Crime of Aggression: Statement by the United States, September 26, 2001

Thank you, Madam Chairman. My delegation would like to join the other delegations that have spoken in commending you on your skillful conduct of our meetings. My delegation would also like to express its sincere gratitude toward those delegations that have expressed their sympathy or solidarity to those who have suffered as a result of the attack of September 11, and we would like to express our condolences to those nations whose citizens have suffered as a result of these attacks. As President Bush has stated, this was not just an attack on America, but on the civilized world. We will look forward to your continued support and cooperation in the effort to bring an end to the global menace from terrorists and States that support and harbor them.

Madam Chairman, we have heard this week from the representatives of Bosnia and Herzegovina, New Zealand and Romania as sponsors of revised proposals for a definition of a crime of aggression, PCNICC/2001/WGCA/DP.2, and the conditions for exercise over the crime of aggression, PCNICC/2001/WGCA/DP.2/Add. 1, and we appreciate their thoughtful statements. We have also listened attentively to those representatives who have made preliminary observations as well as those who have made detailed comments on the proposals.

The United States appreciates the serious efforts made by the members of this Working Group to deal with the difficult questions before it and, in particular, the efforts made by the sponsors to identify and address some of the specific legal issues that arise in defining aggression and seeking to establish the conditions under which the ICC would exercise jurisdiction with respect to an alleged crime of aggression. In what follows, I will not address every aspect of the current proposals before the Working Group, but will identify continuing issues of fundamental concern and vital interest to the United States with respect to the proposals. At an appropriate time, the United States may wish to supplement these observations with additional comments on the new proposals, including comments on the relationship of the text of paragraph 1 of the proposal on the definition of aggression with various articles of the Rome Statute and on specific intent. The United States notes that other proposals also remain before the Working Group and should continue to be the subject of consideration by the Working Group.

Madam Chairman, we have taken the floor at this time to provide our views with respect to both proposals because we believe that the two proposals are connected. In our view, we cannot separate the conditions for the exercise of jurisdiction by the ICC from the definition of aggression. Recognition of the appropriate role of the Security Council is critical to progress with respect to either proposal.

With respect to the proposal on a definition of aggression, we remain convinced that the definition of aggression for purposes of the ICC should reflect customary international law, and we are concerned that Paragraph 2 of the proposal does not conform to this requirement.

Paragraph 2 of the proposal is, of course, based on Article 2, paragraph 4, of the United Nations Charter and would define the crime of aggression by reference to part of the substantive content of that provision. Article 2, paragraph 4 of the Charter, however, does not define its scope as coterminous with that of aggression, which, as a representative recently reminded us, is itself not mentioned in article 2, paragraph 4. So the proposal as we understand it appears to merge two concepts -- aggression on the one hand and the use of force against the territorial integrity or political independence of another State -- which are distinct under the Charter.

It is not through inadvertence that the Charter maintains a distinction between these concepts. It reflects the fact that under customary international law not every use of force that is inconsistent with Article 2, paragraph 4 of the Charter would properly be found to constitute aggression. It was in recognition of this fundamental precept that the Charter leaves it to the Security Council to determine the existence of an act of aggression, rather than establishing that every unlawful use of force would constitute aggression. Simply stated, customary international law reserves for the category of aggression a particular kind of use of force, characterized by sufficient gravity to merit that description.

Again, it is not by accident that this is so. Aggression, whether in the context of an act of aggression by a State or the commission of the crime of aggression by an individual, is not a description that should be lightly applied to the actions of one side or the other in, for example, a border skirmish or a fishery dispute. To do so would not only degrade the concept of aggression, but raise the risk of aggravating what may be a minor dispute and making it more difficult to resolve. While the Commentary attached to the proposal touches on this point and recognizes the need to distinguish between aggression and the use of force that is inconsistent with article 2, paragraph 4, of the Charter, the addition of the words “the use of armed force to attack”, while going in the right direction, does not bring the definition within the customary law parameters of Nuremberg and the corollary standards of the Tokyo trials. The London Charter’s reference to a “war of aggression” provides guidance on the customary law threshold that we must reflect in our work here.

Thus both customary law and sound reasons of international policy dictate that the crime of aggression be reserved for acts of a certain magnitude and not include all uses of force that are inconsistent with article 2, paragraph 4. We were encouraged that a number of delegations that have spoken on this proposal have agreed that the proposal must better reflect the customary international law “threshold” separating aggression from other unlawful uses of force. We do not agree with a number of delegations, however, that would seek to define aggression by means of an itemized list of examples of acts. Thus we would not agree that the definition should include reference to or inclusion of the list of acts set forth by the General Assembly in Article 3 of resolution 3314 (XXIX), a resolution which, as the sponsors have noted, was elaborated for purposes other than those of criminal responsibility and for other audiences.

Insofar as the conditions for the exercise of jurisdiction by the International Criminal Court are concerned, we are of the view that this proposal, like its predecessor, raises profound issues of consistency with the Charter and the legitimate practices of States since the Charter’s inception, and runs the risk of complicating the resolution of international disputes.

One of our colleagues has reviewed for us some of the relevant Charter provisions in this area, noting the role of the Security Council under, inter alia, articles 24 and 39 and the role of the General Assembly under, inter alia, articles 10 and 14. Our reading of these articles does not, however, lead us in the same direction as the sponsors of the current proposals. That article 24 refers to the "primary responsibility" of the Security Council for the maintenance of international peace and security and article 14 provides for a role for the General Assembly in recommending, subject to article 12, measures for the peaceful adjustment of any situation, does not in any way derogate from the exclusive function of the Security Council with respect to the determination of an act of aggression. The exclusive nature of this function is basic to the security regime established by the Charter and fifty-six years of State practice under the Charter provide no basis for a view that a legally significant determination of the existence of an act of aggression may be established in any other manner. Such a determination, including an assessment of which State is responsible in the context of a dispute, is a complex matter. It highlights the wisdom of those who framed the Charter that they committed that function to the Security Council in article 39.

Of course, the General Assembly has a role under the Charter with respect to international peace and security, i.e., to make recommendations for measures for the peaceful adjustment of any situation, a role that the International Court of Justice has acknowledged in the Certain Expenses case, but we believe that this role does not include making a determination about the existence of an act of aggression. Seeking an advisory opinion from the International Court of Justice on that subject would also inevitably encroach on the exclusive function of the Security Council. Neither the General Assembly nor the International Court of Justice may properly infringe upon the role given exclusively to the Security Council by the UN Charter.

The proposal that the General Assembly request an advisory opinion from the International Court of Justice in the event that the Security Council has not made a determination under article 39 of the Charter raises serious concerns. It was explained by one of our colleagues during our discussions here that it was important to distinguish for the purposes of our deliberations those issues bearing on the criminal responsibility of an individual, which would be the subject of a criminal proceeding before the ICC, and those issues bearing on State responsibility, which are related to the determination of whether an act of aggression has occurred. And it is precisely because the determination of the existence of an act of aggression is a matter that affects the responsibility of a particular State that it is inappropriate as a subject of a request for an advisory opinion. One would expect such an issue to be addressed only in a case arising under the Court's jurisdiction to hear contentious cases, of course, with the consent of the States concerned. Suppose, for example, that the Court, in an advisory opinion, determines that State A has committed an act of aggression. Would that finding be dispositive in a contentious case brought by State B, seeking reparation from State A? Is it conceivable that the Court could reach a different result in such a contentious case? Would it be appropriate, in any case, to attach consequences such as the possibility of an ICC prosecution to an advisory opinion of the Court, given its advisory character? One has moved out of the realm of advice when the determination of the Court would have an automatic consequence and would not be provided solely for the guidance of the requesting entity. The Commentary suggests that the advisory opinion would not bind the States affected inter se. But this may be, in my view, a narrow and unrealistic vision of an advisory opinion that would, at the very least, stigmatize a State as an aggressor.

Moreover, as the United States has suggested in earlier sessions of this Working Group, the proposal for the involvement of the International Court of Justice in determining the existence of an act of aggression through its advisory jurisdiction appears to us to risk politicizing the advisory process in a way that would be undesirable.

Ultimately, in our view, to maintain consistency with the Charter with respect to the crime of aggression admits of only one approach. Where the Security Council has determined the existence of an act of aggression under article 39, the exercise of jurisdiction by the ICC to determine the existence of a crime of aggression would be consistent with the Charter. Absent such a determination by the Security Council, it would not be consistent with the Charter regime for the ICC to proceed with prosecution. This was the approach of the International Law Commission when it examined the issue, and it remains, in our submission, the only approach that is consistent with the Charter.

We are aware, of course, of the criticism that has been directed at such an approach. Some have suggested that the Security Council may find itself unable to make a determination of the existence of an act of aggression in a case in which such aggression may be clear, with the result that an individual who deserves to be tried for the crime of aggression may not be brought to justice. This is a serious concern. But it must be weighed against other serious concerns that any alternative approach would introduce. There may be excellent reasons for the Security Council not to make a determination of the existence of an act of aggression in a particular case; pressure on the General Assembly to request an advisory opinion on the existence of an act of aggression may obstruct, rather than promote, international objectives, including various mechanism that might be established by the Security Council, or facilitated by the Secretary-General, to maintain international peace and security. Recourse to the advisory process of the International Court of Justice for the purpose of finding an act of aggression may politicize the Court or compromise the role of the Court in contentious cases and thereby undermine its effectiveness. Ultimately, the legitimacy of any conviction flowing from a process that does not appear consistent with customary international law or with the Charter would be suspect.

I thank the representatives for their attention. Thank you, Madam Chairman.