

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

June 8-11, 2006

Annotated Agenda

The meeting is aimed at continuing discussions held at the previous intersessional meeting in June 2005, at the Assembly of States Parties in November/December 2005 and in the context of the “Virtual Working Group” (VWG). Three circles of questions have emerged as the main issues and were addressed in discussion papers submitted to the SWGCA.¹ It is suggested that the work in Princeton focus on these areas (items 1 – 3 below).

Item 1) The “crime” of aggression – defining the individual’s conduct

Discussion paper 1 (the Crime of Aggression and Article 25, para. 3 of the Statute) addresses the main question identified in this respect: How does the proposed definition of the individual’s conduct (cf. current wording of the Coordinator’s text²) square with the provisions of Article 25, para. 3 (a) to (d) of the Statute, which in general terms and as a “**default rule**” (Part 3: “General Principles of Criminal Law”) describe the forms of **participation** in a crime? Two different approaches have been identified: The Coordinator’s text implies a “**monistic**” **approach** in that the description of the individual’s conduct includes the description of different forms of “participation” which would otherwise be addressed in Article 25, para. 3; therefore the Coordinator’s text suggests that the application of that paragraph be excluded. The discussions in Princeton last year, however, brought support for a “**differentiated**” **approach**, which seeks to apply Article 25, para. 3 to the crime of aggression as well. This might, however, necessitate a revision of the definition of the individual’s conduct in the Coordinator’s text, in order to remove the duplication. Some **proposals**³ were submitted to that effect, but not yet thoroughly discussed. Discussion paper 1 raises questions and suggestions with respect to these proposals. (On a similar issue, namely the duplication of the phrase “intentionally and knowingly” in article 30 and in the Coordinator’s text, participants agreed that the default rule of article 30 should apply)⁴

Further discussion is also needed on the question of **attempt** (Article 25, para. 3 (f)). In this context, the 2005 meeting⁵ has drawn a useful distinction between (a) the collective act of aggression and (b) the individual act of participation in the collective act. The latter should be the focus under this item.

¹ ICC-ASP/4/32 Annex II.B.

² PCNICC/2002/2/Add.2 of 24 July 2002.

³ Appendix 1 to the Princeton report 2005, ICC-ASP/4/32, Annex II.A

⁴ Para. 51 of the Princeton report 2005.

⁵ Para. 33 of the Princeton report 2005.

Item 2) The conditions for the exercise of jurisdiction

According to Article 5 para. 2 of the Rome Statute, the provision on the crime of aggression should define the crime and set out “the conditions under which the Court shall exercise jurisdiction with respect to this crime.” The 2005 meeting brought a substantial discussion on this issue, which was further structured in **Discussion paper 2**. It is suggested to further discuss the pertinent questions in light of **existing international law** and to further clarify all options in greater detail. Should the ICC exercise jurisdiction over the crime of aggression only after receiving an explicit/implicit approval from another organ? Which organ(s) would make that decision (**Security Council**, General Assembly, ICJ)? Would such a decision – namely, that a State act of aggression has occurred – be a **prejudicial determination** for the ICC (i.e. a legally binding determination which can not be refuted in Court by the accused), or only a procedural pre-condition? What are the consequences for the rights of the accused under any of these approaches?

Item 3) The “act” of aggression – defining the act of State

Discussion paper 3 raises a number of questions regarding the definition of the “act of aggression”, i.e. the act of the State. The current Coordinator’s text defines such an act in essence by way of reference to **General Assembly resolution 3314 (XXIX)** of 14 December 1974, which includes an **illustrative list** of acts. The 2005 meeting discussed extensively whether the definition of aggression should indeed be accompanied by a list (the “**specific**” approach) or whether it would be preferable to define the act of aggression in a more “**generic**” way. The generic approach was the preferred option at the 2005 meeting, but such an approach needs further clarification and concrete proposals. Further questions under this item include the question whether aggression should be **qualified** as being in “flagrant” or “manifest” violation of the Charter, and the question of the **attempt** of aggression at the State level.

Item 4) Other substantive issues

Other substantive issues that were previously discussed could be taken up. The question of the **applicability of Article 121 para. 4 versus para. 5** was discussed extensively but not conclusively: Should the definition of the crime of aggression enter into force for all States Parties once ratification by seven-eighths of States Parties is reached (para. 4); or shall it only enter into force for those States Parties which have accepted such an “amendment” (para. 5)? It was argued, however, that such a discussion could be continued once there is more clarity on other issues. Furthermore, there was only a preliminary discussion regarding the **elements of crime** so far, due to the same consideration. Participants might want to raise other substantive issues as well.

Item 5) Future work of the SWGCA

The 4th session of the Assembly of States Parties (28 Nov. – 2 Dec 2005) gave the work of the SWGCA a significant boost by deciding that the SWGCA “in the years 2006 to 2008 shall be allocated at least 10 exclusive days of meetings in New York during resumed sessions, and hold intersessional meetings, as appropriate”. The current calendar of ASP meetings, however, does not yet reflect the full amount of meeting time for the SWGCA. It is suggested that the intersessional meeting consider the issue with a view to preparing the necessary detailed decision about the **next formal meetings of the SWGCA** at the next meeting of the ASP. Participants may want to raise further issues regarding the work of the SWGCA, such as the usefulness of continuing the “Virtual Working Group”.