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?