

Annex I

Report of the Credentials Committee*

Chairperson: H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini (Jordan)

1. At its 1st plenary meeting, on 30 November 2007, the Assembly of States Parties to the Rome Statute of the International Criminal Court, in accordance with rule 25 of the Rules of Procedure of the Assembly of States Parties, appointed a Credentials Committee for its sixth session, consisting of the following States Parties: Benin, Costa Rica, France, Ireland, Jordan, Paraguay, Serbia, Slovenia and the United Republic of Tanzania.

2. The Credentials Committee held two meetings, on 30 November and 13 December 2007.

3. At its meeting on 13 December 2007, the Committee had before it a memorandum by the Secretariat dated 13 December 2007 concerning the credentials of representatives of States Parties to the Rome Statute of the International Criminal Court to the sixth session of the Assembly of States Parties. The Chairman of the Committee updated the information contained therein.

4. As noted in paragraph 1 of the memorandum and the statement relating thereto, formal credentials of representatives to the sixth session of the Assembly of States Parties, in the form required by rule 24 of the Rules of Procedure, had been received as at the time of the meeting of the Credentials Committee from the following 71 States Parties:

Albania, Andorra, Argentina, Australia, Austria, Barbados, Belgium, Benin, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Chad, Colombia, Costa Rica, Croatia, Cyprus, Denmark, Dominica, Ecuador, Estonia, Finland, France, Gambia, Germany, Guinea, Guyana, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Mali, Malta, Mauritius, Mexico, Namibia, Netherlands, New Zealand, Nigeria, Norway, Panama, Poland, Portugal, Republic of Korea, Romania, Saint Vincent and the Grenadines, San Marino, Senegal, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Venezuela (Bolivarian Republic of) and Zambia.

5. As noted in paragraph 2 of the memorandum, information concerning the appointment of the representatives of States Parties to the sixth session of the Assembly of States Parties had been communicated to the Secretariat, as at the time of the meeting of the Credentials Committee, by means of a cable or a telefax from the Head of State or Government or the Minister for Foreign Affairs, by the following 34 States Parties:

Afghanistan, Antigua and Barbuda, Belize, Bolivia, Bosnia and Herzegovina, Central African Republic, Comoros, Congo, Democratic Republic of the Congo, Djibouti, Dominican Republic, Fiji, Gabon, Georgia, Ghana, Greece, Honduras, Kenya, Liberia, Luxemburg, Malawi, Marshall Islands, Mongolia, Montenegro, Nauru, Niger, Paraguay, Peru, Saint Kitts and Nevis, Samoa, Sierra Leone, Tajikistan, Timor-Leste, and Uruguay.

6. The Chairperson recommended that the Committee accept the credentials of the representatives of all States Parties mentioned in the Secretariat's memorandum, on the understanding that formal credentials for representatives of the States Parties referred to in paragraph 5 of the present report would be communicated to the Secretariat as soon as possible.

* Previously issued as ICC-ASP/6/28.

7. On the proposal of the Chairperson, the Committee adopted the following draft resolution:
*“The Credentials Committee,
Having examined the credentials of the representatives to the sixth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, referred to in paragraphs 4 and 5 of the present report;
Accepts the credentials of the representatives of the States Parties concerned.”*
8. The draft resolution proposed by the Chairperson was adopted without a vote.
9. The Chairperson then proposed that the Committee recommend to the Assembly of States Parties the adoption of a draft resolution (see paragraph 11 below). The proposal was adopted without a vote.
10. In the light of the foregoing, the present report is submitted to the Assembly of States Parties.

Recommendation of the Credentials Committee

11. The Credentials Committee recommends to the Assembly of States Parties to the Rome Statute of the International Criminal Court the adoption of the following draft resolution:
“Credentials of representatives to the sixth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court
*The Assembly of States Parties to the Rome Statute of the International Criminal Court,
Having considered the report of the Credentials Committee on the credentials of representatives to the sixth session of the Assembly and the recommendation contained therein,
Approves the report of the Credentials Committee.”*

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 seven meetings on 4, 5, 6, 7 and 12 December 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 discussions in the Special Working Group were held on the basis of the discussion paper proposed by the Chairman in January 2007 (hereinafter “2007 Chairman’s paper”).¹ In addition, the Group had before it the report of an informal inter-sessional meeting of the Group held from 11 to 14 June 2007 at the Liechtenstein Institute on Self-Determination at Princeton University (“2007 Princeton report”)², which included in various annexes a non-paper on the exercise of jurisdiction submitted by the Chairman (“non-paper on the exercise of jurisdiction”)³ and a non-paper on defining the State act of aggression also submitted by the Chairman (“non-paper on the act of aggression”).⁴ At the beginning of the meeting, a further non-paper on the definition of the conduct of the individual (“non-paper on the individual’s conduct”)⁵ was circulated.

4. At the first meeting of the Group, the Chairman introduced the 2007 Princeton report as well as the new non-paper on the individual’s conduct. He recalled that the Group was open to participation by all States on an equal footing, and encouraged an interactive discussion. Delegations were invited to present their views on the substantive parts of the 2007 Chairman’s paper, as further developed by the three non-papers, while leaving aside issues related to the elements of crime, which were included for reference purposes only. The Chairman expressed the hope that the substantive discussion would allow him to produce a revised version of the 2007 Chairman’s paper reflecting the progress made since.

5. Delegations welcomed the progress made during the 2007 Princeton meeting. The 2007 Chairman’s paper and the three non-papers were considered a sound basis for further discussion.

II. The crime of aggression – defining the individual’s conduct

6. Paragraphs 1 and 3 of the 2007 Chairman’s paper address the issue of the definition of the individual’s conduct, i.e. the “crime” of aggression, as opposed to the State “act” of aggression. It was recalled that discussions on this issue had significantly advanced during the Princeton meeting, and that broad support had been expressed for the approach contained in variant (a) of the

* Previously issued as ICC-ASP/6/SWGCA/1.

¹ ICC-ASP/5/SWGCA/2.

² Previously issued as ICC-ASP/6/SWGCA/INF.1 and reproduced in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November to 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex III.

³ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November to 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex III, appendix III.

⁴ *Ibid.*, appendix IV.

⁵ Appendix.

Chairman's paper. This approach allows for the various forms of participation contained in article 25, paragraph 3, of the Statute to be applied to the crime of aggression in the same manner as to other crimes under the Statute ("differentiated approach"). At the 2007 Princeton meeting, the Chairman had circulated a revision of his earlier proposal on variant (a) of the Chairman's paper. The revised proposal included the leadership clause as part of the definition of the crime and also reproduced the leadership clause as a new article 25, paragraph 3 bis.

7. The new non-paper on the individual's conduct contained the text of this revised proposal, with one minor editorial change. The opening phrase "For purposes of this Statute" was replaced with the phrase "For the purpose of this Statute" in order to align the text with the corresponding phrases of articles 6, 7 and 8 of the Rome Statute.

8. The non-paper met with broad agreement among delegations, and no suggestions for improving its first paragraph were made. It was emphasized that the first paragraph of the non-paper duly reflected the leadership nature of the crime. Delegations commended the fact that the same structure was used as for other crimes under the Statute. Furthermore, by using the phrase "planning, preparation, initiation or execution", the text closely mirrored the language used at Nuremberg. The use of this phrase also avoided the difficult choice of a conduct verb to link the conduct of the individual to the act of State, and was considered altogether an elegant solution.

9. Delegations also expressed active support or flexibility regarding the second paragraph of the non-paper, which suggests the inclusion of a new paragraph 3 bis in article 25 of the Rome Statute. The paragraph would clarify that the leadership requirement would not only apply to the principal perpetrator to be tried by the Court, but to all forms of participation referred to in article 25 of the Statute, such as aiding and abetting. Some delegations stated that such a provision would be indispensable in ensuring that only leaders were tried, and not ordinary soldiers. A question was raised, however, as to whether this provision would permit more than a single leader of a country to be prosecuted for aggression. Furthermore, it was questioned whether the current text would also encompass persons outside formal government circles who could "shape or influence" the State's action. In response, some delegations considered the language to be sufficiently broad as to permit the prosecution of more than a single leader, including persons outside formal government circles. It was argued that this interpretation would also be consistent with the Nuremberg precedents, which the judges would take into account. Caution was expressed against broadening the wording of the leadership clause, as this might create more problems than it would solve. It was emphasized that, in any event, such concerns should not detract from the agreement reached on paragraph 1 of the non-paper.

10. An editorial change was suggested to bring article 25, paragraph 3 bis, in line with paragraph (3) (e) of the same article, by replacing the opening phrase "With respect to" with "In respect of". Furthermore, a question was raised as to whether the phrase "provisions of the present article shall apply only to persons" was sufficiently clear. On this point, it was clarified that the goal of article 25, paragraph 3 bis, was to ensure the application of the leadership requirement to all forms of participation. It was also observed that the other paragraphs of article 25 would not, in any event, be applicable.

11. In response to a query, the Chairman reminded delegations that the question of command responsibility (article 28 of the Rome Statute) would be considered at a later stage.

III. The act of aggression – defining the conduct of the State

12. Discussions on the definition of the "State act" of aggression focused on the non-paper on the act of aggression, as contained in appendix IV to the 2007 Princeton report. The Chairman reminded delegations that the purpose of the non-paper was to illustrate how a provision incorporating the relevant parts of United Nations General Assembly resolution 3314 (XXIX) of 14

December 1974 would look. The ensuing discussion of the non-paper closely resembled the discussion held at the 2007 Princeton meeting on this issue.⁶

“Act of aggression” vs. “armed attack”

13. Paragraph 1 of the non-paper on the act of aggression contains the terms “act of aggression/armed attack”, indicating that a choice has to be made between a reference to an “act of aggression” and a reference to an “armed attack”. As at the 2007 Princeton meeting, broad support was expressed for using the term “act of aggression”. Those delegations which had previously supported the inclusion of the term “armed attack” indicated that they could accept its deletion.

References to General Assembly resolution 3314 (XXIX)

14. Broad support was expressed for using resolution 3314 (XXIX) as the basis of the definition of an act of aggression. However, views diverged on how to refer to that resolution, if at all.

15. A number of delegations favoured a reference to resolution 3314 (XXIX) in its entirety, stressing that it was a package and an integral text. The reference to “articles 1 and 3” in paragraph 1 of the non-paper should thus be deleted. Other delegations supported the reference to articles 1 and 3 of the resolution. Otherwise, a future Security Council determination of an act of aggression in accordance with article 4 of the resolution would become binding upon the Court, thereby “legislating into” the Rome Statute. This was particularly difficult to reconcile with the principle of legality in the case of a determination by the Council which clearly went beyond the non-binding guideline contained in resolution 3314 (XXIX). A third position expressed preference for borrowing from the text of the resolution without expressly referring to it, a technique that had been used in article 6 of the Rome Statute in respect of the Genocide Convention. Furthermore, it was recalled that a possible compromise might be found by retaining only one of the two references to the resolution in the non-paper: under this approach, the first paragraph would then end after the phrase “inconsistent with the Charter of the United Nations”.

16. A proposal was made to define the act of aggression without copying relevant parts of resolution 3314 (XXIX) into the Rome Statute, but by referring to it in a manner slightly different from the wording currently contained in paragraph 2 of the 2007 Chairman’s paper: “For the purposes of paragraph 1, act of aggression means an act comprised in the definition contained in resolution 3314 (XXIX) of 14 December 1974.”

The “chapeau” of the definition of aggression

17. There was limited discussion on the “chapeau” of the definition of aggression, as contained in the first sentence of paragraph 2 of the non-paper. As in Princeton, a suggestion was made to add the word “unlawful” before the phrase “use of armed force”. Some participants objected to this suggestion.

List of acts that qualify as an act of aggression

18. The discussion of the non-paper on the act of aggression focused on the list of acts that qualify as an act of aggression, and similar arguments and positions were expressed as had been during the 2007 Princeton meeting. There was general support for the inclusion of such a list of acts taken from article 3 of resolution 3314 (XXIX). However, views continued to differ as to whether the list of acts should be exhaustive (“closed”) or non-exhaustive (“open”) – and also whether it was “open” or “closed” in the draft contained in the non-paper. The phrase “Any of the following acts” in particular presented some ambiguity.

⁶ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November to 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex III, paras. 36-57.

19. A number of delegations supported the list as contained in the non-paper. It was emphasized that that list was closed enough to preserve the principle of legality, and at the same time worded in a fairly general manner. Caution was expressed against rewriting the list, as this would create numerous problems.

20. Those favouring a closed list stressed the importance of the principle of legality, as expressed in particular in article 22 of the Statute (*nullum crimen sine lege*). It was suggested that the list could be closed by deleting the reference to resolution 3314 (XXIX), since that resolution clearly stipulated a non-exhaustive list. The suggestion was made that future developments in international law relating to aggression could be included in the Statute in the form of amendments. In this connection, the approach adopted under article 8, paragraph 2 (b) (xx), of the Statute was recalled. There was a need to provide room for future developments in international law and to ensure that future perpetrators would not enjoy impunity. The acts contained in article 3 of resolution 3314 (XXIX) should be seen as a mere list of typical examples of ways in which aggression could be committed. The view was also expressed that this was particularly true due to the developments that had occurred since the adoption of resolution 3314 (XXIX). In addition to the acts listed in that resolution, other acts could now also qualify as acts of aggression.

21. A suggestion was made to add a subparagraph at the end of the list that would read: “Any other act of a similar character which the Security Council determined under article 4 of resolution 3314 (XXIX) to have constituted an act of aggression.” The reference to “similar character” was intended to ensure respect for the principle of legality. This suggestion was made on the understanding that under the current text of the non-paper, any act listed would also have to satisfy the criteria for an act of aggression contained in the “chapeau” of the definition. In response, concerns were expressed about the vagueness of the language, respect for the principle of legality, and preserving the independence of the Court.

22. It was proposed to leave the list of acts to the elements of crimes which would be adopted at a later stage. However, reservations were expressed concerning this approach, since the elements of crimes under article 9, paragraph 1, of the Rome Statute were meant to serve as an interpretive aid to the Rome Statute, not as a compensation for lacunae within it.

23. The view was expressed that not all of the acts enumerated in resolution 3314 (XXIX) could be considered to meet the threshold of “most serious crimes of concern to the international community”, as required by the Rome Statute. This made the inclusion of a threshold clause all the more important. Furthermore, some delegations emphasized that resolution 3314 was, first and foremost, a political text which had not been formulated to serve as the basis for criminal proceedings and that, in its current form, the list of acts enumerated in article 3 of the resolution would be insufficiently precise to qualify the acts of aggression of the Statute with the rigour demanded by criminal law. However, other delegations objected to this assessment.

Autonomy of the Court and the Security Council in determining an act of aggression

24. In the context of the discussions on the definition of the act of aggression, participants recalled the conclusions of the 2007 Princeton meeting regarding the implications of a future provision on aggression for the Security Council.⁷ There was agreement that the Security Council would not be bound by the provisions of the Rome Statute regarding aggression, which would define aggression for the purpose of criminal proceedings against the responsible individuals. In turn, the Court was not bound by a determination of an act of aggression by the Security Council or any other organ outside the Court. The Court and the Security Council thus had autonomous, but complementary roles. The Chairman recalled in this context the importance of an approach which clearly separated issues of definition from issues of jurisdiction.

⁷ Ibid., para. 54.

Qualifying the act of aggression (threshold)

25. Some delegations commented on the need to include a threshold clause, as currently reflected in two sets of square brackets in paragraph 1 of the 2007 Chairman's paper, qualifying the nature and the object or result of the act of aggression. As at the 2007 Princeton meeting, broad support was expressed for retaining, after the words "act of aggression", the phrase "which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". Some delegations that had previously wished to delete this phrase indicated that they were flexible regarding its retention.

26. A number of delegations requested the deletion of the material in the second set of brackets which would extend the qualification of an "act of aggression" further by adding "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof". However, a preference for the retention of this phrase was also expressed.

IV. Conditions for the exercise of jurisdiction

27. The discussion focused on the non-paper on the exercise of jurisdiction, as contained in appendix III to the 2007 Princeton report. In his introductory remarks, the Chairman recalled that the non-paper was mainly aimed at improving the structure of the provisions on jurisdiction and clarifying some technical questions. Instead of brackets, the paper contained elements which could be combined in different ways or partly deleted, and the non-paper was thus intended to reflect all the positions and options contained in the 2007 Chairman's paper. He recalled that discussions on the role of the Security Council in particular had not advanced in previous meetings and that the general positions thereon were well known. He therefore suggested focusing the discussion on the two elements which were new in the non-paper as compared to the 2007 Chairman's paper:

- (a) The suggested role of the Pre-Trial Chamber; and
- (b) The so-called "green light" option for the Security Council.

28. Many delegations took the opportunity to reiterate their general positions on the question of the exercise of jurisdiction, and in particular on the role of the Security Council. These positions and their reasoning are reflected in detail in previous reports of formal and informal meetings of the Special Working Group, most recently in the 2007 Princeton report.

General comments on the non-paper

29. As in Princeton, the structure of the non-paper on the exercise of jurisdiction was generally well received. The non-paper was also welcomed for separating jurisdictional issues from the definition of aggression by creating a separate provision in the Rome Statute (article 15 bis). In this context, it was suggested that the provisions relating to the crime of aggression could be split up even further for improved clarity. Delegations also welcomed the fact that the proposed article 15 bis clarified in paragraph 1 that all of the jurisdictional triggers contained in article 13 of the Statute should apply to the crime of aggression.

30. Some delegations raised questions about the relationship between article 15 of the Rome Statute and proposed article 15 bis. The Chairman clarified that the latter did not prevent the full application of the former, including the applications of those provisions of article 15 relating to the rights of victims.

Role of the Pre-Trial Chamber

31. Paragraphs 2 and 3 of the non-paper envisage a role for the Pre-Trial Chamber with respect to investigations into the crime of aggression. The Pre-Trial Chamber would on the one hand act as a judicial filter, thereby providing checks and balances with regard to the Prosecutor's activities relating to the crime of aggression (paragraphs 2, 3 and 5 of the non-paper). On the other hand, the Pre-Trial Chamber would be responsible for the notification of the Security Council in the absence of an existing Council decision on the matter (paragraph 4 of the non-paper). With regard to both these functions, there was limited support for the suggested role of the Pre-Trial Chamber. The view was expressed that the procedure regarding the crime of aggression should follow the existing provisions of the Rome Statute to the extent possible, and that the role envisaged for the Pre-Trial Chamber seemed rather complicated.

32. Regarding the role of the Pre-Trial Chamber as a judicial filter, some delegations emphasized that there was no need for additional checks or balances. Practical concerns were also expressed, as it appeared that the decision of the Pre-Trial Chamber came at a rather late stage in the proceedings, when the Prosecutor had already devoted considerable resources to the investigation.

33. Delegations that supported a role for the Pre-Trial Chamber as foreseen in the non-paper considered it a means of balancing the powers of the Prosecutor, thereby allaying fears of politically motivated investigations, and preserving the independence of the Court. The proposal was also considered to be a good compromise between the different positions and of possible assistance in the search for consensus on the crime of aggression. It was recalled that the role contemplated for the Pre-Trial Chamber was already contained in the Rome Statute. The only suggested difference in the case of aggression was that it would apply to cases initiated by any of the three jurisdictional triggers contained in article 13 of the Statute, and not only in cases initiated "*proprio motu*" by the Prosecutor. In this context, it was suggested that the Pre-Trial Chamber should act as a judicial filter only in cases where the Security Council was not involved.

34. The added value of the role of the Pre-Trial Chamber in notifying the Security Council was questioned, as this would not enhance the dialogue between the Security Council and the Prosecutor. It was suggested that the notification should be communicated by the Prosecutor instead. A possible role for the President of the Court was also mentioned in this respect. On the question of notification of the Security Council in general, a preference was expressed for reverting to the approach taken in paragraph 4 of the 2007 Chairman's paper.

"Green light" by the Security Council

35. The Chairman recalled that the language in paragraph 3 (b) of the non-paper on the exercise of jurisdiction reflected an attempt to provide an additional option in case the Security Council did not make a substantive determination of an act of aggression. In such a situation, there might be merit in having an explicit and active decision by the Security Council giving the Court the "green light" to proceed, without, however, making a substantive determination that an act of aggression had been committed. This option had been put forward in order to explore a possible middle ground between those who advocated exclusive competence for the Security Council and those who wished to see other scenarios under which the Court could proceed with an investigation.

36. As in Princeton, the suggested language found limited support. The wording "decided not to object" was considered unclear by some, as it did not clarify the nature of the required Security Council decision. Those delegations which rejected the option contained in paragraph 3 (a) criticized paragraph 3 (b) in a similar manner as undermining the independence of the Court, which would thus be politicized. It was also suggested that this option entailed an implicit determination of aggression and inevitably subordinated the Court to the Security Council. Others felt that it did not advance dialogue between the Security Council and the Court. Doubts were also expressed regarding the legal basis for such a provision. While the option contained in paragraph 3 (a) was

linked to Article 39 of the Charter of the United Nations, this option had no such legal basis and was therefore even more incompatible with the independence of the Court.

37. Questions were raised regarding the relationship between the “green light” option and articles 13 and 16 of the Rome Statute. The Chairman clarified that the “green light” option was distinct from a Security Council referral under article 13, with which the “green light” on aggression could, however, be combined. The “green light” option was also different from article 16 of the Rome Statute, which allows the Security Council to suspend the Court’s investigations. The “green light” option would not affect the functioning of either of these provisions. In response, it was then suggested that paragraph 3 (b) would not serve a useful purpose in the light of article 16. It was recalled that article 16 achieved a careful balance between the Court and the Security Council and that this was sufficient for regulating the relationship between these bodies.

38. Some delegations expressed interest in the proposal. It was argued that it would enable the Security Council to act quickly, by providing it with a further option short of making a determination of an act of aggression. The point was made that such a “green light” should be an explicit decision by the Security Council rather than an implicit one. The opinion was also expressed that the option required further clarification, in particular with regard to the modalities of a decision by the Security Council. In this connection, it was suggested that a “green light” needed to be given by the Council in a resolution adopted under Chapter VII of the Charter of the United Nations. Others expressed the view that the Assembly of States Parties had no authority to specify for the Security Council what form its decision should take.

Determination of aggression by the General Assembly or the International Court of Justice

39. Divergent views were expressed on the options contained in paragraph 3 (c) of the 2007 Chairman’s paper. A number of delegations requested deletion of this paragraph since neither a role for the General Assembly nor a role for the International Court of Justice had attracted a sufficient degree of support. Other delegations insisted on retaining the options reflected in paragraph 3 (c), in particular for their potential for building a bridge between the different viewpoints. Some of the delegations speaking in favour of retention of this option supported a potential role for the General Assembly only, while having reservations about a role for the International Court of Justice, as this would create a hierarchy of international courts. In this context, the view was expressed that both paragraphs 3 (c) and 3 (b) contained compromise formulations for which the time might not yet have come. It was also commented that the drafting of this option was an improvement over previous versions.

V. Other substantive issues

40. The Chairman recalled the need to take up the issue of the elements of crime and asked delegations to consider whether the elements should be adopted at the Review Conference, together with the provisions to be incorporated in the Rome Statute, or possibly at a later stage. After a brief discussion it was agreed that such a drafting exercise should not be embarked on at the present stage, as the current draft contained too many alternatives. The question could be revisited once a new version of the Chairman’s paper had been produced.

41. The Chairman also recalled the need to discuss the modalities for the entry into force of the provisions relating to the crime of aggression. In this context, he drew attention to the relevant article 121 of the Rome Statute as well as to the discussions held at the 2004 and 2005 Princeton meetings.⁸ Due to the complexity of the topic and the limited time available, a substantive discussion was deferred to a later stage.

⁸ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third session, The Hague, 6-10 September 2004* (International Criminal Court publication, ICC-ASP/3/25), annex II, paras.10-19. See also *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, paras. 6-17.

VI. Future work of the Special Working Group

42. Delegations considered the question of future meetings of the Group, based on an informal note by the Chairman outlining a roadmap to the Review Conference: The next meeting of the Group was scheduled for a resumed sixth session from 2 to 6 June 2008 in New York, followed by the seventh session to be held from 14 to 22 November 2008 in The Hague. No specific time had so far been allocated to the crime of aggression during that seventh session. The informal note suggested that the Assembly of States Parties should decide to allocate two working days for the crime of aggression during the seventh session, and that a resumed seventh session of five working days should be added in April, May or June 2009. The precise date should be fixed by the Bureau and should be approximately 12 months before the date of the Review Conference, as mandated by resolution ICC-ASP/5/Res.3. That resumed session would conclude the work of the Group. Delegations agreed with the suggestions contained in the informal note, which should be reflected in the omnibus resolution at the sixth session.

Appendix

Non-paper by the Chairman on defining the individual's conduct

(Paragraphs 1 and 3 of the Chairman's paper¹)

The present non-paper is aimed at facilitating discussions at the meeting of the Special Working Group on the Crime of Aggression during the sixth session of the Assembly of States Parties in New York (30 November to 14 December 2007) with respect to paragraphs 1 and 3 of the Chairman's paper, dealing with the definition of the individual's conduct. As reflected in paragraphs 5 to 13 of the report of the 2007 inter-sessional meeting at Princeton,² broad support had been expressed for earlier proposals by the Chairman on this rather technical issue. During the 2007 Princeton meeting, a revision of the latest proposal was circulated, which included the leadership clause as part of the definition of the crime. This revised proposal was included in the 2007 Princeton report,³ and received positive preliminary reactions.

The Chairman would therefore suggest that discussions in New York regarding the definition of the individual's conduct should focus on this proposal, which is re-printed below:

Proposed language to replace the first part of paragraph 1 of the Chairman's paper, replacing both variant (a) and (b):

For the purpose of this Statute, "crime of aggression" means 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/armed attack, [which, by its character, gravity and scale...]

Proposed language to replace paragraph 3 of the Chairman's paper, replacing both variant (a) and (b):

Article 25: add new paragraph 3 bis:

With respect to the crime of aggression, the provisions of the present article shall apply only to persons in a position effectively 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, Sixth session, New York, 30 November to 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex III.

³ *Ibid.*, appendix II.

Annex III

Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007*

I. Introduction

1. Pursuant to a recommendation by the Assembly of States Parties and at the invitation of the Government of Liechtenstein, an informal inter-sessional meeting of the Special Working Group on the Crime of Aggression was held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States of America, from 11 to 14 June 2007. Invitations to participate in the meeting had been sent to all States, as well as to representatives of civil society. Ambassador Christian Wenaweser (Liechtenstein) chaired the meeting.¹

2. The participants in the informal inter-sessional meeting expressed their appreciation to the Governments of Finland, Germany, Liechtenstein, Mexico, the Netherlands, Norway, Sweden and Switzerland for the financial support they had provided for the meeting and to the Liechtenstein Institute on Self-Determination at Princeton University for hosting and giving financial support for the event.

3. The meeting noted with regret that the delegations of Cuba and the Islamic Republic of Iran had been denied permission to travel to Princeton to attend the meeting, in spite of efforts by the President of the Assembly and the Chair of the Special Working Group.

4. The present document does not necessarily represent the views of the governments that the participants represent. It seeks to reflect the opinions expressed on various issues pertaining to the crime of aggression and to set out the conclusions reached. It is understood that these issues will have to be reassessed in light of further work on the crime of aggression. It is hoped that the material in the present report will facilitate the work of the Special Working Group on the Crime of Aggression.

Item 1

The crime of aggression - defining the individual's conduct

5. Paragraphs 1 and 3 of the 2007 Chairman's paper address the issue of the definition of the individual's conduct, i.e. the "crime" of aggression, as opposed to the State "act" of aggression. It was recalled that at the resumed fifth session of the Assembly, broad support had been expressed for the so-called "differentiated approach" contained in variant (a) of the Chairman's paper.² This approach allows for the various forms of participation contained in article 25, paragraph 3, of the Statute to be applied to the crime of aggression in the same manner as to other crimes under the Statute.

* Previously issued as ICC-ASP/6/SWGCA/INF.1. This reproduction does not include the list of participants, contained previously in annex V of ICC-ASP/6/SWGCA/INF.1.

¹ The annotated agenda of the meeting is contained in appendix I.

² ICC-ASP/5/SWGCA/2, annex. See also *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed fifth session, New York, 29 January - 1 February 2007* (International Criminal Court publication, ICC-ASP/5/35), annex II, paras. 6-13.

Proposal for alternative language on variant (a) – “differentiated” approach

6. It was recalled that the Chairman had submitted a proposal for alternative language on variant (a) contained in the appendix to the report of the January 2007 meeting of the Special Working Group, which had been received with great interest.³ That proposal also included a new paragraph 3 bis to be inserted in article 25 of the Statute, replicating the leadership clause for all forms of participation under article 25, paragraph 3.

7. Participants expressed broad support for the proposal as a basis for a solution. Some participants expressed the view that the proposal would merge the “monistic” and the “differentiated” approaches, while others stressed that there was not much difference of substance between the two approaches. It was also noted that the original language of variant (a) contained in the 2007 Chairman’s paper would have constituted a good basis to proceed. Reference was also made to a proposal to use the word “decide” as a conduct verb, and to include omission as a form of committing the crime.

8. The point was made that with respect to the conduct verb, the Chairman’s alternative language followed the Nuremberg precedent. The proposal would thus cover all forms of conduct and would be qualified by the leadership element. The proposal would furthermore replicate the structure used for the other crimes under the Statute, which would satisfy the principle that the drafting of the provisions on aggression should follow the structure of the other crimes, wherever possible.

Leadership clause

9. An exchange of views took place regarding the placement of the leadership clause in paragraph 1 of the proposal, which was no longer part of the definition of the crime, but a jurisdictional element. Some participants stressed the importance of retaining the leadership clause in the definition itself, since it constituted an integral part thereof.

10. In response to this discussion, the Chairman circulated a revision of his proposal which included the leadership clause as part of the definition of the crime.⁴

11. Different views were expressed regarding the proposal to replicate the leadership clause as a new paragraph 3 bis in article 25. While some participants considered this to be an unnecessary duplication and expressed concerns at overburdening the Statute, others supported this replication to ensure that those responsible for the crime could be held accountable, while at the same time excluding persons who may have participated in the crime, but did not fulfil the leadership criterion. Concern was expressed that the absence of such a clause in article 25 might lead to jurisdiction over secondary perpetrators and thus undermine the leadership nature of the crime. The leadership clause in article 25, paragraph 3 bis, would, furthermore, be useful for implementing legislation at the national level, and could also have an impact on customary law. Some participants suggested that article 25 could also be considered as the *only* place for the leadership clause, while others stressed that it had to be retained in the definition. Several participants indicated flexibility on this question, stating that they could accept whichever solution was preferable from a technical perspective, as long as the leadership nature of the crime remained clear.

12. It was furthermore suggested that the content of the leadership clause merited greater consideration, and that the Nuremberg precedent (indictments under the International Military Tribunal and trials under Control Council Law No. 10) referred to persons outside formal

³ See appendix II.

⁴ See appendix II.

government circles who could “shape or influence” the State’s action.⁵ Some participants cautioned against widening the leadership clause, as the responsibility of persons beyond the direct leaders would be difficult to prove.

Attempt and command responsibility

13. Some comments were made on paragraph 3 of the 2007 Chairman’s paper. It was suggested that the question of whether to exclude the applicability of individual attempt (article 25, paragraph 3 (f) of the Rome Statute) and command responsibility (article 28) would not be of major importance, since both provisions were of rather theoretical relevance for the crime of aggression. It was therefore suggested that paragraph 3 of the 2007 Chairman’s paper could be deleted. Some participants preferred to retain the explicit exclusion of individual attempt under article 25, paragraph 3 (f), of the Statute, while others took the opposite view. A preference was expressed to explicitly exclude the applicability of article 28 (command responsibility), but the opposite view was also voiced. It was suggested that the issue of article 28 should be revisited at a later stage.

Item 2

Conditions for the exercise of jurisdiction

14. The Chairman had prepared a non-paper⁶ on the exercise of jurisdiction, based on paragraphs 4 and 5 of the 2007 Chairman’s paper.⁷ The Chairman explained in his introductory remarks that the non-paper was aimed at improving the structure of the provisions and clarifying some technical aspects. In addition, the non-paper introduced the concept of a possible role by the Pre-Trial Chamber as well as a possible “green light” option, both of which had been advanced by some delegations in the past. Furthermore, it provided for a separation of the provisions on the crime of aggression to be included in the Rome Statute: article 8 bis would contain the definition, and article 15 bis would address the exercise of jurisdiction. The Chairman stressed that the non-paper was intended to reflect all the positions and options contained in the 2007 Chairman’s paper. He expressed his hope that the non-paper would facilitate continued discussions on the exercise of jurisdiction.

General comments on the non-paper

15. It was generally felt that the non-paper was a valuable contribution to the discussion and a step forward in the consideration of the exercise of jurisdiction. It was viewed as an attempt to clarify the manner in which provisions on the crime of aggression should be inserted into the Rome Statute and to present elements that could be combined or deleted in the process of finding an acceptable solution. Some participants, however, expressed reservations with regard to some aspects of the non-paper and saw value in continuing consideration of the 2007 Chairman’s paper. In particular, the view was expressed that the positions and options contained in the 2007 Chairman’s paper were not reflected with sufficient clarity. Moreover, it was noted that there was no agreement on a role for the Pre-Trial Chamber in the procedure concerning the exercise of jurisdiction, and objection was expressed to paragraph 3 (b) containing possible language for a “green light” option. The Chairman indicated that he would give particular consideration to these aspects in the further drafting of the non-paper.

16. Opening the discussion, the Chairman sought the views of participants *inter alia* on the structure of the non-paper, on the technical clarifications he had attempted to make, on the role of the Pre-Trial Chamber, as well as on paragraph 3 (b). Many participants took the opportunity of the

⁵ It was noted that the United States Military Tribunals at Nuremberg had considered this matter in the *Krupp*, the *I.G. Farben*, the *Ministries* and the *High Command* cases, as had the French Tribunal in the *Roehling* case. A proposal had been submitted on the matter in 2002 in connection with the discussion of the Elements of the Crime of Aggression (see PCNICC/2002/WGCA/DP.2, fifth draft element of the crime of aggression).

⁶ See appendix III, which contains a proposal for a new article 15 bis.

⁷ ICC-ASP/5/SWGCA/2, annex.

discussion to reiterate their general positions on the question of the exercise of jurisdiction, and in particular on the role of the Security Council. These positions and their reasoning are reflected in detail in previous reports of formal and informal meetings of the Special Working Group.

Separate provisions on definition and exercise of jurisdiction

17. General support was expressed for the separation of the definition of the crime of aggression from the provisions regarding the exercise of jurisdiction. The introduction of a new article 15 bis was thus generally welcomed. The view was expressed that this constituted a good way to separate the definition of the crime from issues relating to jurisdiction. It was suggested that the provisions dealing with the role of organs outside the Court could be placed after article 13, and that paragraphs 4 and 5 could be incorporated into existing articles.

Trigger mechanisms (paragraph 1)

18. Participants expressed broad support for paragraph 1, which clarified that an investigation into the crime of aggression could be triggered by any of the three mechanisms contained in article 13 of the Statute. It was, however, also pointed out that article 13 of the Statute could not be fully applicable to the crime of aggression due to its special nature. It was further suggested that in the case of a self-referral by a State or in the case of a referral by the Security Council, the suggested procedure of article 15 bis might not be necessary.

Role of the Pre-Trial Chamber

19. Paragraphs 2 and 3 of the Chairman's non-paper envisage a role for the Pre-Trial Chamber with respect to investigations into the crime of aggression. Some participants supported such a role for the Pre-Trial Chamber as a way of balancing the powers of the Prosecutor. In this context, it was pointed out that a similar problem had arisen during the discussions before and at the Rome Conference on a possible *proprio motu* competence for the Prosecutor. The role of the Pre-Trial Chamber was a compromise between the different positions at the time, and the non-paper suggested that the same filter should apply to the exercise of jurisdiction in respect of the crime of aggression.

20. Others questioned the need to involve the Pre-Trial Chamber in the early stages of the investigation on the grounds that this would increase the risk of a confrontation between the Court and the Security Council. The dialogue with the Security Council should instead involve the Prosecutor, as was currently the case in investigations following Security Council referrals. Others, however, expressed the view that a role for the Pre-Trial Chamber would not preclude a dialogue between the Security Council and the Prosecutor during an investigation.

21. The point was made that the exact nature of the role to be given to the Pre-Trial Chamber depended largely on the outcome of the discussions on paragraph 5 of the non-paper.

22. It was noted that in the case of *proprio motu* proceedings, the request for an authorization of an investigation into a crime of aggression could either be combined with the request under existing article 15, paragraph 3, of the Statute, or submitted separately at a later stage.

23. It was suggested that the words "proceed with", contained in paragraph 2 of the Chairman's non-paper, should be replaced with "initiate", as the latter term was used in article 15, paragraph 1, of the Statute.

Procedural options in paragraph 3

24. Paragraph 3 of the non-paper, in particular its subparagraphs, contain elements which are intended to reflect the existing procedural options (contained in paragraph 5 of the 2007 Chairman's

paper), in particular when combined with the retention or deletion of paragraph 5 of the non-paper. Some participants preferred to retain as many options as possible in this paragraph, as this would increase the number of cases which could come before the Court, in particular if paragraph 5 was kept. However, the view was also expressed that options which do not garner strong support should be eliminated and that narrowing down the options should be the goal at this stage of the work on the issue.

Determination by the Security Council (paragraph 3 (a))

25. Some participants supported the retention of this subparagraph and the deletion of all other subparagraphs, in accordance with their position regarding the exclusive competence of the Security Council to make a determination of an act of aggression in accordance with Article 39 of the Charter of the United Nations, and in light of article 5, paragraph 2, of the Rome Statute. It was further argued that this paragraph would protect the Court from accusations of political bias. Others were willing to accept that the Security Council should first be given an opportunity to make such a determination, while the absence of such a determination within a certain time should not prevent the Court from proceeding. In that context it was recalled that the determination of an act of aggression by the Security Council would not be binding for the Court, but rather constitute a procedural pre-condition. Others rejected the subparagraph and argued that article 5, paragraph 2, of the Statute did not require a prior determination by the Security Council and that the relationship between the Court and the Security Council was regulated in other parts of the Statute. Furthermore, there was no need to give specific protection to the Court from accusations of political bias in connection with the crime of aggression, since all existing crimes under the Statute also had a political element.

26. Some participants considered the phrase “the State referred to in article 8 bis” to be an improvement, because it made clear that the State in question was the State that had committed an act of aggression. A preference for the language in the 2007 Chairman’s paper was also voiced.

“Green light” by the Security Council (paragraph 3 (b))

27. The Chairman explained that the language in paragraph 3 (b) reflected a suggested attempt to accommodate the possibility of the Court being allowed to proceed if the Security Council gave its consent to such an investigation, without however making a specific determination that an act of aggression had been committed. This option was put forward in order to explore a possible middle ground between those who advocated exclusive competence for the Security Council and those who wished to see other scenarios under which the Court could proceed with an investigation.

28. Overall, the suggested language found limited support. It was argued that the wording was unclear, because it did not clarify what would happen if the Security Council objected. Furthermore, the relationship between this option and article 16 was considered to be unclear. It was further cautioned that paragraph 3 (b) could imply that the Court could proceed if the Council did not object, thereby forcing the Council to object. Others expressed the view that paragraph 3 (b) did not affect article 16 or its application under the Statute. Although it was noted that the role to be assigned to the Security Council was a policy choice, it was also indicated that the subparagraph would expand the powers of the Security Council regarding the crime of aggression and undermine the Court’s independence in a similar manner as paragraph 3 (a). Doubts were also expressed regarding the legal basis of a provision giving the Security Council the right to give the “green light” for an investigation in respect of a crime of aggression.

29. Some participants expressed interest in the proposal. It was argued that it would enable the Security Council to act quickly, by providing it with a further option short of making a determination of an act of aggression. The point was made that such a “green light” should be an explicit decision by the Security Council rather than an implicit one.

30. In the context of paragraphs 3 (a) and (b), participants discussed alternative language originally suggested as part of a proposal presented at the Turin Conference on International Criminal Justice.⁸ The Chair thus invited comments on a possible addition to paragraph 3 (a) or alternatively a possible new paragraph 3 (a) bis: “if the Security Council has determined the existence of a threat to or breach of the peace as a result of the threat or use of armed force by one State against another State.” This alternative language found very limited support. It was argued that under such an approach a Council decision might be interpreted as de facto determination of an act of aggression, irrespective of the Council’s intention. It might therefore have a negative impact on the decision-making within the Council, which might adjust the way it used certain terms. It was argued that this option would also create a subordinate relationship between the Court and the Council.

Determination by the General Assembly or by the International Court of Justice (paragraph 3 (c))

31. Paragraph 3 (c) reflects an attempt by the Chairman to streamline and merge options 3 and 4 of the 2007 Chairman’s paper. Reservations were expressed regarding a role for either the General Assembly or the International Court of Justice. Some participants reiterated their opinion regarding exclusivity of the Security Council’s competence under Article 39 of the Charter of the United Nations. Others reiterated their opposition to any kind of subordinate relationship affecting the independence of the Court. The question was also raised whether the International Court of Justice could make such a determination in an advisory opinion, since such a determination related by its very nature to a dispute between States, which in turn could only be adjudicated by the International Court of Justice with the consent of those States. Other delegations saw merit in retaining the option reflected in paragraph 3 (c), which might help build a bridge between the different viewpoints. It was suggested that the references to articles 12, 14 and 24 contained in option 3 of paragraph 5 of the 2007 Chairman’s paper should be retained.

Notification (paragraph 4)

32. In connection with paragraph 4, some participants reiterated their view that the role envisaged for the Pre-Trial Chamber should rather be assigned to the Prosecutor, while others saw merit in this role for the Pre-Trial Chamber. Giving a role to the President of the Court was also mentioned as a possible alternative. The issue was raised at what stage of the proceedings the notification should take place. The moment of the issuance of arrest warrants or of the confirmation of charges were mentioned as possible alternatives which would give the Court more time to build the case.

33. It was further questioned why the Secretary-General of the United Nations should be notified on behalf of the United Nations. In this connection, it was pointed out that the Secretary-General’s role would be limited to notifying and transmitting information to the appropriate organ, and that such a role was already foreseen in article 17 of the Relationship Agreement between the International Criminal Court and the United Nations.

Options in case of lack of prior determination by United Nations organs (paragraph 5)

34. As in past discussions and in keeping with positions expressed on paragraph 3 (a), views differed as to whether the Court might proceed with an investigation in the absence of a prior determination that an act of aggression had been committed. It was noted that the time limit envisaged should be short, and that after its expiration no second opportunity should be available for a prior determination. Concern was expressed about the impact of delayed proceedings for the investigation and for the victims. It was also pointed out, however, that the possibility of a notification under paragraph 4 necessarily entailed the establishment of a timeframe for action

⁸ The Conference on International Criminal Justice, organized by the Italian authorities, was held in Turin from 14-18 May 2007 (<http://www.torinoconference.com>).

following the notification, and that the procedure under paragraph 5 was streamlined in comparison to the relevant provisions of the 2007 Chairman's paper.

Investigations into other crimes (paragraph 6)

35. This paragraph was generally supported, in particular because it would allow for the investigation by the Prosecutor into other crimes in the absence of a determination under paragraph 3. Some delegations indicated that paragraph 6 of the non-paper was not necessary. However, no objections were raised regarding its retention.

Item 3

The act of aggression – defining the conduct of the State

36. The Chairman presented a non-paper containing a revised formulation of paragraph 2 of the 2007 Chairman's paper.⁹ He indicated that the purpose of the paper was to illustrate how a provision incorporating the relevant parts of United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974 would look like, while retaining the square brackets around the reference to "articles 1 and 3" in paragraph 2 of the 2007 Chairman's paper. In the discussions on this non-paper, participants also raised comments regarding other issues relating to the definition of the State act of aggression on the basis of paragraphs 1 and 2 of the 2007 Chairman's paper.

37. Broad support was expressed for the approach proposed by the Chairman in the non-paper, which would base the definition of the State act on the term "act of aggression" rather than "armed attack" in paragraph 1 of the 2007 Chairman's paper. Others recalled their preference for the term "armed attack" (reflecting the generic approach), but some indicated their flexibility, provided that a high threshold was included. A preference for the generic approach combined with the use of the term "act of aggression" was also expressed.

References to General Assembly resolution 3314 (XXIX)

38. The discussions focused on the two references to resolution 3314 (XXIX) contained in paragraph 2 of the non-paper. While there was broad support for defining the term "act of aggression" on the basis of resolution 3314 (XXIX) and incorporating relevant provisions of that resolution in the Statute, divergent views were expressed regarding the manner in which the resolution should be referred to, if at all. Some participants cautioned against incorporating a list of acts reproducing provisions of the resolution in the Statute, preferring instead a reference to those provisions.

39. Some participants expressed the view that a provision on the State act of aggression must refer to resolution 3314 (XXIX) in its entirety, stressing that the resolution was a package and that all its provisions were interrelated, as evidenced by its article 8. Furthermore, the reference to the resolution as a whole would underline the non-exhaustive character of the list of acts. It was pointed out that a reference to articles 1 and 3 only had the effect of leaving aside important other elements of the resolution, among them articles 2, 4, 6 and 7. It was also suggested that the interpretative declarations formulated at the time of adoption of resolution 3314 (XXIX) might have to be taken into account.

40. Other participants said they could accept general references to resolution 3314 (XXIX) as a means to facilitate the interpretation of the definition in the future. It was recalled that a similar approach had been chosen for war crimes, where the interpretation of the provisions of the Statute must be consistent with the Geneva Conventions and the Additional Protocols. In this respect, however, the differences in nature between a resolution adopted by the General Assembly and a treaty with binding effects were highlighted.

⁹ See appendix IV.

41. Other participants preferred to retain a reference to articles 1 and 3 of resolution 3314 (XXIX) only, in order to avoid the impression that future determinations of aggression by the Security Council under article 4 of the resolution, which might go beyond acts listed in article 3, could be binding for the Court. It was further suggested that articles 2 and 7 of the resolution should be mentioned in the text. In connection with a suggested reference to article 2, the view was expressed that such a reference would not be consistent with article 67(1)(i) of the Statute since it constituted a de facto reversal of the burden of proof and was therefore unacceptable.

42. Other participants preferred to make no reference to resolution 3314 (XXIX) at all. Furthermore, such a reference was not considered necessary since the non-paper incorporated the relevant provisions of that resolution directly in the Statute.

43. It was noted that the Chairman's non-paper in its current form contained two references to resolution 3314 (XXIX) and that it might be possible to reconcile the different views on this issue by retaining only one of these two references. It was suggested that, in that case, the first of the two references could be deleted.

The “chapeau” of the definition of aggression

44. It was suggested that the reference to resolution 3314 (XXIX) in the first sentence of paragraph 2 of the non-paper (“as set out in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974”) should be deleted and replaced by the phrase “in accordance with the Charter of the United Nations and other relevant provisions of international law”. Overall, there was limited support for this proposal, which was considered to be unnecessary insofar as it referred to the Charter, and confusing insofar as it referred to unspecified other rules. It was further noted that the drafting of the proposal was problematic in particular due to the juxtaposition of two, seemingly contradictory, references to the Charter of the United Nations (“inconsistent with” vs. “in accordance with”). Others stated that the reference was unnecessary on substantive grounds, because the intended effect was already achieved in article 21, paragraph 1 (b), of the Statute. Some participants also noted that the first sentence of paragraph 2 in its current form was identical with article 1 of resolution 3314 (XXIX) and that the suggested addition would therefore amount to a rewriting of that resolution to which they objected. Some participants, however, expressed interest in the proposal, in particular if it allowed deletion of the reference to resolution 3314 (XXIX). It was suggested that, in particular, the reference to the Charter of the United Nations would cover those articles of resolution 3314 (XXIX) that were not incorporated in the Statute. It was proposed that the newly suggested reference to the Charter of the United Nations could be moved to the beginning of the phrase (after “For the purpose of paragraph 1”). It was also seen as an important link to the Charter of the United Nations, which would be relevant since article 5, paragraph 2, of the Statute, containing a reference to the Charter, would be deleted once the provisions on aggression were adopted.

45. A suggestion was made to add the word “unlawful” before the phrase “use of armed force” in the first sentence of paragraph 2 of the non-paper. It was further suggested to delete the word “armed” from this phrase, and to add the requirement that the use of force must constitute “a most serious crime of concern to the international community as a whole”. Some participants objected to both suggestions, preferring to quote article 1 of resolution 3314 (XXIX) as it stood.

List of acts that qualify as an act of aggression

46. Support was expressed for the list of acts contained in the non-paper, taken from article 3 of resolution 3314 (XXIX). It was stated that the list represents current customary international law, though some took the view that that was only true for subparagraph (g). It was stated that most of the acts contained in the list were reflected in the practice of the Security Council, while for some acts there was no Council practice.

47. There was no agreement on whether the list currently contained in the non-paper was exhaustive (“closed”) or non-exhaustive (“open”), while some suggested it was somewhere in between (“semi-closed” or “semi-open”) and that the phrase “Any of the following acts” in particular offered some ambiguity. Some participants considered such ambiguity to be constructive, while others disagreed.

48. The relationship between the chapeau and the list of acts in the non-paper was also interpreted in different ways. It was noted that the chapeau and the list of acts had to be applied cumulatively in considering an act of aggression. However, the view was also expressed that the chapeau contained the definition of the act of aggression, while the list contained only examples of a merely illustrative nature. Under this interpretation, it was also clear that the chapeau entailed the possibility of having acts other than those enumerated in the list considered acts of aggression, irrespective of the drafting of the list.

49. Different views were also expressed as to whether the list *should* be exhaustive or not:

50. Those favouring a closed list stressed the importance of the principle of legality, as expressed in particular in article 22 of the Statute (*nullum crimen sine lege*). The view was expressed that the ambiguity of the nature of the list was in itself problematic under the principle of legality. It was suggested that the list could be closed by deleting the reference to resolution 3314 (XXIX), since that resolution clearly stipulated a non-exhaustive list. Furthermore, any ambiguity about the open or closed nature of the list would be exacerbated if a reference to resolution 3314 (XXIX) were to open the door to acts determined to be aggression under article 4 of that resolution, which would be a clear violation of the principle *nullum crimen sine lege*. A suggestion was made to state explicitly the non-retroactivity of decisions referred to in article 4 of resolution 3314 (XXIX). The suggestion was made that future developments of international law relating to aggression could be included in the Statute in the form of amendments. In this context the approach adopted under article 8, paragraph 2 (b) (xx), of the Statute was recalled. The view was expressed that such amendments would only be prospective in nature and therefore not provide for jurisdiction over a possible incident that had triggered the amendments.

51. Those favouring an open or semi-open list indicated that there was a need to provide room for future developments of international law and to ensure that perpetrators would not enjoy impunity. It was suggested to clarify the open nature of the list by changing the beginning of the first sentence to “Such uses of armed force include”. It was recalled that aggression was the supreme crime under international law and that it was important to ensure that perpetrators were brought to justice. It was further suggested that the definition should include the acts of non-State actors whose conduct was not attributable to a State. In response to concerns regarding legality, reference was made to existing provisions of the Statute that would ensure the rights of the accused in future proceedings, in particular article 22 (*nullum crimen sine lege*), article 32 (mistake of fact or law) and article 5 (reference to “most serious crimes”).

52. Reference was also made to article 7, paragraph 1 (k), of the Statute, which contained an open or semi-open provision. Others, however, viewed article 7, paragraph 1 (k), read in its entirety as rather closed in nature. They pointed out that that article contained an important qualifier and could therefore not be considered an analogy.

53. A suggestion was made to add a paragraph at the end of the list that could read “Other uses of armed force of a similar character and gravity may also constitute acts of aggression.” The view was expressed that such an approach would more likely pose additional problems than offer a solution, because it would be very difficult to find agreed language. The formulation was generally considered to be too vague, in particular as regards the phrase “similar character and gravity”. While some showed a general interest in further exploring the option, others opposed it for reasons of legality.

Autonomy of the Court and the Security Council in determining an act of aggression

54. In the context of the discussions on the definition of the act of aggression, and specifically reference to or incorporation of provisions of resolution 3314 (XXIX), the question was raised as to whether the definition of the State act of aggression incorporated into the Rome Statute would have to be followed by the Security Council. Participants noted in response that the Security Council would not be bound by the provisions of the Rome Statute. Furthermore, the view was expressed that the Security Council was not bound in its determination by resolution 3314 (XXIX) either, since that resolution explicitly left it to the Council to determine that other acts constitute aggression under the Charter, and resolution 3314 (XXIX) was only intended to provide guidance to the Council in this respect. It was emphasized and generally agreed that, in turn, the Court was not bound by a determination of an act of aggression by the Security Council or any other organ outside the Court. The Court and the Security Council thus had autonomous, but complementary roles, which could best be advanced if both institutions had broadly compatible rules regarding the determination of an act of aggression.

Qualifying the act of aggression (threshold)

55. Participants commented on language reflected in two sets of square brackets in paragraph 1 of the 2007 Chairman's paper, qualifying the nature and the object or result of the act of aggression. Participants recalled the broad support for the threshold clause contained in the first set of brackets qualifying the act of aggression ("which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"), and suggested that agreement had almost been reached on this phrase during the resumed fifth session of the Assembly of States Parties in January 2007.

56. It was suggested that the threshold clause should be amended to read: "when the act of aggression in question has been committed in a particularly grave and large-scale manner". The suggestion was made to avoid the impression that some acts of aggression might not be in violation of the Charter and to emphasize the difference between the definition of the crime and the question in which cases the Court should have jurisdiction. Following a discussion on the placement of such a paragraph, it was suggested to include it as a replacement for the threshold clause contained in the first set of brackets. Some participants expressed interest in exploring the idea further. Others objected to its inclusion given the broad support for the first set of brackets in paragraph 1 of the 2007 Chairman's paper, emphasizing that the threshold clause was a definitional rather than a jurisdictional element. They also considered the proposal to be unclear as regards the meaning of "grave" and "large scale". The view was also expressed that no threshold clause was needed at all, given that aggression was considered the supreme crime and that other parts of the Rome Statute already limited the jurisdiction of the Court to the most serious crimes only.

57. Many participants called for the deletion of the second set of brackets qualifying the act of aggression ("such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof"). There were, however, also objections to deleting the phrase. It was suggested that the non-paper on the State act of aggression might be helpful in solving this issue, since it would incorporate elements of resolution 3314 (XXIX) directly into the Statute, some of which were very similar in nature to the elements contained in that phrase. The inclusion of these elements would thus be secured even if the second set of brackets was not retained.

Item 4**Other substantive issues**

58. The Special Working Group did not discuss any topics under this item. The Chairman asked participants to consider, for future discussions, whether the Elements of Crime might only be considered after the Review Conference, given the uncertain state that provisions of aggression

might still be in immediately prior to the Review Conference. It was pointed out in this respect that resolution F of the Final Act of the Rome Conference did in fact require submission of Elements of Crime on the crime of aggression to the Review Conference and that the issue had to be considered against that background.

Item 5

Future work of the Special Working Group

59. Introducing the item, the Chairman recalled that according to its agreed schedule the Special Working Group on Aggression would hold at least three full days of meetings at the sixth session of the Assembly in November / December 2007 and at least four full days of meetings during a resumed session likely to take place in June 2008. He also recalled that the Assembly had decided on an earlier occasion that the Special Working Group should conclude its work at least 12 months prior to the Review Conference; while it had not decided to conclude its work in June 2008. He further recalled that such decision had been made on the general understanding that the Review Conference would take place in July 2009 and that no further inter-sessional meetings in Princeton were planned. The timing of the Review Conference was therefore essential for the Special Working Group.

60. Ambassador Rolf Fife (Norway), the focal point of the Assembly of States Parties on the Review Conference, indicated that the facilitator on the Review Conference, Mr. Sivu Maqungo (South Africa), had done extensive work on the Rules of Procedure of the Review Conference, as well as on its budgetary aspects, within the New York Working Group of the Bureau. The focal point was collecting views on topics such as the scope and duration of the Conference and would hold informal meetings on the subject in New York on 15 June 2007, and in The Hague in July. Criteria for the success of a Review Conference should be discussed. No decision on timing had been made.

61. In connection with the question of timing, he pointed out that the relevant provisions of the Rome Statute were not easy to reconcile in that article 123, paragraph 1, provided for the convening of a Review Conference seven years after entry into force of the Rome Statute, while article 121, paragraph 1, provided for the possibility of States Parties proposing amendments to the Statute seven years after its entry into force. It was therefore possible to interpret the term “convening” in article 123, paragraph 1, as sending out the invitations to the Review Conference, to be held not too long thereafter. As to the scheduling of the Review Conference, he pointed out that it should take into account other meetings on the calendar of international organizations, in particular the regular session of the United Nations General Assembly. The focal point also emphasized that the Review Conference under article 123, paragraph 1, was not necessarily the only Review Conference for the Rome Statute and that universal participation and effectiveness were important issues to be considered for the convening of the Conference.

62. Ambassador Mirjam Blaak (Uganda) presented the offer of her Government to host the Review Conference in Kampala, Uganda, either in late 2009 or early 2010. She emphasized that convening the Conference in a situation country and close to the victims as the main stakeholders would enhance the visibility of the Court in the region where it had already had a very positive effect. Participants welcomed the offer by the Government of Uganda and agreed to consider it in detail. The view was expressed that the fact that Uganda was a situation country should be taken into account in these discussions.

63. During the subsequent discussion, it was agreed that the relevant provisions of the Rome Statute were somewhat contradictory. Nevertheless, it was generally felt that the most convincing reading of the provisions, taking into account other events on the international conference calendar, would lead to the Review Conference being held in early 2010 after the session of the Assembly of States Parties in late 2009. The view was also expressed that the drafters of article 123 had probably intended the Review Conference to take place in 2009, not early 2010.

64. In connection with the session of the Assembly of States Parties to be held in late 2009, the possibility was mentioned that at that session the Assembly could consider amendments submitted in accordance with article 121, paragraph 1, and also serve as a preparatory body for the Review Conference.

65. It was generally felt to be important that the sixth session of the Assembly of States Parties, which would commence on 30 November 2007, should make a decision on the timing and venue of the Review Conference and that more discussions were needed to that end. In connection with the work of the Special Working Group, several delegations expressed the view that not having any work on the crime of aggression done between June 2008 and a possible Review Conference in 2010 was not desirable. Therefore it might be necessary to secure more meeting time from the Assembly of States Parties before the Review Conference. The wisdom of the earlier decision to conclude the work of the Special Working Group at least 12 months prior to the Review Conference was also questioned.

Appendix I

Annotated agenda

The meeting is aimed at continuing discussions held at previous inter-sessional meetings and in the context of the Assembly of States Parties (resumed fifth session of January 2007). It is hoped that participants will, once again, in the “Princeton spirit” engage in highly interactive and constructive discussions, on the basis of the Chairman’s paper submitted to the January 2007 meeting.¹ It is suggested that the discussion should be structured in the following manner:

Item 1) The “crime” of aggression – defining the individual’s conduct

Paragraphs 1 and 3 of the Chairman’s paper contain language aimed at defining the individual’s conduct (the “crime” of aggression, as opposed to the State “act” of aggression). Past discussions have focused on the question of how such a definition of the individual’s conduct can be squared with the provisions of article 25, paragraph 3 (a) to (d) of the Statute, which in general terms and as a “default rule” (Part 3: “General Principles of Criminal Law”) describe the forms of participation in a crime.

Two different approaches have been identified: Variant (b), which was already contained in the 2002 Coordinator’s paper, implies a “monistic” approach in that the description of the individual’s conduct includes the description of different forms of “participation” (cf. the phrase “orders or participates actively”) which would otherwise be addressed in article 25, paragraph 3. Therefore, if variant (b) were to be followed in paragraph 1, variant (b) would also have to be chosen under paragraph 3. Under this approach, the application of article 25, paragraph 3, would thus explicitly be excluded.

Variant (a) reflects the “differentiated” approach which has emerged in discussions in Princeton during the last few years. This approach seeks to incorporate the crime of aggression into the Statute in a manner which applies Part 3 of the Statute (“General Principles of Criminal Law”) as fully as possible to the crime of aggression, and thus applies article 25, paragraph 3, to the crime of aggression as well. Under this approach, the various forms of participation described in that article 25 (e.g. the person “commits” the crime, “orders, solicits or induces the commission of such a crime”) are applied to the crime of aggression in the same manner as they are applied to other crimes covered by the Statute. Paragraph 1 (variant a) of the Chairman’s paper contains language, based on previous proposals made in Princeton meetings, which defines the individual’s conduct in a manner which allows the application of article 25, paragraph 3. In this context, discussions focused on the choice of the “conduct verb” in paragraph 1. At the January 2007 meeting of the Special Working Group the Chairman submitted alternative language on this variant for informal consultations, which follows more closely the wording of existing crimes under the Statute (cf. Appendix of the Special Working Group on the Crime of Aggression January 2007 report).

Under this item, further discussions could also be held on the following issues:

- The leadership clause, cf. paragraph 1 of the Chairman’s paper.
- The question of the attempt of an individual to commit the crime of aggression (as opposed to the attempted State act of aggression), cf. paragraph 3 of the Chairman’s paper (exclusion of article 25, paragraph 3 (f) of the Statute).
- The question of command responsibility: Is there a need to explicitly exclude the application of article 28 of the Statute with respect to the crime of aggression?

¹ ICC-ASP/5/SWGCA/2.

Item 2) The conditions for the exercise of jurisdiction

According to article 5, paragraph 2, of the Rome Statute, the provision on the crime of aggression should define the crime and set out “the conditions under which the Court shall exercise jurisdiction with respect to this crime.”

The Chairman’s paper addresses these issues in paragraphs 4 and 5. While paragraph 4 addresses mainly the relationship with the Security Council and its competence to make a determination of an act of aggression, paragraph 5 deals with procedural options in case the Council does not make such a determination, involving in particular the United Nations General Assembly or the International Court of Justice. In this context, past discussions have also referred extensively to the defendant’s right to rebut all aspects of the case made against him/her.

During the January 2007 meeting of the Special Working Group on the Crime of Aggression, some suggestions were made to achieve progress on this question. These proposals are reflected in paragraphs 29 to 34 of the Special Working Group on the Crime of Aggression January 2007 report:

- Procedural safeguards in case of *proprio motu* investigations and State referrals (in particular requirement that investigations be authorized by Pre-Trial Division sitting in full session of six judges);
- Adding a clarification that the Court may in any event exercise its jurisdiction in case of an existing determination of an act of aggression by the Security Council;
- Providing the Security Council with the option of giving the “green light” to proceed with a case, without making a determination that an act of aggression had occurred;
- Developing the provisions on the conditions for the exercise of jurisdiction on the basis of the trigger mechanisms under the Statute (article 13). Which Court organ would interact with the Security Council at what point in time? What would be the procedural nature of the Security Council’s response?

Item 3) The “act” of aggression – defining the act of the State

The definition of the State act of aggression is addressed in the second part of paragraph 1 of the Chairman’s paper (starting with “act of aggression/armed attack”, followed by two sets of brackets), as well as in paragraph 2. The main issues for discussion are the following:

- Choice of term in paragraph 1: “act of aggression” (accompanied by a reference to General Assembly resolution 3314 (XXIX) in paragraph 2), or “armed attack” (under this approach, paragraph 2 would be deleted).
- Should a mandatory threshold be required for the act of aggression? (first set of brackets in paragraph 1)
- Should the “act of aggression/armed attack” be illustrated by references to “war of aggression” and “occupation”? (second set of brackets in paragraph 1)
- In case the term “act of aggression” is used in paragraph 1, how should the reference to General Assembly resolution 3314 (XXIX) of 14 December 1974 be formulated? The Chairman’s paper provides the option of referring to resolution 3314 (XXIX) as a whole, or only to specific articles (1 and 3) of that resolution. Should the text of General Assembly resolution 3314 (XXIX) be (partly) reproduced in the Statute?

In this context, the question of the attempt of aggression at the State level could also be addressed.

Item 4) Other substantive issues

Other substantive issues that were previously discussed could be taken up. The question of the modalities for the entry into force of amendments to the Statute (article 121) was discussed extensively but not conclusively: Should the definition of the crime of aggression enter into force for all States Parties once ratification by seven eighths of States Parties is reached (paragraph 4); or should it only enter into force for those States Parties which have accepted such an amendment (paragraph 5)? Furthermore, there was only a preliminary discussion regarding the elements of crime so far. The Chairman's paper makes it clear that the elements in their current form serve merely as a placeholder. Participants might want to raise other substantive issues as well.

Item 5) Future work of the Special Working Group on the Crime of Aggression

According to the decisions of the Assembly of States Parties, the Special Working Group on the Crime of Aggression would meet again during the main part of its 6th session (30 November to 14 December 2007, at least three exclusive days of meetings in New York), and for a resumed session of four days in the first half of 2008.² Furthermore, the Assembly of States Parties had previously decided that the Special Working Group on the Crime of Aggression should conclude its work at least 12 months prior to the Review Conference. In accordance with that schedule, the 2007 inter-session meeting in Princeton would thus be the last meeting of this kind. Participants may want to discuss the future work of the Special Working Group on the Crime of Aggression, in particular as it relates to the Review Conference.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November to 1 December 2006* (International Criminal Court publication, ICC-ASP/5/32) part III, resolution ICC-ASP/5/Res.3, para. 38.

Appendix II

1. Proposal for alternative language on variant (a) prepared by the Chairman in January 2007¹

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.

2. Revised 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, 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/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 apply only to persons ~~being~~ in a position effectively to exercise control over or to direct the political or military action of a State.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, resumed fifth session, New York, 29 January - 1 February 2007* (International Criminal Court publication, ICC-ASP/5/35), annex II, appendix.

Appendix III

Non-paper submitted by the Chairman on the exercise of jurisdiction

(Paragraphs (4) and (5) of the Chairman's paper¹)

The present non-paper is aimed at facilitating discussions in Princeton with respect to paragraphs (4) and (5) of the Chairman's paper, dealing with pre-conditions for the exercise of jurisdiction. The paper is submitted in response to suggestions made at the Special Working Group on the Crime of Aggression meeting in January 2007 aimed at improving the drafting technique of these paragraphs. Specifically, it was suggested that clarification is needed in order to determine at what stage of the proceedings and through which Court organ the notification should be effected. The paper furthermore contains wording reflecting the approach of allowing 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 (see paragraph 31 of the report of the Special Working Group meeting in January 2007).

Placement: It is suggested that a provision on exercise of jurisdiction should be placed after article 15 of the Statute, in order to highlight the link to the existing provisions on the exercise of jurisdiction. Articles 13, 14 and 15 address the question of how a situation can come under investigation by the Prosecutor. They remain applicable to the crime of aggression, subject to the special provisions of the new article 15 bis, which details how the Prosecutor shall deal with the crime of aggression – either as part of a larger investigation into other crimes as well, or as the only crime under investigation in a particular situation.

Paragraph 1: The introductory paragraph makes clear that situations which may involve a crime of aggression can come under the jurisdiction of the Court through all three existing trigger mechanisms (State referral, Security Council referral, *proprio motu* investigation).

Paragraphs 2 and 3: These two paragraphs suggest that the question of whether the Prosecutor may initiate an investigation in respect of a crime of aggression – whether it emanates from a State referral, Security Council referral or *proprio motu* investigation – shall be dealt with by the Pre-Trial Chamber, following the same procedure as is currently in place for the authorization of *proprio motu* investigations into other crimes. The Prosecutor would have to specifically request authorization for an investigation in respect of a crime of aggression.

The Pre-Trial Chamber would have to follow the procedure contained in article 15 of the Statute (examine the request and supporting material, consider whether there is a reasonable basis to proceed with an investigation into the crime of aggression, consider whether the case appears to fall within the jurisdiction of the Court). In addition to these requirements, paragraph 3 (and paragraph 6) contains language reflecting the discussed options for other organs to be involved in the question of the exercise of jurisdiction:

Under subparagraph (a), the Pre-Trial Chamber may authorize the investigation if a Security Council determination of an act of aggression exists.

Under subparagraph (b), the Pre-Trial Chamber may authorize the investigation if the Security Council has given the "green light" for an investigation specifically into a crime of aggression.

Under subparagraph (c), the Pre-Trial Chamber may authorize the investigation if a determination by the United Nations General Assembly or the International Court of Justice exists.

¹ ICC-ASP/5/SWGCA/2, annex.

This paragraph reflects mainly Options 3 and 4 of the Chairman’s paper, while simplifying their wording. In particular, it seems irrelevant and thus not necessary to specify how the General Assembly or the International Court of Justice reach a decision which may contain a determination of an act of aggression.

The phrase “has determined that an act of aggression has been committed by the State referred to in article 8 bis” contained in both subparagraphs is intended to formulate more precisely what is meant by the phrase “determination of an act of aggression committed by the State concerned” currently contained in paragraph 4 of the Chairman’s paper.

Paragraph 4 suggests that the Pre-Trial Chamber should notify the Secretary-General of the United Nations of the request submitted by the Prosecutor. This language is intended to be more precise compared to the formulation in the Chairman’s paper, by identifying the competent organ of the Court which should effect the notification, as well as the recipient of the notification (see the role of the Secretary-General in transmitting information between the International Criminal Court and the United Nations provided for in the Relationship Agreement between the International Criminal Court and the United Nations).

Paragraph 5 contains language which mirrors Option 1 of the Chairman’s paper (the Court may proceed if the Security Council does not respond within a certain time), as well as the second sentence of Option 3. In essence, this paragraph reflects the position that organs outside the International Criminal Court should get an opportunity to express themselves on the question of the State act of aggression, but that the Court may proceed if that opportunity is not taken.

Paragraph 6 makes clear that any investigation into a crime of aggression leaves the current provisions with respect to other crimes untouched. This implies in particular that following a State referral, or following a Security Council referral which does not contain a determination of an act of aggression (nor the “green light” to investigate the crime of aggression), the Prosecutor can proceed with the investigation into other crimes. If in the course of this investigation the Prosecutor concludes that there would be a reasonable basis to proceed with an investigation also with respect to the crime of aggression, he would have to request a specific authorization in that respect from the Pre-Trial Chamber. This procedure would however not affect the investigation into other crimes. In case of a *proprio motu* investigation initiated by the Prosecutor under article 15, the Prosecutor could include the specific request for authorization of an investigation into a crime of aggression in the “regular” request for authorization of an investigation into other crimes, or he could add such a request separately, at a later stage.

It is important to note that the proposal below is not intended to affect the substance of the options currently discussed in the Special Working Group on the exercise of jurisdiction. The proposed language in paragraphs (3)(a) and (b), (4) and (5) contains elements which reflect the substance of the options contained in the Chairman’s paper.

These paragraphs are suggested as elements rather than alternatives, i.e. the suggested formulations can be combined in different ways – and therefore do not contain square brackets. The main goal of this re-draft is to improve the rather imprecise formulations in paragraph 5 of the Chairman’s paper, while maintaining the essence of its substance.

Article 15 bis

Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall seek authorization by the Pre-Trial Chamber for the investigation in respect of this crime.
3. The Pre-Trial Chamber may, in accordance with the procedure contained in article 15, authorize the commencement of the investigation in respect of a crime of aggression,
 - (a) if the Security Council has determined that an act of aggression has been committed by the State referred to in article 8 bis; or
 - (b) if the Security Council has decided not to object to the investigation in respect of a crime of aggression; or
 - (c) if the General Assembly or the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.
4. In the absence of such a determination or decision, the Pre-Trial Chamber shall notify the Secretary-General of the United Nations of the request submitted by the Prosecutor, including any relevant information and documents.
5. Where no such determination or decision is made within [xx] months after the date of notification, the Pre-Trial Chamber may authorize the commencement of the investigation in accordance with the procedure contained in article 15.
6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Appendix IV

Non-paper submitted by the Chairman on defining the State act of aggression

(Paragraph 2 of the Chairman's paper¹)

The present non-paper is aimed at facilitating discussions in Princeton with respect to paragraph 2 of the Chairman's paper. At the January 2007 meeting of the Special Working Group on the Crime of Aggression, the suggestion was made to incorporate the text of articles 1 and 3 of United Nations General Assembly resolution 3314 (XXIX) into the draft itself. It was argued that this would be appropriate in light of the principle of legality, which requires a clear definition of the crime.

Paragraph 2 of the Chairman's paper currently reads:

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.

The text below is an attempt to illustrate how a text incorporating the relevant provisions of General Assembly resolution 3314 (XXIX) might look. If such an approach were chosen, the text below could replace the current paragraph 2 of the Chairman's paper.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

¹ ICC-ASP/5/SWGCA/2.

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Annex IV

Statement by Belgium in explanation of position after the adoption of resolution ICC-ASP/6/Res.2

On behalf of Argentina, Belgium, Burkina Faso, Colombia, the Democratic Republic of Congo, France, Germany, Greece, Hungary, Italy, Mexico, Peru, Portugal, Senegal, Spain and Switzerland, my delegation has the honour to make the following statement with regard to the approval of the omnibus resolution.

But we would like first to thank once again the Brazilian Coordinator for the perfect task he accomplished in his work concerning the omnibus resolution itself, of which we entirely approve.

The States previously mentioned declare that they approve the endorsement of the recommendations of the Report of the Bureau on Cooperation, as referred to in paragraph 40 of the omnibus resolution, with the understanding that paragraph 33 of the report relating to civil law systems could depart, for these systems, from an appropriate interpretation of the Rome Statute, *inter alia* articles 34, 54, paragraph 1 (a), and 87.

More precisely, it is in conformity with these articles of the Rome Statute that States having such a law system will require a Court order to answer any request for judicial cooperation emanating from a defence team. Article 87 of the Rome Statute requests States to cooperate fully with regard to requests made by the Court. Article 34 of the Rome Statute lists the different organs of the Court: the Presidency, the Court Divisions, the Office of the Prosecutor and the Registry. Defence teams are not organs of the Court. The principle of equality of arms is respected through the abovementioned procedure: article 54, paragraph 1 a), explicitly states that the Prosecutor, and I quote: “in order to establish the truth, (...), investigate incriminating and exonerating circumstances equally; (...)”, end of quotation. In conclusion, these States will have the obligation, under articles 86 and 87 of the Rome Statute, to answer to a request for judicial cooperation emanating from a defence team once confirmed by a Court order and transmitted to the concerned States by the Registry.

The States on behalf of which this delegation has taken the floor kindly request the Secretariat of the Assembly to include entirely the present statement in the report of this session.

Annex V

List of documents

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ICC-ASP/6/1/Add.1/Rev.1	Annotated list of items included in the provisional agenda
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ICC-ASP/6/3	Report on programme performance of the International Criminal Court for the year 2006
ICC-ASP/6/4	Report on the operation of the Court's legal aid system and proposals for its amendment
ICC-ASP/6/5	Financial statements for the period 1 January to 31 December 2006
ICC-ASP/6/6	Trust Fund for Victims financial statements for the period 1 January to 31 December 2006
ICC-ASP/6/7	Report of the Office of Internal Audit
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ICC-ASP/6/9	Election of members of the Committee on Budget and Finance
ICC-ASP/6/9/Add.1	Election of members of the Committee on Budget and Finance - Addendum - Withdrawal of candidature
ICC-ASP/6/9/Add.2	Election of members of the Committee on Budget and Finance - Addendum - Withdrawal of candidature
ICC-ASP/6/10	Report on budget performance of the International Criminal Court as at 31 July 2007
ICC-ASP/6/11	Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2006 to 30 June 2007

ICC-ASP/6/11/Corr.1	Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2006 to 30 June 2007 - Corrigendum
ICC-ASP/6/11/Corr.2	Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2006 to 30 June 2007 - Corrigendum
ICC-ASP/6/12	Report of the Committee on Budget and Finance on the work of its ninth session
ICC-ASP/6/12/Corr.1	Report of the Committee on Budget and Finance on the work of its ninth session - Corrigendum
ICC-ASP/6/12/Corr.2	Report of the Committee on Budget and Finance on the work of its ninth session - Corrigendum
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ICC-ASP/6/16*	Election of the Registrar of the International Criminal Court
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ICC-ASP/6/22/Add.1	Report of the Bureau on geographical representation and gender balance in the recruitment of staff of the International Criminal Court - Addendum
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ICC-ASP/6/23	Report of the Bureau on the Plan of Action for achieving universality and full implementation of the Rome Statute of the International Criminal Court
ICC-ASP/6/24	Election of judges to fill three judicial vacancies of the International Criminal Court: guide for the election
ICC-ASP/6/25	Report of the Bureau on the permanent premises of the Court
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ICC-ASP/6/L.3	Draft resolution on strengthening the International Criminal Court and the Assembly of States Parties
ICC-ASP/6/L.3/Rev.1	Draft resolution on strengthening the International Criminal Court and the Assembly of States Parties
ICC-ASP/6/L.4	Draft resolution on programme budget for 2008, the Working Capital Fund for 2008, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for the year 2008
ICC-ASP/6/L.5	Draft resolution on the regulations of the Trust Fund for Victims
ICC-ASP/6/L.6	Draft resolution on the Financial Regulations and Rules
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ICC-ASP/6/INF.1	Report on the principles and criteria for the determination of indigence for the purposes of legal aid (pursuant to paragraph 116 of the Report of the Committee on Budget and Finance of 13 August 2004)
ICC-ASP/6/INF.2	Turin report
ICC-ASP/6/INF.2/Add.1	Turin report - Addendum
ICC-ASP/6/INF.3	Review Conference: Scenarios and Options Progress report by the focal point, Mr. Rolf Einar Fife
ICC-ASP/6/INF.4	Hemispheric Seminar "Toward the First Review Conference of the Rome Statute of the International Criminal Court" Mexico City, Mexico 20-21 August 2007

Special Working Group on the Crime of Aggression

ICC-ASP/6/SWGCA/1	Report of the Special Working Group on the Crime of Aggression
ICC-ASP/6/SWGCA/CRP.1	Draft report of the Special Working Group on the Crime of Aggression
ICC-ASP/6/SWGCA/WP.1	Revised text of the proposal submitted by the Bolivarian Republic of Venezuela on the question of the definition of the crime of aggression and conditions for the exercise of jurisdiction
ICC-ASP/6/SWGCA/INF.1	Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11 to 14 June 2007

Working Group on the Programme Budget

ICC-ASP/6/WGPB/1	Report of the Working Group on the Programme Budget for 2008 of the International Criminal Court
ICC-ASP/6/WGPB/CRP.1	Draft report of the Working Group on the Programme Budget for 2008 of the International Criminal Court

Working Group on Permanent Premises

ICC-ASP/6/WGPP/1	Report of the Working Group on the Permanent Premises
ICC-ASP/6/WGPP/1/Rev.1	Report of the Working Group on the Permanent Premises
ICC-ASP/6/WGPP/CRP.1	Draft report of the Working Group on the Permanent Premises

Working Group on the Review Conference

ICC-ASP/6/WGRC/1	Report of the Working Group on the Review Conference
ICC-ASP/6/WGRC/CRP.1	Draft report of the Working Group on the Review Conference