

**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 11 to 14 June 2007**

**Report of the CICC Team on Aggression**

Recent documents of special relevance to the substance of the discussions at the meeting

Discussion paper proposed by the Chairman, Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January – 1 February 2007, ICC-ASP/5/SWGCA/2, 16 January 2007

Report of the Special Working Group on the Crime of Aggression, Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January – 1 February 2007, ICC-ASP/5/SWGCA/3, 31 January 2007 (See also Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January – 1 February 2007, ICC-ASP/5/35, Annex II)

Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11-14 June 2007, ICC-ASP/6/SWGCA/INF.1, 25 July 2007

Documents relevant for mandate and process of the Special Working Group on the Crime of Aggression:

Strengthening the International Criminal Court and the Assembly of States Parties, Resolution 3, Paragraph 37, 38, 50, ICC-ASP/5/Res.3, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fifth Session, The Hague, 23 November-1 December 2006, ICC-ASP/5/32, Part III

Continuity of work in respect of the crime of aggression, Resolution 1, ICC-ASP/1/Res.1, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002, ICC-ASP/1/3, Part IV

Resolution F, Paragraph 7, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, 17 July 1998, A/CONF.183/10

Article 5 Paragraphs 1 and 2, Rome Statute of the International Criminal Court, 17 July 1998, A/CONF.183/9\* *and corr.*, CN.577.1998 TREATIES-8 (Annex), CN.357.1999 TREATIES-14 (Annex), 2187 UNTS 3

## Introduction

From June 11 to 14, 2007, the Special Working Group on the Crime of Aggression [SWGCA]<sup>1</sup> met for the fourth time informally at the Liechtenstein Institute on Self-Determination in the Woodrow Wilson School of Princeton University (June 11-14, 2007).<sup>2</sup> The Princeton meeting followed a Resumed Fifth Session of the Assembly of States Parties in New York (January 29-February 1, 2007) which had been nearly exclusively dedicated to the negotiations in the SWGCA. The meeting was also preceded by a Conference on International Criminal Justice in Torino, Italy (14-18 May 2007) which had also examined various aspects relevant to the work on the crime of aggression. The Virtual Working Group of the SWGCA had served as a preparatory venue for the dissemination of papers and information.

Before the meeting, an annotated agenda had been distributed covering five items. The plenary sessions were usually divided in two morning and two afternoon segments. Like in previous inter-sessional meetings, the intense debate typically spilled over into the conversations during the breaks. Frequently, immediate substantive and strategic adjustments followed quite naturally from the 'informal-informal' assessments over coffee during intermissions.

The Princeton meeting was influenced by uncertainty over the timing of the Review Conference and the time still available for the SWGCA. On one hand, the original idea of a Review Conference in 2009 and a concept for an even earlier conclusion of the SWGCA in 2008 instilled urgency into the negotiations, on the other hand, the growing

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<sup>1</sup> 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 also open to Non-States Parties "on an equal footing", ICC-ASP/1/Res.1. The crime of aggression is already under the jurisdiction of the Court, 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. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." (Article 5 paragraphs 1 and 2 of the Statute.) The Special Working Group is mandated to elaborate a proposal for such a provision and submit it to the Assembly for its consideration at a Review Conference. The task has been previously pursued by a Working Group on the Crime of Aggression in the Preparatory Commission for the International Criminal Court.

<sup>2</sup> For the official report see Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 11-14 June 2007, ICC-ASP/6/SWGCA/INF.1, 25 July 2007 [Inter-sessional Meeting]

probability of a Review Conference date of 2010 and a later conclusion of the SWGCA permitted more leeway to test new proposals for consensus building. But despite being pulled into contradictory directions time-wise, participants<sup>3</sup> managed to maintain their concentrated method of ‘thinking-aloud-together’ that has become synonymous with the ‘Princeton spirit’.

### Agenda Item 1: The “crime” of aggression – defining the individual’s conduct

#### *Background*

Under agenda item 1, the SWGCA concentrated on those two elements of the definition of the crime of aggression which are centered on the individual perpetrator, namely the leadership requirement and the individual conduct. The third element of the definition of the crime, - the act of the State brought about by the individual conduct -, was discussed separately.<sup>4</sup>

At issue under agenda item 1 was also the interrelationship of the definition of the crime with the General Principles in Part 3 of the Statute.

As basis for the discussions on agenda item 1, the SWGCA had before it Paragraphs 1 and 3 of Section I of the Discussion Paper of the Chairman of 16 January 2007<sup>5</sup> [CDP 2007] as well as a new proposal of the Chairman introduced during the Resumed Fifth Session of the Assembly of State Parties<sup>6</sup>.

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<sup>3</sup> 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 non-governmental participants. A few exceptions are made sometimes for delegates speaking on behalf of their State’s own written proposal, if the proposal originated already at the Resumed Fifth Session of the Assembly.

<sup>4</sup> See below Agenda Item 3, pp. 35 ff.

<sup>5</sup> Discussion paper proposed by the Chairman, Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January – 1 February 2007, ICC-ASP/5/SWGCA/2, 16 January 2007, Annex

<sup>6</sup> Proposal for alternative language on variant (a) prepared by the Chairman for the informal consultations, *in* Report of the Special Working Group on the Crime of Aggression, Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January – 1 February 2007, ICC-ASP/5/SWGCA/3, 31 January 2007, Annex (See also Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January – 1 February 2007, ICC-ASP/5/35, Annex II, Appendix). The proposal is now included as Proposal for alternative language on variant (a) prepared by the Chairman in January 2007 *in* Inter-sessional Meeting, *supra* n.2, Annex II.1

With regard to the leadership clause and individual conduct, as well as with regard to the stylistic approach and structure of the definition of the crime, the Princeton meeting of 2007 was able to build on progress achieved at the Resumed Fifth Session of the Assembly of States Parties and at the Princeton meeting of 2006. At the latter meeting the SWGCA had continued its debate whether the definition of the individual conduct should follow the so-called monistic or the differentiated approach<sup>7</sup>. In the monistic approach, the required conduct under the definition covers already all forms of criminal participation, making the application of the General Principles on commission and participation in article 25 paragraph 3 of the Rome Statute superfluous<sup>8</sup>. In the differentiated approach, the conduct clause in the definition centers merely on the primary perpetrator[s] and the General Principles in article 25 paragraph 3 remain largely applicable. A new addition to article 25 paragraph 3 ensures that the provision cannot be interpreted to cover participants below the leadership level.<sup>9</sup> The differentiated approach has the main advantage that the definition of the crime of aggression is better aligned with the structure of the Statute and the structure of the other crimes under the Court's jurisdiction. The main *dis*advantage is the necessary search for the most appropriate aggression-specific conduct words, yet Princeton 2006 propelled this search forward and examined a number of versions<sup>10</sup>. Picking up from the outcome of Princeton 2006, Paragraph 1 of CDP 2007 presented both one of the multiple-choice versions of the differentiated approach<sup>11</sup> and a version for the monistic approach<sup>12 13</sup>. Strong support for

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<sup>7</sup> For background on the questions which have occupied the SWGCA in this regard see Discussion Paper 1, The Crime of Aggression and Article 25, paragraph 3, of the Statute, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.B, <http://www.icc-cpi.int/library/asp/Annexes.pdf>

<sup>8</sup> The monistic approach had been used in the SWGCA's main working paper preceding CDP 2007, 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 [CDP 2002]

<sup>9</sup> *Supra* n.5, I. Paragraph 3 with footnote 4

<sup>10</sup> For the main versions see Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-determination, Woodrow Wilson School, Princeton University, United States of America, from 8 to 11 June 2006, ICC-ASP/5/SWGCA/INF.1, 5 September 2006, Annex I

<sup>11</sup> "Variant (a) 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 (leads)(directs)(organizes and/or directs)(engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack ....."

<sup>12</sup> "Variant (b) 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 orders or participates actively in the planning, preparation, initiation or execution of an act of aggression/armed attack ....."

the differentiated approach during the Resumed Fifth Session of the Assembly of State Parties led to the new proposal by the Chairman for Variant (a)<sup>14</sup>. The alternative language offered a middle way among the choices for the differentiated approach, maintained the inspiration from the relevant criteria in the Nuremberg Charter and patterned the stylistic and grammatical structure on the one used for the other crimes under the Court's jurisdiction. The better structural alignment with the other crimes was made easier by transferring the leadership clause to a new and separate first sentence. In this placement the leadership clause was now formulated as a jurisdictional requirement.<sup>15</sup> The initial reaction during the Resumed Fifth Session was largely positive.

### *Overview*

Princeton 2007 consolidated the support for major aspects of the alternative proposal. The thrust of the discussions was captured in a further revision introduced during the meeting.

### *The conduct clause*

At the beginning, delegates generally welcomed again the alternative proposal. It was seen as a good step forward, that the structure paralleled more closely the one of the other crimes. With regard to the wording of the conduct clause, a few delegates referred back to other possibilities from the Princeton 2006 discussions but expressed at the same time approval for the new clause. One delegate favored conduct verbs associated with the monistic approach and with article 16 of the ILC Draft Code of Crimes against the Peace and Security of Mankind but conveyed flexibility as well. Without disregarding the different preferences of individual States, it is probably fair to say that no one present at Princeton 2007 would stay in the way of consensus about the conduct clause were the Review Conference held tomorrow.

### *The leadership clause*

The most important debate under agenda item 1 concerned the jurisdictional framing of the leadership clause in the alternative proposal. Delegates recognized that the separate sentence made it much easier to achieve the generally desired structural alignment with the other crimes. Yet, the views were soon quite divided about the question if the leadership position should be treated as a jurisdictional requirement or as part of the definition of the crime. Often the arguments about placement and wording were

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<sup>13</sup> Paragraph 1 of CDP 2007 continues with two sets of brackets containing additional threshold requirements and interpretation criteria. This part of Paragraph 1 was discussed under agenda item 3, *infra* pp. 35 ff.

<sup>14</sup> *Supra* n.6

<sup>15</sup> “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 the Statute, “crime of aggression” means the planning, preparation, initiation or execution of an act of aggression/armed attack, [ which ... ]”

intermingled. A number of States liked the separate placement and thought that the jurisdictional formulation was a good idea. They referred in this context to article 8 of the Statute which also uses jurisdictional wording in its first sentence. Some accepted the modeling on article 8 only on the condition that the leadership clause would also be added to article 25 paragraph 3 of the Statute. Others felt that such an addition was unnecessary if the leadership clause was treated as a jurisdictional requirement and saw this as a potential advantage of the alternative language. A jurisdictional hurdle would hold for all forms of the crime, including secondary participation. It was also argued that the leadership clause was still part of the definition even if jurisdictional wording were used.

At the same time, strong voices were raised against the approach to the leadership clause in the alternative proposal. Delegates in this group emphasized that the requirement of leadership was an integral part of the definition, not just a jurisdictional limit. The mixing of jurisdiction and substance in the definition of article 8 was not seen as good idea.

Differentiating between placement and jurisdictional wording, one speaker offered that the clause could be placed in a separate sentence but insisted that the wording had to be substantive. The idea appeared to be similar to the approach already used for the element of the State act of aggression. The State act is named as part of the definition and explained in a further paragraph. Another delegate in this group warned that the jurisdictional wording would enlarge the scope of the conception of this crime outside the Court. The definition in the Statute would play a role for national definitions and customary law. Two other delegates asked in this regard: What message do we want to send? That the Court, - in line with its high threshold -, would *prosecute only leaders* for the crime of aggression or that the crime of aggression could only be *committed by leaders*?<sup>16</sup>

As already indicated, the debate about the leadership clause overlapped in part with the question if a repetition of the clause was necessary in article 25 paragraph 3. Part of the divergence with regard to the latter point was due to different interpretations of the word “committed”: Does the verb cover only the activity of the primary perpetrator? As was recalled at the Princeton meeting, the interpretation of “committed” in the first sentence of the alternative proposal had already played a role in the Resumed Fifth Session. There, one State had been concerned that the jurisdictional clause would not cover those who merely *participate* in the crime and had offered an amendment affording the deletion of “committed”. The amendment was withdrawn<sup>17</sup> after another State insisted instead on the maintenance of the addition of the leadership clause in article 25 paragraph 3 of the Statute which would assure application also to secondary perpetrators. Suggesting the possibility of another interpretation of “committed”, one participant at the Princeton meeting pointed out that the use of the term in several articles of the Statute (e.g. article

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<sup>16</sup> The debate about definitional versus jurisdictional wording played also a major role in the context of the threshold question under agenda item 3, see *infra* p.39 f.

<sup>17</sup> The amendment alerted the SWGCA to another point to be considered. The suggested rewording left unclear that the leadership position has to be a requirement *at the time of the crime* not at the time of the exercise of the Court’s jurisdiction.

11) was not intended to be only relevant for primary perpetrators. Thus, the alternative proposal did not necessarily require a repetition of the leadership clause in article 25 paragraph 3.<sup>18</sup> In response to those who objected to the jurisdictional wording, it was at the same time suggested that it might be sufficient to insert a leadership clause only in article 25 paragraph 3 since that provision applied not only to secondary but also to primary perpetrators. Embedding the leadership clause for the crime of aggression in the General Principles instead of the specific definition would send a strong message about the character of the crime. The leadership requirement would be deeply ingrained in the Statute and in general criminal law.

Another speaker offered an option better tailored to the wish for close integration of the leadership clause into the definition. The leadership requirement as such could be set out in the definition in a shorter form<sup>19</sup> and the full clause could appear in the General Principles. The proposal had some similarity both to the earlier idea for a separate definitional leadership sentence and to the two-step approach with regard to the element of the state act of aggression.

With regard to the substantive wording defining the required leadership position itself, one speaker reiterated his argument from previous meetings that a requirement of “*being in a position effectively to shape or influence*” might better cover industrialists and others who are ‘not formally involved in government’. One other speaker concurred that it might be worthwhile to re-evaluate if “the kitchen cabinet” is covered. The suggestions were made in a fairly low-key manner since they run counter to the more general understanding that the definition of the leadership position should not be reopened and that it does already cover industrial leaders. In the face of the list of challenges the SWGCA must overcome, the relative calm with regard to the description of the leadership position has long served to reassure States that at least one of the tasks has been accomplished. Most likely, only progress on other aspects of the provision on the crime of aggression may provide sufficient room for another double-check with respect to the reach of the criteria for the leadership position.

In reaction to the course of the more basic debate about the definitional versus the jurisdictional treatment of the leadership clause, the Chairman distributed on the next morning a revision of the alternative proposal. He explained that the paper contained no surprises, it merely showed what could be done to reintegrate the leadership clause as part of the definition while keeping the rest of the alternate proposal intact. He also invited comments throughout the Princeton meeting. On the third day, the Chairman expressed again his hope that the revision reflected the thrust of the debate. Only one minor drafting suggestion was made<sup>20</sup>, indicating the absence of major objections.

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<sup>18</sup> Nobody pointed out that an overly narrow reading of “committed” in the jurisdictional leadership clause might even hinder the prosecution of secondary perpetrators who *are* leaders.

<sup>19</sup> The speaker appeared to have in mind short phrases such as “by a leader” or “while being in a leadership position”

<sup>20</sup> “*Shall apply only*” instead of “*shall only apply*”. See Revised proposal for alternative language on variant (a) prepared by the Chairman for the informal consultations, *in* Inter-sessional meeting, *supra* n.2, Annex II 2.

### *Paragraph 3 of CDP 2007*

Under agenda item 1, the SWGCA addressed also Paragraph 3 of CDP 2007. Even under the differentiated approach, Paragraph 3 refers still to two provisions of the General Principles as being not applicable: *Attempt*, article 25 paragraph 3 (f), and *Command responsibility*, article 28. Paragraph 3 of CDP 2007 reflects the technical recognition that the definition of the crime does not fit well with these provisions. Put shortly, command responsibility in article 28 entails responsibility for the crimes of those *under* one's command, whereas the leadership crime of aggression is committed by those *in* command. Yet, the bad fit is so obvious that several delegates argued again that the express provision of inapplicability is unnecessary. Moreover, should there be unusual circumstances where article 28 might make sense, it would be wise to leave the matter to the Court, because no policy reasons were apparent to treat the crime of aggression in this respect differently from the other crimes. Similar considerations play a role with regard to article 25 paragraph 3 (f), even though the evaluation of the applicability of that provision is more prone to misunderstandings in the discussions. The SWGCA differentiates questions with regard to attempt by the individual person from questions with regard to attempt of the State act. In the debate at Princeton 2007, some interventions addressed the issue of the technical fit, or rather lack of fit, others went into policy considerations that appeared to veer more towards jurisdictional/substantive considerations related to the State act. Altogether, the statements on article 28 moved more clearly towards the deletion of express non-applicability than the statements on article 25 paragraph 3 (f). Overall, there was a fairly strong tendency to do without Paragraph 3 of CDP 2007 due to a lack of necessity for the provision.

In the course of the debate, one delegate added that the conception of the crime should include responsibility for omission. The statement may have been based mainly on an assessment of Variant (b) in Paragraph 1 of CDP 2007. The wordings in Variant (a) of CDP 2007 as well as in the alternative proposal and in the revision of Princeton 2007 enable the Court to treat the crime of aggression in this regard just like the other crimes.<sup>21</sup>

Ending the debate on the General Principles, the Chair reiterated the question if obvious non-applicability needs to be specified and remarked that the SWGCA may come back to the matter at a later stage.

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<sup>21</sup> After extensive discussions, the Working Group on General Principles at the Rome Conference arrived at an understanding that criminal responsibility for omission was not excluded by the Statute, that the matter should be left to the Court and the definition of crimes, that the prohibition of analogy serves as a safeguard, that the use of the term "conduct" can be an indication that both acts and omissions are covered, and that one particular case of omission is set out in the provision on the responsibility of commanders and other superiors.

## Agenda Item 2: Conditions for the Exercise of Jurisdiction

### *Background*

Under this item, the SWGCA examines if the exercise of the Court's jurisdiction over the crime of aggression requires additional conditions beyond those already contained in the Statute. *Two questions* have stood out over the years: Does the United Nations Charter require a prior determination of the State act of aggression by the Security Council and does a greater risk of politicization demand higher procedural hurdles?

Only very few States, mainly the Permanent Members of the Security Council, have answered the *first question* in the affirmative. But their argument for a prior Security Council determination has been not only based on legal analysis of the United Nations Charter but also on policy considerations linked to the international security system, notably the importance of enforcement and institutional cooperation. The vast majority of States has denied a requirement for a prior determination by the Security Council under the UN Charter. Their argument has likewise been based not only on legal analysis of the UN Charter but also on policy considerations, here linked to the history and procedure of the Security Council, notably the low rate of determinations of aggression in the past and the unequal impact of the veto power of the Permanent Members of the Security Council on international criminal justice.

With regard to the *second question*, a fairly large number of States has found additional safeguards against politicized prosecutions either indispensable or acceptable. A small number among the States that are worried about political pressure towards prosecution want such an additional safeguard not only against wrong accusations but against politically unwise prosecutions. At the same time, a sizable number of States has thought that the existing safeguards in the Statute, including article 16, are sufficient for both concerns. In the debate about safeguards, States have considered in particular the use of a prior determination by other United Nations organs, i.e. the General Assembly and the International Court of Justice. Finally, even among those States which argue against a requirement of a prior determination under the UN Charter, and even among those which do not see a need for any additional safeguards, acceptance is widespread for some form of acknowledgment of the role of the Security Council in the provision on the jurisdictional conditions, but the conceptions in that regard range from the bare minimum, such as a notification of the Security Council, to the maximum, such as a strong relevance of Security Council decisions.

In previous sessions, the SWGCA has arrived at *two general understandings* which have helped to bring opinions closer together.

*First*, States have recognized that the jurisdictional conditions for the Court cannot subtract from the authority of other UN organs. In other words, even if the jurisdictional conditions would not require a prior determination of a State act of aggression by another UN organ, such determinations may nevertheless exist.

*Secondly*, the SWGCA has come to the agreement that a prior determination of a State act of aggression by another UN organ, even if it were required for the exercise of the Court's jurisdiction, could only serve as a procedural pre-condition, it would not be prejudicial in substance. As one of the elements of the crime of aggression, the State act of aggression must be evaluated by the Court itself in accordance with its own Rules of Procedure and Evidence and in accordance with the definition under the Statute. The SWGCA has recognized that this is a requirement of due process and the rights of the accused. The accused must be heard<sup>22</sup>. The defense has to be able to challenge the Prosecutor on all elements of the crime without a reversal of the burden of proof. Moreover, new evidence could become available. While the Court may take the substance of prior determinations into account, it cannot be bound by them.<sup>23</sup>

In light of these understandings, even a good number of those States which adamantly oppose a requirement for a prior determination by the Security Council, have come to acknowledge that it makes sense to enable cooperation as much as possible within the international security system. And even States which adamantly insist on a prior determination by the Security Council appear to rely now more on a strict conception of primary rather than exclusive authority of the Council or assume complementary competencies for different purposes. They argue not so much that *only* the Security Council can make a determination but that the Court may proceed *only after* the Security Council has spoken.

### *Overview*

During the Resumed Fifth Session, the SWGCA focused on Paragraphs 4 and 5 of CDP 2007 as its basic working draft on the conditions for the Court's exercise of jurisdiction over the crime of aggression. At Princeton 2007, the SWGCA had also before it a new Non-Paper<sup>24</sup> by the Chairman distributed a few weeks before the meeting. The Non-Paper develops CDP 2007 further and utilizes wholly or in part formal and informal proposals made by States during the Resumed Fifth Session. Belgium circulated for the Princeton meeting in addition an informal revision<sup>25</sup> of its proposal at the Resumed Fifth Session<sup>26</sup>.

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<sup>22</sup> In contrast, the processes of the Security Council, the International Court of Justice and the General Assembly are geared towards States and the involvement of governments. Hearing the government of the relevant State is not an adequate substitute for hearing the accused individual, especially since the government may have changed since the time of the use of force which is under examination.

<sup>23</sup> Since, as mentioned above, the Statute cannot prevent other organs from making a determination within their authority, this understanding is relevant as well if the jurisdictional condition of the ICC would not *require* such determinations with regard to the State act.

<sup>24</sup> Non-Paper submitted by the Chairman on the exercise of jurisdiction, *in* Inter-sessional Meeting, *supra* n.2, Annex III

<sup>25</sup> Informal proposal revising the proposal presented by Belgium at the Resumed Fifth Session of the Assembly of States Parties ICC-ASP/5/SWGCA/WP.1, 30 May 2007 (on file with the CICC)

<sup>26</sup> Proposal presented by Belgium on the question of jurisdiction of the Court with respect to the crime of aggression, Assembly of States Parties to the Rome Statute of the International Criminal

Introducing his Non-Paper, the Chairman highlighted the new placement in the Statute, the expanded role of the Pre-Trial Chamber, and the technical improvement of long-known options. In particular, he emphasized that he had not intended to affect the substance of the options and that the various elements could be combined in different ways.

The Non-Paper replaces Paragraphs 4 and 5 of CDP 2007 with a new article 15 *bis* for the Statute, containing six paragraphs. CDP 2007 had already achieved the separation of the definition from the jurisdictional conditions into different paragraphs but all the paragraphs were still grouped in one article 8 *bis*. The new Non-Paper proposes to place the jurisdictional conditions for aggression into closer proximity to the jurisdictional conditions for the other crimes.

Paragraph 1 of the new article 15 *bis* clarifies that the trigger mechanisms of article 13 of the Statute remain applicable just like for the other crimes under the Court's jurisdiction.

Paragraph 2 requires that the Prosecutor shall seek authorization for an investigation from the Pre-Trial Chamber once he or she concludes that there is a reasonable basis to proceed. In other words, such an authorization would have to be sought not only when the Prosecutor acts *ex proprio motu* but also in response to referrals by the Security Council or by States.

Paragraphs 3 to 5 of article 15 *bis* most closely reflect and advance the elements and options of Paragraphs 4 and 5 of CDP 2007: Paragraph 3 of article 15 *bis* states that the Pre-Trial Chamber may provide an authorization under sub-paragraph (a) if the Security Council has determined that an act of aggression has been committed by the State "referred to in article 8 *bis*", *or*, under sub-paragraph (c), if the General Assembly or the International Court of Justice has done so, *or*, under sub-paragraph (b), if the Security Council has decided not to object to the investigation in respect of the crime of aggression.

In the absence of such a determination or decision, Paragraph 4 requires that the Pre-Trial Chamber shall notify the Secretary General of the Prosecutor's request.

Where no such determination or decision is made within a still to be specified number of months after notification, Paragraph 5 provides that the Pre-Trial Chamber may authorize the commencement of the investigation.

Both Paragraph 3 and 5 clarify that the authorization is to be made in accordance with the procedure of article 15 of the Statute.

Finally, Paragraph 6 makes clear that article 15 *bis* is without prejudice to the provisions relevant for the exercise of jurisdiction with regard to other crimes listed in article 5 of the Statute.

The Chairman noted that Paragraph 3 (b) introduces the so-called ‘green-light’ option. This option is based on one part of a proposal by Sweden<sup>27</sup>. The ‘green-light’ idea starts from the premise that it should be easier and sufficient for the Security Council to signal its non-objection to an investigation than to make an assessment of the State act. At the Resumed Fifth Session, the ‘green-light’ option had been met with a number of positive reactions, quite a lot of apprehension and a large dollop of misunderstanding. The Non-Paper modified the relevant original phrase “*has declared that it does not object*” with “*has decided not to object*”. As the summary of the debate further below will show, confusion remained a problem.

The Chairman explained that Paragraph 3 (c) represents mainly Options 3 and 4 in Paragraph 5 of CDP 2007 and that the Non-Paper does no longer set out *how* a determination by these UN organs is to be obtained. This simplifies matters in particular with regard to the International Court of Justice where not only contentious cases but also advisory opinions may lead to a determination of a State act of aggression. CDP 2007 had not been as comprehensive in this regard as the earlier CDP 2002<sup>28</sup>, a limitation which led to criticism by the Netherlands, Romania and New Zealand during the Resumed Fifth Session. The Netherlands offered at the time an oral proposal which managed to expand the scope again by shifting the focus from the feasibility or mode of the adoption of a determination to the more essential question of the *existence* of a determination. The Non-Paper follows a similarly straightforward approach.

In the context of Paragraph 3 (a) and (c), the specification of the “State referred to in article 8 *bis*” was mentioned as one of the technical improvements.<sup>29</sup>

With regard to the notice to be given to the Secretary General under Paragraph 4 of the Non-Paper, the Chairman remarked that the Secretary General would serve as something like a “mail box” or a focal point who would forward the information to the appropriate UN organ.

Inviting comments, the Chairman expressed hope for progress in particular with regard to the provisions on the Pre-Trial Chamber.

After the introduction of the Non-Paper, an important reminder was added by the delegate who coordinated the ‘basket’ of jurisdictional questions in the Virtual Working Group<sup>30</sup>: The determinations of the State act of aggression under Paragraph 3 could only

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<sup>27</sup> Proposal presented by Sweden on the question of jurisdiction of the Court with respect to the crime of aggression (Informal), Special Working Group on the Crime of Aggression Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January- 1 February 2007, 30 January 2007. The proposal adds the “green light” option to the first sentence of Paragraph 4 of CDP 2007. Apart from the “green light” option, the Swedish proposal inserts specifications for the notification of the Security Council in the second sentence of Paragraph 4 of CDP 2007.

<sup>28</sup> Supra n.8

<sup>29</sup> For a different assessment see *infra* p.22.

<sup>30</sup> Three ‘baskets’ of questions developed by Coordinators in the Virtual Working Group were maintained from the fall of 2005 till the end of the Resumed Fifth Session to structure and

serve as procedural preconditions, they could not be binding on the Court in substance. This clarification about due process and the non-prejudicial nature of prior determinations was later seconded by other delegates. The general agreement in that regard, as set out above<sup>31</sup>, represents one of the major achievements of the SWGCA, even though some of the interventions at the Princeton meeting showed that not all aspects may have fully sunk in.<sup>32</sup>

The delegate added that other documents, such as the revised Belgian proposal<sup>33</sup> and a proposal by David Scheffer<sup>34</sup>, could also provide interesting food for thought.

Initially, the debate about item 2 went badly. If there was already some disappointment that agenda item 1 had engendered more discussions than anticipated, the dynamics between several of the early interventions on the jurisdictional conditions brought the meeting to its low point. Those on opposite sides of the debate started the discussions by mainly reiterating their basic positions or by expressing a profound lack of enthusiasm about the Non-Paper. Or they did both:

Delegates opposed to any prior determination, particularly a prior determination by the Security Council, repeated arguments well-known from the past: The International Criminal Court had to be independent. The authority of the Security Council to make a determination of the act of aggression under article 39 of the UN Charter was merely intended for action under Chapter VII. The Security Council authority was not exclusive. The General Assembly and the International Court of Justice have responsibilities similar to the Security Council. There was no restriction on the International Court of Justice, thus there should be none on the International Criminal Court. The role of the Security Council in the international security system was already taken into account in article 16 of the Statute. History showed that the Security Council had always been reluctant to make determinations of an act of aggression. The International Criminal Court was well equipped to evaluate public international law questions, especially in light of the judges elected from List B. The crime should be treated like the other crimes under the Court's jurisdiction. Thus, any resort to 'easier' decisions by the Security Council (Paragraph 3 (b))<sup>35</sup> or to determinations by the General Assembly or the International Court of Justice

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catalyze discussions. With regard to agenda item 2 see Discussion Paper 2, The conditions for the exercise of jurisdiction with respect to the crime of aggression, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.C, <http://www.icc-cpi.int/library/asp/Annexes.pdf>

<sup>31</sup> Supra pp. 9-10

<sup>32</sup> Aspects of the topic played also a role under agenda item 3, infra pp. 44-45, 48-49

<sup>33</sup> Supra n.25 and infra pp.17, 31, 34

<sup>34</sup> Proposal on the Crime of Aggression, by Professor David Scheffer, Northwestern University School of Law, Chicago, Illinois, 23 May 2007. The proposal was presented in a speech at the Torino Conference, supra p.2, and circulated in written form to the Virtual Working Group prior to Princeton 2007. An earlier oral version of one part of the proposal had been discussed at Princeton 2006. David Scheffer has been the main negotiator for the United States at the Rome Conference.

<sup>35</sup> For more about the discussions on Paragraph 3 (b), see infra pp. 22-25

(Paragraph 3 (c))<sup>36</sup> or to authorization by the Pre-Trial Chamber<sup>37</sup> was likewise dismissed. For quite a number of States, the opposition to Paragraph 3 and notably to Paragraph 3(a) translated at the beginning of the debate into opposition to the Non-paper as a whole. It was claimed that the new article 15 *bis* of the Non-Paper was subordinating the International Criminal Court. The ICC should only take judicial notice of another determination but not be jurisdictionally dependent.

Meanwhile, those strongly in favor of a requirement for a prior determination (or possibly other decision) by the Security Council expressed *their* preference for CDP 2007 over the Non-Paper. One delegate thought the SWGCA should return to CDP 2007. One ‘hoped’ that the Non-Paper would not affect the Options and felt that it does not maintain the essence of CDP 2007. One argued that the proposals of Sweden<sup>38</sup>, Norway<sup>39</sup> and Belgium<sup>40</sup> had been lost: ‘We found them interesting.’<sup>41</sup> And one stated that his country had been more attracted to CDP 2007: That paper ‘was of more assistance to us.’ The Non-Paper should not overtake 2007 entirely. With regard to Paragraph 3 (a) itself, the four delegations were mainly using policy arguments rather than interpretations of the UN Charter, but a narrow reading of article 39 of the UN Charter was repeated again as well. Thus, it was argued that a determination by the Security Council was required by article 5 paragraph 2 of the Statute since that provision demanded consistency with the UN Charter. Two speakers stated their opposition to Paragraph 3 (c) with one of them detailing that the reference to the General Assembly may be too simplistic in light of articles 11, 12, 14 and 24 of the UN Charter. Considering the option to involve the International Court of Justice, the delegate referred to the Lockerbie case where the International Court of Justice had deferred to the Security Council<sup>42</sup>. He even concluded being uncomfortable with autonomous decisions by the ICC<sup>43</sup>. One of the ‘Four’ stated expressly his support for the ‘green light’ option in Paragraph 3 (b), one his opposition<sup>44</sup>.

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<sup>36</sup> For more about the discussions on Paragraph 3 (c), see *infra* pp. 27-30

<sup>37</sup> For more about the discussions on the Pre-Trial Chamber, see *infra* pp. 18-19, 20, 30-33

<sup>38</sup> *Supra* n.27

<sup>39</sup> 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, Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed Fifth Session, New York, 29 January – 1 February 2007, ICC-ASP/5/SWGCA/WP.2, 30 January 2007.

<sup>40</sup> *Supra* n.26

<sup>41</sup> Since the same delegate subsequently expressed his opposition to Paragraph 3(b), the regret about the loss of the Swedish proposal most likely related only to the part concerning information by the Prosecutor to the Security Council.

<sup>42</sup> In contrast, another participant noted later that the ICJ had deferred to an existing Security Council resolution whereas the problem preoccupying the SWGCA was the *absence* of a Security Council resolution in a situation where the international community as a whole felt an investigation of the crime of aggression was warranted.

<sup>43</sup> In light of the comments of his delegation at the Resumed Fifth Session, his concern may have centered on ‘contradictions’ between the Council and the Court. Later in the debate about the definition of the State act of aggression, he offered more positive statements about the autonomy of the Court. See *infra* p. 51.

<sup>44</sup> For more detail on the ‘green light’ option, pp. 22-25

During the first afternoon break, faces looked troubled and assessments about the course of the debate sounded rather dire. The famous Princeton spirit seemed never more needed. Yet, it was also never more at work:

Already from the beginning, several participants reacted quickly to try to steer the meeting away from the mere presentation of positions and more towards the cooperative search for solutions typical for the Princeton meetings. In particular, it was re-emphasized that all options of CDP 2007 were still in the Non-Paper. For those set against the requirements of prior determinations by another UN organ, their preferred option was contained in Paragraph 5. For those on the other side, their preferred option would be the result of the deletion of Paragraph 5 and 3 (c) (and possibly 3(b)). The meeting should focus instead on the changes in the Non-Paper, especially on the involvement of the Pre-Trial Chamber.

Notably, in the second half of the first afternoon, a number of participants resorted to general pleadings and argued for more positive readings of the Non-Paper.

As one delegate put it, ‘we are getting too much into the Security Council’, the meeting should concentrate instead on policy. What would be the *wisest* arrangement? Aggression was a politically charged issue. It was important to shield the Court against political bias. He combined his endorsement of the primary responsibility of the Security Council with a reference to the due process requirement, namely that the International Criminal Court would not be bound by a Security Council determination. In other words, if he saw the requirement of a Security Council determination as the best safeguard against politicized pressures on the Prosecutor, he may have also sought to reassure those who might be more worried instead about the politicization of Security Council determinations. Still more likely, his statement was geared to prevent any reappearance of the notion of exclusive Security Council authority, a notion which would effectively preclude a process in accordance with the rights of the accused.

Another participant started by expressing his sympathy for the views of those opposed to the requirement of a prior determination. He stated that the legal arguments on behalf of an absolute requirement for a prior determination by the Security Council were not very strong, as had been most recently shown in a paper distributed in the Virtual Working Group<sup>45</sup>. He also recalled that there had been a clear preference for Option 1 in CDP 2007. But, he added, ‘we must find something that works for all, we have to reach a solution, maybe something between a circle and a square’. Some revising could make it clearer how the Non-Paper related to the old options. In addition, he pointed to Paragraph 3 (b) and the Scheffer proposal as options which both could make decisions by the Security Council easier and referred as well to the possibility of differentiating the jurisdictional requirements depending on the trigger used under article 13 of the Statute.

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<sup>45</sup> Carrie McDougall, *When Law and Reality Clash – the Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court’s Jurisdiction over the Crime of Aggression*, distr. 19 April 2007 (scheduled for publication in the 2/3 (2007) edition of the *International Criminal Law Review*; Ph.D. Work-in-Progress.)

Emphasizing the need for agreement, one speaker summoned the horror of armed conflict. Neither the deaths and injuries of civilians described as so-called collateral damage, nor the deaths and injuries of soldiers were typically covered by the provisions on war crimes or crimes against humanity in the Statute. In terms of the Court's jurisdiction, these deaths and injuries could only be traced to the criminal responsibility of the one who committed aggression and they would only be addressed and deterred by the provision on the crime of aggression. Not only moral but also utilitarian reasons spoke for the need to succeed with the provision. In the past, powerful States could rely on military deterrence to protect themselves. Thus, maintaining discretion over the use of force could be more valuable than the increase of non-military deterrence through the international criminalization of aggression. Yet the situation had changed in an age of weapons of mass destruction. Even powerful States should have a strong interest in the increase of international non-military deterrence because national (or allied) military deterrence may not sufficiently protect against the spill-over effects of the wars of other States. In support of the Non-Paper, she asserted that it combined both objectives, cooperation between the institutional building blocks of the international security system and the protection of the independence of the Court.

One speaker phrased her plea in more critical terms: 'We sounded today too much as if we are back in 1994, we are beyond that stage, we need to find a medium line, we need to come together, we need to leave our intransigent positions.'

One of the pleas reminded the meeting that the crime of aggression would be the most important item at the Review Conference. Brackets in the Non-Paper might make the options clearer.

Throughout the jurisdictional discussions, - which ran until the middle of the next day -, statements in support of the Non-Paper grew. Delegates appreciated the "simplification", the coverage of the political spectrum and the narrowing of differences.

The paper was found "extremely useful" and more encouraging for entering the discussions than previous versions.

One delegate who had previously declared his preference for CDP 2007 continued to express reluctance but signaled at the same time his willingness to move along on a modified Non-Paper: The Non-Paper might contain all the options but it raised also new problems, - nevertheless, there might be also some progress.

Another speaker declared himself "happy to proceed on any paper if it brings us forward" and noted that the paper had received much support. It was also stated that the Non-Paper should be "nurtured and not aborted" and that the SWGCA could work on having one text as outcome of the Princeton meetings. The wish to use the Non-Paper as the new work basis for the SWGCA was stated repeatedly.

In the course of the debate on agenda item 2, the Chair adjusted direction several times to achieve further movement. Policy arguments and a more detailed focus on the substance of each of the provisions of the Non-paper increased.

A survey of these comments follows, roughly in accordance with the approach of the Non-Paper. Observations with regard to the Belgium proposal were made both separately<sup>46</sup> and in the context of the placement of the jurisdictional conditions. Positions relevant to the Belgium proposal appeared also indirectly in arguments about trigger differentiation and the Pre-trial Chamber authorization. The Scheffer proposal was debated as an additional Paragraph 3 (a) *bis*<sup>47</sup>.

### *Placement in the Statute*<sup>48</sup>

The Chair remarked that the placement of the jurisdictional conditions in a new article 15 *bis* flowed from past discussions in the Resumed Fifth Session. At the Princeton 2007 meeting, the reactions to the separate location were all positive or at least “flexible”. Placing the various aspects of the provision on the crime of aggression closer to related articles in the Statute appeared to make sense to the SWGCA as a whole. Only the choice of the specific article number 15 *bis* did not yet find complete agreement. While a few speakers sounded favorable or simply noncommittal about the exact spot, it was also argued to place the jurisdictional conditions into a new article 13 *bis*, in line with the structure of Belgium’s revised proposal<sup>49</sup>: The revised Belgian proposal had still related to CDP 2007 but the options in Paragraph 3 of the Non-Paper, if maintained, would also fit better right after article 13<sup>50</sup>. On the other hand, it was pointed out that the Non-Paper now required an authorization by the Pre-Trial Chamber and had thus taken up part of the Belgian proposal. It would be easy to combine article 15 *bis* with the full Belgian proposal since article 15 *bis* referred already explicitly to article 15, and the new article 15 paragraph 7 proposed by Belgium could simply provide for an increase of the judges in the case of the crime of aggression.

The exchanges made it obvious that the use of two or more jurisdictional locations and/or the direct integration into existing articles might be other possibilities depending on the final outcome (including with respect to a trigger differentiation).

Altogether, the evaluation of the best placement clearly confirmed an integrative approach in line with the logic of the Statute. The Chair reminded the SWGCA in this context also of the addition of the leadership clause in article 25 paragraph 3 and that there were various ways of integration. The different possibilities of incorporating the provision on the crime of aggression into the Statute would obviously have a technical impact on the Chair’s paper overall. Summarizing the debate, the Chair noted that the separate placement of the jurisdictional conditions had been welcome.

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<sup>46</sup> *Infra* p. 34

<sup>47</sup> *Infra* p. 25-27

<sup>48</sup> *Supra* p.11

<sup>49</sup> *Supra* n. 25

<sup>50</sup> See also *infra* p. 31 about placement in case the notification under Paragraph 4 would have to be given by the Prosecutor.

*The clarification in Paragraph 1*<sup>51</sup>

Paragraph 1 solicited only few comments but they were all positive.

*The requirement to seek authorization by the Pre-Trial Chamber in Paragraph 2*<sup>52</sup>

The requirement for the Prosecutor to seek authorization by the Pre-Trial Chamber under Paragraph 2 takes its clue from article 15 of the Statute and expands the range of that provision to all investigations with respect to the crime of aggression no matter what the jurisdictional trigger has been under article 13 of the Statute.<sup>53</sup> As mentioned above, the concept is also related to the Belgian proposal, except that the latter requires an increase in the number of judges involved in the authorization and does not apply to Security Council referrals under article 13 (b).<sup>54</sup>

As one delegate pointed out, Paragraph 2 responds to the search for a special safeguard against politicization by establishing the safeguard at the Court itself. The requirement of an authorization by the Pre-Trial Chamber could be a stand-alone solution or there could be a “division of labor” with safeguards outside the Court as under Paragraph 3. He added that the idea of the Pre-Trial Chamber as a filter emerged in Rome in the context of *ex proprio motu* actions by the Prosecutor, a topic that had been just as polarizing as the topic under agenda item 2.

Those reactions which concentrated specifically on Paragraph 2 and the requirement of authorization *as such* expressed primarily support rather than rejection, with a middle group hovering somewhere between misgivings, hesitancy and flexibility. For example, one participant stated that ‘we understand that article 15 *bis* corresponds with article 15 but we wish to underline the independence of the Prosecutor.’

It was difficult to assess the overall tendency: Since the role of the Pre-Trial Chamber is also set out in Paragraphs 3, 4 and 5 of the Non-Paper, many statements were more focused on the particular aspects contained in those provisions<sup>55</sup> than on the essential idea. While particularized or technical comments can help to indicate the underlying basic attitude, any deduction remained here nevertheless just guesswork because evaluations with regard to the role of the Pre-Trial Chamber in Paragraphs 2, 3, 4 and 5 were at the same time connected to evaluations of the role of organs other than the Court under Paragraphs 3 and 5.

With respect to the range of Paragraph 2, a few delegates thought that authorization by the Pre-Trial Chamber may not be necessary in the case of Security Council referrals under article 13 (b) of the Statute. One speaker felt the same also in the case of State referrals under article 13 (a). Under that opinion, the trigger differentiation would remain the same as under the Statute and any additional requirements such as notifications, prior

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<sup>51</sup> Supra p. 11

<sup>52</sup> Supra p. 11

<sup>53</sup> With respect to the other crimes under the Court’s jurisdiction an authorization under Article 15 is only required when the Prosecutor acts *ex prior motu* under article 13 (c) of the Statute.

<sup>54</sup> For reactions specifically related to the Belgian proposal, see supra p.17 and infra pp. 31, 34

<sup>55</sup> See below.

determinations and/or waiting periods would only apply to the Prosecutor's *ex proprio motu* actions.

The possibility was also mentioned to require authorization at a different moment of the process, for example at the time of the arrest warrant.

*The options in Paragraph 3 overall*<sup>56</sup>:

Comments relevant to Paragraph 3 as a whole related to the quantity of options, the interrelationship of the sub-paragraphs and their value in the context of Paragraph 5.<sup>57</sup>

The debate if the number of options for the jurisdictional conditions should be reduced or increased arose in particular in the context of the 'green-light' option in Paragraph 3 (b) and the Scheffer proposal pondered as a new Paragraph 3 (a) *bis*, yet it can also be relevant for other options and the jurisdictional conditions in general. The discussion was intriguing not only on substance. It was led by two delegates who both are strongly dedicated to the search for compromise and the delegate arguing against an increase had actually been instrumental in reversing a reduction of options contained in CDP 2007. The opponent to further additions argued that 'we are doing too many things at once. We need to be more precise.' The advocate for an expansion of options connected his argument to the eventual choice with regard to Paragraph 5: If one deletes Paragraph 5, the more options under Paragraph 3 the better. And even if one keeps Paragraph 5, more options under Paragraph 3 could reduce the waiting period for the authorization by the Pre-Trial Chamber. The existence of a determination would cut the time required in the absence of determination.

The Chairman managed to agree with both. 'Of course, there should not be *too* many options. But we have delegates who are against Paragraph 5 and for Paragraph 3(a) and other delegates who are for Paragraph 5. The increases in options are attempts to put the views closer together, through Paragraph 3 (b), and now Paragraph 3 (a) *bis*. We need to think practical. And the paper needs to be more refined.'

While the dispute about streamlining versus expansion has a generic relevance for the direction of the negotiating process and the structure of the provision, it could also be read as an indirect argument about the particular options and the promise they hold for consensus. Here it matters what type of option one thinks could do the trick. The debate indicated differences of opinion in that regard.

A few speakers expressed concern that the "all-in" approach of the Non-Paper could pose the risk of inconsistent decisions by the different institutions. The issue came to the foreground in the context of Paragraph 5 as well<sup>58</sup>. But the question was also posed what would happen if Paragraph 5 were dropped. The inquiry appeared to express concern

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<sup>56</sup> Supra p. 11. For the discussions on each subparagraph, infra pp. 21 ff.

<sup>57</sup> With regard to the word "may" in the chapeau of Paragraph 3 and in Paragraph 5, see infra pp. 33 and 49.

<sup>58</sup> Infra pp. 32-33

both about the impact of a notification under Paragraph 4 without a time period<sup>59</sup> and again about inconsistent decisions<sup>60</sup>.

Partly in answer, it was noted that the Statute could not stop other organs from making determinations and that Paragraph 3 repaired technical shortcomings of CDP 2007 and CDP 2002 which both had not taken fully into account that a determination by another institution may already exist by the time the Prosecutor intends to proceed. Here and at other moments the point was made that the Non-Paper advanced cooperation between the relevant institutions in the international security system.

Both in the context of Paragraph 3 and in the context of Paragraph 5, the Chairman saw no problem with regard to inconsistent decisions.<sup>61</sup>

While an outright opposition to Paragraph 3 as a whole was repeated several times, there were more and more voices who could accept the paragraph conditionally or who hinted at possible compromises. Thus it was emphasized by one delegate that his State was not in denial about the role of other bodies, but the Security Council should not jeopardize the role of the ICC. Another delegate objected to any subordination of the Court but agreed with cooperation and coordination.

It was observed that Paragraph 3 does not necessarily give a fundamental role to the UN organs, they were just taken into account. The same speaker related at another moment that he felt positively about Paragraph 3. The ICC was not stopped. ‘As long as the Pre-Trial Chamber has the last word, - fine.’

Similarly, another delegate mentioned the Preamble of the Statute and its reference to an “independent permanent International Criminal Court in relationship with the United Nations system” and continued that the Pre-Trial Chamber would just take cognizance of the determination of an act of aggression. The involvement of another UN organ did not necessarily undermine the independence of the ICC.

In most cases, these acceptances of Paragraph 3 appeared to be conditioned on the maintenance of Paragraph 5, but some positions may also have been based on the maintenance of Paragraph 3 (c).

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<sup>59</sup> According to the current text of Paragraphs 3 and 4, the dropping of Paragraph 5 would make no difference in the case of an already existing determination of an act of aggression or a Security Council ‘green light’. The Pre-Trial Chamber could provide its authorization. But if no determination exists, the Pre-trial Chamber would be blocked, except that the requirement of notification in Paragraph 4 implies that the Pre-Trial Chamber could still authorize the investigation whenever a determination would be forthcoming in the future.

<sup>60</sup> According to Paragraph 3, in the case of *inconsistent* decisions by the Security Council, the International Court of Justice and/or the General Assembly, - and assuming Para.5 were dropped-, *one* affirmative determination of an act of aggression or a green light would be sufficient for an authorization *except* for an obvious hurdle in case the *Security Council* has made an express determination that an act of aggression by the relevant State has *not* occurred: If the Pre-Trial Chamber were to rely nevertheless on the affirmative determination by another institution, the Security Council would clearly have all the votes necessary for a suspension under article 16. Other cases of inconsistency (e.g. SC: “Aggression”, ICJ: “No Aggression”) could speak against the existence of a reasonable basis to proceed but this would be a matter of evaluation by the Prosecutor and the Pre-Trial Chamber.

<sup>61</sup> With regard to inconsistent decisions in case Paragraph 5 is kept, see *infra* p.29, 33 and n.93.

*Determination by the Security Council in Paragraph 3 (a)*<sup>62</sup>

Similar statements occurred also specifically with regard to the role of a determination by the Security Council in Paragraph 3 (a). Here too, several delegates repeated their rejections, even in light of the rest of Paragraph 3 and Paragraph 5, but an increasing number accepted the subparagraph ‘in context’, meaning if Paragraph 5 (or possibly just the rest of Paragraph 3) stays or if another way is found to sidestep failures in the decision-making of the Council that would be intolerable to the international community as a whole. Thus, it was noted, conditionally, that Paragraph 3 (a) presented no problem in the Non-Paper. It reflected the role of the Security Council under the UN Charter. It had to be taken into account. It was acceptable as *part* of the trigger mechanism. One speaker was positive with regard to Paragraph 3 (a), as long as the ICC was not dependent and as long as the Council’s determination was not prejudicial, but she objected at the same time to Paragraph 3 (b) and (c).

Those in favor of *only* Paragraph 3(a), i.e. of an absolute requirement of a Security Council determination added in particular two observations, one already during the start-up of the debate, another towards the end: One delegate affirmed that the independence of the ICC and the Prosecutor was also important to his State and that protection against political pressure was important. The requirement of a prior determination by the Security Council could be compared to the requirement of consent by the Attorney General in a national system.<sup>63</sup> The other delegate argued that a determination by the Security Council was needed for practical reasons. Without Security Council support, there would be no peacekeeping support, no logistical support and no enforcement. The Court needed the implementation of a warrant of arrest. ‘We want to accomplish something, we want a strong mechanism.’

Appeals were made both in the direction of those allergic to any Security Council involvement and in the direction of those partial to it. Addressing the first group, speakers expressed understanding for its legal analysis. After all, article 39 of the UN Charter did not say that “only” the Security Council had the authority to make a determination. But there had to be some compromise and some role for the Security Council. The involvement of the Security Council was not a legal requirement but a policy decision. The Council and the Court should not collide. Again, the justiciability of the Security Council determination was highlighted to reassure this group. – Addressing the second group, it was noted that national, including universal jurisdiction over the crime of aggression was bound to increase, which would be a positive development. But there might still be cases where international jurisdiction would be preferable, due to the political situation, due to bias under a national jurisdiction, or due to the procedural rules

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<sup>62</sup> Supra p. 11

<sup>63</sup> Nobody answered directly. The difficulty with the example may be that a full comparison with the Security Council would have to envision an Attorney General who at times might be involved in the crime or plagued by conflicts of interest and thus set against consent for the wrong reasons.

and penalties of the ICC. Even the Permanent Members of the Security Council could have an interest in having a window around the veto.

In CDP 2007, the words used in reference to the State committing the act are “*the State concerned*”. Paragraph 3 (a) and (c) of the Non-Paper use instead the words “*the State referred to in article 8 bis*”. As mentioned above, the change was intended as a technical improvement. This assessment was not shared by everyone, at least not in the context of Paragraph 3(a). As one delegate argued, the Security Council would not be bound by the definition in article 8 *bis* and an act of aggression under article 39 of the UN Charter was not necessarily the same as an act under article 8 *bis*, thus it would make no sense to refer to that article in the context of a Security Council determination.<sup>64</sup> The Chairman conveyed that the new version had been thought to be more precise and the old one open to misunderstanding<sup>65</sup>.

#### *The ‘green light’ option in Paragraph 3(b)*<sup>66</sup>

Leading into the discussions about the ‘green light’ option, the point was made that most options in the Non-Paper require some waiting period. Since it would be good to get a Security Council decision, it would make sense to make that decision easy. This could for example shorten the waiting time. As under the original proposal by Sweden, Paragraph 3 (a) and (b) could be combined.

Two delegates strongly in favor of Paragraph 3 (a) reacted quite differently to the alternative in Paragraph 3 (b). One of them expressed his support for Paragraph 3(b) as long as the decision by the Security Council would be explicit. The other delegate objected that there was ‘no mechanism for such a decision.’ The Chairman read the objection as an expression of concern that silence by the Security might be sufficient for the Court to move forward. He responded in that respect that Paragraph 3(b) required a decision *stating* that the Security Council does not object. The sub-paragraph also did not force the Security Council to object under article 16.<sup>67</sup> The second delegate remained reluctant and argued later that reliance on a mere decision of non-objection had to be avoided. The situation had to be clear. As far as the rejection here extended even to explicit decisions under Paragraph 3(b), - because they did not include a determination of an act of aggression -, the Chairman remarked that the Security Council may ‘not be willing or able’ to make a determination of an act of aggression. Yet the Security Council may have an interest in a look into the matter by the Court. The Security Council could delegate its competence to the Court.

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<sup>64</sup> The same comment was later made by another participant during the discussions on agenda item 3.

<sup>65</sup> Since article 8 *bis* mentions more than one State, the new version could also prompt misunderstandings.

<sup>66</sup> Supra p.11

<sup>67</sup> Under article 16, the use of the veto power can prevent a *suspension* of Court proceedings pursued by the majority of the Security Council.

Paragraph 3(b) did not necessarily fare better with those *opposed* to exclusive reliance on Paragraph 3(a). One delegate stated that Paragraph 3(b) posed a problem as far as it required a decision by the Security Council. The comment signaled concern about the potential use of the veto by the Permanent Members of the Security Council. Others added that Paragraph 3 (b) caused difficulties because it implied an authorization by the Security Council. Article 16 of the Statute had been already a difficult enough compromise. The argument that the Security Council lacked a mechanism for a decision of non-objection was eagerly picked up. Objection due to the claimed lack of a legal basis for a decision under Paragraph 3(b) became a matter of principle for those wary of creeping expansions of Security Council authority. Paragraph 3(b) would be giving too much of a role to the Security Council<sup>68</sup>. Moreover, it was countered that the decision was practically a determination of an act of aggression since the Security Council would be aware of the consequences of its decision. Thus, the same reasons which would prevent a determination would prevent the decision. On the other hand, the speaker continued, if the Security Council wanted the Court to move ahead and just did not want to make a determination, it just did not have to object. In other words it could simply remain silent and let the Court proceed<sup>69</sup>. One speaker repeated explicitly in the context of the debate about Paragraph 3(b) that there was no need for Paragraphs 3, 4 and 5. Several delegates combined their assessments of Paragraph 3 (b) and the Scheffer proposal<sup>70</sup>. As one speaker noted critically, Paragraph 3 (b) followed ‘the same logic as the Scheffer proposal’, there were ‘too many obscurities’.

During the Resumed Fifth Session, some States had read the words “*has declared that it does not object*” as “*has not declared that it does object*”, causing a lot of misunderstandings of the intent of the Swedish proposal. The Non-Paper failed to overcome the confusion. Actually, the new words “has decided not to object” were maybe even more easily misread, now as “decided to remain silent”. In addition, both at the Resumed Fifth Session and at Princeton, delegates had difficulty to square an early non-objection by the Security Council with a later objection under article 16 of the Statute.

Thus, it was first asked what would happen if the Security Council were to object. The Chairman answered that the Security Council would then use article 16. The response

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<sup>68</sup> The complaints about ‘too much’ Security Council authority should not be misread. Generally, they were tied to concerns about the Court’s dependency as such and the power of the Council to *block* the Court (through the failure to adopt a decision), and not about too much power to push the Court towards prosecution. Worries about *too easy* prompts by the Security Council would not have made much sense in the context of arguments largely set against additional jurisdictional conditions. This does not necessarily mean that such worries do not exist at all. But evaluations under that angle would have to test the presence and absence of Paragraph 3(b) not only in the interaction with other options under Para.3 and Para.5, including the requirement of authorization by the Pre-Trial Chamber, but also in light of the authority of the Security Council under article 13(b) of the Statute.

<sup>69</sup> But note that an explicit decision means that the non-objection is carried, at the least, by a majority. In the case of silence, a majority may actually be opposed yet lack the concurrence of all Permanent Members for a decision under article 16.

<sup>70</sup> *Infra* pp. 25-27.

became a reason for further counter opinions. Now it was argued that the power of the Security Council to set a ‘red light’ under article 16 would be sufficient.

Other speakers wondered what would happen if the Security Council were to provide first a green light and later a red one. Thinking in terms of the sufficiency of silence by the Security Council, it was asked if the Court could exercise its jurisdiction as long as the Council did not make use of article 16.

Delegates expressed the view, on one hand, that a decision not to object was the ‘same thing as article 16’, and on the other hand, that a decision not to object was implicit in Paragraph 5 of the Non-Paper because Paragraph 5 entailed an implicit ‘go-ahead’. Misunderstandings of the intent behind Paragraph 3(b) were at the root of positive reactions as well: One speaker expressed support and interpreted the Council’s decision *not* to object as a decision *never* to object, i.e. to never to make use of article 16.

In an effort to correct possible misunderstandings of Paragraph 3(b), it was pointed out that Paragraph 3(b) does not add anything to the power of the Security Council to *stop* the Court under article 16, it adds to the power of the Security Council to *enable* the Court to proceed. The green light under Paragraph 3 (b) was much ‘softer’ than the determination under Paragraph 3 (a).

Throughout the debate, the Chairman offered explanations in all directions, depending on the arguments of the delegates. In particular, Paragraph 3 (b) did not affect article 16. The Security Council would not say ‘we won’t use article 16’. Circumstances relevant with respect to article 16 may change. Article 16 applied, just like under the Statute. The decision under Paragraph 3 (b) was just short of a determination of an act of aggression. Paragraph 3 (b) was also not an alternative to article 16. The Chairman conceded that the language was perhaps confusing. Maybe other words might work better.<sup>71</sup>

A number of delegates referred to Paragraph 3 (b) as an option they supported or were willing to consider. One delegate connected his evaluation of Paragraph 3 (b) and the Scheffer proposal to the agreement of the SWGCA about the due process requirement and the non-prejudicial nature of a determination or decision by the Security Council. Considering that the resolution of the Security Council could not be definite and it was unacceptable to build a criminal prosecution on a political determination, what could the input of the Security Council be? The option under Paragraph 3 (b) was one possibility. It was for example not uncommon in US practice to ask the Executive for its position<sup>72</sup>. The Executive could say that it has no objection. His country was neutral with regard to Paragraph 3 (b). He reminded the SWGCA that he had earlier made a similar proposal. The input of the Security Council could be a determination of the existence of *prima facie* evidence. The Security Council would state, just like a grand jury, that there was ‘some

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<sup>71</sup> The Chairman suggested the verbs “consent” or “allow for”, but anything that sounds too much like a *permission* by the Security Council would still run into opposition. More acceptable alternatives might make use of the verbs “*concur*” or “*support*”. Or the green light might consist of information or assurance by the Security Council that it has no *present* intention to use article 16 or that it stands ready to cooperate with its enforcement powers. See also n.73

<sup>72</sup> The argument was similar to the earlier claim that the determination by the Security Council under Paragraph 3(a) was comparable to the input of an Attorney General, *supra* p.21 and n.63.

evidence', i.e. on first sight. He added, to general laughter, that there had to be a way that the two groups, 'mainly the Four and the rest of us' would find common ground! Another delegate pleaded likewise for compromise. She related that her view point was not dissimilar from those more critical of Paragraph 3 (b) but the provision had to be retained, 'we need as many options as possible, we have to reach consensus, we have to find something between the two extremes to move.'<sup>73</sup>

*The 'Scheffer proposal' as a possible Paragraph 3 (a) bis*<sup>74</sup>

The 'Scheffer proposal', as it was typically referred to in short, was discussed for potential inclusion as a new Paragraph 3 (a) *bis*. It actually consists of two options. Option I contains two alternatives as a condition for the exercise of the Court's jurisdiction, either a determination similar to Paragraph 3 (a) or a determination of "*the existence of a threat to or breach of the peace as a result of the threat or use of armed force by one State against another State.....*". Option II contains apart from the first alternative under Option I two further alternatives relevant with regard to aggression-specific referrals by the Security Council under article 13 (b) of the Statute<sup>75</sup>. The comments at the Princeton meeting of 2007 with regard to the Scheffer proposal focused explicitly or implicitly primarily on the main feature of the second alternative under Option I. An earlier and wider oral version of Option II had been already once before debated at the Princeton meeting of 2006.

The initial reference to the Scheffer proposal and a second, more specific introduction was presented by the delegate who had been responsible for the jurisdictional conditions in the Virtual Working Group. He highlighted that Option I relied not only on a determination of an act of aggression by the Security Council, a determination which was

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<sup>73</sup> In general, the debate about Paragraph 3(b) showed again that one side in the SWGCA does not perceive the current green light option as a sufficiently reliable go-ahead mechanism, the other side is not content with article 16 as a sufficient safeguard against politicized or ill-advised prosecutions. One possible next step, the *trade between an 'easier' green light and an 'easier' red light*, has not been tested directly. In such a trade, those in favor of an easier green light would accept the adoption of red light decisions under article 27 paragraph 2 of the UN Charter instead of under article 27 paragraph 3 and those in favor of an easier red light would accept the same shift from article 27 paragraph 3 to article 27 paragraph 2 for the adoption of green light decisions. In both types of decisions, the problem of the irresponsible or biased veto would be sidestepped. At the same time, if the overruled minority in a green light decision had actually responsibility and wisdom on its side, it would have a second chance to convince the others towards a red light down the road. And a minority overruled in the red light either gets its way at the end of a suspension period or has at least a second chance in the deliberations to renew a suspension. (The green and red light do not have to look in substance the same as now. New conceptual ideas for both notions could shift the voting in the Security Council more naturally towards article 27 paragraph 2 of the UN Charter. For different wording of the green light see supra n.71.) On dialogue with the Security Council see also infra pp. 30-31, n.89, p. 49

<sup>74</sup> Supra n.34

<sup>75</sup> The jurisdictional conditions in Option I and II contain additional aspects but they were not addressed in detail during the debate.

highly unusual. Instead, the possibility to determine a threat to or breach of the peace would give the Security Council more options. This variation of Option I did not resolve the issue of equality but it would be more realistic. It could again reduce the waiting period under Paragraph 5. The Chairman explained that the thinking was similar to the green light option under Paragraph 3(b).

The reactions of the delegates from Permanent Members of the Security Council were divided just like with regard to the green light option. Whereas one delegate thought that there might be some use for the Scheffer proposal, another delegate remarked critically that the proposal had not been formally tabled and that his first reaction was skepticism. He reiterated the need for clarity. In the past, the Security Council may not have felt a need to make determinations of an act of aggression, but with the inclusion of the definition and the jurisdictional conditions in the Statute, the Security Council would be aware of the consequences of a determination of an act of aggression. This would change what the Security Council does, in the sense that the Security Council would now feel a necessity to make the determination. One just needed to compare the referral of the Sudan situation by the Security Council. The availability of the Court's jurisdiction had prompted an approach by the Security Council different from the past.

In general, the Scheffer proposal was met with much respect but very little enthusiasm.

One supportive voice which referred to the due process requirement in the context of Paragraph 3(b) did so as well for Paragraph 3(a) *bis*: It had been agreed that the determination by the Security Council could not be prejudicial. The proposal would fit with that concept and it would be also consistent with past practice. Another delegate thought that the proposal merited further discussion, how it could best be merged into the Non-Paper.

One speaker recalled the statement of Professor Scheffer at the Torino Conference that the Security Council determination of a threat to or breach of the peace could be adopted under Chapter VI of the UN Charter. The written proposal notes too that the resolution would not have to be adopted under Chapter VII of the UN Charter. This could be helpful since "*a party to a dispute shall abstain from voting*" in decisions under Chapter VI, according to the last half-sentence in article 27 paragraph 3 of the UN Charter. Unfortunately, it was not clear from the history of decision-making in the Security Council how strongly this voting provision was adhered to. Maybe more importantly, the text of Chapter VI was not really fitting for the situations at issue here. Chapter VI mainly contemplated determinations "whether the *continuance* of a dispute or situation is likely to *endanger* the maintenance of international peace and security". Here, the crime of aggression had already disrupted the peace.<sup>76</sup>

One of the statements in opposition noted positive aspects of the proposal, only to conclude 'however it does not help'. More directly, it was argued that the proposal did

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<sup>76</sup> Possibly, the determination of a "threat to the peace" (rather than "breach of peace") could fit with the topic of Chapter VI, assuming that the exact wording does not play a role. To make the idea work under Chapter VI, a lack of prosecution of the crime of aggression could become a new threat to the peace.

not guarantee that a determination would happen (despite relevant evidence) or that the trigger would be activated. (The latter observation was one of the rare references clearly related to Option II of the proposal.) In principle, the Security Council could only be accepted as a political participant. There could be no dependency by the Court. In other words, the proposal did not overcome the prevailing concerns about the effect of the veto power of the Permanent Members of the Security Council. Towards the end of the debate, one delegate asked in a more blunt rejection why the SWGCA paid attention to the proposal.

In the minds of many delegates, the proposal raised a problem which did not exist for the green light option under Paragraph 3(b). As one speaker put it, everyone in the Security Council would know that the language required for the determination could trigger the Court. Would this not have an effect on the Security Council? Would it not watch its language simply to avoid a criminal investigation? This posed the risk of impeding the functions of the Security Council. The proposal was intellectually brilliant but it could backfire, it could do more harm than good. In other words, if the determinations under article 39 of the UN Charter are not made, the enforcement actions under Chapter VII may not be undertaken either. (A similar interrelationship would have to be considered with regard to article 34 and the recommendations under Chapter VI.) One delegate stated that he would look at the proposal closely but would want to make sure that the proposal does not affect Security Council mandates related to peacekeeping. Another delegate related that he had posed a question with regard to this issue to David Scheffer during the Torino Conference. During that exchange, David Scheffer had felt that the Security Council would *have* to make the determinations in order to function. The delegate added, maybe delegates could consult on this with their respective UN departments.

There were also at least two speakers who stated that other aspects of the Scheffer proposal were interesting. Reference was made in particular to the description of the act of aggression and the threshold in Paragraph 4 of Option I and II. The Chairman pondered that this could be maybe discussed in the context of agenda item 3.

*Determination by the General Assembly or the International Court of Justice in Paragraph 3(c)*<sup>77</sup>

As in prior sessions, the debate about Paragraph 3(c) and the relevance of determinations by the General Assembly<sup>78</sup> and the International Court of Justice<sup>79</sup> continued to be rather

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<sup>77</sup> Supra p. 11

<sup>78</sup> The requirement of a General Assembly resolution would be somewhat comparable to the trigger mechanism of a state referral joined by the majority of states required under article 15 of the UN Charter.

<sup>79</sup> The determination of the State act by the International Court of Justice would not preempt the subsequent determination by the International Criminal Court in accordance with due process under the Statute. (The rules of procedure of the ICJ are not geared towards the protection of the rights of the accused.) The requirement of a determination by the ICJ would be mainly intended

mixed. Not all observations took into account the changes in the Non-Paper, in particular that the provision is no longer encumbered by the procedural *how* for obtaining these determinations, that the determinations may already exist by the time the Prosecutor intends to commence the investigation and that the determinations could shorten the waiting period under Paragraph 5. The comments did also not necessarily ponder Paragraph 3(c) on its own terms or within a final provision that might not look like the Non-Paper.

Several participants found the option in Paragraph 3(c) useful, or at least acceptable. Sometimes the support focused more on the General Assembly, sometimes on the International Court of Justice.

Others expressed doubts, with or without an indication of flexibility.

Those critical of the option offered beyond flat rejection a series of arguments, mostly against the relevance of a determination by the International Court of Justice.

One delegate asked, what the added value of the International Court of Justice would be, after all, the International Criminal Court judges elected from List B certainly had as much international law expertise<sup>80</sup>.

The observation about sufficient international law expertise in the International Criminal Court plays an important role with regard to the due process requirement.<sup>81</sup> As has been pointed out also in prior meetings of the SWGCA, the International Criminal Court will be just as able to judge if the legal definition of an act of aggression is fulfilled<sup>82</sup>. But the comment may have left aside part of the original purpose of the requirement of an International Court of Justice determination *as such*, namely to act as a safeguard against politicized prosecutions *before* they really start. On the other hand, that purpose matters less in the context of the Non-Paper: The requirement of a Pre-Trial Chamber authorization of the commencement of investigations, if maintained, would also function as a very early safeguard.

A few speakers expressed concern about the time lag caused by the involvement of the General Assembly and especially the International Court of Justice, in light of the negative effect on the rights of the defendant. It was not clear if this concern was raised in general for Paragraph 3(c) or only under certain constellations of the options. Within the current arrangement of the Non-Paper, the determination by the General Assembly or the International Court of Justice may already exist when the Prosecutor wants to commence investigations. A determination made later but before the waiting period for the

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as safeguard against the commencement of politicized prosecutions. (On due process see also supra pp. 9-10, 12-13, infra pp. 44-45, 48-49)

<sup>80</sup> In an earlier Princeton meeting the same delegate had pointed out that ICC judges from List A could also have sufficient international law expertise.-

<sup>81</sup> Supra pp. 9-10, 12-13, infra pp. 44-45, 48-49

<sup>82</sup> If there were any doubts about the appropriate mixture of List A and List B judges for the determinations of acts of aggression by the International Criminal Court, the relevant rules could be amended to assure the sufficient involvement of judges with international law expertise.

authorization in Paragraph 5 would probably speed up that procedural step. If such determinations are not yet made at the end of the fixed waiting period, the Pre-Trial Chamber is no longer dependent on them. Only in case the Pre-Trial Chamber decided to wait longer or in case Paragraph 5 is dropped, could a time lag and prolonged detention become problematic<sup>83</sup>. (But it should be noted again that even a belated authorization of the Pre-Trial Chamber under Paragraph 3 occurs before investigations are commenced. At that moment in the process, a defendant may not necessarily have been identified.)

Other delegates criticized that the involvement of the International Court of Justice would affect the role of the International Criminal Court and render it ineffective. They also pointed out that it would be more difficult for the International Court of Justice than for the International Criminal Court to gather evidence from non-cooperative States. These criticisms, as well as some of the concerns about the rights of the defendant, appeared to assume that the International Criminal Court would no longer undertake its own determination. But based on the due process requirement, it had been generally agreed that a prior determination could not relieve the International Criminal Court from its responsibility to make its own determination of the State act of aggression. Even if the International Court of Justice were to apply the same definition as under the Statute, the accused must be heard. The rules of procedure of the International Court of Justice are not suitable in this regard, especially not if the accused is no longer active in the government of the State concerned.

The possible conflict between determinations was also mentioned as an argument against Paragraph 3(c)<sup>84</sup>.

Arguments still known from the discussions before CDP 2002 were revived. One speaker warned of jurisdictional limitations of the International Court of Justice, probably in reference to the lack of compulsory jurisdiction with regard to contentious cases and the need for consent by the relevant State<sup>85</sup>. And another speaker thought that any reliance on advisory opinions would be problematic, because the determination of an act of aggression would really be a contentious case<sup>86</sup>. (According to this argument, the request

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<sup>83</sup> According to article 60 paragraph 4 of the Statute, the Court must consider the release of a person “detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor.” The time lag contemplated by delegates in the context of Paragraph 3(c) would be due to a reason other than an inexcusable delay by the Prosecutor.

<sup>84</sup> For more on the issue of inconsistent decisions, see supra pp. 19-20, n.60 and pp. 29, 33, n.93.

<sup>85</sup> For one possibility to address this particular issue compare the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Diplomatic Relations (1961) which provides for the compulsory jurisdiction of the International Court of Justice within the limited purposes of that Convention.

<sup>86</sup> According to Article 96 of the UN Charter, advisory opinions are given on *legal* questions. In previous debates, some states have argued that the determination of an act of aggression is a *factual* question. Others saw it as a legal question. According to the Western Sahara case, ICJ Reports 1975, p.19 f., a factual question becomes a legal question if it is a prerequisite for the evaluation of a legal question. In line with this view, the establishment of the existence of relevant facts, - e.g. did State A bomb State B? -, would be treated as a legal question because it is a prerequisite for the main legal question, namely whether these facts fit the legal definition of an act of aggression, - e.g. was the bombing in manifest violation of the UN Charter?

for an advisory opinion would circumvent the consent requirement for contentious cases and the International Court of Justice would refuse to deliver an advisory opinion.

#### *Notification under Paragraph 4*<sup>87</sup>

In technical terms, questions with regard to the notification requirement in Paragraph 4 centered mainly on the provider and recipient of the notification, but the basic positions of delegates with regard to the jurisdictional conditions overall played a role as well.

The notification is to be given in case no determination of an act of aggression has yet been made in line with Paragraph 3. Opposition was voiced from both ends of the political spectrum. From one direction, it was argued that Paragraph 4 would be moot if Paragraph 3 were deleted. If prior determinations or decisions by other UN organs were irrelevant, no notification of these institutions needed to be initiated. Thus, Paragraph 4 was unnecessary. In response, one delegate, more oriented towards compromise, pointed out that Paragraphs 4 and 5 were closely connected. The Pre-Trial Chamber would be able to authorize the Prosecutor to investigate if the notified UN organs would still not have made a determination after notification (for example because they would prefer to leave the matter to the ICC). Another delegate who leaned towards the maintenance of Paragraph 3 saw the interconnection between Paragraphs 4 and 5 more critically and asked what would happen after the notification if Paragraph 5 were deleted. Observations by others, that the Non-Paper does no longer say how the determinations under Paragraph 3 are to be reached, served as a partial answer. A requirement of notification in absence of Paragraph 5 would imply that a subsequent determination would still be relevant, i.e. the Pre-trial Chamber would have to wait and could wait till a determination is forthcoming before it provides the authorization.

A delegate in favor of Paragraph 3 (a) and (b) commented that mere notification of the Secretary-General by the Pre-Trial Chamber was not enough. The requirement of a “dialogue” with the Security Council would have been more desirable. He regretted that the proposal of Sweden had not been included. According to the relevant part of the Swedish proposal the Court would have to 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 deliberation*”. The Chairman responded that such a dialogue could be done anyway<sup>88</sup>. It could be based on a decision by the Security Council.

A delegate who insisted on a prior determination by the Security Council and opposed authorization by the Pre-Trial Chamber expressed also in the context of Paragraph 4 concern about conflict between the logic of the Security Council and the logic of the Pre-Trial Chamber. He preferred notification by the Prosecutor instead of the Pre-Trial Chamber and argued that a dialogue with judges was not the same as a dialogue with the Prosecutor. There was also *now* no dialogue between the Security Council and the judges. The Prosecutor would know the real world and make the investigations on the ground.

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<sup>87</sup> Supra p. 11

<sup>88</sup> On dialogue with the Security Council, see also supra 24-25, infra p.49

S/he would know the political constraints and speak the same language as the Security Council. Dialogue would be possible and necessary with the Prosecutor.

In response it was noted that there would be no conflict between the judicial logic and the logic of the Security Council at the time of notification since there would not yet exist any determination under Paragraph 3. It would be merely a procedural question. Another speaker added that it was also a question at what point the interaction should happen. The Prosecutor should probably not make a notification if an aggression-specific referral had come from the Security Council itself, but only in the case of a State referral or initiations by the Prosecutor *ex proprio motu* or non-specific referrals by the Security Council. Most likely, the Prosecutor would also not have to make a notification with every letter he or she gets, but would first ponder if there was a reasonable basis to proceed. That would be the same time when he would submit the request for authorization to the Pre-Trial Chamber. Thus, it would be rather at the beginning of the process. The publicity would be in any event already there, but the Pre-Trial Chamber would act as a balancing element to politicized pressure. In other words, the notification might as well be made by the Pre-Trial Chamber.

The argument for dialogue between the Prosecutor and the Security Council appeared to indicate a particular objective, namely to find a way to communicate possible concerns of the Security Council in a fashion more low key than for example a decision under article 16<sup>89</sup>.

While some delegates clearly preferred notification by the Prosecutor because it would invite interaction with the Security Council, others considered a more visible role for the Prosecutor because the Pre-Trial Chamber might be ‘a bit heavy and bureaucratic’.

The Belgian delegate, in line with the proposal of his country, raised in this context again the placement issue. If the notification were to be made by the Prosecutor, the provision should be placed after article 13 of the Statute<sup>90</sup>.

Among those who favored notification by the Pre-Trial Chamber, one speaker felt that the choice of the appropriate entity depended on Paragraph 5: If Paragraph 5 is kept, the Pre-Trial Chamber would be seized already. Thus the Pre-trial Chamber would have to make the notification. The speaker also saw the notification purely as an information function.

Another delegate proposed that the notification should be made by the President of the International Criminal Court, because the President assigns the matter to the Pre-Trial Chamber according to Regulation 46 of the Regulations of the Court. Before the assignment, the Pre-Trial Chamber is not yet seized.

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<sup>89</sup> In such a dialogue, the Security Council could signal for instance its *present* intention to use or not to use article 16 at this state of the process or it could provide information about the availability or non-availability of its enforcement powers. With regard to an easier green light and an easier red light, see supra n.71 and 73.

<sup>90</sup> Supra p. 17

One participant pointed out that there was no inherent contradiction between the different positions. Paragraph 4 dealt with notification when the Pre-Trial Chamber is seized and the issues under Paragraph 5 are still undecided. Contact between the Prosecutor and the Security Council was not precluded. It may not be necessary to provide for this expressly in the Statute. How the Secretary General would best be notified, i.e. by the President or the Pre-Trial Chamber, could still be worked out.

The specification of the UN Secretary General as addressee of the notification was also examined. One speaker asked critically what the role of the Secretary General was. What kind of information would be provided? Would this include requests? The provision was just one more superfluous complication. Another speaker answered that the role of the Secretary General corresponded with articles 17 and 18 of the Relationship Agreement between the Court and the United Nations. It was foreseen that the Secretary General would function as 'mailbox' for the Security Council. The Chairman explained that the new Non-Paper tried to capture the substance of CDP 2007. One element in CDP 2007 was notification of the Security Council. The Secretary General had been chosen in the Non-Paper because of the possibility that also organs other than the Security Council might get involved. The Secretary General seemed the most logical.

*The authorization by the Pre-Trial Chamber in Paragraph 5<sup>91</sup>*

Paragraph 5 of the Non-paper closely resembles Option 1 in Paragraph 5 of CDP 2007 insofar as the Court is not blocked by the absence of a determination or decision by another UN organ. The reference to the need for authorization by the Pre-trial Chamber is the main difference in the Non-Paper. The discussions on Paragraph 5 of the Non-Paper related to the role of the Pre-trial Chamber as such, to the paragraph as a whole, to the still to be determined time period between notification and authorization, and to the meaning of the absence of a determination or decision.

Positive reactions to Paragraph 5 were either low-key or vehement or both. Often, the evaluation of the role of the Pre-Trial Chamber related to several or all of the relevant paragraphs together.

Carefully indicating support, one delegate stated that his country would not object to the role of the Pre-Trial Chamber. Another delegate expressed willingness to consider ideas with regard to the Pre-Trial Chamber. Both statements were particularly noteworthy because the respective States belong to different political alliances and because other opinions from each alliance expressed more opposition. The absence of rigid group positions continued to help the SWGCA with a subject-oriented debate.

One speaker clearly supported Paragraphs 2 and 5. In reference to Paragraph 2, another delegate had noted critically the expansion of the authorization requirement beyond article 13(c) of the Statute but added that this would be acceptable to her if others agreed. In reference to Paragraph 5, she and another delegate offered at different moments in the

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<sup>91</sup> Supra p.11

debate more forceful opinions. If Paragraph 5 were deleted, there was no need to continue with the whole provision of article 15 *bis*, i.e. with the Non-Paper.

Some expressed concern about the waiting time required after notification of the UN Secretary General<sup>92</sup>. One delegate warned of the impact on the rights of the accused. It was argued that the waiting time should be one month or as short as possible. Questions about a possible renewability of the time period and about the suitability of a fixed waiting time with regard to a determination by the International Court of Justice arose as well.

The Chairman highlighted that the procedure was now more efficient than in the previous paper. The Pre-Trial Chamber ascertains whether there is a determination. If the determination exists, there would not be a time problem. If there is none, a notification is given and then one needed to have a time period.

Concern was also expressed about “may” instead of “shall” in the phrase “the Pre-Trial Chamber may authorize” and in similar wording of Paragraph 3. But another participant felt that “may” was more appropriate since the Pre-Trial Chamber had to establish also the other requirements in article 15 of the Statute before it could provide the authorization.

One delegate stated in a straightforward manner that Paragraph 5 was not acceptable. The caution of other delegates was more often expressed in inquiries about the meaning and implication of the phrase “*Where no such determination or decision is made*” or the similar “*In the absence of such a determination*” in Paragraph 4. Did this only relate to positive determinations? “*Such*” would link only to the positive determinations in Paragraph 3. In other words, what about determinations that *no* act of aggression took place. “*Such*” could be removed to include negative determinations. On the other hand, delegates wondered again what would happen if two organs made different determinations, one providing a red light and the other a green one. The Chairman answered that he saw no possibility for conflict, exactly because only the absence of positive determinations mattered for the purposes of Paragraph 5<sup>93</sup>. One speaker asked also which determination, i.e. by which organ, had to be missing. The Chairman responded that this depended on the choices the SWGCA would make with regard to Paragraph 3.

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<sup>92</sup> But note that Option 1 in Paragraph 5 of CDP 2007 also requires a waiting period.

<sup>93</sup> The response focused on the logic of the paragraph. It did not necessarily preclude any impact of an express determination by another organ that no act of aggression occurred. Such a determination would influence the evaluation of the Pre-Trial Chamber under article 15 whether a reasonable basis existed for an investigation, - especially in the absence of any positive determination as under Paragraph 5. Moreover, as indicated above in n. 60, in the case of a negative determination by the Security Council, authorization by the Pre-Trial Chamber would be largely futile in light of a likely suspension by the Security Council under article 16. (For the sake of clarity, the SWGCA could also choose to include an explicit exception in Paragraph 5, enabling an authorization (under the same conditions as now) except if a negative determination has been made by the Security Council.)

*The revised proposal by Belgium*<sup>94</sup>:

Especially in the context of discussions on the authorization by the Pre-trial Chamber, some comments focused also directly on the revised Belgian proposal. As mentioned earlier, the Belgian proposal differs from the Non-Paper insofar as it extends the authorization requirement under article 15 paragraphs 2 - 6 of the Statute to investigations triggered by State referrals and not also to those based on Security Council referrals. At the same time, the Pre-Trial Chamber must be composed in full session of all judges of the Pre-Trial Division. The proposal leaves still open if the decision would have to be adopted by a two-thirds or a five-sixths majority or by unanimity. The decision could be appealed by any implicated State or by the Prosecutor. The Belgian delegate explained that the proposal could be combined with all jurisdictional Options, and that the proposal was more of a technical nature.

One delegate missed the Belgian proposal in the Non-Paper and asked if it could be fitted in or if it was meant as an alternative. A second delegate said that he was not sure if either the Belgian proposal or Paragraph 5 of the Non-Paper were sufficient as a safeguard. 'The more you involve senior ICC officials in this politicized question, the more you politicize the ICC'. Another speaker was of a different opinion and thought that the Belgian proposal would present a very good filter against politicized prosecutions. The Pre-Trial Chamber would have to make an evaluation if there was a reasonable basis to proceed in light of the legal definition under the Statute. Also, the Belgian proposal could be fitted into the Non-Paper<sup>95</sup>. The question of trigger differentiation could be resolved within Paragraph 2 of the Non-Paper and additional requirements with regard to the number of judges and with regard to the adoption of the decision could all be placed into article 15, similar to the new article 15 paragraph 7 in the revised Belgian proposal. They would be included over the reference to article 15 in the Non-Paper.<sup>96</sup> With regard to the adoption of the decision by the Pre-Trial Chamber, the speaker thought that a five-sixth majority might be best. At least under the current article 39 of the Statute, the Pre-Trial Division is composed predominantly of judges with criminal trial experience. A decision based on a two-thirds majority might thus be carried without concurrence of judges with public international law experience. A requirement of unanimity might give too much influence to one vote.

The Belgian proposal was mentioned as an option also by other speakers. To some degree, the reactions to the role of the Pre-Trial Chamber in the Non-Paper were indicative as well of the positions towards the Belgian proposal.

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<sup>94</sup> Supra n. 25 and pp. 13, 17, 31

<sup>95</sup> Vice versa, the essential features of the Non-Paper could be fitted into the structure of the Belgian proposal.

<sup>96</sup> For related placements issues, supra p.17

*The clarification in Paragraph 6 with regard to other crimes*<sup>97</sup>

There were not many reactions to Paragraph 6. The clarification expressly counters any notions that the article on the exercise of jurisdiction over the crime of aggression could affect the respective provisions relevant to the other crimes. One delegate stated that Paragraph 6 was especially welcome, because the draft provisions in the past may have inhibited the prosecution of other crimes. Another delegate called the paragraph acceptable.

Towards the end of the debate about item 2 of the agenda, Whitney Harris (former Prosecution Counsel at the International Military Tribunal at Nuremberg) expressed his strong support for the work of the SWGCA. The provision on the crime of aggression was doable. ‘We must not fail. The security of the world depends on this.’

Altogether, the intense focus on the substance of the jurisdictional Non-Paper made it clear that the SWGCA had again not permitted itself to become defeated by the difficulty of the subject. As one delegate put it, ‘we have been going around in circles, we want movement forward’.

In his summary, the Chairman noted in particular that there had been strong support for a future continuation on the basis of the Non-Paper even though not in its current form. While the options of CDP 2007 were also reflected in the Non-Paper, they may not be sufficiently clear. He would look for some way to make it easier. At this point, there had not yet been agreement on the role of the Pre-Trial Chamber. Some had suggested as alternatives the Office of the Prosecutor or the Presidency of the Court.

He also announced that he had distributed a revision with regard to the leadership clause under agenda item 1<sup>98</sup>. The SWGCA would reconvene in the afternoon for agenda item 3, the definition of the act of aggression. Item 3 would be easier than item 2.

Agenda item 3: the act of aggression – defining the conduct of the State

*Overview*

Item 3 of the agenda concentrated again on an element of the definition of the crime, specifically the definition of the act of aggression. This is the State act which a person in a leadership position<sup>99</sup> must have brought about (through planning, preparation, etc.<sup>100</sup>) in order to be individually responsible for a crime of aggression. The SWGCA addressed

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<sup>97</sup> Supra p. 11

<sup>98</sup> Supra pp. 5-7

<sup>99</sup> Supra under agenda item 1

<sup>100</sup> Id.

under agenda item 3 also the question of a threshold related to gravity, character and scale.

In CDP 2007, the relevant text for agenda item 3 is covered in the second part of Paragraph 1 and in Paragraph 2. The pertinent segment of Paragraph 1 presents the *requirement* of an “act of aggression/armed contact”<sup>101</sup> and continues with two sets of brackets, the first one containing a threshold<sup>102</sup> and the second one illustrative references<sup>103</sup>. Paragraph 2 adds the *definition*<sup>104</sup> of the “act of aggression” cited in Paragraph 1. At the Princeton meeting, the SWGCA had also before it a new Non-Paper<sup>105</sup> by the Chairman which offered an alternative<sup>106</sup> to Paragraph 2 of CDP 2007. Calling the Non-Paper self-explanatory, the Chairman pointed out that it had been written in response to suggestions at the Resumed Fifth Session. It showed how the paragraph could look like if the definition would incorporate the text of articles 1 and 3<sup>107</sup> of

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<sup>101</sup> The slash indicated the choice still to be made between “act of aggression” and “armed attack”, see below.

<sup>102</sup> The threshold would require an act of aggression/armed attack “[which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations]”

<sup>103</sup> “[such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof]”

<sup>104</sup> “2. For the purpose of paragraph 1, “act of aggression” means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.”

<sup>105</sup> Non-paper submitted by the Chairman on defining the State act of aggression, *in* Inter-session Meeting 2007, *supra* n. 2, Annex IV

<sup>106</sup> “2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.

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

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

<sup>107</sup> The definition of the act of aggression is contained in the Annex of the Resolution. References to articles of the Resolution are meant as references to articles in the Annex.

General Assembly Resolution 3314 directly. Where the Non-Paper refers to General Assembly Resolution 3314 [Res. 3314], it also includes a set of brackets to indicate the possibility to refer just to articles 1 and 3.

Opening the debate, the Chairman noted that this would be more of a technical exercise than the work on the jurisdictional conditions. The delegate who had guided the subject of the jurisdictional conditions in the Virtual Working Group felt that the texts on the definition of the State act of aggression and the threshold were close to a viable solution.

In line with the program, the discussions on item 3 occupied the SWGCA during the afternoon of June 12 and the morning of June 13. Even measured by the traditional intensity of the SWGCA process at Princeton, they were unusually interactive and characterized by a rush of significant new proposals. One CICC team member contributed research and analysis about the historical record of Security Council determinations relevant to the definition of the act of aggression and the threshold.

Many of the questions under item 3 are interlinked and the meeting used a holistic approach. Interventions often addressed several issues together. The description below tries to separate some strands of the discussion in order to better show the trends around topics that have long occupied the SWGCA, even though this also means some repetition of the same interventions in different contexts.

#### *Discussions on Paragraph 1 in CDP 2007*

##### *“Act of aggression” or “armed attack”*

With regard to the question if Paragraph 1 should refer to “act of aggression” or “armed attack”, the annotated agenda had pointed out that the latter term would entail the deletion of Paragraph 2 (mainly insofar as Paragraph 2 is currently dedicated to a definition of “act of aggression”). In the course of past sessions, most States have associated the choice of “armed attack” with the choice of a generic definition, even though it was not always clear if the term as such was considered sufficient or if the generic definition would to some degree rely on the parameters in the first set of brackets in Paragraph 1 or if a new generic definition would follow in Paragraph 2. What had become clear was mainly the disjunction between “armed attack” and the current approach in Paragraph 2. At the same time, the choice of “act of aggression” was for many, but not all delegates associated with a specific definition, i.e. a definition accomplished by reference to Res. 3314 (or parts thereof) and including a closed or open list of typical fact patterns as established in article 3 of Res. 3314. These associations of term with type of definition had more to do with the negotiating history and the structure of the discussion papers, - there is no inherent reason why either term could not be accompanied by either type of definition<sup>108</sup> as long as the definition is clear enough to

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<sup>108</sup> The possibility of a generic definition for “act of aggression” received a new push in the course of the discussions about the Non-Paper for Paragraph 2, see below.

satisfy the principle of legality. In terms of structure, it is also important to be aware that a choice of “act of aggression” in Paragraph 1 would not necessarily preclude a narrow definition limited to armed attacks in Paragraph 2<sup>109</sup>.

In a process largely resembling a roll call, the vast majority at Princeton 2007 preferred the term “act of aggression” in Paragraph 1. The subject has been discussed previously, thus only two speakers mentioned again reasons for this preference. One of them merely referred to his arguments at the Resumed Fifth Session. Then and earlier, his main concern had been the potential loss of the parameters in Paragraph 2, a consideration probably shared widely. In essence, from this angle, the term “armed attack” would be too wide. The other speaker focused on its narrow aspects: Not all acts of aggression involved armed attacks. In a remark that centered more on the definition in Paragraph 2, it was also argued that not all acts of aggression were armed force<sup>110</sup>.

For many, the preference for “act of aggression” in Paragraph 1 grows also from the structural decision to stick with the interconnective approach for Paragraphs 1 and 2 in CDP 2007 (and in the Non-Paper).

Among the small number of those who prefer “armed attack” in Paragraph 1, one delegate based her choice on the use of the term in article 51 of the UN Charter. Another delegate thought that “armed attack” was essential and a generic definition would be preferable. In this context, the importance of highlighting the principle of self-defense and the need of a qualifier of unlawfulness were underlined as well. These concerns were again expressed during other stretches of the discussions since they matter also for the threshold in Paragraph 1 and the definition in Paragraph 2. How best to take care of them will at least partly depend on the shape of Paragraphs 1 and 2 as a whole. In the course of the negotiations overall, it has generally been thought that the principle of self-defense and the requirement of unlawfulness would be covered by the requirement of inconsistency with the United Nations Charter in article 1 of Res. 3314 and more forcefully by the requirement of a “manifest violation of the Charter of the United Nations” in the threshold contained in the first set of brackets of Paragraph 1. Article 21 paragraph 1 (b) of the Statute has been considered another safeguard in this respect since it lists among the applicable law “the principles and rules of international law, including the established principles of the international law of armed conflict.”<sup>111</sup>

*The threshold in the first set of brackets in Paragraph 1 of CDP 2007:*

In the course of past sessions, support for the use of the threshold in the first set of brackets in Paragraph 1 [Th-CDP] has steadily grown. Several factors have kept the

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<sup>109</sup> In terms of substance, such a narrow definition would be another matter. For example, the Nuremberg Tribunal has condemned annexations as acts of aggression even if accomplished by military might rather than armed attack, see e.g. Preparatory Commission for the International Criminal Court, Working Group on the Crime of Aggression, Historical review of developments relating to aggression, PCNICC/2002/WGCA/L.1, 24 January 2002, p. 19 f.

<sup>110</sup> See also *infra* p.55

<sup>111</sup> See further below the discussions with regard to the Non-Paper for Paragraph 2, pp. 42 ff.

matter nevertheless in suspense. States may have been in support of a threshold yet in doubt if the current formula is already the best one. Or, States talked at times past each other because some concentrate in the context of the threshold on the scale of the use of force and others on the degree of legal clarity in 'grey area' cases. Misunderstandings have also occurred because of different logical deductions. It is just as correct to say that all acts of aggression are violations of the UN Charter as it is to say that not all violations of the UN Charter are acts of aggression. Yet, variations of the two sentences have been employed on opposite sides of the debate. Using the first sentence, opponents to the requirement of a "manifest" violation have stated that a violation is a violation and that the qualifier could lead to the dividing and narrowing of the concept of an act of aggression. Using the second sentence, proponents have argued that the qualifier assures that only clear/flagrant/manifest acts of aggression come before the Court. At the Princeton meeting, several speakers emphasized conceptions for the threshold to bridge the gap. Thus, at the beginning it was underlined that the idea for a threshold was not to affect the general definition of the State act of aggression under Paragraph 2 but to focus on the individual crimes which should come before the Court and to clarify individual criminal responsibility. At a later moment, one speaker offered a comparison to the distinction between civil and criminal law. On the international level, civil law would correspond to the ability of one State to obtain reparations, etc. from another State under the law of State responsibility. Criminal proceedings generally required higher standards, exactly because they could result in the criminal liability of an individual person. The threshold would maintain the distinction between the standard relevant for State responsibility and the higher or more precise standard needed for a criminal conviction<sup>112</sup>. It was also argued that the SWGCA had to be realistic about the capacity of the Court.

The initial interventions at Princeton 2007 showed further movement towards near-agreement on Th-CDP. After a large number of delegates had expressed their support, a different version for the threshold [Th-DV] was introduced which read: "*The Court shall have jurisdiction in respect of the crime of aggression when the act of aggression has been committed in a particular grave and large-scale manner.*" Presenting the proposal, the delegate stated that his country could support a threshold but it had to be a threshold which did not limit the concept of an act of aggression. Instead, it would limit the jurisdiction of the Court. The announcement of support for a threshold *as such* was of particular interest to the SWGCA since it came from the only permanent member of the Security Council which had up till then remained in express opposition.

Initially, several speakers welcomed not only the consolidation behind a threshold but also its new conception as a *jurisdictional* barrier. But on second thought most of these voices joined the majority which strongly advocated the maintenance of the substantive approach in Th-CDP. The arguments paralleled in so far those which had been made in the context of the leadership clause<sup>113</sup>. Again, it was pointed out that the definitional formulation would present a clearer model for domestic legislation and work better with the complementarity of international and national jurisdiction than the jurisdictional

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<sup>112</sup> See also infra n. 117

<sup>113</sup> Supra pp. 5-7

formulation. Importantly, one delegate pointed out that the definitional Th-CDP threshold would help to fulfill the standards of the principle of legality for the definition<sup>114</sup>. Another delegate whose State had originated the wording in Th-CDP alerted the SWGCA that his country's willingness to forego a generic definition for the act of aggression and to work on the new Non-Paper for Paragraph 2 depended on maintaining that threshold. The threshold had to be treated as a matter of substance.

A number of States found Th-DV 'useful' and wanted to study it further. While underlining the need for a threshold, one delegate stated that his country shared the opinion which prompted Th-DV, namely that any use of force was a violation of the UN Charter. This expression of support was maybe overly condensed since the emphasis of both countries had not always been quite the same. Th-DV followed from the starting point that all acts of aggression were violations of the UN Charter whereas the sentence of support appeared in addition to be connected to the question of the scope of the act of aggression.<sup>115</sup> Another delegate said that his country supported a threshold in principle. A threshold would be needed both in substance and in procedure.

In terms of the 'qualifiers' of Th-DV, delegates wondered about the meaning of "in a particular grave and large-scale manner". It was asked if "grave" and "large-scale" were not anyway the same, if the terms referred to the degree of breach and why the threshold did not refer to "character" (as in Th-CDP). In case Th-DV would be used and did not filter out 'grey area' cases, it was also suggested that another new proposal under Paragraph 2, requiring a violation of relevant international law<sup>116</sup>, could be a valuable addition. One delegate drew the attention to article 17 paragraph 1(d) of the Statute: A case is inadmissible if it is not of "sufficient gravity". Thus there was already a jurisdictional threshold. This was why his country preferred a definitional threshold. Another delegate saw in Th-DV not much of a difference to the existing threshold in the Statute which limits the Court to the most serious crimes. In contrast, another speaker would include the qualifiers of Th-DV in addition to Th-CDP.

Towards the end of the afternoon, - after the first half of the debate on item 3 -, one delegate had noted positively that all agreed on the need for a threshold, yet the debate during the next morning led also shortly back to reconsiderations in that regard. A passionate objection to the inclusion of a threshold was closely tied to the qualifying words "in a particular grave and large-scale manner" in Th-DV. The intervention noted that a threshold was already built into the Statute. Th-DV would encourage powerful States to undertake repeated small-scale attacks on weaker States. Territorial integrity was sacrosanct. Anyone who disturbed it, deserved to be punished. The violation of territorial integrity must not be tolerated whatever the duration. The international community should not have to wait for large-scale war before it could condemn and

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<sup>114</sup> See also below the debate about the Non-Paper for Paragraph 2, pp. 42 ff.

<sup>115</sup> During the Preparatory Commission, the particular State had made it clear that its earlier proposal to define an act of aggression as "war of aggression" was a minimum position and that it was open to a wider definition which would encompass uses of force prohibited under article 2 paragraph 4 of the UN Charter.

<sup>116</sup> *Infra* pp. 50 ff.

punish the perpetrators of such attacks. Weak States must be protected from bullying States. Gravity should be taken into account but it should not be an additional part of the crime provision.

In the past, many States had expressed the opinion that the Court's jurisdiction should not extend to relatively minor uses of force as in 'border skirmishes'. Now the example of *repeated* small-scale attacks by a stronger against a weaker State presented a more problematic situation. In this context, it mattered that Th-DV requires force in a "large scale manner" whereas Th-CDP demands a scale which constitutes a manifest UN Charter violation. The latter formulation might not necessarily preclude the Court from assessing a series of repeated attacks together, as a whole, and from finding them to be of sufficient scale. Some speakers expressed understanding for the rejection of a threshold but argued also that Th-CDP made more sense. Others followed with additional reasoning on behalf of Th-CDP and sought to respond directly to the concerns which had prompted the jurisdictional wording in Th-DV: Thus, it was observed that the text in Th-CDP was actually not in conflict with these concerns, since the generic concept of the State act of aggression in Paragraph 2 would not be touched. The threshold had more to do with the individual crime than with the State act. The individual person had to be involved in a particularly serious act of aggression: 'We were a breath away from agreeing on the "manifest" language and maybe we should just take that breath.' The connection of the threshold to the individual crime was reemphasized also by others. The remarks highlighted that the evaluations of the threshold at Princeton 2007 were not only comparing jurisdictional and substantive approaches but differentiating between substantive approaches which mattered for the element of the State act and those which mattered for the individual crime<sup>117</sup>.

The proponent of Th-DV reacted in a conciliatory fashion to the many preferences for a non-jurisdictional approach and made it clear that placement was not important for the new proposal. It could be also placed into the first set of brackets in Paragraph 1. The statement appeared to indicate that the proposal could be reformulated in a non-jurisdictional fashion while maintaining the language otherwise. Others may have understood the remarks differently because all the speakers afterwards continued to express their objections to a jurisdictional formula. Many stated also expressly their preference for the language in Th-CDP.

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<sup>117</sup> In earlier sessions, at least some of the delegates had seen the threshold more closely tied to the definition of the element of the State act and had asked for a placement of the threshold clause in Paragraph 2. That view would not necessarily conflict with the stated concerns behind Th-DV either. The SWGCA is generally in agreement that the definition of the State act of aggression in Paragraph 2 is for the purposes of the Statute, or explicitly "for the purpose of paragraph 1", i.e. for the purpose of the definition of the crime. Thus, even if the threshold were closely combined with the definition of the State act of aggression under the Statute, it would not necessarily redraw the concept of the State act of aggression outside of the Statute. An example for a closer combination of the threshold with the statutory definition of the act of aggression would be: "*For the purpose of paragraph 1, "act of aggression" means the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, if that use of force constitutes by its character, gravity and scale a manifest violation of the Charter of the United Nations.*"

*The illustrative references in the second set of brackets in Paragraph 1 of CDP 2007*

In general, speakers found the illustrative references in the second set of brackets in Paragraph 1 superfluous or cumbersome or conducive to bias. Only one delegate did not yet agree to the deletion of the text. It was pointed out that her concerns could possibly be met over the definition in Paragraph 2, but partly because that definition has not yet been finalized, the matter remains still open.

*The Non-Paper on the definition of the State act of aggression in Paragraph 2*

No one objected to the Non-Paper as basis for the discussions and several speakers noted their support for the idea to show how the incorporation of text from articles 1 and 3 of Res. 3314 might look. As mentioned earlier, one participant emphasized that it was important to maintain the threshold in the first set of brackets of Paragraph 1. Only then was his country ready to work on the basis of the new text for Paragraph 2. Despite this caveat, it was obvious that the Non-paper for agenda item 3 received a better welcome than the one for agenda item 2.

In an introductory remark one delegate asked participants to keep in mind two types of State acts of aggression, the common one under Res. 3314 and the more serious one qualified with the threshold in Paragraph 1. Under Paragraph 2, the SWGCA would be talking about the more common basic definition. The subsequent discussions confirmed at the same time that the definition under Paragraph 2 was primarily for the purposes of the Statute<sup>118</sup>.

The willingness of the SWGCA to move forward on the basis of the Non-Paper was more remarkable than it may seem on first sight. Many States have long expressed their unwillingness to get into a repetition of the original labor in developing Res. 3314. Using technical references instead of text can be a safeguard in that regard. Vice versa, the movement towards the incorporation of text requires a certain confidence. The SWGCA could dare to take the step because it had tested the waters successfully with the inclusion of the option in CDP 2007 to use a partial reference to articles 1 and 3 instead of a reference to the Resolution as a whole. The debate about this option had signaled the risks, but more importantly, it had demonstrated that the SWGCA was not falling apart over them, that the concerns on different sides were taken seriously and that the quest for a common solution remained the overriding goal. The discussions at Princeton 2007 continued in that vein. More strongly than previously, the linkage with the UN Charter and the tie-in with the principles and rules of international law in article 21 of the Statute were shown to be highly relevant for the building of consensus.

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<sup>118</sup> Infra pp.48-49; see also supra above n. 117.

*The question if the definition should be generic or specific and the question if the text of articles 1 and 3 of Res. 3314 should be directly incorporated in Paragraph 2*

The SWGCA has long pondered whether the act should be defined by one umbrella phrase expressing the essence of the act or by a series of typical fact patterns, or by both. At Princeton 2007, this question if the definition of the State act should be 'generic' or 'specific' or 'combined'<sup>119</sup> was rarely referred to in a purely abstract fashion but tied to the text of the Non-Paper and the inclusion of the list of article 3 of Res. 3314. Mostly, the support for a specific definition was simply apparent from the approval of the incorporation of the *text*<sup>120</sup> of article 3<sup>121</sup>. Many delegates expressed such approval. At the outset, a few delegates mentioned their preference for a generic definition while expressing their willingness to discuss the specific definition in the Non-Paper, - but in at least one case expressly dependent on the inclusion of the threshold in CDP 2007. Here as elsewhere in the work of the SWGCA, the ongoing evolution in the position of States is often striking. One delegate expressed his support for the approach of the Non-paper noting that a list was needed for the principle of legality. Another delegate concurred somewhat more cautiously that the principle of legality was important and one could have a specific list. Both States had in earlier negotiations been averse to a specific definition.

One delegate who had in previous sessions preferred the original reference to the Resolution (without the text incorporation), stated that the text expressed the essence of Res. 3314 and would work well with the principle of legality. The opinion was shared by other delegates. Another delegate found it crucial to use the text and thought, as mentioned earlier, that the wording would help with a deletion of the illustrative references in Paragraph 1 because the same concepts would be reflected here too.

One delegate argued differently and said that it was not necessary to transcribe the text. It was sufficient to refer to articles 1 and 3 of Res. 3314.

In the course of the years of its existence, the negotiating positions in the SWGCA have been generally characterized by a lot of fluidity, in a very positive sense. States have been willing to test innovative propositions on their reasonableness and to constantly adjust their outlook with the growth of a common body of understanding. The Princeton meeting was again typical in this regard.

As further described below, it was during extensive discussions about the exhaustiveness of the list and about the retention of references in the Non-Paper to Res. 3314 (in addition to the incorporation of text from the resolution) that the idea of a generic definition

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<sup>119</sup> Some delegates see a combined formula not as a separate category but also as a specific definition because it contains a list. Others see the possibility that a combined definition could consist of a generic definition with a list of examples. In any event, both parts in a combined definition have to add up to a whole that is in line with the principle of legality.

<sup>120</sup> The issue of the additional documentary reference to Res. 3314 is dealt with below.

<sup>121</sup> In terms of the customary law character of the list, one delegate referred to the similar wording of article 2 in the Convention for the Definition of Aggression, signed at London, 3 July 1933, 27 AJIL (1933) 192-195

regained prominence with a new proposal: The definition should simply stop after “United Nations” in the first or main chapeau, - i.e. Paragraph 2 would make use of the generic text from article 1 of Res. 3314 up till and including “United Nations”. *Accompanied by the threshold of Paragraph 1*<sup>122</sup>, the principle of legality would be fulfilled<sup>123</sup>. Any addition to the proposed text from the main chapeau would function merely as an exemplification. A number of delegates moved behind this proposal. Some of them expressed a preference for cutting the list but they also indicated that this was not a requirement.<sup>124</sup>

*The question if the references to Res .3314 (or to its articles 1 and 3) should be retained and the question if the list of acts in the definition should be closed or open*

The two questions were partly interrelated, especially in the flow of the debate. This was largely due to article 4 in Res. 3314 which states: “The acts enumerated are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.” Quite a number of interventions treated the two aspects of article 4 together. At the same time, separate approaches and new proposals led also to quite distinct paths on these two aspects. Discussions about the meaning, need and appropriateness of retaining the various references to the Resolution in the Non-Paper brought to the forefront in particular the issue of opening the *definition* to the discretion of the Security Council in article 4. With regard to the topic of exhaustiveness, the Princeton meeting paid much attention to possible new clauses to semi-open the list in case of the deletion or limitation of the references to the Resolution<sup>125</sup>. As shown further below, in the context of the references to Res. 3314, the interplay with other provisions of Res. 3314 was pondered as well.

As also detailed below, one compromise proposal geared towards the deletion of the references led to an evaluation of the interrelationship of the wording in the definition with the UN Charter and international law. One proposal, mentioned above, pulled the definition closer to a generic concept. One proposal suggested limiting the impact of Security Council determinations on the definition to future-oriented, pre-crime decisions. Apart from the differentiation between a dependency of the *definition* on *retroactive* determinations and a dependency of the *definition* on *future-oriented* determinations by the Security Council, the more fundamental differentiations between a dependency of the *definition*, a dependency of the *jurisdictional conditions* and a dependency of the *determination of the act of aggression by the Court* in relationship to Security Council determinations played an important role in the discussions as well. Interventions which concentrated on these topics were largely prompted by a direct question about an opposite form of dependency, i.e. dependency of the Security Council on the definition

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<sup>122</sup> Supra n. 102

<sup>123</sup> The argument seemed to urge a common reading rather than a more combined placement, such as a shift of the threshold into Paragraph 2. In such a combination, States would have to consider the reference points with the main chapeau and the relationship with the list.

<sup>124</sup> More detail about the context of the proposal follows below.

<sup>125</sup> Infra pp. 53 ff.

under the Statute. This debate<sup>126</sup> reaffirmed the commitment of the SWGCA to the principle of legality and to the due process agreement described above under agenda item 2<sup>127</sup>.

In order to understand the debate about the references to Res. 3314, it is indispensable to pay close attention to the exact wording of Paragraph 2 in the Non-Paper<sup>128</sup> and to Res. 3314 itself.

The myriad of opinions with regard to the references to Res. 3314 are difficult to categorize, exactly because delegates were looking at times at different technical variations and at different substantive implications simultaneously: In terms of the technical variations, it should be noted that both the first and the second ‘chapeau’ in Paragraph 2, - i.e. the ‘main chapeau’ and the ‘list chapeau’ -, contain references to Res. 3314, with the first chapeau offering in brackets also the option to refer only to articles 1 and 3 of the Resolution. By simple mathematics alone, the meeting was faced with six possible constellations with regard to the references:

- I. Main Chapeau: No Reference  
List Chapeau: No Reference
  
- II: Main Chapeau: Reference to articles 1 and 3 of Res. 3314  
List Chapeau: No Reference
  
- III: Main Chapeau: Reference to Res. 3314  
List Chapeau: No Reference
  
- IV: Main Chapeau: No Reference  
List Chapeau: Reference to Res. 3314
  
- V: Main Chapeau: Reference to Articles 1 and 3 of Res. 3314  
List Chapeau: Reference to Res. 3314
  
- VI: Main Chapeau: Reference to Res. 3314  
List Chapeau: Reference to Res. 3314

Many delegates treated the issue of the references as either/or question for both chapeaux together. There were those who saw no problem with the references to Res. 3314, and others who were in opposition to any references. But it was also argued that the impact of the reference to Res. 3314 was possibly not the same in each chapeau and that the first reference should be deleted but not necessarily the second one, as far as the latter could be seen merely as a citation of the source and background for the list of acts. After all, the reference in the list chapeau was connected to the acts *in* the list. Yet others had a

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<sup>126</sup> *Infra* pp. 48-49

<sup>127</sup> *Supra* pp. 9-10, 12-13

<sup>128</sup> *Supra* n. 106

different take<sup>129</sup>: One speaker found the second chapeau particularly nonsensical: What could “in accordance with” even mean if one incorporated a specific list?<sup>130</sup>

One delegate, asking if the references were really necessary and arguing that one could just take the language itself, related at the same time that his country would be flexible: After all, the Statute referred to the Geneva Conventions as well. Other speakers likewise compared the quotation of Res. 3314 to the quotation of the Geneva Conventions in article 8 of the Statute.

In contrast to this particular line of argument, it was pointed out that the reference to Res. 3314 did not fit well with the status of the Statute as an independent treaty and that the Resolution, - different from the Geneva Conventions -, was not a binding treaty.

The alternative reference to articles 1 and 3 in the main chapeau was for some superfluous since the Non-Paper now contained already the relevant wording. For others, the partial reference was an acceptable quotation of the legal source or simply preferable to the citation of the Resolution as a whole. From an opposite view point, the reference to the whole was favored and the partial reference found unacceptable. For some it was better to have no reference to the Resolution than to have a partial reference. There was also an objection against the reference to article 3 because its chapeau, differently from the list chapeau in the Non-Paper, referred to article 2 of the Resolution and the authority of the Security Council<sup>131</sup>. One speaker spoke for a reference to articles 1 and 3 but thought it would be easier to simply have no reference at all.

Some of the statements focused in particular on the issue of non-exhaustiveness in article 4 of Res. 3314. On one side, it was argued that the reference to Res. 3314 should be kept in order to include unforeseen conduct. On the other side, the reference was opposed because the openness was considered to be in conflict with the principle of legality.<sup>132</sup>

For those who argued on behalf of a reference to Res. 3314, the considerations were also connected to article 8 which states that the provisions of the Resolution are interrelated. Each provision should be construed in the context of the other provisions. Thus, speakers found it important to maintain the reference to Res. 3314 as a whole because the linkage with all articles in the Resolution would bear upon the interpretation of the definition. The relevance of statements of interpretation in the reports of the Sixth Committee was mentioned as well. But in the latter regard it was also noted that the research of two delegates in the UN library had not found much that could be pertinent and of interest to the delegates.

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<sup>129</sup> Criteria for the interpretation are not only the phrases “as set out in” and “in accordance with” but the connections of the references, i.e. either with the *meaning* of the “act of aggression” or with the *qualification* of “acts” as act of aggression.

<sup>130</sup> See in this regard also the discussion on the closed nature of the list, *infra* pp. 53 ff.

<sup>131</sup> Under article 2 of Res. 3314, the Security Council may conclude that a determination of an act of aggression is not justified, despite *prima facie* evidence. See also below.

<sup>132</sup> For more on the debate about the openness of the definition to determinations by the Security Council, see *infra* p.47. For the debate on a clause for a semi-open list, see *infra* pp. 53 ff.

Articles 2 and 7 of Res. 3314 mattered as well in the arguments to keep a reference to Res. 3314 as a whole.

Article 2 provides that the first use of armed force by a State in contravention of the UN Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may determine otherwise. It was pointed out that the Non-Paper does not mention first use as indicator of an act of aggression, whereas Res. 3314 contains article 2. The argument was closely related to other interventions about the importance of the right to self-defense and of the unlawfulness of the use of force. In the context of the question about the reference to Res. 3314, the positions on article 2 were difficult to reconcile with the preference of some of the same speakers for a closed rather than non-exhaustive list, and with their concerns that the reference to Res. 3314 was too broad, yet extractions from the Resolution required carefulness. In response to the focus on article 2 and the right to self-defense, other participants pointed in particular to the existing link in the definition with the United Nations Charter and its article 51.

The significance of the right to self-determination in article 7 has been highlighted in many previous sessions. Thus, it was sufficient to alert the meeting at Princeton 2007 with fairly low-key reminders. Past meetings have also pondered already the protection of self-determination under the UN Charter and international law. The debate during the Resumed Fifth Session indicated that States have proceeded to take a look at the adequacy of the reference to the UN Charter in the definition.

A proposal, described further below<sup>133</sup>, sought to strengthen the bond with the UN Charter and international law, in order to permit more easily the deletion of the reference to Res. 3314.

Opposition to the references to Res. 3314 was most vehement as far as they would entail a linkage to article 4 and the discretion of the Security Council. As was pointed out, there could be no reference which would include article 4 because it would violate the principle of *nullum crimen sine lege*. If the Security Council was not bound by the enumerated acts in the definition and could determine that other acts were aggression, the definition would remain unclear and would be dependent on retroactive decision-making since such a determination would happen after the act had taken place. The SWGCA had already earlier faced the problem of dependency on a post-facto determination when the definition of the act of aggression and the jurisdictional conditions had still been linked and the definition had been dependent on a determination by the Security Council, or other UN organs, if an act of aggression had been committed by the State concerned. In the meantime, the SWGCA had long recognized that a dependency of the *definition* on a pre-trial but post-crime determination had to be differentiated from a dependency of the *jurisdictional conditions* on such a determination. Importantly, the SWGCA had succeeded in de-linking the definition and the jurisdictional conditions. The de-linking had removed a retroactive dependency of the definition on a determination which could only happen *after* the crime. Now the same unacceptable dependency was at issue with the reference to Res. 3314. One speaker asserted, ‘as far as the reference to Res. 3314

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<sup>133</sup> Infra pp. 50 ff.

includes article 4, we would undo what we achieved with the separation of the definition and the jurisdictional conditions.’ These concerns were widely shared.

Actually all statements showed agreement that the definition could not be determined retroactively, but not every one thought that this required the deletion of the reference to Res. 3314. One delegate underlined the presence of article 22 in the Statute which sets out the principle of *nullum crimen sine lege*. He thus expressed his understanding that ‘any additions [to the definition] after the event are reigned in by the Statute.’ He added that Res. 3314 was a package and that he had ‘a problem with bits and pieces.’ Aware that one of the opponents to the link with article 4 was a strong proponent for the threshold in Paragraph 1 of CDP 2007, he also spotlighted another feature of the Resolution, namely Paragraph 3 of the text which precedes the Annex containing the definition. That paragraph would clarify that not all uses of force in conflict with the UN Charter were acts of aggression. This would be useful when deciding whether a person is individually guilty.

Another delegate who also argued for the reference to Res. 3314 partly concurred that there might be a problem under article 4 but one should not close the possibility for grave acts to be prosecuted just because they were not on the list. One could add that a determination by the Security Council would be only for the future, i.e. without retroactive effect on the definition. It was just a practical problem and one could find a practical solution. The proposal was not taken up by other participants, possibly because not everyone heard it or because delegates were wary about subtracting from the authority of the Assembly of States Parties to amend the definition. The discussions made it also quite obvious that article 22 of the Statute did not necessarily reassure those who worried that the express reference to Res. 3314 within the definition could be read as an exception to article 22. One speaker conceded that the Court may have means to avoid any problem but one should not create problems for human rights and due process in the first place. Therefore, the delegate who suggested to limit the retro-active effect of SC determinations by specific wording, proposed at a later moment in the debate a new linea at the end of the list which *would specifically state that article 22 of the Statute would apply to additional acts defined in accordance with article 4 of Res. 3314.*

The proposed wording would not have helped with any concerns regarding the authority of the Assembly of States Parties over the definition in the Statute but there was no time left to discuss this.

One delegate, who shared the concern about the dependency of the definition on the Security Council under article 4, called the references to the Resolution a can of worms and asked if the Security Council would be bound by the definition under the Statute. She continued that the Security Council was a political organ and the references would render all efforts for the definition futile. Another delegate responded ‘what we put in the Statute cannot limit the Security Council.’ He recalled the reason given by those who argued for the link to article 4, namely to prevent impunity for acts similar to those in the list, and stated that the Security Council has the ability to determine acts of aggression which are not covered in the list. His argument confirmed on one hand that a link to article 4 in the definition would be open-ended indeed and on the other hand that such a link was not

needed for the Security Council because its capacity to make its own determinations of an act of aggression in connection with its enforcement powers under Chapter VII of the UN Charter exists independently.

One speaker added somewhat critically that this would mean that the Court would have to first take up the matter and then dismiss it. In response, the Chair confirmed that the Court looks at its own definition. He pointed to the Non-Paper on the jurisdictional conditions and underlined the phrase “the Pre-Trial Chamber *may* ... authorize”, i.e. the Pre-Trial Chamber does not *have* to authorize the commencement of the investigations. One delegate saw this as a problem. It is *not* a problem, was the answer by several others. The Court *has* to make its own decision. This was required due to the rights of the accused. The accused had to be heard. There may be new evidence. The two institutions have different mandates. Delegates referred back to paragraph 71 of the SWGCA Report about Princeton 2006 which reflects the agreement about the due process requirement, namely that a prior determination by another body cannot be prejudicial with regard to the Court’s own determination. One delegate who represented a Permanent Member of the Security Council reemphasized that ‘the definition in the Statute will not bind the Security Council, it is for the ICC. We also agreed, what the Security Council does, does not bind the ICC. These are distinct processes.’ The agreement on due process represents, as indicated already under agenda item 2, a major accomplishment of the SWGCA, especially if one compares the misunderstandings of early meetings in the Preparatory Commission years back. On the next morning, the delegate returned to the subject: ‘The Statute cannot bind the Security Council. The Security Council has to take into account wider considerations. And the decision of the Security Council is not binding on the Court. We agreed to this over several meetings and it does not create any difficulties for the group. The Court and the Security Council have complementary roles. They should be compatible.’ He also stated that ‘the way the discussions are moving’, the SWGCA would find a way to address the concern raised about discrepancies. He referred in particular to Paragraph 4 of CDP 2007 which contained ‘a number of interesting ideas. Maybe we can come back to this.’ The statements reassured the SWGCA that the agreement on due process was holding across the board. With the reference to Paragraph 4 of CDP 2007, it also signaled the importance of ‘dialogue’ between the Security Council and the Court.<sup>134</sup>

In effect, the question if the definition was binding on the Security Council and the debate about the relationship of the definition to article 4 of Res. 3314 led to three important reaffirmations. Two concerned the principle of legality, namely that the Court required its own clear definition and that the *definition* could not be retroactively affected by a post-crime determination. And one concerned the requirement of due process and the rights of the accused, namely that the *determination by the Court* could not be dependent on a determination by another body. Simultaneously, the debate highlighted that the authority of the Security Council to make its own determinations was not dependent on a link to article 4 of Res. 3314 in the definition under the Statute.

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<sup>134</sup> On dialogue between the Court and the Council see also supra pp. 24-25, 30-31 and n.89.

If the chain of arguments highlighting the principle of legality and due process started from interventions related to article 4 of Res. 3314, another chain of arguments highlighting the linkage with the UN Charter originated from interventions related to articles 2, 7 and 8 of the Resolution.

As described earlier, the latter articles were referred to as reasons against the deletion of the references to Res. 3314.<sup>135</sup>

As also mentioned already, one delegate offered a text proposal to permit the deletion of the references while taking into account these concerns<sup>136</sup>. He first responded with several arguments on behalf of deletion. In particular, a reference to the Resolution would open the door to its article 4. It was important for the principle of legality not to permit any other organ to define what aggression was. Yes, Res. 3314 had been an interrelated package but it was not intended for the ICC but as a guideline for the Security Council. Since the Security Council was authorized by the UN Charter, it could not be limited by the Resolution. Therefore it had been necessary to insert articles 2 and 4 which acknowledge the independent authority of the Council. Article 7 was important, but the ICC would not look at the definition in isolation. This could be reinforced by replacing the end of the first chapeau (“*as set out in ...*”) with: “*subject to and in accordance with the United Nations Charter and other provisions of international law.*”

The reception of the proposal was decidedly mixed, yet it served as a significant catalyst for the discussion on the references and for increased understanding about the definition as well as the threshold. Immediately delegates saw a major problem with “subject to” and the breadth of the reference to international law.

One delegate who represented a Permanent Member of the Security Council and had insisted on the reference to Res. 3314 reacted positively. He repeated that all provisions of the Resolution are interrelated and all its articles are relevant, but perhaps as a way out one could replace the reference to the Resolution with a reference to the UN Charter.

In general, it was found grammatically problematic to add the phrase after the preceding requirement that the use of force must be “inconsistent with the UN Charter”. One suggestion was made to run the two phrases together: “*inconsistent with the UN Charter and relevant provisions of international law.*”

In light of a number of critical reactions, the delegate who had made the proposal offered another argument for the deletion of the reference to Res. 3314, also related to the UN Charter. He asked if the reference was really needed and went through the Resolution article by article. He arrived at the conclusion that the principles which were relevant were also reflected in the UN Charter. Since the meaning of the act of aggression under the Non-Paper depended already on the requirement that the use of armed force must be “*inconsistent with the Charter of the United Nations*”, the relevant aspects of the Resolution were covered. In other words, at this moment in the debate, he had second thoughts about his earlier proposal.

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<sup>135</sup> Supra p. 47

<sup>136</sup> Ibid.

The delegate, who had reacted favorably to the original proposal, explained his position further. He asked the SWGCA to consider what the implications would be of not referring to the whole Resolution. His country understood the purpose of the autonomy of the Court, but a reference to the Resolution as a whole rather than in part was also an issue of formality. Negating any individual articles would cause the loss of the basis for agreement. On the other hand, not referring to the Resolution at all would not imply that the content of the resolution is negated. In the end, all articles of the Resolution are related. Instead of referring to the Resolution, one could refer instead to the UN Charter, as in the new text proposal. The reference to the UN Charter in the Non-Paper “or in any other manner inconsistent with the Charter” was not sufficient. A type of reference was needed which would matter for assessing the acts as a whole. Otherwise the use of armed force could constitute an act of aggression despite justifications under the UN Charter. Maybe one could solve the grammatical issue by putting at the beginning of the text of the main chapeau: “*For the purpose of paragraph 1 and subject to the Charter of the United Nations....*” His comment about the autonomy of the Court suggested that the new phrases were not intended to make the definition in the main chapeau dependent on retroactive determinations by the Security Council, but rather that he sought to incorporate substantive justifications, exceptions and principles of the UN Charter relevant to the meaning of the act of aggression. His remark about the insufficiency of the link to the UN Charter in the main chapeau of the Non-Paper seemed to indicate an interpretation which would relate the requirement of inconsistency with the Charter only to uses of armed force in “manners” *other* than those directed against sovereignty, territorial integrity or political independence, rather than to *all* uses of armed force. But other interpretation issues appeared to play a role as well.

The next morning the original proposal was made available in writing with some changes: “... *in accordance with the UN Charter and other relevant provisions of international law.*” The delegate explained that the proposal was not really a concern of his own country. He was satisfied with the current link to the UN Charter. He offered it because it had been considered as a possible alternative to the reference to Res. 3314.

A delegate who represented another Permanent Member of the Security Council argued that the proposal led to confusion because it appeared to conflict with the words preceding under the Non-Paper. With regard to substance, he asked if it was at all necessary. It would not add anything. He always had interpreted article 1 of the Resolution as requiring a violation of the UN Charter, i.e. that an act of aggression can only take place where there is a breach of the Charter, and that was reflected in the phrase “or in any other manner inconsistent with the Charter”. In other words, for him the requirement of inconsistency with the UN Charter related to all uses of force deemed to be an act of aggression.

Another delegate concurred with the interpretation and saw also no reason for the additional reference to relevant provisions of international law.

One speaker, who also agreed that an additional reference to the UN Charter was not necessary, was of the opinion that the SWGCA should ask itself whether there were any

rules outside of the UN Charter relevant to the use of force, for example relied upon by the International Court of Justice.

The participant who favored the proposal reacted to some of the objections by offering another amendment for a phrase at the beginning: “*For the purpose of paragraph 1 and in accordance with the UN Charter*”. The reference to the provisions of international law could be deleted. He was flexible in this regard, but it was anyway more difficult in terms of drafting and the relevance of international law was already covered in the Statute. He remained concerned that the phrase in the Non-Paper, regarding inconsistency with the UN Charter, referred only to one element of the act.

In contrast, a delegate who also represented a Permanent Member of the Security Council expressed his doubts about the proposal as a whole. The inconsistency phrase in the Non-Paper was sufficient to address the concerns of his country. He said that his State would examine the reference to relevant provisions of international law, but asked with some skepticism what they could be apart from the UN Charter – which, after all, contains an express prohibition of the use of force.

The originator of the proposal largely agreed with the changes for a phrase at the beginning of the text. He reiterated that the proposal was just intended to help. With regard to the reference to the UN Charter, he thought that the inconsistency requirement in the Non-Paper referred to the *use of armed force* but that the link in the proposal was still wider since it referred to the *definition* of the act of aggression as a whole. With regard to the second link, he noted that article 21 of the Statute instructs already the Court to apply international law.

The comment about the difference in scope due to the difference in the reference point actually brought out the problem with the proposal quite clearly. Whereas an evaluation of the illegality of the use of armed force under the UN Charter pulls in the justifications under the Charter and reemphasize such parameters as “international relations” in article 2 paragraph 4 of the Charter, an evaluation of the definition or meaning of the act of aggression in accordance with the UN Charter could reintroduce linkages to the procedural authorities of United Nations organs, including to the authority of the Security Council under article 39. The conflict with the principle of legality, due to the openness or even retroactivity of the definition, would parallel the one occurring with a linkage of the definition to article 4 of Res. 3314.<sup>137</sup>

The SWGCA did not test if the reference to the UN Charter in the threshold of Paragraph 1 could satisfy a desire for a satisfactory but less controversial scope and help with the deletion of the references to Res. 3314. But it was clear that most in the room thought it sufficient to draw on the UN Charter for the legal evaluation of the *use of armed force* (and other elements *within* the definition) and that this was assured under the Non-Paper.

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<sup>137</sup> The relevance of article 39 of the UN Charter for the *jurisdictional conditions* is a different matter and occupied the SWGCA under agenda item 2, supra pp. 9 ff.

The reminder about article 21 in the Statute clearly strengthened the perception in the room that the proposal was redundant<sup>138</sup>. Many referred to article 21 in their reasoning why the proposal was not necessary.

In terms of the discussion about the references to Res. 3314, one delegate returned towards the end again to the compromise possibility to delete the reference in the first or main chapeau of Paragraph 2 and to keep it in the second one. The main chapeau would exclude acts of self-defence in any event. The list chapeau would be the better place; there, it would not open the definition too much. Another delegate argued for the deletion of the references, but felt at the same time that a reference might need to be somewhere in the provision to meet agreement, presumably he was referring to a placement that would not have the negative consequences objected to by many.

#### *The question of a clause for a semi-open list*

The question if the list in the Non-Paper requires a clause to include unforeseen fact patterns of acts of aggression must be understood against the background of the discussions described so far. Part of the debate if the list should be open or closed was connected to the question if the references to Res. 3314, and implicitly to article 4, should be deleted. If the link to article 4 is deleted primarily because of opposition to the dependency of the definition on the Security Council, the issue remains if one still would want a non-exhaustive list. And if one does not want a completely non-exhaustive list, there is still the question if the list should be semi-open or semi-closed according to certain criteria. Several proposals to open the list were made at the Princeton meeting. The SWGCA examined them under two angles, namely if they would be *permissible* under the principle of legality and if they would be *necessary* for unforeseen fact patterns not mentioned in the list. The main guiding points for the first angle have been already clarified in previous meetings of the SWGCA: In terms of *permissibility*, much depends on the first or main chapeau of the definition. If the definition in the main chapeau is already clear enough to satisfy the principle of legality, the list can be wide open as long as it is covered by the chapeau. If the main chapeau is too vague, the criteria for opening the list must themselves be clear enough to satisfy, together with the rest of the definition, the principle of legality. In terms of the *necessity* of a clause, the SWGCA weighed in particular the line between rigidity and flexibility in the list chapeau and the list itself.

It was still on the afternoon of the first day of discussions on agenda item 3 that one delegate first argued both for the deletion of the references to Res. 3314 and for the inclusion of text to the effect that an act of aggression ‘may include but not be limited to’ the acts in the list.

Several interventions followed which mainly indicated preferences for or against an open list in principle. One of them stated that the definitions of the crime of genocide and of war crimes in the Statute also had closed lists. Another one expressed the thought that the chapeau closes the list in fact but that this did not mean that other examples could not qualify. Another delegate argued for the opening of the list ‘given man’s propensity to

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<sup>138</sup> Article 21 is not only relevant for the definition but also, in accordance with article 31 paragraph 3 of the Statute, for the grounds excluding criminal responsibility.

invent new ways of warfare not necessarily captured here.’ He pointed to the definition of crimes against humanity in article 7 of the Statute. That definition includes under paragraph 1 (k) “[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

The next speakers remained nevertheless set against an open list, highlighting especially that the definition of a crime had to be strictly construed and could not be extended by analogy, a rule also set out in article 22 paragraph 2 of the Statute.

The debate moved to the evaluation of specific text when a delegate argued for a semi-open list because the drafters of the list in 1974 may not have foreseen all types of force. Under his conception, the list was governed by the main chapeau which sets out the definition and could consist of examples. He proposed to add at the end of the list “*other uses of armed force of a similar character and gravity may also constitute acts of aggression*”. This would be similar to article 7 paragraph 1 (k) of the Statute.

Moving into another direction, one speaker argued against an open list, stating that the list itself had already some flexibility because its provisions were quite broad.

Taking that line further, one delegate related that he was not certain that the list was closed or not in the Non-Paper. He would be in principle against an open list but there were other parameters already in the Statute, including *nullum crime sine lege* in article 22, mistake of fact or law in article 32 and the threshold requiring “most serious” crimes, plus the contemplated additional threshold of a “manifest” violation. His uncertainty about the closed or open nature of the list drew the attention of the SWGCA also to the interpretation of “[a]ny of the following acts ... shall qualify ...” in the list chapeau. Read together with the main chapeau, the phrase could mean that *at least* the following acts should qualify.

There was a swift charge back: ‘If it is not a closed list, we must make it one.’ The speaker did also not think that the new text proposal for an additional clause was comparable to article 7 paragraph 1 (k) since the latter was much more specific in the context of the whole paragraph. She also suggested that future developments could be addressed by amendments.

Within the back and forth about the list, it was at this point that the proposal was made to stop the first chapeau after “United Nations”. As related earlier, the idea was to use the generic main text of article 1 of Res. 3314 and to accompany this with the threshold of Paragraph 1. This would fulfill the principle of legality<sup>139</sup>.

Obviously, if the text above the list would achieve satisfactory concreteness already, the list itself could be treated as a set of examples and be opened within the criteria of the preceding text.

Both this proposal and the comments about a degree of flexibility in the list shifted the debate quite dramatically. The proposal made the idea of a new clause more permissible, whereas the comments made the same idea less necessary. The effect was quite

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<sup>139</sup> See also supra pp. 43-44

immediate. One delegate, who had been adamant about the need for a closed list, now stated that a semi-open list was possible if it was governed by a generic chapeau without the reference to Res. 3314, and accompanied by the threshold.

At the same time, the delegate who had made the proposal for a new additional clause pulled a bit back. It would be still slightly preferable not to close the list completely, but one could also live with a closed list. He continued that one had to give some thought about the kinds of acts of aggression one might have in the future. The list might be actually flexible enough. For example, “use of any weapons” in subparagraph (b) covered quite a lot.

The next morning, the discussions took up again with the proposal for the additional clause. The clause was reintroduced with explanations similar to those given initially.

One comment concentrated on the interplay between the concreteness of the main chapeau and the flexibility for the list and reemphasized the question what types of acts of aggression the international community might anticipate and be worried about already. Maybe one needed a clause that spoke of “other uses of force” or another wider phrase rather than “other uses of armed force”<sup>140</sup>.

In the course of the morning, at least two other interventions touched on this phrase but one of them was not necessarily focused on acts of aggression of the future. The delegate stated generally that the list could be semi-open if certain criteria were met. Not all aggressions were armed force. Other acts, such as against economic independence, were also inconsistent with the Charter and thus acts of aggression. The intervention of another delegate was more future-oriented and mentioned in particular computer network attacks<sup>141</sup>.

Interestingly, two delegates who represented Permanent Members of the Security Council had different views on the clause. One thought it could be taken on board. The other one thought it would be difficult to find the right formula. Was the proposed clause really useful? Did it capture the goal with the necessary precision? What did “similar character and gravity” refer back to? He added that he was not firmly against it, ‘but we need to be first clear if there is at all a general wish for this and then we need to be very clear how we do it.’ The comment served as a reminder that the definition requires not just a legal analysis but a legal policy decision about the reach of the Statute.

The delegate who had moved towards a more flexible position with regard to the clause in case the main chapeau would meet the standards of the principle of legality was not convinced that the proposed clause was the best formula: The reference point was unclear. Building on the example of article 7 would be problematic because of differences in the drafting between crimes against humanity and the crime of aggression. The point of reference should be the main chapeau. “*Such uses of armed force include*”

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<sup>140</sup> But note that the current main chapeau requires “armed force”.

<sup>141</sup> Compare in this regard relatively wide interpretations of “use of force”, covering “any effective coercive measures”, in article 11 of the Montevideo Convention on the Rights and Duties of States of 1933, 165 L.N.T.S. 19.

should go at the top of the list. The Chairman verified that this clause would be inserted after the main chapeau ending with “United Nations Charter”, instead of the current list chapeau.

The delegate who had made the initial proposal responded that one could work as well with this alternative proposal at the top of the list.

Another proposal sought to clarify the reference point by inserting into a new line (h): “Other uses of armed force of a similar character and gravity as the acts listed above” But the debate of the initial proposal and the proposal for the beginning of the list showed a preference for the main chapeau as reference point.

One delegate underlined again the importance of an open list. The option of future amendments was not sufficient since it would come too late. One could achieve this with the reference to Res. 3314, and equally well with the alternative clause at the top of the list and the earlier proposal offered for the end of the list. As a further alternative, he proposed to take the first phrase of article 4 of Res. 3314: “*The acts enumerated above are not exhaustive.*”<sup>142</sup> The principle of legality would not be violated. There were safeguards in the Statute and the chapeau provided sufficient detail. Any would-be aggressor would still know that he is doing something wrong even if his plans did not fit completely with the list.

A very different opinion was soon afterwards offered by a delegate who had already earlier spoken strongly for a closed list. He now expressed equally strong opposition against the initial clause proposal for the end of the list. The clause would be a mistake. The principle of legality was a principle of justice as already stated by the Nuremberg Tribunal. The definition of the crime must be strictly construed and not extended by analogy and it must be interpreted in favor of the accused. The language proposed in the clause was too vague. In terms of comparison, article 7 paragraph 1 (k) had an important modifier, namely “intentionally causing great suffering, or serious injury to body or to mental or physical health”. Once one read the whole, one would see that it was not as open-ended. In contrast, it would be difficult to give concrete content to the proposal here. His comment did not clarify if it was meant also in the context of a main chapeau without the reference to Res. 3314.

Several other delegates spoke similarly against the clause and/or in favor of a closed list.

The speaker who had already previously pointed to the flexibility built already into the list under the Non-Paper asked again if the clause was really necessary. The elements in the current list and the list chapeau had already some open-endedness. A number of delegates were of the same opinion.

One participant related that her country supported an open-ended list because some means of modern warfare might not fall under the current list such as massive computer network attacks, but such a semi-open list had to be paired with a restrictive, carefully crafted chapeau. She could be flexible on how this open-endedness was achieved. One

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<sup>142</sup> Compare also the proposal for a new line, supra p.48.

could use the approach taken with regard to article 7 paragraph 1 (k) where restrictions had been put into the Elements of Crimes.

Another delegate recalled that he had argued for a closed list on the previous day, but for the sake of compromise he could go with a semi-open list if the wording was specific enough. He also referred to the safeguards in the Statute.

At the beginning of the debate about agenda item 3, participants had called the effort to find a good definition also a balancing challenge between impossible crystal clarity and too much vagueness. In that sense, the debate at Princeton 2007 showed a constant rebalancing to find the right middle. The willingness to consider a semi-open list grew in parallel with support for a main chapeau ending with “United Nations”. Yet an observation towards the end of the debate may have moved the balancing slide again more towards a closed list when it was pointed out that the phrase “or in any other manner” in the main chapeau acted also as a residual clause<sup>143</sup>.

Significantly, the last comment on the flexibility built into the list chapeau alerted the SWGCA to a balancing act in the practical application of the definition. It was pointed out that the words “[a]ny of the following acts” amounted to a case of constructive ambiguity. This would be not only relevant to the Court but also to the Counsel for the Defense and to the principle *in dubio pro reo*, giving the benefit of doubt to the accused.

#### Agenda Item 4: Other Substantive Issues

The main point under Agenda item 4 was the topic of the Elements of Crimes. One draft proposal for the Elements of the crime of aggression was produced in 2002 and is included in CDP 2002 and CDP 2007. But in the latter document it serves explicitly only as a placeholder since the provision has developed much further and the draft of 2002 is no longer consistent with it. The Chairman suggested that the Elements might best be tackled after the Review Conference since it was not yet clear how the final provision would look like. The Draft Elements of 2002 were drawn from a proposal by Samoa and have not been extensively discussed. The delegate was ‘sorry to loose the Elements’ but agreed with the assessment that it might be best to work on the Elements after the Review Conference. He also pointed to the mandate in Resolution F of the Final Act of the Rome Conference which includes the preparation of a proposal for the Elements for submission at a Review Conference<sup>144</sup>. This had to be resolved. He clearly considered this to be a

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<sup>143</sup> Article 2 paragraph 4 of the UN Charter makes clear that its prohibition against force relates to the use of force by States “in their international relations”. That parameter does not appear expressly in the text of article 1 of Res. 3314 but it is certainly obvious from article 3 of the Resolution.

<sup>144</sup> The mandate was carried forward to the SWGCA through a resolution by the Assembly of States Parties, Continuity of work in respect of the crime of aggression, Resolution 1, ICC-ASP/1/Res.1, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002, ICC-ASP/1/3, Part IV

minor technical point. Article 5 paragraph 2 of the Statute merely refers to the need for a definition and the jurisdictional conditions. Everyone appeared to be inclined towards the suggestion of the Chairman.

The pattern for the further development of the Elements for the definition of the crime of aggression could be similar to the one for the other crimes under the Court's jurisdiction. The Elements of Crimes have been negotiated after the Rome Conference. In a comparative approach, the Review Conference could set a deadline for the drafting of the Elements in the SWGCA.

#### Agenda Item 5: Future Work of the SWGCA

Agenda item 5 required an exchange of thoughts about the road map for the SWGCA. The Chairman reminded the SWGCA that three days of meeting time were allocated for the Sixth Session of the Assembly of States Parties in December 2007 and four full days at a Resumed Sixth Session, most likely in June 2008. At an earlier meeting the SWGCA had agreed to conclude its work 12 months prior to the Review Conference. At the time it had been assumed that the Review Conference would be held in 2009 but this date was not yet finalized. The planning for the SWGCA tied in with the planning for the Review Conference.

Ambassador Rolf Fife, the focal point of the Assembly of States Parties for the Review Conference, briefed the SWGCA on the preparations for the conference, particularly with regard to its rules of procedure and budgetary matters. It was important to consider the success criteria for the conference. No decision had yet been made on date and venue. This would probably be done at the Sixth Session in December. According to article 123 of the Statute, the Secretary-General of the United Nations had to "convene" a Review Conference seven years after the entry into force of the Statute. The term "convene" was ambiguous since it could either mean that the invitations had to go out at that time or that the conference had to be held. Article 121 paragraphs 1 and 2 also contained provisions relevant for the question of timing. Article 121 paragraph 1 permitted proposals for amendments also seven years after the entry into force of the Statute. Article 121 paragraph 2 provided three months for the consideration whether to take up the proposal. In the consideration of the date, one had to also take into account the meetings of the General Assembly of the United Nations and other bodies in the fall of 2009. There was some room for discussion between a date at the end of 2009 or one at the beginning of 2010. It mattered also that the practice of the Court was still short. The early entry into force had also surprised some States. The adoption of amendment required a two-thirds majority. According to the conception of a number of States, the Review Conference should strengthen international criminal justice. This was an occasion to look at ways how to link up the preparations for the Review Conference with the process in the SWGCA.

While the focal point related that he considered himself as nothing but a neutral ballot box, it was nevertheless quite obvious that the briefing tilted towards a preference for a 2010 date.

The Chairman said that for the SWGCA the timing was important. In terms of scope, 'we know that aggression will be on the agenda.' Many had thought that 'convening' means 'holding' the conference in 2009. But there may be also some difficulties with the time requirements for proposals. If the date for the Review Conference would not be 2009, then more time needed to be allocated to the SWGCA.

The last point reflected the recognition that a long intermission between the end of the SWGCA and the Review Conference would risk a loss of momentum.

The Ambassador of Uganda offered to host the Review Conference in Kampala. This would enhance the visibility of the Court. It would bring the Court closer to the people who are affected most. It would also help to dispel the notion that we are not cooperating. Speaking of the beautiful rivers and lakes of her country she expressed a warm welcome for participants. She also related that there were no time constraints in the offer.

The Chairman and many of the delegates conveyed their thanks for the offer, including one speaker who asked whether there was any point of principle which spoke against a venue in a situation country.

One delegate remarked that even if the focal point had no *views*, he must have some *impressions* with regard to the best timing for the conference. If one assumed a date of 2010, would there be a role for the Assembly in 2009 in the preparation of the conference?

The focal point considered a timing of the Review Conference after the regular session of the Assembly in 2009, which would permit some preparatory time in the Assembly. There could be an advantage in hearing the views of States about amendments and to hit the ground running, especially since the Review Conference would have a limited time frame.

In effect, his statement indicated that the opportunity for preparatory work in the Assembly may be for some State Parties one of the more important reasons for a 2010 date.

One delegate mentioned that the costs of the Review Conference were already an issue. A look at the articles 121 and 123 of the Statute would show that they are difficult to reconcile. Practically every other speaker on this issue agreed in this regard. He also explained in detail their ambiguities. Here not everyone agreed with his interpretations. Whereas his reading emphasized again the hurdles caused by the time requirements for proposals under article 121 paragraphs 1 and 3, other readings saw the Review Conference as a statutory event which permitted the consideration of amendments even if they had not been brought forward previously. But in the end, all appeared to accept the 2010 date as the more practical option.

Significantly, the view was expressed several times that a date in 2010 required a shift in the conclusion of the work on the proposal for the provision on the crime of aggression. Additional meeting time had to be allocated. Delegates made also the point that the subject of the crime of aggression required adequate time at the Review Conference

itself. The focal point referred again to the use of time at the Assembly in 2009. It was not clear how much his response took into account that the relevant resolutions provide that the SWGCA has to submit its proposals to the Assembly for its *consideration at the Review Conference*.

Apart from the recognition that the conclusion of the work of the SWGCA had to be shifted with a later date of the Review Conference, doubts were expressed if the agreement to conclude 12 months prior to the Review Conference made still sense.

The adoption of decisions at the Sixth Session of the Assembly in December 2007 with regard to the meeting days available to the SWGCA will be essential, since States will need clarity in this regard before the Resumed Sixth Session in June 2008.

### Outlook

The inter-sessional meeting of 2007 demonstrated again the commitment of States to fulfill the mandate of the SWGCA. The sense in the room on the last day was quite palpable: Difficult questions, intense discussions and the uncertainty about timing had not managed to undermine the strength of the drive. If anything, quite the opposite. Not all international legal negotiations break spontaneously into a birthday song, as this one did for an inspiring and much-liked delegate.

The groundwork has been laid for further development at the formal Sixth Session of the Assembly of States Parties: States are basically in agreement about the person-centered elements of the definition. Some matters of form may still have to be finalized but the essence has become clear. With regard to the definition of the State act of aggression, the incorporation of text from Res. 3314 has shown again the strong commitment to the principle of legality. While several ways are still discussed how best to assure adherence to the principle, States are joined in the common objectives to steer away from undue vagueness and to protect the definition from any dependency on retroactive determinations. The threshold has been retested while gaining new support. The discussions both on the definition of the State act and on the jurisdictional conditions have reconfirmed the agreement on due process and the independence of the determination of the act of aggression by the Court. The focus on the Pre-trial Chamber as a Court-internal safeguard against politicized prosecutions has increased. The recognition of the complementary roles of the Court and the Security Council in the international security system has found its expression in the call for 'dialogue' between the two institutions.

As much as each State is influenced by its past and current history and by its geopolitical location and role, the consistent progress at the Princeton meetings owes much to an underlying mood of confidence and to a future-oriented, trans-regional orientation in the service of the international community as a whole. This operating mode has carried over into the formal sessions. If need be, will the SWGCA be able to recharge at the Liechtenstein Institute on Self-Determination? The meeting had been announced as the last one at Princeton University. With a Review Conference in 2010, there may be room for reconsideration.