

**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,
at Princeton University, New Jersey, United States, from 13 to 15 June 2005**

Report of the CICC Team on the Crime of Aggression¹

Documents of special relevance during the meeting

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, at Princeton University, New Jersey, United States, from 21 to 23 June 2004, in Note by the Secretariat, ICC-ASP/3/SWGCA/INF.1, 13 August 2004. The report of the 2004 inter-sessional meeting can also be found more recently in 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, ICC-ASP/3/25, Proceedings, para.41 and Annex II.

Discussion paper proposed by the Coordinator, (originally UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2 of 11 July 2002), in Report of the Preparatory Commission for the International Criminal Court (continued), Part II, Proposals for a provision on the crime of aggression, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002, p.3, also contained in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second Session, New York, 8-12 September 2003, ICC-ASP/2/10, Annex II

Developments during the meeting²

Again, just as in 2004, the inter-sessional meeting at the Liechtenstein Institute on Self-Determination, at Princeton University's Woodrow Wilson School, has meant progress for the Special Working Group on the Crime of Aggression. "There is something in the atmosphere", as one delegate put it to underscore her positive assessment at the end of the session. The 'Princeton spirit' could work its magic thanks to funding for the meeting by Finland, Germany, Liechtenstein, the Netherlands and Switzerland and thanks to the organizational expertise of the Institute's administrative staff under Dorothy Hannigan,

¹This report was prepared by members of the CICC Team on the Crime of Aggression, and does not represent the views of all organizations/members of the Coalition for the ICC. While the work of the teams reflects the positions of those Coalition members most active on particular issues, their work cannot be construed to represent the views of all organizations/members of the CICC.

² In line with the informal character of the meeting, the team report refrains in its description of the discussions from the identification of individual States, State delegates or other participants.

the determination of its Director, Wolfgang Danspeckgruber, and the active interest of the Woodrow Wilson School, as exemplified by the appearance of its Dean, Anne-Marie Slaughter, during one of the breaks in the negotiations. Last not least, the fruitfulness of the 2005 Princeton meeting has to be credited to the chairmanship of Christian Wenaweser of Liechtenstein, the support of Medard Rwelamira, the Director of the Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court, and especially to the willingness of State delegates to engage in straightforward and concentrated exchange.

This year's challenge for the Special Working Group³ was no less formidable and suspense-ridden than last year's. The previous inter-sessional meeting had to overcome tensions festering since a troubled start during the 2003 session of the Assembly of States Parties to the Rome Statute of the International Criminal Court. That task had been mastered with the help of an agenda exclusively dedicated to technical or 'secondary' issues. Since then, the return to the core issues was curtailed due to the meager time allocation at the 2004 Assembly session. Thus, Princeton 2005 stood for the opportunity to 'get back to business'. While the ultimate political agreement could only be expected to be forthcoming at the Review Conference, would the inter-sessional meeting permit renewed hope or merely provide fresh ammunition for the skeptics? Would the differences with regard to the definition and jurisdictional conditions for the crime of aggression push the Special Working Group back into frustration and hostility or increase the resolve to find consensus? Right from the beginning of the 2005 meeting, it was a positive sign that States appeared to be eager to deal as efficiently as possible with technical questions scheduled for the first day in order to get back to the core issues.

The technical items of the first day consisted both of 'left-over' issues from the previous year (agenda item 2), as well as new topics (agenda item 3). Agenda item 1 concerned the possible extension of the "List of issues relating to the crime of aggression" annexed to the official report of last year's inter-sessional meeting⁴ No new issues were added to that list.

Issues discussed at the 2004 meeting requiring further consideration

³ The Special Working Group on the Crime of Aggression is a subsidiary body of the Assembly of States Parties to the Rome Statute of the International Criminal Court. It is nevertheless open to all States "on an equal footing", ICC-ASP/1/Res.1. The crime of aggression is already under the jurisdiction of the Court (Art.5(1) of the Statute), yet the *exercise* of the Court's jurisdiction is still dependent on the adoption of a provision "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. ..." (Art.5(2) of the Statute.) The Special Working Group is mandated to come up with a proposal for such a provision in time for adoption by a Review Conference of the Assembly in 2009. The same task has been previously pursued by a Working Group on the Crime of Aggression in the Preparatory Commission for the International Criminal Court.

⁴ *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, at Princeton University, New Jersey, United States, from 21 to 23 June 2004, in Note by the Secretariat, ICC-ASP/3/SWGCA/INF.1, 13 August 2004, Annex I, p.14. See also 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, ICC-ASP/3/25, Proceedings, Annex II, appendix.*

One of the issues not yet conclusively addressed in 2004 concerns the possibility to 'opt-out' of the Court's jurisdiction over the crime of aggression. The question is closely connected to the more basic evaluation if the entry into force of the provision on aggression is governed by Art.121(4)(6) or by Art.121 (5) of the Statute. As the Special Working Group realized in 2004, the assumptions and interpretations differ in this regard. This year, States revisited only shortly the arguments about the correct applicable rule.⁵ Several delegates stated a clear preference, at times with changes of opinion since the prior year.

Openness towards a compromise solution was indicated by a number of States and prompted not only by the desire to overcome the differences of statutory interpretation but also by the recognition of the shortcomings of both Art.121 (4)(6) and Art.121 (5): While Art.121 (4)(6) assures the full integration of the provision on aggression into the Statute, - a result quite obviously more in line with the Court's already existing jurisdiction over the crime on aggression under Art.5(1) -, the integration is only achieved after the ratification of the provision by seven eighth of the States Parties. After the coming into force of the provision on aggression, withdrawal from the whole Statute is the only option for those not wishing to be bound. Under Art.121 (5) the provision on aggression comes into force in piece-meal fashion, i.e. only for the ratifying State. With regard to non-ratifying States, the jurisdictional reach of the Court under Art.12 is blocked completely. Neither Art.121 (4)(6) nor Art.121 (5) offer the linkage of full integration and limited opt-out.

In line with the general thrust of the debate to move beyond a repetitive back-and-forth about Art.121(4)(6) and Art 121(5), a literal interpretation of Art.5(2) of the Statute was added to the considerations: Since Art.5 (2) permits the exercise of the Court's jurisdiction once the provision on aggression is "adopted" in accordance with Art.121,123, the provision on aggression could be said to come into force simultaneously with its adoption in accordance with Art.121(3). (The Rules of Procedure and Evidence, for example, came also into force with their adoption by the Assembly of States Parties.) Or, in the alternative, Art.5(2) could be argued to tie only the adoption of the provision on aggression to Art.121,123, the entry into force not necessarily. Thus, the entry into force could be accomplished under a process different from Art. 121(4)(6) or Art.121(5). (For example, the 60 ratifications required for the entry into force of the Statute itself might constitute a fitting pattern.)

A mere combination of Art.121 (4)(6) with Art 121(5) was deemed by many logically not feasible, but those who alluded to a combination seemed to have actually the same in mind as those who spoke of compromise or those who looked to an amendment of the amendment rules, namely a solution to move beyond the two alternatives in Art. 121. Roughly, such a solution might try to be in harmony with the Court's existing jurisdiction over the crime of aggression and yet sufficiently flexible to address transitional political difficulties. As was pointed out, an opt-out version, possibly time-bound, could be built right into the jurisdictional conditions of the provision itself. While not everyone dismissed the literal interpretation of Art.5(2) as a 'dream option', more States voiced support for another hopeful approach: With consensus about the provision, the issue would resolve itself quite naturally.

⁵ These arguments can be found in last year's report of the Special Working Group, id., para. 12-19.

The Special Working Group then returned to the General Principles of Criminal Law in Part 3 of the Statute.

Art.25(3) sets out the forms of participation in a crime which lead to individual criminal responsibility. Yet, the definition of the crime of aggression in Part I para.1 of the Coordinator's Discussion Paper, - the basic working paper since the end of the Preparatory Commission for the International Criminal Court -, explicitly lists various forms and stages of individual participation in the crime as well, resulting in overlap with Art.25(3) of the Statute. Therefore, Part I para.3 of the Coordinator's Discussion Paper excludes the applicability of Art.25(3) for the crime of aggression. But the overlap between the definition and Art.25 (3) may be only partial and the exclusion may go too far. Thus the Special Working Group began in 2004 to reconsider the matter. At the same time, concerns arose that the full application of Art.25(3) might undermine the leadership character of the crime of aggression. This year, the Special Working Group addressed Art.25(3)(f) -(Attempt)- separately from Art.25(3)(a)-(d). With regard to the latter it became soon clear that the problem was not one of substance. In general, the Special Working Group appeared to be in agreement that the forms of participation under Art.25 (3)(a)-(d) did not conflict with the character of the crime of aggression as long as the participant held a leadership position in accordance with the definition. Various technical approaches were discussed. Arguing for the straightforward application of Art.25(3) some felt that the definition itself would in any event guard against any reach beyond the leadership level. At the same time, they appeared to be open towards additional safeguards. Particular attention was given to the possibility of inserting a new paragraph into Art.25 (3) to assure adherence to the leadership requirement for all forms of participation in the crime of aggression. Art.25(3)(e) which relates only to genocide served as an example of special treatment. The option of a new provision within Art.25(3) represents a more efficient version of last year's proposal for a separate aggression-specific chapeau followed by a repetition of Art.25(3).

The possibility to use Art. 25(3) for the various forms of participation in the crime of aggression opened the way towards a discussion of the streamlining of the conduct element in the definition. For a short while, the Special Working Group contemplated even the deletion of all conduct elements and to define only the "collective act", but this could have meant throwing out the child with the bathwater. The conduct element is necessary to express the linkage between the leadership position and the State act, i.e. the (mis)use of the leadership position to bring about the State act. In this context, the discussions were troubled by the use of terminology that did not have the same meaning for everyone and different terminology was used interchangeably as if it were the same. Thus, the debate left it not always clear that the term 'collective act/crime' does not necessarily capture the legal significance of the term 'State act' and vice versa. Similarly, the back and forth left the lines not always sharply drawn between different conceptual juxtapositions, such as collective act/crime versus individual act/crime, State-centered element of the crime (i.e. the State act) versus individual-centered elements of the crime (i.e. leadership position of control and conduct link to the State act), general definition of the act versus specific definition of the act (i.e. the basic term followed by a list of acts such as bombing), general definition of the crime versus specific definition of the crime,

basic conduct element versus different forms of participation, and forms of participation under the general principles versus those which are crime-specific. But despite the opportunity for misunderstanding, the Special Working Group managed to move forward, with the debate leading to two new proposals which were discussed the next day together with agenda item 5 on the definition. (See below.)

The question of attempt and the applicability of Art.25(3)(f) had never before been discussed in the same detail, but it was a debate which went all over the board and cannot be described as conclusive. Nevertheless, the Special Working Group emphasized more clearly than previously the difference between attempt of the State act and attempt on the personal level. The point was made that the former type of attempt should be dealt with in the definition and the latter over Art.25(3)(f). Some of the interventions appeared to allocate the treatment of the two types of attempt to Art.25(3)(f) and to the definition in the opposite way, especially when the conduct elements in the definition were under discussion, but this was not directly stated. At the same time, not everyone agreed that a line could be drawn between these two types of attempt. It was also repeatedly argued that the definition may have to be dealt with first. Several delegates shared the opinion that the whole matter could be left to the Court. Delegates referred as well to the jurisdictional conditions which may in any event require the determination of the occurrence of a completed State act of aggression. Some felt that attempt was covered by the inclusion of planning, preparation and initiation in the definition of the Coordinator's Discussion Paper, others saw a difference and defined attempt as lack of completion due to reasons beyond one's control. Reference to an attempt to steer the State towards aggression led to the contemplation of attempt as threat of the use of force. But it was pointed out that threat and attempt were not synonymous and that one could even conceive of attempts to threaten the use of force. All in all, delegates considered particularly the attempt to 'order or participate' but the attempt of the State act was contemplated as well. Moreover, they touched on attempt as lack of success or as voluntary abandonment, attempt with completion (by others) at the individual level and/or with completion of the State act, completion due to attempt (i.e. the attempt got the ball rolling) or independently of it, and lack of completion due to attempt or due to other causes. Thus, the debate brought out many legally significant markers that might be present in different combinations and might influence the treatment of attempt, but these were not dealt with in a very structured fashion. As was mentioned in the debate as well, Art.25(3)(f) itself addresses only attempts where the crime remains uncompleted. Even if it remains applicable, it does not play a direct role for attempts to order or participate where the act of aggression actually occurs. (Vice versa, assuming States intended to cover failed attempts of the State act (e.g. the order for the attack is given but outside forces intervene), nothing in Art.25(3)(f) speaks against its applicability to this type of attempt.) The first sentence of Art.25(3)(f) provides for criminal responsibility in the case of attempt if the crime does not occur due to circumstances independent of the person's intentions. According to the second sentence a person is only relieved in the case of voluntary abandonment, but again the crime must not have occurred. In other words, the criminal responsibility of those who attempt to order or participate in an act of aggression that actually occurs will in any event not depend on Art.25(3)(f) but on the definition, including on applicable forms of participation. Considering the first sentence of

Art.25(3)(f) one would assume that criminal responsibility should arise under such circumstances even more clearly. Considering the second sentence, it is at least arguable that voluntary abandonment of an attempt to participate should make a difference even with regard to crimes that actually occur.

As the Chair indicated, the subject will probably only be returned to "in context", presumably after further clarity on the definition.

Part I para.3 of the Coordinator's Discussion Paper excludes also the applicability of Art.28 and 33 of the Statute. In both cases, the exclusion was based on the character of the crime of aggression as a leadership crime. The Special Working Group reconsidered first the exclusion of Art.33.

Art.33 addresses superior orders and prescription of law. Since leaders are assumed to order rather than act *under* order, and since the crime of aggression is committed by way of an order rather than pursuant to an order, Art.33 appears not to 'fit' to the character of the crime of aggression, at least not on first sight. But the crime of aggression may be committed by more than one leader and leaders may both order and be under order. The crime may also be committed by leaders who participate in rather than order the State act of aggression. Thus, leaders accused of the crime of aggression may try to shift the blame among each other and excuse themselves claiming superior orders. The Special Working Group thus continued to ponder the wisdom of excluding the applicability of Art.33. Probably all possible opinions were voiced. Some were for the application of Art.33. Some were for the application and the inclusion of the crime of aggression into para.2 of Art.33. Some were for the exclusion of Art.33. Some were non-committal. Some were less for applicability than against express exclusion: Art.33 might be a bad 'fit' but the matter could be left to the Court. Significantly, these divergent views were not necessarily due to differences of opinion about the desired result. Rather, part of the problem is stemming from differences in the understanding of Art.33 itself. One side holds that Art.33 primarily limits or eliminates 'superior orders' as a ground to relieve a person of criminal responsibility, the other side points to the double negative in para.1 of Art.33 and contends that Art.33 primarily sets out the parameters *for* the excuse or justification. Under the latter view, the exclusion of Art.33 would even have positive implications, since it would cast the Court's net wider. The perceived effect seemed to be comparable to the effect of an inclusion of the crime into Art.33 para.2. In contrast, those with the first view worry that the express exclusion of Art.33 would prevent the Court from dismissing a claim of 'superior orders'. Of course, this discrepancy of perception would be by-passed with the actual inclusion of the crime of aggression into the straightforward para.2 of Art.33, an inclusion in harmony with the definition of the crime requiring a "flagrant" (or earlier: "manifest") violation of the Charter of the United Nations. Yet during the 2004 discussions, objections were raised against that approach. Apparently, here the parameters of para.1 were seen as an additional safeguard against a net cast too wide.

Art.28 is another case of bad 'fit': Art.28 places criminal responsibility on the commander or superior for crimes committed by "forces" or subordinates under his or her command/control or authority. The crime of aggression, on the other hand, is committed by those *in* command and control, i.e. by the leaders themselves. The question was again

raised if Art.28 was nevertheless needed to establish criminal responsibility for the omission of a neglectfully blind leader. In response, it was pointed out that the Rome Conference had left that matter of omissions to the Court and that the case might possibly be dealt with in the definition by deleting the word "actively" before "participates." While this might capture omissions by a leader who "knows", the discussion did not further evaluate the treatment of omissions of a leader who "should have known". Since the crime itself requires knowledge, such omissions would probably not be reached with the modifications suggested for the definition.

More significant in the debate about Art.28 was the growing movement away from express exclusions of statutory provisions. While some delegates focused in this regard only on Art.28, several comments were phrased generally. If - and as far as - provisions did merely not 'fit' with the crime of aggression, they would anyway not be applied. It was unnecessary to say so. Moreover, express exclusions implied that everything not excluded *had* to be applied. Going down the road of express exclusions would require combing through the whole Statute. In this context, reference was made to Art.16 of the ILC Draft Code of Crimes against the Peace and Security of Mankind.⁶

With regard to Art.30, the Special Working Group also picked up its considerations where they had been left off in the previous year. They were quickly brought to a conclusion. As the Chair pointed out, here the issue was not if Art.30 was applicable but what Art.30's impact was on the definition. Specifically, were the words "intentionally and knowingly" in the definition needed at all? In light of Art.30 as the general default rule, it was agreed that they were not and that they could be deleted.

Other issues relating to the Rome Statute

The Special Working Group considered first Part 5 of the Statute and came to the preliminary agreement that no modifications were needed at this point. Possibly, a new look might be taken at Art.53 of the Statute once the conditions for the exercise of the Court's jurisdiction are clarified⁷.

Similarly, no problems arose in the examination of the provisions on national security information, particularly not with regard to Art.57(3), 72, 93(4) and 99(5) of the Statute. One question focused on Art.73: Is the requested State bound by its confidentiality agreement with the originator of the information if the originator is the Aggressor State and especially if the originator is not a State Party, as addressed in the last sentence of Art.73? In response, it was pointed out, most significantly, that any concerns in this respect are not different from those with regard to the other crimes under the Court's jurisdiction, that the provisions in the Statute were the result of difficult and delicate negotiations, and that it might in any event not be clear if the originator is an Aggressor

⁶ International Law Commission Report 1996, Chapter II

⁷ For example, it could be pondered if an organ whose determination of a State act of aggression might be instrumental for the exercise of ICC jurisdiction (e.g. the International Court of Justice) should be added to Art.53 para. 2 and 3(a), enabling that organ to submit a request to the Pre-Trial Chamber for the review of the Prosecutor's decision not to proceed.

State by the time of the Court's request. Art.67(2) of the Statute was referred to as well. In conclusion, the Special Working Group was in agreement that there was no need to come back to the provisions on national security information.

Elements of Crimes

On the second day of the inter-sessional meeting, the Chair suggested to look first at the Elements of Crime in Part II of the Coordinator's Discussion Paper, - leaving out Elements 2,4,6 and 8 -, but it became soon clear that too many of the delegates thought that the definition had to be considered first. In any event, not only those who preferred the latter sequence but even those who were in favor of the Chair's approach intermingled their comments about the Elements with arguments about the core issues of the definition and the jurisdictional conditions. At the same time, footnote 1 in the "Precondition" of the Elements was highlighted and strong pleas were made to address the rights of the accused. Recalling here the history of the negotiations surrounding the "Precondition" and the footnote, it should be pointed out that it had been the express understanding during the last session of the Preparatory Commission for the International Criminal Court that the "appropriate organ" to make the determination of an act of aggression by a State could be the International Criminal Court itself, as also indicated by the footnote's reference to options 1 and 2 of para.2 of Part I⁸. But the problem with regard to the rights of the accused arises primarily in the context of a prior determination of the act of aggression by an organ other than the International Criminal Court. As delegates recalled in this inter-sessional meeting, during the discussions on the jurisdictional conditions a main concern had always been the possible failure of the Security Council to make a determination of the act of aggression. Here, with respect to the rights of the accused, a main concern was the actual ability of the Security Council to make a determination. May the International Criminal Court reexamine the act of aggression and come to a different conclusion? Does the accused have the right to argue that no act of aggression occurred, for example because justifications under the law of State responsibility, such as self-defence, existed?

During the debate about the proper sequence for the Elements and the definition, the point was also made that the "Precondition" in the Elements would become superfluous with the removal of several of the options for the jurisdictional conditions in Part I. It would be relevant as well if the jurisdictional conditions required only a form of consent by another body, i.e. a procedural 'go-ahead' for the Court or a substantive determination. After the Chair highlighted the issue about the proper relationship between the precondition and the definition, a plea was made to remove the "Precondition" from the Elements, since the Elements should only focus on the definition of the crime. Likewise, the definition of the act of aggression in para.2 of Part I of the Coordinator's Discussion Paper should be de-linked from the determination that an act had been committed. The determination could only be made after the crime had been committed. Yet the definition

⁸ At the time, Portugal raised concerns that the "Precondition" might exclude the option to leave the determination of the act of aggression to the International Criminal Court. The Coordinator, supported by Israel and Samoa, reassured Portugal that the "Precondition" did not conflict with Options 2 and 3 in para.5 of Part I and that the International Criminal Court was one of the "appropriate organ[s]".

of the act was part of the definition of the crime. Therefore, it was a grave violation of the principle of legality to make the definition of the act dependent on a post-crime determination. Under the current structure of para.2 of Part I, nobody would know what aggression meant before the post-crime determination. Treating the jurisdictional conditions separately from the definition did not prejudice any of the options with regard to the jurisdictional conditions. Similar arguments have been made by delegates during the sessions of the Preparatory Commission.⁹ At this inter-sessional meeting several delegates voiced their apprehensions about these aspects of the structure of the Coordinator's Discussion Paper as well. On the other hand, in one counter argument against these criticisms, national examples were cited of required determinations of elements of crime by organs other than criminal courts and even binding on the criminal courts. But it was not definite if these examples specifically concerned the type of problem under para.2 of Part I. Three forms of dependency have to be differentiated: dependency of the *jurisdiction* of the criminal court on the post-crime determination of an element of the crime by another body, dependency of the *determination* of the crime by *the Court* on the post-crime determination by another body, and dependency of the *definition* on the post-crime determination by another body. Only the last form of dependency constitutes the violation of the principle of legality brought up again during this debate. The second form of dependency may raise due process concerns. The first one may cause problems of ineffectiveness, politicization and inequality.

As a consequence of the debate about the proper sequence of the Elements and the definition, the Special Working Group followed the Chair's suggestion to concentrate within their statements on the core issues first on the rights of the accused with regard to the prior determination of an act made by another institution, then on the need for a prior determination of the State act of aggression and the preferred institution and subsequently on the question if the definition should be generic or specific.

The rights of the accused with regard to a prior determination

In the discussion on the rights of the accused, delegates pondered both the question if the Court could take a second look at a prior determination of the act of aggression and at ways to possibly accommodate the rights of the accused in the process before the institution making the determination. Delegates emphasized the requirement of due process, human rights law, especially Art.14 of the International Covenant on Civil and Political Rights, and the prescriptions of the Statute, notably Art.67. Some used the topic as an argument against jurisdictional conditions which would make the Court dependent on a prior determination by another body, especially by the Security Council. But it was also recognized, that the problem did not completely disappear even if the International Criminal Court were not dependent in this way. It could nevertheless occur that institutions other than the Court would make their own determinations. As one delegate underlined, it was a matter of balancing the interest of the international community in the

⁹ Delegates had not only referred to the principle of legality but argued as well that a dependency of the definition on a later determination by an international body would conflict with the inherent right to self-defence and with national prosecutions of the crime of aggression.

harmony of decision-making with the rights of the accused. In general, the Special Working Group agreed that the rights of the accused had to be respected and that a prior determination did not relieve the Court of its own responsibility in this regard. Many pointed out that it would make a big difference if the prior determination were treated as binding in substance or as a rebuttable presumption or simply as a procedural trigger for the Court's jurisdiction. One of the delegates who favored the first treatment of the determination stated that this did not mean the automatic condemnation of the accused and that ways could be found to address arguments and evidence related to the State act over other elements of the definition of the crime. With respect to this conception, it matters that not only Art.31 but also Art.30 and 32 of the Statute were mentioned by the delegates. Other delegates were not convinced that a focus on person-centered elements of the crime, i.e. on intent, knowledge, mistake of fact and mistake of law could do justice to the rights of the accused with regard to questions about the actual existence or non-existence of the State act. Several argued for the treatment of the prior determination as a procedural trigger. Some leaned towards treatment as a rebuttable presumption. The latter approach was countered with a reference to Art.67(1)(i) which prohibits the imposition of a reversal of the burden of proof or any onus of rebuttal on the accused. But here it would make a difference if it is the Court or the accused which has the burden of rebuttal against the prior determination. Delegates did not always differentiate between a re-examination of the prior determination and a re-examination of the State act. In any event, a host of arguments were made to support a 'second look', often but not always centered on a prior determination by the Security Council: a prior determination by the Security Council would have been made by a political and not a legal body, there was no hierarchical relationship between the Court and the Security Council, the Security Council would not have been bound by the definition under the Statute, the Court would have to establish in any event the specific statutory definition and especially the scale and threshold, new evidence may have become available, and the accused had been absent in the prior process. It was also suggested that the Court could establish a Chamber of judges with qualifications in accordance with Art.36(3)(b)(ii) of the Statute to assure expertise in public international law and the law of State responsibility in the context of the determination of the element of the act.

Questions with regard to a prior determination of the act

Arguably, the inter-sessional meeting was most successful in its debate on the core issue of core issues, the question if the exercise of the Court's jurisdiction had to or should be dependent on the prior determination of the State act by another body, notably by the Security Council. Not that any new written proposal or definite forward step was made, but the tension and acrimony of the first meeting during the second session of the Assembly of States Parties has disappeared. Partly, the Chair's skill in agenda-engineering was responsible for the eagerness at the outset. Partly, the opportunities for truly informal exchanges outside the conference room helped to keep apprehension at bay. Moreover, as deplorable as the lack of time during the third session of the Assembly had been, it was clearly a big advantage that the first real concentration on this topic after the

dispiriting second Assembly session took place in the smaller sized conference room at the University, with no distraction from other Assembly tasks.

Those who insisted on an absolute requirement for the prior determination of the commission of the State act by the Security Council argued that Art.39 gave to the Security Council the exclusive authority to make such a determination, that the reference in Art.5(2) of the Statute to the UN Charter implied adherence to Art.39, that alternatives would undermine the Charter, that GA Res.3314 also assumed determination by the Security Council, and that the Security Council had a legally binding monopoly. Additionally, aggression was a transboundary event, and the determination by the Security Council would not undermine the independence of the Prosecutor who remained free to proceed or not. Looking at the issue from a legal policy angle, it was also emphasized that the Prosecutor needed the protection of a Security Council determination.

Those who are opposed to the Security Council as necessary trigger for the Court's jurisdiction can be roughly divided into three groups. One group argues that the Security Council has no role to play, the purposes of Chapter VII are centered on enforcement, and the International Criminal Court has direct authority to determine all elements of the crime. The crime had been already placed under the jurisdiction of the Court, giving the Security Council a role would take away what had been already given. The Nuremberg and Tokyo trials were cited as precedents for direct determination by the Court.

The second and third group argue that the Security Council does not have exclusive but only primary responsibility. According to the second group, the International Criminal Court can make its own determination if the Security Council fails to do so. The third group would in such a case require either a resolution by the General Assembly, a decision by the International Court of Justice in a contentious case, or an advisory opinion of the International Court of Justice. At times, references to the General Assembly appeared to entail merely a waiting period of consideration, an option conceptually closer to the second group. As the Coordinator's Discussion Paper shows, States have proposed as trigger mechanism for an advisory opinion by the International Court of Justice either a request by the General Assembly or a request by a procedural majority of the Security Council.

During the inter-sessional meeting, the arguments of these three groups against the exclusive authority of the Security Council referred to Art.11,14 and 24 of the UN Charter, the Historical Review¹⁰, past involvement of the General Assembly in the question of aggression, including the Uniting for Peace Resolution, and decisions by the International Court of Justice, especially the Certain Expenses case. The reference to the UN Charter in Art.5(2) of the Statute did not imply acceptance of the exclusive authority of the Security Council. The Security Council could make use of Art.16. Concern about the inequality caused by the veto power on the Security Council was diplomatically expressed as concern about the unequal resources of the accused. The importance of a

¹⁰ *Historical Review of developments relating to aggression, Prepared by the Secretariat, Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, New York, 8-19 April 2002, UN Doc. PCNICC/2002/WGCA/L.1 (24 January 2002) and Add.1 (18 January 2002).*

good relationship between the Court and the Security Council was pondered as well. The possible involvement of the Security Council combined with the exclusion of the veto was one of the highlighted options. Some looked to the General Assembly as secondary trigger, others preferred the involvement of a juridical body. According to one of the delegates, an advisory opinion would not take too long. The possibility was also mentioned to require that State referrals under Art.13(a) of the Statute are joined, *erga omnes*, by a majority of members of the Security Council (or by other groups of States signifying the support of the international community as a whole).

Surely, the divergent interpretations of the UN Charter demonstrated again the daunting difficulties which the States have to overcome, yet the debate was more characterized by legal argument and solution-seeking than propaganda and posturing. Largely, delegates reiterated well-known positions, but exactly because these are familiar, they often did so in a summary or indicative style. Most significantly, several States repeated not only their convictions or preferences but expressed openness towards compromise. It was apparent that States remain determined to find an answer miraculously in harmony with the different Charter interpretations and the different policy concerns.

The definition

In the discussions on the definition, the vast majority preferred a generic over a specific definition, with the latter implying a list of acts. A non-exhaustive list would be contrary to the principle of legality, an exhaustive list would be troublesome to produce. It was also pointed out that a generic definition had to be strict and precise. A few voices sounded non-committal. A preference would depend on the exact wording. The main question was if the right cases were covered.

The discussions of the previous day led to two new and similar proposals relevant to the definition¹¹. With the agreement to rely on the general principles in Art. 30 and 25(3), the chapeau of para.1 in the Coordinator's Discussion Paper could be streamlined eliminating the overlap.

Both proposals combine the streamlining of the chapeau with the insertion of a safeguard provision for the leadership element in Art.25(3). Proposal A would insert the leadership requirement in Art.25(3)(d)bis, Proposal B in Art.25(3)bis. The new paragraph in Proposal A refers specifically to Art.25(3)(a)-(d), but neither proposal was meant to necessarily preclude the application of Art.25(3)(f). Both proposals delete "intentionally and knowingly" from the definition as agreed upon the day before. They also replace the string of words for the conduct element with one general verb. Specifically, the words "planning, preparation, initiation and execution" are deleted. Proposal B moves the structure of the chapeau closer towards the structure of the definition of other crimes under the Court's jurisdiction, and uses instead of "orders or participates actively" the phrase "engages a State,, in [...collective/state act]". Proposal A drops "orders" and employs "participates actively in an act of aggression".

¹¹ See Annex

The basic idea behind the proposals was well received, but delegates had a host of queries in detail. The deletion of "planning, preparation, initiation" caused concern that this would break the linkage to the Nuremberg principles and that it was doubtful if Art.25(3) really covered this. One delegate raised the question if "planning" should be included in case no act occurs. He argued for criminal responsibility of attempt on the individual level under Art.25(3)(f). Art.25(3)(d) was one of the paragraphs mentioned to compensate for the deletion: "common purpose" was close to "planning", assuming the crime happens. Art.25(3)(b) was referred to as well.

Everyone agreed that the verb was important because it links the person to the collective/State act. But the term "engages" did not find much favor. Nor did "participates actively" receive full approval: "Actively" should be left off to cover commission through omission. It was argued as well that "facilitates" might be better or that the word "directs" could be removed from the leadership clause and used as the conduct verb. But others did not like the idea of tempering with the leadership clause. (No one appeared to question if "participates" would cover a solitary leader who, solely responsible, "orders".)

The placement of the leadership safeguard in Proposal B received specific support. Delegates pondered again as well if attempt of the State act should be included and how this would sit with the requirement of a prior determination of the State act.

The future work of the Special Working Group

On the last day, the Special Working Group concentrated on questions concerning its future work. Everyone recognizes that too little time is provided during the regular sessions of the Assembly. Delegates agreed, that at least two full days should be allocated, without parallel meetings, starting in 2006.

With regard to venue, it was pointed out that meetings in The Hague are more influenced by the 'ICC point of view' and meetings in New York by the 'UN point of view'. Some preferred The Hague because it is the seat of the Court and because experts of the Court are readily available. Others promoted New York because the participation of State representatives is easier. The New York meetings of the Law of the Sea Tribunal were offered as an example. Lack of competition with other Assembly matters would be helpful. Still others thought that the venue of the Special Working Group should follow the venue of the Assembly.

Delegates agreed that the inter-sessional meeting had been very useful and had significantly advanced the work. The venue at Princeton University had been ideal. Delegates deplored in this context that Cuba had not received permission to attend despite the efforts of the Chair and the President of the Assembly. It had been too late to establish a video link. Since the Review Conference was no longer far in the future, inter-sessional meetings were indispensable.

Delegates agreed that the Special Working Group should conclude its work one year before the Review Conference to permit enough time for national consultations and the generation of political momentum in preparation for the final agreement. The Chair was also asked to move forward with a 'virtual' working group for exchanges and analyses

between meetings¹² and to structure future meetings during the regular sessions with a specific list of topics and questions, similar to the approach for the inter-sessional meetings.

In the words of one delegate, "Princeton equals progress". Maybe the most fruitful proposal was made by the Director of the Liechtenstein Institute on Self-Determination when he suggested that the Special Working Group should meet at the University more than once a year.

¹² Similar arrangements within the International Maritime Organization, in the context of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, were cited as precedent.

Annex

Proposed rewordings for the chapeau of the Coordinator's paper

Proposal A

Definition, paragraph 1:

“For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person participates actively in an act of aggression ...”

Article 25, paragraph 3

Insert a new subparagraph (d) bis:

“In respect of the crime of aggression paragraph 3, sub paragraphs (a) to (d) apply only to persons who are in a position effectively to exercise control over or to direct the political or military action of a State.”

See also Element of Crimes, paragraph 8 of the general introduction.

Proposal B

Definition, paragraph 1:

“For the purpose of this Statute, “crime of aggression” means engaging a State, when being in a position effectively to exercise control over or to direct the political or military action of that State, in [... collective/state act].”

Article 25

Insert new paragraph 3 bis

“In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment.”

(Article 25, paragraph 3, does apply to the crime of aggression)