

**Assembly of States Parties to
the Rome Statute of the
International Criminal Court**

**Resumed fifth session
New York, 29 January-1 February 2007**

Official Records

Note

Symbols of documents of the Assembly of States Parties to the Rome Statute of the International Criminal Court are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a document of the Assembly of States Parties to the Rome Statute of the International Criminal Court. Resolutions of the Assembly bear the letters “Res.”, while its decisions bear the letters “Decision”.

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Contents

	<i>Paragraphs</i>	<i>Page</i>
Part I		
Proceedings		1
A. Introduction.....	1-11	1
B. Consideration of issues on the agenda of the Assembly during the resumed fifth session	12-24	2
1. States in arrears.....	12-13	2
2. Credentials of representatives of States Parties at the resumed fifth session.....	14	3
3. Election of the members of the Board of Directors of the Trust Fund for Victims	15-18	3
4. Report of the Special Working Group on the Crime of Aggression.....	19	3
5. Other matters.....		3
(a) Judicial vacancies	20-21	3
(b) Pension scheme regulations for judges	22	4
(c) Trust Fund for the participation of the least developed countries and other developing States in the work of the Assembly.....	23	4
(d) Equitable geographical representation and gender balance in the recruitment of staff	24	4
Part II		
Resolutions adopted by the Assembly of States Parties.....		5
ICC-ASP/5/Res.5 Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: amendment to operative paragraph 27 of resolution ICC-ASP/3/Res.6		5
ICC-ASP/5/Res.6 Conditions of service and compensation of judges of the International Criminal Court: amendment to the pension scheme regulations for judges of the International Criminal Court.....		6
Annexes		
I. Report of the Credentials Committee.....		7
II. Report of the Special Working Group on the Crime of Aggression		9
III. Statement of the representative of Namibia at the 9th meeting of the Assembly, on 1 February 2007		17
IV. List of documents.....		18

Part I Proceedings

A. Introduction

1. In accordance with its decision at its 4th meeting of its fourth session, on 3 December 2005,¹ the Assembly of States Parties (the Assembly) to the Rome Statute of the International Criminal Court held the resumed fifth session at United Nations Headquarters from 29 January to 1 February 2007.

2. In accordance with the rules of procedure of the Assembly of States Parties,² the Secretariat of the Assembly invited all States Parties to the Rome Statute to participate in the resumed fifth session. Other States which had signed the Statute or the Final Act were also invited to participate in the session as observers.

3. In accordance with rule 92 of the rules of procedure, also invited as observers to the resumed fifth session were representatives of intergovernmental organizations and other entities that had received a standing invitation from the General Assembly pursuant to its relevant resolutions³ as well as representatives of regional intergovernmental organizations and other international bodies invited to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome, June/July 1998), accredited to the Preparatory Commission for the International Criminal Court or invited by the Assembly of States Parties.

4. Furthermore, in accordance with rule 93 of the rules of procedure, non-governmental organizations invited to the Rome Conference, registered to the Preparatory Commission for the International Criminal Court or having consultative status with the Economic and Social Council of the United Nations whose activities were relevant to the activities of the Court or that had been invited by the Assembly of States Parties attended and participated in the work of the Assembly.

5. In accordance with rule 94 of the rules of procedure, the following States that had been invited during the fifth session to be present during the work of the Assembly, excluding those that had become party to the Statute, continued in that capacity at the resumed fifth session: Bhutan, Cook Islands, Democratic People's Republic of Korea, Equatorial Guinea, Grenada, Kiribati, Lao People's Democratic Republic, Lebanon, Maldives, Mauritania, Micronesia (Federated States of), Myanmar, Niue, Palau, Papua New Guinea, Rwanda, Somalia, Suriname, Swaziland, Tonga, Turkmenistan, Tuvalu and Vanuatu.

6. The list of delegations to the resumed fifth session is contained in document ICC-ASP/5/INF.4/Rev.1.

7. The resumed fifth session was presided by the President of the Assembly of States Parties, Mr. Bruno Stagno Ugarte (Costa Rica).

¹ *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), part I, para. 40.

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.C.

³ General Assembly resolutions 253 (III), 477 (V), 2011 (XX), 3208 (XXIX), 3237 (XXIX), 3369 (XXX), 31/3, 33/18, 35/2, 35/3, 36/4, 42/10, 43/6, 44/6, 45/6, 46/8, 47/4, 48/2, 48/3, 48/4, 48/5, 48/237, 48/265, 49/1, 49/2, 50/2, 51/1, 51/6, 51/204, 52/6, 53/5, 53/6, 53/216, 54/5, 54/10, 54/195, 55/160, 55/161, 56/90, 56/91, 56/92, 57/29, 57/30, 57/31, 57/32, 58/83, 58/84, 58/85, 58/86, 59/48, 59/49, 59/50, 59/51, 59/52, 59/53 and decision 56/475.

8. The Bureau of the fifth session continued as follows:

President:

Mr. Bruno Stagno Ugarte (Costa Rica)

Vice-Presidents:

Mr. Erwin Kubesch (Austria)

Ms. Hlengiwe Mkhize (South Africa)

Rapporteur:

Ms. Alina Orosan (Romania)

Other members of the Bureau:

Belize, Bolivia, Croatia, Cyprus, Democratic Republic of Congo, Denmark, Estonia, France, Gambia, Kenya, Netherlands, New Zealand, Niger, Peru, Republic of Korea, Romania, Samoa and Serbia.

9. The Credentials Committee also continued to serve at the resumed session, with the following membership: Benin, France, Honduras, Ireland, Jordan, Paraguay, Serbia, Slovenia and Uganda.

10. The *ad interim* Director of the Secretariat of the Assembly, Mr. Renan Villacis, acted as Secretary of the Assembly. The Assembly was serviced by the Secretariat.

11. At its 8th meeting, on 29 January 2007, the Assembly adopted the following agenda (ICC-ASP/5/24/Rev.1):

1. Adoption of the agenda.
2. States in arrears.
3. Credentials of representatives of States at the resumed fifth session.
4. Organization of work.
5. Election of the members of the Board of Directors of the Trust Fund for Victims.
6. Report of the Special Working Group on the Crime of Aggression.
7. Other matters.

B. Consideration of issues on the agenda of the Assembly during the resumed fifth session

1. States in arrears

12. At its 8th meeting, on 29 January 2007, the Assembly was informed that article 112, paragraph 8, first sentence, of the Rome Statute was applicable to 13 States Parties.

13. The President of the Assembly renewed the appeal to States Parties in arrears to settle their accounts with the Court as soon as possible. The President also appealed to all States Parties to pay their assessed contributions for 2007 in a timely manner.

2. Credentials of representatives of States Parties at the resumed fifth session

14. At its 9th meeting, on 1 February 2007, the Assembly adopted the report of the Credentials Committee (see annex I to this report).

3. Election of the members of the Board of Directors of the Trust Fund for Victims

15. At its 15th meeting, held on 16 May 2006, the Bureau of the Assembly of States Parties decided to open the period for nomination for the second election of members of the Board of Directors of the Trust Fund for Victims, to run from 5 June to 27 August 2006. At the end of this period, the minimum requirements for the nomination of members of the Board of Directors had not been met. In accordance with paragraph 4 of resolution ICC-ASP/1/Res.7, the nomination period was extended four times to 19 November 2006. At the end of the nomination period, no candidate had been nominated for the Group of Asian States.

16. At the 6th meeting of its fifth session, on 30 November 2006, the Assembly proceeded to elect four members of the Board of Directors of the Trust Fund for Victims:⁴

Archbishop Desmond Tutu (South Africa)
Mr. Tadeusz Mazowiecki (Poland)
Mr. Arthur N.R. Robinson (Trinidad and Tobago)
Ms. Simone Veil (France)

17. At its 6th meeting, the Assembly decided to defer the election for the seat allocated to the Group of Asian States to the resumed fifth session of the Assembly.⁵ The Bureau fixed the nomination period to run from 1 to 28 January 2007.

18. At its 9th meeting, on 1 February 2007, the Assembly proceeded to elect Mr. Bulgaa Altangerel (Mongolia) as the fifth member of the Board of Directors of the Trust Fund for Victims.

4. Report of the Special Working Group on the Crime of Aggression

19. At its 9th meeting, on 1 February 2007, the Assembly took note of the report of the Special Working Group on the Crime of Aggression (ICC-ASP/5/SWGCA/3) and, on the recommendation of the Special Working Group, decided that the report be annexed to the proceedings of the resumed fifth session of the Assembly (see annex II to this report).

5. Other matters

(a) Judicial vacancies

20. At its 9th meeting, on 1 February 2007, the Assembly, on the recommendation of the Bureau, adopted resolution ICC-ASP/5/Res.5, whereby it amended the provision regarding judicial vacancies contained in operative paragraph 27 (a) of resolution ICC-ASP/3/Res.6 (see part II of this report).

21. The Assembly also decided that the election to fill the judicial vacancy resulting from the 10 December 2006 resignation of judge Maureen Harding Clark (Ireland) would be held during its sixth session in November 2007. In this connection, the Assembly fixed the nomination period to run from 1 June to 24 August 2007.

⁴ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 23 November - 1 December 2006* (International Criminal Court publication, ICC-ASP/5/32), part I, para. 35.

⁵ *Ibid.*, para. 37.

(b) Pension scheme regulations for judges

22. At its 9th meeting, on 1 February 2007, the Assembly, on the recommendation of the Bureau, adopted resolution ICC-ASP/5/Res.6, whereby it amended the pension scheme regulations for judges contained in article I of appendix 2 of the annex to resolution ICC-ASP/3/Res.3 (see part II of this report).

(c) Trust Fund for the participation of the least developed countries and other developing States in the work of the Assembly

23. The Assembly noted with satisfaction that five delegations made use of the Trust Fund to attend the resumed fifth session of the Assembly.

(d) Equitable geographical representation and gender balance in the recruitment of staff

24. At the 9th meeting, on 1 February 2007, statements were made by the representatives of Namibia (see annex III to this report), Nigeria, Sierra Leone and Uganda. The President took note of the concerns expressed regarding geographical representation and indicated that they could be better addressed in the framework of The Hague Working Group of the Bureau, which had appointed a facilitator on issues pertaining to geographical representation and gender balance. He expressed the hope that the issue be granted the full priority it deserves.

Part II
Resolutions adopted by the Assembly of States Parties

Resolution ICC-ASP/5/Res.5

Adopted at the 9th plenary meeting, on 1 February 2007, by consensus

ICC-ASP/5/Res.5

Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: amendment to operative paragraph 27 of resolution ICC-ASP/3/Res.6

The Assembly of States Parties,

Recalling operative paragraph 11 of resolution ICC-ASP/1/Res.3 of 9 September 2002, in which the Assembly agreed that it would review the procedure for the election of judges on the occasion of future elections with a view to making any improvements as may be necessary,

Further recalling operative paragraph 27 of resolution ICC-ASP/3/Res.6 of 10 September 2004, on the procedure for the nomination and election of judges of the International Criminal Court,

Decides to amend subparagraph (a) of operative paragraph 27 of resolution ICC-ASP/3/Res.6 of 10 September 2004, by adding the following to the end of the subparagraph:

“unless the Bureau decides otherwise after consulting the Court”.

Resolution ICC-ASP/5/Res.6

Adopted at the 9th plenary meeting, on 1 February 2007, by consensus

ICC-ASP/5/Res.6

Conditions of service and compensation of judges of the International Criminal Court: amendment to the pension scheme regulations for judges of the International Criminal Court

The Assembly of States Parties,

Recalling the pension scheme regulations for judges of the International Criminal Court, as contained in appendix 2 of the annex to resolution ICC-ASP/3/Res.3 of 10 September 2004,

Pursuant to operative paragraph 27 of resolution ICC-ASP/5/Res.3 of 1 December 2006, on strengthening the International Criminal Court and the Assembly of States Parties,

Decides to amend article I of appendix 2 of the annex to resolution ICC-ASP/3/Res.3 of 10 September 2004, by adding the following paragraph:

“7. No retirement pension shall be payable to a former judge who has been elected a member of the International Court of Justice or who has been elected or appointed a permanent judge of the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda or who has been appointed to serve in the International Criminal Tribunal for the Former Yugoslavia or the International Criminal Tribunal for Rwanda as an ad litem judge until he or she ceases to hold that office or appointment.”

Annex I

Report of the Credentials Committee¹

Chairperson: Mr. Adi Khair (Jordan)

1. At its 1st plenary meeting, on 23 November 2006, 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 the fifth session and for the resumed fifth session, consisting of the following States Parties: Benin, France, Honduras, Ireland, Jordan, Paraguay, Serbia, Slovenia and Uganda.

2. The Credentials Committee held two meetings on 29 January and 1 February 2007 respectively.

3. At its meeting on 1 February 2007, the Committee had before it a memorandum by the Secretariat dated 1 February 2007 concerning the credentials of representatives of States Parties to the Rome Statute of the International Criminal Court to the resumed fifth 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 resumed fifth 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 52 States Parties:

Albania, Andorra, Argentina, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Costa Rica, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Ghana, Greece, Guinea, Hungary, Ireland, Italy, Jordan, Kenya, Latvia, Liechtenstein, Lithuania, Luxembourg, Mali, Mexico, Mongolia, Namibia, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Saint Vincent and the Grenadines, Serbia, Slovakia, Slovenia, South Africa, Sweden, Switzerland, Trinidad and Tobago, the United Republic of Tanzania, and the United Kingdom of Great Britain and Northern Ireland.

5. As noted in paragraph 2 of the memorandum, information concerning the appointment of the representatives of States Parties to the resumed fifth 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 36 States Parties:

Afghanistan, Australia, Barbados, Belize, Benin, Bolivia, Botswana, Central African Republic, Colombia, Comoros, Democratic Republic of the Congo, Djibouti, Dominican Republic, Ecuador, Fiji, Gambia, Georgia, Guyana, Honduras, Iceland, Lesotho, Malawi, Marshall Islands, Niger, Nigeria, Paraguay, Peru, Samoa, Senegal, Sierra Leone, Spain, Timor-Leste, the former Yugoslav Republic of Macedonia, Uganda, Uruguay and Venezuela (Bolivarian Republic of).

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

¹ Previously issued as ICC-ASP/5/34, which was then orally amended on 1 February 2007.

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.

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 resumed fifth 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;

Recalling that at its 7th meeting, on 1 December 2006, the Assembly approved the report of the Credentials Committee on the credentials of representatives to the fifth session of the Assembly;²

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 resumed fifth 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,

Recalling that at its 7th meeting, on 1 December 2006, the Assembly approved the report of the Credentials Committee on the credentials of representatives to the fifth session of the Assembly;³

Having considered the report of the Credentials Committee on the credentials of representatives to the resumed fifth session of the Assembly and the recommendation contained therein,

Approves the report of the Credentials Committee.”

² *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth session, The Hague, 24 November - 1 December 2006* (ICC-ASP/5/32, International Criminal Court publication), annex I.

³ *Ibid.*

Annex II

Report of the Special Working Group on the Crime of Aggression

I. Introduction

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

II. Consideration of the discussion paper proposed by the Chairman

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

The crime of aggression - defining the individual’s conduct

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

¹ ICC-ASP/5/SWGCA/2.

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

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

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

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

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

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

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

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

The act of aggression – defining the conduct of the State

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

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

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

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

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

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

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

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

The reference to General Assembly resolution 3314 (XXIX)

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

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

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

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

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

Conditions for the exercise of jurisdiction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸ The proposal reads: "Where the prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned *or has declared that it does not object to the Court's proceeding with the case*. If no *such* Security Council determination *or declaration* exists, the Court shall notify the Security Council of the situation before the Court, *including any relevant information and evaluation thereof that might assist the Security Council in its deliberations*."

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

Procedural options in the absence of a Security Council determination

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

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

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

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

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

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

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

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

Appendix

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

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

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

Article 25: add new paragraph 3 bis:

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

Annex III

Statement of the representative of Namibia at the 9th meeting of the Assembly, on 1 February 2007

1. I thank you for the floor under agenda item 7 (“Other matters”) and your guidance of this resumed session. I also congratulate the Director from Mongolia on his election just now.
2. Namibia is delighted about the wide and constructive participation and progress achieved in our meeting, which was primarily taken up by the Special Working Group on the Crime of Aggression.
3. Like Trinidad and Tobago and many others we salute Ambassador Christian Wenaweser of Liechtenstein for his perfect stewardship of the Working Group. We believe Liechtenstein is moving towards being an icon in international criminal law, just as Malta is in the law of the sea. I am convinced that Ambassador Wenaweser will join Ambassador Arvid Pardo in the annals of diplomatic history.
4. Some credit for the distinct success of this particular session must, of course, also go to the venue. The drafters of the Rome Statute were indeed wise to provide in article 112, paragraph 6, for Assembly meetings at United Nations Headquarters.
5. I am obliged, if not compelled, to bring the following to your, the Bureau’s and this Assembly’s attention. The International Criminal Court essentially and practically consists of five visible institutions: the Court, the Office of the Prosecutor, the Registry, the Secretariat of the Assembly of States Parties and the New York Liaison Office. None of these institutions is headed by an African. In fact, two are headed by individuals from the Western European and Others Group and three by individuals from Latin America.
6. And this situation prevails despite the fact that the African Group is the largest in the International Criminal Court, indeed nearly providing a third of its States Parties. Additionally, all current situation countries are in Africa.
7. While excellence is paramount, my delegation should like to bring to the attention of you, the Bureau and the Assembly, all of whom are by definition political actors and take political decisions, that equitable geographic representation at all levels must also be taken into account. Namibia, of course, is proud to hail from Africa and its abundance of excellent people.
8. Finally, I should like to emphasise that excellence, particularly in peer-abundant and peer-preoccupied international relations, is grounded on a multitude of attributes, including first and foremost, adequate, required and relevant experience and qualifications, as well as stature, persuasiveness, language abilities, etc.
9. I thank you for the opportunity to speak and request that this statement be included in the records of this session.

Annex IV

List of documents

Plenary

ICC-ASP/5/24/Rev.1	Provisional agenda
ICC-ASP/5/28	Second election of members of the Board of Directors of the Trust Fund for Victims
ICC-ASP/5/28/Add.1	Second election of members of the Board of Directors of the Trust Fund for Victims – Addendum
ICC-ASP/5/33/Rev.1	Annotated list of items included in the provisional agenda
ICC-ASP/5/34	Report of the Credentials Committee
ICC-ASP/5/L.4	Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court: amendment to operative paragraph 27 of resolution ICC-ASP/3/Res.6
ICC-ASP/5/L.5	Draft report of the Assembly of States Parties to the Rome Statute of the International Criminal Court
ICC-ASP/5/L.6	Conditions of service and compensation of judges of the International Criminal Court: amendment to the pension scheme regulations for judges of the International Criminal Court
ICC-ASP/5/INF.4/Rev.1	Delegations to the resumed fifth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court

Special Working Group on the Crime of Aggression

ICC-ASP/5/SWGCA/2	Discussion paper proposed by the Chairman
ICC-ASP/5/SWGCA/3	Report of the Special Working Group on the Crime of Aggression
ICC-ASP/5/SWGCA/WP.1	Proposal presented by Belgium on the question of jurisdiction of the Court with respect to the crime of aggression
ICC-ASP/5/SWGCA/WP.2	Proposal presented by Norway on the question of the conditions for the exercise of the Court's jurisdiction with respect to the crime of aggression