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**Report of the Special Working Group on the Crime of Aggression****I. Introduction**

1. The Special Working Group on the Crime of Aggression of the Assembly of States Parties to the Rome Statute of the International Criminal Court held six meetings on 9, 10, 11 and 13 February 2009. Ambassador Christian Wenaweser (Liechtenstein) served as Chair of the Special Working Group.

2. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Group.

3. The discussions in the Group were held on the basis of three papers submitted by the Chairman: a revised discussion paper (“2009 Chairman’s paper”);<sup>1</sup> a “Non-paper on other substantive issues regarding aggression to be addressed by the Review Conference”;<sup>2</sup> and an informal note on the work programme.<sup>3</sup> At the first meeting of the Group, the Chairman introduced all three documents. He recalled that the Group was open to participation by all States on an equal footing, and encouraged delegations to comment in particular on issues that had not been thoroughly discussed in recent sessions. The Chairman further recalled that, in accordance with resolution ICC-ASP/7/Res.3, this was the final session of the Group, but not the final opportunity to discuss the crime of aggression. After the conclusion of the work of the Special Working Group, discussions would continue in the framework of the preparations of the Review Conference and possibly at the Review Conference itself.

**II. 2009 Chairman’s paper**

4. In introducing the 2009 Chairman’s paper, the Chairman noted that the paper was the product of the Group’s work over several years and contained only minor changes as compared to the June 2008 version. In particular, the revised version reflected a new structure based on the understanding that the Review Conference would adopt the amendments on aggression as an annex to an enabling resolution. The annex to that resolution would contain only the actual amendments to the Rome Statute, whereas other issues, such as the question of entry into force, would be addressed in the draft resolution or possibly some other text. Draft article 15 bis was renumbered and included two new technical additions (paragraphs 3 and 5), the contents of which had already been agreed during earlier discussions. The Chairman explained that the paper was presented in a manner that should allow the Group to adopt a

<sup>1</sup> ICC-ASP/7/SWGCA/INF.1.

<sup>2</sup> See annex II.

<sup>3</sup> See annex III.

text that was as clean as possible. In this context, he emphasized that the absence of footnotes and brackets was not intended to indicate that those parts of the text were agreed and that the topics that had been discussed in the past remained on the table. The Chairman also recalled the general understanding that “nothing is agreed until everything is agreed”, that the suggested provisions were interlinked and that they would therefore be considered as a package.

### **Structure of the 2009 Chairman’s paper**

5. There was general support for the overall structure of the 2009 Chairman’s paper, consisting of a draft enabling resolution to which amendments would be annexed. A suggestion was made to refer in the opening phrase of the enabling resolution to “The Review Conference”, rather than to “States Parties”. This would more closely mirror the structure of resolutions adopted by the Assembly of States Parties as well as the Rome Conference. The Chairman subsequently circulated a suggested wording for such an amendment, which met with general agreement.

### **Procedure for entry into force of the amendment on aggression**

6. The Chairman noted that the general question of whether paragraph 4 or 5 of article 121 of the Rome Statute was applicable to the amendment on aggression had already been comprehensively discussed in the past.<sup>4</sup> It was understood that the solution to this issue was closely linked to the outcome on other parts of the provisions on aggression.

7. The Chairman invited delegations to focus their comments on a proposal submitted by a delegation suggesting that paragraphs 4 and 5 of article 121 of the Rome Statute comprised a unified and complementary regime, rather than two mutually exclusive regimes. Under this reading, the amendment on aggression would initially enter into force only for those States Parties that had ratified it, as outlined in paragraph 5. However, once seven-eighths of States Parties to the Rome Statute had ratified the amendment, it would enter into force for all States Parties, in accordance with paragraph 4. Once that threshold would be met, paragraph 5, including its second sentence, would no longer apply and the amendment would become binding on all States Parties.

8. While delegations welcomed the non-paper as a contribution to the debate, the view prevailed in the discussion that the amendment procedures set out in paragraphs 4 and 5 were mutually exclusive. This was evidenced by the phrase “Except as provided in paragraph 5” in paragraph 4, as well as by the content of the second sentence of paragraph 5. The drafting history as well as academic commentaries on these provisions also supported this view. It was noted that the Rome Statute provided in article 122 and article 121, paragraphs 4 and 5, three distinct amendment regimes to which different thresholds for entry into force applied. Some delegations, however, expressed interest in the proposal and welcomed attempts to bridge the two regimes. It was also suggested to add a provision to the Statute ensuring that States that ratify the Statute after the entry into force of the amendment were treated equally with States Parties that have not ratified the amendment.

9. Some delegations used the opportunity to reiterate arguments in favor of their preferred regime for entry into force, as reflected in previous reports of the Group.<sup>5</sup> During this discussion, some new arguments were raised. It was submitted that applying article 121, paragraph 5, to the amendment on aggression would de facto amount to allowing reservations,

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<sup>4</sup> June 2008 Report of the Special Working Group, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed sixth session, New York, 2-6 June 2008* (International Criminal Court publication ICC-ASP/6/20/Add.1), annex II, paragraphs 6-14.

<sup>5</sup> *Ibid.*

which were prohibited under article 120 of the Statute, and which would be incompatible with the object and purpose of the Statute in the sense of article 19 (c) of the Vienna Convention on the Law of Treaties. Such an approach was also inconsistent with article 12, paragraph 1, of the Rome Statute, whereby States Parties automatically accept the jurisdiction of the Court with respect to the crimes referred to in article 5. Furthermore, it was suggested that article 121, paragraph 4, of the Rome Statute might find more support amongst delegates favoring the application of paragraph 5 if the Court's jurisdiction would only apply to States that had accepted such jurisdiction by way of a declaration.

10. It was also suggested that article 5, paragraph 2, of the Rome Statute implied that the amendments on aggression only needed to be adopted by the Review Conference, and that therefore no ratification process was necessary for the entry into force of the provisions on aggression. States Parties had thus already given anticipatory consent to the future exercise of jurisdiction over the crime of aggression when ratifying the Statute. This reading was strongly contested by some delegations, while others indicated they would want to consider it further.

11. It was suggested that article 121, paragraphs 4 and 5, could be invoked in respect of different amendments pertaining to aggression. Suggestions to delete or revise the second sentence of article 121, paragraph 5, were also made. It was also noted that consideration could be given to drafting an amendment procedure specific to the crime of aggression, since that crime was already included in the Rome Statute, but lacked a definition, unlike the other crimes contained therein. It was observed, however, that proposals to amend the amendment provisions in the Rome Statute would not solve the immediate problem of determining which procedure was applicable to the amendments on aggression.

#### **Draft amendment #1: Deletion of article 5, paragraph 2 of the Rome Statute**

12. No objection was raised to the suggested deletion of article 5, paragraph 2, of the Rome Statute. Nevertheless, it was also recalled that the issue was linked to an agreement on the definition contained in article 8 bis and the conditions for the exercise of jurisdiction.

#### **Draft amendment #2: Definition of the “crime” and the “act” of aggression (draft article 8 bis)**

13. The suggested wording of draft article 8 bis found generally strong support. It was stressed that the text was the result of years of negotiation and many compromises, and some delegations recalled that they had preferred different solutions for certain parts of the text, but supported the draft as a balanced compromise. Nevertheless, some delegations recalled their concern about the threshold clause contained in draft article 8 bis, paragraph 1, which would limit the Court's jurisdiction to cases where the act of aggression “by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations”. It was argued that the clause was unnecessary because any act of aggression would constitute a manifest violation of the Charter of the United Nations, and that the definition should not exclude any acts of aggression. Furthermore, aggression was sufficiently qualified through the list of acts contained in draft article 8 bis, paragraph 2. Other delegations expressed support for the threshold clause, which would provide important guidance for the Court, and in particular prevent the Court from addressing borderline cases. It was also argued, however, that the current text implies that the threshold clause will constitute a new definitional layer applicable to the act of aggression, which has been clearly defined by article 8 bis, paragraph 2.

14. To enhance clarity, it was suggested that the space between the first and the second sentence of draft article 8 bis, paragraph 2, be deleted. The revised version of the 2009 Chairman's paper that was subsequently circulated included this editorial change.

15. Some delegations explored possible changes to the text. These suggestions received limited support. With respect to draft article 8 bis, paragraph 1, it was suggested to include the element of “intent” as well as a reference to “persons” in plural. In this respect, it was recalled that these issues were already addressed in the general part of the Rome Statute, in particular articles 25 and 30, as well as in draft article 25, paragraph 3 bis. Caution was also expressed that such changes could have unintended consequences for the interpretation of other crimes, and it was pointed out that the drafting in the Chairman’s paper followed the structure of the other crimes covered in the Statute. Furthermore, a suggestion was made with respect to draft article 8 bis, paragraph 2, namely to replace the phrase “in any other manner inconsistent with the Charter of the United Nations” with the threshold clause contained in paragraph 1. In response, it was recalled that the phrase in question was based on article 2, paragraph 4, of the Charter of the United Nations, which was also mirrored in article 1 of General Assembly resolution 3314 (XXIX). The suggestion was also made to insert a reference to “unlawful” use of force in draft article 8 bis, paragraph 2, for the sake of clarity. Delegations recalled, however, that this suggestion had been discussed in the past, without attracting significant support. It was argued that such a reference was not necessary, as any use of force inconsistent with the Charter of the United Nations was, by definition, unlawful.

16. Some delegates expressed the view that draft article 8 bis contained certain shortcomings. In particular, it was questioned whether the text sufficiently criminalized the activities of armed groups, in particular where such activities enjoyed the cooperation of a State. Furthermore, the view was expressed that the reference to “another State” might inadvertently omit acts committed against a territory that falls short of statehood, and that therefore, the word “State” in that paragraph should be given a broad interpretation. In this regard, it was observed that the General Assembly Declaration on Friendly Relations<sup>6</sup> recognized that Non-Self-Governing territories had a distinct status under the Charter of the United Nations. A discussion of the statehood issue also took place during the drafting of General Assembly resolution 3314 (XXIX) and was reflected in the explanatory note to article 1 of the definition of aggression. It was recalled that some other understandings recorded in the context of the adoption of that resolution might also still be relevant.

17. Some delegations reiterated their view that General Assembly resolution 3314 (XXIX) had not been adopted for the purpose of defining an individual crime, but as guidance for the Security Council in its determination of a State act of aggression. Some delegations also reiterated their views and preferences regarding the nature of the list of acts of aggression in paragraph 2 of draft article 8 bis (open or closed), which had been discussed in previous meetings of the Group.<sup>7</sup> In particular, it was stated that acts similar to those listed might also constitute acts of aggression. The point was made that the reference to General Assembly resolution 3314 (XXIX) did not import the content of that resolution as a whole. The view was also expressed that the list should include acts that are not of military nature, such as economic embargoes.

### **Draft amendment #3: Conditions for the exercise of jurisdiction (draft article 15 bis)**

18. The Chairman recalled that draft article 15 bis, dealing with the conditions for the exercise of jurisdiction over the crime of aggression, had been discussed for a number of years. Two technical additions were reflected in paragraphs 3 and 5 of the draft text, as outlined in the Explanatory Note to the 2009 Chairman’s paper.<sup>8</sup> The Chairman noted that a

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<sup>6</sup> Resolution 2625 of 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

<sup>7</sup> November/December 2007 Report of the Special Working Group and 2007 Princeton report, both contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex II, paragraphs 18-23 and annex III, paragraphs 46-53.

<sup>8</sup> ICC-ASP/7/SWGCA/INF.1.

solution for the difficult issue of the conditions for the exercise of jurisdiction was not expected during this session, and he therefore encouraged delegations to limit their comments to the question whether draft article 15 bis accurately reflected the status of the discussion. The various positions on this issue were amply reflected in previous reports of the Group.

19. There was general agreement that the alternatives and options contained in paragraph 4 reflected the positions of delegations and required further discussion, including on the basis of new ideas and suggestions. While it was agreed that paragraph 4 would require more work, paragraphs 1 to 3 as well as 5 and 6 were generally acceptable.

20. Some delegations used the opportunity to reiterate their preferences on the issue of conditions for the exercise of jurisdiction, in particular by identifying their preferred alternatives and options as well as combinations thereof. These views are comprehensively reflected in previous reports of the Group.<sup>9</sup> In this context, a new suggestion was made to include option 2 currently contained in alternative 1 under the umbrella of alternative 2, in combination with options 2, 3 and 4 thereunder. It was indicated that such a proposal could be understood to already be contained in the current structure of draft article 15 bis, paragraph 4, and that the search for a compromise on these issues will have to continue after the conclusion of the work of the Group.

21. An earlier suggestion to simplify the wording of alternative 2, option 2 was recalled. The option would thus simply read: “in accordance with article 15”. This was intended to bring the procedure for the crime of aggression in line with other crimes. The question was raised, however, whether the proposed wording was intended to limit the procedure referred to in alternative 2, option 2 to *proprio motu* investigations by the Prosecutor, as was the case with article 15 of the Rome Statute, or instead apply to all jurisdictional trigger mechanisms, as was envisaged in the 2009 Chairman’s paper.

22. The Chairman suggested a technical improvement to the wording of draft article 15 bis, paragraph 5, replacing the reference to the Court’s “determination of an act of aggression” with the phrase “own findings”. There was general agreement on this change.

### **The “red light” proposal**

23. Delegations continued their discussion of the so-called “red light” proposal, which was submitted in a further revised version.<sup>10</sup> This proposal would allow the Security Council to decide to stop an ongoing investigation into a crime of aggression by adopting a resolution under Chapter VII of the United Nations Charter.<sup>11</sup> The additional explanation was provided

<sup>9</sup> June 2008 Report of the Special Working Group, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed sixth session, New York, 2-6 June 2008* (International Criminal Court publication, ICC-ASP/6/20/Add.1), annex II, paragraphs 38-48; and, 2007 Princeton report, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex III, paragraphs 14-35.

<sup>10</sup> November 2008 Report of the Special Working Group, contained in: *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, paragraphs 21-23; and June 2008 Report of the Special Working Group on the Crime of Aggression, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed sixth session, New York, 2-6 June 2008* (International Criminal Court publication, ICC-ASP/6/20/Add.1), annex II, paragraph 47.

<sup>11</sup> The draft text reads as follows (footnotes omitted):

*4bis. No investigation may be proceeded with on the situation notified to the Secretary-General of the United Nations, if the Security Council, [within [X] months after the date of notification] has adopted a resolution under Chapter VII of the Charter of the United Nations which indicates that it would not be justified, in the light of relevant circumstances, to conclude that an act of aggression has been committed in such a situation, including the fact that the acts concerned or their consequences are not of sufficient gravity.*

that the proposal intended to complement the current scenarios contained in draft article 15 bis, paragraph 4: Currently, these scenarios only foresaw that the Security Council would either determine the existence of an act of aggression, or not act at all. The proposal would address the missing scenario in which the Security Council would indicate that it would not be justified to conclude that an act of aggression had been committed. The text reflected the language contained in article 2 of General Assembly resolution 3314 (XXIX).

24. There was limited support for the proposal, while some delegations wished to consider it further. Some delegations reiterated their doubts raised during previous meetings of the Group, in particular regarding the overlap of this proposal with article 16 of the Statute. Furthermore, doubts were expressed whether such a negative determination by the Security Council was legally binding for the Court. It was further questioned whether the Security Council was even empowered to make a negative determination of aggression under the United Nations Charter or article 2 of General Assembly resolution 3314 (XXIX). The latter provision seemed to apply only to the internal deliberations of the Security Council that would lead to the conclusion not to make a determination. The point was also made that article 2 of the resolution dealt with the first use of armed force by a State, which would *prima facie* be considered an act of aggression. In contrast, the purpose of the Court's proceedings was to determine individual criminal responsibility.

**Draft amendment #4: Forms of participation in the crime (draft article 25, paragraph 3 bis)**

25. As in previous meetings of the Group, there was general agreement on the inclusion of draft article 25, paragraph 3 bis, which would ensure that the leadership requirement would not only apply to the principal perpetrator, but to all forms of participation. It was noted that this provision was crucial to the structure of the definition of aggression in its current form. The view was also expressed that the language of this provision was sufficiently broad to include persons with effective control over the political or military action of a State but who are not formally part of the relevant government, such as industrialists.

**Draft amendment #5 and #6: Consequential amendments to articles 9 and 20 of the Rome Statute**

26. Based on the previous agreement that article 9 of the Statute would have to be amended to refer to the crime of aggression,<sup>12</sup> the 2009 Chairman's paper contained a specific amendment to that effect. It was observed that a similar amendment would need to be made to article 20, paragraph 3 of the Statute (*Ne bis in idem*). The Chairman subsequently circulated a suggested wording for such an amendment that met with general agreement.

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*4ter. If the Security Council has adopted a resolution based on the previous paragraph, the Prosecutor may submit a request, through the Secretary General of the United Nations, to review the decision where the Prosecutor considers that new facts have arisen which could negate the basis on which the resolution has been previously taken. If the Security Council adopts a new resolution making a determination of an act of aggression committed by the State concerned, the Prosecutor may proceed with the investigation in respect of a crime of aggression.*

<sup>12</sup> November 2008 Report of the Special Working Group, contained in: *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, paragraph 34.

### III. Other substantive issues regarding aggression to be addressed by the Review Conference

27. The Chairman submitted a non-paper on other substantive issues regarding aggression to be addressed by the Review Conference.<sup>13</sup> He noted that the Review Conference could address some of these issues when adopting the amendment on aggression, though not necessarily in the enabling resolution itself. The concrete wording suggested in the non-paper on these issues was merely intended to assist in the discussion, and was not meant to imply that these issues necessarily needed to be addressed explicitly. Delegations welcomed the non-paper as a useful basis for discussion. The summary of these discussions below should be read in conjunction with the more detailed explanations on the various topics contained in the non-paper itself.

#### Activation of the Court's subject-matter jurisdiction on aggression with respect to Security Council referrals

28. The non-paper raised the question of the moment at which the Court would possess subject-matter jurisdiction over the crime of aggression on the basis of article 13, paragraph b, of the Rome Statute (referral by the Security Council), either after adoption of the relevant amendments by the Review Conference, or after their entry into force. In addition, the non-paper offered draft language for the possibility of clarifying that a Security Council referral, which may include the crime of aggression, does not depend on the consent of the State concerned, as was the case with any other Security Council referral. The following two sentences were suggested for discussion:

*It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression [is adopted by the Review Conference/has entered into force].*

*It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.*

29. Delegations generally found the language suggested agreeable, but expressed different views on the time of activation of the Court's subject-matter jurisdiction over the crime of aggression. Some delegations preferred the alternative in which the Court could exercise jurisdiction over aggression based on a Security Council referral once the amendment on aggression was adopted by the Review Conference. The wording of article 5, paragraph 2, and article 121, paragraph 3, of the Rome Statute were cited in support of this view. This was also considered to be consistent with the fact that the Security Council's power to refer cases to the Court did not depend on the acceptance of the State concerned, as evidenced in particular by article 103 of the Charter of the United Nations. Other delegations, in particular those who favored the application of article 121, paragraph 4, for the entry into force of the amendments on the crime of aggression, voiced a preference that the Court could exercise jurisdiction over the crime of aggression only after the amendment on aggression had entered into force.

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<sup>13</sup> See annex II.

**Minimum number of ratifications in case of article 121, paragraph 5**

30. The non-paper explored the idea, originally raised during the November 2008 session of the Group, that a minimum number of ratifications for entry into force could be required in case article 121, paragraph 5, was applied. No support was expressed for such a possibility, in particular as a number of delegations preferred that the Court's subject-matter jurisdiction over the crime of aggression be activated upon the adoption of the amendments on aggression by the Review Conference. The point was also made that such a minimum number of ratifications was inconsistent with the wording of article 121, paragraph 5, of the Rome Statute.

**Implications of article 121, paragraph 5, second sentence, for State referrals and *proprio motu* investigations**

31. The non-paper referred to previous discussions on this issue, during which there was a strong view that the application of article 121, paragraph 5, of the Rome Statute should not lead to differential treatment between non-States Parties and States Parties that have not accepted the amendment on aggression.<sup>14</sup> The Chairman recalled that these issues were discussed without prejudice to delegations' positions on the application of either paragraph 4 or 5 of article 121 of the Rome Statute, and recommended that this complex issue be considered on the basis of the updated chart included in the non-paper and the scenarios described therein.

32. With respect to scenario 2, referring to an act of aggression committed by a State Party that has accepted the amendment on aggression against a State Party that has not accepted the amendment on aggression, the following language was suggested for discussion:

*It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.*

33. A number of delegations agreed with this clarification, which would ensure equal treatment of States that are victims of aggression, be they States Parties that have not accepted the amendment on aggression, or non-States Parties. The view was also expressed that, under all nine scenarios listed in the chart, the issue should be left for the judges to decide.

34. With respect to scenario 4, referring to an act of aggression committed by a State Party that has not accepted the amendment on aggression against a State Party that has accepted the amendment on aggression, two alternatives were submitted by the Chairman, both of which intend to avoid differential treatment of State Parties and non-States Parties.

35. Alternative 1 would clarify that the Court did have jurisdiction in scenarios 4 and 7:

*It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.*

36. Alternative 2 would clarify that the Court did not have jurisdiction in scenarios 4 and 7:

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<sup>14</sup> November 2008 Report of the Special Working Group, contained in: *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, paragraph 17.

*It is understood that article 121, paragraph 5, second sentence of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.*

37. Both alternatives met with some support as well as some opposition. While no agreement was reached on this issue, the textual approach taken in these two alternatives was considered appropriate and practical. It was noted that these formulations were based on the assumption of concurrent territorial jurisdiction over the crime of aggression (discussed below).

### **The leadership crime of aggression and territoriality**

38. During a preliminary discussion of this issue in November 2008, broad support had been expressed for the view that “concurrent jurisdiction arises where the perpetrator acts in one State and the consequences are felt in another”.<sup>15</sup> The non-paper explored whether the issue should be clarified explicitly or not, and suggested the following language for discussion:

*It is understood that the notion of “conduct” in article 12, paragraph 2 (a), of the Statute encompasses both the conduct in question and its consequence.*

39. There was general support for the concept contained in this draft language, though some delegations expressed the view that clarification was not needed on this issue and that it was best left to be determined by the Court. Concern was also expressed that the language proposed may have unintended consequences including for other crimes. Furthermore, an alternative formulation was suggested: “It is understood that jurisdiction based on the territoriality principle relates both to the territory in which the conduct itself occurred and the territory in which its consequences occurred.” Some delegations supported this language, while others preferred the language contained in the non-paper.

### **Jurisdiction *ratione temporis***

40. The non-paper suggested that language could be considered to specify that the provisions on aggression would not have retroactive effect, in response to a suggestion made during the last meeting of the Group. The draft language in the non-paper was modeled after article 11 of the Rome Statute and read as follows:

*(i) It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].*

*(ii) It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.*

41. The draft language was generally well received and considered useful, and delegations voiced different preferences regarding the options contained in the bracketed language in paragraph 1, which were linked to the question of the activation of the Court’s subject-matter jurisdiction over the crime of aggression (see paragraph 29 above). A drafting suggestion was made to insert a reference to article 13, paragraph b, of the Rome Statute into the first paragraph. Some delegations supported this suggestion, while it was also noted that in

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<sup>15</sup> Ibid., paragraphs 28-29.

this case, a reference to article 12, paragraph 3, of the Rome Statute might have to be added to the first paragraph as well.

#### **IV. Elements of Crimes**

42. The Group continued its discussion regarding the future process with respect to the drafting of Elements of Crimes.<sup>16</sup> The view was expressed that it would be preferable for the Elements of Crimes to be presented at the Review Conference for adoption along with the amendments on aggression. The Group was informed that two delegations were currently preparing a discussion paper on the Elements of Crimes, which would be discussed with interested delegations. The discussion paper would be made available to delegates ahead of the inter-sessional meeting in June 2009.

#### **V. Future work on Aggression**

43. Following suggestions during the last meeting of the Group in November 2008, the Chairman informed the Group about the status of preparations for an inter-sessional meeting on aggression, thereby updating the information contained in the informal note on the work programme. The Chairman was now exploring the possibility of such a meeting taking place from 8-10 June 2009, in New York. The Chairman further announced that he would no longer chair the discussions on aggression following the conclusion of the Special Working Group at this final session. He suggested that the future work on aggression should be chaired by H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini (Jordan).

44. At the June inter-sessional meeting, delegates would continue the discussion on the work achieved in the past and also have the opportunity to discuss the Elements of Crimes. The Chairman emphasized that the discussions on the Elements of Crimes would take place in the same format as the other meetings on aggression in the past and were thus open for participation by all States. The first substantive discussion at the June inter-sessional meeting would also offer an opportunity to exchange views on the timing of the adoption of the Elements. A number of delegations had expressed the view that the Elements should be adopted simultaneously with the amendments on aggression themselves, but the discussion on this topic had not been conclusive. The suggested venue for the inter-sessional meeting met the support of delegations, especially by those who had been unable to travel to the Princeton inter-sessional meetings in the past. A request for interpretation services at the inter-sessional meeting was made, which the Chairman took under advisement.

#### **VI. Conclusion of the Special Working Group on the Crime of Aggression**

45. The Chairman circulated a revised version of the 2009 Chairman's paper, reflecting the progress made during this session.

46. At its sixth meeting, on 13 February 2009, the Special Working Group concluded its work in accordance with resolution ICC-ASP/1/Res.1 ("Continuity of work in respect of the crime of aggression")<sup>17</sup> and in accordance with resolution F of the Final Act of the Rome Conference.<sup>18</sup> The Group submitted the proposals for a provision on aggression contained in annex I to this report to the Assembly of States Parties for further consideration.

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<sup>16</sup> Ibid., paragraphs 30-34.

<sup>17</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>18</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* (United Nations publication, Sales No. E.02.I.5), vol. I.

## Annex I

### Proposals for a provision on aggression elaborated by the Special Working Group on the Crime of Aggression

#### Draft resolution

*(to be adopted by the Review Conference)*

The Review Conference,

*(insert preambular paragraphs)*

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in the annex to the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute;

*(add further operative paragraphs as needed)*

#### Appendix

#### Draft amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

1. *Article 5, paragraph 2, of the Statute is deleted.*
2. *The following text is inserted after article 8 of the Statute:*

##### **Article 8 bis** **Crime of aggression**

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. *The following text is inserted after article 15 of the Statute:*

**Article 15 bis**

**Exercise of jurisdiction over the crime of aggression**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.
3. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.
4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

*Option 1 – end the paragraph here.*

*Option 2 – add:* unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.

4. **(Alternative 2)** Where no such determination is made within [6] months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression,

*Option 1 – end the paragraph here.*

*Option 2 – add:* provided that the Pre-Trial Chamber has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;

*Option 3 – add:* provided that the General Assembly has determined that an act of aggression has been committed by the State referred to in article 8 bis;

*Option 4 – add:* provided that the International Court of Justice has determined that an act of aggression has been committed by the State referred to in article 8 bis.

5. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

6. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. *The following text is inserted after article 25, paragraph 3 of the Statute:*

**3 bis.** In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. *The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.

6. *The chapeau of article 20, paragraph 3 of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

## Annex II

### **Non-paper on other substantive issues on aggression to be addressed by the Review Conference**

1. In previous meetings of the Special Working Group on the Crime of Aggression (SWGCA), in particular during the seventh session of the Assembly, a number of issues have surfaced which the Review Conference might usefully address when adopting the amendment on aggression, though not necessarily in the amendment text itself. Instead, these issues could be dealt with in the resolution by which the provisions on aggression are adopted, or elsewhere in the Final Act of the Conference. Delegations might also be of the view that some, or all of these issues, do not need to be addressed explicitly at all, e.g. because they would be reflected in the report of the Working Group or elsewhere in the “travaux préparatoires”.

2. The drafting suggestions below are thus only submitted with a view to facilitating a deeper discussion of the issues addressed, without prejudice to the eventual placement and format of such text.

#### **I. Activation of the Court’s subject-matter jurisdiction on aggression with respect to Security Council referrals**

3. Delegations might wish to deepen the consideration of this question, which was only preliminarily discussed during the last session.<sup>1</sup> There appeared to be increasing acceptance of the view that, in accordance with article 5, paragraph 2, of the Statute, the Court would be able to exercise jurisdiction over the crime of aggression on the basis of a Security Council referral immediately after the adoption of the provision on aggression by the Review Conference. Such an approach would follow from the wording of article 5, paragraph 2, and more generally from the jurisdictional system established by articles 12 and 13 of the Rome Statute, which do not require State consent in case of Security Council referrals. Alternatively, delegations could come to the conclusion that the subject-matter jurisdiction on aggression based on Security Council referrals begins with the entry into force of the amendment (under either article 121, paragraph 4 or 5). In either case, it might be useful to have the agreed understanding reflected. The following language could be considered:

*It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression [is adopted by the Review Conference/has entered into force].*

4. In this context, the SWGCA could furthermore consider language clarifying that a Security Council referral, which may include the crime of aggression, as any other Security Council referral, does not depend on the consent of the State concerned. Such a clarification could be useful irrespective of which entry into force provision is applied (article 121, paragraph 4 or 5), and would in particular address questions that could be raised in the context of article 121, paragraph 5, second sentence.<sup>2</sup>

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<sup>1</sup> November 2008 Report of the Special Working Group, contained in: *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, paragraph 38.

<sup>2</sup> Previously discussed in the November 2008 Report of the Special Working Group, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal*

*It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.*

## **II. Minimum number of ratifications in case of article 121, paragraph 5**

5. During the November 2008 session of the SWGCA, some delegations expressed interest in requiring a minimum number of ratifications for the entry into force of the amendments on aggression under the option in which article 121, paragraph 5, is applied. Such a requirement would arguably only add value if combined with the understanding that the Court may accept Security Council referrals only after the entry into force of the amendment (and not, as discussed above, immediately after the adoption of the amendment by the Review Conference). In this case, delegations might want to avoid a situation where a single ratification of the amendment would activate the Court's jurisdiction with respect to Security Council referrals. Nevertheless, the opposite view was also expressed, favoring a quick activation of the Court's subject-matter jurisdiction. It was also questioned whether the introduction of a provision on a minimum number of ratifications required for entry into force was compatible with article 121, paragraph 5. The following language is thus only presented with a view to facilitating the discussions on this issue, with the understanding that there is currently no agreement as to whether article 121, paragraph 4 or 5 should apply.

(Text in bold to be added to operative paragraph 1 of the draft resolution in the 2009 Chairman's paper)

*... the amendments ... shall enter into force in accordance with article 121, paragraph 5, of the Statute **one year after the deposit of the [x<sup>th</sup>] instrument of ratification or acceptance.***

## **III. Implications of article 121, paragraph 5, second sentence, for State referrals and *proprio motu* investigations**

6. The SWGCA has already held a preliminary discussion on this issue, during which there was a strong view that the application of article 121, paragraph 5, second sentence, should not lead to differential treatment between non-States Parties and States Parties that have not accepted the amendment on aggression.<sup>3</sup> At the same time, the sentence in question has given rise to different interpretations, and some delegations called for clarification.

7. Article 121, paragraph 5, second sentence, reads: "*In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.*"

8. The issue can best be understood by referring to the illustrative chart on "Jurisdiction scenarios regarding article 121, paragraph 5, second sentence",<sup>4</sup> and in particular scenarios 2 and 4 contained therein. Delegations held different views regarding the question of jurisdiction under these two scenarios, but the view prevailed that there should be no discrimination between non-States Parties and States Parties that have not accepted the amendment.

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*Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I, annex III, paragraphs 7-10.

<sup>3</sup> *Ibid.*, paragraphs 11-15.

<sup>4</sup> Also see the November 2008 Report of the Special Working Group, contained in: *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, appendix II.

<i>May the Court exercise jurisdiction over the crime of aggression?</i>	Victim: State Party, accepted CoA	Victim: State Party, has <u>not</u> accepted CoA	Victim: Non-State Party
Aggressor: State Party, accepted CoA	1  <b>Yes</b>	2  <b>?</b>	3  <b>Yes</b>
Aggressor: State Party, has <u>not</u> accepted CoA	4  <b>?</b>	5  <b>No</b>	6  <b>No</b>
Aggressor: Non-State Party	7  <b>Yes</b>	8  <b>No</b>	9  <b>No</b>

9. In order to facilitate the discussion of this complex issue, it is suggested to address scenarios 2 and 4 separately. With respect to both scenarios, text can be formulated that ensures non-discrimination and clarifies whether the Court has jurisdiction. The respective formulations could eventually be merged once agreement on an overall approach is reached.

10. **With respect to scenario 2**, the following interpretative language could be considered to ensure non-discrimination (compare scenarios 2 and 3) and to clarify that the Court **does**<sup>5</sup> have jurisdiction:

*It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.*

11. **With respect to scenario 4**, the following interpretative language could be considered to ensure non-discrimination (compare scenarios 4 and 7). Since delegations appeared to have different views as to whether the Court should have jurisdiction in scenario 4, two alternatives are provided, both of which ensure non-discrimination.

**Alternative 1** (clarifies that the Court does have jurisdiction in scenario 4 and 7):

*It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.*

**Alternative 2** (clarifies that the Court **does not** have jurisdiction in scenarios 4 and 7):

*It is understood that article 121, paragraph 5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.*

<sup>5</sup> It appeared from the discussions in the Special Working Group that no delegation found it desirable that the Court should not have jurisdiction in this scenario.

#### IV. The leadership crime of aggression and territoriality

12. The SWGCA has already held a preliminary discussion on this issue, during which broad support was expressed for the view that “concurrent jurisdiction arises where the perpetrator acts in one State and the consequences are felt in another”.<sup>6</sup> Should delegations indeed wish to clarify this issue, along the lines indicated during the last session of the SWGCA, the following language could be considered:

*It is understood that the notion of “conduct” in article 12, paragraph 2 (a), of the Statute encompasses both the conduct in question and its consequence.*

#### V. Jurisdiction *ratione temporis*

13. During the last meeting of the SWGCA, the suggestion was made that it should be specified that the amendments on aggression shall apply prospectively. The SWGCA had discussed this issue during its 2004 Princeton meeting<sup>7</sup>, during which there was no objection to specifying that the provisions on aggression would not have retroactive effect. In light of the provisions of article 5, paragraph 2, and following the structure of article 11 of the Statute, the following language could be considered:

- (i) *It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].*
- (ii) *It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.*

14. It should be noted that the first paragraph suggested above marks the beginning of jurisdiction *ratione temporis* in case of a Security Council referral or in case of an *ad hoc* declaration under article 12, paragraph 3, of the Statute. The second paragraph marks the beginning of jurisdiction *ratione temporis* for referrals by States Parties and for *proprio motu* investigations.

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<sup>6</sup> November 2008 Report of the Special Working Group, contained in: *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, paragraphs 28 and 29.

<sup>7</sup> 2004 Princeton report, contained in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third session, The Hague, 6-10 September 2004* (International Criminal Court publication, ICC-ASP/3/25), annex II, paragraphs 6-9.

## Annex III

### Informal note on the work programme

1. The Chairman of the Special Working Group on the Crime of Aggression (SWGCA) would like to draw the attention of all delegations to the report of the Special Working Group of the seventh session<sup>1</sup> and the revised Chairman's paper submitted in preparation of the upcoming session (2009 Chairman's paper).

2. In order to facilitate the preparation for the substantive work of this last session of the SWGCA, the Chairman would like to suggest a number of issues on which the Group could usefully focus its work. This list is subject to change depending on the progress made in the discussions and without prejudice to other topics delegations may wish to raise.

#### I. Draft amendments on aggression, based on the 2009 Chairman's paper

3. The main goal of this session will be to adopt a final report of the SWGCA for consideration by the Assembly of States Parties, containing a set of draft amendments to the Rome Statute. It is envisaged that this document should be as clean as possible, based on the 2009 Chairman's paper. At the same time, it is understood that several questions, including the issue dealt with in draft article 15 bis, paragraph 4 (procedural options in case of inaction by the Security Council) will require further work after the completion of the SWGCA. It is also understood that all draft provisions on the crime of aggression are interlinked and that the principle "nothing is agreed until everything is agreed" therefore applies.

#### II. Other substantive issues related to the draft amendments on aggression

4. In previous meetings of the SWGCA, in particular during the seventh session of the Assembly, a number of issues have surfaced which the Review Conference might usefully address when adopting the amendments on aggression, though not necessarily in the amendment text itself. These relate, *inter alia*, to (a) the activation of the Court's subject-matter jurisdiction on aggression with respect to Security Council referrals; (b) the question of a minimum number of ratifications to be required in connection with article 121, paragraph 5, of the Statute; (c) issues related to the potential application of article 121, paragraph 5, second sentence; (d) the question of territoriality of the crime of aggression in light of its nature as a leadership crime; and (e) the question of jurisdiction *ratione temporis*.

5. The Chairman therefore suggests draft language on these issues for discussion by the SWGCA. The Review Conference could adopt language on these issues simultaneously with the amendments on aggression, in an appropriate format that is yet to be discussed. A separate non-paper has been submitted in order to facilitate discussions.

#### III. Elements of Crimes

6. In light of the previous discussions of the SWGCA,<sup>2</sup> the 2009 Chairman's paper contains a draft amendment to article 9 of the Statute. The SWGCA could in particular make recommendations to the Assembly regarding the future consideration of the Elements of Crimes and the timing of their adoption.

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<sup>1</sup> November 2008 Report of the Special Working Group, contained in: *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.

<sup>2</sup> *Ibid.*, paragraph 34.

#### **IV. Future work on aggression**

7. This will be the final session of the SWGCA. Since the Assembly has already agreed to continue the work on aggression after the SWGCA has concluded its work, the Group should discuss such future work. In this context, delegations might wish to discuss the modalities for submission of the proposed amendment on aggression, on the one hand in light of article 121 of the Rome Statute (submission to the United Nations Secretary-General), and on the other hand in light of resolution ICC-ASP/1/Res.1 (Continuity of work in respect of the crime of aggression) and resolution F of the Final Act of the Rome Conference (submission to the Assembly). Furthermore, the details of a further inter-sessional meeting on aggression should be discussed. At this stage, such a meeting is tentatively planned for a duration of two and a half days, from 15 to 17 June 2009, at Princeton University, in light of the discussions held at the seventh session of the Assembly.<sup>3</sup>

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<sup>3</sup> Ibid., paragraphs 43 and 44.