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Informal inter-sessional meeting of the Special Working Group on the Crime of Aggression, held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, United States, from 8 to 11 June 2006

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I. Introduction

1. Pursuant to a recommendation by the Assembly of States Parties and at the invitation of the Government of Liechtenstein, an informal inter-sessional meeting of the Special Working Group on the Crime of Aggression was held at the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, New Jersey, United States, from 8 to 11 June 2006. Invitations to participate in the meeting had been sent to all States, as well as to representatives of civil society. Ambassador Christian Wenaweser (Liechtenstein) chaired the meeting. The annotated agenda of the meeting is contained in annex III.

2. The participants in the informal inter-sessional meeting expressed their appreciation to the Governments of Canada, Finland, Liechtenstein, the Netherlands, Sweden and Switzerland for the financial support they had provided for the meeting and to the Liechtenstein Institute on Self-Determination at Princeton University for hosting and giving financial support for the event.

3. The participants observed a minute of silence in memory of Dr. Medard Rwelamira, the late Secretary of the Assembly of States Parties who passed away on 3 April 2006. The Chairman recalled the outstanding performance of Dr. Rwelamira, a dear colleague and close friend of many delegates, in assisting the Special Working Group.

4. The meeting noted with regret that the delegation of Cuba had, once more, been denied permission to travel to Princeton in order to attend the meeting, in spite of efforts by the President of the Assembly and the Chair of the Special Working Group.

5. The present document does not necessarily represent the views of the Governments that the participants represent. It seeks to reflect conclusions and opinions regarding different issues pertaining to the crime of aggression; and it is understood that these issues will have to be reassessed in light of further work on the crime of aggression. It is hoped that the material in the present document will facilitate the work of the Special Working Group on the Crime of Aggression.

II. Summary of proceedings

6. It was decided to focus the work in Princeton on the five items listed in the annotated agenda of the meeting: The "crime" of aggression – defining the individual's conduct; The conditions for the exercise of jurisdiction; The "act" of aggression – defining the act of the State; Other substantive issues, and Future work of the Special Working Group on the Crime of Aggression. Particular attention was devoted to the issues identified in the discussion papers submitted to the Special Working Group: discussion paper No. 1, entitled "The crime of Aggression and Article 25, paragraph 3, of the Statute"; discussion paper No. 2, entitled "The Conditions for the exercise of jurisdiction with respect to the crime of aggression", and discussion paper No. 3, entitled "Definition of Aggression in the context of the Statute of the ICC". The Chairman reminded participants that the work of the Special Working Group on the Crime of Aggression continues to be based on the "Discussion paper proposed by the Coordinator", PCNICC/2002/2/Add.2 (reproduced in annex II and hereafter referred to as "2002 Coordinator's paper").

A. The act of aggression – defining the conduct of the State

Generic versus specific approach

7. There was extensive discussion of whether the definition of the act of aggression at the State level as referred to in paragraph 2 of the 2002 Coordinator's paper should be generic or specific. It was recalled that a generic definition was one which does not include a list of acts of aggression, while a specific definition was accompanied by such a list, e.g. the one contained in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.

8. Several participants favoured a generic definition. It was argued that a generic definition was the most pragmatic approach as it would be impossible to capture all instances in which the crime of aggression would be applicable. The point was made that the option of an illustrative list, such as that contained in General Assembly resolution 3314, was difficult to reconcile with the need to respect the principle of legality. Some delegations also noted that the option of a specific list might create potential conflicts of jurisdiction between the Security Council and the Court, while others argued that such risks were alleviated by the fact that it was for the Court to determine which cases fell under the definition of aggression.

9. Those participants who favoured a specific approach noted that a detailed list of acts was better suited to ensure legal clarity and consistency with the definitions of other crimes in articles 6 to 8 of the Rome Statute. It was stressed that a specific definition was essential in light of the importance of the crime and the requirements under article 22 of the Statute. The point was made that some specific acts listed in General Assembly resolution 3314 such as the "blockade of ports or coasts of a State" (article 3(c) of General Assembly resolution 3314) might not be captured by a generic definition.

10. However, it was also emphasized that the generic and specific approaches could easily be combined by way of including a general chapeau and a non-exhaustive list of specific acts.

11. Reference was made in this context to the example of article 7 of the Rome Statute dealing with crimes against humanity which combines a generic chapeau with a specific but open-ended list ("other inhumane acts", article 7(1)(k)). It was noted that the illustrative list contained in General Assembly resolution 3314 provided a good starting point, since that resolution was generally accepted and offered some leeway to take new developments into account.

12. Participants agreed that the principle of legality should be safeguarded. In this context it was pointed out that the principle of legality allows for some flexibility according to article 15, paragraph 2, of the International Covenant for the Protection of Civil and Political Rights, which was drafted with the Nuremberg crimes, including the crime of aggression, in mind.

13. Regarding the definition of the crime of aggression, a suggestion was made to include a comprehensive definition by reference to all relevant precedents: the Nuremberg Charter, as affirmed by General Assembly resolution 95(I); Principle VI of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal, adopted by the International Law Commission in 1950; General Assembly resolution 3314

(XXIX); and the draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission in 1996.

Description of the act of aggression

14. The question was discussed how to describe the aggression by a State, namely whether to use the words "use of force", "armed attack", "act of aggression" or "use of armed force". It was recalled that the Charter of the United Nations uses a variety of relevant notions (article 2 (4), article 39, article 51) and that all terms listed above referred to the quality of the act (as opposed to the intensity of the act which is encompassed in the qualifier "flagrant or manifest").

15. Many participants preferred to retain the notion of "act of aggression" in paragraphs 1 and 2 of the 2002 Coordinator's paper and the reference therein to General Assembly resolution 3314, which in article 1 defined the act of aggression as the "use of armed force". Any departure from this resolution should be considered with caution. The view was expressed that the term "act of aggression" was necessary to link the collective act of the State to the crime committed by the individual. It was noted that the word "collective" could be added to underline the distinction between the act of the State and the individual crime of aggression.

16. Some delegations expressed a preference for the use of the term "armed attack". A concern was expressed that the term "act of aggression" might be too broad to serve as a basis for defining the crime of aggression in accordance with customary international law.

17. The point was also made that the practical implications of using different words were limited, since all of the four notions are used in different parts of General Assembly resolution 3314. The difference in wording and meaning would only become tangible if a generic approach was to be retained.

Qualifying the State act as "flagrant" or "manifest" violation of the Charter

18. There was a discussion on the phrase "which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations" in paragraph 1 of the 2002 Coordinator's paper. Some participants stressed that there was no need for an additional qualifier of the term "violation of the Charter". It was argued that an act of aggression entails typically an attack against the "sovereignty, territorial integrity or political independence of a state" (article 1 of General Assembly resolution 3314), which is serious enough not to warrant any further qualification. The point was made that the idea of a threshold was inherent in the limitation of the jurisdiction of the Court under article 1 ("most serious crimes of international concern") and would be taken into account in the practice of the Court. In this connection, it was emphasized that criminal prosecution of the crime of aggression was tied to a prior determination by the Security Council. It was added that the phrase under discussion was technically not part of the definition of the act, but that circumstances can be taken into account in the course of criminal proceedings even in the absence of such a phrase (e.g. under articles 31 and 32 of the Rome Statute). Moreover, it was stressed that both terms are uncertain and difficult to distinguish in substance; a qualifier should therefore rather refer to the gravity of the act.

19. Some participants continued to support the retention of the phrase, as this would serve to exclude some borderline cases. They generally favoured introducing the idea of a threshold, which could for example be achieved through the use of a qualifier. In this context, it was noted that the crime of aggression had to be seen in the context of the preamble as well as article 1 of the Rome Statute, which made reference to the most serious crimes of concern to the international community.

20. A tendency was noted to prefer the term ‘manifest’ over the notion of ‘flagrant’ if a qualifier was to be retained.

Limiting jurisdiction to acts amounting to “war of aggression”

21. It was noted that the concept of limiting the jurisdiction to acts amounting to a “war of aggression”, which was based on the Nuremberg precedent, had been raised during the Preparatory Commission and was reflected in option two, paragraph one, of the 2002 Coordinator’s paper.

22. It was also noted that option one, paragraph one, of the 2002 Coordinator’s paper dealt with the issue of a war of aggression, but did not limit the jurisdiction to such acts.

23. There was a predominant view that the inclusion of a reference to a “war of aggression” in the definition would be too restrictive, in particular in light of the acts specified in article 3 of General Assembly resolution 3314, and that therefore option three, paragraph one, of the 2002 Coordinator’s paper would be preferred.

24. The view was also expressed, however, that the acts in question should be tantamount to a “war of aggression” in order not to deviate from customary international law. On the other hand, what customary law requires was disputed.

Relevance of object or result of an act of aggression

25. There was a discussion whether the object or the result of an act of aggression should be relevant. Options 1 and 2 of paragraph 1 of the 2002 Coordinator’s paper contain such references (“object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof”).

26. Most participants voiced a preference for not including the object or result in this paragraph. The reasons for not doing so included, inter alia: the fact that the object extends into the *ius in bello*, whereas the crime of aggression fell within the *ius ad bellum*; the difficulties in making an exhaustive enumeration of the objects or results; the fact that articles 3 and 5 of General Assembly resolution 3314 only included military occupation or annexation as examples of aggression; and the fact that the Security Council does not refer to the object or result in its decisions relating to aggression.

27. The point was made that military occupation should be included in the definition, in order to address the continuity of the situation after the attack has occurred. In that respect, however, attention was drawn to article 3, subparagraph a) of General Assembly resolution 3314, which already deals with military occupation as a continuum, and to the fact that the crimes within the jurisdiction of the Court are not subject to any statute of limitations (article 29 of the Rome Statute).

28. Although several participants favoured the inclusion of a threshold in paragraph 1 of the 2002 Coordinator's paper, it was noted that this need not be done by pursuing either one of the two options. However, some support was expressed for including option 2.

29. The view was also expressed that article 4 of General Assembly resolution 3314 allowed the Security Council to determine other acts which could constitute aggression. There may therefore not be a need to restrict the definition of aggression; in this connection, it was stated that the goal of establishing a threshold could be achieved in the elements of the crime.

30. It was also observed that paragraph 1, option 1, of the 2002 Coordinator's paper would not add much since the exemplification it contained was that of a clear case of aggression; a better example would be to reflect a less obvious case of an act of aggression.

31. After noting the importance of differentiating between the crime of aggression and the act of aggression, it was stressed that the definition of an act of aggression should be contained exclusively in paragraph 2 of the 2002 Coordinator's paper.

The reference to General Assembly resolution 3314 (XXIX)

32. Participants discussed how and to what extent the provision on aggression should make reference to the definition of aggression under General Assembly resolution 3314. Three options were mentioned: a generic reference to resolution 3314, such as the one contained in paragraph 2 of the 2002 Coordinator's paper; reference only to specific parts of resolution 3314, in particular its articles 1, 3 and 4; or a reproduction of parts of the text of the resolution in the provision itself.

33. Many participants expressed a preference for a generic reference to General Assembly resolution 3314. It was argued that such a reference would be consistent with the need to preserve the integrity of the resolution, respect the inter-connected nature of its provisions (article 8 of General Assembly resolution 3314) and, in particular, cover also articles 1 and 4 of the resolution which were relevant in this context. This approach would further avoid time-consuming discussions on the selection of specific acts. It was also pointed out that a generic reference would not be inconsistent with the structure of crimes under the Rome Statute, since the act described in General Assembly resolution 3314 was not the individual conduct of the perpetrator, but the collective act of the State and thus a circumstance element.

34. The view was expressed that paragraph 2 of the 2002 Coordinator's paper needed to be re-drafted if a generic approach were to be adopted. It was observed that the use of the term "act of aggression" in the current text might be interpreted as a mere reference to the acts of aggression listed in article 3 of General Assembly resolution 3314. It was suggested to re-formulate paragraph 2 in order to make it clear that reference was not made to article 3 only, but also to the other relevant provisions of the resolution, in particular its articles 1 and 4. In this context, it was recalled that there was no consensus on the use of the term "act of aggression" in paragraphs 1 and 2 of the 2002 Coordinator's paper and that alternative language had been suggested to cover the notion of "act of aggression".

35. Some participants favoured the idea of a reproduction of specific paragraphs of resolution 3314 over the option of a generic reference. It was argued that a generic reference to resolution 3314, including its open-ended paragraph 4, lacked the degree of specificity required in the

context of individual criminal responsibility. A suggestion was made to define the act of aggression on the basis of a combination of article 1 and an illustrative enumeration of the acts contained in article 3 of the resolution.

Attempt of aggression by a State

36. It was noted that the question of whether an attempt of an act of aggression by a State should be included was not reflected explicitly in the 2002 Coordinator's paper and that the question had only arisen at the 2005 inter-sessional meeting, in connection with the discussions on an individual's attempt to commit the crime of aggression.

37. Some participants voiced their approval for the inclusion of attempt of aggression. It was noted that this would reinforce the need for a threshold because attempt would broaden the acts that would be covered.

38. It was further noted that a determination of whether or not an attempt took place would be difficult. Although considered theoretically possible, it was deemed unlikely that the United Nations Security Council would discuss and determine that an act of aggression had been attempted.

39. It was also noted that the difficulty was the fact that an individual's actions are inevitably linked to those of the State. Caution was expressed against including anything related to planning or preparation because according to article 39 the Charter of the United Nations, an act of aggression needs actually to have occurred.

40. Another view held that, if attempt was to be included, then it would have to be defined separately from the crime of aggression per se, which refers to a completed act.

41. The view was further expressed that changes to the 2002 Coordinator's paper might not be required since the concept of attempt might indeed be catered for when the Security Council takes the respective decision.

42. Several participants however were not in favour of explicitly including the concept of attempt. The text in the 2002 Coordinator's paper was best retained unaltered and there was little to gain from defining an attempt of aggression by a State. In that context, it was noted that some of the acts which participants favouring the inclusion of attempt had mentioned by way of example were in fact already covered by the 2002 Coordinator's paper and would not have to be considered attempts, but could be considered completed acts of aggression. Examples such as the launching of a missile against another country, which missed the target would constitute use of force covered by General Assembly resolution 3314, irrespective of whether they were carried out successfully or not. It was added that the concept of the "first use of armed force by a State" in article 2 of General Assembly resolution 3314 confirmed this understanding.

43. In this connection, the importance of not deviating from the content of General Assembly resolution 3314 was stressed. That resolution had been adopted by consensus after very lengthy discussions and constituted customary international law.

44. Some discussion also took place regarding an attack that was neutralized outside the national territory, which should be considered a completed act of aggression; the characteristics of modern warfare made it clear that the crossing of territorial borders was not a prerequisite

for the commission of an act of aggression. In this connection it was pointed out that General Assembly resolution 3314 does indeed not require that the territory be crossed by the armed forces of a State, but that armed force was used against the sovereignty, territorial integrity or political independence of another State.

45. There was some discussion as to whether the first part of the phrase “planning, preparation, initiation, or execution”, contained in paragraph 1 of the 2002 Coordinator’s paper, could be construed as encompassing the concept of attempt, bearing in mind that the first two words related to situations prior to an act of aggression. Nonetheless, the view was expressed that the phrase referred to the acts of participation of an individual in the commission of a crime of aggression rather than the act of State. It was further noted that the deletion of the phrase in paragraph 1 had already been suggested in a different context.

46. As a result of the discussion, there appeared to be an increasingly prevailing view that the 2002 Coordinator’s paper already covered certain types of acts which might be considered attempts and might thus suffice.

47. A discussion was held on the question whether the definition also should cover the “threat” of aggression. Participants agreed that the notion of “attempt” had to be differentiated from the notion of “threat”, which albeit similar to attempt, nonetheless constituted a different concept which was not reflected in the 2002 Coordinator’s paper. A threat was mainly a verbal expression, but it could include other, more substantial activities, and it would be broader than an attempted act of aggression. The question of retaining an appropriate threshold was therefore particularly important.

48. It was noted that the threat of aggression had been included in the early versions of the draft code of crimes prepared by the International Law Commission, but that such a notion had disappeared in the Commission’s draft of the 1990s.

49. It was stated that including the concept of threat would create complications because the word threat was contextual, not necessarily having the same meaning in one situation as in another. Nonetheless, a view was also expressed that the concept of threat—particularly if backed up by substantial or credible activities— should be considered more closely.

50. The point was made that the work on the crime of aggression would influence the interpretation of provisions regarding the use of force in general and acts of aggression by States. Issues such as the interpretation of Article 51 of the Charter of the United Nations, imminent use of force and the pre-emptive right of self-defence should be avoided.

B. Conditions for the exercise of jurisdiction

51. At the 2005 inter-sessional meeting of the Special Working Group, a substantive discussion was held on the issue of the conditions for the exercise of jurisdiction which was further structured in discussion paper No. 2.[1] Following the suggestion contained in discussion paper No. 2, further discussions were held to clarify the issues involved with the aim of setting the stage for later agreement.

Prior determination of an act of aggression by an organ outside the Court

52. Divergent opinions were voiced as to whether the exercise of jurisdiction over the crime of aggression should be conditioned on a prior determination of the act of aggression by the Security Council or another body outside the Court.

53. The view was expressed that there is no need for any special provisions on a prior determination of an act of aggression by the Security Council, since articles 13 and 16 of the Rome Statute dealt sufficiently with the role of the Security Council under the Statute. In this context, reference was also made to Article 103 of the Charter of the United Nations in relation to the obligations under the Rome Statute.

54. Some participants argued that a pre-determination of an act of aggression by another organ was a possible scenario, but should not constitute a pre-condition for the exercise of jurisdiction by the Court. Article 13(b) of the Rome Statute dealt sufficiently with the role of the Security Council, and in the absence of a determination from the Council or any other organ the Court could still proceed and make its own determination that an act of aggression had occurred.

55. In this context, attention was drawn to the independence of the Court and the distinct functions of the Security Council and the Court with respect to aggression. It was noted that Article 24 of the Charter of the United Nations gives the Security Council primary, but not exclusive responsibility with regard to aggression. It was argued that the prerogative of the Security Council under Article 39 of the Charter was confined to the determination of, inter alia, acts of aggression with a view to taking measures relating to the maintenance of international peace and security, and did not extend to making a judicial determination concerning aggression for the purpose of individual criminal proceedings. In any case, it could not be argued that other bodies did not have the competence to make such a determination. The point was made that the International Court of Justice had on several occasions determined that aggression had occurred, without prior Security Council determination. It was also pointed out that individual States could also make an independent determination on the existence of an act of aggression, e.g. when invoking the right to self-defence, or for the purpose of individual criminal proceedings at the national level. Finally, it was recalled that, under article 16 of the Statute, the Security Council always had the possibility to request the deferral of an investigation or prosecution by the Court.

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[1] The original discussion paper is reproduced in the *Official Records of the fourth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Forth Session, The Hague, 28 November to 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32). At the inter-sessional meeting of the Special Working Group, the discussion was centered on a revised version of the paper.

56. The view was expressed that the crime of aggression merited being considered in the same manner as the other crimes falling under the Court's jurisdiction, in accordance with article 13 of the Rome Statute. The Court did therefore not necessarily require a prior determination that an act of aggression had occurred in order to exercise its jurisdiction. In this connection, the deletion of options 2 to 5 under paragraph 5 of the 2002 Coordinator's paper was suggested.

57. Some participants were of the view that the Court should only be able to exercise jurisdiction over the crime of aggression after the Security Council or another organ had determined that an act of aggression had been committed. There was a preference for such a determination to be made by the Security Council. Reference was made to the authority of the Security Council under Article 39 of the Charter of the United Nations and to article 5, paragraph 2, of the Rome Statute which required that any provision on the crime of aggression be consistent with the relevant provisions of the Charter. Moreover, it was noted that the involvement of the Security Council was appropriate and that it was difficult to make a clear-cut distinction between responsibilities in the field of international peace and security and jurisdictional issues in the context of aggression.

58. Nonetheless, some participants were of the view that the pre-condition for the exercise of jurisdiction by the Court could be satisfied by the determination of a body other than the Security Council, such as the General Assembly of the United Nations or the International Court of Justice. It was suggested to allow the General Assembly to either make the determination or to request an advisory opinion of the International Court of Justice.

59. In connection with the General Assembly involvement, it was noted that further reflection was warranted as to the type of "recommendation", as reflected in the 2002 Coordinator's paper that would be sought: a recommendation for the Court to proceed or a recommendation that an act of aggression had occurred.

60. Some doubts were expressed whether it would be desirable, from a legal perspective, to involve the International Court of Justice, since it would apply different standards of proof than the Court. The point was also made that it would be preferable to avoid a duplication of efforts by having a matter considered by the International Court of Justice and then by the International Criminal Court.

61. In reaction to the divergent views regarding the respective roles of the Security Council and the Court, the suggestion was made that different solutions might be found for each of the three scenarios of Article 13 of the Statute. Under article 13(a), a State could make a self-referral to the Court in case it is unable to conduct the trial at the national level. In such a case, it might be easier to accept the Court's jurisdiction without the involvement of another organ. It would, however, be necessary to make a distinction between such a self-referral and other referrals made by States. Under article 13(b), the Security Council could refer a situation to the Court which might involve all crimes under the Court's jurisdiction, including the crime of aggression. In such a case, the Security Council might consider it beneficial to leave the issue to the Court instead of making its own determination at that stage. Under this option, it might be more acceptable to give the Court greater autonomy in the determination of an act of aggression since the Security Council itself referred the situation to the Court. Under article 13(c) the Prosecutor would initiate an investigation *proprio motu*. This seemed to be the only scenario envisaged by the 2002 Coordinator's paper. It was therefore suggested to distinguish these different scenarios in paragraph 4 of the 2002 Coordinator's paper.

62. Nonetheless, it was also noted that several arguments had been raised to support the involvement of other organs – the need for political backing, to avoid frivolous referrals and for public international law expertise – and that all these arguments might also be applicable to self-referrals.

Options for Security Council decisions regarding aggression

63. A discussion was held on the basis of the approach that a Security Council decision was required for the Court to proceed. In this regard, three types of decisions were identified. The Security Council could:

a) determine that an act of aggression had occurred and refer the situation to the Court in accordance with article 13(b) of the Rome Statute;
b) determine that an act of aggression had occurred;
c) refer a situation to the Court without making a determination of an act of aggression.

64. It was pointed that out that under scenario a) and b) no difficulty arose. Under scenario a) the Court would receive an explicit "go-ahead", combined with a determination of an act of aggression; while under scenario b) the Court still needed to satisfy the requirements of article 13 of the Rome Statute. However, it was to be discussed whether the Court could investigate the crime of aggression under scenario c).

65. Some participants voiced support for the view that the Security Council should be able to give a go-ahead for the Court to proceed without an express determination of an act of aggression. Attention was drawn to the fact that the Security Council rarely uses the term "aggression" in its past and current practice and that the Council might in some situations prefer to give the Court the "green light" to go ahead without making an explicit determination of an act of aggression. Such a solution might be useful for both the Court and the Security Council, which would be given an additional policy option. It was suggested, however, that a referral under article 13(b) of the Rome Statute without specifying whether the basis of the referral is the crime of aggression, or another crime under the Statute, might not be sufficiently conclusive to establish the Court's right to exercise jurisdiction over the crime of aggression. It might be particularly useful if it were to be assumed that a determination of an act of aggression by the Council could not be binding on the Court for reasons of due process. It was also noted that it might still be unclear at the time of the referral whether an act of aggression had occurred, and that the Security Council might make a determination at a later stage.

66. Attention was also drawn to a past proposal according to which no pre-condition for the exercise of jurisdiction was required in the case of a referral by the Security Council.

67. Other participants expressed doubts as to whether the Court should be allowed to proceed without an express determination of the Security Council or another organ. It was argued that prior determination should be a clear pre-condition for the Court to exercise its jurisdiction. According to this view, it was not within the jurisdiction of the Court to decide whether an act of aggression had occurred. Furthermore, some concerns were raised as to whether the judges of the Court, who deal with individual criminal responsibility, should be entrusted with this decision. The point was also made that the elements of crime should include that a determination on the existence of an act of aggression has been made by the appropriate organ.[2] Other participants opposed the inclusion of the precondition for the exercise of jurisdiction in the elements of crimes.

68. The view was also expressed that there should be a cumulative requirement: first, it should be determined by the Security Council that an act of aggression had occurred and then the Council should issue a specific go-ahead to the Court in accordance with article 13(b) of the Rome Statute.

69. Other participants drew attention to the idea of combining the options of a determination of an act of aggression by the Council and the possibility of a procedural go-ahead. Although the primary responsibility to determine that an act of aggression had occurred fell on the Security Council, some flexibility should nonetheless be left to enable the Court to act. Such an option was compatible with the competence of judges and the function of the Court. Issues of public international law may arise as preliminary issues in criminal proceedings and the determination of whether an act of aggression had occurred would therefore not be beyond the competences and expertise of the Court's judges.

Binding nature of the determination of an act of aggression

70. A discussion was held as to whether a determination of an act of aggression by another organ should be conclusive and therefore binding[3] on the Court.

71. Many participants voiced a strong preference that this determination be open for review by the Court, in particular in order to safeguard the defendant's right to due process. The Prosecutor would bear the burden of proof regarding all elements of the crime, including the existence of an act of aggression, for which a prior determination by another organ would provide a strong case. Reference was made to the rights of the accused, in particular article 67, paragraph 1(i), of the Statute. It should always be possible for the defence to challenge the case of the Prosecutor on all grounds. Furthermore the point was made that new evidence which might refute the case for the existence of an act of aggression might emerge after a Security Council determination, and that it needed to be possible for the Court to take such new evidence into account.

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[2] It was recalled that such an approach was reflected in the elements of the crime of aggression contained in the 2002 discussion paper by the Coordinator, wherein the existence of an act of aggression was defined as a precondition.

[3] The word "prejudicial" was used in the revised version of the discussion paper.

72. It was noted that the possibility of such a review would allow the defence to dispute the existence of the act of aggression, argue that it was an act of self-defence, deny or minimize the participation of the individual, etc. Some participants considered that these complexities should not be overstated, since they could also arise when the Court had to deal with crimes against humanity and war crimes. It was also argued that safeguarding the rights of the accused was important, but that States also needed to be aware of the implications of a review by the Court of a Security Council determination that an act of aggression had occurred.

Procedural options in the absence of a Security Council determination

73. Different views were expressed regarding the options contained in paragraph 5 of the 2002 Coordinator's paper.

Option 1

74. Some participants expressed their preference for retaining this option alone, since the other four options contained elements that could affect the independence and credibility of the Court.

Option 2

75. The view was expressed that only this option should be retained, since the others would interfere with the competencies of the Security Council under the Charter of the United Nations.

Option 3

76. A proposal was made to replace the word "shall" in the first sentence with "may". Another suggestion was to replace the word "recommendation" with "determination". It was questioned whether it was meaningful for the Court to first request a decision from the General Assembly and to then proceed with a case in the absence of such a decision.

Option 4

77. Some doubts were expressed regarding the involvement of either the General Assembly or the International Court of Justice due to the fact that the intended political backing for the Court was not a consequence of the involvement, for example, of a legal organ such as the International Court of Justice; the possibility of avoiding frivolous referrals, cited as another point in favour of their involvement, might not necessarily be considered to be consistent with the mandate of the International Court of Justice.

78. As regards the phrase "acting on the vote of any nine members" in variant b), some participants considered that this amounted to interference with the competence of the Security Council and was contrary to the Charter of the United Nations which stipulated that the Council itself decides what is a procedural matter. Given that it was highly unlikely that the Security Council would consider a request for an advisory opinion a procedural matter, it was suggested to delete this controversial phrase. On the other hand, it was also noted that this might be a good option to alleviate concerns regarding the role of the Security Council and that the Security Council might be amenable, at some stage, to accept such an approach. It was therefore suggested that the variant be retained.

79. It was also noted that the Council had at that point of the process already had the opportunity to make a determination on the question whether or not an act of aggression had occurred and should therefore not be asked by the Court to request an advisory opinion on the same matter.

80. Concern was expressed that an advisory opinion from the International Court of Justice would seriously delay the case.

81. It was suggested that it should be clarified that the Court may proceed with the case if an advisory opinion already exists, irrespective of whether that advisory opinion had been requested by the Security Council or the General Assembly.

82. Finally, it was noted that the only relevant question was whether or not the Court could proceed with an investigation on the basis of an advisory opinion from the International Court of Justice and that the provision on aggression did not need to specify on the basis of what request the International Court of Justice would give such an advisory opinion.

83. Most delegations favoured deleting options 3 and 4 from the 2002 Coordinator's paper, while they did so for different reasons.

C. The Crime of Aggression – Defining the individual's conduct

84. The discussions on this issue were guided by the growing tendency at the 2005 inter-sessional meeting to move from a "monistic" approach to a "differentiated" approach. It was pointed out that the 2002 Coordinator's paper reflected a monistic approach in that the description of the individual's conduct in paragraph 1 includes the description of the different forms of participation which would otherwise be addressed in article 25, paragraph 3. Under the differentiated approach, the definition of the crime of aggression would be treated in the same manner as the other crimes under the jurisdiction of the Court: The definition of the crime would be focused on the conduct of the principal perpetrator, and other forms of participation would be addressed by article 25, paragraph 3, of the Rome Statute. It was agreed in principle that the differentiated approach was preferable in that it treated the crime of aggression the same way as the other crimes under the jurisdiction of the Court. However, it was also agreed that the viability of the differentiated approach needed further exploration and that the monistic approach therefore needed, for the time being, to be retained in the 2002 Coordinator's paper.

85. It was reiterated that the work on the differentiated approach required further work, including further discussion of the suggestions for an appropriate conduct verb, such as those contained in appendix I of the report of the 2005 inter-sessional meeting.

86. It was decided to focus at this inter-sessional meeting on the issue of individual participation (article 25, paragraph 3(a) to (d)). The question regarding the relationship of the definition to article 28 (responsibility of commanders and other superiors) and article 33 (Superior orders and prescription of law) would be dealt with at a later stage and on the basis of an additional discussion paper submitted by the sub-Coordinator. The issue of individual attempt (article 25, paragraph 3(f)) would also be dealt with at a later stage.

87. There was widespread agreement that the use of the word "participates" should be avoided in the definition of the conduct element under the differentiated approach, in order to avoid overlap with the forms of participation under article 25, paragraph 3, of the Rome Statute.

88. Moreover, there was consensus among participants that aggression should be understood as a leadership crime. In this respect, the view was expressed that the leadership clause should refer to the ability to influence policy.

89. The terms “organize and direct”, “direct” and “order” were suggested as possible alternative conduct verbs. It was noted that this language was commonly found in counter-terrorism conventions and might be more established in the context of criminal law than the less common term “engage”, which was, however, favoured by some.

90. Some efforts were made to clarify the scope and meaning of the phrase “engaging a State”. Several participants expressed support for this notion. It was however suggested to combine it with “armed forces or other organs of a State”. Others voiced some concern about this phrase, as it was not commonly used in international law.

91. A further suggestion was made to introduce the conduct verb “lead”, to underline the leadership role of the principal perpetrator. It was argued that this would be the most accurate description of the conduct of a leader, and that the verb “leads” could ideally be combined with the existing phrase “the planning, preparation, initiation or execution of an act of aggression”. Several participants supported or expressed interest in the proposal, which should be considered further. It was however also noted that this option might be too narrow and only include a head of State or Government as principal perpetrator.

92. It was further discussed whether to retain or delete the phrase “planning, preparation, initiation or execution”. A view was expressed that these words should be deleted since the elements of this notion were contained in the forms of participation under article 25, paragraph 3 of the Rome Statute. It was argued that the inclusion of these terms in the conduct element might blur the distinction between the primary and other perpetrators. Other participants preferred to retain this phrase. It was noted that this phrase reflected the typical features of aggression as a leadership crime, and its retention in the text would clarify the criminalized conduct and thus increase the deterrent effect of the provision. In this context, it was further suggested to use the terms in this phrase as conduct verbs (“plans, prepares, initiates or executes”). Some participants expressed interest in this proposal, whereas caution was expressed that these verbs would not adequately represent the leader’s activities, who in particular does not personally execute the use of armed force, but rather directs or leads the execution.

93. Some participants expressed the view that the practical differences between these different options were limited. The options essentially differed in their delineation of the role of the principal versus the secondary perpetrator. This delineation had however no effect on the sentencing in accordance with the Statute.

Options for the differentiated approach

94. It was decided to reflect the discussions on the differentiated approach in an updated paper based on the proposals A and B of appendix I of the report of the 2005 inter-sessional meeting. The updated options paper is contained in annex I. It was indicated that these options were merely drafted to highlight possible approaches regarding the definition of the conduct element under the differentiated approach and were not meant to reflect drafting alternatives on other issues reflected in paragraph 1 of the 2002 Coordinator’s paper or to preclude discussions on other issues.

95. In a preliminary discussion of this options paper attention was drawn to the different initial phrases of proposals A and B. It was explained that the initial phrase of proposal B (using the term "means") was intended to bring the definition more in line with the definitions in articles 6, 7 and 8 of the Rome Statute, and to more closely follow the differentiated approach. It was further clarified that the main difference between the two proposals was the inclusion of the phrase "planning, preparation, initiation or execution" in Proposal A and its deletion in Proposal B. It was also pointed out that the different wording of the initial phrase of proposal B could also be used in connection with proposal A. It was suggested to further clarify the leadership clause in Proposal B by including a reference to "the conduct of a person".

D. Future work of the Special Working Group on the Crime of Aggression

96. Bearing in mind that at its fourth session the Assembly of States Parties decided that the Special Working Group in the years 2006 to 2008 shall be allocated at least 10 exclusive days of meetings in New York during resumed sessions, and hold inter-sessional meetings, as appropriate,[4] it was suggested that the Chair convey a request to the Assembly regarding the possibility of having additional meeting time at a resumed sixth session of the Assembly, which would be held in the first trimester of 2008. This was deemed necessary in order to implement the relevant resolution[5] of the Assembly of States Parties, bearing in mind that the Special Working Group had already decided to conclude its work at the latest 12 months prior to the convening of the Review Conference.

97. The Special Working Group expressed its appreciation for the contribution of participants in the "Virtual Working Group" on the crime of aggression, which had been established in the latter part of 2005, and saw value in continuing to use that forum as a means of building upon the progress attained on the issue of the crime of aggression.

98. The Special Working Group was also informed of the contents of a letter, dated 12 May 2006, addressed to the President of the Assembly by the President of the Military Tribunal of Turin, regarding a Conference on International Criminal Justice to be held in Turin, Italy, from 2 to 11 October 2006 and the suggested convening of an inter-sessional meeting of the Special Working Group.

99. The Special Working Group welcomed the offer by the Italian authorities to host an inter-sessional meeting of the Special Working Group in the framework of the International Conference on International Criminal Justice to be held in Turin, from 2 to 11 October 2006.

100. The Italian representative indicated that the objective of holding such an inter-sessional meeting in Turin was to complement the work carried out at Princeton, that the format of the meeting and the conditions for participation would be the same as those followed at the Princeton inter-sessional meetings. He also made it clear that the details of the agenda and Programme of work of the Turin Conference were still subject to further modifications and that they could be adjusted in a manner to suit the needs of the Special Working Group.

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[4] *Official Records of the fourth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Forth Session, The Hague, 28 November to 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32), Part III, resolution ICC-ASP/4/Res.4, operative paragraphs 37 and 53.
[5] *Ibid.*

101. The Turin Conference was welcomed as one of the biggest and most significant events on international criminal justice in recent years. Gratitude was expressed to the Italian authorities both for organizing such an important event and for giving the issue of aggression a prominent place in the agenda of the Conference. The view was expressed that the timing and venue of the Conference might make it difficult to achieve the widest possible participation from States, if there was to be an inter-sessional meeting of the Special Working Group. The view was therefore expressed that the meeting time allocated to the crime of aggression could also be used for panel discussions and workshops which might help create the political momentum necessary in preparation for the Review Conference.

102. It was agreed that the Turin Conference provided a unique opportunity to raise awareness of the importance of the crime of aggression, to do outreach and to place the crime of aggression in the larger context of international criminal justice. The Chair of the Special Working Group was entrusted with continuing his consultations on the matter with the President of the Assembly of States Parties, including through the Bureau of the Assembly, and with the representative of Italy, with a view to making optimal use of the time generously allocated to the crime of aggression at the Turin Conference.

Annex I

Options for rewording the chapeau of the 2002 Coordinator's paper under the differentiated approach[6]

Proposal A

For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person
[leads] [directs] [organizes and/or directs] [engages in]
the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

Proposal B

For the purpose of the present Statute, "crime of aggression" means
[directing] [organizing and/or directing]
[engaging a State/the armed forces or other organs of a State in]
an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations, when being in a position effectively to exercise control over or to direct the political or military action of a State.

Under both proposals:

Article 25, paragraph 3
Insert a new subparagraph (d) bis:

"In respect of the crime of aggression, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a position effectively to exercise control over or to direct the political or military action of a State."

(Article 25, paragraph 3, does apply to the crime of aggression. See also Elements of Crimes, paragraph 8 of the general introduction.)

[6] The options for rewording the chapeau referred to in this annex have the sole purpose of reflecting the status of the discussions on article 25, paragraph 3, and are without prejudice to other proposed amendments to the chapeau.

Annex II[7]

Discussion paper proposed by the Coordinator

I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

> **Option 1**: Add "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof".
>
> **Option 2**: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".
>
> **Option 3**: Neither of the above.

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

> **Option 1**: Add "in accordance with paragraphs 4 and 5".
>
> **Option 2**: Add "subject to a prior determination by the Security Council of the United Nations".

3. The provisions of articles 25, paragraphs 3, 28 and 33 of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the Security Council may take action, as appropriate:

> **Option 1**: under Article 39 of the Charter of the United Nations.
>
> **Option 2**: in accordance with the relevant provisions of the Charter of the United Nations.

[7] This annex is an excerpt from PCNICC/2002/2/Add.2.

5. Where the Security Council does not make a determination as to the existence of an act of aggression by a State:

Variant (a) or invoke article 16 of the Statute within six months from the date of notification.

Variant (b) [Remove variant a.]

Option 1: the Court may proceed with the case.

Option 2: the Court shall dismiss the case.

Option 3: the Court shall, with due regard to the provisions of Articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make a recommendation within [12] months. In the absence of such a recommendation, the Court may proceed with the case.

Option 4: the Court may request

Variant (a) the General Assembly

Variant (b) the Security Council, acting on the vote of any nine members,

to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court, on the legal question of whether or not an act of aggression has been committed by the State concerned. The Court may proceed with the case if the International Court of Justice gives an advisory opinion that an act of aggression has been committed by the State concerned.

Option 5: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

II. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)[8]

Precondition

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ[9] has determined the existence of the act of aggression required by element 5 of the following Elements.

Elements

1: The perpetrator was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression as defined in element 5 of these Elements.

2: The perpetrator was knowingly in that position.

3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.

4: The perpetrator committed element 3 with intent and knowledge.

5: An "act of aggression", that is to say, an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.

6: The perpetrator knew that the actions of the State amounted to an act of aggression.

7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

> **Option 1**: Add "such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof".
>
> **Option 2**: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".
>
> **Option 3**: Neither of the above.

8: The perpetrator had intent and knowledge with respect to element 7.

Note:
Elements 2, 4, 6 and 8 are included out of an abundance of caution. The "default rule" of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.

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[8] The elements in part II are drawn from a proposal by Samoa and were not thoroughly discussed.

[9] See options 1 and 2 of paragraph 2 of part I. The right of the accused should be considered in connection with this precondition.

Annex III

Annotated agenda

The meeting is aimed at continuing discussions held at the previous inter-sessional meeting in June 2005, at the Assembly of States Parties in November/December 2005 and in the context of the "Virtual Working Group". Three circles of questions have emerged as the main issues and were addressed in discussion papers submitted to the Special Working Group on the Crime of Aggression.[10] 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, paragraph 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 text[11]) square with the provisions of article 25, paragraph 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, paragraph 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**[12] 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).[13]

Further discussion is also needed on the question of **attempt** (Article 25, paragraph 3 (f)). In this context, the 2005 meeting[14] 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.

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[10] *Official Records of the fourth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Forth Session, The Hague, 28 November to 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32 Annex II.B).
[11] PCNICC/2002/2/Add.2 of 24 July 2002.
[12] *Official Records of the fourth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Forth Session, The Hague, 28 November to 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32, Annex II.A, Appendix 1 to the Princeton report 2005).
[13] Para. 51 of the Princeton report 2005.
[14] Para. 33 of the Princeton report 2005.

Item 2) The conditions for the exercise of jurisdiction

According to article 5, paragraph 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 International Criminal Court 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, International Court of Justice)? Would such a decision – namely, that a State act of aggression has occurred – be a **prejudicial determination** for the International Criminal Court (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, paragraph 4 versus paragraph 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-eights of States Parties is reached (paragraph 4); or shall it only enter into force for those States Parties which have accepted such an "amendment" (paragraph 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 Special Working Group on the Crime of Aggression

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

Annex IV

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Intersessional Meeting of the Special Working Group on the Crime of Aggression
Liechtenstein Institute on Self-Determination, Princeton University
June 8-11, 2006

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