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**International Criminal Court
Fourth Session of the ASP**

Special Working Group on Aggression
30 November 2005 (3:00 pm – 4:30 pm)

Chair (Ambassador Christian Wenaweser, Liechtenstein):

Good afternoon. Please take your seats. There are two issues to discuss this afternoon. Now as I indicated, this afternoon we will discuss the three non-papers produced by the three sub-coordinators of the Virtual Working Group. They are not all here yet themselves but one of them is. I would like to get started. I would like to draw your attention first to paragraph 91 of the Report on the Princeton inter-sessional entitled “Follow up and Preparation for Future Work”. Could the delegations by the exit sign leave the room and maybe discuss outside or take their seats? Thank you.

Para 91 makes it clear that the Inter-sessional agreed in Princeton to establish a Virtual Working Group that would allow states to advance discussions outside regular and inter-sessional meetings. Now it was understood that this working group by communicate by electronic means and obviously we are open to all interested states. So you can at any time approach my delegation if you're interested in being included in the mailing list. The report also states that I was given the task of exploring the best way of exploring such a group. Immediately after Princeton, we sat down with those people those people that had expressed a particular interest in the core issues, namely the definition and conditions of exercise of jurisdiction. So immediately after the adoption of the report, we did establish that Virtual Working Group and this Working Group has three sub-coordinators. The first one is Mr. Klaus Kress from Germany and he has produced non-paper no. 1 entitled “The Crime of Aggression and Article 25, paragraph 3, of the Statute” that you should have in front of you. Non-paper 2 will be presented by Mr. Paul Wrangel from Sweden and that is entitled “Conditions for the Exercise of Jurisdiction with Respect to the Crime of Aggression” and the third one was authored by the Funny Levada from Greece and this one is entitled “Definition of Aggression in the Context of the Statute of the ICC”. All these three papers have been made available informally and we will briefly discuss them this afternoon.

Let me just say we did discuss this possibility in Princeton and as I stated that it was a good idea in principle. We were fully aware that this was an innovative and novel thing to do and that we would basically find out how it goes as we go along. It is very clear to all of us that this cannot replace consultations and negotiations on the topic and some comments were offered this morning, including delegations from the UK and France who stated quite accurately to my mind that people of course tend to be a bit more formal and conservative in their views if they do have to present their views in writing and I think we have seen a bit of that in the response that we have received so far. So to my mind, the

purpose of the Virtual Working Group is exclusively to help us prepare for the next meeting and of course this is also the understanding of the sub-coordinators. Now having said that, I would like to give the floor to all the three sub-coordinators and after each presentation, quickly open the floor to delegations for comments. I do not ask for very specific comments on substance because the idea is of course you do that in the Working Group through e-mail. But I'm interested in your views as to the value of this exercise in particular and on possible suggestions on how maybe we could improve the work.

I have said enough and I'm happy to give the floor to Klaus Kress from Germany to introduce non-paper no. 1. You have the floor.

Germany:

Thank you very much, Mr. Chairman and let me say at the outset how pleased I am to see you back in the Chair. You have invited me to coordinate the electronic debate on the pending issues concerning the relationship between the definition of the crime of aggression and general principles as contained in part 3 of the Statute. Let me start by making a comment on the nature of those issues with which I have to deal. They are in my mind essentially technical in nature of instead of politically sensitive. They are at the same time rather complex as they pertain to questions of criminal law theory. For this reason I think the Virtual Working Group can play a useful role. It could allow us to prepare thoroughly for future negotiations and you've mentioned it, as they will come along in Princeton next year. It allows for a deeper reflection on those issues and it also allow, within each delegation, expert delegations on national criminal law, which is especially important in my area, who may not always be present when we negotiate in The Hague, New York, or in Princeton. I am convinced that on this basis and with good will, we can solve these issues contained in my basket relating to the general principles, not just in the form of some compromise but in a satisfactorily manner. In this respect, I'm encouraged by the first reactions I had and I would most kindly encourage you to participate in the debate that has started.

As you mentioned, my non-paper 1 focuses on 2 questions of primary importance again with regard to the relationship between general principles and definitions of the crime. The first one is how should we deal with the possible forms for individual participation in the crime, in the collective state act. First issue – forms of individual participation and the second would be how to deal with attempts in the context of crime of aggression. I would suggest to leave for a later stage questions pertaining to superior orders command responsibility and other issues discussed at the last Princeton inter-session. And to the structure of my non-paper, briefly, three points. It takes of course the reports of Princeton 2005 inter-sessionals we have discussed and make ready for adoption as a starting point and it should be read together with this report. It includes for ease of reference specific direct cross-references to the pertinent paragraphs of this report. Secondly, the paper tries to capture the progress that we have already achieved in order to avoid repetition. Thirdly, it tries to identify and to summarize and explain key issues that remain to be solved. I have tried in this paper to present those key issues in the form of 8 questions. Your thoughts on those 8 questions are appreciated. Of course, needless to say, you're welcome to raise any other issue as well.

On the two issues very briefly. Individual participation, forms of it, we are confronted here, as it was clear at the Princeton inter-sessional, drafting alternatives, which I have framed in the terms of monistic and differentiated approach. The monistic approach goes back to the 2002 discussion paper, submitted by the then coordinator, as a primary point of reference. This paper contains what I call the monistic approach and this is essentially the conduct of the individual perpetrator in the crime of aggression is described by the generic term “participation” – participation in the state act, the collective act. As a consequence of this generic description, the different forms of individual responsibilities contained in Article 25, para 3, a-d, are deemed to be inapplicable because the whole area of individual criminal responsibility is covered by this generic term.

In Princeton, many participants questioned the monistic approach and have spoken in favor of applying article 25, para 3, a-d, to the crime of aggression. This would lead to what I call differentiated approach because then all the different forms of individual participation – the ordering, the aiding, the abetting, the instigating, all would apply to this crime. I have tried to point out, p. 2-3, the differentiated approach presents one major challenge that we still have to meet. If we want to differentiate between the different forms of participation, we must say in the definition of the crime itself what the principal perpetrator of the crime of aggression actually does. In other words, what does it mean to commit the crime of aggression? On that crucial question, one will find that we have already discussed in Princeton on pages 3-5 of my non-paper. Please comment if you wish on those options or if you think none of them is entirely satisfactory, try to think of a better way to capture what we are trying to express.

For the time being, my basic procedural suggestion would be as follows. Let us not yet disregard the monistic approach in the 2002 coordinator’s paper because even though not ideal it offers at least one coherent solution for our problem. Let us only disregard it once we have found the complete formulation of the differentiated approach, which on balance is preferable to the monistic approach already set out.

I shall be very brief on the second issue which is attempt. Article 25, 3f contains general provision on attempt. The 2002 coordinator’s paper suggests not to apply this provision not to apply in the case of the crime of aggression. In Princeton, this suggestion has received mixed reactions. On pages 7-9, it is suggested that before we reach a decision on this question, it might be helpful to clarify what an attempted crime of aggression means in practice and it is suggested that once more in this context, it is essential to distinguish between the individual and collective acts of participation. It is suggested that if Article 25 3f is applied, it would cover attempted individual acts of participation. Such cases would not seem to be of practical importance. What is important would be whether the application of 25, 3f would lead to the criminalization of individual acts of participation in uncompleted state acts. I’d like to hear your views on that specific question. I’m sure clarifying will help us to reach an informed decision on whether or not to apply article 25, 3 f. Mr. Chairman, this concludes what I have to say at this stage. I thank you very much for the opportunity to make this introduction.

Chair:

Thanks for the presentation and producing a paper that is extremely thorough and sophisticated. I very much recommend it for reading by everybody here and also people outside the room obviously and even more so, I encourage people to interact on the questions raised in the paper. I have Samoa on the list. Samoa you have the floor.

Samoa:

Thank you Chair. I should say at the outset that we're delighted with the Princeton process and with the Virtual Working Group. We have already participated in the Virtual Working Group to send a virtual non-response to the non-papers that are in front of you.. Those of you who are participating can read that there. I shall be brief. I'd like to reiterate a couple of points made by the sub-coordinator that I think are fundamental to what we have been trying to do at Princeton.

The sub-coordinator talked about structure. He used the very useful terms – the monist and the differentiated approach. Not language we've used before but nevertheless very, very helpful. These two approaches arise in the context of a fundamental issue not addressed at the PrepComs. Namely how to apply part 3 of the Rome Statute to the crime of aggression? The general part, part 3 of the Rome Statute, go much into much more detail than in any other general part contained in earlier international law instruments. That part is a set of default rules, a force that has to be reckoned with. We can reject it in total or in part but we simply cannot ignore it. Until 2002, the drafting of the crime of aggression followed the International Law Commission's lead and proceeded on the basis that aggression is special. It is sui generis and not subject to the general part. I think we are now agreed that some parts of the general part must apply. Article 30 for example, articles 31 and 32 on the state of fact and the state of law. But we need to resolve application of provision to the general part, article 25, para 3, a-d. We're all agreed, I think, that crime of aggression a leadership crime. What is the best way to describe that position? A stand alone provision that deals with all issues? Or should we refer in some way to article 25, para3, a-d.

Having the alternate draft in front of us has clarified the issue considerably. When we have a draft before us of how a total provision would look, based entirely on a differentiated approach, we can then make a meaningful choice between that and the monist approach. I must agree emphatically with the sub-coordinator that we should keep both on the table until we're sure which of the two most effectively captures the spirit of aggression as a leadership crime. Thank you Chair.

Chair:

I thank you very much. There are no other speakers on the list. I will then go to the author of non-paper 2, the representative from Sweden. You have the floor sir.

Sweden:

Thank you Mr. Chair. I propose we continue the road taken at Princeton. I tried to produce an outline. I intend to run through the list shortly but before that one note. As has already been indicated, there were not many interventions in the Virtual Working

Group. Roger Clark has presented an interesting and very readable article that he has already presented but they deal with other issues, not the condition of the exercise of jurisdiction. I intend to connect the list to our discussion at Princeton and that would essentially do what the German representative has already done regarding the general part. This will be an attempt to show where we are. The 2 most important questions to my mind, which are, first conditions for the exercise the jurisdiction in a strict sense. I asked whether the ICC should exercise jurisdiction after another organ has exercised jurisdiction and if so, what sort of decision would be required. I also asked which organ makes the decision. The second decision, I call prejudicial decision. Here I ask should the determination be made by another organ prejudicially and if so , which organ. These 2 questions are distinct issues. The conditions for the exercise of jurisdiction, of course, concern the option that the ICC should be able to exercise jurisdiction only after some other organ has made the decision to that effect. Such a decision could consist of either an explanation that aggression has occurred or explicit consent for the ICC to proceed, with or without determination. Questions under (b) on the other hand is the question of prejudicial decision, do not assume that another party has to make the determination for the ICC to start exercising jurisdiction. These questions instead ask whether or an explicit consent for the ICC to proceed.

As I read the Princeton report, the questions have been answered in the following way (a) conditions for the exercise of jurisdiction. (a1) Should ICC exercise jurisdiction only after another organ has accepted such exercise. Most, but not all delegates believe so. That is the ICC should not exercise jurisdiction only after another organ has accepted that exercise. The much discussed Greek/Portuguese paper assume that such a decision would be welcome but not necessary.

Second sub-question. If so, what sort of decision would be required. A determination that a state where an act of aggression has occurred give an explicit consent for the ICC? At Princeton, it was the first option, the option that a determination would be the condition for the exercise of jurisdiction. It was also the basis of the coordinator's paper as well as for other proposals, including the one from Bosnia, Romania, and New Zealand discussed in the PrepCom.

I could in theory imagine the determination of the condition for the exercise of jurisdiction would not be a determination of a state act, but rather an explicit consent.

The third sub-question under this heading is which organ should make the decision. It is well known that there is a clear divide here between a clear majority which believe that other organs might be able to do that while a significant minority believe that only the UNSC can do so under article 39. I would like to pose all those arguments here.

So the second group of issues regarding prejudicial decision. The first question here should the determination of the state act be made by another organ prejudicially or should it be for the ICC itself to determine itself that a state act of aggression has occurred. Second, if so, which organ. In earlier discussions, it was not clear to me that those states that held that the determination should be made by another organ also held that that

determination should be binding on the Court or not. At Princeton, there seemed to emerge a consensus that any such determination would not be prejudicial, but a procedural decision, that is a condition for the exercise of jurisdiction. When I say procedure, I mean procedural from the vantage point of the ICC. The reason for this conclusion reached at Princeton is, as I understand it, no organ should make a non-rebuttable decision for the ICC since that would prejudice the rights of the accused. An accused does not have a standing or a right to be heard before the ICJ or UN General Assembly, or the UNSC, which are the organs that have been proposed for the prejudicial decision.

Hence it appears that question b-1 should be answered with no. Then I also had a few other questions outlined in the non-paper. There are procedural questions regarding decisions made by other organs. They are not addressed either in Princeton or anywhere else.

Last issue brought up. 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. This was discussed at Princeton. There seemed to be a general agreement that any determination made by another organ should not be binding on the ICC. Furthermore, it has been pointed out that articles 30 and 31 of the Statute may provide some relief if on the crime of aggression, contrary to what has been said, is binding on the Court. These were the questions I asked or the state of answers as I find them today. I think we need much more discussion. I'm not sure my review here really reflects all of the views and I think there may also be avenues, which we have not fully explored and which might help when we reach the necessary stage for compromise.

Four things. This book "Historical Review of Developments Relating to Aggression", I think is not known by all delegates here. I think it might be useful here if one way or another we could include the document number in the report of this Working Group.

Secondly, I'd like to hear the views of other delegates on whether the outline I've presented is feasible as a basis of further discussions for the time being.

Thirdly, I have felt encouraged by the welcoming comments of the Virtual Working Group. Delegates have suggested that we continue with the informal discussions. I believe that the informal discussions may be extremely helpful.

Fourthly, I would urge colleagues to contribute and even though I understand that things that are written are a little bit more cautious, I think we should stick to the rule that nothing that appears should be attributed to any governments. I would also note that one delegate pointed out that the sub-coordinators do some gentle prompting. Thank you.

Chair:

Many thanks for your presentation and producing this paper, especially the lists of question which strikes as useful, covers the issues as they arise. Anyone wish to comments?

Samoa:

Someone else will comment on this very helpful paper from the sub-coordinator. I just wanted to refer to 2 aspects. First is the nature of determination that an act of aggression has been made by a state. The coordinator commented on whether that is to be a pre-judicial decision. I'm not sure if all of the brothers and sisters understood what he meant by that. I understand him to mean is it determinative, is it conclusive as to the existence of one element of the offence, namely the act of aggression by a state. That is how I understood the 2002 coordinator's paper, which we're using as a basis of our discussion. Under his draft, once the UNSC, GA, or ICJ has spoken, the ICC must take that as a given. As the coordinator points out, an accused might rely on lack of knowledge, lack of intent, mistake, or some other ground for the exclusion of responsibility but as I say the determination that a state has committed a crime of aggression is taken as a given. We've been moving in a diff direction from the 2002 paper towards the position that the appropriate UN organs might make a go-ahead or consent decision. Their decision or opportunity to make a decision might be regarded as a pre-condition, or a threshold decision, of some sort.

My second point is that point that the coordinator made in the context of which organs of the UN might be able to speak to this matter. I note in this context the last sentence of article 5, paragraph 2 of the Rome Statute referring to the provision we must draft on the crime of aggression. It says such a provision shall be consistent with the relevant provisions of the UN Charter. But what are the relevant provisions of the Article 5, para 2 last sentence suggests a division of labor between the ICC and the UN. And we have on one hand the view that the UN security council is the go-ahead for consent and determination but is exclusive. On the other hand, there are those of us who believe that as a matter of the language of the Charter, as confirmed in the practice of the Council, the GA, notably the Uniting for Peace Resolution, and of the ICJ, there is ample precedent for the proposition that those other two organs, the GA, and the ICJ might have a role in situations where the Security Council has declined to act. I must in this respect underscore that the document that the Secretariat produced for us in 2002, namely the historical review of developments relating to aggression. It is a very telling document in examining the practice of the GA in this regard. Thank you Mr. Chairman.

Chair:

Many Thanks. The delegate from Cuba.

Cuba:

Thank you. Mr. Chairman, some brief commentary on what was said with respect to the Working Group. My delegation supports it. However, according to certain principles, perhaps we're seeing something obvious and we may not be aware of some things. This would be a way to facilitate discussions but not a way to take decisions, which could only be taken in the Working Group according to the principle that nothing is decided until everything is.

Secondly, we hope it'll be transparent and have access and not through any sort of filter. We'd like to participate and make our contribution but we believe it'd be a good time to make comments with respect to the circumstances in which the Court will address the issue of aggression. For Cuba, this is still a main principle that the ICC should not be a politicized issue. The Court should be entirely independent of the UN organs in judicial functions. It is very important that the court be able to decide for itself on crime of aggression independently of the UN position on an aggression made by the state. So we believe that the Court will have to deal with the most serious violations of international law. The UN is there to ensure peace and security. We agree that the ICC would not have jurisdiction on the question of the UN with regard to an act of aggression. However, such a declaration or an absence of declaration should not impinge upon the decisions of the court. We also believe that with respect to jurisdiction, it should not be connected to Security Council. It should be up to the bodies of this court. The ICC, according to Article 16, a judicial body and should not be subordinated to any political body that might question the independence of its functioning. Thank you.

Chair:

Thank you. I agree entirely with your general comments on the characteristics of this Working Group. Russian Federation, you have the floor.

Russia:

Our delegation is grateful to the drafters of this very useful document. This document will help us find positive answers. With respect to the exercise of the ICC's jurisdiction, with respect to a crime of aggression we've expressed our position. We believe it is practically settled by the UN charter. The legitimacy of all actions of the Court should be subordinated to a prior decision of the UNSC decision. We won't be able to accept any other decision, and it would go against international law and draw us away from the right solution. It is important that we set up a mechanism for dialogue where the international community is faced with acts that can be characterized as crime of aggression. Such a dialogue that might be provided for in the Court's statutes would make it possible to avoid opposition between the Security Council and the Court when it comes to determining the characteristics of a crime. In any case, we are convinced that it would only be through a constructive dialogue between the ICC and UNSC that we will be able to see successful conclusion to the problems of punishing the crime of aggression and attributing the responsibility of such crimes. Without a positive interaction between the two, it is likely that the ICC will not be able to carry out its mission successfully.

Chair:

Many thanks. The Republic of Korea.

Republic of Korea:

Thank you Mr. Chairman. I'd like to thank my Swedish colleague for his introduction of the non-paper. It is our view that the role played by the UNSC should be limited to the pre-condition for the ICC's exercise of its jurisdiction. The nature of the determination by the UNSC should be regarded as procedural. In this regard if the Security Council fails to act, it is quite necessary to develop a mechanism which enables the ICC to initiate

its own procedure. A finding by the Security Council should only have an impact for the ICC only if the SC fulfills its role. Otherwise it might undermine the autonomy and independence of the Court. The political considerations in making a determination by the Security Council should be reduced to the minimum in triggering a judicial action. Thank you very much.

Chair:

Thank you very much. In the absence of any other requests, I will proceed to give the floor to the representative from Greece in order to introduce non-paper 3 on the issue of definition of aggression. You have the floor Madam.

Greece:

Thank you Mr. Chairman. Allow me to present the questionnaire, which refers to the general question on the definition of aggression as an act of state. This questionnaire was circulated by email with the others. The question of definition as a collective was only cursorily discussed at Princeton. This was due to the fact that one of the basic understanding underpinning the process agreed upon from start that the most difficult and controversial issues were left to be discussed later in the process and only when it was clear that the meeting was leading to successful results.

Despite the shortness of time, on the question of the definition of crime of aggression at Princeton, those discussions that took place were substantive and meaningful and is a solid basis on which to proceed. The discussions confirm the continuing relevance of the work of the coordinators who worked on this issue in the context of the PrepCom following the Rome conference had reached. There was a discussion paper submitted featuring various options over the basic aspects of aggression to be included in the jurisdiction of the ICC.

The question therefore had two pillars. First, was the former coordinator's paper insofar as the conclusions and options therein contained continue to be relevant in the light of the discussions at Princeton and the second, tendencies which appear to find support in the present Princeton meeting. Presentation wise, we're trying to formulate the questionnaire as simply and concrete as possible while some brief comments accompany the individual questions where this appears to be necessary or helpful. In this way, we can find it forthright and concrete without being in way discouraging on expanding on each of the particular issue offering new ideas and options and discussing whatever might be relevant or helpful. Let me now say a few words about particular questions in the questionnaire.

The first question is whether the definition of aggression should be "generic" or "specific". All along the process during discussions, the understanding has been that generic meant no list of cases of aggression would be attached as illustrative or exhaustive. Conversely, a specific definition would compose of a list much along the lines of GA 3314 resolution or exhaustive. Each of the options has its own pros and cons and you'll find it in footnotes and replies sent by Roger Clark in particular. These pros and cons have to be carefully considered. However it has to be noted that discussions so far confirm that in Princeton, the generic approach seems to rally more

support primarily because it presents fewer problems than the others. If a generic approach is preferred, there is no doubt however that the content and elements of the corresponding definition must be both clear and sufficient in describing the act so as to avoid any clash with the principle of legality.

The second question refers to the description of aggression as an act of state and a number of options this offers. These options are derived from the basic instruments dealing with aggression. That is to say the UN Charter, UN GA Resolution 3314. Among these terms, which it must be noted are indiscriminately used within the instruments I mentioned. The broader one is use of force. Use of armed force is narrower as a term and armed attack, even more so. Act of aggression, this is a description per se and can only be associated with broader choice of a specific definition which, as already mentioned, entails a list of actions.

The next question refers to whether aggression being by definition in violation of the UN Charter, should furthermore be “flagrantly” or “manifestly” so. Taking into account formal nuances, which are not particularly helpful, we know there has been some different discussions on whether the two adjectives are interchangeable or whether they cover different situations; “flagrant” referring to mostly situations going beyond border skirmishes for example and “manifest” to situations where there is no doubt whatsoever about the illegality of the act.

The fourth question on whether the aggression should reach the level of war is based on proposals made at various times using mainly the Nuremberg precedent. It is of course a very restrictive approach which has been shown by certain participants in the Working Group and I’m referring to Roger Clark in particular and seems liberal view of terminology.

The fifth question refers to yet another possibility of referring to aggression by object or result. This option is based on a proposal which puts forward the idea that the occupation or annexation of part or whole of a territory of another state should be object or result of aggression. Obviously this is another option which restricts aggression for the purposes of jurisdiction of the Court.

The sixth question relates to whether an attempt is conceivable at all or whether aggression is an act of a particular nature. Perhaps only when it has fully materialized. However, be it only marginally, one could visualize a situation of attempted aggression where you have for example naval or air attacks in the territory of the state under attack. It must be noted that certain participants see merit to threat rather than attempt. Obviously this lowers the threshold significantly.

I tried to give a short account of the questionnaire. What do we expect from the response? We hope to collect as many responses as possible from the participants, not just only those participating in Princeton. Furthermore, it has to be made clear that this is to allow a constructive dialogue among ourselves.

The purpose of this exercise would be two-fold purpose. It would help dissipate doubts, while it would also allow lines of thought where progress could be achieved. The immediate objective is to ensure as many delegations and actors as possible. Our concept of replies is broad and informal. We'll be equally satisfied with short answers or nuanced replies. The input gathered will be presented at the upcoming Princeton inter-sessional to that already successful brain-storming session. Of course, there is no doubt that it would be extremely desirable if the process could lead to more tangible results as we get closer to the review conference in 2009. In fact, it is mandated by the Rome Statute. I hope we can rise up to the challenge.

Chair:

Thanks for the detailed report and excellent questionnaire. I have the Netherlands. You have the floor Sir.

Netherlands:

Thank you Mr. Chairman. We have already said in our intervention this morning that in our view it was a wise decision of the last Princeton meeting not only to have further inter-sessional meetings in the future but also to establish a virtual working group in order to advanced the discussion and keep the momentum. That this was a wise decision was proved two months ago when within in the context of this virtual working group three excellent and sorrow papers were prepared and circulated. My delegation wants to thank Klaus Kress, Paul Wrangel and Fanny Levada for their work. These papers are very useful points of reference to stimulate and structure our work and to identify where we can find common ground and where finally political choices will have to be made.

There are two observations we would like to make in relation to the work of our young virtual working group. First participants were asked to give comments before November 14 of this year. Perhaps this ambition was a bit too high. Until now very few contributions have been made. Perhaps because, as was mentioned by the representations of the UK and France this morning, participants are somewhat reluctant to give observations in writing. We ourselves have also been late and have been able to send out comments only yesterday. We hope that our contribution of yesterday will encourage other participants. Hopefully more contributions will follow soon. Feedback for our coordinators is now the way to move forward for our virtual working group and the way to make also the next intersessional meeting a success.

Our second observation is the following. No matter how useful the work of the virtual working group is it is essential that formal meetings like this one keep pace with the informal and virtual work done. If in the near future we will be able to make progress in our informal and virtual work it is necessary that we embed such progress in formal sessions and formal documents. My delegation therefore fully supports you, Mr. Chairman, in your efforts to have more meetings of the working group in this formal context. Thank you.

Chairman:

Many thanks for your comments.

Samoa:

Thank you Chair. As in the case of the first 2 sub-coordinators, the representative from Greece has presented us with a very stimulating document.. This is a very fine piece of work. I only want to address the first question right at this moment. In terms of whether we want a generic and specific definition. I must confess that in the last decade I've spent in the negotiations on the ICC, I've seen how inadequate language can be to get across the point we're trying to get across. Heaven only knows Samoan English is different from English English and is different from Canadian English. Until the sub-coordinator explained, I'd never understood the point properly and I think we'd been talking past one another. I was very pleased to get it down on paper. The important question is not whether one calls it generic or specific but how precise we need to be consistent with the principle of legality. The definitions of the crimes contained in the Nuremberg and Tokyo Charters and in the Rwanda and former Yugoslavia statutes are often breath-taking in their use of the generic to the point of total indeterminacy. In response to questions about the principle of legality, Article 6, 7, 8 of the Rome Statute depart from that model. They're not illustrative, they are not open-ended. They speak precisely to a number of acts that are prohibited. The list is exclusive, the list is exhaustive. Negotiating those articles by consensus beginning with the drafting of the Genocide Convention resulted in leaving out some acts some of us would have liked to have in those provisions but we can all live with that and return at amendment time. I would like to ask why we can't agree on similar details for aggression. And I note in this response that we keep returning to UN GA 3314. It is a mish-mash of generic and specific. Article 1 has some quite detail general terms, Article 3 has very specific list of forbidden acts but SC can decide there is no act of aggression even if the elements of the list are there, according to Art. 2. According to Article 4, the SC can make the decision of an act of aggression even if none of the elements are there. That kind of drafting is not good enough for a criminal statute and is inappropriate in this statute given the precision of articles 6, 7 and 8. We should be careful about extracting from UN GA 3314. A precise list of acts that are forbidden and then we live with the result. Thank you Chair.

Chair:

Thank you very much. Portugal.

Portugal:

Thank you. I'd like to present my congratulations for the 3 great papers. A lot of work has obviously gone into it. We think there's no time to comment in-depth analysis. Portugal has participated in the last summer's meeting. There must be a problem with the circulation, as we didn't get these papers. We'll comment in written form at a later time. We think as the speakers have presented told us that these are exercise. As far as Portugal is concerned, the people in Princeton know that Portugal prefers the differentiated approach but we're in a mood to discuss this further though. I agree with the Dutch point about the need to have as many informal sessions as formal sessions. And in principal, we only considered that the ICC and the UN have to cope with one another and relating to the third paper that there are few arguments on both sides to deal with.

Chair:

Many thanks for your comments. I'm going to summarize slightly rushed manner. Now I have Germany. Germany is asking for the floor.

Germany:

Thank you Mr. Chairman. Although we're coming close to the end of our deliberations, let me know how pleased I am to see you back in the chair and let me express my gratitude for the excellent organization of the Princeton meeting that helped us achieve progress. My delegation appreciates the comprehensive and accurate Princeton report. I wish to assure you of Germany's full commitment to the ICC Statute to define the crime of aggression so that the Court will be able to exercise its jurisdiction over this crime in due time. We share your impression that there is a genuine will in this group to conclude our task successfully and on time. The last Princeton meeting has been especially conducive to our endeavor. We think it was wise decision to try to keep this momentum by establishing Virtual Working Group. I thank the other sub-coordinators for the excellent papers they have presented to us. The division of the three topics seems appropriate and we welcome the non-papers submitted by the coordinators. Germany shall try to participate in the e-debate which is needed to save precious time. In addition, we use the negotiating time for work in the formal session of the ASP if we wish to conclude our work in 2008. That's early enough for the final decisions to be taken at the review conference. We therefore welcome the roadmap submitted by you. In particular we're convinced that it is absolutely important to devote at least two and maybe three days to formal debate in 2007. This debate should take place in New York. Let me conclude by assuring you Germany's full and continued support in order to reach consensus in 2009 review conference.

Chair:

Many thanks for your comments and words of support. I'm going to summarize. I want to discuss the road map with you to the extent possible. I'd like to thank the 3 sub-coordinators for presentation. I recommend them to your close examination even if you do not respond in the Virtual Working Group. Even if you don't respond, these papers are an excellent way to prepare for the next inter-sessional. Hopefully we'll have more frequent ASP formal meetings. If you look at the 2004 and 2005 reports, you will see a lot that will be helpful to you. I think it's fair to say that the discussions in Article 3 are more advanced since we've had a more detailed discussion..

We all know that the definition of aggression and exercise of jurisdiction are controversial and difficult topics. I very much recommend to you to participate in the Virtual Working Group. If you're not on it, please approach my delegation. Everybody can be part of this. Also for the record, I'd like to make clear that it is not a decision-making body and it cannot be a substitute for meetings at all. As I said, the main purpose of the Virtual Working Group is to help us prepare for future meetings. I think it can be an extremely useful tool. We were not counting on an overwhelming amount of responses initially and our expectations have been met that way but I hope there's an increase in interest. Although we've discussed only briefly, I think it's very good that we

can bring it to the attention of a wider audience. I hope this will help us intensify this process. I would suggest with your consent that the non-papers also be annexed to the proceedings of ASP 4. If that is agreeable, they're online and part of the Virtual Working Group. If that is agreeable, we'd proceed accordingly. This is a useful exercise.

As I've said, I would like to hear your views on the roadmap. We did discuss this in Princeton. It's important to have a roadmap, that we cannot have an ad-hoc approach. I did introduce the paper that we have circulated. You all should have the paper in front of you. The idea is not that this in any way overtakes the discussions that are being held next door. Timing and venue were discussed this morning, apparently in a quiet positive manner. There is a better acceptance this year that we need more time. As I said this morning, what I want to hear from you now, or later, how much time you think is needed between now and the conclusion of the work of the Working Group. We have agreed that we need to conclude at least 12 months prior before the review conference. That means we would have 17.5 meeting days between now and 2008 (early). You know how all these meetings go. There is at least half-day is devoted to the preparation of the report. Also, if you were to follow the model in the roadmap, there is a possibility that other issues than aggression are also discussed. That might lead to a further reduction of the meeting time. Then there is the issue of a venue. I've made my views clear on several occasions and they are based on the fact that this Working Group is called special because it is open to all states on an equal footing. The floor is open. Portugal.

Portugal:

Thank you Mr. Chairman. Regarding both questions posed by the chair. We'd like to agree with the timetable proposed by Lichtenstein. Thank you very much.

Chair:

Thank you very much. This is very helpful. La France.

France:

Thank you Mr. Chairman. I do have a slight doubt. My impression is that the time passing between formal and informal session counts as much as if not more than the actual time of the session in terms of the maturing of ideas. I have a doubt with regarding the session in NY between now and 2007 is a long gap. I'm not sure we can efficiently use 5 full days. I think the format to date has been well thought out. If we're approaching a successful outcome, we'll need time to formalize the various options on which we're agreed. While wasted in this period of open reflection, 5 days is rather excessive. Thank you Mr. Chairman.

Chair:

Finland.

Finland:

Thank you very much Mr. Chairman. I'd like to support what is proposed in this paper. The division of the venue seems appropriate and the amount of days is barely necessary. It would be perhaps be risky to start by diminishing the amount of days if the progress

will be bigger than expected. But as it stands, 17.5 days is just about enough. Thank you.

Chair:

Many thanks. There's no harm in concluding early but I don't think there is a big risk there. Samoa.

Samoa:

We support your proposal, Mr. Chairman, both the timing and the venue. Thank you.

Chair:

Thanks. The Russian Federation.

Russian Federation:

Thank you Mr. Chairman. We also support the roadmap you've proposed. It's not important for us where it takes place. For us it's important, within the framework of the ASP session, this topic should be discussed specially and specifically and therefore we support your road map. Thank you Mr. President.

Germany:

Thank you Mr. Chairman. When I mentioned it'll be necessary to have 2-3, this didn't mean to contravene your proposal. We can look into the possibility to have further days in a setting like a PrepCom, which is more formal than inter-session, but less than ASP.

Chair:

Thank you. It depends on the range of issues. The ASP might be the PrepCom. It's actually important we have a discussion of the review conference as the only topic on the agenda so far is the crime of aggression. We have to conclude soon. This is a very brief opportunity for people speak. Thank you very much for your comments and for the support you have given to me personally and the informal proposal of a roadmap. This concludes our work for this ASP. I would like to thank you very much for coming and participating actively and constructively. I think that Princeton spirit has indeed carried over to The Hague and I wish to have opportunity for more substantive discussions. With that, thank you again and the meeting is adjourned.