In the discussion regarding the reference to General Assembly resolution 3314 (XXIX) in paragraph 2 of the Chairman’s paper, broad support was expressed for the retention of that reference.

20. Some delegations expressed support for an explicit reference to articles 1 and 3 of resolution 3314 (XXIX), as reflected within brackets in the Chairman’s paper. These delegations argued that these paragraphs were pertinent and concrete references, whereas a reference to the resolution as a whole would violate the principle of legality, since it would also entail references to unspecified acts in article 4. Support was also expressed for the idea of reproducing the text of both articles in the definition.

21. Other delegations favoured a reference to resolution 3314 (XXIX) in its entirety, since that text had been drafted as a careful compromise after lengthy negotiations. Article 8 of the resolution underscored the point that all its articles were interlinked, and that therefore no selection should be made. It was, however, also pointed out that, even in the case of a specific reference to articles 1 and 3, these provisions still would have to be interpreted in the context of the resolution as a whole. A suggestion was made to take into consideration interpretative declarations formulated when resolution 3314 (XXIX) was adopted.

22. Some delegations expressed doubts regarding the reference to resolution 3314 (XXIX) altogether. These delegations argued that the resolution was a political instrument negotiated in a

different context and not related to issues of individual criminal responsibility. It was pointed out that the lack of precision of any future definition could lead to problems regarding the principle of legality.

Conditions for the exercise of jurisdiction

23. Divergent views were expressed as to whether the exercise of jurisdiction over the crime of aggression should require a prior determination of the State act of aggression by the Security Council, and on the consequences of the absence of such determination. A view was expressed that in either case the Court would benefit from the authority of the Security Council as there would be political backing for the Court's investigation of situations. These questions are addressed in paragraphs 4 and 5 of the Chairman's paper.

24. It was pointed out that paragraph 4 of the revised discussion paper prepared by the Chairman was a good starting point for a more focused debate and that further work was needed to clarify the relationship between the Court and the Security Council.

25. Some delegations expressed support for the idea that the Prosecutor could proceed with an investigation without a prior determination of the Security Council as to the existence of an act of aggression. The point was made that the involvement of a political body would undermine the Court's independence and would subordinate the Court to the Security Council. These delegations argued that the existing provisions of the Statute regarding the exercise of jurisdiction already provided an appropriate framework to define the relationship with the Security Council.⁴

26. Other delegations stressed that in view of the role of the Security Council under Article 39 of the Charter, a prior determination by the Security Council would be necessary and that any provision on the crime of aggression should be consistent with the relevant provisions of the Charter, as required by article 5, paragraph 2, of the Rome Statute. Under Article 39 of the Charter, the Security Council was the only organ competent to determine that a State act of aggression had occurred.

27. Other delegations expressed the view that the competence of the Security Council under Article 39 of the Charter was primary, but not exclusive, and that the General Assembly and the International Court of Justice also had competences in this area. Reference was made to the practice of the General Assembly and the International Court of Justice which had made findings on aggression irrespective of a previous determination by the Security Council. In this context, it was emphasized that the International Criminal Court should be able to make its own determination of a State act of aggression in the context of individual criminal justice. In order to safeguard the rights of the defendant, the Court should in any event not be bound by a prior determination of an act of aggression by the Security Council.

28. Support was expressed for a solution which duly takes into account the special responsibility of the Security Council under Chapter VII of the United Nations Charter, while allowing the Court to act in the absence of a determination by the Security Council. This solution should provide for a system of checks and balances, thus avoiding frivolous referrals.⁵

29. A proposal was introduced regarding the procedure to be followed in cases where the Prosecutor intended to initiate an investigation *proprio motu* or following a State referral. The

⁴ Reference was made to a proposal by Cuba on the definition of the crime of aggression and conditions for the exercise of jurisdiction (ICC-ASP/2/SWGCA/DP.1).

⁵ In this connection reference was made to the proposal submitted by Colombia on the definition of the crime of aggression and on the conditions for the exercise of the jurisdiction of the Court with regard to this crime (PCNICC/2000/WGCA/DP.1).

proposal suggested in particular that a Pre-Trial Division, sitting in full session of six judges, should be responsible for the authorization of the investigation, acting on a qualified majority.⁶

30. A further proposal was made to re-draft paragraph 4 to express the idea that the Court may exercise its jurisdiction in respect of a crime of aggression where a prior Security Council determination existed. It was emphasized that this idea was put forward in order to capture what seemed to be generally accepted and that the proposal was without prejudice to the outcome of the negotiations on paragraph 5.⁷ Some delegations welcomed the proposal, while others expressed reservations and were not of the view that the proposal constituted an improvement over the draft contained in the Chairman's paper. In particular, the view was expressed that, notwithstanding the expressed intentions behind the proposal, the proposed formulation seemed to prejudge the outcome of the discussions on paragraph 5 in that it could only be combined with option 2 under paragraph 5 in the Chairman's paper.

31. Another proposal was made to reformulate paragraph 4 in a manner which would allow the Council to give the Court the "green light" to proceed with a case, without making a determination that an act of aggression had occurred.⁸ The purpose of this proposal was to give the Council an additional option, namely to declare that it does not object to the Court's proceeding with the case, which would make it easier for the Council to enable the Court to proceed with an investigation. It was emphasized that this proposal was relevant in combination with any of the options in paragraph 5, and that it could be combined with the other new proposals made. The proposal furthermore required the Court to notify the Council of a situation before it in case neither such a declaration nor a determination of an act of aggression had been made, and to convey all relevant information thereon. The proposal was welcomed by some delegations, while others showed preference for the original draft contained in the Chairman's paper.

32. The discussion of the three proposals mentioned above was preliminary and held in informal consultations, and it was agreed that further discussion was required.

33. It was noted that the phrase "the Prosecutor intends to proceed" was not clear, and that paragraph 4 required re-drafting in order to determine at what stage of the proceedings and through which Court organ the notification should be effected. In this context, it was suggested that due to their procedural nature, paragraphs 4 and 5 should not be part of the proposed new article 8 *bis*, but instead be inserted separately as a new article 13 *bis*. Furthermore, it was highlighted that the phrase "determination of an act of aggression" required further clarification.

34. It was pointed out that the timing and procedural implications of paragraph 4 needed to be further developed in light of the existing trigger mechanisms under the Statute, since article 13 of the Statute would also apply to the crime of aggression. The point was made that a notification to the Council might not be required in all cases listed in article 13 of the Statute. In particular, there was the possibility that the Security Council itself referred a case to the Prosecutor without making a determination of an act of aggression. It was also noted that the need for a pre-determination of an

⁶ Proposal presented by Belgium on the question of jurisdiction of the Court with respect to the crime of aggression (ICC-ASP/5/SWGCA/WP.1).

⁷ The proposal reads: "The jurisdiction of the Court may be exercised in respect of a crime of aggression where the Security Council of the United Nations has made a prior determination of an act of aggression committed by the State concerned, without prejudice to article 16 of the Rome Statute of the International Criminal Court. In the absence of a determination by the Security Council, the Court may notify the Security Council of a situation that concerns an alleged crime of aggression."

⁸ The proposal reads: "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 *or has declared that it does not object to the Court's proceeding with the case*. If no *such* Security Council determination *or declaration* exists, the Court shall notify the Security Council of the situation before the Court, *including any relevant information and evaluation thereof that might assist the Security Council in its deliberations*."

act of aggression by the Security Council may be less pronounced in case of a self-referral by a State, e.g. following a regime change.

Procedural options in the absence of a Security Council determination

35. Different views were expressed regarding the options contained in paragraph 5 of the Chairman's paper. It was pointed out that there was a close relationship between paragraphs 4 and 5 and that they needed to be considered as a package.

36. Many delegations voiced their support for the approach contained in option 1, either as a stand-alone option or in combination with option 3 and/or option 4. The argument was made that only option 1 was consistent with the Court's independence under the Rome Statute, while respecting the role of the Security Council under the Charter. In this context, the competence of the Security Council under article 16 of the Statute was recalled.

37. Other delegations expressed a strong preference for option 2, recalling the primary responsibility of the Security Council for the maintenance of international peace and security and the powers of the Council under Article 39 of the Charter. It was also noted that a clear relationship between the Court and the Security Council might provide advantages for both institutions.

38. Some delegations saw merit in retaining options 3 and 4. These options were particularly valuable since options 1 and 2 constituted opposite extremes. Deleting options 3 and 4 from the Chairman's paper would likely lead to the submission of new compromise proposals. In this connection, it was also suggested to move the content of options 3 and 4 into the text of option 2.⁹ It was stressed that this could help in the search for some middle ground, since options 1 and 2 were of such fundamentally different nature.

39. Concerns were expressed regarding the involvement of the International Court of Justice under option 4, which would undermine the independence of the International Criminal Court and create a hierarchy between these two institutions.

40. Other delegations, however, argued that option 4 provided a useful fallback option. In this connection, attention was drawn to option 4 (b) of the 2002 Coordinator's paper which allowed the Court to proceed after an advisory opinion of the International Court of Justice. These delegations were of the view that the competence of the International Court of Justice to make a determination on an act of aggression should not be limited to Chapter II of its Statute, but extended also to Chapter IV.

41. The Chairman invited delegations to continue discussions at the forthcoming informal inter-sessional meeting, scheduled to take place at the Liechtenstein Institute on Self-determination at Princeton University, from 11 to 14 June 2007. The Chairman indicated that he would, together with the President of the Assembly of States Parties, continue efforts aimed at ensuring that all interested delegations can attend the informal inter-sessional meeting.

⁹ It was proposed to add, at the end of paragraph 5, option 2, of the Chairman's paper the words "...unless it ascertains that the International Court of Justice or the General Assembly have made a determination that an act of aggression has been committed".

Appendix

Proposal for alternative language on variant (a) prepared by the Chairman for the informal consultations

The Court shall have jurisdiction with respect to the crime of aggression when committed by a person being in a position effectively to exercise control over or to direct the political or military action of a State.

For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation or execution of an act of aggression/armed attack, [which, by its character, gravity and scale...]

Article 25: add new paragraph 3 bis:

With respect to the crime of aggression, the provisions of the present article shall only apply to persons being in a position effectively to exercise control over or to direct the political or military action of a State.