International Criminal Court **ICC-ASP/6/SWGCA/1**

Assembly of States Parties

Distr.: General
13 December 2007

Original: English

Sixth session
New York
30 November to 14 December 2007

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"), which included in various annexes a non-paper on the exercise of jurisdiction submitted by the Chairman ("non-paper on the exercise of jurisdiction")[2] and a non-paper on defining the State act of aggression also submitted by the Chairman ("non-paper on the act of aggression").[3] 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")[4] 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.

[1] ICC-ASP/5/SWGCA/2.
[2] ICC-ASP/6/SWGCA/INF.1, annex III.
[3] Ibid., annex IV.
[4] Annex.

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 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 annex 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.[5]

"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 contained in the definition comprised in resolution 3314 (XXIX) of 14 December 1974."

[5] ICC-ASP/6/SWGCA/INF.1, paras. 36 to 57.

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.

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.[6] 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.

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 annex 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.

[6] ICC-ASP/6/SWGCA/INF.1, para. 54.

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.[7] Due to the complexity of the topic and the limited time available, a substantive discussion was deferred to a later stage.

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.

[7] *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 to 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 to 17.

Annex

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

(Paragraphs 1 and 3 of the Chairman's paper[1])

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.

--- 0 ---

[1] ICC-ASP/5/SWGCA/2.
[2] ICC-ASP/6/SWGCA/INF.1.
[3] Ibid., annex II.