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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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.