Annex I

Report of the Credentials Committee*

Chairperson: H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan)

1. At its 1st plenary meeting, on 28 November 2005, the Assembly of States Parties to the Rome Statute of the International Criminal Court, in accordance with rule 25 of the Rules of Procedure of the Assembly of States Parties, appointed a Credentials Committee for its fourth session, consisting of the following States Parties: Benin, France, Honduras, Ireland, Jordan, Paraguay, Serbia and Montenegro, Slovenia and Uganda.

The Credentials Committee held one meeting on 2 December 2005.

2. At its meeting on 2 December 2005, the Committee had before it a memorandum by the Secretariat dated 2 December 2005 concerning the credentials of representatives of States Parties to the Rome Statute of the International Criminal Court to the fourth session of the Assembly of States Parties. The Chairman of the Committee updated the information contained therein.

3. As noted in paragraph 1 of the memorandum and the statement relating thereto, formal credentials of representatives to the fourth session of the Assembly of States Parties, in the form required by rule 24 of the Rules of Procedure, had been received as at the time of the meeting of the Credentials Committee from the following 60 States Parties:

> Albania, Andorra, Austria, Belgium, Belize, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Canada, Colombia, Costa Rica, Croatia, Cyprus, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Ecuador, Estonia, Finland, France, Gambia, Germany, Ghana, Greece, Guinea, Hungary, Iceland, Ireland, Italy, Kenya, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Mali, Malta, Mongolia, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Samoa, Serbia and Montenegro, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, Uruguay and Venezuela (Bolivarian Republic of).

4. As noted in paragraph 2 of the memorandum, information concerning the appointment of the representatives of States Parties to the fourth session of the Assembly of States Parties had been communicated to the Secretariat, as at the time of the meeting of the Credentials Committee, by means of a cable or a telefax from the Head of State or Government or the Minister for Foreign Affairs, by the following 22 States Parties:

> Afghanistan, Argentina, Australia, Bosnia and Herzegovina, Burundi, Cambodia, Central African Republic, Congo, Dominican Republic, Fiji, Honduras, Jordan, Namibia, Niger, Nigeria, Peru, Senegal, Sierra Leone, The former Yugoslav Republic of Macedonia, Uganda, United Republic of Tanzania, and Zambia.

5. The Chairperson recommended that the Committee accept the credentials of the representatives of all States Parties mentioned in the Secretariat's memorandum, on the understanding that formal credentials for representatives of the States Parties referred to in paragraph 4 of the present report would be communicated to the Secretariat as soon as possible.

* Previously issued as ICC-ASP/4/31.

6. On the proposal of the Chairperson, the Committee adopted the following draft resolution:

"*The Credentials Committee*,

Having examined the credentials of the representatives to the fourth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, referred to in paragraphs 3 and 4 of the present report;

Accepts the credentials of the representatives of the States Parties concerned."

7. The draft resolution proposed by the Chairperson was adopted without a vote.

8. The Chairperson then proposed that the Committee recommend to the Assembly of States Parties the adoption of a draft resolution (see paragraph 10 below). The proposal was adopted without a vote.

9. In the light of the foregoing, the present report is submitted to the Assembly of States Parties.

Recommendation of the Credentials Committee

10. The Credentials Committee recommends to the Assembly of States Parties to the Rome Statute of the International Criminal Court the adoption of the following draft resolution:

"Credentials of representatives to the fourth session of the Assembly of States Parties to the Rome Statute of the International Criminal Court

The Assembly of States Parties to the Rome Statute of the International Criminal Court,

Having considered the report of the Credentials Committee and the recommendation contained therein,

Approves the report of the Credentials Committee.

Annex II

Special Working Group on the Crime of Aggression

Annex II.A

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, New Jersey, United States, from 13 to 15 June 2005*

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* Previously issued as ICC-ASP/4/SWGCA/INF.1. This reproduction does not contain the list of participants, contained previously in annex III of ICC-ASP/4/SWGCA/INF.1.

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I. Introduction

1. At the invitation of the Government of Liechtenstein and pursuant to a recommendation by the Assembly of States Parties, 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 13 to 15 June 2005. 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 agenda of the meeting is contained in annex II.

2. The participants in the informal inter-sessional meeting expressed their appreciation to the Governments of Germany, Finland, Liechtenstein, the Netherlands 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 the event.

3. 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

A. Issues related to the crime of aggression requiring further discussion

4. With regard to the list of issues to be addressed in developing proposals for a provision on aggression in accordance with article 5, paragraph 2, of the Rome Statute and pursuant to resolution F adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, it was decided that there was no need to add issues to the list contained in the report of the 2004 inter-sessional meeting.[1]

B. Issues discussed at the 2004 inter-sessional meeting requiring further consideration

1. Possibility for a State to "opt out" of the Court's jurisdiction

5. Reference was made to the fact that the provisions of the Rome Statute regarding aggression were not necessarily clear because they had been incorporated in the text at a late phase of the 1998 Diplomatic Conference and were not the result of specific negotiations. It was also noted that article 121 had been drafted prior to the inclusion of the crime of aggression within the crimes falling under the jurisdiction of the Court and that consequently article 121 had not been drafted against the background of the specific problems posed by the crime of aggression.

[1] ICC-ASP/3/25, annex II, appendix.

6. It was noted that there were three approaches to how to proceed once agreement was reached on the definition of the crime of aggression and the exercise of the Court's jurisdiction.

7. The first two approaches took account of the discussion on article 121 of the Statute reflected in paragraphs 13 to 19 of the 2004 report.

8. The first approach posited that article 121, paragraph 4, would be applicable and that it was of the essence to maintain a unified legal regime with regard to the crimes over which the Court had jurisdiction. According to this approach, once seven eighths of the States Parties had ratified or accepted an amendment to the Statute, the amendment would become binding on all States Parties, including States that subsequently became parties. Furthermore, it was argued that the crime of aggression was already included in the Statute and that State Parties had therefore already accepted it by becoming parties thereto; accordingly, an "opt in" approach for the crime of aggression as foreseen under article 121, paragraph 5, was contrary to the Statute. Another argument in favour of paragraph 4 was that the crime of aggression should not be treated differently from the other crimes within the jurisdiction of the Court. As a further argument against the applicability of article 121, paragraph 5, it was stated that the Statute should constitute a coherent whole. Caution was thus required in order to avoid "à la carte" regimes, something the Statute had carefully avoided, with the sole exception of article 124, which included a temporal limitation regarding war crimes.

9. The view was expressed that, if anything, an "opt out" approach was preferable to the "opt in" approach reflected in article 121, paragraph 5. In this connection, reference was made to the "opt out" clause contained in article 124, with some States repeating their criticism of that provision. The view was expressed that an "opt out" provision would provide for a more unified legal regime than an "opt in" approach.

10. The second approach was based on the premise that that article 121, paragraph 5, would be applicable. In this connection, it was argued that a State would have to opt in before recognizing the Court's jurisdiction over the crime of aggression. As a result of the application of article 121, paragraph 5, two sets of regimes might be applicable to different groups of States.

11. The opinion was expressed that the incorporation of the crime of aggression would automatically entail an amendment to article 5. Since article 121, paragraph 5, made reference to article 5, it was clear that article 121, paragraph 5, was automatically applicable.

12. It was held, on the other hand, that the applicability of article 121, paragraph 5, was doubtful inasmuch as the completion of discussions on the crime of aggression would not necessarily entail an amendment of article 5. Structurally, the crime of aggression would not be accommodated under article 5 but in all likelihood as a new article 8 *bis*. According to this view, the procedure envisaged in paragraph 5 was not applicable to the crime of aggression, but was rather intended to apply to the inclusion of new crimes within the jurisdiction of the Court. This would clearly not be the case for the crime of aggression which was already included within the Court's jurisdiction under article 5, paragraph 1. Furthermore, it was argued that article 5, paragraph 2, could be either left in the Statute, even though it would become obsolete after the incorporation of the crime of aggression, or simply deleted.

13. It was also suggested that it might be feasible to combine paragraphs 4 and 5 of article 121; it was argued, however, that those two paragraphs were incompatible.

14. The third approach considered that article 5, paragraph 2, required only the "adoption" of the provision for the exercise of the Court's jurisdiction and noted that no reference to "amendment" was contained in that provision. According to this view, adoption by the Assembly of States Parties would suffice for entry into force so that only article 121, paragraph 3, would apply. However, others were of the view that the Vienna Convention on the Law of Treaties[2] made a distinction between the adoption of the text of an amendment and the consent of a State to be bound by it. The application of article 121, paragraph 3, would therefore not answer the question as to whether article 121, paragraph 4, or article 121, paragraph 5, was applicable with regard to the incorporation of the crime of aggression. It was also argued that the reference in article 5, paragraph 2, to "adoption" differed from the meaning given to the term in the context of the Vienna Convention on the Law of Treaties.

15. The view was also expressed that the inclusion of the words "in accordance with" in article 5, paragraph 2, referred to the need for an amendment. It was posited that this had been the understanding when the Statute was adopted in 1998. Others, however, stated that this was not their understanding.

16. Reference was further made to the need to ensure that the provisions on the conditions for the exercise of jurisdiction entered into force under the same conditions as the provisions relating to the definition.

17. It was suggested that the focus of the discussion should be on the definition of the crime of aggression and on conditions for the exercise of jurisdiction. If consensus was attained on those issues, the answer to the question as to whether paragraph 4 or paragraph 5 of article 121 was applicable would probably become self-evident.

2. Retention, exclusion or adaptation of article 25, paragraph 3, of the Rome Statute

18. It was agreed that article 25, paragraph 3, of the Rome Statute contained two concepts that potentially had a bearing on aggression: participation by an individual in the criminal act and an attempt to commit a crime.

(a) Participation by an individual in the criminal act

19. There was agreement that the crime of aggression had the peculiar feature of being a leadership crime, thereby excluding participants who could not influence the policy of carrying out the crime, such as soldiers executing orders. Accordingly, the issue to be discussed was more one of the legal technique to be applied. It had to be decided whether the fact that aggression was a leadership crime needed to be reflected in article 25, paragraph 3, or whether parts thereof had to be excluded from application to the crime of aggression.

20. It was suggested that instead of including the conditions for individual criminal responsibility within the definition of the crime, it might be preferable to keep the definition of the crime rather narrow. Thus, article 25, paragraph 3, would reflect the leadership nature of the crime through the insertion of a new subparagraph (e) *bis* modelled on subparagraph (e), which dealt with genocide. This new subparagraph (e) *bis* could be inserted to clarify that article 25, paragraph 3, was applicable to the crime of aggression insofar as it was compatible with the leadership nature of the crime. Another possibility was to elaborate on the leadership traits within the elements of the crime of aggression.

[2] United Nations, *Treaty Series*, vol. 1155, p. 331.

21. Several participants were of the view that article 25, paragraph 3, as a whole was applicable to the crime of aggression.

22. As regards the possible exclusion of the applicability of article 25, paragraph 3, it was noted that there was a potential risk of excluding a group of perpetrators. Consequently, it would be preferable to verify whether the provisions of article 25, paragraph 3, matched each specific situation. It followed that a general exclusion would not constitute a sound option.

23. The exclusion of article 25, paragraph 3, would be justified only in light of the argument reflected in paragraph 39 of the 2004 report, namely that the crime of aggression had not been carried out. According to this view, the matter was best dealt with by leaving the determination of whether or not to apply article 25, paragraph 3, in specific situations to the discretion of the judges.

24. It was suggested that the issue could be dealt with by:

(a) Elaborating a concise definition of aggression, leaving the relevant general principles of criminal law to be covered by other parts of the Statute, in particular article 25;

(b) Refining the definition of aggression contained in the Coordinator's paper by aligning the general principles of criminal law with other provisions of the Statute; or

(c) Inserting a new subparagraph (e) *bis* to clarify the specific relationship between the crime of aggression and article 25, paragraph 3.

25. Some participants felt that it might be necessary to include a provision ensuring the applicability of article 25, paragraph 3.

26. In the course of the discussion, reference was made to the jurisprudence of the Nuremberg and Tokyo tribunals, which might be said to have codified customary international law and was deemed more relevant than the practice of the ad hoc tribunals established in the 1990s, which do not deal with the crime of aggression.

27. While some delegations expressed the view that the issue of participation related to a question of drafting technique rather than substance and could therefore be catered for in the definition of elements of crime, some delegations warned against leaving everything to the elements of crime. Such an approach to participation, it was argued, might have serious implications for the crime of aggression. If the definition of participation were to be removed completely, one would be left with collective participation alone. That would introduce an anomaly with regard to the crime of aggression that did not exist in the case of other crimes, such as crimes against humanity, in respect of which not only was a definition of collective participation provided but acts of individual participation were also listed.

28. According to this view, it was crucial to seek a solution in the primary text and not in the elements of crime. It was necessary to develop a formulation that would recognize aggression as a leadership crime but at the same time define what individual participation meant in each situation envisaged under article 25, paragraph 3. There was considerable agreement that, to the extent feasible, the definition of aggression should deal with the collective as well as the individual act.

29. Some participants also expressed the view that more clarity was needed as regards the meaning of leadership as well as the scope of its application.

30. As a result of the discussion on article 25, a proposal[3] was introduced to insert a new paragraph 3 *bis* which would read:

> "In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment."

31. This proposal assumed that article 25, paragraph 3, would be applicable to the crime of aggression and sought to ensure that only leaders would be held liable for that crime. The new provision was proposed as a separate paragraph because the leadership requirement needed to be fulfilled in all cases, whereas paragraph 3 contained alternative requirements, set forth in subparagraphs (a) to (d). The proposal was combined with the deletion of elements of participation from the chapeau of the Coordinator's paper, on the understanding that the elements would be covered by article 25, paragraph 3.

32. Two somewhat similar proposals for a rewording of the chapeau were also submitted for consideration by the participants.[4]

(b) Attempt to commit the crime of aggression[5]

33. Attention was drawn to the need to make a distinction between: (a) the collective act of aggression, which would be carried out by a State; and (b) the individual act of participation in the collective act.

34. In relation to the collective act, the question was raised whether it was necessary for the collective act to have been completed or whether an attempt to carry out the collective act sufficed. It was suggested that this issue pertaining to the collective act should be dealt with in the definition of aggression.

35. As regards the individual act of participation in the collective act, the question was raised whether actual participation in the collective act was needed or whether an attempt at participating in the collective act sufficed. This issue, it was stated, would fall within the scope of article 25 if that provision was applicable to the crime of aggression.

36. Some participants considered it important to cover the attempt to commit the crime, particularly since no differential treatment should be accorded to the different types of crimes within the jurisdiction of the Court. As one of the purposes of including the crime of aggression in the Statute was to deter its commission, there was also a need to deter the attempt to commit it. Accordingly, article 25, paragraph 3(f), posed no problem with regard to the crime of aggression and should therefore be deemed applicable.

37. With regard to possible concerns about an excessively broad concept of attempt resulting in inappropriate situations being submitted to the jurisdiction of the Court, it was noted that there were two safeguards to ensure an adequate threshold. The first was the requirement for the Office of the Prosecutor to analyse the specific situation and not to pursue irrelevant attempts; the second was the role of an outside body that might be called upon to determine whether an act of aggression had taken place.

38. On the other hand, it was also stated that a crime of aggression presupposed that the act of aggression had been completed. In the absence of such a completed act, there would be no crime.

[3] See proposal B in appendix I.
[4] See proposals A and B in appendix I.
[5] See also paragraph 82.

39. The query was also raised whether attempt might already be covered by the reference to planning, preparation or initiation, which was contained in the definition. However, this was considered to be doubtful since planning referred more to the material element of the crime and an attempt was different from preparation or initiation of the act. It was also noted that some legal systems did not criminalize planning and preparation of a crime, with the notable exception of the crime of terrorism; yet the attempt to commit a crime was always penalized. Furthermore, it was not clear whether there were instances in existing case law of attempt being considered as a crime. In this connection, it was observed that existing case law did not cover attempt because in all cases aggression had in fact been committed. Attention was also drawn to the fact that the 1992 draft Code of Crimes against the Peace and Security of Mankind,[6] prepared by the International Law Commission, also covered the threat to commit aggression, which was however different from an attempt to commit the crime. Threat was not, however, included in the final text adopted by the Commission in 1996.

40. It was observed that the concept of attempt was common to many legal systems, and support was voiced for leaving the issue of differentiating between preparation, planning and attempt to the Court on the basis of article 25, paragraph 3(f).

41. It was noted that the jurisprudence of the Nuremberg and Tokyo tribunals also referred to planning and participating, but in the context of acts that had been completed; the Coordinator's proposed definition, which relied on the 1974 definition by the United Nations General Assembly,[7] also dealt with an act that had been completed. The distinction was made between planning or preparation (not punishable in itself as an inchoate offence) and planning or preparation as a mode of participation that rendered a secondary party liable for either an attempt or the complete offence, depending on what the other parties did.

42. Furthermore, it was stressed that the crime of aggression was inextricably linked with the commission of an act of aggression and that although from a legal perspective an attempt could be penalized, considerable difficulties could arise in the application of such a concept.

43. According to another view, it was difficult to discuss attempt before settling on a definition of the crime of aggression; this was particularly crucial if a third party was called upon to make a determination that an act of aggression had taken place.

3. Retention, exclusion or adaptation of article 33 of the Rome Statute

44. A number of participants considered that article 33 was applicable to the crime of aggression and favoured its retention in order to allay the concern that some perpetrators might evade prosecution. This would not, however, affect the leadership trait inherent in the crime of aggression. It was noted that exclusion of article 33 might have the effect of actually broadening the scope of application of the provision.

45. According to a different view, article 33 would not be applicable to the crime of aggression, which was a leadership crime and hence not applicable to mid- or lower-level individuals. Some participants were of the opinion that, for the sake of clarity, a provision specifically indicating that article 33 did not apply to the crime of aggression merited inclusion. Others, however, opined that, as in the case of many other provisions of the Statute which were not always applicable to all the crimes, there was no need to refer specifically to its non-applicability to the crime of aggression. It would be the role of the Court to make a determination as to whether an article would apply in specific cases.

[6] *Yearbook of the International Law Commission*, 1992, vol. II (2).
[7] General Assembly resolution 3314 (XXIX) of 14 December 1974.

46. It was suggested that the crime of aggression should be incorporated in paragraph 2. On the other hand, some caution was urged in light of the fact that paragraph 2 referred to acts that were clearly directed against the civilian population, which was not necessarily the case when a crime of aggression was committed.

4. Retention, exclusion or adaptation of article 28 of the Rome Statute

47. The discussion on this article replicated the logic of the arguments voiced during the consideration of article 33. Most participants shared the view that article 28 was not applicable by virtue of both the essence and the nature of the crime; aggression as reflected in the Statute was a leadership crime. However, there was no agreement as to whether non-applicability needed be reflected in the Statute.

48. A query was raised as to whether the provision might be applicable in the event of omission by a leader who might have been able to impede the commission of the crime. In reply, it was suggested that the situation described might be dealt with by amending the chapeau of the Coordinator's proposal, for instance by deleting the word "actively".

49. The discussion revolved around whether the inapplicability of article 28 should be specified. Once more, concern was voiced at expressly excluding the applicability of certain articles, since that exercise would require a complete inventory of the Statute to determine what was or was not applicable to the crime of aggression and it would also set a negative precedent by implying that a provision was applicable unless it had been excluded.

50. It was also suggested that the wording of article 16 of the draft Code of Crimes against the Peace and Security of Mankind should be incorporated.[8]

5. Retention, exclusion or adaptation of article 30 of the Rome Statute

51. After recalling the discussion on the use of "intentionally and knowingly" in the preliminary definition, as reflected in paragraph 55 of the 2004 report, the participants agreed that article 30 was a default rule which should apply unless otherwise stated. Consequently, the relevant phrase in the chapeau of the Coordinator's proposal could be deleted.

C. Preliminary discussions on other issues relating to the Rome Statute

1. Part 5. Investigation and prosecution

52. It was agreed that Part 5 of the Statute did not, at the present time, require any modification for the crime of aggression. It was noted in this regard that there was no need for different treatment of this crime in comparison to the other crimes within the Court's jurisdiction.

53. Nonetheless, it was pointed out that the issue of article 53 might be considered anew if a decision was made to give a third body a role in the exercise of jurisdiction by the Court over the crime of aggression.

[8] Article 16 reads: "An individual who, as a leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression." *Yearbook of the International Law Commission*, 1996, vol. II (2).

2. Provisions on national security information

54. There were no major concerns about the applicability of the articles on national security information, in particular as regards article 57, paragraph 3, article 72, article 93, paragraph 4, and article 99, paragraph 5. One query was raised, however, in relation to article 73. The concern expressed was whether or not a State from which the Court had requested information would still be bound by the provision requiring that it seek the consent of the State which had disclosed the confidential information, where that State was an aggressor State. In this connection, it was stated that if the requested State was referring the situation to the Court, it would probably not have difficulties in disclosing third-party information. Furthermore, if the requested State was not a Party to the Statute, it would not be bound by the provision. In addition, it was recalled that the provisions on national security were the result of a delicate and difficult compromise and were best left unmodified.

55. It was agreed that there was no reason to look at these provisions again in light of the definition of crimes of aggression.

D. Definition and conditions for the exercise of jurisdiction

56. The Chair suggested addressing the elements of crime first and then moving on to a discussion of the definition of the crime of aggression. This gave rise to a preliminary discussion regarding whether it was preferable to start with the discussion of the elements of crime before any discussion of the definition of the crime of aggression itself had taken place. The view was expressed that it would be difficult to comment on some of the elements of crime suggested in the Coordinator's text, which seemed to reflect points that should be part of the definition.

57. On the other hand, some felt that discussing elements first would help to structure the discussion of the crime of aggression and the definition of aggression.

58. While there was broad recognition that the two issues were interrelated and could not be neatly separated, there was agreement with the Chair's suggestion that the discussion should be structured around the following questions:

(a) The rights of the accused with respect to the determination of an act of aggression by an outside organ;

(b) Whether there should be prior determination of the act of aggression before the Court can exercise jurisdiction, and if so, what is the appropriate body to make that determination;

(c) Whether the definition of aggression should be specific or generic.

59. It was also understood that all other issues relating to the Coordinator's text could be addressed and that the list of issues suggested by the Chair was not exhaustive.

1. The rights of the accused during the predetermination

60. It was pointed out that any discussion regarding predetermination of whether an act of aggression had been committed must be guided by considerations of due process. In particular, it was argued that a predetermination of an act of aggression should respect the rights of the accused. A contrary approach would not be consistent with article 67, paragraph 1 (i), of the Statute or with human rights law, especially article 14 of the

International Covenant on Civil and Political Rights. Participants agreed that the rights of the defendant as foreseen in the Statute must be safeguarded under all circumstances, including in connection with prior determination by a body other than the Court.

61. In this connection the view was expressed that it was doubtful whether the accused would be given access to the Security Council to enable him or her to challenge such a determination. Related to this was the question whether such a challenge would be before the body making the determination or before the International Criminal Court. It was pointed out in this regard that the Security Council could still remain primarily responsible for determining whether an act of aggression had been committed. There would be nothing under the Statute or under general international law to prevent the accused from raising or challenging such a finding during proceedings before the Court. Indeed there was agreement that a prior determination by a body other than the Court would not relieve the Court of its responsibility. It was pointed out that grounds for rebuttal could also be based on articles 30 and 31 of the Statute.

62. It was pointed out that a conflict between the Court and the Security Council could arise where the Court determined that there was no ground for prosecution since the act of aggression had not been committed, contrary to the findings of the Security Council. It was made clear that such a conflict was undesirable. While it was recognized that there was a need to protect the rights of the accused, it was also considered important to avoid confusing the rights of the accused with the determination of jurisdiction. It was necessary to delineate clearly the point of intersection between individual responsibility on the one hand and State responsibility on the other.

2. Prior determination of the act of aggression before the Court can exercise jurisdiction and the appropriate body to make that determination

63. Reference was made to the provision of article 5, paragraph 2, dealing with the conditions under which the Court shall exercise jurisdiction with respect to the crime of aggression. In this regard it was pointed out that article 5, paragraph 2, required a provision on the crime of aggression to be consistent with the provisions of the Charter of the United Nations. While there was general agreement that any provisions on the crime of aggression would have to be consistent with the Charter, there were considerable differences of opinion as to whether this implied that there had to be a prior determination of the act of aggression and whether such determination fell within the exclusive competence of the Security Council.

64. The participants focused on the 2002 discussion paper proposed by the Coordinator[9] in which it was suggested that determination of the existence of an act of aggression by an appropriate organ should be made a precondition for the exercise of the Court's jurisdiction in addition to the preconditions contained in article 12 of the Statute. It was contended that such a determination should only be procedural and not binding on the Court. If it were binding it would have a drastic impact on the rights of the accused.

65. As regards the body which should make the prior determination, there were differing views as to whether it should be made by the Security Council only or whether it could also be made by other bodies such as the International Court of Justice, the United Nations General Assembly or the Assembly of States Parties. Two approaches emerged: one in favour of the exclusive competence of the Security Council and the other advocating such competence for other bodies as well.

[9] PCNICC/2002/2/Add.2.

66. According to the first approach, the Security Council, under Article 39 of the Charter of the United Nations, has the exclusive competence to determine "the existence of any threat to the peace, breach of the peace or act of aggression" and to decide on appropriate measures to restore international peace and security; this exclusive competence must be respected in the provisions on the crime of aggression.

67. It was further argued that this determination could not be made by any other body such as the General Assembly or the International Court of Justice since it was only the Security Council that could take binding decisions on the existence of acts of aggression. In particular, it was argued that conferring such competence on the International Court of Justice would undermine the balance in the Charter and be inconsistent with the Rome Statute.

68. On the other hand, strong reservations were expressed regarding predetermination by the Security Council before the Court could exercise jurisdiction. Concern was expressed that such a precondition might undermine the development of an autonomous definition of the crime of aggression, particularly where a body guided by political rather than legal considerations would make such a determination. There was a strong preference for having such a determination made by a judicial organ instead.

69. It was pointed out that even if it were conceded that there should be a predetermination by another body, there was nothing in existing international law which gave the Security Council the exclusive right to make such a determination. It was also noted in this regard that article 5, paragraph 2, of the Statute did not make reference to Article 39 of the Charter. Those who disputed that the Charter conferred exclusive competence on the Council stated that at most it conferred primary competence, while determinations could still be made by other organs such as the General Assembly or the International Court of Justice, as had happened in the past. It was also argued that Article 39 of the Charter was confined to determining whether an act of aggression had taken place for the purpose of taking action and maintaining peace and security, and not for the purpose of authorizing judicial action.

70. It was also pointed out that the General Assembly had been able to adopt resolution 3314 (XXIX) notwithstanding Article 39 of the Charter. Reference was also made to the "Uniting for peace" resolution of the United Nations General Assembly,[10] and to the subsequent practice of the General Assembly in deciding that aggression had occurred in particular cases. In this regard it was mentioned that recent decisions of the International Court of Justice had also confirmed the competence of the General Assembly in this respect.

71. It was stated that, accordingly, the exercise of jurisdiction by the Court should not be tied to the determination by the Security Council nor should it be constrained by Security Council considerations, except in circumstances envisaged by article 16 of the Statute. Concerns regarding the exclusive competence were also based on the fact that permanent members of the Security Council could veto a proposed determination that an act of aggression had occurred and thus block criminal investigation and prosecution. Since aggression was a leadership crime, this could jeopardize the principle that all accused had similar legal resources at their disposal, irrespective of their nationality.

72. Some delegations maintained that the determination of an act of aggression should ideally be left to the Court itself. They recognized, however, that the Security Council had competence under Article 39 of the Charter, although not an exclusive one.

[10] A/RES/377 (V) of 3 November 1950.

73. During the discussion, consideration was also given to what would happen if the Security Council was unable to make a determination that an act of aggression had taken place. It was observed that if the provisions of Article 39 of the Charter were to be interpreted as conferring exclusive competence on the Security Council, the Court would be left in a state of paralysis since it would be unable to proceed in the absence of a prior determination by the Council.

74. Although no agreement was reached on the ideal course of action to be followed in such situations, it was argued that such a development would undermine the effectiveness and independence of the Court. In this regard the view was expressed that the Court already had jurisdiction over the crime of aggression pursuant to article 5 of the Statute. Thus, the Prosecutor had the competence either to seize the Security Council or another competent body with the question or to proceed with the investigation, except where this option was excluded under the procedure envisaged under article 16 of the Statute. The Security Council could thus always invoke article 16 of the Statute in connection with a determination of an act of aggression.

3. Definition of the crime of aggression: generic or specific

75. There was extensive discussion of whether the definition of the crime of aggression should be generic or specific (i.e. accompanied by a list such as that contained in United Nations General Assembly resolution 3314 (XXIX)). There was a considerable preference for a generic approach.

4. Proposed rewordings for the chapeau of the Coordinator's paper

76. It was noted that the proposed rewordings[11] sought to delete elements from the Coordinator's paper that were already covered by other provisions of the Statute, in particular article 25, paragraph 3, and article 30. As regards the difference between the two proposed rewordings, it was noted that while proposal A referred to a person who "participates actively" in the act of aggression, proposal B referred to an individual who "engaged a State" in the act of aggression.

77. It was pointed out that the main purpose of the proposals was to define the conduct element of the *actus reus*, it being understood that the question of individual criminal responsibility was dealt with by article 25, paragraph 3.

78. A number of participants considered that the proposals were helpful and merited further discussion. Among the concerns raised vis-à-vis the proposals was the fact that by deleting the words "planning, preparation, initiation or execution" they constituted a significant departure from the link which the Coordinator's text had retained with the Nuremberg principles, a matter that merited careful consideration.

79. Others held the view that the Rome Statute had significantly advanced the previous doctrine in areas such as war crimes and that such progress was also necessary with regard to the crime of aggression. This was a necessity because the Nuremberg principles took a completed act of aggression as the point of departure, whereas the Statute had to determine what constituted aggression for the future. The presence of the "general part" (Part 3) in the Statute was a new departure in international drafting that needed to be taken into account.

[11] See appendix I.

80. Another concern was the need for greater precision on how the proposed rewordings would deal with planning and preparation as possible parts of the crime of aggression; in particular, the query was raised as to whether planning and preparation going back a decade or more would be adequately covered by the proposed rewordings. In this connection, it was stated that proposal B would cover planning and preparation only if the act of aggression had been carried out and that other provisions, such as subparagraphs (b) and (f) of article 25, paragraph 3, might be useful for addressing situations where the act had not been completed.

81. An additional query was whether the proposed definitions covered the case of omissions, since subparagraphs (b) and (c) of article 25, paragraph 3, would apply. It was also mentioned that the issue of omission might best be left to the Court itself, as was the case for the other crimes.

82. In relation to the "attempt" to commit the crime of aggression, it was stressed that subparagraph (f) would relate only to the attempt by an individual to participate in the collective act and not to the collective act *per se*. It was noted that the attempted collective act itself could, however, be covered by the chapeau of the definition. According to another view, although an attempt by a State to commit an act of aggression merited penalization, in practice it would be difficult since the act of aggression was a circumstance element of the individual crime. While the view was expressed that penalizing an attempt to commit an act of aggression was desirable, it was also said that this would prove impossible in the case of a provision requiring a predetermination of such an act by a body other than the Court.

83. Some drafting observations were also formulated, in particular in relation to proposal B where the use of the word "engaging" seemed to be unsuitable. One option suggested was to dispense with the term "direct" in the chapeau and to use it to replace "engage". However, it was also agreed that there was a need to verify the origin of the language on the issue of leadership crime before altering it. Nonetheless, it was also suggested that the term "engage" should be retained as a placeholder until a more appropriate term could be agreed to.

84. Some participants welcomed the approach of moving away from the logic of the Coordinator's paper, although others felt that it was necessary to ascertain whether all the issues dealt with in the Coordinator's proposal were adequately covered by the new proposals.

85. As regards the definition suggested in proposal A, preference was voiced for the deletion of "actively", which would possibly address the issue of omission.

86. It was noted that further reflection was required on some conceptual issues, such as those dealing with planning and preparation, as well as on the applicability of the notion of "attempt" to the crime of aggression. Nonetheless, there was agreement that article 25 should be applicable to the crime of aggression.

E. Future work

1. Allocation of time at the regular sessions of the Assembly of States Parties

87. Participants expressed concern that the time allocated to the Special Working Group in the context of sessions of the Assembly of States Parties was insufficient. Participants agreed that the Assembly, starting with its fifth session in 2006, should allocate a minimum of two full days for meetings of the Special Working Group without any

parallel meetings on other issues taking place. A further advantage would be that full interpretation and translation services were provided for formal meetings of the Assembly.

2. Venue of the meetings of the Special Working Group on the Crime of Aggression

88. In relation to the venue, the question whether future formal meetings of the Special Working Group should be held in The Hague or in New York was discussed. Some participants argued that The Hague was the seat of the Court and therefore the natural meeting place for the Assembly of States Parties and the Special Working Group. A number of participants underlined the need for the greatest possible participation by all States, not only States Parties, and noted that higher attendance could be attained in New York. It was observed that some regional groups had a very limited presence at the meetings in The Hague and would be much better represented if the Working Group were to meet in New York. It was mentioned that the Special Working Group needed to adopt the same venue as the Assembly as a whole and that the discussion might be better placed in the context of the Assembly.

3. Future inter-sessional meetings

89. There was agreement that the informal inter-sessional meeting had proved very useful and significantly advanced the work. There was recognition of a very positive momentum that needed to be preserved. It was therefore agreed that informal inter-sessional meetings should continue to be held in the future and that Princeton University was the ideal venue for such meetings. The meeting noted with regret that the delegation of Cuba had again been denied permission to travel to Princeton in order to attend the meeting in spite of the efforts of the President of the Assembly and the Chair of the Special Working Group. For technical reasons, it had also proved impossible on this occasion to establish a video link between New York and Princeton to allow for at least partial participation. It was noted that the Review Conference was not very far away and that further inter-sessional meetings would be indispensable to allow for the timely conclusion of the work of the Special Working Group, even with more time allocated at the regular sessions of the Assembly.

4. Roadmap

90. With regard to a roadmap, the meeting agreed that the Special Working Group needed to conclude its work well in advance of the Review Conference. This would allow for the necessary domestic consultations and generation of the political momentum needed for the adoption of provisions on the crime of aggression at the Conference. It was therefore agreed that the Special Working Group should conclude its work 12 months prior to the Review Conference at the latest.

5. Follow-up and preparation of future work

91. As for the follow-up to the discussions in Princeton, the meeting agreed in principle to establish a “virtual working group” that would allow States to advance their discussion outside regular and inter-sessional meetings, it being understood that such a working group communicating by electronic means would be open to all interested States. The Chair was given the task of exploring the best way of establishing such a group.

92. As regards the preparation of future work, it was suggested that the discussions at the next meeting of the Special Working Group should be well structured, as had been the case at the current inter-sessional meeting. The meeting mandated the Chair to draft a list of topics and questions for consideration at future meetings.

Appendix I

Proposed rewordings for the chapeau of the Coordinator's paper

Proposal A

Definition, paragraph 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 participates actively in an act of aggression …"

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

"In respect of the crime of aggression, paragraph 3, sub paragraphs (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."

See also Elements of Crimes, paragraph 8 of the general introduction.

Proposal B

Definition, paragraph 1:

"For the purpose of this Statute, 'crime of aggression' means engaging a State, when being in a position effectively to exercise control over or to direct the political or military action of that State, in [… collective/State act]."

Article 25
Insert a new paragraph 3 bis

"In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the political or military action of the State shall be criminally responsible and liable for punishment."

(Article 25, paragraph 3, does apply to the crime of aggression.)

Appendix II

Annotated agenda

1. List of issues related to the crime of aggression

The 2004 inter-sessional meeting revised the list of issues[12] to be addressed in developing proposals for a provision on aggression in accordance with article 5, paragraph 2, of the Rome Statute. Since it was understood that the list is non-exhaustive, participants might want to add further elements to the list or to revise existing elements.

2. Issues discussed at the 2004 meeting requiring further consideration

The conclusions of the 2004 meeting can be broadly divided into three categories: (a) On a number of issues the meeting concluded that the relevant provisions of the Rome Statute were adequate or did not pose problems specific to the crime of aggression; (b) on some issues the meeting reached general agreement and in some cases also recommended that the issue be revisited once agreement had been reached on the definition of aggression; and (c) on some issues divergent views were offered and there was no agreement; further consideration is thus required.

Reference is made in particular to the following issues:

(a) Possibility for a State to "opt out" of the Court's jurisdiction over the crime of aggression;[13]

(b) Retention, exclusion or adaptation of article 25, paragraph 3, for the crime of aggression (leadership crime); and [14]

(c) Retention, exclusion or adaptation aggression (superior orders).[15]of article 33 for the crime of

Furthermore, articles 28 and 30 were also identified as requiring further consideration.

3. Preliminary discussions on other issues relating to the Rome Statute

- International cooperation and judicial assistance

This issue figures on the list as requiring further consideration depending upon the applicability of the principle of complementarity. The 2004 meeting concluded that the provisions on complementarity would not need to be amended for the crime of aggression. Participants might therefore want to discuss whether Part 9 of the Rome Statute warrants any changes.

- Investigation and prosecution (Part 5 of the Statute)
- National security information (article 57, paragraph 3; article 72; article 93, paragraph 4; and article 99, paragraph 5)

[12] Report of the inter-sessional meeting of the Special Working Group on the Crime of Aggression, contained in document ICC-ASP/3/25, annex II, appendix.
[13] Ibid., para. 19.
[14] Ibid., para. 53.
[15] Ibid., para. 63.

Participants might want to hold preliminary discussions on the potential need to adapt the relevant provisions.

4. Elements of Crimes and Rules of Procedure and Evidence

The list of issues refers to possible issues relating to the Elements of Crimes (a draft is contained in the Coordinator's text[16]) and the Rules of Procedure and Evidence. Participants might want to discuss whether and how these questions should be dealt with before agreement has been reached on the definition itself, or whether they should be left for consideration at a later stage.

5. Definition

On the basis of the Coordinator's text,[17] participants might want to continue discussions on the definition of the crime of aggression.

6. Conditions under which the Court shall exercise jurisdiction

On the basis of the Coordinator's text,[18] participants might want to continue discussions on the conditions under which the Court shall exercise jurisdiction.

7. Other issues

Participants might want to discuss procedural questions relating to the work of the Special Working Group, in particular allocation of time at regular sessions of the Assembly of States Parties and their venue, future inter-sessional meetings, etc. It could also be discussed whether a roadmap outlining the future work leading to the submission of proposals for a provision on aggression to the Assembly for consideration at a Review Conference could be beneficial.

[16] PCNICC/2002/2/Add.2.
[17] Ibid.
[18] Ibid.

Annex II.B

Discussion paper 1
The Crime of Aggression and Article 25, paragraph 3, of the Statute

A. Individual participation - Article 25, paragraph 3 (a) to (d) of the Statute

(Point of Reference: Paragraphs 19 to 32 of the *Princeton Report 2005, under "(a) Participation by an individual in the criminal act"*)

I. *Background*: The recent evolution of our discussion

1. The suggestion to *exclude the applicability of Article 25, paragraph 3(a) to (d), of the Statute* as set out in the *Discussion Paper (2002) on the definition and elements of the crime of aggression prepared by the Coordinator of the Working Group on the Crime of Aggression during the Preparatory Commission of the International Criminal Court* [hereafter: *Discussion Paper*])[1] = The "monistic approach"

Paragraph 1 of the *Discussion Paper* describes the *conduct* element[2] of the crime of aggression, i.e. the conduct by which the individual concerned is linked to the State's act of aggression/use of (armed) force/armed attack (hereinafter: the collective act[3]), as follows [the key words appear in italics]:

> "[…] 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 […] [emphasis added]"

This definition must be read together with paragraph 3 of the *Discussion Paper* which purported to *exclude* the applicability of Article 25, paragraph 3 of the Statute dealing with the different forms of participation into a crime.

Hereby, the *Discussion Paper*, in following the Nuremberg legacy, adopts a straight forward approach to define the *individual conduct* giving rise to international criminal responsibility for the crime of aggression: The terms "ordering and participating" *exhaustively* define such conduct. Of particular importance is the *generic* term "participating"[4] which serves as a kind of "catch all clause" for the very differentiated list of forms of participation in a crime as contained in Article 25, paragraph 3 (a) to (d) of the Statute.

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[1] Originally issued as PCNICC/2002/2/Add.2, 24 July 2002, and reissued as Annex II to the Official Record of the Second Session of the ASP (ICC-ASP/2/10, p. 234).
[2] For use of this term in the Statute, see Article 30, paragraph 2 (a).
[3] This paper does not take any position on the definition of the collective act.
[4] Which, incidentally, would certainly encompass "ordering", the latter being nothing but a *specific form* of participation.

For convenience's sake, the *Discussion Paper*'s approach to individual participation will be called *monistic* throughout this paper because it does not distinguish between the *commission* of the crime on the one hand (Article 25, paragraph 3 [a], of the Statute) and *ordering* etc. (Article 25, paragraph 3 [b] of the Statute) and *aiding* etc. (Article 25, paragraph 3 [c], of the Statute) (in) such commission on the other hand.

2. The suggestion to apply Article 25, paragraph 3 (a) to (d) of the Statute as favoured during the *Princeton 2005 Intersessional* = The "differentiated approach"

During the *Princeton Intersessional 2005*, a tendency has materialized in favour of what may be called for the sake of convenience the *differentiated* approach, that is to apply Article 25, paragraph 3 (a) to (d) with all the different forms of participation listed therein to the crime of aggression (for the details of the debate, see paragraphs 19 *et seq.* of the *Princeton 2005 Report*).

This differentiated approach must be qualified, however, as "there was agreement that the crime of aggression had the peculiar feature of being a leadership crime, thereby excluding participants who could not influence the policy of carrying out the crime, such as soldiers executing orders" (paragraph 19 of the *Princeton 2005 Report*).

The tendency emerging at the *Princeton 2005 Intersessional* was to combine the differentiated approach with the recognition of the leadership character of the crime. Thus, to summarize, the meeting leaned towards the view

- first, *not* to exclude the applicability of Article 25, paragraph 3 (a) to (d) of the Statute to the crime of aggression, and
- second, to transpose the "leadership qualifier" in paragraph 1 of the *Discussion paper* into Article 25 of the Statute and thus to state there:

> "In respect of the crime of aggression, only persons being in a position effectively to exercise control over or to direct the military action of a State shall be criminally responsible and liable for punishment" (see paragraph 30 of the *Princeton 2005 Report*).

II. Two suggested areas for discussion

In light of the recent tendency in favour of the differentiated approach, it is suggested to first see as to whether such an approach can be spelled out in a complete and workable manner. As will be shown immediately *infra sub* III., this goal has *not* yet been reached.

It will then (*infra sub* IV.) be suggested not, at this stage, to definitively abandon the monistic approach as set out in the *Discussion Paper* because, whatever its possible flaws, this approach certainly constitutes a simple and coherent way to deal with the problem.

Instead, it will be suggested to make the final choice as to which of the two approaches is preferable only after a full consideration of both approaches.

III. Completing the differentiated approach

1. Defining the *conduct* element of the crime of aggression

a) The problem

The *two* components of the differentiated approach as they have been emerging in the *Princeton 2005 Intersessional* are the applicability of Article 25, paragraph 3 (a) to (d) of the Statute (first component) and the addition of a "leadership qualifier" hereto (second component). As paragraphs 27 and 32 of the *Princeton 2005 Report* indicate, the differentiated approach needs as a *third* component the description of the *conduct element* of the crime in the crime's definition to be workable.

In more precise words: If Article 25, paragraph 3 (a) to (d) of the Statute is to apply to the crime of aggression, it must be defined what it means that an individual *commits* such a crime (cf. the use of the term "commits" in Article 25, paragraph 3 (a) of the Statute). Only once it will be defined what *commission* of a crime of aggression means, it will be possible to answer the question what it means that a person has *ordered* the *commission* of such a crime within the meaning of Article 25, paragraph 3 (b) of the Statute or that a person has *aided* in the *commission* of the crime of aggression within the meaning of Article 25, paragraph 3 (c) of the Statute.

The person who *commits* a crime is often called the *principal perpetrator*. So what is needed to complete the differentiated approach is, in short, the definition of what a principal perpetrator of the crime of aggression actually does. Any definition of the conduct of a *principal* perpetrator of the crime of aggression must take account of *two special features of the crime of aggression*:

First, in the case of the crime of aggression, the underlying *collective* act is not broken down in a list of possible individual types of conducts, as is the case with the crime of genocide (killing, causing serious bodily or mental harm etc.) and the crime against humanity (murder, extermination etc.); that means that it is the collective act *as such* that constitutes the point of reference for any definition of what the individual principal perpetrator actually does. No individual principal perpetrator can, however, commit a (State) use of (armed)force/armed attack/act of aggression; even the top leader will always need to make use of many other individuals belonging to the State apparatus (soldiers in particular) to bring about the collective act. It would seem to follow that a principal perpetrator of the crime of aggression would be an individual who, in respect of the actual use of armed force, *acts through many other persons* under his or her control.[5]

Second, due to the leadership character of the crime of aggression *every* participant in the crime must "be in a position effectively to exercise control over or to direct the military action of a State" to incur criminal responsibility. The differentiated approach must therefore formulate a *criterion to distinguish* between two types of leaders: those who *commit* the crime ("the leader type principal perpetrator") and those who participate in the crime in one of the other forms of participation listed in Article 25, paragraph 3 (b) to (d).

[5] Arguably, this type of principal perpetrator is not unknown to Article 25, paragraph 3 (a) of the Statute, as the latter provision covers a person who "commits a crime … through another person, regardless of whether that other person is criminally responsible".

b) What solution?

During the *Princeton 2005 Intersessional*, two proposals have been put forward to define the conduct element in the definition of the crime; those proposals have been reprinted as Annex I to the *Princeton 2005 Report*.

Proposal 1: "*participates* […] in [the collective act]"

Comment: This wording is partly[6] *congruent* with the wording suggested in the *Discussion Paper*[7]. The reference to "participation" makes sense under the *Discussion Papers* monistic approach because *if* Article 25, paragraph 3 does *not* apply, and consequently a *generic* term for all forms of individual involvement in the very definition of the crime of aggressions is needed; it would seem hard to find a more suitable *generic* term than "participation".

At the same time, it is submitted that the use of the term "participation" does *not* work under the differentiated approach precisely because it is *generic* in character: The use of the word "participation" does not specifically refer to the conduct of the principal perpetrator. It follows that it cannot be read together with other forms of participation under Article 25, paragraph 3 of the Statute. Take only one example: If the word "participate" is used in the definition of the crime *and* if Article 25, paragraph 3 (c) of the Statute is applied, the result would be that an *aider* in the crime of aggression would be someone who "*aids* in the *participation* in [the *collective* act]". That would not seem to make much sense.

Suggestion: It is submitted that to define the conduct element by the term "participate" *and* to apply Article 25, paragraph 3 of the Statute to the so defined crime amounts to an impossible combination of a monistic (generic definition of individual involvement in the crime's definition) *and* differentiated (applicability of Article 25, paragraph 3 [a] to [d]) approach.

Question 1: Is this analysis correct or can the term "participate" work alongside Article 25, paragraph 3 (a) to (d) of the Statute?

Proposal 2: "*engages* a State in [the collective act]"

Comment: Other than proposal 1, this proposal tries to capture the specificity of the *principal* perpetrator of the crime. The idea is to express that the principal perpetrator of the crime of aggression is the person[8] who ultimately decides about the initiation and the carrying out of the State's use for force. It is recalled from the *Princeton 2005 Intersessional* that especially native speakers expressed doubts whether "engage" is a good word to express this idea. It is wondered whether a more precise formulation of the idea behind *Proposal 2* could be to say "engages the (armed) forces of a State in a [collective act]".[9]

[6] The additional reference to "orders" in the *Discussion Paper* is eliminated.
[7] *Supra* note 3.
[8] Or a group of persons.
[9] One additional piece of information on the experience with the definition of the crime of aggression in *Germany*'s criminal code. The definition in section 80 of the *German* code is widely considered to be badly drafted as it describes the perpetrator of the crime as a person "who prepares a war of aggression". In the course of the debate about a improving section 80 the most promising proposal

Question 2: Which are the (possible) merits and/or (possible) flaws of Proposal 2?

Proposal 3: "*directs* the [collective act]"

Comment: One further option which has not been reprinted in Annex I to the *Princeton 2005 Report* but which was discussed in the margins of the *Princeton 2005 Intersessional* is to use the word "direct": The principal perpetrator of the crime of aggression would thus be the person who directs the collective act. It is submitted that this idea deserves a closer look; it seems to accurately reflect the fact highlighted *supra sub* a) that the principal perpetrator of the crime of aggression can only be somebody who "commits the collective act through other persons". It may also be noted that the word "direct" is used in the "leadership qualifier" as it currently stands.

Question 3: Which are the (possible) merits and/or (possible) flaws of the use of the term "direct"?

Question 4: Which other term can be thought of to solve our problem to define the conduct element?

2. The suggested omission of a reference to "planning and preparation" in the definition of the crime

a) The problem

In the definition of the crime of aggression as set out in paragraph 1 of the *Discussion Paper*[10] the conduct element "orders or participates" refers not only to the "initiation or execution of" the collective act but also to its "planning and preparation". Within the scheme of the *Discussion Paper*, the practical effect of this reference is as follows: While individual criminal responsibility for a crime of aggression presupposes that a complete collective act, i.e. an actual use of force, actually occurs, it is possible for an individual to incur criminal responsibility for an act of participation which is confined to the planning or preparation stage of the collective act. It would seem that the criminalization of such acts of participation has a sound basis under customary international law and has so far been largely uncontroversial.

The recent tendency to move away from the *Discussion Paper*'s approach to individual participation in the direction of the differentiated approach seemed to be coupled with an inclination to eliminate the references to "planning and preparation" from the crime's definition (the last sentence of paragraph 31 of the *Princeton 2005 Report* implies such an inclination).[11] However, the question was also asked in *Princeton* whether such an elimination did not entail the risk of excluding the individual criminal responsibility for such acts of participation which have been confined to the early stages of the collective act.

refers to a person "who engages the armed forces of a State into a war of aggression by that State" (in *German*: "wer die Streitkräfte eines Staates zu einem Angriffskrieg einsetzt").

[10] *Supra* note 3.

[11] To take the example of Proposal A for a "Definition, paragraph 1" as set out in Annex I of the *Princeton 2005 Report*: The suggested conduct element "participates" refers simply to "an act of aggression", ie a completed collective act.

b) Comments

The answer may vary depending on the formulation of the conduct element within the differentiated approach (see supra sub 1.):

Proposal 2 as discussed *supra sub* 1. b) defines the individual conduct simply as "engaging (the armed forces of) a State into a use of force" and not also "engaging a State into the planning and preparing of such a use of force". Would such a definition exclude the criminal responsibility of a State leader whose involvement in the (emerging) collective act has remained confined to the planning and preparation stage? It would seem doubtful to me whether the answer depends on the applicability of the attempts provision under Article 25, paragraph 3 (f) (but see paragraph 40 of the *Princeton 2005 Report*) because the "early participant" has completed his or her act of participation and, as a consequence hereof, he or she cannot easily be described as a person who has attempted to commit the crime of aggression. Instead, the question would seem to hinge on the application of Article 25, paragraph 3 (c) of the Statute. Can somebody who has been involved (only) in the planning of an eventual use of force be said to have aided or abetted the (principal) perpetrator in his or her act of engaging the State concerned in its use of force?

The same type of questions can be asked if the word "*engage* (the armed forces of) a State into the collective act" is replaced by the word "*direct* the collective act" (Proposal 3 *supra sub* 1. b). Is it possible to aid or abet the directing of a use of force by a mere contribution to the planning of such use? In case the answer remains open to doubt, it should be considered as the safer option to add the specific references as contained in paragraph 1 of the *Discussion Paper* and to say, e.g., "direct the planning, preparation, initiation or execution of the collective act".

Question 5: Does the applicability of Article 25, paragraph 3 (a) to (d) of the Statute to the crime of aggression entail the possibility to eliminate the reference to "planning and preparation" in the definition of the conduct element of that crime?

IV. Merits and flaws of the monistic approach in comparison with the differentiated approach

The considerations *supra sub* III. 1. a) reveal that the *differentiated* approach to the problem of individual participation into the crime of aggression entails the rather complex question how to define the conduct element of the crime; this question has not yet been answered in a satisfactory manner (*supra sub* III. 1 b). In addition, the difficult question arises whether the reference to "planning and preparation" in the definition of the conduct element is needed if one is to follow the differentiated approach (*supra sub* III. 2.).

In comparison, the *monistic* approach as set out in the *Discussion Paper*[12] appears to be *rather simple*. It tries to cover *all* individuals incurring criminal responsibility for the crime of aggression by the generic formula "*participates* … [in the collective act]". At this point of the discussion, it seems an open question, whether the simplicity of the monistic approach might not, in the end of the analysis, turn out to be a decisive advantage.

For this reason, it is suggested to have another very close look at the monistic approach to see whether it has flaws and, if so, how serious they are. Looking back at the *Princeton 2004 and 2005 Debates*, it would seem that one main *substantive* and one main *systematic* critique have been voiced against the monistic approach:

[12] *Supra* note 3.

As a matter of *substance*, it was noted that the exclusion of Article 25, paragraph 3 of the Statute entailed "a potential risk of excluding a group of perpetrators" (paragraph 22 of the *Princeton 2005 Report*).

Comment: It would be very helpful if this argument could be specified. Is it possible to think of a concrete example of a "group of perpetrators" which should be included, but risks to be excluded from individual criminal responsibility for the crime of aggression *as a result of the monistic approach*? In other words: Which "group of individuals" could *not* be said to have *participated in* the collective act and *should* as well as *could* still be hold criminally responsible by reference to one of the categories of Article 25, paragraph 3 (a) to (d) of the Statute?

The *systematic* argument is that the *monistic* approach does not reflect the fact that the ICC Statute - other than prior international criminal law instruments - is based on the idea of an interplay between the definitions of crime ("Special Part of International Criminal Law in Part 2 of the Statute") and the ("General Principles of [International] Criminal Law" in Part 3 of the Statute).

Comment: This argument has an immediate appeal as it aims at an *equal* treatment of all core crimes under the Statute in terms of drafting technique. As Part 3 has been included into the Statute, there should, indeed, be a kind of presumption to apply this Part to all core crimes. But another thought should be given to the question as to whether *the specific characteristics of the crime of aggression* (see *supra sub* III. 1.: the *collective* act *as such* being the point of reference for the individual conduct; the *leadership character* of the crime; *supra sub* III. 1.) are not of such a quality to justify a rebuttal of the presumption.[13]

Question 6: What is the weight of the two arguments which have been advanced against the monistic approach in light of the questions and comments above? Is the monistic approach flawed in (yet) other respects?

Question 7: Is it agreeable not (yet) to abandon the monistic approach as *one* option to deal with the problem of individual participation in the case of the crime of aggression?

B. The crime of aggression and *attempt*

(Point of reference: Paragraphs 33 to 43 of the *Princeton 2005 Report, under "(b) Attempt to commit the crime of aggression"*)

I. Background

Paragraph 3 of the *Discussion paper*[14] purports to *exclude* the applicability of Article 25, paragraph 3 (f) of the Statute[15] to the crime of aggression. This suggestion has

[13] As a note of information: In *Germany*, the applicability of the "General Part" including the sections on the different forms of individual participation in a crime is not specifically excluded in the case of Section 80 on preparing a war of aggression; in the course of the doctrinal debate it has, however, clearly emerged that the interplay between the definition of the crime of aggression contained in Section 80 and the Sections on individual participation contained in the General Part causes immense if not unsolvable problems.

[14] *Supra* note 3.

[15] The first sentence of this provision reads: "Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions."

received mixed reactions (see paragraphs 35, 36 and 40 of the *Princeton 2005 Report*) so that further discussion is needed.

II. The (possible) practical effect of applying Article 25, paragraph 3 (f), of the Statute to the crime of aggression

It is suggested that it may be helpful to first *clarify the practical effect of the exclusion of the attempts provision*. In that respect, the *Princeton Intersessional 2005* has advanced the debate by drawing "a distinction between (a) the collective act of aggression, which would be carried out by a State; and (b) the individual act of participation in the collective act (paragraph 33 of the *Princeton Report 2005*)."

1. Article 25, paragraph 3 (f) of the Statute, and the commenced but uncompleted *individual* act of participation

a) Article 25, paragraph 3 (f) of the Statute, and the alternative "monistic"/ "differentiated" approach to individual participation

The choice to be made between "monistic" and "differentiated" approach to individual participation (*supra sub* A) is not without repercussions on the questions posed: The exclusion of Article 25, paragraph 3 (f) of the Statute goes better with the "monistic" than with the "differentiated" approach because *litterae* (b) to (d) of Article 25, paragraph 3 all refer to the "*attempted* commission" of the crime. By those references, Article 25, paragraph 3 (b) to (d) presupposes that the attempt to commit the crime is, in fact, criminalized. If we exclude the applicability of Article 25, paragraph 3 (f) to the case of aggression while conserving the applicability of Article 25, paragraph 3 (b) to (d) of the Statute, the references in the latter *litterae* would be left without point of reference. This may be seen as a purely formal point but it should be noted as a point of diligent drafting.

b) The cases of an attempted individual act of participation in a completed collective act

The applicability of Article 25, paragraph 3 (f) of the Statute would have the effect of extending the scope of individual criminal responsibility in cases where the individual act of participation has only been commenced while the collective act has been completed. It is submitted, however, that *such cases of attempt remain rather theoretical in nature*: Two cases that come to mind are the high-ranking State official who has commenced to participate in a meeting at the preparation stage of the collective act but is then prevented to take part in the actual decision making; and the (very) high military leader who was about to give an important order in the course of the execution of the State use of force but has then been prevented to complete his act of ordering.

2. Article 25, paragraph 3 (f) of the Statute and the case of the "commenced but uncompleted" *collective* act

The much more sensitive question appears to be whether the applicability of Article 25, paragraph 3 (f) of the Statute would also extend the individual criminal responsibility to cases where the collective act has not fully materialized. This question is of greatest relevance where the definition of the crime of aggression - as in the case of the *Discussion Paper*[16] - describes the collective act as a use of force by State which has actually occurred.

[16] *Supra* note 3.

Would the application of Article 25, paragraph 3 (f) of the Statute have as its result that individual criminal responsibility for the crime of aggression is no longer dependent on the actual occurrence of the use of force but would instead be triggered by some earlier stage of the collective act? Such an effect would be of great practical importance as the demarcation line for the international criminality for aggression would be shifted "collectively", i.e. vis-à-vis to *all leaders involved*.

It is difficult to derive a conclusive answer to our question from the wording of Article 25, paragraph 3 (f) of the Statute. Can it be said that all leaders who have participated in the collective act at a time where the armed forces of the respective State have begun to move in the direction of the target State's border have "taken action that commences its [the crime's] execution by means of a substantial step" (cf. the wording of Article 25, paragraph 3 [f] of the Statute)? As a matter of both historic and purposive interpretation, one certainly wonders whether it is the goal of Article 25, paragraph 3 (f) of the Statute to extend the individual criminal responsibility in such a *collective* manner: It would seem open to question whether the drafters of Article 25, paragraph 3 (f) of the Statute thought of the possibility that the provision would be applied to the case of the participation (of potentially many individuals) in an "attempted collective act", let alone the unprecedented challenge to apply the criminal law doctrine of attempt to a "collective act".

In light of these considerations, there are good reasons to doubt whether judges would apply Article 25, paragraph 3 (f) of the Statute in those cases where the use of force of the State has not actually occurred; it would seem bold, however, to predict such a case law with certainty.

Final note: The foregoing considerations have started from the assumption that the *definition* of the crime of aggression requires that the *collective* act fully materializes, i.e. that the use of force by a State actually occurs. *Whether or not the collective act shall be so strictly defined, is an entirely distinct question* and no view is expressed on that matter in this paper.

Question 8: Should the applicability of Article 25, paragraph 3 (f) of the Statute to the crime of aggression be excluded in the light of the foregoing or other considerations?

Annex II.C

Discussion paper 2
The conditions for the exercise of jurisdiction with respect to the crime of aggression

The Working Group still has some work to do before it gets close to a consensus. Consequently, it may not be advisable to discuss concrete drafting proposals; while everything is still on the table, all of the texts have been thoroughly discussed. Instead, it is proposed to continue on the road taken at Princeton, namely to clarify the issues involved, in order to set the stage for a later agreement. Therefore, it would be most useful to:

1. try to analyse the legal parameters (de lege lata, existing international law) and
2. set out the possible options including the legal implications of these options.

Below is an outline of the issues which appear to be involved. This scheme should imply no preference for any particular view or solution.

The Group had a good discussion on the rights of the accused (D, below) in Princeton (see paras 60-62 of the Princeton report). Further, the questions listed under C are slightly more technical (though by no means uncontroversial). Consequently, discussions on points A and B seem to be most urgent. Those two clusters contain between them the important and controversial issue whether the UN Security Council has the exclusive right to determine that an act of aggression has occurred. That, of course, entails a discussion about Article 39 of the UN Charter, but hopefully the Group will deal with other issues, too.

A few words about the distinction between the issues under A and B, which is a bit tricky. The issues under A concern the option that the ICC should be able to exercise jurisdiction only after some other organ has made a decision to that effect; such a decision could consist of either a determination that an aggression has occurred or an explicit consent for the ICC to proceed (with or without a determination of aggression by that organ). The questions under B, on the other hand, do not assume that a decision of another body is necessary for the ICC to start exercising jurisdiction, for instance by starting an investigation. Nevertheless, B asks whether it should be for another body to determine the state act of aggression; if so, it would be for the ICC to accept such determination as prejudicial in cases involving individual acts of aggression.

Hence, the “go ahead” for the ICC to proceed and the judicially relevant determination of an act of aggression are not necessarily the same thing. On the one hand, one could imagine a solution whereby the OTP could initiate investigations even without a decision by another organ, but that any judgment (and, perhaps, any prosecution), would have to build on a determination of the state act by someone else. On the other hand, there is also the converse possibility, i.e., that a decision by some other organ is necessary for an investigation or a prosecution to be initiated, but that it is for the ICC only to determine whether an act of aggression – as a necessary element of the crime of aggression -- has occurred. The two approaches (A and B) could, of course, also be combined, in which case the ICC could not exercise jurisdiction without a decision by another organ, and a determination by another organ would be prejudicial.

This line of reasoning assumes that it is necessary to determine that a state act of aggression has occurred before it can be determined that an individual crime of aggression is at hand. It is on

that assumption that the Group has based its discussions, and that assumption seems never to have been challenged.

A. Conditions for the exercise of jurisdiction

1. Should the ICC exercise jurisdiction of the crime of aggression only after another organ has accepted such exercise?

2. If so, what sort of decision would be required?
   (a) A determination that a state act of aggression has occurred?
   (b) An explicit "go ahead" (consent) for the ICC to exercise jurisdiction?

3. Which organ would make that decision? (The Security Council? The General Assembly? The ICJ? Any one of the above?)[1]

B. Prejudicial decision

1. Should the determination of the state act be made by another organ prejudicially?

2. If so, which organ? (The Security Council? The General Assembly? The ICJ? Any one of the above?)

C. Procedural questions regarding decisions made by other organs

1. If UNSC:

   (a) Should the decision be taken under Chapter VII of the UN Charter?

   (b) Could it be regarded as a procedural question under Article 27(2) of the UN Charter?

   (c) Should the decision or the determination be made only in an operative or also, alternatively, in a preambular paragraph?

   (d) *Comment:* This subquestion seems to be most relevant as regards determinations. A "go ahead" would most likely be given in an operative paragraph. Several alternatives could, theoretically, be envisaged:

      a) It is necessary that the Council make a decision binding on all states under Article 25 UNC, in which case it should probably use the word "decide" in an operative paragraph (this would be a very strict view);

      b) It is necessary that the Council make an explicit decision in an operative paragraph, but without using the verb "decide", but rather words like "determine";

      c) The Council must make its finding in an operative paragraph, but could do so either explicitly or implicitly, "en passant", for instance by using an adjective such as "aggressive" to characterize the behaviour of a state;

      d) The Council could make an explicit characterization, like in b), but could do so in either a preambular or an operative paragraph;

      e) It would suffice if the Council made the determination in any form (explicit or implicit), in a preambular or an operative paragraph.

[1] Of course, the ICJ would not be a likely candidate if option A.2.b is chosen.

2. If the ICJ:

   (a) Only in an advisory opinion after an explicit request or also, alternatively, in any other final decisions (advisory opinions or judgments)?

   (b) Only in the operative decision (dispositif) or also, alternatively, in the reasons?
   Comment: If an operative decision is necessary, that means that the Court would have to vote on the determination of the act. In addition, the Group would have to discuss whether the characterization should be explicit or implicit (cf the comment to 3.1.3, *supra)*.

3. If the GA:

   (a) ½ or 2/3 majority?

   (b) Should the decision or the determination be made only in an operative or also, alternatively, in a preambular paragraph? (See comments to C.1(c).)

D. Other issues

1. How to protect the rights of the accused according to the Rome Statute and international human rights law, particularly in the determination of the state act?

Annex II.D

Discussion paper 3
Definition of Aggression in the context of the Statute of the ICC

Aggression as an act of State

1. Should the definition be generic or specific? If specific, should the list be that of Resolution 3314/74 ?

Commentary

A generic definition is one which does not include a list of acts which would constitute acts of aggression. Conversely, a specific definition is one which does contain such a list or refers to an existing one, such as the one contained in General Assembly Resolution 3314/74.[1]

With respect to a specific definition, it should be noted that the list attached to Resolution 3314 is illustrative. This does not seem to combine with the need to respect the criminal law principle *nullum crimen nulla poena sine lege*.

It is possible to avoid this difficulty by making the list exhaustive. However, this would in effect interfere, perhaps impermissibly, with the definition of Resolution 3314 and could, furthermore, generate a need or a wish to include new cases of aggression which are not actually provided for in Resolution 3314.

It is for these reasons that it has been rather clear in Princeton but also in sessions of the Prep Com that a generic approach to the definition would be preferable.

2. How do you think that aggression by a State should be described in the context of the ICC Statute?

-- Use of force[2]?
-- Armed attack[3]?
-- Act of aggression[4]?
-- Use of armed force[5]

Commentary

There are different degrees of specificity and width in each one of the above terms. "Armed attack" and "use of armed force" might be interpreted to be narrower than "use of force". "Act of aggression" would combine with a "specific" definition as it might be considered as an implicit reference to article 3 of the Annex to Resolution 3314.

[1] Reference to Resolution 3314 (without mentioning each particular case) is made in the "Discussion paper proposed by the Coordinator", (PCNICC/2002/WGCA/R.T.1/Rev. 2), 1.2 .
[2] Article 2 para. 4 of the U.N. Charter, Preamble of Resolution 3314.
[3] Article 51 of the U.N. Charter, language of Resolution 3314 (Article 3,a,d).
[4] Article 39 of the U.N. Charter, language of Resolution 3314 (Articles 2,3).
[5] Article 1 of Resolution 3314.

3. Should there be a qualifier of the aggression, e.g. should it be in "flagrant" or "manifest" violation of the Charter of the United Nations ? Do you think that "flagrant" and "manifest" cover different situations?

Commentary

The need for aggression to be in violation of the Charter stems from the fact that we need to exclude use of force undertaken in application of article 51 of the Charter, i.e. in the exercise of legitimate defence, or in application of Chapter VII of the Charter.

The requirement for a flagrant and manifest violation purports to provide a threshold relating either to the magnitude or gravity of the action (e.g. exclude border skirmishes) or possibly (?) to other considerations where there might be a degree of uncertainty (legality of the action).

4. Do you think that such violation should amount to a "war of aggression"?

Commentary

During the PrepCom discussions, the idea has had the support of some delegations, on the basis of the Nuremberg precedent. Others, however, found it extremely restrictive.

5. Should the object or result of the aggression be relevant? If so, could military occupation or the annexation of the territory of another State or part thereof be such object or result ?

6. Should attempt of aggression by a state, be also included in the text?

Commentary

In connection with attempt, it should first be asked whether attempt of aggression is conceivable (this irrespective of whether attempted aggression by a State is reprehensible under international law). It would indeed seem so, particularly, if not exclusively, in cases of naval or air attacks which can be neutralized before the aggressor reaches national territory.

It is understood that attempt of aggression by an individual will be addressed in the "basket" related to the crime of aggression and general principles of criminal law.

Annex III

Statements of the representative of the host State

Annex III.A

Statement of the representative of the host State at the 1st meeting of the Assembly, on 28 November 2005[1]

1. I would like to express once again my sincere thanks and appreciation to the Court officials for the quality of our day-to-day co-operation, and for the underlying trust and friendship. Being in a position to witness, almost on a daily basis the work of the Court, I am impressed by the progress made in setting up the Court, i.e. an effective organisation, while at the same time the Court is fully operational. I am very much aware, as we all might be, of the fact that with setting up the International Criminal Court we all are engaged in pioneering work. It is not simply a matter of copying existing models, or of reinventing the wheel. No, progressively, step by step, and with common sense and creativity, the Court, States Parties and the host State shoulder to shoulder shape tailor-made facilities that should allow the Court to fulfil its important and difficult task in an effective manner. Whilst trying to accomplish this pioneering work, especially in the initial phase, once in a while one has to face unforeseen challenges.

2. On the interim premises of the Court, as regards Court facilities, the investments in the Pre-Trial Chamber, court rooms, detention cells, a press conference room and facilities for the media have been accomplished. They are now in the phase of being used, tested and fine-tuned.

3. As regards office space, according to figures provided by the Court, by the end of 2005 more than 600 persons will be attached to the Court. In the budget proposal for 2006 it is envisaged that some 850 persons will be attached to the Court, including General temporary assistance, interns and consultants. The host State had hoped, and envisaged, to accommodate this rapid growth of the Court by putting at the disposal of the Court, by 2006, several floors of the so-called B wing of the interim premises, now occupied by a European institution called Eurojust. However, due to unforeseen circumstances this option is not feasible.

4. Hence, the host State has been forced to look for additional office space for the Court outside the current office building. I am very conscious of concerns about inefficiencies dislocated office space may entail. It is yet too early to provide any reliable figures. I would suggest that the results of the discussions between the host State and the Court about additional office space be presented to the Committee on Budget and Finance for its spring session in 2006.

5. On co-operation between the host State and the Court, as regards secured transport, the host State has informed the Court about the details of procedural and logistical arrangements related to the secured transport on Netherlands' territory of suspects/detainees and of witnesses requested to give testimony by an order of the Court.

[1] This statement was received by the Secretariat on 30 November 2005.

6. As regards detention, the Court and the host State are in the process of concluding a formal agreement relating to interim detention provisions, and one relating to permanent detention provisions.

7. As regards the diplomatic pouch, at the request of the Court, the host State and the Court are working on a bilateral agreement allowing the Court, at its request, and at the expense of the Court budget, to use the diplomatic pouch of the Ministry for Foreign Affairs of the Netherlands, in cases where transportation of objects for its investigations requires a secure modality of handling.

8. On the headquarters agreement between the Court and the Netherlands I recall that in November 2002 the Court and the host State agreed to make interim arrangements dealing with the status of the Court, its relationship with the host State, and in particular the privileges and immunities of staff and other categories of persons envisaged under the Agreement on Privileges and Immunities. Diplomatic notes confirming these arrangements were exchanged on 19 November 2002. These provisional arrangements have been fully satisfactory in enabling the Court to function effectively thus far.

9. The negotiations on a draft for a definitive headquarters agreement between the Court's and the host State's experts have been characterized by a spirit of co-operation, which has resulted in resolution of many of the complicated issues. The main objectives have been to ensure that the provisions of the headquarters agreement facilitate the smooth and efficient operations of the Court in the host State, that the needs of all persons required to be present at the seat of the Court are met, and that information and evidence coming in and out of the host State is protected. The status of the Secretariat of the Assembly of States Parties, as well as the privileges and immunities of representatives of States participating in proceedings before the Court, and of representatives of States participating in meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, have been clarified.

10. Progress on the negotiations has not been as fast as initially anticipated, due to the complexity of some of the issues and the requirement for internal consultations on both sides. The host State has to seek guidance from various line Ministries which will have to implement the agreement. In the same way, the Court also requires time to consult internally and harmonize its position on various issues. A few outstanding issues need to be settled. The host State will make every effort to finalize the negotiations with the Court as soon as possible.

Annex III.B

Statement of the representative of the host State at the 3rd meeting of the Assembly, on 2 December 2005[1]

1. Last year, at its third session, the Assembly of States Parties ("Assembly") of the International Criminal Court endorsed the recommendation of the Committee on Budget and Finance ("Committee") regarding consideration of the desirability of establishing purpose-built permanent premises for the Court. The Assembly also endorsed the recommendation of that Committee regarding the Court to prepare an analysis of the costs and benefits of continuing to use the current premises of the International Criminal Tribunal for the former Yugoslavia, in order to assist the Assembly in considering the options.

2. As recommended by the Committee and endorsed by the Assembly, the Court prepared and submitted different reports, for consideration by the Assembly at its fourth session, including documents containing the comparison of different options for future permanent premises, and estimates of the possible range of costs. Furthermore, the Court, at the request of the Committee prepared a report on financing methods used for the new premises of other major international organisations, including comparable international judicial institutions.

3. In their preparation for the fourth session of the Assembly, both in The Hague and in New York, and in the meetings this week of the Working Group on the Permanent Premises, States Parties have expressed their views on the issue, and more in particular on the documents mentioned before, that have been submitted by the Court.

4. The host State has noted that, at several occasions, States Parties have made an appeal, sometimes passionate, to the host State to be forthcoming with regard to the financing of permanent premises. States Parties thereby also referred to financing methods adopted for other similar international organisations.

5. The host State has also noted that some States Parties expressed as their view that an offer by the host State of financial support with regard to permanent premises would be an important element in their preference for purpose built premises, and for the way ahead with regard to the issue of permanent premises for the International Criminal Court.

6. At the Diplomatic Conference in Rome in 1998, the Netherlands presented a bid entitled "International Criminal Court: a Bid for justice". With regard to the issue of premises this bid states that

> Quote
>
> "..Suitable premises (conforming to the standards of the Dutch building code and complying with local planning regulations) will be made available to the Court, rent-free, for 10 years from the date on which the Statute enters into force (i.e. July 1st, 2002). At the end of that period (i.e. July 1st, 2012), the ICC may rent the premises, tax-free at the prevailing market rates…" Unquote

7. Against the background of the discussions on permanent premises to date, and bearing in mind the unique character, and significance, of the International Criminal Court, the host State at Cabinet level has decided to offer an additional financial bid that is related to permanent premises for the International Criminal Court.

[1] This statement was received by the Secretariat on 8 December 2005.

8. This additional financial bid consists of the following:

- The bid relates to purpose built new premises on the "Alexanderkazerne" site;

- The host State offers the land of that site free of charge; the ownership of the land remains with the host State;

- The costs related to making the site ready for construction works to start, will be borne by the host State;

- For the financing of the costs of purpose-built new premises (i.e. construction costs, fees, and fixed interior costs) the host State will provide a favourable loan to the amount necessary, to a maximum of €200 million, to be repaid over a period of 30 years, at an interest rate of 2,5 per cent;

- The host State will bear the costs related to the selection of an architect; this selection process will be presided by the Government State Architect of the Netherlands.

9. Savings on the budget of the Court regarding housing costs after 2011, resulting from this financial bid, may be calculated at some 40 per cent.

10. To conclude, the host State itself has, on the basis of the documents presented by the Court, and based on the recommendations of the Committee, come to the conclusion that purpose-built permanent premises on the site of the Alexanderkazerne are indeed the best solution for the permanent housing needs of the Court.

11. The host State hopes, that the Assembly, at its current session, can conclude that the States Parties and the Court be seized with the further planning and preparatory work for purpose-built permanent premises, including preparations for the selection of an architect.

12. The host State trusts that, with this additional financial bid of the host State in mind, the Assembly will be able to complete the preparations of this important matter for final decision at its fifth session in 2006.

Annex IV

List of documents

Plenary

ICC-ASP/4/1	Report to the Assembly of States Parties on the Future Permanent Premises of the International Criminal Court: Housing Options
ICC-ASP/4/2	Report of the Committee on Budget and Finance on the work of its fourth session
ICC-ASP/4/3	Staff rules of the International Criminal Court (Annex to ICC/AI/2005/003)
ICC-ASP/4/4	Report of the Office of Internal Audit
ICC-ASP/4/5	Proposed Programme Budget for 2006 of the International Criminal Court
ICC-ASP/4/5/Corr.1	Proposed Programme Budget for 2006 of the International Criminal Court - Corrigendum
ICC-ASP/4/5/Corr.1*	Proposed Programme Budget for 2006 of the International Criminal Court - Corrigendum – Reissued in English
ICC-ASP/4/6	Option paper by the Bureau on the establishment of a New York Liaison Office
ICC-ASP/4/7	Report on changes to the Financial Regulations and Rules as a result of the establishment of the Contingency Fund pursuant to paragraph 2 of resolution ICC-ASP/3/Res. 4
ICC-ASP/4/8	Report on the impact of staff increases on the Information and Communication Technologies Section pursuant to paragraph 18 of Part II of the Official Records of the Third Session of the Assembly
ICC-ASP/4/9	Financial statements for the period 1 January to 31 December 2004
ICC-ASP/4/10	Trust Fund for Victims financial statements for the period 1 January to 31 December 2004
ICC-ASP/4/11	Report on the Conditions of Service and Compensation of the Prosecutor and the Deputy Prosecutors pursuant to paragraph 26 of resolution ICC-ASP/3/Res. 3
ICC-ASP/4/12	Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 16 July 2004 to 15 August 2005
ICC-ASP/4/12/Corr.1	Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 16 July 2004 to 15 August 2005 - Corrigendum

ICC-ASP/4/13	Report on programme performance of the International Criminal Court for the year 2004
ICC-ASP/4/14	Report of the Bureau on the arrears of States Parties
ICC-ASP/4/15	Report on draft guidelines for the selection and engagement of gratis personnel at the International Criminal Court
ICC-ASP/4/16	Report on the activities of the Court
ICC-ASP/4/17	Report on the Standard Operating Procedures for the travel of members of the Committee on Budget and Finance
ICC-ASP/4/17/Corr.1	Report on the Standard Operating Procedures for the travel of members of the Committee on Budget and Finance - Corrigendum
ICC-ASP/4/18	Provisional agenda
ICC-ASP/4/18/Add.1	Annotated list of items included in the provisional agenda
ICC-ASP/4/18/Add.1/ Corr.1	Annotated list of items included in the provisional agenda - Corrigendum
ICC-ASP/4/19	Provisional agenda
ICC-ASP/4/20	Report on budget performance of the International Criminal Court as at 31 August 2005
ICC-ASP/4/21	Report of the Bureau on the draft Code of Professional Conduct for counsel
ICC-ASP/4/22	Report on the future permanent premises of the International Criminal Court: Project Presentation
ICC-ASP/4/23	Report on the Future Permanent Premises of the International Criminal Court - Financial Comparison of Housing Options
ICC-ASP/4/24	Report on the Future Permanent Premises of the International Criminal Court - Interim Report on the Composition of Estimated Staffing Levels
ICC-ASP/4/25	Report on the Future Permanent Premises of the International Criminal Court - Financing Methods Used for the Premises of Other International Organizations
ICC-ASP/4/26	Report on the long-term budgetary consequences of the pension scheme regulations for judges

ICC-ASP/4/27	Report of the Committee on Budget and Finance on the work of its fifth session
ICC-ASP/4/27/Corr.1	Report of the Committee on Budget and Finance on the work of its fifth session - Corrigendum
ICC-ASP/4/27/Corr.2	Report of the Committee on Budget and Finance on the work of its fifth session - Corrigendum
ICC-ASP/4/27/Add.1	Report of the Committee on Budget and Finance on the work of its fifth session – Addendum
ICC-ASP/4/27/Add.1/Corr.1	Report of the Committee on Budget and Finance on the work of its fifth session – Addendum - Corrigendum
ICC-ASP/4/28	Report of the Bureau on the permanent premises of the Court
ICC-ASP/4/29	Report of the Bureau on the draft Regulations of the Trust Fund for Victims
ICC-ASP/4/30	Election of members of the Committee on Budget and Finance
ICC-ASP/4/31	Report of the Credentials Committee
ICC-ASP/4/L.1	Draft resolution: Procedure for filling vacancies in the Board of Directors of the Trust Fund for Victims
ICC-ASP/4/L.2	Draft resolution: Procedure for filling vacancies in the Committee on Budget and Finance
ICC-ASP/4/L.3	Draft resolution: Amendment regarding the term of office of members of the Board of Directors of the Trust Fund for Victims
ICC-ASP/4/L.4	Draft resolution: Strengthening the International Criminal Court and the Assembly of States Parties
ICC-ASP/4/L.5	Draft report of the Assembly of States Parties to the Rome Statute of the International Criminal Court
ICC-ASP/4/INF.1	Provisional: Delegations to the Fourth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court
ICC-ASP/4/INF.1/Rev.1	Delegations to the Fourth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court

Special Working Group on the Crime of Aggression

ICC-ASP/4/SWGCA/INF.1	Note by the Secretariat
ICC-ASP/4/SWGCA/CRP.1	Draft report of the Special Working Group on the Crime of Aggression
ICC-ASP/4/SWGCA/1	Report of the Special Working Group on the Crime of Aggression

Working Group on the Trust Fund for Victims

ICC-ASP/4/WGTFV/WP.1	Proposal by Trinidad and Tobago on Regulations 52 and 53 of the draft regulations of the Trust Fund for Victims
ICC-ASP/4/WGTFV/WP.1/Rev.1	Proposal by Trinidad and Tobago on Regulations 52 and 53 of the draft regulations of the Trust Fund for Victims
ICC-ASP/4/WGTFV/CRP.1	Draft Report of the Working Group on the Trust Fund for Victims
ICC-ASP/4/WGTFV/1	Report of the Working Group on the Trust Fund for Victims

Working Group on the Programme Budget

ICC-ASP/4/WGPB/CRP.1	Draft report of the Working Group on the Programme Budget for 2006 of the International Criminal Court
ICC-ASP/4/WGPB/CRP.1/Rev.1	Draft report of the Working Group on the Programme Budget for 2006 of the International Criminal Court
ICC-ASP/4/WGPB/CRP.1/Rev.2	Draft report of the Working Group on the Programme Budget for 2006 of the International Criminal Court
ICC-ASP/4/WGPB/1	Report of the Working Group on the Programme Budget for 2006 of the International Criminal Court

Working Group on the New York Liaison Office

ICC-ASP/4/WGNYO/CRP.1	Draft report of the Working Group on the New York Liaison Office of the International Criminal Court
ICC-ASP/4/WGNYO/1	Report of the Working Group on the New York Liaison Office of the International Criminal Court

Working Group on the draft Code of Professional Conduct for counsel

ICC-ASP/4/WGCPC/CRP.1	Draft Resolution on the Code of Professional Conduct for counsel
ICC-ASP/4/WGCPC/CRP.2	Draft Report of the Working Group on the draft Code of Professional Conduct for counsel
ICC-ASP/4/WGCPC/1	Report of the Working Group on the draft Code of Professional Conduct for counsel
ICC-ASP/4/WGCPC/1*	Report of the Working Group on the draft Code of Professional Conduct for counsel – Reissued in French and Spanish

Working Group on the Permanent Premises

ICC-ASP/4/WGPP/CRP.1	Draft Report of the Working Group on the Permanent Premises
ICC-ASP/4/WGPP/1	Report of the Working Group on the Permanent Premises
ICC-ASP/4/WGPP/CRP.1/Rev.1	Draft Report of the Working Group on the Permanent Premises
ICC-ASP/4/WGPP/1/Rev.1	Report of the Working Group on the Permanent Premises

Annex V

Proposed budget for the Secretariat of the Trust Fund for Victims (programme 3600)

1. At its third session held in The Hague in September 2004, the Assembly of States Parties approved the establishment of the Secretariat of the Trust Fund for Victims (resolution ICC-ASP/3/Res.7, paragraph 1). The Secretariat was created to provide such assistance as is necessary for the proper functioning of the Board of Directors in carrying out its tasks for the benefit of the victims of crimes within the jurisdiction of the Court and the families of such victims.

2. The States Parties decided that, pending its future evaluation in accordance with the annex of resolution ICC-ASP/1/Res.6, the Secretariat would be funded by the regular budget of the Court in 2005.

3. Accordingly, the Secretariat of the Trust Fund for Victims was established in 2005. It was decided that the Secretariat would operate under the full authority of the Board of Directors in matters concerning its activities (resolution ICC-ASP/3/Res.7, paragraph 2), and that for administrative purposes the Secretariat and its staff would be attached to the Registry of the Court. Paragraph 3 of the same resolution states that the Registrar of the Court, mindful of the independence of the Board and the Secretariat, may provide such assistance as is necessary for the proper functioning of the Board and the Secretariat (resolution ICC-ASP/3/Res.7, paragraph 3).

4. The Board wishes to draw the attention of States Parties to the fact that, if the workload of the Trust Fund increases, the Secretariat will require an expanded capacity in order to carry out its functions. The workload is likely to be affected by a number of factors, including the precise nature of the mandate given by the States Parties to the Trust Fund in the regulations, once adopted, and the speed at which proceedings progress before the Court. To the extent such factors remain unknown, it is difficult to anticipate at what point an expanded capacity will be required for the Secretariat and, consequently, whether or not an expansion of the Secretariat should be recommended for 2006.

Objectives

To provide the assistance necessary for the proper functioning of the Board of Directors in carrying out its tasks (resolution ICC-ASP/3/Res.7, paragraph 1).

Expected results	***Performance indicators***
• Effective support provided by the Secretariat to the Board of Directors	• Working procedures put in place to facilitate the work of the Secretariat of the Trust Fund and of the Board of Directors
• The capacity of the Trust Fund to raise voluntary contributions enhanced	• Mechanisms established to verify sources of funds received • Criteria adopted to avoid manifestly inequitable distribution of funds among the different groups of victims • Increased number of States Parties and external actors contributing to the Trust Fund for Victims

Budget proposal

5. Given these unknown factors, the Board can recommend a modest expansion in the capacity of the Secretariat during 2006. The Board believes that, since the Fund-raising Officer will have been in place for several months in 2006 and the level of funds in the Trust Fund is expected to grow during the year, and in view of the strong likelihood that the Trust Fund will be activated in 2006, it will be important to have an Executive Director in place. The Executive Director would be able to oversee the conclusion and implementation of specific projects as well as the effective performance of the various functions assigned to the Trust Fund under the Rules of Procedure and Evidence and the regulations of the Trust Fund.

6. The Board also foresees that additional administrative capacity will be needed, both to provide necessary support to the Executive Director and to manage the large amounts of data and sophisticated information systems that the Trust Fund will be using.

7. Such an increase would bring the staffing level of the Secretariat to five: one Executive Director (D-1), one Fund-Raising Officer (P-4), one full-time Associate Legal Officer (P-2) and two administrative assistants (G-5).

Programme 3600: Secretariat of the Trust Fund for Victims

Proposed budget for the Secretariat of the Trust Fund for Victims

8. The proposed budget for 2006 is set out in the table below.

Item	*Expenditure 2004*	*Approved budget 2005 (thousands of euros)*			*Proposed budget 2006 (thousands of euros)*		
	Total	*Core*	*Condi-tional*	*Total*	*Basic*	*Situation-related*	*Total*
Professional staff		91		91	246.1		246.1
General Service staff		39		39	84.4		84.4
Subtotal staff	*0.0*	*130*		*130*	*330.5*		*330.5*
General temporary assistance		35		35			0.0
Subtotal other staff	*0.0*	*35*		*35*	*0.0*		*0.0*
Travel		70		70	70.0		70.0
Hospitality		7		7	7.0		7.0
Contractual services incl. training		90		90	90.0		*90.0*
General operating expenses		93		93	83.0		*83.0*
Supplies and materials		4		4	10.0		10.0
Furniture and equipment		41		41			0.0
Subtotal non-staff	*0.0*	*305*		*305*	*260.0*		*260.0*
Total programme	**0.0**	**470**		**470**	**590.5**		**590.5**

Proposed staffing for 2006

Secretariat Trust Fund for Victims	USG	ASG	D-2	D-1	P-5	P-4	P-3	P-2	P-1	*Total P-staff*	GS-PL	GS-OL	*Total GS-staff*	*Total staff*
Basic				1		1		1		*3*		2	*2*	*5*
Situation-related														
Total staffing				1		1		1		*3*		2	*2*	*5*

9. For 2006, it is envisaged that the Secretariat established in 2005 will provide support to the Board of Directors for the proper functioning of the Board in carrying out its mandate in the day-to-day administration of the Trust Fund. This includes:

- Assisting the Board in taking receipt of resources collected through awards for reparations and in separating them from the remaining resources of the Trust Fund in accordance with rule 98 of the Rules of Procedure and Evidence;

- Assisting the Board in preparing written or oral observations on the transfer of fines or forfeitures to the Trust Fund at the request of a Chamber (rule 148 of the Rules of Procedure and Evidence, draft regulation 34);

- Supporting the Board in submitting written or oral observations on the disposition or allocation of property or assets in accordance with rule 221 of the Rules of Procedure and Evidence;

- Implementing the guidelines adopted by the Board on how to solicit financial contributions from private institutions and establishing mechanisms that will facilitate the verification and separation of sources of funds received (draft regulations 27 and 29);

- Supporting the Trust Fund in taking receipt of all voluntary contributions from sources stipulated in resolution ICC-ASP/1/Res.6, paragraph 2, and noting the sources and amounts received (draft regulation 28);

- Assisting the Board in establishing contact with governments, international organizations, individuals, corporations and other entities to solicit voluntary contributions to the Trust Fund (draft regulation 26);

- Supporting the Board in establishing and directing the activities and projects of the Trust Fund and in allocating the property and money available to it, subject to the decisions taken by the Court (resolution ICC-ASP/1/Res.6, annex, paragraph 7);

- Assisting the Board in the implementation of individual and collective reparations awards ordered by the Court according to rule 98 of the Rules of Procedure and Evidence and in the use of other sources for the benefit of victims subject to the provisions of article 79 of the Rome Statute;

- Developing and implementing strategies for effective fund-raising;

- Implementing the outreach strategy of the Trust Fund and promoting awareness of the plight of victims within the jurisdiction of the Court;

- Applying the criteria adopted for the refusal of contributions deemed to be inconsistent with the principles of the Court;

- Maintaining communication on relevant matters with the Registry and other organs of the Court, and with other organizations;

- Providing a periodic report to the Board on its activities (draft regulation 20).

Staff requirements

One Executive Director (D-1)

10. With overall executive responsibilities, the incumbent will direct and coordinate the general and specialized policies, programmes and activities of the Trust Fund for Victims. In overseeing the operations of the Secretariat staff, he or she will ensure that the overall objectives and requirements of the Fund, as dictated by the Board of Directors, are properly implemented in the medium and long term. The incumbent will be responsible for:

- Supervising and establishing guidelines for the provision of legal opinions or advice on issues relating to reparations and the functions, structure and activities of the Trust Fund for Victims and its Secretariat;

- Providing guidelines for and/or directing the formulation and execution of the Trust Fund's public information and outreach campaigns, as well as the fund disbursement programmes;

- Providing and ensuring the highest standards of quality and cost-effectiveness in the Fund's programmes and activities;

- Providing advice and assistance in resolving procedural and substantive questions to the Board of Directors on all matters relating to the management and oversight of the Fund, and representing the Fund Secretariat at legislative, interdisciplinary and inter-agency meetings;

- Directing the programmes and activities of the Fund and, as appropriate, coordinating them with the programmes and activities of the organs of the Court;

- Undertaking consultations and participating in negotiations with high-level representatives of State Parties or other organizations and representing the Secretariat at meetings with other organizations and bodies;

- Representing the Trust Fund at the meetings of other organizations and bodies;

- Analysing, coordinating, formulating, approving, submitting, negotiating and justifying budgetary and personnel proposals, and managing staff and contractual resources.

One Fund-Raising Officer (P-4)

11. The Fund-Raising Officer will identify and target new opportunities and build on relationships with donors in order to optimize revenue. The responsibilities of the post include: determining types of fund-raising and developing programmes/campaigns to be implemented; preparing fund-raising schedules; advising and directing volunteer groups who are willing to help in fund-raising; keeping records of funding and grant ideas and successful sources of funding. The incumbent will work with a wide range of advocacy groups. In his or her capacity as fund-raiser, the responsibilities will include:

- Identifying and targeting new fund-raising opportunities and building on relationships with donors in order to optimize revenue;

- Determining types of fund-raising and developing programmes/campaigns to be implemented;

- Supporting the Board in providing guidelines for and/or directing the formulation and execution of the Trust Fund's public information and outreach campaigns, as well as the fund disbursement programmes;

- Preparing fund-raising schedules, advising and directing volunteer groups who are willing to help in fund-raising, and keeping records of funding and grant ideas and successful sources of funding.

One Associate Legal Officer (P-2)

12. This post was established in the 2005 budget as a result of recommendations made to the Assembly of States Parties by the Working Group on the Trust Fund for Victims, but only for half the year. The incumbent would be responsible for providing legal advice to the Board of Directors and conducting substantive research on complex legal issues relating to reparations and on matters relating to the relationship between the Court and the Trust Fund as well as on the functions and activities of the Trust Fund, including the receipt and expenditure of funds. Subject to any decision by the Assembly in November 2005, it is assumed for the purposes of the draft budget that this post will be full-time for 2006. Under the supervision of the Executive Director, the incumbent will be in charge of:

- Implementing orders relating to the drafting of contracts and agreements as well as other arrangements with grantees and entities, including intergovernmental, international or national organizations, as appropriate;

- Supporting the Board in submitting written or oral observations on the disposition or allocation of property or assets in accordance with rule 221 of the Rules of Procedure and Evidence;

- Assisting the Board in the implementation of individual and collective reparations awards ordered by the Court according to rule 98 of the Rules of Procedure and Evidence and in the use of other sources for the benefit of victims subject to the provisions of article 79 of the Rome Statute;

- Establishing procedures to manage and facilitate the activities and programmes of the Trust Fund for Victims;

- Providing support to the Chair of the Board of Directors by conducting substantive research on complex legal issues relating to reparations awards, on the relationship between the Fund and the Court and on matters relating to the functions, structure and activities of the Trust Fund;

- Organizing and preparing general meetings, seminars and working sessions on matters relevant to reparations;

- Building and maintaining relations with victims, victims' organizations and, as appropriate, with intergovernmental, international or national organizations.

One Computer Information Systems Specialist (G-5)

13. The post involves the planning, design, development, implementation and maintenance of computer information systems for the Secretariat. The incumbent will be responsible for the following tasks:

- Preparing feasibility studies, analysing and modifying existing applications, maintaining systems software, designing and writing computer programs, and designing databases;

- Updating and maintaining the organization and accessibility of the data;

- Liaising with the Registry, particularly with the Victims Participation and Reparations Section (VPRS), regarding the data collected via the application forms on reparations, and providing operational support to users and advising them on the most suitable hardware and software for the different tasks that the Secretariat will undertake;

- Conducting training sessions and demonstrations for users.

One Administrative Assistant (G-5)

14. Under the supervision of the Executive Director of the Trust Fund, the Administrative Assistant will provide administrative support functions to the Secretariat. The tasks will include:

- Tracking and monitoring all allotments and expenditures relevant to the Secretariat;

- Performing tasks relevant to the administration of the Secretariat in close coordination with relevant sections in the Registry;

- Performing work relevant to the preparation of budget documents; briefing staff in the Secretariat on general administrative matters; and checking correspondence and documents for completeness and accuracy of style and grammar;

- Coordinating the Executive Director's work schedule by arranging meetings/appointments with officials within and outside the Court; maintaining a filing system of working documents; and monitoring incoming correspondence.

Non-staff costs

Travel

15. The "Travel" item in the budget covers travel expenses in business class, accommodation and terminal expenses to enable the five members of the Board of Directors to travel to The Hague to attend the annual meeting of the Board. This item will also cover official travel by the Fund-Raising Officer and other staff.

Meeting of the Board of Directors

16. According to paragraph 2 of the annex to resolution ICC-ASP/1/Res. 6, the members of the Board act in their personal capacity on a *pro bono* basis. However, provision was made in the 2005 programme budget of the Court for support to cover the costs associated with the annual meeting of the Board of Directors, which was held from 20 to 22 April 2004.

17. For 2006, with the creation of the Secretariat of the Trust Fund for Victims, it is recommended that a budgetary provision be made again for the organization of meetings of the Board, one of which has to take place in The Hague, where the Board of Directors could use the facilities of the Court. The costs to be taken into consideration for a meeting of the Board in The Hague are set out below.

- Transportation, business class:

Return flights to The Hague	Approx. cost in euros
From Amman	1,750
From Cape Town	3,714
From San José	2,534
From Warsaw	831
From Paris (Thalys)	550
Subtotal	**9,379**

- Other costs

(a)

Accommodation	
Hotel 2 nights for 5 persons	2,968
Terminal expenses	600
Subtotal	**3,568**

(b)

Translation and interpretation services	
External conference interpreters (English and French) for two days at €376 per day per interpreter + travel (€900)	6,608
Transcript: €220 per hour English and French for two days of conference	7,040
Pre-sessional translation of documents: 100 pages In-session documentation: 15 pages Post-sessional documentation: 75 pages (at the normal rate of €45 per page [=300 words])	8,550
Subtotal	**22,198**

(c)

Hospitality	
Catering (for 2 days)	290
Dinner (for 15 persons, 1 day)	1,000
Lunch (for 15 persons, 2 days)	2,000
Subtotal	**3,290**

Total for 1 meeting	**38,435**