

Informal and Unofficial Notes from the ASP
SWGCA, 30 January 2007 (Afternoon Session) – Formal Meeting

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Chairman: [...]

Trinidad Tobago: The Court is an important vehicle in the fight against impunity. Despite the independence of the Court, the preamble of the Statute contemplates cooperation between the Court and the UN system. In citing the preamble as the interpretation of the Statute, we refer to two preambular paragraphs which emphasize the need for cooperation between the ICC and the UN: „Reaffirming the Purposes and Principle of the Charter of the United Nations, and in particular that all States shall refrain from the use of force; Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system“. From the foregoing, it is clear that the need for cooperation between the Court and the UN system is self-evident. With this in mind, Mr. Chairman, we are in favor of the language proposed in Paragraph 4 as amended by the Swedish proposal, which sought to strike a balance between the UN system and the independence of the Court.

As far as our country is concerned, we find some merit with Option 3 and 4 of Paragraph 5. Option 3 would ensure that the principal representative organ of the UN system, the General Assembly, would be able to make a determination as to whether an act of aggression has taken place. As far as the role of the ICJ is concerned, another important organ of the United Nations, the ICJ could also make such a determination and it would be in keeping with the cooperation envisioned in the preamble of the Rome Statute. Nevertheless, we seek to clarify whether the Court has to proceed under Chapter 2 of the ICJ, because Chapter 2 deals with contentious issues between States. We want this body to examine whether it wouldn't be better for the Court to proceed under Chapter 4 of the ICJ Statute, which deals with advisory opinions. We remain confident in the work of this body. Our positions are not held in granite, but we are flexible, and we will be willing to amend our position as the debate unfolds.

Uganda: Mr. Chairman, this is the very first time our delegation has taken the floor. I would like to join other delegations in commending you for the excellent work that has been carried out in the Working Group, which resulted in the current paper, that is now the subject of our meeting and is extremely helpful in furthering our discussions on the crime of aggression. We shall keep our comments very concise.

We would like to support the views expressed by the delegation of Nigeria; our delegation doesn't favor the inclusion of Paragraphs 4 and 5, because the Security

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Council is not a Court; it makes political decisions, and we would like to ensure the independence of the Court in exercising its mandate without interference of outside bodies, particularly political bodies. The mandate of the ICC, as a judicial body, is, *inter alia*, to determine whether individuals committed a crime, and the crimes are described in the Statute. Article 39 of the Charter determines whether an act of aggression has taken place, and it would then further determine enforcement measures against the State, and it doesn't deal with individuals. The Security Council has more often than not refrained and failed from taking a decision when allegations of aggression have been made. The fact that it has not taken a decision doesn't mean that an act of aggression hasn't taken place. The ICC cannot exercise its jurisdiction, and if the ICC cannot exercise its jurisdiction, then it would encourage impunity.

Our delegation is of the opinion that Article 16 of the Statute provides sufficient involvement by the Security Council; this involvement should not be stretched to the extent of threatening the independence and integrity of the Court. Mr. Chairman, this is a preliminary position, and we may continue at a later time. Thank you very much.

Brazil: Mr. Chairman, my delegation wishes to put forward some very brief and straightforward remarks with respect to Paragraphs 4 and 5. Brazil agrees with other delegations, in particular with Norway, in the sense that Paragraph 4 presents the right idea, but could be redrafted somehow in order to improve its wording.

As regards Paragraph 5, my delegation supports Option 1 and the application of the provisions contained in Article 13 of the Rome Statute to the largest extent possible to the crime of aggression. Even though Brazil is not against Options 3 and 4, it is our view that a position of the United Nations General Assembly or the International Court of Justice would not add much weight to a possible ruling of the ICC regarding the crime of aggression.

Mr. Chairman, as we are all aware, the United Nations Security Council has primary responsibility for the maintenance of international peace and security, according to Article 24 of the UN Charter. That does not imply that the Security Council has exclusive responsibility for international peace and security or for the decisions if an act of aggression has occurred. There is no doubt that it would be much easier to implement a decision made by the ICC with full support from the Security Council. However, it is important to highlight that the ICC is a judicial body responsible for delivering justice, according to international law. The work of the ICC cannot be obstructed by decisions made by political organs, even if that organ is the United Nations Security Council. Justice is an extremely important value, that we should all uphold regardless of political decisions. Therefore, Brazil is of the view that Option 2 would not be the best way of addressing the trigger mechanism of the crime of aggression.

Brazil welcomes the proposal by Belgium, which will be analysed more thoroughly, so that we can have more elaborate comments on that.

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Argentina (*translation from Spanish*): Mr. Chairman, as we have expressed on many occasions, the ICC is an independent body and its main function is to assess individual responsibility, judge individual responsibility, without prejudice to there perhaps being a determination made by another body of an act of aggression. This does not imply a prejudgement of the case or of the individual responsibility of individuals. In fact, this determination of an act of aggression by the body which, according to the Charter is able to make that determination, doesn't mean *ipso facto* that the Court has the obligation to rest the case, or to stop any proceedings with regard to clarifying the issue. This is why we feel that the determination of an act of aggression by another body might be important for establishing whether there has been an act of aggression. It might be an important part of the picture. We also need to take into account Article 16 of the Rome Statute.

With regard to your paper, and particularly with regard to Paragraph 5, (of course this is subject to further study), but the position of Argentina is that Options 1, 3, and 4 are not necessarily mutually exclusive. But, of course, these are complicated matters that require greater reflection. Subsequently, we will be making a comment on the Swedish and Belgian proposals.

Spain (*translated from Spanish*): Thank you, Chairman. By way of preliminary comment, my delegation is very happy to see that the document that you have presented and the structure of the debate show that the determination of an act of aggression by a body other than the Court is not a principal part of the definition.

My delegation in general feels that Paragraph 4 is acceptable, although we do share some of the comments that have been made by other delegations with regard to its wording (particularly that of Norway). In any event, the current wording of the paragraph has the advantage of striking a balance between the guarantee of the independence of the Court and the need to ensure the respect of the relevant provisions of the UN Charter, that is required by Article 5(2) of the Rome Statute. Therefore, my delegation positively views the Swedish proposal. Although we share the spirit of their first proposal, we don't feel that the wording that was produced yesterday in the room can be a final wording. We need to give more thought to that wording, in order to reflect the true scope and meaning of the proposal.

With regard to Paragraph 5, my delegation would like to draw your attention to the fact that we see that the intervention of the Court and of other bodies with regard to the crime of aggression is clearly distinct. And in particular, we feel that the intervention of other bodies that are not part of the Court can only be understood as part of what we have in the last indent of paragraph [article] 5 of the Rome Statute; therefore, we feel that what we are talking about here is a political determination of an act of aggression. With that understanding, my delegation feels that Option 2 is not acceptable; we would prefer Option 1 and Option 3. In the latter case, we say this because it enables the main political bodies of the UN, both are competent in their respective ways, to express themselves politically with regard to an act of aggression.

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With regard to Option 4, my delegation does not feel it is appropriate, because the intervention of a judicial body in the predetermination phase of the crime of aggression doesn't sit well with political interests, which my delegation feels have to be taken into account in a predetermination. New problems could be created as well with regard to the two different levels of jurisdiction, which are not clearly defined.

Finally, with regard to the Belgian proposal my delegation will study this in detail, and in particular the proposal in Article 15 *bis*, in order to assess what contribution it can make to solving this specific and real problem that we are dealing with here.

Sweden: Thank you, Mr. Chair. This is again in response to your encouragement to keep this debate as interactive as possible. First of all, I'd like to associate myself fully to the opinions expressed by my Greek colleague with respect to the status of the discussion paper. It is important that your paper reflects discussions. This of course does not mean that old proposals are no longer on the table, until they are withdrawn. But the paper as such should reflect the main turns of the discussion.

With regard to Article 39 of the UN Charter, I firmly believe that it is not the case that only the Security Council has the authority to determine whether an act of aggression has occurred. A few years ago, the UN Secretariat published a book called "Historical Review of Developments Relating to Aggression"; it is available in the UN bookstore for 30 Dollars, I believe. There are several examples, in fact a large number, of resolutions in which the UN General Assembly has pronounced itself on the existence of acts of aggression; you can also check the voting records for these resolutions. I believe all States present here have voted for some of these resolutions. Nevertheless, we might still give the Security Council a prominent role in the jurisdiction phase; that is a political choice we have.

Regarding the four options in Paragraph 5, I noticed that there has been some support for Options 3 and 4, but I also have the sense that most of that support has been as the second best choice to Option 1. Nevertheless, the two options still do have some support. But I believe we should concentrate on Options 1 and 2. These two might look like extremes; the choice between them is surely difficult. Legal principles and political realities do not always speak in the same direction. I think we should try to devote some energy to find whether there is a middle-ground between them.

As was rightly identified by my colleague from Finland, the proposals that we made yesterday did fit well into the modified version of Option 2, but they could have well fit with any of the other options. The purpose of those suggestions, which could surely be redrafted in better English, was to make it as easy as possible for the Security Council to say *yes* and as difficult as possible to say *no*.

I note the Russian suggestion for trying to develop a mechanism for interaction between the Security Council and the Prosecutor. Several colleagues have discussed at what stage of the proceedings the Security Council should play a role. I believe that the Democratic

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Republic of Congo and Mexico and others were interested in this. That is an issue that we might explore further.

Regarding the Norwegian suggestion to redraft Paragraph 4, that's a sensible proposal. But we must make sure that the drafting doesn't prejudice the choice between the four options.

Regarding the Belgian proposal, we are very grateful for it, and for all the hard work that went into it, and we will study it further, in particular to see what value it would bring to our deliberations. One of the advantages is that it puts our discussion in the context of the worded provisions on the other crimes.

Chairman: When President Hugo Chavez addressed the General Assembly last fall, he recommended a book by Noam Chomsky which promptly became the number 1 on the bestseller list. I am curious to see if your statement will prompt a mad rush to the book store. [Laughter] But indeed, I recommend this for anybody with an interest in the subject.

Estonia: Thank you, Mr. Chairman. For those rushing to the bookstore, it is also available in pdf format on the UN website. [Laughter]

Mr. Chairman, thank you for producing the discussion paper. It seems to us that the two options in Paragraph 5, Option 1 and 2, will probably not serve as a compromise, and a more modified approach will be needed. During our discussions, many delegations have referred to the different roles played in the maintenance of peace and security by different UN organs. As Brazil has just expressedly mentioned, the Security Council has the primary, but not the exclusive role, as the ICJ has ascertained already 45 years ago. We share the view of the Netherlands, that whatever we decide here, we won't affect the powers of these organs, and we would just have to decide to what extent we would have to link these organs to the ICC.

The proposal made by Belgium and the comment made by Liechtenstein certainly have reminded us that more structural changes to the Statute are needed when negotiating the jurisdiction issues. We certainly think this approach should be explored further. We agree with Finland that they might not solve the paramount disagreements that we have here, but they would foster our understanding how the Court will proceed in different instances of referral.

Coming to the proposal by Norway, we thank the Norwegian delegation on the proposal to amend Paragraph 4; it's important to us that the meaning of this paragraph would be the same as the one drafted by the Chairman, so we would need to look at it more thoroughly.

Italy: Let me first address in very general terms the issue at stake. We understand that the principle of the independence of the judiciary and of the ICC is the departure point of reasoning in addressing the pending issue. The Court is an independent body, this makes

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the difference. If we give up on this point, the Court becomes just another political body, deciding in this case on a situation entailing aggression by a State. This would seriously affect the credibility of the Court. If the Security Council, which has undoubtedly the primary responsibility on peace and security, suspects that the proceedings before the Court might affect peace and security, it has already under the Rome Statute a way out (Article 16). It has already been used, maybe not appropriately, by the Security Council for adopting Resolutions 1422 and 1487.

Following this reasoning and addressing Paragraph 5, Option 1 should be preferred. However, we understand it's inappropriate for the ICC to make a determination on the existence of acts of aggression. This should be reserved to United Nations organs, Security Council on the one hand, and the General Assembly, and as far as responsibility of States is concerned, the ICJ. This is why we favor Option 2 with amendments that take into account the involvement of other bodies in determining the precondition to commission existence of an act of aggression.

What is the body? The General Assembly versus the ICJ? Maybe both of them; maybe it is better to concentrate on the ICJ. I say this, because, to some extent, if we didn't have the ICJ involved in this process, at some point the right of the accused to challenge the existence of an act of aggression should be granted in front of the ICC. If, on the other hand, we had the ICJ involved in the determination of the preconditions, the right of the accused could be satisfied, because another judicial body, which has exclusive competence on the appreciation of the existence of acts of aggression, under a judicial point of view, has already taken a decision. It is not new in both national and international law, that there is another judicial body, which can solve a precondition for the exercise of jurisdiction by the principal judicial body. It is something which exists under human rights law. Option 3 and 4 can be deleted, in our view, although we need to take into account some parts of their content in Option 2.

In this regard, we go much along the lines proposed by the Netherlands. As far as Paragraph 4 is concerned, we are in favor of the amendments proposed by Norway; although the paragraph has to be redrafted, we look forward to informals for this.

India: Thank you, Mr. Chairman. Since it is the first time we are taking the floor, I would like to express all the thanks to you for the discussion paper. The position of India on the United Nations Security Council's role vis-à-vis the Court is well-known. We don't favor any option that would result in the the Security Council playing a determinant role in the Court's jurisdiction over the crime of aggression. We believe that the Security Council has the primary but not exclusive responsibility under Article 39 in determining the existence of acts of aggression. But its failure to do so should not prevent the ICC from exercising jurisdiction over the crime of aggression. As the distinguished delegate of Sweden has already stated, the United Nations General Assembly has made several such determinations in various instances. Therefore, at this stage we would favor retention of Options 1, 3, and 4 in Paragraph 5. We look favorably to the proposal that this crime

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should be treated similar to the other crimes referred to in Article 5 of the Statute. Therefore, we would like to come back to the proposals presented by Belgium.

Chair: If no other delegations wish to take the floor, I give to floor to two NGO representatives.

Jutta Bertram-Nothnagel (Unions Internationale des Avocats): Thank you very much for this privilege. I would like to express just one quick concern over the new discussion paper. I understand that when you clean-sweep Paragraph 5 and just leave Option 1 and 2, you then maybe encourage States to come up with new creative ideas; and we very much like this, and we very much like the proposals that have been made so far. At the same time, we want to caution you not to be too quick to throw out what has been considered earlier. Are you really finding it more troublesome to have a cumbersome solution than to have none? This is just what I wanted to say at this moment.

Ben Ferencz (former Nuremberg Prosecutor): Thank you very much, Mr. Chairman. My name is Benjamin Ferencz. Some of you do not know me. You are lucky. I have been working on this a long time as you know, and I appreciate the opportunity the Chairman has given me at this stage to give my views on this. I appreciate very much everything the Chairman has done to bring it to this point, where we have only a few options before us. And it has been a long time coming. This is why I have been so insistent in finishing the job, now that we are so close to the end. Let me see if I can put the dots together, as the representative of Belgium I think has tried to do in this paper, - taking a new approach. I think we have to be bold now. There's no purpose in continuing the old arguments, which have been repeated year after year, and making very little progress; there have been some modifications in the words, but we are not much closer to the goal. Let me see if I can pick up the main problem as I see it after having studied the issue for at least 50 years. The main problem is how do you assure the independence of the Court. We must respect the UN Charter and also the Rome Statute. The trick here is to try to find a compromise within the context of the papers which have been circulated.

I will put before you an idea that has the benefit of simplicity. I suggest to eliminate Paragraph 5 completely. Being fully aware that the Court must be independent, and that the Security Council cannot be allowed to dominate the Court in any additional ways than the ones prescribed in Article 16, which gives them pretty much a veto power to jump in at any time. And I think it can be done if you can follow with me the existing wording of the Statute, and I will then explain the reasoning why I think it might solve what bothers you and what bothers me. Article 15 says, that "the Prosecutor shall analyse the seriousness of the information received; for this purpose he/she may take additional information from States, United Nations, NGOs, reliable sources..." So the Statute gives the Prosecutor a certain amount of independence in analyzing the situation; he is not dependent on the Security Council for that; on the contrary, he has to notify the Security Council when he begins to consider this matter. If, on the basis of this analysis, he concludes that no crime of aggression has been committed, then the case is closed as far as the criminal action is concerned. The Court reaches this decision completely

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independently. If, on the other hand, the indicators are that, if he had been put on trial for the crime of aggression, he would have been convicted, that conclusion should follow automatically from the analysis of the facts he has assembled. Of course, all these matters become matters of public record and with the help of the Internet, they can immediately spread to everybody in this room, and to all their citizens. This puts us into a position of having a means of persuading, or coercing the Security Council to do what they were intended to do when the Charter was signed; this is the shame factor; I call it the “shame factor.” If they have behaved badly... we call for it as the principal tool of the ICC; if we think about it, it’s the only tool they have. The ICC has absolutely no enforcement power, certainly not against the 5 permanent members; if they disagree with you, there’s no way in the world the ICC can rely on anything else than public outrage. But don’t underestimate public outrage, as some of our friends in Washington have recently discovered.

If we do that, then all we have to do is change a couple of words in Paragraph 4 and cut out Paragraph 5 completely. Paragraph 4 would read as follows: “where the Prosecutor intends to proceed, the Prosecutor shall analyze the seriousness of the information received with respect to a crime of aggression,” which is the wording which comes straight out of Article 15(2), and then you have only the last sentence “if no Security Council determination exists, the Court will notify the Security Council of the situation before the Court.” So I’ve taken up on Liechtenstein’s suggestion and others’ as well to simply reword the suggestion in Paragraph 4, the essence of which is to accept the Charter restraints on this Court, because we cannot avoid them. Many people here have expressed regret on this, and I am one of them, but you have to accept what you cannot avoid, and find another way of achieving your goal.

Now let me add one other possibility. This is what we did at Nuremberg as well. We charge the defendant not merely, in this case, with the crime of aggression, but also with crimes against humanity. You don’t have to wait for the Security Council to do anything; you send him a notice: “this is what I intend to do.” You do that out of courtesy, or as the Russian colleague suggested, as a dialogue. There should be a continuous dialogue between these two agencies; they are both presumably, and I think in fact, designed to create a peaceful world. You charge him with crimes against humanity and proceed with that case, without further delay. As soon as you have the evidence, you go ahead. The Security Council can deal with the problem as long as they like. In the meanwhile, if your trial is over, you will have sentenced the defendant. He will be in prison, provided that he’s guilty, and in the meantime he’ll be sitting in jail waiting for the Security Council to decide whether it’s aggression or not. But the important thing is that you will have allowed the crime of aggression to be a crime under the jurisdiction of the Court, and with the possibility of the Court to act on it. This won’t deter everybody, not that I think that having this will deter all aggression, but it may deter some, and it is certainly an essential part of a rational, peaceful world order.

In concluding, let me thank all of you who have indicated flexibility on the definition. I think that the definition of aggression should not be a real problem. Most people agree

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that A and B are all the same. The important thing is to come up with something that will be accepted, not with something that will be better. Anybody can sit down and write something which is better than this Statute; I can give you a thousand improvements and most scholars can do the same. But it's a great thing. It is the first time in human history when the nations of the world have come together and they have said "we have got to have a Court and the rule of law to deal with the most terrible of all crimes, the crime of aggression." Don't let that disappear in trifling arguments which are not vital. The Security Council is a vital instrument, the Charter is a vital instrument. We can't ignore it. I wish they had carried out the purpose they were created for, of being impartial judges to carry out the will of the world. But we can't do that. We have to reach out for a compromise. And those of you who are flexible, think about it.

I don't sell books in the UN. All my book you can get for free, on my website, at www.benferencz.org. My final plea in addition to the appreciation for those of you who have taken this seriously, and I am sure you all have, to all of you who have recommended the right conclusion, which is an independent court, and have indicated a willingness to proceed, if you continue in the same spirit, I am sure that under the able chairmanship that we now have, and have always had, I am sure we will make progress.

Chairman: Thank you very much. This concludes our discussion on the second part, on Paragraphs 4 and 5. I think we've had a rich debate. Thank you all for contributing. I believe at this point that looking now at Paragraph 4 in particular, it is worth looking at the drafting again. I certainly have a better picture as far as Paragraph 5 is concerned, in particular the advisability of deleting Options 3 and 4. I do not believe at this point that there is any good chance to make progress on Paragraph 5, and we will not refer to it as far as the informals are concerned in this session.

For the rest of the afternoon, we will go into informals and look at the drafting of Paragraph 1 to see if we can make progress. I have circulated a new paper on Para.1. It does not have a title. It is prepared by me.I would like your thoughts on this. The new paper tries to improve Variant (a) It eliminates some of the conduct verbs. It tries to respond to the view expressed by many to come up with alternative language modeled on the structure of the other crimes in the Statute, i.e. it starts „the crime of aggression means ...“ I have taken out the leadership clause and put it in a chapeau. This doesn't change the substantive requirement, it's just a matter of drafting

Formal meeting ends and gives way, after a short break, to informal consultations.