

## **Informal inter-sessional meeting on the crime of aggression 8-10 June 2009**

### **Non-paper by the Chairman on the Elements of Crimes**

1. The present non-paper is aimed at facilitating the discussions at the Princeton Club on the Elements of the crime of aggression and reflects the progress made during the substantive discussions on the definition of the crime since the circulation of the draft Elements in 2002.<sup>1</sup> It follows up on the work done pursuant to the mandate of the Preparatory Commission, as set out in resolution F of the Final Act of the Rome Conference,<sup>2</sup> and the Special Working Group on the Crime of Aggression (hereinafter “the Group”), pursuant to resolution ICC-ASP/1/Res.1 of the Assembly of States Parties on “The Continuity of work in respect of the crime of aggression”,<sup>3</sup> also referred to in paragraph 30 of the report of the Group of November 2008.<sup>4</sup> This non-paper is intended to promote in-depth consideration of the Elements as part of the overall process leading up to the Review Conference.
2. A discussion paper, prepared by Australia and Samoa, was informally distributed at the last meeting of the Group in February 2009 and thereafter considered at a small informal retreat on the Elements of Crimes for the crime of aggression, held at Montreux, Switzerland, from 16-18 April 2009. A brief summary of the discussions at the retreat has been circulated separately. During this retreat, several options for possible Elements were envisaged, and a number of drafting ideas were suggested.
3. The present non-paper builds on this work and contains a draft of the Elements in **annex I**, as well as detailed explanations in **annex II**. It is submitted by the Chairman for the purpose of facilitating discussions.

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<sup>1</sup> Discussion paper on the definition and elements of the crime of aggression, prepared by the Coordinator of the Working Group on the Crime of Aggression (PCNICC/2002/2/Add.2).

<sup>2</sup> *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June / 17 July 1998*, (UN doc. A/CONF.183/13, vol. I).

<sup>3</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part IV, resolution ICC-ASP/1/Res.1.

<sup>4</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I, annex III.

## Annex I

### Draft Elements of Crimes

#### Article 8 bis Crime of aggression

##### Introduction

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.
2. As a result of Element 4, there is no requirement to prove that the perpetrator has made a legal evaluation as to the inconsistency with the Charter of the United Nations of the use of armed force by the State.
3. With respect to Elements 5 and 6, the term “manifest” is an objective qualification.
4. As a result of Element 6, there is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation.

##### Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person<sup>1</sup> in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances establishing the inconsistency of the use of armed force by the State with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances establishing such a manifest violation of the Charter of the United Nations.

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<sup>1</sup> With respect to an act of aggression, more than one person may be in a position that meets these criteria.

## Annex II

### Explanatory note

#### I. The existing general introduction to the Elements of Crimes

1. The existing general introduction to the Elements of Crimes explains several issues relating to the Elements of Crimes. For example, it clarifies the relationship between the Elements and other general principles in part 3 of the Statute, explains several issues of terminology and comments on the structure of the Elements.
2. The proposals of the Group contain a draft amendment to article 9 of the Rome Statute that would add a reference to the crime of aggression.<sup>1</sup> Paragraph 1 of the general introduction to the Elements of Crimes would require a similar amendment, replacing the words “articles 6, 7 and 8” with the words “articles 6, 7, 8 and 8 bis”.
3. It is considered that the other parts of the general introduction can be applied to the Elements for the crime of aggression without further modification.

#### II. The special introduction for the Elements of the crime of aggression

4. The existing Elements of Crimes contain, in addition to the general introduction, “special” introductions to each crime under the Court’s jurisdiction. This non-paper suggests such a “special” introduction for the crime of aggression which is intended to provide additional guidance in relation to several issues arising from the proposed Elements of the crime of aggression.
5. Paragraph 1 clarifies that the whole of the definition of an act of aggression in draft article 8 bis, paragraph 2, continues to apply, despite the fact that the language of proposed Element 3 focuses only on part of this definition. As it would be cumbersome to repeat the whole definition in Element 3, paragraph 1 clarifies that the Elements do not alter that definition.
6. Paragraph 2 makes clear that proposed Element 4 proposes a mental element of “knowledge of fact” in respect of the inconsistency of a State use of force by a State with the Charter of the United Nations. This clarifies that the perpetrator is not required to have knowledge of the legal doctrine and rules used to evaluate whether a State use of force is inconsistent with the Charter of the United Nations, but is only required to have awareness of the factual circumstances establishing this inconsistency. A parallel can be found in the first dot point of paragraph 3 of the “special” introduction for the Elements of war crimes which clarifies that the last two elements of war crimes do not impose a requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international.

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<sup>1</sup> See February 2009 SWGCA report, paragraph 26, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

7. Paragraph 3 clarifies that the use of the term “manifest” in proposed Elements 5 and 6 is an objective qualification. In other words, the Court’s determination whether the particular violation of the Charter of the United Nations is objectively a “manifest” violation is decisive, rather than whether the perpetrator considered it to be a manifest violation. A parallel can be found in the second dot point of the “special” introduction for the Elements of genocide.

8. Paragraph 4 serves a similar function in respect of proposed Element 6 as paragraph 2 serves in respect of proposed Element 4.

### **III. Scheme and principles of proposed Elements for the crime of aggression**

9. The draft Elements in annex I follow the scheme and principles of the existing Elements of Crimes for genocide, crimes against humanity and war crimes. These Elements usually list conduct, consequence and circumstance in that order, with particular mental elements, where required, listed after the relevant conduct, consequence or circumstance.<sup>2</sup> In order to present elements which flow logically, the sequencing of proposed elements in annex I is slightly different from this general ordering.

10. Article 30, paragraph 1, of the Rome Statute requires that, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Read together with paragraph 2 of the general introduction to the Elements of Crimes, this means that where no reference is made in the Elements to a particular mental element for any particular material element listed, the relevant mental element set out in article 30 – intention, or knowledge, or both – applies. Usually, intention applies to a conduct or consequence element, and knowledge applies to a circumstance or consequence element.

### **IV. Proposed Elements 1 and 2: the individual’s conduct and the leadership requirement**

11. The wording of proposed Elements 1 and 2 draws directly from the relevant parts of draft article 8 bis, paragraph 1, of the proposals for a provision on aggression, elaborated by the Special Working Group on the Crime of Aggression.<sup>3</sup>

12. *Proposed Element 1* sets out the conduct element for the crime of aggression. Applying article 30 to the crime of aggression would mean that the perpetrator must have intended (that is, meant) to plan, prepare, initiate or execute the act of aggression (article 30, paragraph 2 (a)). The mental element of knowledge will not be applicable here as proposed Element 1 is a conduct element, and not a circumstance or consequence element. Since the application of article 30 is sufficiently clear here, there is no need to articulate an express mental element attaching to proposed Element 1.

13. Proposed Element 1 implies a degree of causation between the perpetrator’s involvement and the occurrence of the State act. However, given the range of factual situations in which the question of causation might be relevant in a particular case, it does not seem feasible to outline a general test specifying the nature or degree of causation required, but preferable to leave this matter to the Court to determine according to the facts of a particular case before it.

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<sup>2</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B, paragraph 7.

<sup>3</sup> See February 2009 SWGCA report, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II, appendix I.

14. *Proposed Element 2* is a circumstance element, that is, it describes a circumstance in which the conduct in proposed Element 1 is to have taken place. Applying article 30 to proposed Element 2, this means that the perpetrator must have known (that is, been aware) that he or she was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression. Since the application of article 30 is sufficiently clear here as well, there is no need to articulate an express mental element attaching to proposed Element 2.

15. The footnote in Element 2 clarifies that, in respect of a particular act of aggression, more than one person who meets the leadership requirement described in Element 2 may be potentially liable for a crime of aggression. For example, where a joint decision to commit an act of aggression is made by two persons who are both “in a position effectively to exercise control over or to direct the political or military action” of a State, both persons may be potentially liable for the crime.

## V. Proposed Elements 3 and 4: the State act of aggression

16. *Proposed Element 3* describes the State act of aggression. The proposed element draws closely on the language of draft article 8 bis, paragraph 2, in the Group’s proposals.<sup>4</sup> However, the wording has been modified slightly to avoid the use of the active voice. This follows the drafting technique used in the existing Elements of Crimes according to which the active voice should only be used in relation to the conduct of an individual perpetrator.<sup>5</sup> This is intended to avoid any confusion which may arise from the use of the active voice in relation to the acts of the State, which may suggest that the acts of the State constitute a “conduct” element.

17. As explained further in paragraph 5 above, paragraph 1 of the “special” introduction clarifies that the whole of the meaning of “act of aggression” as set out in article 8 bis, paragraph 2, is intended to apply also here.

18. Historical precedents (for example, the *High Command Case*<sup>6</sup>) required a high degree of knowledge of the State’s aggressive war to establish individual criminal responsibility. However, a mental element requiring that the perpetrator positively knew that the State’s acts were inconsistent with the Charter of the United Nations (effectively requiring knowledge of law) may have unintended consequences. For example, it may encourage a potential perpetrator to be wilfully blind as to the legality of his or her actions, or to rely on disreputable advice supporting the legality of State acts even if that advice is subsequently shown to have been incorrect. Also, mental elements requiring knowledge of the law are regularly avoided in domestic legal systems as they are often difficult to prove to the required standard.

19. To overcome some of the disadvantages of an express knowledge of law requirement, proposed Element 4 is instead a “factual circumstances” element, a type of element which is used frequently in the Elements of Crimes for certain crimes of humanity and war crimes which involve legal concepts.<sup>7</sup> Proposed Element 4 requires that the perpetrator was aware of

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<sup>4</sup> Ibid.

<sup>5</sup> See for example, Element 3 of the war crime of pillaging in article 8 (2) (b) (xvi), which reads “[t]he appropriation was without the consent of the owner” rather than “[t]he owner did not consent to the appropriation”.

<sup>6</sup> *United States of America v. Wilhelm von Leeb et al.* (the *High Command case*), Judgement, 27, 28 October 1948. See also the very useful work of the Preparatory Commission in its Historical Review of Developments Relating to Aggression, Table 6 - Knowledge (PCNICC/2002/WGCA/L.1 and Add.1).

<sup>7</sup> For example: factual circumstances establishing the lawfulness of a person’s presence in an area (Elements of Crimes, article 7 (1) (d) crime against humanity of deportation or forcible transfer of population, Elements 2 and 3); the protected status of a person under the Geneva Conventions (see Elements for most of the war crimes, for example article 8, (2) (a) (i) war crime of wilful killing,

factual circumstances pointing to the inconsistency of the State's use of armed force with the United Nations Charter. Although this requirement stops short of requiring knowledge of the illegality of an act of aggression, it strives for an appropriate balance between the need to ensure criminal liability where the perpetrator is fully aware of the factual circumstances surrounding the State act and the need to avoid the disadvantages of a strict "knowledge of law" approach outlined above.

20. To satisfy proposed Element 4, it would not be sufficient merely to show that the perpetrator knew of facts indicating that the State used armed force. It would also be necessary to show that the perpetrator knew of facts establishing the inconsistency of the use of force with the Charter of the United Nations. Examples of relevant facts here could include: the fact that the use of force was directed against another State, the existence or absence of a Security Council resolution, the content of a Security Council resolution, the existence or absence of a prior or imminent attack by another State.

21. Specifying a mental element of "knowledge of factual circumstances", as opposed to a mental element of "knowledge of law" may, in principle, have the effect of limiting the availability of certain mistake of law arguments.<sup>8</sup> However, such mistake of law arguments would be very difficult to advance anyways, given that only "manifest" Charter violations, and no borderline cases, would fall under the Court's jurisdiction due to the threshold requirement in article 8 bis, paragraph 1. In any event, a perpetrator could still raise a defence of mistake of fact as to this element under article 32, paragraph 1, which, if proven, would result in acquittal.

22. A further point for consideration is that in a number of the Nuremberg trials, in addition to actual knowledge, the Tribunal considered the possibility of inferring or imputing knowledge.<sup>9</sup> Paragraph 3 of the general introduction to the Elements already clarifies that the Court may infer the existence of such knowledge from relevant facts and circumstances. In addition, however, States may wish to consider whether the Nuremberg jurisprudence supports (and whether there would be any utility in incorporating) a knowledge element which expressly allows knowledge to be imputed, or specifies a "should have known" threshold for the mental element (i.e. a negligence element). While a culpability element of negligence is used in the Elements of Crimes in relation to certain genocide and war crimes offences,<sup>10</sup> the compatibility of such elements with the definition of aggression would require further discussion.

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Elements 2 and 3); or the existence of an armed conflict (see Elements for most of the war crimes, for example Article 8 (2) (a) (i) war crime of wilful killing, Element 5).

<sup>8</sup> Article 32, paragraph 2, provides that "[a] mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime ...".

<sup>9</sup> See references to *Hess*, *Schacht*, *Bormann* and *IG Farben* cases in Table 6 (note 6, above).

<sup>10</sup> The relevant crimes are: genocide by forcibly transferring children (article 6 (e)); war crime of improper use of a flag of truce (article 8 (2) (b) (vii)-1); war crime of improper use of a flag, insignia or uniform of the hostile party (article 8 (2) (b) (vii)-2); war crime of improper use of the distinctive emblems of the Geneva Conventions (article 8 (2) (b) (vii)-4); war crime of using, conscripting or enlisting children (article 8 (2) (b) (xxvi)); and war crime of using, conscripting and enlisting children (article 8 (2) (e) (vii)). The mental element of negligence, found in the Elements of Crimes, has been applied by Pre-Trial Chamber I of the Court in a number of decisions, for example: Decision on the Confirmation of Charges, *Lubanga*, PTC 1, 29 January 2007 (ICC 01/04-01/06); Decision on the Confirmation of Charges, *Katanga and Ndugjolo Chui*, PTC 1, 30 September 2008 (ICC 01/04-01/07). The consistency of the negligence elements with the Statute has not yet been fully argued in the Court.

## **VI. Proposed Elements 5 and 6: the threshold requirement**

23. *Proposed Element 5* describes the threshold requirement in draft article 8 bis, paragraph 1, that the State act of aggression be a manifest violation of the Charter of the United Nations in order to attract individual criminal responsibility.

24. *Proposed Element 6* sets out a specific mental element for proposed Element 5. Instead of repeating the full phrase found in the definition and in proposed Element 5 of an act which “by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations”, Element 6 uses the term “such a manifest violation of the Charter of the United Nations”.

25. The requirement for knowledge in proposed Element 6 stands in addition to that in proposed Element 4. This is because there may be instances where an accused is aware of facts establishing that a State use of force is an act of aggression, but not aware of other facts establishing that this act of aggression constitutes, by its character, gravity and scale, a manifest violation of the Charter of the United Nations. For example, an accused may be aware of a movement of some troops across a State border but not aware of the scale of the attack. For this reason, a separate mental element for Element 6, requiring knowledge of factual circumstances establishing a manifest violation, is appropriate.

26. As mentioned in paragraph 7 above, paragraph 3 of the “special” introduction clarifies that the term “manifest” in proposed Elements 5 and 6 is an objective qualification, that is, it is a matter for the Court to determine. Furthermore, paragraph 4 of the “special” introduction confirms that there is no requirement to prove that the perpetrator made a legal evaluation as to the threshold requirement, since proposed Element 6 requires only awareness by the perpetrator as to relevant facts.

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