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

November 30, 2005  
Working Group on the Crime of Aggression  
(11:40 am)

Chairman (Ambassador Christian Wenaweser, Liechtenstein):

I declare this meeting open. As you know, Article 5 of the Rome Statutes lays down that the court shall exercise jurisdiction over the Crime of Aggression (CoA) after it has been defined.

As you know, the Special Working Group has been allocated only one meeting divided into two 1 ½ hour sessions. I would like to state for the record that the decision taken at the last ASP to allot one full day for the work of the Special Working Group has not been implemented. Understandably but regrettably, due to time constraints the ASP work schedule will always be designed at the expense of the Special Working Group. It is my opinion that other topics, such as the budget, are more pressing and therefore seems momentarily more important than the CoA. This is because it only has to be decided upon by the review session in 2009.

However, we must be aware of the complexity of the topic of the CoA. The only way of dealing with the work of the Special Working Group is to have more days available.

It is my opinion that the Special Working Group should meet in NY, as this will allow for the broadest possible participation of states and states parties in accordance with resolution F of the Rome Statute, thus ensuring the strongest possible political support. Numerous states considering ratification attach particular importance to this matter. Thus it will have a strong impact on future ratifications and thus the universality of the court.

A proposal on future timing is being circulated. I attended the opening of the informal meeting on the CoA at 11 am and distributed it there as well. As you know, there is also a lessons learned paper of the Bureau dealing with the same issue.

Given the lack of time, I suggest that we limit our discussions to the following topics:

1. Consideration of the intersessional meeting held in Princeton this summer as summarized in the document ICC\_ASP/4/SWGCA/4/1
2. Discussion of the work of the virtual working group established at the Princeton Intersessional which is functioning via e-mail
3. A road map that leads up to the 2009 session

We cannot afford continuing our work at the current pace. We need to approach the issue before us with longer term thinking. The issue of a road map was also discussed in Princeton (see § 90 of the report).

Our proposals should be finalized no later than 12 months prior to the review conference in 2009, that decision was made in Princeton.

This means that there is even less time available to us for concluding our work. We should not continue working at an ad hoc basis. We should conclude our work in early 2008. This is necessary in order to gather political support for any definition of the CoA.

Can I take it that the Special SWG agrees to proceed accordingly?

Thank you very much.

Let's turn to the first topic: the report on the Intersessional Meeting.

As you know, this was the 2<sup>nd</sup> intersessional meeting that was held at Princeton, we held a similar one in June 2004. In 2004, we started off discussing issues in the list prepared by the PrepCom. These included *Ne bis in Idem*, *Ratione Materiae* and general principles of law as regards the CoA. We then devised a revised list of issues relation to the CoA. We took up those issues on the revised list in 2005. Before turning to the report which I will introduce very briefly, I wanted to offer by way of channel comments the following: while the intersessionals were born out of necessity, they have proven to be a valuable tool in its own right. Separation from daily business helped to spread an atmosphere of open-mindedness and flexibility. I am under no illusion as to how difficult it will be to find a resolution, but I am encouraged by the spirit and general collective will to do what we have a mandate to do and the belief that this is achievable. We should have another intersessional meeting in Summer 2006, and there is already cooperation with Princeton and the Liechtenstein Institute to plan that.

Such intersessional meetings can, however, only be complementary to the ASP and not a substitute. It is essential to resume substantive discussions at the ASP as well.

There are two concerns on my mind with regard to the intersessionals:

Cuba was not given a travel permit to attend; the relevant request was rejected at the last minute, despite last minute interventions by myself and the ASP president. I deeply regret this.

Second, if we continue to hold intersessionals in English this is only conducive to the informal atmosphere, but I am open to providing translations into other working languages if delegations expressly wish to have it provided. But of course this can easily lead to a dramatic increase in the costs and it is always difficult to procure financial means, to say the least.

In this context I would like to thank Finland, Germany, The Netherlands and Switzerland who have together with Liechtenstein so generously contributed to the financing of the intersessional meetings.

Turning to the report (ICC-ASP/4/SWGCA/1

Many of you were present either there or at a briefing I held in New York on this issue.

Let's look at the table of contents:

You will see that we have on page 5 the issues that require further discussions. As I said before we took up where we left off in 2004.

1. On the possibility for a State to "opt out": You will find the relevant points in §§5-17.
2. On Article 25, paragraph 3 – participation in and attempt to commit the CoA: these issues are dealt with in §§18-43 of the report
3. On Article 33 there was a shorter discussion, see §§ 44-46 of the report
4. On Article 28, dealt with in §§47-50, there was a similarly brief discussion
5. On Article 30, dealing with the mental element, there was an agreement that the phrase "intentionally and knowingly" can be deleted, as Article 30 will function as a default rule

Other issues were also discussed and the discussion is to be found in §§52-55 of the report.

There is no need to discuss this now, perhaps later on after more progress on the core issues has been made.

Section D of the report deals with the core issues. The definition and conditions for exercising jurisdiction are to be found in §§56-86 of the report.

We should first address the easier issues before addressing the core issues. We did this in the Section D and had a promising and constructive discussion on these issues without reaching agreement on the main issues. I would like to draw attention in particular to Section D 4, §§ 76 ff., regarding the Chapeau of the Coordinator's paper.

As to the allocation of time, the possibility of future intersessional meetings, a road map and follow up and preparation of future work were also discussed.

I would finally like to draw attention to § 91 of the report, which leads to the second topic to be considered today, the agreement to establish a virtual working group. This group communicates via e-mail and is open to all interested states. I will report on my efforts on this behalf later.

The floor is open for comments.

Cuba:

Thank you, Mr. Chairman. Cuba is sure that you will lead us to success in our task.

The continuing independence of this Court and the definition of the term of the crime of aggression remain priorities and therefore we are pleased to see we have this informal meeting of this working group in New Jersey. We feel that this is very positive, but we still need the ASP to see the possibilities within its program and also intersessional working group meetings, if we are to come to the end of our task. Unfortunately, Cuba

was not able to attend that informal meeting. This is because the US did not give our delegate clearance in time to attend the meeting. We feel that this was very discriminatory and we feel that since this person was a permanent representative to the UN, such discrimination was quite unjustified and the ICC, according to the US, apparently this has nothing to do with UN, and therefore the UN permanent representative from Cuba could not attend the meeting and we feel this is entirely mistaken. As we understand it, the working group is open to all members of the UN, without discrimination and we hope that in the future this will be the case so that all states can work on the definition of this crime of aggression so that we can successfully accomplish our task. Thank you, Mr. Chairman.

Chair

Thank you very much. The delegation of Cuba was not allowed to be present at the meeting in Princeton, and I hope this will be possible in the future. Thank you for your kind words and the understanding that you have expressed in your statement.

Russian Federation

Mr. Chairman, first and foremost, allow me to state that we are very pleased that you are continuing to chair our working group and we are convinced that your experience will help us to succeed in the work. I just have some preliminary comments stating that our delegation will be ready to take part in discussions on reports or working material provided by the coordinator on the special three topics. But first of all, I'd like to state specific gratitude to the permanent representative of Lichtenstein to the UN and the Lichtenstein Institute, enabling the ASP to have an intersession meeting in June of this year and I should like to underline that within the Princeton process, there is a deep desire to work on all aspects on the crime of aggression and investigation of such crimes by international courts. Alongside these aspects, we can see that certain progress has been made, as provided by the report, but there are still other issues which require solution. We would like to say that the Russian Federation supports the report and is prepared to work on its basis. We note that the Princeton meeting was unofficial and therefore we support the proposal that within the framework of the Assembly, this issue of the crime of aggression should be given great attention because we all understand that there isn't that much time until 2009. We feel that it's vital that the Assembly makes the crime of aggression universally recognized and that all member states recognize it. We feel that if the definition were only approved by a majority, this would mean that a minority was still not recognizing this crime. In political and legal environments, we feel that it is absolutely vital that we have a universal understanding here. The Russian Federation still feels that we need to continue on studying all the national understandings on the crime of aggression so that we can have a universal definition and so that this crime can be investigated and prosecuted and therefore we feel that we should work on Resolutions 3314 of the UN GA on the special session of the crime of aggression. We feel that we ought to use the existing legal basis so that we can come to a consensus among ourselves. Thank you very much, Mr. Chairman.

Chair

Thank you for your statement and for the kind words addressed to me and I'd like to thank you also for the contribution that you made to the discussions. They are most valuable. Thank you very much.

Kyrgyzstan

Thank you, Mr. Chairman. First, I'd like to join those who spoke before me and congratulate you on Chairman of this working group on the crime of aggression. This subject is quite complicated compared to other subjects and items in the agenda of this Assembly week and we can say already that some aspects of this item may suggest that...it is a political one...and there are some political aspects which may hinder its resolution and not only legal or judicial aspects and it has got a link with the Security Council where there are many conflicted interests. I've got a clarification and a remark. There are some items which were not included on the report from Princeton this year and they were included in the report of 2004 and they are important and you would have wished that all that all those items were added in this new document. Therefore, we would like to pin-point this issue. We are aware of the gravity of the crime of aggression and its consequences on the stability of the world and this is part of other crimes which are within the jurisdiction of the ICC and after the crime of aggression we can discuss other crimes like war crimes, genocide, or crimes against humanity. We think it is strange that the Court would prosecute genocide, but not the crime of aggression, for instance. We remark that this present document is a serious one and we would appreciate that it is taken into account Article 25 of the Statute about the crime of aggression. I've got a remark as well. The definition of the crime of aggression—we would like to also take into account the conditions of the crimes and the exercise of jurisdiction of the crime of aggression by the Court and there is another issue here on the number of amendments to the articles of the Rome Statute. There was a deletion of Paragraph 2 of Article 5 of the Rome Statute. So, we should take all of this into account when trying to find a definition on the crime of aggression. In this report which is about the impossibility of trying a person twice for the same crime in paragraph 3 of Article 52 of this document—on withdrawing it or excluding it. Here, we think that these issues would be left to the ICC so that it plays its role and it gives force to these pertinent laws and related laws applicable to the crime of aggression. I also have another remark, which is the aspect of time. The Article 5 of the Rome Statute includes all of the crimes which are in the jurisdiction of this Court, including the crime of aggression, and these crimes are within the jurisdiction of the ICC. And the definition of the crime of aggression is there and explains very clearly that it falls within the jurisdiction of the ICC. And it has a retroactive effect as well. And I'd like to say here that Paragraph 2 of Article 5 of the Rome Statute did not use the terminology of amendment and therefore the included provisions on the crime of aggression will not entail an amendment but will fall smoothly within the Rome Statute. Finally, I'd like to state that we welcome holding more meetings like that in Princeton. We also call for simultaneous interpretation in all languages so that all of us can participate and exchange our opinions in a clear manner. Thank you.

Chair

Many thanks for your statement to respond to one of the points we've made. We did take up the topics at Princeton that we decided at the 2004 meeting and some issues were discussed then while some still remain to be discussed. The result of the 2004 meetings are still valid for the conclusions of our work.

Greece

Thank you. Mr. Chairman, I agree with your assessment of the Princeton meeting which you so ably guided. We are very satisfied with the discussions that took place there. They were very open and frank. They were also conducive to concrete results, as is apparent from the report. It has been possible to make a complete review of the applicability of a number of provisions of the Statute on crime of aggression and as a result, the questions were answered mostly in the affirmative, thus alleviating many concerns that had been expressed at that time that the crime of aggression is maybe too generous for many of the provisions of the Statute to apply to it. The report also refers to the road map that was discussed at Princeton. And this road map has already been drawn up by you. The road map pertains to much of the work which remains to be done. Let me once again reiterate the importance of this meeting and our gratitude to Lichtenstein Institute, Princeton University, as well as to those states which financially support this endeavor. Apart however from the intersessionals of utmost importance, we still have to manage to find the time for the pending issue on the crime of aggression in the context of the ASP meetings themselves. In that again, we are in full agreement of your road map so that we don't have a repetition of the ASP providing for a certain allocation of time for the Working Group on the Crime of Aggression, which itself then does not comply with, for whatever reason, for lack of time or whatever reason. We need to have real time allocated to this Working Group and this is the only way to go forward. Thank you very much.

Chair

Thank you very much for your words and your support.

France

On the three issues that you propose, I'd like to make a few comments. The report is a good one and reflects the discussions held at Princeton. They were informal, I do underline that fact because in the French version, the fact that it was an informal meeting does not appear in this paragraph. Perhaps it appears in the English version. And perhaps the reason for this openness and frankness is because we were in an informal framework. This doesn't mean that we can't be open and frank within a formal framework. It's just somewhat different. In Princeton, I think there was a completely different spirit than from within the ASP sessions and they were not states speaking as states, but participants trying to make progress. I think such meetings are very useful and necessary and the Lichtenstein Institute should be thanked very much for helping us to hold that meeting, but the conclusion has to be that we need to come to decisions with a formal framework. With regard to your 3 topics, I think this is an innovative approach and format, based on the work of the informal meeting and this is certainly a different way of exchanging impressions and ideas, but having things in writing, rather than orally does mean that they do become more formal. I think that correspondence then becomes a

rather sensitive issue and on behalf of the French delegation we feel that it would continue to progress the debate and in regards to the road map, as I stated, we need both formal work and informal sessions. To date, we haven't been able to progress in formal sessions because we only had 3 hours given to us last year and really, this year we very little time and only enough time to invoke procedural issues. So if we do want to finish before the next meeting, we do need a lot more time. My delegation has opinions with regards to the issue of relations between New York and The Hague. As a lawyer, it's good to have a channel of exchange with New York, like the liaison office. But the Court is a judicial instrument and should only be partially linked to New York and I feel that we should be detached and perhaps if we have too much presence in New York, we may forget that we are based in The Hague and that we are completely independent. Within the Working Group, we are all working within a particular framework because it is open to all interested parties on equal footing. In reference to the UN General Assembly Special Session does lean us towards the UN and their charter, but I think we need to have to perhaps change the balance a little from your formal proposals. Rather than having 5 days in The Hague and 5 in New York, it would be better for the ASP to concentrate its sessions in the Hague and to spend 6-7 days in The Hague and a few days in New York to be dedicated entirely to the crime of aggression and only in exceptional circumstances we are not able to cover everything, like here in November. Thank you.

Chair

The proposal I have made is being available to you now. This is the third topic I wanted to take up and discuss later.

Afghanistan

Thank you Mr. Chairman. The crime of aggression and its definition is a subject of importance and cause of concern. My delegation supports a generic definition with components that satisfy member countries and elevate concern. The tasks of this special Working Group have been enormous and very difficult. So far, it has accomplished a great service by preparing a discussion paper, but speed is needed in finalizing the process. The time allocated for this topic is not enough. My delegation would like to see a consensus of a definition as soon as possible. The notion to invoke the ICC to consider facts on the crime of aggression—we believe that such facts should be within the jurisdiction of the ICC. My delegation has the notion that the ICC should deal with the crimes of aggression as it deals with war crimes, crimes against humanity, and genocide. Otherwise, the ICC would experience a paralysis when considering the crimes of aggression.

Switzerland

Thank you, Mr. Chairman. Like other delegations, I'd like to express my gratitude to see you presiding over the Working Group on the Crime of Aggression. I'd also like to state that the Swiss delegation, which participated in Princeton, was very pleased with the open and professional manner in which it was conducted. The meeting has proved to be a valuable addition to the discussion within the framework of the ASP. It enables delegations to look for common ground in several areas of criminal law, based upon which it could now be easier to tackle the more contentious issues. In the Swiss

delegation's opinion, it is necessary to explore all possibilities to have more intersessional meetings in the future, in which all states can participate. We will definitely need more time allocated to the Working Group on the Crime of Aggression during ASP meetings. To conclude, my delegation supports the adoption of the report.

Chair

Thank you for your words of support and financial contributions.

Netherlands

Thank you, Mr. Chairman. Let me first say that we are pleased to see you chairing our meeting. My delegation would like to thank you, the Lichtenstein Institute and team, and Princeton University, which has helped make the second intersessional meeting on this special Working Group a success. This meeting was a success indeed. For the first time since 2002, an exchange of views on court issues on the crime of aggression, such as the definition of the crime of aggression and its jurisdiction, including a very useful discussion on the rights of the accused and the role of criminal law and the role of certain general principles of criminal law. We agree with your observation in your remarks that these discussions which were constructive. The report was a good reflection on these discussions and the Netherlands is in favor of the decision of the ASP adopting the report. However, no matter the success of the Princeton meeting, we are still far-removed from a conclusion. The results of our work will be included in the Rome Statute on 2009, but we are in favor of concluding our work a year before the review conference. This means we have less than three years to conclude our work, which is not a lot of time. It was wise of the Princeton meeting not only to suggest to have more intersessional meetings, but also to establish a virtual Working Group in order to advance discussions. I also have observations about the virtual Working Group to be discussed later.

Chair

Thank you and a special gratitude to your government for your support and financial contributions.

Portugal

Thank you, Mr. Chairman. I'd like to congratulate myself to see you as chairman of this Working Group and I'd like to thank you for presiding this group. I'd also like to thank the Lichtenstein Institute and contributing states on the Working Group of the Crime of Aggression. The things Portugal presents are not merely symbolic, but substantive because the work in Princeton has been very useful and lots of progress has been made. In that view, I'd also like to support the report made on the last session. That report reveals a lot of honesty and presents an exactness which does not often happen in these kind of reports. We continue to support having meetings in Princeton. In the last meeting, the paper was discussed and coming into play and it is all reflected on the report for that session. Like other delegations, we'd like to address the question of time. It is indeed a pity that not more time can be allocated to this ASP session, and who are here know that there is no time in this session for discussion. We'd like to see more time allocated on the subject of this issue. If you want the review conference to be success in 2009, the question of time has to be dealt with seriously and carefully. Because if states

want the crime of aggression to be included as a crime pursued by the Court, a lot of work has to be done. Thank You.

India

Thank you Mr. Chairman. Let me join the previous delegations in expressing my satisfaction that you are chairing this Working Group. My delegation did not participate in the Princeton meeting. I would like to discuss a very important issue—the issue that all member states of the UN and to extend invitation to all members. We believe this is a wise decision. Also, we need more time to discuss these complex issues addresses here, when considering the framework of 2009, for 2009 signifies not a bench mark for the ICC, but it will give more weight to the Court in deciding war crimes, crimes against humanity, and genocide. We need more possibilities like the experience we had before in the Princeton process. Let me turn briefly on the substantive issue regarding Resolution 33174, since it was adopted by consensus. Based on Article 121 paragraph 5 and for the reasons that are consistent with the Rome Statute, which remind us of the Nuremberg trials. Therefore, we that the crime of aggression issue should be discussed further as part of the Statute.

New Zealand:

The Princeton meeting was well attended and it is good to see and hear from states that are not yet parties to the Rome Statute. We still have a long way to go. We feel that the virtual working group will keep the momentum going. We wish to note that unfortunately New Zealand hasn't yet participated due to sheer lack of time, not lack of interest. Occasional gentle prompting from the Chairman within the virtual working group might help in that respect.

Finally, Princeton doesn't take the place of previous formal working groups held at the ASP. Having most of the discussions in New York is a good idea so all state parties can come and participate.

UK:

I would like to thank you personally for the excellent chairmanship at the Princeton meeting. The atmosphere there was very positive, interesting questions and comments were raised. That sort of atmosphere and positive approach will help us all towards the goal of achieving a definition of the CoA which demands the widest possible consensus. There is perhaps a problem with asking for comments in writing in the context of a virtual working group. It could be less forthcoming than in an informal setting. We would invite you to reflect on this issue.

Argentina:

Thank you for the sensitive and professional manner in which you have been conducting the discussions. The comments of India as well as others concerning equal time for all members of this group are important.

France, Switzerland, the Netherlands and the UK have said many things we support. We participated in Princeton and appreciated the spirit. In a more general way I would like to

say without opening any new discussion as to substance, we are concerned about incorporating any provision that would undermine the main principles contained in the Roman Statute. Any amendment to the statute can in our view only be suggested by a state that has submitted the ratification instruments.

Belgium:

I wish to reiterate our entire support and total confidence in the manner in which you have been conducting the work of this group in the past years. The Belgian delegation has been participating in all intersessional meetings. We believe that this work and the reports have been very useful. We are very interested in the development of this group. This work will intensify our thoughts.

Given the specific rules of this working group we understand that there is an interest to ensure that the further work on the definition should take place in NY. Belgium would like to join Kuwait, Greece and Argentina in stressing that we need more time to deliberate. We should dedicate the second half of the NY session (3 days) entirely to the CoA.

Rep of Korea:

I wish to reiterate that the topic is of great importance to all nations, regardless of whether they are state parties or not. The virtual setting can not be the substitute for the real face to face meetings. We need more intersessional meetings and share the view that we should devote the second half of the NY ASP meeting entirely to this issue.

Yemen:

We would like to thank the Liechtenstein Institute for the invitation to hold the informal meetings in their facilities.

In my contribution I would like to emphasize the content of the report on the Princeton meeting. Yemen shares the opinion of other delegations who have expressed the idea that the mission of this group is to reach a definition acceptable to all in accordance with § 5 of the Rome Statute. The work of this group is complimentary to the Statute of Rome. We should reach a definition as soon as possible to enable the court to exercise its jurisdiction as quickly as possible. If we do not manage to define this crime this could hinder ratification by other states. Dedicating only two sessions to this group during the ASP is not sufficient. We should dedicate more time in the future and hold more intersessional informal meetings with enough time, not just two days as said in the report.

Niger:

The ICC should deal with the crimes we are trying to define. With respect to the informal working group setting, we would like the sessions to take place in several languages so we can have the broadest possible participation. More time should be dedicated to the work on the definition of the CoA. We agree with France that more time should be dedicated to the Working Group in The Hague rather than New York. We need to hold a general discussion in the future sessions of the ASP.

Austria:

In this debate we were able to identify further issues that need discussion in the future.

It is clear that the debate here today shows that we should have at least two whole days to be able to have the substantive discussion that we want to have, and I understand that there is a desire to have the meeting in NY. That is sensible because the working group is open to non state parties also.

Italy:

We appreciated the Princeton meetings very much. We do endorse the continuation of intersessional informal meetings in the future. At the same time we hold the view that more time has to be devoted in the formal settings as well. With this in mind, we find that the New York setting would be the right one for the formal sessions. However, the length of the possible discussions should be targeted most exclusively on the definition CoA. We look forward to cooperating with you for ensuring that the definition of the CoA proceeds smoothly for the target we all have in mind.

Chairman

This concludes my list of speakers. This has been a positive and constructive debate, which is something I very much welcome to hear in these general meetings. I'm reminded that delegates are raising the issue of more meetings, and this was the case last year. Hopefully we can do things differently this year. Can I take it that it is the wish of the Working Group to adopt the report of the intersessional session?

I see no objection and it is so decided.

Before adjourning, I'd like to take two minutes in preparation of our meeting at 3 pm. I have a few comments on the paper that has been circulating informally entitled, "Proposed time table for future ASP meetings." Some delegations and I decided it would be a good idea to circulate and have in front of you because some delegations referred to it. This brings up the framework of the omnibus resolution. There was a meeting dedicated to the issue on timing and venue of future meetings, exclusively this morning at 11 am and I attended the beginning of the meeting. So, there's no question that that group does decide on future venues and meetings. Also, what is important for this group in particular, there is a mistake in the paper we've made—if you look at the year 2009, you have on the agenda in the second part the subject of aggression. This is not correct. We actually wanted to have a conclusion of the discussion at least 12 months prior to the review conference. That makes it clear that meeting time available is reduced to another 5 days. Another comment I'd like to make is on the issue of the crime of aggression, which was central in preparing this paper, but not the only one. We thought this might strike a good balance between the decision on the venue of meetings for the ASP, namely New York and The Hague and we also see potential benefits in having the ASP meet twice a year and not always have the Court wait for decisions they need from the ASP. Since our last meeting it's been 12 months, or longer—it's actually been 14 months since we last met. Let's discuss this later this afternoon. Even though another group is really in charge of this, I'd like to hear your thoughts in particular on the venue, which I have made my preference for New York clear. We should also discuss the total of time of meeting days that are needed for this group to conclude its work prior to the review conference. This comes down to about 17 days to review the report over the next 3

calendar years. This concludes what I have to say. Please make sure you are here on time this afternoon. Meeting is adjourned.