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,
at Princeton University, New Jersey, United States, from 8 to 11 June 2006

Report of the CICC Team on Aggression

Documents of special relevance during the meeting

Report of the Special Working Group on the Crime of Aggression, ICC-ASP/4/SWGCA/1

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, at Princeton University, New Jersey, United States, from 13 to 15 June 2005, in Note by the Secretariat, ICC-ASP/4/SWGCA/INF.1, 29 June 2005. The report of the 2005 inter-sessional meeting can also be found more recently in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague,28 November to 3 December 2005, ICC-ASP/4/32, Annex II.A, http://icc-cpi.int/library/asp/Annexes.pdf

Discussion paper proposed by the Coordinator, (originally UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2 of 11 July 2002), in Report of the Preparatory Commission for the International Criminal Court (continued), Part II, Proposals for a provision on the crime of aggression, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002, p.3, also contained in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second Session, New York, 8-12 September 2003, ICC-ASP/2/10, Annex II

Discussion Paper 1, The Crime of Aggression and Article 25, paragraph 3, of the Statute, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.B, http://www.icc-cpi.int/library/asp/Annexes.pdf

Discussion Paper 2, The conditions for the exercise of jurisdiction with respect to the crime of aggression, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.C, http://www.icc-cpi.int/library/asp/Annexes.pdf

Discussion Paper 3, Definition of Aggression in the Context of the Statute of the ICC, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.D, http://www.icc-cpi.int/library/asp/Annexes.pdf

Strengthening the International Criminal Court and the Assembly of States Parties, ICC-ASP/4/Res.4, paragraphs 37 and 53, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, Part III: Resolutions, p.334, http://www.icc-cpi/library/asp/Part_III_12dec05_1300.pdf

Introduction

From June 8-11, 2006, the Special Working Group on the Crime of Aggression [SWGCA][1] met informally for the third time at the Liechtenstein Institute on Self-Determination in the Woodrow Wilson School of Princeton University.
At the regular sessions of the Assembly of States Parties to the Rome Statute of the International Criminal Court, the SWGCA suffers from severe time limitations due to an overcrowded agenda. Extended dialogue, the testing of arguments and the development of creative solutions become practically impossible. The inter-sessional meetings at Princeton University, previously held in June 2004 and June 2005, offer the much needed opportunity to sidestep the time constraints and move closer towards the fulfillment of the SWGCA mandate. Financial support for the 2006 Princeton meeting came from Canada, Finland, Liechtenstein, the Netherlands, Sweden and Switzerland. The Liechtenstein Institute provided space, organization, hospitality and additional financial support.
The discussions were preceded by a minute of silence in memory of Dr.Medard Rwelamira, who died April 3, 2006. Dr. Rwelamira, Secretary of the Assembly of States Parties, had been a friend to many in the room and is badly missed by the SWGCA.

Already in 2004 and 2005, the Princeton venue had been conducive to in-depth exchanges whose informal and good-spirited nature belied the notorious difficulty of the subject. In 2006, the number of participants rose from around 80 to 140. The Chair, Ambassador Christian Wenaweser of Liechtenstein, deplored the absence of Cuba whose delegate did again not receive travel permission by the US government despite entreaties of the Chair as well as the President of the ASP.

The greater number of participants necessitated a larger room, - testimony to the success of the meetings, as Dr.Wolfgang Danspeckgruber, the Director of the Liechtenstein

[1] The Special Working Group on the Crime of Aggression is a subsidiary body of the Assembly of States Parties to the Rome Statute of the International Criminal Court. It is nevertheless open to all States "on an equal footing", ICC-ASP/1/Res.1. The crime of aggression is already under the jurisdiction of the Court (Art.5(1) of the Statute), yet the *exercise* of the Court's jurisdiction is still dependent on the adoption of a provision "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." (Art.5(2) of the Statute.) The Special Working Group is mandated to come up with a proposal for such a provision in time for adoption by a Review Conference of the Assembly in 2009. The same task has been previously pursued by a Working Group on the Crime of Aggression in the Preparatory Commission for the International Criminal Court.

Institute, put it in his welcoming remarks. Using a darker metaphor in his introduction, the Chair called the Princeton meeting a victim of its success, thus alluding to the potential loss of immediacy and intimacy. Yet, after an initial hour characterized by formality and hesitation, the SWGCA managed to regain its swift and vivid mode of 'thinking aloud together'.

The discussions profited from prior electronic exchange: a Virtual Working Group [VWG] had been established in the course of the previous year. Its subject matter is divided into three 'Baskets' under the guidance of three (Sub-)Coordinators. Phani Dascalopoulou-Livada (Greece) is responsible with regard to the definition of the *act*[2] of aggression (Basket 1 / VWG-1), Claus Kress (Germany) with regard to the *crime* of aggression and the general principles of Part 3 of the Statute (Basket 2 / VWG-2) , and Pål Wrange (Sweden) with regard to the conditions for the exercise of jurisdiction (Basket 3 / VWG-3). The Coordinators had started the electronic debate with series of questions presented in discussion papers[3].[4] At the Princeton meeting, the contributions by State delegates in the VWG were made available in the form of compilation texts. The basic reference text for a draft provision on the crime of aggression continues to be the Coordinator's Discussion Paper of 2002[5] [CDP 2002].

Substantive developments during the meeting[6]

June 8, 2006

[2] I.e. the State act of aggression, a circumstantial element of the individual crime of aggression.
[3] These discussion papers were later formally annexed to the report of ASP-4:
Discussion Paper 1, The Crime of Aggression and Article 25, paragraph 3, of the Statute, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.B
Discussion Paper 2, The conditions for the exercise of jurisdiction with respect to the crime of aggression, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.C
Discussion Paper 3, Definition of Aggression in the Context of the Statute of the ICC, in Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Annex II.D
The three papers are available at *http://www.icc-cpi.int/library/asp/Annexes.pdf*
[4] Please note that the numbers of the Basket and Discussion Paper for the same subject do not correspond with each other .
[5] Discussion paper proposed by the Coordinator, (originally UN Doc. PCNICC/2002/WGCA/RT.1/Rev.2 of 11 July 2002), in Report of the Preparatory Commission for the International Criminal Court (continued), Part II, Proposals for a provision on the crime of aggression, UN Doc. PCNICC/2002/2/Add.2, 24 July 2002, p.3, also contained in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Second Session, New York, 8-12 September 2003, ICC-ASP/2/10, Annex II
[6] In line with the informal character of the meeting, the team report refrains in its description of the discussions from the identification of individual States, State delegates or other participants.

The first day of the meeting was dedicated to Agenda Item 3: "The "act" of aggression - defining the act of State".
The Coordinator of Basket 1 introduced the questions of the corresponding Discussion Paper 3 [DP 3] and provided a summary of previous responses.

Under Question 1 of DP 3, the participants at the Princeton meeting debated again if the definition of the State act of aggression should be generic or specific, with the latter connoting a definition which includes a list of typical acts. Whether a list should be exhaustive or non-exhaustive, closed or open-ended, was a necessary sub-question. Related to this sub-question was the second part of Question 1: If specific, should the list be the one from Resolution 3314/74? Two basic arguments countered Question 1 itself, - first, that the question was unnecessary as long as the provision on aggression maintained as its definition of the State act the current reference to General Assembly Res.3314/14, and second, that the question was beside the point since the real issue was to find a definition, be it generic or specific, which would be in line with the principle of legality. One participant wondered also if it made sense to look for a definition before some consensus had been achieved on the organ which would make the determination if a State act of aggression occurred. But in that regard it was pointed out, that the issue of the definition of the act had to be seen separately from the issue of the jurisdictional conditions, i.e. *if* another organ had to make a determination that an act occurred *before* the ICC could proceed. The definition of the State act under the Statute could in any event not bind another organ. The definition was for the ICC and for the purposes of the Statute: The definition of the act was indispensable since the act was a circumstantial element of the crime. It had to be clear in order to show what would lead to criminal responsibility.[7]

Those for a specific definition argued that a generic definition would violate the principle of legality. Those for a generic definition argued that it could very well be succinct enough. Quite the contrary, a non-exhaustive list would conflict with the principle of legality and a closed list was much too difficult to achieve, be possibly incomplete and omit future developments.

The Princeton meeting in 2005 had shown a clear preference for a generic definition. This time an explicit version was read to demonstrate the feasibility of a generic definition but the opinions were more evenly divided and shifted soon to new

[7] The next question, - what happens if another organ has used a different definition? -, plays an important role in two subject areas covered in Basket 3 (see below the Princeton debate of the second day). The use of a looser definition by another organ constitutes one of the background scenarios in the due process debate: If another organ, e.g. the Security Council, has made a determination that an act of aggression has been committed by the State concerned, sh/w/could this constrain the right and responsibility of the ICC to make its own determination under its own statutory definition and under rules of procedure protecting the rights of the accused? In contrast, the use of a tighter definition by the other organ presents one of the background scenarios in the debate about the jurisdictional conditions. Would the requirement of a prior determination by the other organ lead to the ineffectiveness of the ICC because too many cases might be filtered out?

alternatives: The view tended more and more to a 'combination' and the main question became whether the definition would have a generic chapeau with a closed list, or a generic definition with an illustrative list.[8] As had been already done in the VWG, reference was made to Art. 7 para.1 (k) of the Statute and the open-endedness it entails. But now it was also argued that Art.7 para.1 (k) had to be read in the context of what preceded it and that it was not a true case of non-exhaustiveness.

Finally it was argued that the SWGCA should start working on a generic definition and that the usefulness, type or content of a list would depend on the outcome with regard to the generic definition. It was also pointed out that a list placed in the Elements of Crimes could be more easily amended.

This discussion of Question 1 prepared the ground for a closer look at GA Res.3314/74 on the third day of the meeting (see below).

On the first day, Question 2 of DP 3 became the next focus of the meeting: How do you think that aggression should be described in the context of the Statute? Use of force, armed attack, act of aggression, use of armed force?

The contributions to this topic were overshadowed by misunderstandings and new divergences in approach. Whereas most respondents in the VWG and at the Princeton meeting related Question 2 to Para.2 of Section I[9] of CDP 2002, the Coordinator and other respondents related the question to Para.1 of CDP 2002, or *also* to Para.1. Despite the efforts of several speakers, the misunderstandings and complications, if they were just that, appeared not to be cleared up by the end of the Princeton meeting.
At issue is the structural approach and more. During the Preparatory Commission it had been recognized that the State act of aggression was a circumstantial element of the crime but that there were also difficulties, - including stylistic and grammatical difficulties -, to achieve a full definition of the element of the act within the definition of the crime. Thus, it had been decided to *name* the State *act of aggression* as element of the individual *crime* of aggression in Para.1 of CDP 2002 and *then* to *repeat* and *define* that element, i.e. the *act of aggression*, in Para. 2 of CDP 2002: "For the purposes of paragraph 1 an act of aggression means ....." In other words, Para.1 *links* the leadership position, the conduct and the State act and is sufficiently specific with regard to the first two of these three elements. Para.2 adds specificity for the third element. Obviously, the allocation for the descriptive terms listed in Question 2 can matter for the maintenance of this structure. Moreover, a different term in Para.1 might also play a role in the debate on the jurisdictional conditions.[10]

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[8] Under the categorization used by the Coordinator of Basket 1, these alternatives are in effect versions of a specific definition since they contain a list.
[9] The capitalized references to paragraphs of 2002 CDP refer in this report to those in Section I. [Definition of the crime of aggression and conditions for the exercise of jurisdiction], and not to those in Section II. [Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)].
[10] Such an interconnection was brought up in the course of the debate on the second day, see below the main text above n.21.

The confusion was further increased because even those who appeared to relate Question 2 to Para.2 of CDP 2002, related it in different ways, pondering either the *replacement* or the *meaning* of the term "act of aggression". (At times it was also not clear to which of the two paragraphs the comment related.) Most thought that the proposed terms were meant to forge ahead in the search for a definition (e.g. "an act of aggression means the use of armed force .....") or in the evaluation of the suitability of GA Res.3314/74 and that these terms were to be seen as merely one of several building blocks of the definition. "Use of armed force" or "armed attack" appeared to have the strongest support in this group. In the context of these two terms, one speaker brought up an interrelationship between the 'force element' (or rather 'force sub-element') and the qualifying terms for the "violation of the Charter of the United Nation": If the provision would not require a "flagrant" or "manifest" violation, then the narrower term "armed attack" should be used.

Other speakers saw the terms "use of force/ armed attack/act of aggression/use of armed force" as proposals for a *full* description of the act of aggression and argued to keep "act of aggression", expressing concern that the other terms were incomplete or inadequate reflections of the act of aggression: In case any of the other terms were used, it was essential to add "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations" or similar additional building blocks to capture the essence of an act of aggression. Here too, more than structure came into play: For example, without the additional building blocks, the force element might not sufficiently exclude use of force in internal conflict or by or against non-State actors[11].

Finally, those who preferred to rely for the definition on the current reference to GA Res.3314/74 saw not much reason to look at the various terms in the first place.

It was also suggested to use "collective act of aggression" in order to better differentiate the element of the act of aggression from the crime of aggression as a whole.

Question 3 asked: 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?

CDP 2002 requires a "flagrant violation of the Charter of the United Nations".

During the time initially dedicated to Question 3, the majority spoke against the need for a qualifier. A violation was a violation. If a qualifier was needed at all, the provision should require a "flagrant/manifest act of aggression" not a "flagrant/manifest violation". It was also pointed out that the Statute did not require a flagrant/manifest genocide or flagrant/ manifest crime against humanity, so why with regard to aggression. Aggression was inherently serious. Art.39 of the UN Charter mentioned already a number of gradations and a qualifier would mean another gradation and another definition. A

[11] See in this context also n.21.

threshold was already built into the Statute since the Court had jurisdiction only over the "most serious crimes of international concern." This would have to be taken into account by the Prosecutor. The principle of complementarity and a prior determination by the Security Council were additionally mentioned as filters. The relevance of the qualifier in the context of mistake of fact or law was briefly contemplated but the General Principles of the Statute were considered adequate in this regard.

On the other hand, it was pondered if there was any harm in a qualifier: Some States were concerned about borderline cases and a qualifier might make the provision more acceptable. It was also asked, what if the Security Council referred a non-flagrant violation? Occasions where the Security Council had spoken of "gross" or "flagrant" violations were mentioned. It was argued that two different issues needed to be contemplated. Even if no qualifier was necessary with regard to the gravity of the force, it might be wise to exclude legally dubious cases from the beginning, cases which may amount to a technical violation of the UN Charter but be considered justified by the international community. The qualifier such as "manifest" or "clearly without justification" would send a signal in this regard. A qualifier might matter also for the due process issue (see below) since a reexamination of the State act of aggression would be politically less problematic if it were based on a narrower definition or higher threshold than a prior determination by another body. Such a threshold could be worded like a definitional filter, as in the chapeau of Art. 7 para.1 of the Statute, or more like a jurisdictional filter as in Art.8 para.1.

Before the Chair moved on to the next question, he noted a strong tendency against a qualifier, and a preference for "manifest" among those who wanted one. The discussion returned later to the subject again.

Question 4 was quickly disposed of: Do you think that such a violation should amount to a "war of aggression"?[12] There was general agreement that the answer should be "no".

The Chair continued with Question 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?

Just like the previous question, Question 5 is centered on Options 1-3 of Para.1 of CDP 2002. Option 1 adds as an illustrative specification for the act of aggression: "such as ..... an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof". Option 2 *requires* that the act has this object or result. Option 3 would add neither an illustrative nor a mandatory object or result.

[12] The question relates to the beginning of the Options 1-2 in Para.1 of CDP 2002, not to the type of definition reflected under a different Option 2 in the Consolidated Text of Proposals on the Crime of Aggression, PCNICC/1999/WGCA/RT.1/Corr.1. Nor was it meant as a continuation of Question 2 or asking about a direct equation, i.e. "For the purpose of paragraph 1, "act of aggression" means war of aggression." Not all responses to the VWG had recognized this.

To overcome the impasse with regard to the three Options, alternatives were proposed at the beginning of the debate, i.e. "with an object or result shocking to the conscience of humanity" or "with an object of result unacceptable to the international community as a whole". But these proposals appeared to be beside the point since practically no one wanted Option 1 or 2 in any event.
At the same time, a number of speakers argued again quite strongly that *some* type of threshold was needed. The thoughts turned here back to the qualifiers "manifest" or "flagrant" (see Question 3) but several speakers did not consider them the best choice. One speaker wanted something "more precise". Another speaker found that the type of 'territorial' effects in Options 1 and 2 of Para.1 of CDP 2002 would be the least useful. A third speaker thought that something "like" Option 2 might be effective. The hope was expressed that the concept of a threshold could be targeted better.

The discussion focused next on Question 6: Should attempt of aggression by a State be also included in the text?

The Question centers only on attempt of the State act, *not* on individual attempt. (The latter topic is dealt with in Basket 2 which covers the person-centered elements and the General Principles of the Statute, see below.)

The Coordinator of Basket 1 explained that one preliminary issue was if attempt of the State act could be at all conceivable. The contributions to the VWG had indicated such an assumption. It had also been suggested to consider the "threat" of an act. The suggestion was repeated at Princeton but only once or twice welcomed. With regard to attempt, one speaker argued that the words "planning" and "preparation" in Para.1 of CDP 2002 covered attempts sufficiently, but another speaker countered that the draft of CDP 2002 criminalizes "planning" and "preparation" only if the act is later completed, i.e. as complicity in the completed act. This was made apparent, for instance, by the phrase in Para.2 "an act ....which is determined to have been committed" and by the Draft Elements. But that interpretation of CDP 2002 did not necessarily convince the first speaker. Yet also independently of the idea to rely on the words "planning" and "preparation", the debate moved steadily towards the recognition that a change of the draft might not be necessary. The meeting used as one example the firing of a nuclear missile which fails over the High Seas and does not reach the territory of the Victim State. Against this background, it was argued that the use of force became a completed act of aggression not only with the crossing of the territorial border but also due to the violation of political independence, another of the target values. The firing of the missile surely violated the political independence of the Victim State. Others argued that the crossing of the border was in any event not required. The relevant provisions in the UN Charter or in GA Res.3314/74 spoke of force "against the territorial integrity" not "in violation of the territorial integrity".

In the discussion, the participants kept also in mind the different organs which might make a determination of the State act. At the beginning several speakers argued against the inclusion of attempt because the Security Council would be unlikely to undertake the determination of an attempt. Towards the end of the discourse, it was considered likely

that the Security Council would call the firing of the missile directed at the Victim State an act of aggression. The meeting came increasingly to the conclusion that the scenario of concern was already covered and an explicit inclusion of an attempt of the State act was not necessary.

At the closing of the first day of discussions, the Chair announced that he would return on one of the following days to the issue of developing the reference to GA Res.3314/74.

June 9, 2006

On the second day, the SWGCA concentrated on Agenda Item 2: The conditions for the exercise of jurisdiction. This Agenda Item is the topic of Basket 3 in the VWG. In CDP 2002 it refers to Para.4 and 5, as well as the last part of Para.2.

At the beginning of the debate in Princeton, the Coordinator of Basket 3 summarized the responses in the VWG. The summary was structured in accordance with the questions[13] of Discussion Paper 2 [DP 2].

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[13] "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 should make that decision? (The Security Council? The General Assembly? The ICJ? Any one of the above?)

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

The Coordinator relied as well on a second informal discussion paper which had clarified the questions further and been sent after ASP-4 to the VWG[14]. A compilation paper of the State contributions to the VWG was made available.

Beyond his summary, the Coordinator invited further in-depth responses. One query addressed those who are arguing that the SC does not have an exclusive authority to determine an act of aggression[15]: Are there other examples where two or more organs have a parallel authority to determine the existence of a legally relevant circumstance? Another inquiry focused on a minority view that prior determinations of the State act by the SC are prejudicial: How can this view be combined with the due process rights of the accused, especially when reliance on mistake of law or fact may not offer adequate protection?

The Coordinator explained that more theoretical subjects like the institutional architecture for global security and the issue of equality would be taken up in the future.
The interventions at the Princeton meeting indicated that the SWGCA fully appreciates the effort of the Coordinator to postpone these theoretical subjects and to first achieve technical clarity about the jurisdictional conditions. But the exchange made it also clear that it is nearly impossible to remain purely technical when good answers are not just a matter of legal deduction but of policy choice.

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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.

2. If the ICJ:

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

(b) Only in the operative decision (dispositif) or also, alternatively, in the reasons? *Comment:* If an operative decision is necessary, it 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?

[14] Sub-coordinator's second discussion paper on the conditions for the exercise of jurisdiction with respect to the crime of aggression, sent 1 March 2006.

[15] Basically, those who do not share the view that the SC has exclusive authority to determine an act of aggression either argue that the authority of the SC is merely a primary authority and that the General Assembly, the International Court of Justice, as well as national institutions have such an authority as well, or they argue that the authority of the Security Council to determine an act of aggression is tied to Chapter VII of the UN Charter and unconnected to the area of criminal justice.

The Chair steered the debate in line with the questions of DP 2, but not all questions could be covered and the interventions did not always stay within the given structure. At the same time, the SWGCA ventured into fresh ideas and managed to look in addition at technical detail in Para.5 of CDP 2002. As will be shown below[16], the debate took several times a new turn addressing the interrelationship between the jurisdictional conditions and the trigger mechanisms of the Statute, especially with regard to Security Council referrals, State 'self-'referrals and State referrals by a large majority.

The Chair started with Question A.1: Should the ICC exercise jurisdiction over the crime of aggression only after another organ has accepted such exercise? After an initial round of reactions which tended to shift the focus from conceptual considerations to the Security Council, the Chair urged participants to consider also Question A.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?

Answers to A.1 covered the whole range, "yes", "not necessarily", "ideally not", "no", and "it depends".

The first intervention of the day opposed the requirement of an explicit authorization but argued for the requirement of a prior determination of an act of aggression. The speaker recalled that the authority of the SC had been most recently reaffirmed by the outcome document of the 2005 World Summit. "Our task is to make the SC work better." In line with Art.5 para.2 of the Statute, the outcome of the SWGCA had to be consistent with the relevant provisions of the Charter of the United Nations. The provision on aggression had to acknowledge the authority of the SC. Para.4 of CDP 2002 would fulfill this requirement.
While the requirement of consistency with the UN Charter is more frequently cited by those arguing for the *exclusive* authority of the SC, here a citation of Art.39 of the UN Charter was paired with a reference to the *primary* authority of the SC, a reminder of the task of the SWGCA to find a provision in harmony with contrasting interpretations of the UN Charter. Since the argument centered on Para.4 of CDP 2002, the preferred Option in Para.5[17] was only hinted at in the speaker's emphasis on SC reform.

A number of participants evaluated the mechanism, meaning and history of Para.4 of CDP 2002. With respect to the mechanism, it was argued that Para.4 contained a one-step and not a two-step procedure. With respect to the meaning and history, several opinions were largely congruent even though they came in different shades. It was pointed out that the process in Para.4 helped to alert the SC of the Prosecutor's intentions to investigate and was meant as an extra push for a determination.

[16] To do justice to the varied responses and the intense efforts of the SWGCA with regard to this agenda item, the report tries to capture the flow of the debate at least roughly, but some interventions are bundled by topic or position.
[17] Variant (b) of Option 4. -
Under Option 1 the Court may proceed. Under Option 2, the Court must dismiss the case. Option 3 involves the GA, Option 4 Variant (a) the GA and the ICJ(advisory opinion), Variant (b) the SC (majority) and the ICJ (advisory opinion), and Option 5 the ICJ (decision).

According to the more diplomatic assessment of another speaker, the paragraph acknowledged the need for cooperation with the SC and invited the SC to act.
A recall of the negotiating history related that the paragraph had been conceived in order to overcome the "heavy" condition of a prior determination by the SC and was to be read together with Para.5 of CDP 2002 and the Options which permitted the ICC to proceed. Option 3 was specifically mentioned.

In another intervention, Para.4 of CDP 2002 was declared unnecessary. The ICC was an independent body. There was no need to ask the SC for any action. Art.24 of the UN Charter spoke of the *primary* and not the *exclusive* authority of the SC for the maintenance of peace and security, thus the SC was not the only one with the authority to make a determination of an act of aggression. The powers under Art.39 of the UN Charter were only for the enforcement actions of Chapter VII. Art.39 did not preclude other bodies from assigning criminal responsibility. The International Court of Justice [ICJ] had also made pronouncements on aggression. The ICC was only precluded from moving forward if the SC acted under Art.16 of the Statute.
Others who shared this opinion and thus answered likewise "no" to Question A.1 interpreted Para.4 of CDP 2002 as nothing more than a way to inform the SC about the developments at the ICC. Moreover, the difference between the responsibilities of the ICC and those of the SC were underlined. Determinations may be made by the SC and other organs, but they were not required. The trigger mechanisms of Art.13 of the Statute were sufficient.

Coming from the opposite direction, the reading which connected Para.4 with Option 3 of Para.5 was explicitly not shared by one of the participants who insisted on the exclusive authority of the SC. The determination of an act of aggression by the SC would not impact on the independence of the Court since the Court's independence existed only on the judicial level and the determination was not a judicial determination.

Without referring to a particular organ, one delegate stated that both a prior determination of the act of aggression and a "go-ahead" were needed. The determination had to be a clear pre-condition: There was no crime without an act. The second sentence in Para.4 of CDP 2002 was seen as a very useful mechanism for consultation between the Prosecutor and the SC. If a determination had not yet been made by the SC, the Prosecutor had the right to appeal for one.

Whereas the opponents to the involvement of another organ emphasized the difference between criminal justice and the maintenance of peace and security, those who favored the involvement of the SC de-emphasized that difference. The increased focus of the SC on transitional justice was here expressly supported, even if it was not necessarily combined with insistence on an exclusive authority of the SC . The SC should have the first bite of the cherry, but not necessarily the last. That argument on behalf of a *primary* authority of the SC had a thrust similar to the one in the first intervention.

A few of the delegates indicated that they had not yet arrived at a definitive position. One speaker wondered if the SC *should* give the green light even if it did not *have* to. Much

would depend on the definition[18] and how well it excluded cases in the 'gray zone'. The speaker also criticized the GA and the ICJ as alternatives to the SC. The GA would be just as political as the SC, there was no advantage, an argument which appeared to focus only on one aspect of the SC. With regard to the ICJ, it was pointed out that it did not have the same standards of proof as the ICC. The intervention left unclear why this would not matter with regard to the SC whose standards of proof are also different from those in the ICC.[19]

Another speaker expressed again concern about the independence of the ICC and how one could square the procedures for a determination by another organ with the criminal procedures of the ICC. He also asked about the consequences of a veto to a SC draft resolution, i.e. in circumstances where the majority of states would arrive at a determination of an act of aggression. Would the ICC still be able to proceed?

One delegate started his considerations with the principle of cooperation. In an ideal world, the SC takes action and the ICC fulfills the complementary role of the prosecution of crimes. Para.4 of CDP 2002 was formulated in a cumbersome fashion. A reformulation should focus on the time limit, to tell the SC that the clock is ticking for possible actions by other organs. At the same time, the speaker questioned if all these issues needed to be addressed at all. They were internal to the UN. It would be sufficient to ask the *UN as a whole* to express itself. It could be left to the internal division of the UN which body would make the determination.

The next speaker focused again on the SC. The SC and the ICC were completely different organs. A determination by the SC was for the UN system. Art.16 of the Statute provided sufficiently for deference to the SC. A lack of determination by the SC should not tie the hands of the ICC.

To obtain a wider focus, the Chair reformulated the question: Do you think the ICC should be able to act on its own without action by any other organ? The question is if another body - *also other than the SC* - has to make a determination.

One delegate responded that *some* determination had to be made by another organ, but not just by the SC. It would tie the hands of the ICC too much.

Another delegate, largely opposed to a prior determination, stated that the ICC would not be the only organ which could make a determination on its own. The ICJ in the Nicaragua case had made such a determination. Individual States had the right to make such a determination for the purpose of self-defense, as well as for the purpose of national prosecutions. It was another matter, if consensus could be achieved on the independent determination by the ICC. If an organ other than the ICC had to be involved, the SC would be the preferred one. In the context of the presentation as a whole and of prior contributions of this delegate to the SWGCA, the advocated involvement of the SC was most likely intended to be time-bound rather than absolute.

[18] Especially the definition of the element of the act of aggression, and possible threshold criteria.
[19] With regard to the due process issue see the discussions below under Question B.

In response to the Chair's reformulation of A.1., it was also pointed out that it was difficult to answer A.1. without considering the organs themselves. It would not be a good idea for world peace to require a prior determination by the SC in an absolute or exclusive manner. It would be quite unlikely that leaders close to the Permanent Members could then be brought before the Court. The inequality in international criminal justice would increase tension and resentment. With regard to other options for a prior determination, the answer to A.1. depended on a list of evaluations. Without a prior determination, how likely would be prosecutions for uses of force in the 'gray zone'? The more likely it became that the SC would authorize force based on the responsibility to prevent genocide, the less likely it was that such uses of force occurred in a legally dubious way. It mattered too if the definition itself was already sharp enough to preclude politicized prosecutions. A prior determination might also be less necessary depending on the trigger mechanism. Possibly, the trigger mechanism itself could be modified, for example by requiring a referral by a majority of States, *erga omnes*, instead of a referral by a single State. The answer was also contingent on the need to achieve a successful outcome for the negotiations. The speaker said she would be going very far towards compromise because it was much better to enable the exercise of the Court's jurisdiction over aggression than to continue the suspension.
The intervention continued with an expression of support for the proposal to refer to the UN at large: The idea to leave it up to the UN which organ would make a prior determination had been earlier mentioned in the Preparatory Commission. One intervention in the VWG had also referred to the Relationship Agreement between the UN and the ICC. Under Art.7 of that agreement, the ICC could already propose items for consideration by the UN. A comprehensive approach, involving the UN as a whole, did not have to undermine the authority of the SC. The provision could for example read: "The Court may exercise its jurisdiction with respect to the crime of aggression if a United Nations organ with the authority to do so has made a determination of an act of aggression committed by the State concerned. In case the determination has been made by an organ other than the Security Council, the Court may only proceed if the Security Council confirms the determination by a vote of at least a majority of its members."[20]

After some further back and forth, and a coffee break, the Chair asked specifically if there should be a "go-ahead", the second option under Question A.2.b. The statements so far had mainly addressed A.2.a., a prior determination of the State act of aggression. The Coordinator recalled that the idea of an explicit "go-ahead" had been unpopular in the VWG. There were nevertheless some reasons for it: The SC might find a case serious enough but it may not want to engage in legal discussions or express an opinion on the act of aggression. The Chair added that the SWGCA should also weigh if either one, - a determination or a "go-ahead" -, were needed when the SC had referred a situation under Art.13 (b) of the Statute to the ICC. Such a referral could be seen as an implicit determination or consent.

[20] The reverse formula for the second sentence, namely that the ICC would not proceed (after a determination by an organ other than the SC) if a majority of the members of the SC were to object, was not brought up at this moment, but a later intervention by another speaker referred to "something related to Art.16" (see below).

The first response was a "no" to A.2.b. The idea of consent would conflict with the independence of the ICC. The primary concern should be the independence of the Court. The argument reverted here to the subject of the previous day. To preserve the independence of the Court, the term of "act of aggression" should not be used. The definition of the crime should merely speak of "use of force" as in Art.1 of Res.3314/74. This would avoid the issue of Art.39 of the UN Charter and of a prior determination or consent.[21]

The next speaker tied the Question to the Statute. The issue was how Art.12 of the Statute should be modified. Art.13 of the Statute described how cases could be brought. There was no need to change Art.13.

Another participant highlighted the interconnection with due process, a subject discussed in more detail later. He interpreted the determination in CDP 2002 as a conclusive determination, i.e. binding on the Court, - something he would be uncomfortable with, since the determination concerned a circumstantial element of the crime. If there had to

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[21] See in this context the discussions about Question 2 on the first day of the meeting, above n.10 and 11.
The idea to delete the term "act of aggression" from Para.1 and 2 of CDP 2002 would sound eminently practical if the debate around Art.39 of the UN Charter were merely a formalistic matter of words. Yet, a number of drawbacks should be born in mind.
First, *if* "use of force" is defined as in Art.1 or other Articles of Res.3314/74, it is practically synonymous with "aggression". The change in term would not be seen as a change in substance. It thus might sidestep a technical but not the political difficulty. The real issue appears to be not so much the wording of Art.39 but what Art.39 stands for, the political and legal control over the use of force.
The speaker above and the Coordinator *would* link the "use of force" or "use of armed force" with Res.3314/74. As the Coordinator herself suggested, the replacement of terms would not make a difference in the definition as such, since the meaning of both terms would depend on the building blocks drawn from Res.3314/74. (See also below p.33, 34.) With regard to this approach, it is important to note that the concerns expressed on June 8, - about uses of force beyond the classical understanding of aggression -, might be misplaced, especially if the "use of [armed] force" is also linked to Art.3 of Res.3314/74. Yet, again, the congruence of meaning between "act of aggression" and "use of [armed] force" would make it also unlikely that the difficulties about the jurisdictional preconditions disappear.
Second, *if* the term "use of [armed]force" were employed just as such, - without any of the definitional parameters of Art.1 of Res.3314/74 -, the current political difficulties around the jurisdictional conditions are likely to persist as well, insofar as the wider term ("use of [armed] force") includes the narrower one ("act of aggression"). Worse, those political difficulties might be joined by nearly as strong political difficulties about a too wide reach of the definition. 'At best', the latter difficulties could just replace the former. In theory, some leverage may be gained in playing one set of difficulties against the other, but the fractured fields of opinion on both sides of the equation, including a number of crossovers, do not seem to hold much promise for such a negotiating strategy. (Of course, the difficulties about the term "use of force" arising in the absence of any of the parameters of Art.1 of Res.3314/74 might subside if the requirement of a "violation of the Charter of the United Nations" in Para.1 of CDP 2002 were to be considered already sufficient to reign in the width of the term.)

be some prior action by another body, it should be a "go-ahead" or a determination which would be treated as nothing but a procedural precondition. The draft of the Elements in CDP 2002, it was argued, treated the prior determination (by whatever organ) as a precondition[22]. The act itself was included as Element 5. It might be useful to revisit the Elements. - The suggestion was a reminder of the efforts of the Chair in 2005 to do just that.

A number of speakers repeated that the Question was irrelevant. No prior action apart from Art.13 was necessary. Requiring a prior action would encourage impunity because the SC was not known for its eagerness to make determinations of an act of aggression. In a later response, it was countered that this lack of eagerness could change in the future, since Para.4 of CDP 2002 puts the onus on the SC.

Others made it clear that it would matter if the option were affected by the veto.

Several participants favored the 'procedural approach', meaning either a "go-ahead" or a determination which would only have a procedural/jurisdictional effect in the context of the ICC process. The procedural approach would remove the problem of prejudiciality[23]. It would be easier to draft. Only minimal changes would be necessary to the current regime. It would be easier on the SC. One could provide for a choice, either a determination or a "go-ahead" could serve as a precondition. This would give more options to the SC.
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After one speaker thought of the prior procedural action as something like a "no-objection", another speaker argued that there could be "something like Art.16." The Court could go ahead if the SC did not ask it to refrain within a certain time. The express support for a "procedural solution" may have been meant as a reference to a decision in accordance with Art.27 para.2 of the UN Charter, but this was not clarified.

One participant thought there was not much of a difference between the two options. Why should one then not "call a spade a spade", i.e. make a determination of the act of aggression. Because the SC may not like to 'call a spade a spade' was the answer in a later intervention. The SC may not want to make the determination itself but it may also not object to another organ 'calling a spade a spade'.

The expertise of the ICC was pondered as well in the context of Question A.2.a. and b. Requiring merely a go-ahead would leave the determination of the act to the ICC judges who were, according to two speakers, not equipped for the task. It would demand superhuman qualities to have both criminal and public international law expertise. But another speaker offered as a counterargument that the ICC judges would have to make such a determination in any event. The definition or threshold of the act under the Rome

[22] Since it was the understanding in the Preparatory Commission that the "appropriate organ" in the "Precondition" as described in the Elements included the ICC itself, it would seem that one of the options under this conception would include a (preliminary?) determination by the ICC during the jurisdictional phase of the proceedings in accordance with Art.19 of the Statute.
[23] See in this regard also the discussions on Question B. below.

Statute may be different from the one used by another organ. The determination would also have to be made in line with due process under the Statute. The Court may have to look at justifications under the law of State responsibility. The judges elected under List B were public international law experts, and possibly even better equipped than some of the participants in the SC. A special chamber could be formed to address the public international law questions arising with regard to the State act.
In the course of the meeting, other speakers added later that the judges of List A had also the capacity to handle these issues. Public international law questions would arise as well in the prosecution of the other crimes under the jurisdiction of the Court. The ICTY and the ICTR had addressed public international law and the conduct of States and nobody had thought much of it.
In response to one of these observations it was asked how the idea of a special chamber would fit with Art.39 *of the Statute*. Another speaker pointed to the beginning of the negotiations and claimed that it was never the idea ten years ago to ask the ICC judges to make this determination. - The remark highlighted, if only indirectly, how far the negotiations had progressed since then, especially in the understanding of the due process issue[24].

One speaker, expressing his support for a prior determination by the SC, declared that the decision had to be prejudicial and final. This would protect the human rights of the accused against political games.
It was an argument which received particularly passionate rebuttals even before the Chair moved specifically to the topic of prejudiciality and due process: The accused needed the full protection of the law precisely when the SC had made a determination. The act was part of the crime. Whether the act had occurred was part of the question whether the crime had occurred. A prior determination needed to be refutable. New arguments and evidence must be possible The ICC must determine the act under its own stringent standards. All other approaches were difficult to reconcile with due process and fundamental principles. Someone else added that it was unimaginable that the accused could only say, 'I did not plan, I did not prepare'.

Another participant went beyond the either/or question of A.2.a. and b. and stated that both types of action were needed. First the SC would have to make a determination of the act, then it would have to give an explicit go-ahead. Subsequently asked if these decisions would be taken under Art.27 para.2 or 3 of the UN Charter, the answer was, both under Art. 27 para.3.

A speaker who thought that the procedural approach was meant to overcome the veto issue, - with the possible application of Art.27 para. 2 of the UN Charter -, expressed at the same time doubt if the SC could be influenced in this respect.T[25]

[24] For further progress on due process in the course of this day of the meeting, see the discussions on Question B below.
[25] The focus on the applicability of para.2 or 3 of Art.27 of the UN Charter may indicate in some sense a too restrictive angle. After all, the SWGCA must ponder more what the ICC and less what the SC should be doing. The international community could possibly sidestep the relevance of the choice between Art.27 para.2 and 3 and 'simply' provide that the exercise of ICC jurisdiction shall

In the course of the often wide-ranging discourse, the Chair rephrased his question, to get a better focus on the last part:
The SC could

a) determine an act of aggression, without a referral under Art.13 (b) of the Statute,
b) determine an act of aggression and make a referral under Art.13 (b),
c) make only a referral under Art.13 (b).

Would c) be sufficient?
The Chair also reminded the SWGCA that Art.13 spoke of referrals of "a situation in which one or more of such crimes appears to have been committed."
Would this be sufficient?

The first immediate response was: "More than enough."

Coming from a different angle, it was pondered if the referral could be seen implicitly as a determination. But the speaker continued that one could not be sure if an aggression existed before this was determined. It would be also unclear if the referral meant an aggression. With regard to the binding nature of the determination by the SC, the ICC had an additional threshold under the admissibility criteria of Art.17 para.1 (d) of the Statute. The Court would have considerable leeway to look if the situation was grave enough to proceed.

Another speaker focused on the determination solely as an initial political threshold determination and took less into account that the determination concerns also one of the elements of the crime. While he thought that the scenario under c) would not have to require in addition a prior determination by the SC, he emphasized that there would then have to be a decision by another UN organ, i.e. by the GA or the ICJ. This would be a "window" (i.e. a way to overcome the veto problem)[26]. But somebody had to make a political decision. The comment switched then to another trigger mechanism: *Ex proprio motu* alone would not work with only a check by the judges themselves. In a later intervention, the speaker refined his argument with regard to a SC referral (see below).

According to a different opinion, the SC should be able to refer without a determination. Nothing in the UN Charter precluded this. The ICC Statute did not need more obstacles than the Charter contained. The ICC should not have to wait for another political decision. It should proceed with its legal determination.

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be permitted as long as a prior SC determination or go-ahead has received a large majority of votes. At least in theory, the options for the jurisdictional preconditions could include a SC draft resolution whose adoption failed due to a veto.

[26] In other words, the speaker would use Option 2 of Para.5 of 2002 CDP for trigger mechanisms other than SC referrals: In the case of State referrals and ex proprio motu actions, only a prior determination by the SC could enable the ICC to proceed.

It was also pointed out that an earlier tri-partite proposal by Bosnia-Herzegovina, New Zealand and Romania[27] had only provided for additional jurisdictional preconditions in the case of State referrals and ex proprio motu proceedings, not in the case of referrals by the SC. It was not clear if CDP 2002 had omitted such an explicit differentiation inadvertently or for a particular reason.

In the meantime, other participants had made it plain that they considered scenario c) beside the point and that the real issue was what if the SC did nothing, neither a referral nor a go-ahead nor a determination. After initially trying to retain the focus solely on scenario c), the Chair responded to the disquiet and invited the SWGCA to *also* talk about possible inaction of the SC.

After a lunch break, the Chair moved to Question A.3: Which organ would make that decision (be it a prior determination or a go-ahead), the SC, the GA, the ICJ, the ICC Assembly of States Parties? Either one of the above?

The Coordinator first recapitulated several of the morning interventions, notably those concerning the non-prejudicial nature of a prior decision, the sufficiency of Art.13 (b) of the Statute, the possibility to look at possible modifications of the trigger mechanisms, and the idea to involve the UN as a whole. He also thought the SWGCA could undertake a closer legal analysis of Art.39 of the UN Charter. The GA and the ICJ had been much discussed earlier but not so much recently. He restated the frequent references to the Nicaragua decision and to GA resolutions, especially the Uniting for Peace Resolution and Res. 3314/74. He repeated his earlier comment that other examples of parallel assignments might be interesting.

Citing Art.39 of the UN Charter, the Chair summarized that there was a majority view, but not consensus, that the SC did not have an exclusive role with regard to the determination of an act of aggression. What should happen in the case of SC inaction? Which other body would make the determination?

A number of participants continued to concentrate on Art.13, - and not only on scenario c) under Art.13 (b) but also on Art.13 (a).
Thus, the question was posed if a prior determination by the SC (or another UN organ) was necessary if a State had referred a crime of aggression by its own past leaders, in accordance with Art.13 (a): The State has already made a determination of an act of aggression by itself and would have national jurisdiction, but prefers adjudication by the ICC. The Chair considered this to be a complementarity issue. Another participant agreed and saw no need for a difference. The Prosecutor would proceed in accordance with Para.4 and 5 of CDP 2002. But later it was argued that no determination by the SC or another UN Organ would be needed (see below).

[27] PCNICC/2001/WGCA/DP.2/Add.1. But note that the document speaks of SC referrals of "a situation in which the crime of aggression appears to have been committed". The formulation is slightly less crime-specific in the earlier tri-partite proposal PCNICC/2001/WGCA/DP.1 whose para.2 reads: "Where a situation involving the crime of aggression is referred to the Prosecutor pursuant to article 13 (b) ..."

With regard to a referral by the SC under Art.13 (b) and scenario c), it was again emphasized by one speaker that a prior determination of the State act was still needed by another UN organ, except if the SC had referred a situation with an explicit focus on aggression[28]. This could be put into the Elements. With regard to a prior determination and the due process issue, the speaker added that the defense would of course raise the question whether an act of aggression occurred. The burden would then be on the Prosecutor to show that a determination had been made. The Prosecutor could present evidence from the organ which made the determination and the Court could readily dispose of the issue.
The idea to put the precondition for an ICJ or GA decision into the Elements found a voice of support.[29] The Rules of Procedure were suggested as another place for the precondition.

One participant who had previously argued for a prior determination by the SC thought that no special provision was needed here. The matter could be left to the wisdom of the Court. It was not quite clear if his statement referred to Art.13 (b) or to the 'self-referral' by a State under Art.13 (a).

Another participant did not think much of a duplication of efforts by going to the ICJ and then the ICC. Art.13 (b) had been crafted with intelligence. It spoke of the referral of "[a] situation in which one or more of such crimes appears to have been committed....". It was not the function of the SC to make a legal determination.

On the other hand, the generality of Art.13 (b) was also the cause for a particularly significant concern raised in favor of a prior determination: Wars may involve many crimes. The SC could hesitate to refer crimes against humanity if this would open the door for the ICC to prosecute crimes of aggression.[30]

The discussion was clearly distressing for those who believe that the ICC can proceed without the input of another organ. As one delegate put it, the discussion proceeded *as if* the ICC needed another organ. The larger question was first *whether* another organ is needed at all. The real issue was inaction by the SC. It was surprising that the SWGCA

[28] The window opened under this concept does not let in much light. Most likely, a State intent on vetoing a determination would also veto an aggression-specific referral. Presumably too, the veto would only play no role in a general SC referral under Art.13 (b) if the relevant veto holder does not reckon with a charge of aggression. Exactly in the most blatant cases of aggression, this is difficult to envision.
[29] It is an idea that has been highly controversial in prior meetings, since it would look as if the precondition (a post-crime determination) is treated as an element of the definition. Since the determination happens after the crime has been committed, the definition would be marred by lack of clarity.
[30] Art.13 appears to be ambiguous about the question if a referral explicitly focused on particular types of crimes (e.g. crimes against humanity) would prevent proceedings on other types of crimes (e.g. crimes of aggression).

was now talking about the involvement of the GA or the ICJ even if the SC wants the ICC to act!

The Chair referred back to Question A.3. The discussion should not be limited to Art.13 (b) of the Statute.

In response, it was pointed out that CDP 2002 could further help to structure the discussion. What were the implications if the SC did not arrive at a determination under Para.4 of CDP 2002? Why did the SWGCA spent so much time on ways to continue the process? Para.5 of CDP 2002 was for extreme cases, shocking situations where the world community could not accept inaction. Perhaps Option 4 Variant (b) could be used. The request by the SC for an advisory opinion of the ICJ could be a procedural decision where the veto would not apply. The meeting should take a closer look at the Options in Para.5.

One delegate expressed his reluctance about alternatives to a determination by the SC. The reference to shocking situations would introduce a subjective element. And if a situation *were* shocking, the SC would be able to act.
Another participant argued that inaction by the SC would not mean that the situation had to be completely outside the jurisdiction of the ICC. There was the possibility to bring charges of genocide, crimes against humanity and war crimes.

Countering these statements, it was pointed out that the perception of a shocking situation would not have to be subjective if one required for example a vote by the majority of States in the SC or the GA. Even in shocking situations, the SC may not be able to act, for example if the war has been started by the leaders of a State allied to a Permanent Member. The possibility to prosecute other crimes would not compensate for the inability to prosecute aggression. It might be difficult to reach the leaders with regard to the other crimes, whereas aggression was a leadership crime.[31]

For several participants, Option 1 of Para.5 of CDP 2002 was the best one. If the SC remained silent, the ICC could proceed. Pursuing a more rigorous concept of the independence of the ICC, it was also argued that both Para.4 and 5 were not needed.

Two speakers tried to show that the absence of a determination or go-ahead by the SC was only an issue in a narrow configuration, but they did so with the opposite objective. One speaker stated that direct ICC proceedings could be already in any event acceptable for self-referrals of States and for referrals by the SC. Not all of the trigger mechanisms required another precondition. 2002 CDP itself seemed to have only *ex proprio motu* cases in mind. In other words, a solution to permit the continuation of ICC proceedings should be feasible.

[31] The expectation that war crimes, crimes against humanity and genocide will be committed in the course of armed conflict only increases the culpability of the aggressor. Moreover, much of the damage and injury inflicted in the course of a crime of aggression is difficult to trace to the other crimes. The so-called collateral damage is one example in this regard.

The other speaker listed seven ways the SC could act. It could determine an act of aggression. It could refer a case without a determination. It could do both, a referral and a determination. It could refer a case and specifically empower the ICC to determine an act of aggression. It could request the Court under Art.16 of the Statute to suspend the proceedings. It could explicitly determine that no act of aggression had been committed by the State concerned. It could do nothing. With these many options, there would probably be a good reason for doing nothing. The speaker, who had earlier stated that the SC should have the first bite of the cherry but not necessarily the last, felt here that inaction by the SC should maybe spell the end of the case at the ICC.
It was countered that inaction by the SC was not always based on good reason.[32]

One delegate objected expressly against a "hierarchy" among the trigger mechanisms. It was not further clarified if the objection applied to all proposals integrating a differentiation among the trigger mechanisms. After all, the two main proposals were quite disparate. One of them requires a prior determination by the SC for the trigger mechanisms of Art.13 (a) and (c), and determinations by the GA or ICJ for non-aggression-specific referrals under Art.13 (b). The other one requires no prior determination for the trigger mechanism of Art.13 (b) and for State self-referrals under Art. 13 (a). For other State referrals under Art.13 (a) and for the trigger mechanism of Art.13 (c), the jurisdictional precondition could involve the GA or ICJ.

Referring to the suggested differentiations depending on the trigger mechanism, the Coordinator added that the choice among the Options in Para.5 of 2002 CDP would also depend on the policy reason for requiring a prior decision:

> If one wanted political backing for the ICC proceedings, the involvement of either the SC or the GA would be useful.
> If one wanted to avoid frivolous referrals, the GA and the ICJ might be a safeguard.
> If one were seeking a more competent legal evaluation of the act, one might prefer the ICJ.
> And so on.[33]

The Coordinator also urged more reflection with regard to 'self-referrals' by States. Such referrals may be frivolous if a government is motivated by political conflict with former leaders.

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[32] Time prevented a fuller consideration of the seven ways for SC action or inaction. The SWGCA might ponder in particular the likelihood or percentage for the various types of SC action or inaction. Inaction as one seventh of the approaches *available* does not necessarily mean that inaction constitutes only one seventh of the approaches *taken*. Moreover, several of the Options in Para.5 of CDP 2002 would require the concurrence of a majority of States, something that is quite unlikely to happen if good reasons for SC inaction exist.

[33] The statement appeared to signal that the policy reason for requiring a prior decision may also vary depending on the trigger mechanism.

The afternoon began with a speech by Benjamin Ferencz who has worked on the subject of aggression since sixty years and has repeatedly urged the SWGCA to focus on what is essential. He stated that States had the opportunity and the obligation to deter illegal war-making. It was not true that the crime of aggression could not be defined. It had been defined many times. The SWGCA could employ an accumulated definition referring to all the prior sources, Nuremberg, Tokyo, the GA in 1946 and in 1974, and the International Law Commission. One could get around the problem with the SC by combining the charge of aggression with charges of other crimes. The ICC could use a compendium and just move ahead.

At the start of the discussions, the Chair asked for comments on the drafting of the Options in Para.5: First Option 3, then the other Options. And then the other Questions.

It was pointed out that Option 3 says that the Court may proceed in the absence of a GA resolution. Maybe one should add the variation "in the presence of such a recommendation, the Court may proceed with the case." At least in the oral discussions, many had argued in this vein and many had referred in this context to the Uniting for Peace Resolution. The current text did also not reflect circumstances where the GA has already spoken before the Prosecutor intends to proceed. One could rephrase the text, for example: "The Court may proceed if the GA has made a recommendation to this effect. In the absence of a recommendation by the GA, the Court may submit a request for such a recommendation."
The Coordinator commented similarly that the current text does not state the consequences of a GA resolution. Now it only gives a time period after which the Court may proceed, apparently without a resolution. Was the idea to provide for some cooling-down? The Coordinator remarked as well that the provision did not describe what type of recommendation (e.g. go-ahead) would be pursued.
More technical observations followed, notably one speaking for parallel wording with regard to the SC and the GA. Thus, Option 3 should speak of "determination" instead of "recommendation". The replacement of "shall" with "may" was also proposed.

With the understanding that a redrafting of Option 3 did not imply the choice of this Option, the Chair went on to Option 4 and 5.

Most speakers returned to substantive considerations.

Option 4 and 5 were dismissed both by those who insist on the exclusive determination of the act by the SC and by those who argue against a prior determination by the SC or by alternative organs. Among the participants who tend to hold positions more in the middle, fewer than in the past spoke in favor of involvement of the ICJ. But the arguments were not without contradictions and did not appear to be the final word.

One participant expressed reluctance about the involvement of the GA, and even more so about the involvement of the ICJ. He repeated the possible reasons for the requirement of a prior decision, i.e. political backing, prevention of frivolous prosecutions and legal competence. None of these reasons would speak for the ICJ. He claimed that the ICJ

could not provide political backing, an assertion which appeared to disregard the effect of the authority of ICJ opinions. He stated that the ICJ was not shielded from frivolous referrals.[34] He also shared the concern about duplication voiced by others. The ICC judges were just as competent. The ICJ decision would be in any event not conclusive, due to the different standards of proof.
Since the due process issue arises also with regard to determinations by other organs, including the SC, and since the concern about duplication pales against the concern about undue paralysis of the ICC, it was not clear if this argument was meant as an argument for Option 1 or for Option 2 or for the elimination of both Para.4 and 5.

The Coordinator wondered if the two Variants in Option 4 of Para.5 were needed. Maybe the request for an advisory opinion did not have to be made by the GA or the SC. A third Variant could be that the request could be made by any competent organ.
Invited to offer comments, the sponsor of Variant (b) of Option 4 explained that this arrangement would bring the issue back to the SC. The SC would make the request for an advisory opinion. This could be a procedural decision which would not be affected by the veto power. It had been an idea inspired by the Uniting for Peace Resolution. If the SC decided that this was a procedural decision, it could be done. There had been some positive indications from the Permanent Members.

But again, the argument was made that the SC may be right when it does not make a determination. The counterargument referring to the availability of Art.16 was not considered pertinent since the SC might be of the opinion that there was no aggression[35].

One participant stated clearly that Option 1, 3, 4 or 5 were unacceptable. He also pointed out that Option 4 Variant (b) would interfere with the competence of the SC because the SC adopts its own rules of procedure[36]. Variant (b) would tell the SC how to proceed. The Chair pointed out that the SC has never adopted its own rules of procedure.

The critical remark about Option 4 Variant (b) left it open if a solution incorporating SC majority decisions might gain greater acceptance in a different wording or constellation or only when paired with a SC rule of procedure specifying procedural decisions. The objection to Options 1, 3, 4 and 5 did not appear to close the door on new ideas. On the

[34] This remark was somewhat perplexing and may have been misunderstood. After all, it is not so much the request to the ICJ but the *examination by* the ICJ which would be expected to hinder frivolous prosecutions. If one wants a safeguard against frivolous prosecutions, a legal determination would seem much more valuable than a political determination.
[35] Nobody answered at this point that the SC could also make a determination that no act of aggression had been committed. The SWGCA is only too aware that concerns with regard to the veto power can matter on both sides of the argument. Such concerns may center as much on the undue relevance of the irresponsible veto as on the undue disregard of the responsible veto. Whether they can be assuaged by procedures which require the support of a majority of States could depend among other things on the particular institution where the majority vote takes place (e.g. SC or GA), on the type and direction of the decision voted upon (e.g. "go-ahead" or "objection"), and on the possible combination and balancing effect of several such majority votes.

other hand, as the Chair made clear, what is or what is not a procedural decision has been extensively discussed. He doubted that the SC would ever conclude that the request for an advisory opinion is a procedural decision.

One delegate asked specifically for more detail about past positive indications by Permanent Members of the SC with regard to Option 4 Variant (b). The Chair conveyed his understanding that there had been some indications of agreeability about treating the request as a procedural decision. The subsequent question sounded more facetious than serious: "On the record?"

Participants tried to accommodate the observation that one could not tell the SC how to proceed. Thus, it was suggested that Option 4 Variant (b) might sound less prescriptive if it spoke of a vote of "at least" nine SC members. In a similar vein, it was speculated that the SC might *want* to treat certain decisions as procedural[37]. Maybe most significantly, the Coordinator wondered if it could not be left open whether the request for an advisory opinion was subject to a veto. Would it not be up to the ICJ to decide if the request was valid?[38]

Some of those who favor the more direct road to the ICC under Options 1 and 3 called Options 4 and 5 cumbersome and burdened by too much delay, - an assessment not shared by all in that group. Slightly contradictory, both the different evidentiary burden in the ICJ and the non-binding nature of advisory opinions were described as drawbacks.[39] Attention was also called to the fact that the ICC had an appeals chamber.

The Chair and other speakers clarified that the non-binding nature of advisory opinions does not matter in the context of a jurisdictional pre-condition. What matters is that the advisory opinion *occurs*.[40]

One speaker found it strange that the SC would first not want to make a determination but then request an advisory opinion. He appeared to have in mind determinations which fail for good reason and lack of majority support. Variant (b) is carefully tailored to situations

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[37] This thought would only work in a non-case specific situation, i.e. for a general SC rule. The question if a decision is procedural or substantive is generally seen as a substantive question. Thus, a Permanent Member intent on vetoing the request for an advisory opinion would also be able to veto the vote about the procedural or substantive nature of the request.
A general rule on the procedural nature of certain decisions is imaginable if the advantages outweigh the disadvantages for Permanent Members. This may be more likely for objections against ICC proceedings than for requests for advisory opinions.

[38] One potential problem with this approach might be that a majority request would remain a draft request, if the SC does not treat it as a procedural decision. While it would be possible in the ICC Statute to consider draft decisions sufficient as a precondition, this would be another matter under the existing Statute of the ICJ, see Art.65.

[39] The non-binding nature of an advisory opinion can be seen as an advantage in the due process context. No formal hindrance prevents a second examination of the act of aggression in accordance with the evidentiary rules of the ICC and the rights of the accused.

[40] The same goes for non-binding GA resolutions or any other non-binding decision one might want to use as a jurisdictional pre-condition.

where the determination fails only due to the veto, yet the majority wants the ICC to be able to proceed, - with the advisory opinion as an additional safeguard.

The comments of one delegate were especially noteworthy since they did not quite harmonize with the earlier patterns of responses from that State. While a previous delegate of the same country had indicated a positive interest in Variant (b) at the time it was proposed in the Preparatory Commission, now the reaction was more critical: The Option would be unwise; it was difficult to see how the request for an advisory opinion could be procedural and this issue would be disputed both in the SC and the ICC; Options 3-5 were all too elaborate; the delegate was then heard to say that he preferred Option 1. "Option 1" was repeated after inquiry by the Chair. In light of the previous emphasis on a determination by the SC, the remark seemed a major surprise and may have been misunderstood. Possibly, the speaker did not "prefer" but "refer" to Option 1. Both a preference and a mere reference could fit with his subsequent observation that Variant (b) *above Option 1* misses the necessary time element.

One speaker argued specifically for both Variants (a) and (b) of Option 4, with the argument that both the SC and the GA had the authority to request advisory opinions under Art.96 of the UN Charter. The comment sidestepped the issue if advisory opinions should only be able to function *as jurisdictional precondition for the ICC* when a particular form of request has been used.[41]

Looking at the draft of Option 4 more from a technical angle, changes were suggested to take account of circumstances where an advisory opinion already existed by the time the Prosecutor intends to proceed. A reformulation may be also desirable to cover circumstances where the advisory opinion had been requested by a body other than the one in the chosen Variant[s]. The current text would practically require another request for a second advisory opinion. An affirmation of the advisory opinion by the majority of the GA or SC, - depending on the chosen Variant -, may be satisfactory as well.
With regard to Option 1, a reference was made to the ILC Commentary on the Draft Code of Crimes Against the Peace and Security of Mankind. In para.5 of the commentary to Art.16 of the Draft Code, the International Law Commission states that the State act of aggression can be determined by the competent court. In the context of the commentary it appears obvious that the competent criminal court is meant.

The Chair proceeded next to the Coordinator's Questions B.1. and B.2. on the prejudicial nature of a prior determination and the rights of the defense: Should the determination of the State act be made by another organ prejudicially? If so, which organ? (The SC? The GA? The ICJ? Either one of the above?)

[41] Not all potential variants for Para.4 of CDP 2002 mentioned in the VWG were discussed at the Princeton meeting. For example, in case the international community prefers requests based on the vote of at least nine members of the SC but doubts the feasibility of a procedural decision in the SC, it could also look towards requests by the GA whose adoption included the votes of a majority of the members of the SC.

The Coordinator explained that "prejudicial" meant that the prior determination would be binding and not up to review in the ICC.

One delegate argued that the discussion was unnecessary because a prior determination should not be required in the first place. In response, it was pointed out that the issue may arise in any event. A prior determination may exist even if it is not required. The Statute could not prevent other institutions from making a determination.

In general, the SWGCA appeared to be in agreement that a prior determination could not be binding on the ICC. Everyone was aware that the procedures in the SC, GA and ICJ differed from the due process standards in the ICC.
One delegate saw a serious dilemma, since the evidence with regard to the act of aggression would be large and complex and he was not convinced if the ICC was suited for this type of evaluation. The defendant would take advantage of a reopening of the determination. At the same time, there were due process requirements which could not be neglected, especially in this serious crime. The SWGCA needed to be aware of the problem.
Others who saw less of a problem with an ICC reevaluation of the act were of the opinion that similar issues, such as State self-defense, arose with regard to the other crimes. The ICTY and ICTR had also dealt with complicated political subjects. There was no reason why the prior determination could not be refuted in the ICC. The Nuremberg Tribunal was cited as a precedent since it had also assessed the act of aggression and defenses in regard to the act.

The remark about the refutation of the prior determination was partly misunderstood. The speaker had meant the refutation by the *Court* as a whole. Now it was strongly emphasized that it was not the task of the *accused* to refute the determination[42]. While this reaction was not quite to the point of the previous intervention, the spotlight on the presumption of innocence was welcome. In the course of the debate, Art.66 and 67 of the Statute were repeatedly cited: the burden of proof was on the prosecution, it could not be shifted to the accused.

An intervention which stressed that a prior determination was needed, underlined that it had to be rebuttable. The burden could not be on the accused, but a prior determination by the SC would be strong evidence.

One delegate listed the arguments which the defense might be making, including some of the arguments related to the act of aggression, such as State self-defense. He also cited examples where courts have been or are bound by prior decisions. For example, if the US Attorney General made a determination of terrorism, it was binding on the courts. Some of the decisions of the Nuremberg Tribunal were binding on subsequent courts[43]. But

[42] A similar misunderstanding had occurred already at a previous Princeton meeting.
[43] Yet here the earlier determination by the Tribunal had been arrived at under criminal law procedures.

since the act was an element of the crime, he had serious doubts about the binding nature of a prior determination.

Another speaker reiterated that Question B did not present a big problem. None of the relevant findings on the act of aggression by another institution were binding on the ICC. GA resolutions evaluating the act were not binding. Advisory opinions by the ICJ had legal authority but they were not binding. ICJ decisions were only binding on the parties. SC resolutions were binding on the States but they were not tying the ICC. They were political decisions. The SC was not required to use the definition of the act of aggression relevant under the Statute. The ICC was thus free to look again at the facts in accordance with its own definition and threshold, and in accordance with its own process standards. The only dilemma was one which had been mentioned in a previous Princeton meeting. There was on one hand the importance of harmony among different international institutions and decisions, and on the other hand the due process rights of the accused. But the latter was the stronger value.

Another participant who had earlier observed a different type of dilemma was not convinced by all arguments against prejudiciality. In particular, he doubted that State self-defense would matter much for the other crimes. Yet he also put great weight on the rights of the accused. It would be impossible to treat a political decision as binding. This would be in conflict with the law of his country and with human rights law, including regional human rights law.

The conflict with human rights was further highlighted when one of the delegates referred to developments arising after the prior determination. New evidence, new facts, new arguments may emerge. A binding decision would have an unacceptable effect on the rights of the accused.

Towards the beginning of the debate, the same speaker had already argued that nothing needed to be added to the Statute. In other words, Art.66 and 67 spoke for themselves. The Statute did not preclude a look at the State act. It would be good to remain silent with the understanding that different standards might produce different conclusions. Later in the debate, another speaker thought that it might be wise to put such an understanding in writing, in case a prior determination would be explicitly required.[44]

No one argued that a prior determination had to be prejudicial.

When the Chair proclaimed himself "quite happy" with the progress of the day, it was probably obvious to many in the room that the discussions gave much cause for hope but also for frustration. The movement, just within one day, towards a greater common understanding on the due process issue and the effect of a prior determination with regard to the ICC process had been remarkable. At the same time, the approach to the Options of

[44] Some wording was proposed for such an Understanding: "A prior determination that an act of aggression has been committed by the State concerned does not relieve the Court of its responsibility to determine that the definition of the act of aggression under the Statute has been met and to respect also in this regard the rights of the accused."

Para.5 of CDP 2002, particularly to Options 3-5 seemed occasionally reckless. Understandably, participants will and should argue as long as possible for the arrangement they find best. But too often, the criticisms of a particular Option sounded too much as if the international community could never be in need of a compromise and as if the negotiations should be condemned to failure if consensus on Option 1 or 2 or another preferred Option could not be achieved. All Options need to be critically evaluated, but in order to find improvements or alternatives, not to leave black holes.

June 10, 2006

On the third day of the meeting the SWGCA covered three items on the agenda. The first topic was Agenda Item 1: The "crime" of aggression - defining the individual's conduct. Later the SWGCA returned to the definition of the act, specifically to GA Res. 3314. The meeting also took up consideration of Agenda Item 5, the organizational future of the work of the SWGCA.

Agenda item 1 addresses the interrelationship of the definition of the crime of aggression in Para.1 of CDP 2002 with the General Principles in Part 3 of the Statute.
The SWGCA concentrated at this meeting specifically on the interrelationship with Art.25 para.3 (a)-(d) of the Statute. The provisions set out the general conduct links to a crime, i.e. the basic forms of commission and participation which engender criminal responsibility. In the evaluation of the interrelationship between the definition and Art.25 para.3 (a)-(d), the SWGCA examines primarily what a person has to *do* in order to be linked to a State act of aggression. As far as the interrelationship is influenced by the placement of the leadership clause, the SWGCA ponders in addition what type of position the person must hold, or who must the person *be*.[45]

Apart from CDP 2002, the meeting had before it Discussion Paper 1 [DP 1] by the Coordinator of Basket 2 of the VWG, and also Proposals A and B in the Annex of last year's Princeton Report[46] Just as on the previous days, a compilation text of State contributions to the VWG was available as well.

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[45] To what degree *being* equals *doing* matters in the context of command responsibility and omission. With regard to these and other topics concerning the interrelationship of the definition of the crime with the General Principles, the Coordinator is planning further discussion papers in the VWG. Individual attempt under Art.25 para.3 (f) has been addressed in DP 1, also at prior meetings and in the VWG, but the subject was not further developed at Princeton 2006 (in contrast to attempt of the act, supra p.8-9).

[46] *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, at Princeton University, New Jersey, United States, from 13 to 15 June 2005, in Note by the Secretariat, ICC-ASP/4/SWGCA/INF.1, 29 June 2005. The report of the 2005 inter-sessional meeting can also be found more recently in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague,28 November to 3 December 2005, ICC-ASP/4/32, Annex II.A, http://icc-cpi.int/library/asp/Annexes.pdf*

The Coordinator recapitulated that the SWGCA distinguishes between the *monistic* and the *differentiated* approach. CDP 2002 applies the *monistic* approach: The conduct verbs in Para.1 of 2002, -"orders or participates"-,[47] appear to include all forms of participation in the crime, thus Art.25 para.3 (a)-(d) was considered superfluous and declared non-applicable in Para.3 of CDP 2002.
At the Princeton meeting in 2004 the SWGCA had started to evaluate the *differentiated* approach: Art.25 para. 3(a)-(d) would remain applicable. The conduct verb would be crime-specific but not necessarily comprehensive, since basic forms of criminal participation would be reached over the General Principles. In 2004, the SWGCA achieved preliminary consensus that the application of Art.25 para.3 (a)-(d) would be modified by the explicit addition of a leadership clause within Art.25, in order to prevent the extension of the crime of aggression below the leadership level, notably to soldiers. The debate in Princeton 2005 concentrated on new conduct verbs which would work well with the *differentiated* approach. Proposals A and B of Princeton 2005 offer variations in this regard. They also reflected a continuing understanding that a leadership clause would not only appear in the definition of the crime but also in Art.25 para.3 of the Statute.

The Coordinator summarized the result of the VWG discussions. According to the majority opinion, both the monistic and the differentiated approach remained on the table. The differentiated approach had received stronger support, depending on finding a suitable conduct verb instead of "orders or participates".
The Coordinator highlighted three options from the VWG for the conduct verb in the *differentiated* approach:
1) "engages [the State][the armed forces][the organs of the State] in an act of aggression";
2) "directs", "directs or organizes", "executes effective control" - these verbs would necessitate changes in the leadership clause;
3) "plans, prepares, initiates or executes an act of aggression" - the gerunds/nouns of "planning, preparation, initiation or execution" in Para.1 of CDP 2002 would be turned into the conduct verbs. (Here too, "orders or participates" is deleted and Art.25 para.3 (a)-(d) becomes applicable.)

With regard to the terms in the second option, the Coordinator pointed out that they would require changes in the leadership clause since the clause employs those terms as well.
In this context, the prior proposal to change the current clause to a 'policy level' clause would be of special interest.

In the course of the debate at the meeting, the proponent of the 'policy level' requirement explained the different ways in which it had played a role in case law. Essentially, the

[47] The fragment of Para.1 of CDP 2002 relevant to the discussions reads: " .... 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 ..."

accused would have to be in a position to shape or influence policy. Criminal intent, knowledge and purpose were mentioned as relevant criteria.
From the interventions during the debate and the conversations during a break, it was obvious that most participants found a policy level requirement either too diffuse or no advantage over the current clause. The Chair reminded the SWGCA of its agreement to use the default rule of the General Principles of the Statute with regard to intent and knowledge. He also referred to Princeton 2005 where the SWGCA had agreed to maintain the leadership clause. The main point of discussion was the conduct link. The proponent of the policy level requirement explained that it would be wider than the leadership clause. It would reach beyond the high command and cover also involved industrialists and financiers. In answer, the Chair pointed out that it had been always understood that the leadership clause would reach just as far and that it had never been limited to heads of state or individuals in the military.

Mostly, the interventions at the meeting centered on the search for a suitable expression of the conduct element under the differentiated approach.

The SWGCA is fully aware that the choice of the conduct link to the act of aggression in the definition is intended to characterize the principal perpetrator, whereas the forms of participation listed in Art.25 para.3 could be used to reach as well secondary perpetrators. In this regard, it has been clear too that it matters if any new term[s] replaces only "orders or participates" or also "[in] the planning, preparation, initiation or execution of".[48]

In respect of the line between principal and secondary perpetrator, it was argued that the distinction was of little practical value since the Statute did not provide for a corresponding difference in the penalties. In opposition, it was pointed out that the aggression-specific conduct described in the definition played a major role in forewarning potential perpetrators. It was important to signal that the crime of aggression started with the planning stage.

The meeting examined old and new proposals with regard to conduct verbs.

The verb "to direct" was recalled from the VWG and DP 1 and gained again some support.
The verb to "engage" received mixed reactions, depending on the object linked to it, e.g. "a State", "the armed forces of a State", "the organs of a State" or the formula mentioned below.
The verb "to participate" was also tested for the differentiated approach. Thus, it was suggested that Art.25 para.3 could be seen as a specification rather than a repetition of the term. But others did not share this conception and feared confusion. The word was dropped from consideration.

The SWGCA was divided about "to plan, prepare, initiate or execute", the third option described by the Coordinator. While a number of participants expressed support, others

[48] In accordance with the approach of the Coordinator, the SWGCA set aside issues with regard to the word "actively" in Para.1.

preferred one conduct verb instead of several. In general, the latter group advocated also the 'long' deletion of the words in Para.1 of CDP 2002, i.e. not only "orders or participates" but also the conduct stages of "the planning, preparation, initiation or execution". This all would be covered by Art.25 para.3. After all, the objective of the differentiated approach was to treat the crime of aggression as much as possible like the other crimes[49]. Specifically, it was argued that some of these verbs were in Art.25 Para.3 (a)-(d) and others were inherent in the act. Why would one then not also transfer "induce" or "aid" or "abet" from Art.25 para.3? In response it could have been pointed out that the verbs in Art.25 para.3 (a)-(d) are linked to the *crime*, whereas the verbs under the third option are linked to the State *act*. An earlier contribution to the VWG had cautioned that the difference may be meaningful, but the argument was not considered at the meeting.

New submissions included in particular "to organize and direct", - a combination of terms found in international terrorism conventions -, and "to lead". The SWGCA considered also the version "to organize *or* direct". "To lead" was offered in two variations, "leads an act of aggression" or "leads the planning, preparation, initiation or execution of and act of aggression". The proponent observed: 'What does a leader do? He leads.' Since the definition contains already a leadership clause, concern was expressed if this meant that the person had to sit at the head of the planning table, i.e. if he or she had to be a leader among leaders. The concern appeared not to be shared by others, after all the leadership clause refers to the position of the person and "to lead" to the conduct. The conduct term would focus on those leaders who are actually involved in the act of aggression [50]. But one of the questions raised was also if "to lead" implies a single person. The response in this respect referred to Art.25 para.3 (a) which includes the joint commission of crimes.

The second variation for the use of "to lead" prepared the way for a similarly constructed conduct link employing the verb "to engage", namely "engages in the planning, preparation, initiation or execution of an act of aggression." The proposal was explicitly based on Art.30 para.2 of the Statute which includes the words "engage in the conduct". One speaker pointed out that "engages in the planning, preparation, initiation or execution of an act of aggression" was practically the same as "plans, prepares, initiates or executes the act of aggression" in the third option.

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[49] The arguments for one conduct verb seemed to some degree contradictory since the other crimes in the Statute do not necessarily use just one conduct verb. One can imagine the conduct verbs for the crime of aggression arranged in a column list, and thus achieve an even greater structural similarity to the other crimes, especially to the definition of genocide. The similarity would be still more apparent with a grammatical transformation of the verbs into gerunds, the word form frequently used as well in the list of war crimes. The conduct terms would then read:

(a) planning
(b) preparing
(c) initiating
(d) executing

Compare also "plans" and "planning", infra p.33. (The list structure of the other crimes under the Statute has been used as an argument to incorporate the list of Art.3 of Res. 3314/74 into the provision on aggression. That list relates to the State act, not the individual conduct element.)

[50] "To lead" and "to direct" might make the leadership clause in the definition less essential.

In the course of the discussions, it became more and more apparent that the choice between the 'short' and the 'long' deletion[51] in Para.1 of CDP 2002 amounted to a significant structural decision. The SWGCA decided to put the two basic structures in writing.

Maybe the new written draft tried to do too much at once. As intended, one proposal (Proposal A) lines up the conduct verbs with the 'short' deletion[52], the other (Proposal B) with the 'long' one[53]. At the same time, the two proposals are presented in different grammatical sentence structures. Proposal A uses the old form which defines the crime with the basic structure: "A person *commits* the crime when that person *does* x". Proposal B uses the structure of the other crimes in the Statute: "The crime *means doing* x". Obviously, each of these structures could be used either with the 'short' or the 'long' deletion. This was made clear after some confusion in the debate. But the double variation led also to other misunderstandings because the "*means"*-structure employs the conduct verb in the gerund, i.e. "*doing*" instead of "*does"*[54]. "Planning, preparation, etc." can be either terms to denote conduct stages (or grammatical objects) as in Proposal A or they can be conduct actions like the terms "directing, etc" in Proposal B. Thus, suggestions to insert "planning, preparation, etc." also in Proposal B were meant by various speakers in either one of these two ways and easily mistaken in this regard.

Nevertheless, the SWGCA managed another step in the clarification of the definition and moved closer to the structural drafting decisions.

After another round on substance and form, and after some amendments, including a footnote and a stylistic shift, the SWGCA decided to annex [55] the new Proposals A and B to the report. The Chair stated that the discussions would continue in the VWG.

While the SWGCA had been waiting for the initial written draft for the new Proposals A and B, the Chair moved the discussions back to the definition of the State act under Agenda Item 3, specifically to GA Res.3314/74 referred to in Para.2 of CDP 2002. He asked if the definition of the act should refer to Res.3314/74 in its entirety or to parts of it. Text from the Resolution could also be directly reproduced in the provision.

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[51] "Orders or participates [actively]" versus "orders or participates [actively] in the planning, preparation, initiation or execution".

[52] " .... [leads][directs][organizes and/or directs][engages in] the planning, preparation, initiation or execution of an act of aggression ...."

[53] " .... [directing][organizing and/or directing][engaging a State/the armed forces or other organs of a State in] an act of aggression ...."

[54] This would be also possible with the "*commits*"-structure, e.g. "a person *commits* the crime when *doing* x". (Compare now in the leadership clause "when *being*".)

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

Art.1 represents a generic definition. Art.3 contains a list for a specific definition. Art. 4 provides that the list in Art.3 is non-exhaustive. Without Art.4, the list in Art.3 is a closed one.

One participant reminded the SWGCA that he had proposed in the VWG a definition which would use Art.1 and 3. Art.1 could furnish a generic chapeau which would be further defined by the list in Art.3. The drafting style would be similar to the other crimes in the Statute. He would prefer a closed list. If the SWGCA preferred a non-exhaustive list, one could add "for example". Since the ICJ had called Art.3(g) customary law, Art.3(a)-(f) were most likely customary law as well.

Others preferred a reference to the Res.3314/74 as a whole. It would be too difficult to pick and choose. It was also argued that an indirect reference to the whole made sense since Para.2 of CDP 2002 addressed the element of the State act. Art.8 of Res.3314/74 showed that all Articles in the Resolution were interrelated.[56]

In contrast, one opponent to a reference to the whole Res.3314/74 was concerned that it would be in effect only a reference to Art.3 of Res.3314/74. Only Art.3 speaks of an "*act of* aggression" whereas Art.1 starts "Aggression is ...." Yet Art.1 had to be included. Several participants tried to offer solutions in this regard. One of them suggested to say in Para.2 of CDP 2002: "... an act of aggression means an act within the meaning of GA Res.3314, Art.1 and 3." Another proposed "... an act of aggression means aggression as defined in GA Res.3314".
The Coordinator for this subject repeated that not everyone had agreed to the term "act of aggression" in Para.1 of CDP 2002 in the first place. "Armed force" could also refer to the acts contained in Res.3314/74. The remark caused again consternation: Para.1 of CDP 2002 required an act of aggression as element of the crime. Para.2 defined that element. A change in Para.1 would throw away the whole structure.[57] A strong argument against the wholesale use of Res.3314/74 followed. A reference to Res.3314/74 would make no sense at all: Read it! The Resolution gives the SC the power to call anything aggression or not. That was fine for the SC. But it would be a terrible proposition for the definition of a crime.

After a lunch break, the SWGCA returned to Proposals A and B for the definition of individual conduct under Agenda Item 1 as described earlier.

The Chair then turned to Agenda Item 5: The future of the work of the SWGCA. He reminded the SWGCA of the decision of the ASP to allocate ten full regular days to the SWGCA between now and 2008[58]. According to the roadmap, the SWGCA is scheduled

[56] There was also some focus on the interrelationship of Para.2 and Para.4 but the Chair stated that this was a matter for another discussion.
[57] See also n.21 and the text above n.10, 11 and 21.
[58] Official Records, Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, 28 November to 3 December 2005, ICC-ASP/4/32, Part III,

to conclude its work in 2008 or at least 12 months before the Review Conference. Only little time was allocated for aggression during ASP 5 in November 2006. Three days were dedicated to aggression in a resumed ASP session in January 2007[59]. The SWGCA would need another resumed session to obtain the ten days. He suggested January/February 2008.

One participant proposed more informal meetings possibly before the next ASP. He referred in this context to the planned conference in Turin. The Chair announced that information in this regard would be provided on the following day, but it was unrelated to the need for regular/formal meeting days. Another participant expressed hope for another Princeton meeting in 2007, since these meetings were very fruitful. With respect to formal meeting days, he pondered if the resumed session of 2007 or of 2008 should be longer. It would seem better to have a longer meeting in 2008. The Chair agreed.

One speaker recalled that the ASP cuts into the time for aggression when unexpected business arises. Some were thinking this would happen again in January 2007. He also saw a problem in the shortness of the interval between the November session and the January session. The Chair's response was offered with just the right amount of acerbity to cause laughter: If the cut into SWGCA time was known already, it was no unexpected business.
In line with the general agreement of the SWGCA, the Chair will make a request for the further allocation of the additional days decided upon at ASP 4.

After adjournment of the debate, the NGO Coalition proceeded with a briefing on ICC matters in general. One delegate used the occasion to advocate a stronger concentration on the preparation for the Review Conference.

July 11

The SWGCA continued with Agenda item 5.

The delegate of Italy provided an extensive briefing about the plans for a conference on international criminal justice in Turin, October 2-11, 2006: Since the draft program of work included segments on the crime of aggression, it could provide an opportunity to convene an informal meeting of the SWGCA. The format and conditions of participation could be the same as at Princeton. The program of work could be adjusted to accommodate the needs of the SWGCA.
The announcement received a warm welcome. The conference promised to be a major event in international criminal justice. Several questions and comments were offered. The conference would be a unique occasion to increase the political momentum towards the

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Resolution 4 "Strengthening the International Criminal Court and the Assembly of States Parties", para.37
[59] Id., para.53.

adoption of the provision on aggression at the Review Conference. Speakers referred both to the possibility of panels and to workshops on technically difficult issues. In light of concerns about overlap with the work at the UN General Assembly and elsewhere, it was decided that the Chair would continue consultations to find the best arrangements furthering progress with regard to the crime of aggression.

The rest of the time was spent with the examination and amendment of the draft report of the Princeton meeting and the report's adoption.

The Chair concluded the meeting with expressions of thanks, especially to the Director, Secretariat and Staff at the Liechtenstein Institute on Self-Determination at the Woodrow Wilson School. The thanks were intermingled with applause from the whole room. After the intensity of the communications at the meeting, the farewells seemed again much too sudden.