

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

Plenary Session and SWGCA, 29 January 2007, 10am-1am

**Informal and Unofficial Notes from the ASP
Plenary Session and Special Working Group on the Crime of Aggression
29 January 2007, 10am-1am**

These notes are not an official transcript of the meetings, but may serve as an informal and general overview of the proceedings. Please do not use these notes for official purposes. Please note in particular that some of the interventions were listened to in translation and may differ significantly in meaning from the original.

Plenary Session

President: I declare open the Resumed Session of the Fifth ASP. Thanks to the UN for the resources it has provided. [...]

Our first order of business is the adoption of the Assembly's agenda. The provisional agenda is contained in ICC-ASP/5/24/Rev.1. In addition to the items contained in the provisional agenda, one additional item has been brought to the attention of the Bureau. This is the judicial vacancy resulting from the resignation of Judge Maureen Clarke from Ireland. According to Rule 13 of the Rules of Procedure of the Assembly, this additional item may be placed on the Agenda of the Assembly. If the Assembly concurs with this suggested approach, it is the view of the Bureau that the issue of the judicial vacancy be subsumed under Agenda Item 7, other matters. May I take it that it is the wish of the Assembly to adopt the agenda as contained in ICC-ASP/5/24/Rev.1, with the inclusion of the additional item just mentioned? It is so decided.

Let us now turn to Agenda Item 2: States in Arrears. States in arrears for over two years, with arrears equal to or exceeding their designated amount of contribution, will not be able to vote unless it is determined that factors beyond the state's control are responsible for them being in arrears. Currently, 13 states are in arrears, and these states have been told the least amount they must contribute in order to not be ineligible to vote.

Invited states to the November ASP in The Hague are filling the same roles for the resumed session in New York. Invited states include – Tuvalu, Vanuatu, Bhutan, Cook Islands, Democratic People's Republic of Korea, Equatorial Guinea, Grenada, Kiribati, Laos People's Democratic Republic, Lebanon, Maldives, Myanmar, Mauritania, Micronesia, etc.

Agenda Item 4: Program of work. It could be subject to change but the focus of this session lies in addressing the issue of the Crime of Aggression. Agenda Item 5 concerns the election of the Board of Directors of the Victims Trust Fund. Because the documentation is not available in all languages yet, I suggest that we postpone this discussion. Agenda Item 7 concerns Other Matters. The work program will be exercised with flexibility. Are there any objections to the schedule as listed by the Program of Work? I see none; it is adopted.

*Notes Provided by The European Law Students' Association (ELSA) and
the Council of American Students in International Negotiations (CASIN)*

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The Credentials Committee will now have a brief meeting in Conference Room 8. This current meeting of States Parties is suspended for 20 minutes.

[Meeting resumes 20 minutes later.]

President: The eighth meeting of the Fifth Session will now resume. I now give the floor to the Chair of the Credentials Committee for an interim report.

Jordan – Chair of the Credentials Committee: The Committee would like to report that formal credentials have been received from 32 countries. In addition, 35 States Parties have communicated to the Secretariat their representatives to the Resumed Session. 34 States have not yet communicated any information on their representation at this session. This report is submitted to the Assembly as an initial report. We are still receiving credentials and we will update the report accordingly. A full and updated report will be handed to the Assembly towards the end of the Resumed Session.

Trinidad and Tobago: We did submit our credentials to the Credential Committee today.

Chair of Credentials – Jordan: All credentials submitted today will be added to the list that we already have and the report will be updated accordingly.

President: We now turn to the judicial vacancy. Judge Maureen Clarke of Ireland resigned from the Court in order to assume higher office in her country. This creates a judicial vacancy at the ICC. As Judge Clarke served in the Trial Division, she had not yet been called to duty. According to Resolution ICC-ASP/3/Res. 6, the Bureau must set the date and venue of election within one month of the vacancy, which should be no later than 20 weeks after the vacancy.

The Bureau considered two options: (1) a special session for 2 days at the end of April, which would hold logistical and budget implications of 100,000€; (2) deferring the election to the Sixth Session of the ASP, which would require us to amend Resolution ICC-ASP/3/Res. 6 to give the Bureau some flexibility beyond the 20 weeks.

According to the 2007 assumptions, due to the fact that there is only one expected trial before the Court, only one of two judges who are not serving full time will be required to serve full-time in the next year. Therefore, the Bureau recommends that the task of electing a judge to fill Judge Clarke's bench can be left to the Sixth Session of the ASP. A draft resolution on the amendment to ICC-ASP/3/Res. 6 will be circulated. May I take it that the ASP concurs with this recommendation in principle? I see no objection to this recommendation.

On the pension scheme for judges, a draft resolution on the amendment will be circulated.

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At the Fifth Session in The Hague, the issue of low state participation at the ASP was brought up. I request that State Parties indicate to the Bureau why their delegation might not have been able to attend, so that we can make an effort now to increase state participation.

We are just now receiving information coming in from the ICC in The Hague. In the case of the Prosecutor vs. Thomas Lubanga Dyilo, Pre-Trial Chamber I is moving forward with the trial. *[The President reads first paragraph of ICC Press Release on Confirmation of Charges Decision.]*

The Special Working Group on Crime of Aggression will now conduct its business.

[The President leaves his seat, which the Chairman of the Special Working Group takes over. Henceforth, the term "chairman" refers to the Chairman of the Special Working Group on the Crime of Aggression.]

Special Working Group on the Crime of Aggression

Chairman: This is the first time since Princeton that we can discuss our topic in a coherent and systematic manner. We need to do so within the larger framework, i.e. we decided to conclude at least twelve months before the Review Conference. There is not much time left. Today, we are entering a new phase in our work, the phase during which we narrow the existing differences on a definition and conditions for the exercise of jurisdiction. The process established in Princeton has proven useful to the work of the Special Working Group. Another inter-sessional meeting will be held in June, again in Princeton. We have worked so far on the Coordinator's Discussion Paper of 2002. The discussions in Princeton have aided me in putting forth a revision to the Coordinator's paper before the Working Group, which should reflect the progress made. The Special Working Group, meeting in The Hague, gave me the authority to do so. An explanatory note was distributed with the paper. The paper, ICC-ASP/5/SWGCA/2, is not yet conclusive, first, with regard to the differentiated and the monistic approach to the definition of the crime of aggression. I hope that the discussions at this session will point us into the direction to take. Second, the paper does not yet decide whether a specific or generic definition of the act of aggression should be included. Input from members is important. Please focus on Part I, leave aside the Elements in Part II. They do not yet reflect the changes in Part I. There will be a time for that later; and advice rendered could change the structure and substance of the paper. Please go straight into substance and refrain from general statements. I would also like your thoughts on the future course of action. We'll take Para.1-3 first. Para.4 and 5 will be discussed later. After concluding a reading of the paper I will decide if we go into informals. In the ideal, we will have more informal discussions to narrow down the variety of options on this matter. Also, this morning, the discussions should be as interactive as possible. The floor is now open for comments on the revised Chairman's paper.

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Greece: Let me get the ball rolling. Thank you Mr. Chairman for this new paper you have drafted for this Working Group. It intends to capture the progress made on this issue. The document before us does not therefore break new ground as it is not intended to do so. It focuses on the progress made in the past four years. The paper does not discard options which have some degree of viability – this is a prudent view to which we subscribe. You have asked us to comment on the paper, and we will do so as it might bring us to the final steps of this entire process on the Crime of Aggression.

In Paragraph 1, Variant (a) and Variant (b) clearly correspond to the differentiated and monistic approach respectively. I will not answer the question of choice among verbs in Variant (a), which could be done in informal session.

Consistent with the views we have been having at inter-sessional meetings, we favour Variant (a). This approach allows us to integrate the definition as smoothly as possible into the system of Rome Statute. The continuation under both variants, which appears in two sets of brackets, finds us in agreement on the first bracketed text, the phrase requiring a ‘manifest violation.’

Coming to paragraph 2, this delegation is inclined to prefer a reference to GA Resolution 3314 and preserve Art.3.

Referring to the distinction between a generic and specific approach to defining the act of aggression, it indicates a choice between a self-contained approach and a global reference to 3314 or part thereof. In the previous Chairman’s paper, the option of a generic approach had been eliminated; however, ever since then, the argument persisted. Princeton 2005 favoured a generic approach. In Princeton 2006, there was however, a growing support for a specific or erroneously called ‘combined’ approach.

In the document before us, the choice between a generic approach and a specific one is alluded to but not clearly set out. In our view, an allusion to the generic approach is not enough at this stage of our work. We are referring to the text in brackets in Para.1 in combination with Footnote 3. There was far less support to this text in brackets. However, if we are asked to make a choice between a generic or specific approach, the Greek delegation would like to show some flexibility. If a correct wording is reached, we would go along with either option.

Chairman: We can take this up in an informal setting. Next is Sweden.

Sweden: The paper you have produced is a good, balanced paper that embodies the progress we have made on this issue. We hope you can produce yet another draft of this paper after this meeting that will embody further progress. We need to do so at an increased pace. We have less than 2 years to work on this. We also need a date for the Review Conference very soon.

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The draft defines the crime of aggression on two levels – first, in Para.1, there is the definition of the crime of aggression which includes the element of the act of aggression, and then, in Para.2, there is the definition of the act of aggression. For my delegation, it is important to have a threshold between these two levels. A fairly high threshold for the crime of aggression should be established. Not all acts of aggression are crimes of aggression. The threshold does not necessarily have to be established by type, i.e. by requiring cross-border attacks. We would require a “manifest” violation, to exclude acts where lawyers may disagree. To include only acts which were clearly undertaken with bad intentions. It is wise to have this already in the definition.

Paragraph 1 should be re-phrased slightly in order for it to be more congruent with the other crimes. It could read: “For the purpose of the present Statute, the crime of aggression *means* ...” We prefer the monistic approach, which is Variant (b), but we will not block Variant (a) if that is the one chosen.

With regards to Paragraph 2, there has been an important change. The definition is now detached from a reference to another organ. The reference to another organ would be a matter for the jurisdictional conditions and not the definition. We support the move to have a self-contained definition and to have for the definition of the crime of aggression a legal framework rather than a political one. This leaves judicial affairs to the ICC and political affairs where they belong. It respects the jurisdiction of the other bodies. Accused persons will also be able to properly defend themselves. This provides a self-contained definition and is the proper approach.

For Paragraph 3, we should remove the brackets around 28.

Samoa: We were delighted to see your paper. Last year was the 60th anniversary of the Nuremberg judgment. Sixty years ago people were having difficulties with similar issues. Your paper has taken us as far as anybody has managed to go. The Variants in the first paragraph now make it clear the distinction we can draw between the monistic approach and the differentiated approach. Many of us had difficulty in seeing how the differentiated approach would work and it is now clear that it can and would work effectively within the structure of the rest of the Rome Statute. We really do want to put the crime of aggression in there with the rest of the structure, which includes a determination to be quite precise in defining all crimes. We are well on our way to be just as precise as with the other crimes. Secondly, the way the Rome Statute is structured is that there are both the specific part with Art.6, 7 and 8 and the general part 3 of the Rome Statute. A big part of our discussion at Princeton was how aggression would fit with the general part. We are close to getting this right. We are at this point very close to leaning toward the differentiated approach. The ILC had at first leaned toward the monistic approach, but if you read their report nothing is very convincing about that. We believe that the differentiated approach is the appropriate one.

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We are not sure about some of the verbs mentioned in the paper; therefore we are not sure about an approach to conduct, but we are happy with the paper and will be happy to go on with the differentiated approach. Not sure also if we have in there the circumstance element, that is the position in the hierarchy that the actor holds – that needs a little more work. But in short, we are happy to go with the differentiated approach.

Secondly, I'd like to say a word or two about the way in which the definition is now decoupled from what the Security Council or another organ does after the event. It was difficult to square the old approach, which included a determination of another body in this element of the state act of aggression, with the basic principle of legality and fairness to the accused. We have now gotten over that problem and we are happy that is the case.

So far as the reference to Resolution 3314 is concerned, we are not at all sure at this point whether we ever really understood the difference between the generic and the other approaches to this. We are comfortable with how you have placed the specific references to paragraphs [Articles] 1 and 3 in Resolution 3314. Paragraph [Article] 1 provides a kind of chapeau and paragraph [Article] 3 sets out the details. For our part, we would be happy to leave the definition at that, not modified with reference to 'manifest' or reference to purposes for which the aggression might be carried out. On the other hand, if we must choose between your bracketed options, we prefer the one which uses 'manifest' for the same reasons mentioned by previous speakers.

Chairman: Thank you very much indeed for your comments and now I give the floor to Austria.

Austria: I am joining those who commended you for the paper for the good work that has been done so far. With regard to the definition of aggression, we recognize the advantages of pursuing a differentiated approach, through which the definition of the crime of aggression would be treated on the same manner as the other crimes falling under the Rome Statute and would thus require fewer changes to Part 3 of the Statute. We share the opinion voiced by States Parties that the state act of aggression should be a component of the crime of aggression.

We welcome the Swedish proposal to insert a strong threshold. We believe that the definition should not cover minor cases. By this threshold, we would also avoid the grey area problem and we would be happy to accept the use of a qualifier for that.

We have no particularly strong feelings toward the inclusion of the 'attempted' act of aggression, which means the incomplete act.

And finally we discourage the incorporation of a blank reference to UN GA resolution 3314, which was adopted in a different political context. And we want to bear in mind that, when referring to certain articles of this resolution or importing language from it, the

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importance of not undermining neither the general principle of criminal law *nullum crimen sine lege* nor the rights of individuals.

Netherlands: Thank you Mr. Chairman. It is good to see you again guiding our work Mr. Chairman. Our delegation will assist you as much as possible to make progress in the negotiations on the crime of aggression. This is an important moment in the work of the SWGCA. For the first time we all have an opportunity for negotiations on the substance, after three rounds of Princeton's informals. This is a moment of stocktaking. The Special Working Group has asked you to produce a new discussion paper and we thank you for preparing this. We have studied it carefully and it is a fair reflection of our work over the past few years and it has rightly chosen to keep the structure of the 2002 discussion paper.

Let me now give you some comments regarding Paragraphs 1, 2 and 3 of the discussion paper. Let me make a few comments regarding the threshold and regarding Paragraph 2 and then my colleague would like to make some comments regarding the differentiated and the monistic approach and regarding Paragraph 3 of the discussion paper.

As far as the threshold is concerned, in our view, we need a high threshold and as we indicated before, we would need to choose between the two options between brackets - our preference would be the first option.

As far as Paragraph 2 is concerned, we have a few comments. First of all, we need to take into account here that the SWGCA has only briefly discussed this paragraph during the last Princeton inter-sessional. Second, we agree with the basic approach taken: an individual can only commit a crime of aggression if his or her state commits a correspondent act of aggression and in order to know what an act of aggression is we should take recourse to Resolution 3314 of the GA.

Third, during the inter-sessional it was suggested to take out a few elements of this resolution. We have emphasized the risks of this approach. It took some 20 years of negotiations before Resolution 3314 was adopted. This carefully balanced compromise should not be re-opened for discussions in the context of our work, at least, if it is our aim to work towards a solution by 2009-2010.

At the same time, however, we have been convinced of the need not to simply refer to Resolution 3314 in its entirety, in particular because Article 4 of the definition of 1974 is too open-ended. This open-endedness is not a problem in inter-state relations and in a political instrument such as Resolution 3314. But it is a problem when it comes to criminal proceedings against individuals as it violates the *nullum crimen sine lege* principle. Therefore, Paragraph 2 rightly does not refer to Article 4 of Resolution 3314. Needless to say that the Security Council continues to be totally free to determine that a state has committed an act of aggression; also in cases other than those in the list in

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Article 3. However, in such cases, the ICC may not exercise jurisdiction over the individual concerned.

Four, we also agree that Articles 5, 6, 7 and 8 of Resolution 3314 should not be referred to, as they do not directly relate to the definition of the act of aggression. However, we are less certain about the deletion of Article 2. This article states that the first use of armed force is *prima facie* evidence of an act of aggression. Why should this be removed?

It is an important indication whether or not an act of aggression has taken place. We realize that there is some open-endedness in Article 2, but if we do not refer to it, we also lose the notion of first use of armed force.

Fifth and final point, how should the proposed Article 8-bis refer to Resolution 3314? As it is now proposed? Or should Article 8-bis reproduce the full text of the relevant paragraphs of Resolution 3314? In our view, the relevant paragraphs should be reproduced in their entirety. It would seem strange if the Statute would not contain the text of an important element of the crime of aggression, namely the specific acts which qualify as an act of aggression. In this context I may refer to the work of the International Law Commission during the 1990s and 80s. In its work on the draft of the code of crimes against peace and security of mankind, the ILC adopted in 1988 in first reading a provision on aggression that almost reproduced the text of Resolution 3314. In that context, a similar discussion took place as the one we are now having here, as is clear from the 1988 commentary to the proposed provision on aggression.

My colleague would now like to comment on Paragraph 1 and 3.

Chair, your discussion paper helps us to make progress in making a considerate choice between the so-called differentiated and monistic approach. Both options have a lot in common as they both aim to criminalize the individuals who played a decisive role in the collective acts of aggression. The monistic approach is supposed to be self-sufficient, without Article 25(3). The differentiated option is supposed to be applied with Article 25(3), but both options should lead to the same scope of criminalisation.

We certainly see the advantages of the differentiated approach: it is more specific than the monistic one and there is the systematic argument that Article 25(3) would apply to all of the Statute's crimes. The different forms of participation of Article 25(3) are developed and established for general application, so it makes sense not to move in another direction with regards to aggression and one may argue in favour of this approach that it could be interpreted and applied with the focus on the key players and principle perpetrators. However, there are still doubts whether this is the best approach.

Of course, we are still in search of the right verbs in Variant (a), to indicate what the aggressor is doing, and which fits in the framework of Article 25(3), but apart from this, the old monistic approach continues to have its attractiveness. It is straight-forward, it is

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simple and focuses clearly on the essence of the offence, a leadership crime. It followed from Nuremberg, it was followed in the 1996 draft code of the International Law Commission and we are not so much convinced by the systematic argument.

Those who question whether the crime of aggression is really so special and different from the other crimes have to answer the question of why the negotiation of the crime of aggression is so complex, why we need to go to Princeton and why we are here these days. It is a system crime more than the other crimes and its leadership element is generally accepted. The differentiated option, Chair, is without doubt the more complex option, finding the right verbs and also the need of adding a qualification in Article 23 to assure the right scope. For all these reasons we think that it is wise that you kept the two approaches in the discussion paper. The Netherlands is flexible and will certainly work together to find a solution. Thank you.

Chairman: Thanks a lot to the Dutch delegation for your comments. I next have Belgium from my list.

Belgium: (*translation from French*) Mr. Chairman, first of all allow me to thank you once again for the quality of the work that you have been carrying out since you started to chair our work and to thank you also for the quality of the document that you have produced for this session. I think it shows quite well the excellent work that you have produced and we are all more than happy to work on this new document. I will go straight to the very specific and technical comments on the different proposals that have been included on your paper. On behalf of Belgium I would make the following comments.

As Greece, Samoa and the Netherlands have said, clearly Variants (a) and (b) are two different formal ways of saying the same thing. So, whether you will choose one or the other approach, what is important are the results and the scope of the definition. For the reasons that have already been put forward by Greece and the Representative of Samoa, we would have a preference at this point on Variant (a), but we could be flexible when we reach the end of negotiations to choose the other. The advantage of course is that Variant (a) is more explicit and allows us to cover everything we want to cover.

What it is important is that in the choice of the verbs that are chosen for the individual conduct, which allows for the prosecution of a crime of aggression, we would choose a verb that reflects the fact that the activity that is reprehensible is not that of carrying out, but that of leading – the leadership crime.

As to the paragraph that can be added to the one or the other variant, the Belgian delegation prefers a threshold, and a threshold in terms of gravity and the scope of the crime that has been committed, which would be the first bracketed text, which as far as Belgium is concerned, it is the one that we would prefer to keep. The text that follows in the second set of square brackets, which talks of a war of aggression, does not seem

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appropriate to us for different reasons. First of all, in the definition of a crime and in terms of the specificity of the crime in a code, it gives a non-exhaustive list of examples, and it does not seem to us that this should be the case in international criminal law. And then in the first paragraph there would be a mix of the definition of the crime of aggression and the definition of the element of the act which you find also in paragraph 2, and so there is a certain redundancy and there even could be a contradiction with paragraph 2. So we feel that it would not be appropriate to include the second bracket in this second sub-paragraph.

With regards with Paragraph 2, we could join those delegations that have welcomed the specific reference to Resolution 3314, which was a text adopted by consensus, and which would refer specifically to Articles 1 and 3 of the Resolution. In fact, these are the two articles that exactly precise and technically define what you mean by an act of aggression.

We have listened carefully to the comments from the distinguished delegate from the Netherlands with regards to whether or not it was appropriate to refer to Article 2 of Resolution 3314. Our reading of Article 2 it is that in this specific context, Article 2 has to do more with the evidence – the proof of the act of aggression – and not the definition of the act of aggression. This is why we do not believe that we should be mentioning Article 2.

Now, we have no problems with replacing references to Articles 1 and 3 with the text in full of Articles 1 and 3 as proposed by the Netherlands. At this point, Mr Chairman, and since we are looking just at the definition of the crime of aggression and the act of aggression, we have nothing else to add. Thank you.

France: *(translation from French)* Mr. Chairman, I understand that you are in a hurry to get into the details and direct consideration of your paper. However, although I would like to be speedy, I would like to make some general comments. This is the first time that we are in this particular format to deal with the substance of this issue and, although we realise that there will be a Review Conference (that for the moment is set for a date which has not yet been specified), there has been progress thanks to your guidance of the work and thanks to the spirit that prevailed at Princeton. Even though some would think we have made very modest progress, we have been able to progress because we were not in a hurry, because there were not time pressures. So we hope we will continue in this spirit, because the definition of the crime of aggression does not only concern the ICC, but also more directly an international system where all the elements are sensitive which are related to this subject.

Your paper does include many of the elements that we have discussed over the last three years.

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So, coming to the specific three first paragraphs and the definition, - after the comments in regards to this new stage -, and what we have been able to discuss in our Capital, the differentiated approach would seem to us feasible and certainly the preferable one. It makes a reference to Article 25(3), which avoids the ambiguity of the single verb “participate”, which is the main difference between these variants. We want to look at the authors of the crime of aggression and we would like to be as prudent as possible and would favour a specific addition to Article 25(3), which would once again stress what is contained in paragraph 1 of the working document – namely that only a person who has direct authority over the political or military actions of a State can be guilty of a crime of aggression.

With regards to the terms in Para.1, we think that there is a risk with the choice between “act of aggression” and “armed attack”[French original: “attaque armée”]. The French word in the French version of the UN Charter translates “armed attack” into “agression armée”. This refers to Article 51 and is translated in English into “armed attack”. We would prefer the first term “act of aggression”, as in Article 39, which is what the Rome Statute is referring to. The notion of “agression armée” relates to the specific context of legitimate self-defence, which does not directly concern the proposal for the crime of aggression in the Rome Statute.

With regard to the two bracketed texts, we would prefer taking both out for different reasons. With regard to the first text, concerning the threshold, the threshold is already established in the Preamble and in Article 5, limiting the Court’s jurisdiction to the most serious crimes of concern to the international community as a whole. Introducing another threshold formulated differently would be introducing a risk of ambiguity. Additionally, the way it is stated could say that an act of aggression might not be a violation of the UN Charter, which would seem to be a contradiction.

The text in the second set of square brackets, as the Belgian delegation has said, anticipates the second paragraph on the notion of the act of aggression, so there might be a risk of redundancy, or a contradiction, or a confusion between two different formulations of the definition of the act.

With regards to the definition of the act we are in agreement with the different delegations which have spoken in favour of a reference to Resolution 3314, which was very lengthily negotiated and adopted by consensus. Although it was a different political context, it is still in effect, it benefits of the authority of the UN GA and not the ASP. Even though there is a specific objective to our work, we should not redefine in any way this pre-existing definition which itself asserts its integrity in its Article 8.

There is another difficulty in not referring to Article 2 of the Resolution, because Article 3, which has been favoured by a number of delegations, does refer explicitly to it. Art.2 provides the context with regards to the different events or acts which are listed in Article 3 of Resolution 3314. The context is essential to be able to qualify what it is an act of aggression, because any of these acts without the context could simply be a military

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action that could be legitimate. So you cannot simply list these acts and events without putting them in a context, necessarily a political context. That is the whole difficulty with this exercise.

Finally, on Paragraph 3, we have doubts here with regards to the appropriateness of covering or not covering this and we think that the debate didn't go to the end on this and the issue of referring or not referring to Articles 28 and 33; In your paper, you mention still Article 28, but Article 33 has gone out of our view and I don't think we have really concluded on this either. Both articles belong to the same problem and they should be treated in a similar fashion. I would have to say that we should explicitly say that they do not apply.

Now, the objective of the differentiated approach is to integrate the crime of aggression in the closest way possible to the other types of crimes that are directly under the purview of the ICC. Yet everyone underlines that this is the crime of all crimes, a crime that covers all the others and it would be surprising if the crime of aggression were committed without other crimes under the ICC not being also perpetrated. So, the ICC in fact covers this already. However, it is true, there is a moral and political objective and we are committed to the process.

With regards to the French version of your working paper, I would highlight, apart from the erroneous translation of "armed attack" as "attaque armee", that there are also two passages in brackets in the English version that are not in brackets in the French version: Articles 1 and 3 in Paragraph 2 are not in square brackets in the French version and Article 28 in the French version does not have the square brackets which are in Paragraph 3 in the English version.

Chairman: Many thanks for drawing our attention to the differences in the French version.

Russian Federation: *(translation from Russian)* First, allow me to express satisfaction with your chairmanship of this group and we hope that through your guidance we will be able to make serious progresses. Our delegation is grateful for this new discussion paper. Of course, it reflects the progress which has been achieved over the last two years and allows us to move further and it is a good basis for work. We share the view of the other delegations who feel that the work should be continued in the same constructive atmosphere, in a spirit of consensus and without excessive haste, which in our view does not serve us, considering the importance of this work.

The result of deciding on the provision on aggression, the result of that goes far beyond the Statute of the ICC and there is no doubt that it will have a serious impact on international law as a whole and generally on the system of the maintenance of international peace and security.

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With regards to our approach to these specific issue, which is indicated in your paper, at this stage I would like to note the following comments: we don't see a great difference between the general [monistic] and the specific [differentiated] approaches. In our view, to a great extent, they pursue the same goal. However, if we were to choose, we would have a preference for Variant (b) of Paragraph 1; that is the general [monistic] approach. This question has been discussed in quite some detail in Princeton and I shall not repeat those arguments which were made, and it seems to us that the general [monistic] approach is the more pragmatic one.

In any case, we do give our preference for the use of the term of "act of aggression". The other option in our view does not work so well and could lead to some deviations from the crime being considered. As we all know, the term "armed attack", which has been proposed, is used in Article 51 of the Charter of the UN and in the Charter there is no definition of it. There is no definition of "armed attack" either in universal treaties. The term "use of force" is a complex concept in itself which can be interpreted as being the main concept which covers a whole range of other actions and concepts.

And of course, the international court has noted that we need to differentiate between the most serious forms of the use of force and remove those more serious forms in regards to scope and power. We believe that for the purpose of the ICC, we need quite a high threshold for the commission of the crime, so that it can fall under the jurisdiction of the Court. Therefore, if a decision is taken, to use any other term rather than "act of aggression", it will be absolutely essential to add a phrase to show that the crime is by its character, gravity and scale a clear violation of the Charter of the UN. That is the wording which is proposed in your document

As regards Paragraph 2, we agree that it would be useful to have a reference to Resolution 3314. However, we would like to recall and remind certain delegations, - some delegations mentioned this already -, that this Resolution was itself the result of quite a complex compromise. Many years have been spent on its development and drafting. Therefore, it would hardly be useful to take out of its context just Articles 1 and 3. We believe that if we do have a reference to this Resolution, we must refer to it as a whole .

We have no objection to the crime of aggression also covering attempts to commit such crimes , in our view that is fully justified.

And lastly, in Paragraph 3 of your document, under Variant (b) of paragraph 1, it seems to us fully justified and useful.

Germany: Like other delegations before me, I want to thank you for this document which is very rich and perfectly-well reflects the different views and opinions that had been suggested in the informal discussions before this meeting. Also, I wanted to underline the importance of these meetings of three days. This is the first time in official meetings that we have the possibility to discuss the questions before us. This is indeed an

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opportunity we should very positively use. With regards to the possible date of the Review Conference, some speakers suggested that we do face time constraints, but after the beginning of this meeting and the very constructive approach many delegations have taken, we think that even with time constraints, we have a task which we don't start today and an enormous work has already been done and we can build on it. We can be optimistic.

Let me turn to the questions with regards to the definition. Germany has always been in favour of a generic approach – a self-contained definition. And for us the most important feature of this definition should be a very high threshold, to make sure that the definition we find for the crime of aggression is in line with the other crimes covered by the Rome Statute. It is important to underline the leadership character of the crime of aggression, i.e. that we cover only these individuals who guide and decide for a state and thus exclude people who are not within the inner-circle of a state's government.

Turning to Variant (a) and (b), I can indicate some measure of flexibility of my delegation. If it appears to be the majority decision, we are perfectly in line in supporting Variant (a) of the two possibilities. With regards to the exact wording - 'leads', 'directs', 'organises', 'direct and/or' - we also could show some flexibility. Maybe 'direct and/or' might be the best way to express what we want to say here.

When we turn to the very difficult question of the wording of "act of aggression" or "armed attack", my delegation had always been more in line with the "armed attack" approach, because we feel that this wording, that stems from Article 51 of the UN Charter, is the best way to say that only most sincere violations of the UN Charter should be covered by the crime of aggression, only those that generate the right of self-defence of the state that has been attacked.

We see Resolution 3314 as a long standing definition of aggression, but we feel that this document, which has not been created in the context of international criminal law, might not be able to express in the same way what we want to punish with the crime of aggression.

We feel that the wording "manifest violation" of the Charter of the UN is a decisive wording for the definition. This word is able to exclude grey zones in the whole wording. It is better than other words we discussed such as 'flagrant'. With the inclusion of this word we should be able to have a definition of the crime of aggression.

Czech Republic: I would like to express our appreciation for the considerable work that has been done so far within the SWGCA. Although this group has been charged with a very complicated task, we can say now that substantial progress has been achieved, in particular with regard to the overall legal analysis of the issue. The Czech Republic believes that at the end of the day reaching consensus on the definition of the crime of aggression will be a matter of political decision, however, what must not be missing is a

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comprehensive legal analysis and a legal basis for such a decision . The Czech Republic is generally of the view that developments of international law cannot be ignored.

Let me address some aspects of the definition of the crime of aggression.

First, speaking about the issue of individual participation in the crime, the Czech Republic believes that in order to safeguard the integrity of the Rome Statute, its provisions should be applied to the crime of aggression where possible. Therefore, the Czech Republic prefers the differentiated approach reflected in Variant (a), for example, to apply Article 25(3)(a)-(d), where we distinguish among various forms of participation to this crime. Such drafting solution reduces the risk of excluding certain groups of perpetrators. Furthermore, the leadership qualifier should be included in the definition.

Second, the question whether the definition should be generic or specific. The Czech Republic believes that the definition should be a combination of both of them. The reason is to avoid to the extent possible the disadvantages inherent in both approaches. The definition needs to be reasonably general in order not to omit certain situations, especially in view of the diversified and ever-developing practice, and at the same time not to cover situations which should not be covered due to their particular circumstances. The definition however needs to be reasonably specific in order to meet the requirement of the principle of the *nullum crimen sine lege* and to avoid arbitrariness.

For those reasons the Czech Republic favours a definition comprised of a carefully drafted general provision, supplemented by a specific, non-exhaustive list, based on the list contained in Resolution 3314.

Third, the question how to describe the aggression by a state. The Czech Republic for legal reasons supports the notion of an "act of aggression" and consequently the reference to Resolution 3314. However, we do not support proposals for a qualifier such as "flagrant" or "manifest", since Article 5(1) of the Rome Statute already limits the jurisdiction of the Court to the most serious crimes. And the notions in question, such as "armed attack" being the narrowest, and "use of force" being the broadest one, refer to different situations and are used by the UN Charter accordingly.

China: *(translation from Chinese)* On behalf of my delegation, let me express our gratitude for your leadership. The SWGCA has indeed achieved great results as reflected in the new discussion paper written by you. The common understanding of the parties has been increasing, the differences have been dwindling, and we wish you the best for your work.

As the same time, we should also come to terms with the fact that the task we are dealing with is not an obvious one and requires arduous work. China is willing to work with all parties concerned in a spirit of common understanding and to proceed from a continuous use of political wisdom and legal skills, so as to gain agreement on some of the issues discussed.

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With regard to the new text furnished by Mr. Chairman, this delegation has two preliminary thoughts to share with you. Regarding Paragraph 2, on the definition of the act of aggression, China supports invoking Resolution 3314 in its entirety. That to us should also represent part of the common understanding of the majority of participants. Resolution 3314 was hard won and takes into account comprehensively various factors and balances the concerns of the different parties.

We wish to draw your attention to one thing in particular: Article 8 of the Resolution highlights that in terms of explanation and application all the clauses and articles are closely inter-related and must not be taken out of its context. We firmly believe that it is essential to maintain the integrity of the Resolution 3314. However, if we only refer to Articles 1 or 3 of the Resolution, that approach would sever the links between the different articles that relate to the definition of the act of aggression and damage the integrity of the definition and would not satisfy the need of the principle of legality. In essence, if we only refer to certain articles of the Resolution in a selective manner, so as to use them as our basis for the definition of the act of aggression, that approach, legally, technically and politically-speaking, would be problematic. Therefore, we support the deletion of the contents in the square bracket in Paragraph 2 .

In Resolution 3314, at many occasions, the rights and obligations of the UN Security Council have been alluded to. We have to face this squarely. So we believe that in the determination of the act of aggression, the determination of the act of aggression by the Security Council is a pre-condition for the determination of the crime of aggression by the ICC. No other organ has the right to come out with a similar determination. The above understanding originates from Articles 24 and 39 of the UN Charter, in which the Security Council has been accorded the primary authority and responsibility in maintaining international peace and security and such an approach is in accordance with the collective security mechanism which has long been in practice. At the same time, in accordance with Article 103 of the UN Charter, the Charter obligations take precedence over other obligations that the UN member states undertake under other international agreements, including the Rome Statute. Therefore, when it comes to the definition of an act of aggression, all UN member states should comply with the position as stated in the UN Charter and safeguard the authority of the Security Council in maintaining peace and security. We thus endorse the second Option that we find in Paragraph 5, which to us represents the balanced and constructive option.

Lastly, responding to the suggestion by the Chairman , we wish to elaborate a bit on the future of the work. We believe the mode of work we adopted at Princeton is very good indeed, as the meeting was informal. It is in the interest of open and frank discussions. It allowed an opportunity to discuss and negotiate. No preformed conclusion was set before the meeting kicked off. We are in favour of the continued use of the above mode of work. Opinions and views coming from the discussion can well find themselves in a document that could be in a tabled form. Matters of consensus can as well be listed in a tabled form so that we can sort out where our minds meet. Differences can also find themselves in a

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meeting document. In that way, opinions can be found for easy reference in the future so that we can sort out where the problems are and where our minds meet. This would be in the interest of our future work.

Chair: I have the following speakers on my list for the afternoon as of now I would like to thank you very much for the discussion of this morning that I found very encouraging. And I hope that the speakers this afternoon will also offer very specific comments on the Discussion Paper. I encourage this very strongly. We will start at 3:00 p.m. sharp.