

Intersessional Meeting of the Special Working Group on the Crime of Aggression

June 11 – 14 2007.

Annotated Agenda

The meeting is aimed at continuing discussions held at previous intersessional meetings and in the context of the Assembly of States Parties (resumed session in 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 to structure the discussion 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 how such a definition of the individual’s conduct can be squared with the provisions of Article 25, para. 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, para. 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, para. 3 would thus explicitly be excluded.

Variant (a) reflects the “**differentiated**” **approach** which has emerged in discussions in Princeton during the last 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, para. 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, para. 3. In this context, discussions focused on

¹ ICC-ASP/5/SWGCA/2.

the choice of the “**conduct verb**” in paragraph 1. At the January 2007 meeting of the SWGCA 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 SWGCA 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?

Item 2) The conditions for the exercise of jurisdiction

According to Article 5 para. 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 UN 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 SWGCA, some suggestions were made to achieve progress on this question. These proposals are reflected in **paragraphs 29 to 34 of the SWGCA 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 GA res. 3314 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 res. 3314 as a whole, or only to specific articles (1 and 3) of that resolution. Should the text of GA res. 3314 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 (para. 4); or shall it only enter into force for those States Parties which have accepted such an amendment (para. 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 SWGCA**

According to the decisions of the Assembly of States Parties, the SWGCA 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 furthermore for a resumed session of 4 days in the first half of 2008.² Furthermore, the ASP had previously decided that the SWGCA needs to conclude its work at least 12 months prior to the Review Conference. In accordance with this schedule, the 2007 intersessional meeting in Princeton would thus be the last meeting of this kind. Participants may want to discuss the future work of the SWGCA, in particular as it relates to the Review Conference.

² ICC-ASP/5/Res.3, para. 38.