

Fifth Session of the Assembly of States Parties to the Rome Statute of the International
Criminal Court

SWGCA, 28 November 2006, 10:00 am-11.30 am

Informal and Unofficial Notes from the ASP
SWGCA, 28 November 2006 (Morning Session)

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Chair: Good morning colleagues, let's get started with the 2nd meeting of the Special Working Group on the Crime of Aggression (CoA). As I outlined yesterday, first, we may have comments on the inter-sessional report and secondly your thoughts and views on the linkage between this Working Group and the Review Conference (RC). Thirdly, the view has been put to me to produce a revised version of the 2002 Coordinator's Discussion Paper. I did encourage you to reread this paper and provide me with some comments and feedback on how I could redraft the paper in the best possible way. I will also continue to consult delegations as I have already. I will get back to you with a revised version of the Coordinator's Paper, perhaps not in time for this meeting but well before the resumed session next year in New York, which will be completely dedicated to the CoA.

We are also looking into having another inter-sessional meeting in Princeton, and right now we are thinking that this meeting will be held from 11-14 June 2007, as a tentative date. So please check with your calendars. I will also consult on this date. I would like to open the floor.

Cyprus: Thank you Mr. Chair. The CoA is a very important crime, and we therefore believe that it should be included in the Rome Statute. Such an inclusion must strengthen the Court and have in our view as much support from the international community as possible, to increase membership and to establish universality.

With regard to the definition, we think as other speakers yesterday put forward, that there should be no additional qualifier, such as "flagrant" or "manifest", as pointed out in para. 18 of the Princeton report. I don't want to elaborate on that.

With regard to the jurisdiction of the Court and a prior determination of an act of aggression by an organ other than the Court, our position is that we are against it, for the simple reason of protecting the integrity and the independence of the Court. Also, I would like to refer to other arguments for this position in that same Princeton document. Thank you, Chairman.

Chair: I thank you very much.

Venezuela: I would like to thank you on all the work you have done. It is important to take on board all advances: The new discussion paper would work as an aide-memoire.

We have no objections to the new discussion paper being drafted for the resumed session. However, we think it would be very useful to have this document before our next meeting in New York so that we can make a contribution. My delegation supports you in all your work. Thank you.

Chair: Thank you very much.

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Germany: Thank you, Chairman. We are aware of the fact that the discussion on this new paper will take place in New York. However, we want to point your attention to some points which are important to us.

First, we think that a definition of aggression should be a generic one with a limited scope; therefore, we would not like to support a proposal which directly refers to the GA resolution 3314. This is a political document in our view, which is not designed for defining international criminal law.

Secondly with regard to the qualifier, we think that inclusion of the term 'manifest' would be most useful in order to avoid problems with situations in a grey area and to stay clearly in conformity with what is acknowledged in international customary law.

Thirdly, we would not tend to support a proposal which requires a reference of the case to the General Assembly or to the ICC [sic – ICJ?].

These are three major points for us. We are open to discussion on these topics, also with regard to the Belgium proposal which we find extremely interesting. We would like to examine this and are happy to engage with them.

Finally, I would like to state that my delegation joins the other delegations who would like to have a revised version of the Coordinator's Paper to continue our work from. We are happy to receive an updated version in due time. Thank you very much.

Chair: Thank you very much

Trinidad and Tobago: Thank you chairman. We support this Working Group and all its efforts and work on the CoA in the fight against impunity.

First, we also would like to indicate here, as we did in Princeton, that we prefer that the Court can exercise full jurisdiction over the CoA without regard to any other body. The CoA should be treated like the other crimes.

We hope that the ASP will provide us with all the necessary means and resources to meet the deadline and finish our work in time for the RC. Thank you.

Chair: Many thanks for your comments and for the support expressed to my delegation. Thank you very much. Yemen has the floor.

Yemen (simultaneously translated into English): In the name of God the merciful and compassionate. Thank you, Chairman. I would like to start by joining previous speakers in congratulating you on your work as chair of the SWGCA. We are convinced that thanks to your expertise and your deep knowledge, we should be able to shoulder the task which has been assigned to this group. We are convinced that the mission of this group is not a straight forward one. It is not an easy task. The idea is to reach a definition of the CoA and to create language which will meet the expectations of all of those concerned in this discussion.

Some of the parts of the provision are very sensitive and we refer to an idea which we expressed before in the Special Working Group at the 4th session of the ASP last year. We have stated that the other crimes mentioned in article 5 of the Rome Statute mostly stem from the CoA per se.

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My delegation has read the excellent report of the meeting held at Princeton University. We express our congratulations to the Chair of this group and to the government of Liechtenstein, as well as to the other governments mentioned in this report. I would like to thank them for the assistance provided which has made it possible for this meeting to be a success. We addressed a number of extremely important issues at the meeting. This is a crime which is mentioned in the Rome Statute under article 5. The report relates a number of choices or ideas which were raised during the deliberations held in June 2006. Consequently, my delegation will try to make some comments on those options.

With regard to the definition of the act of aggression, we do not entirely agree with the preference expressed by some of the participants for a generic approach. That preference seems to be based on pragmatic considerations. Nonetheless, we think that the specific approach would allow us to draw a most explicit list, similar to the other crimes which are mentioned in the Rome Statute. If we were to reconcile the two approaches, it would be better.

How would we do this? Concerning the act of aggression, which would constitute one element of the CoA, there is the definition of General Assembly Resolution 3314 which the General Assembly adopted after long years of deliberation. Many years have been devoted to this issue in the General Assembly. The preference at that time was to produce a general description. Anything else was seen to reduce the impact of the definition of the act of aggression.

On the question of “flagrant” or “manifest”: Something one needs to bear in mind is that this takes us back to the issue of respect for the UN Charter... This is going to complicate the legal burden not to mention the ethical burden. So, a definition of this sort of act must be careful not to prejudice the purpose of the definition. To speak about a “flagrant” crime may not be desirable.

My delegation would agree with a number of delegations that one should not necessarily refer to the object or result of the act of aggression. Requiring an “object or result establishing a military occupation of, or annexing, the territory of another State or part thereof” may lead to impunity.

We entirely agree with those other states who have suggested to include the various conducts which may be deemed to be the beginning of a CoA.

We would prefer to spell things out in detail, including the circumstances in which it may have been perpetrated, i.e. against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

We need to distinguish between the beginning of an act of aggression and the threat of an act of aggression.

With respect to paragraph 52 of the Princeton report, - the question of jurisdiction and whether the exercise of jurisdiction by the ICC requires a prior decision by a body other than the ICC -, there are different opinions on this issue. This means that the Coordinator will have to step up his efforts in order to reach a general agreement on this specific issue of jurisdiction.

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I think a clear cut distinction needs to be drawn between this crime and the other crimes mentioned in the Rome Statute. It is with regard to the question of whether the SC or another body should be involved. Everybody is talking about the independence of the ICC, a Court which is based purely on the law. This specific body, the SC, upholds peace and international security and takes a more political view than the ICC and this is indeed something which is covered in the Rome Statute. We have articles 13 and 16 of the Rome Statute, referring to the role of the SC with regard to the Court. So we would like to see the SC acting appropriately to ensure that the CoA is given appropriate treatment compared to other crimes. SC referrals must ensure that the criminal does not enjoy impunity, which is the real purpose of the establishment of the ICC. Thus, by way of conclusion, the various choices proposed are important,

We feel that delaying the Review Conference which was due to take place in 2009 would mean that we should continue our work to address these issues in greater detail. So we need to think in terms of our conclusion twelve months before the RC. Thank you.

Chair: I thank you very much indeed for your comments. Any other requests for the floor? Uganda.

Uganda: Thank you very much Mr. Chairman. I would like to congratulate you so far on how you are conducting this meeting. Uganda is on record as a nation that does not promote impunity and would not like to see it at the national level, regional or international level.

I have to say that, in our laws and the various jurisdictions, none of them allows for the crime to be defined in an ambiguous manner. Years back when I was at law school it was explained to me that a crime must be clearly defined, punishment for it must be clearly prescribed and that nobody should be subject to punishment unless the crime is so defined and punishments for it are prescribed. This is good for national domestic laws and as an institution which seeks to fight impunity we should not allow anybody to hide behind ambiguity. One can sound scientific and find names for other types of definition and call them generic, but it is very clear: the ICC, as an institution which fights impunity or seeks to do that, should be able to abide by certain principles under which it will operate. We cannot allow a process where the perpetrators define the rules under which they are going to be treated. We have nothing to fear. [...]. Let us close all the possible loopholes which those who would promote impunity might take advantage of.

Mr Chairman along these lines, Uganda would simply like to say this: The crime, - specific; the punishment, - prescribed, clear language, nothing ambiguous. Thank you, Mr Chairman.

Chair: I thank you very much for your comment. I next have the delegation of Kuwait.

Kuwait (simultaneously translated into English and partly adjusted in accordance with information about the original provided by the delegate): Thank you, Mr Chairman. Mr Chairman we wanted to make some comments on Annex 1 and 2 of the report we have before us and my contribution to this debate is mainly with regard to these two Annexes. Mr Chairman I also would like to emphasize the need of making sure that the ICC is very far from political considerations and I suggest that we concentrate on the definition of aggression in GA Resolution 3314 and I have two comments to make in this regard.

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Firstly, Resolution 3314 was the result of work carried out originally by the International Law Commission. Therefore, it is based on legal reasoning. I would now like to come back to our own definition. The report proposes in Annex I a definition of the CoA. We see that Resolution 3314 is missing from the Annex. So, without making any further comments on Annex 1, we should use the possibility of rewording the Coordinator's Paper for rewording the differentiated approach.

I would like to move straight on to deal with Annex 2, which is the 2002 Coordinator's Discussion Paper and here I would like to focus on the reference to Resolution 3314. In particular certain points in the resolution reflect general consensus among the Arab states. Resolution 3314, of course, led to a great discussion in Arab states, in the time that led to the adoption of that resolution. There was a general debate on the exploitation of a people, the inherent right of peoples to self-determination and there were many states which insisted that this principle be included. It is a reflection of the law. We want this principle included. We should keep the reference to Resolution 3314.

Chair: Thank you very much. Does any other delegation wish to take the floor at this time? That would not seem to be the case. I do not have anyone inscribed in my list right now. So in the absence of any request for the floor we would bring the meeting to a close. As I have said in my opening remarks, I will continue consulting outside the room on the several topics that I have outlined including the revision of the Coordinator's Paper. We will meet again tomorrow afternoon to adopt the report and to forward the report to the plenary which will obviously be a straight-forward report and we will then have the report adopted in the plenary on Thursday or Friday. So thank you very much for your contributions.

I certainly take with me the mandate from you to produce the revision of the Coordinator's Paper. I am hoping to be able to circulate this at an early opportunity, not necessarily in the course of this session of the ASP but certainly well ahead of the resumed session in January in New York. I thank you very much for your contribution and the meeting is adjourned.