

Annex II

Report of the Working Group on the Crime of Aggression

A. Introduction

1. The Working Group on the Crime of Aggression held eight meetings on 1, 4, and 7 to 9 June 2010. H.R.H. Prince Zeid Ra'ad Zeid Al-Husseini (Jordan) served as Chair of the Working Group.
2. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Group.
3. The discussions in the Working Group were held on the basis of two papers submitted by the Chair: a conference room paper on the crime of aggression ("conference room paper") and a non-paper containing further elements for a solution on the crime of aggression ("non-paper").
4. At the first meeting of the Working Group, the Chair introduced both documents. He recalled that, while the inclusion of the crime of aggression in the Rome Statute had been controversial in 1998, much progress had been made since then. The process had been inclusive and transparent, and marked by a spirit of cooperation. In February 2009, the Special Working Group on the Crime of Aggression had adopted proposals for amendments on the crime of aggression by consensus. The Chair noted that the conference room paper brought all the elements together and reflected progress and agreement on many issues: The definition of aggression contained no brackets; there was agreement on the leadership clause; the draft amendments were of very good technical quality and would fit well within the existing structure of the Statute; and the subsequent exercise on the Elements of Crimes had contributed further to the understanding of the definition.
5. The Chair noted that divergent views remained on the conditions for the exercise of jurisdiction. Nevertheless, much progress had been made in this regard, as reflected in the paragraphs of draft article 15 *bis* without brackets: There was agreement that all three jurisdictional 'triggers' in article 13 of the Rome Statute would apply to the crime of aggression; the Prosecutor would have to inform and cooperate with the Security Council; the best-case scenario would be one in which the Security Council and the Court would act in tandem; a determination of aggression by an organ outside the Court would not be binding on the Court, thus guaranteeing judicial independence in the application of the substantive law; and any particular requirements for an investigation into a crime of aggression would not affect investigations into any of the other three core crimes.
6. The views of delegations continued to diverge, however, on two issues: First, delegations had different opinions whether there should be a requirement that the alleged aggressor State has accepted the Court's active jurisdiction over this crime, such as through ratification of the amendments on aggression. Second, delegations had different opinions as to how the Court should proceed when the Security Council did not make a determination of an act of aggression. The Chair noted that, at this stage, most delegations that favored additional possibilities for the Court to proceed in the absence of a determination of aggression by the Security Council preferred that such a decision rest with the Court itself, for example with the Pre-Trial Chamber.
7. The Chair encouraged delegations to focus their attention on how to bridge the gap on these outstanding issues, based on the conference room paper and the ideas contained in the non-paper.

B. Conference room paper on the crime of aggression

8. The Chair noted that the conference room paper was submitted with a view to facilitating the remaining work on the crime of aggression. The paper contained a proposed draft outcome for the Review Conference on the crime of aggression, including the following elements: (a) the draft enabling resolution on the crime of aggression with an added short preamble and additional operative paragraphs; (b) draft amendments to the Rome Statute on the crime of aggression; (c) draft amendments to the Elements of Crimes; and (d) draft understandings regarding the interpretation of the amendments. All of these texts had previously been discussed in the context of the Special Working Group on the Crime of Aggression and the Assembly of States Parties.

9. Delegations welcomed the conference room paper as accurately reflecting and consolidating the previous work on the crime of aggression. It was recalled that efforts to define aggression had begun six decades ago and that concrete efforts to give effective jurisdiction to the Court had lasted more than 12 years. A great deal of progress had been made on these complex issues. The Review Conference was a historic opportunity to complete this work and strong support was expressed for this to be done on the basis of consensus for the benefit of the Court.

10. Delegations expressed their willingness to be flexible and open to compromise and creative solutions that would bring about a solution. Confidence was expressed that a successful outcome was within reach, provided that delegations were ready to engage with one another to see what could be achieved.

1. Draft enabling resolution

11. The Chair noted that a few basic preambular paragraphs had been added to the draft enabling resolution. The draft resolution also contained additional operative paragraphs to adopt the amendments to the Elements of Crimes as well as understandings regarding the interpretation of the amendments. Furthermore, the customary call for the earliest possible ratification or acceptance of the amendments by all States Parties was added. Delegations did not raise specific issues regarding these new elements. Further operative paragraphs could be added at a later stage, such as a possible review clause.

2. Procedure for entry into force of the amendments on aggression

12. Delegations expressed divergent views regarding the procedure for entry into force of the amendments on aggression. The arguments raised in this regard are amply reflected in previous Working Group reports on the crime of aggression. Some delegations stressed that article 121, paragraph 5, of the Statute, combined with the “negative understanding” of its second sentence, was the correct procedure under the Statute. As a consequence, acceptance of the amendments on aggression by the alleged aggressor State would be required for a State referral or a *proprio motu* investigation. Other delegations stressed that article 121, paragraph 4, of the Statute should apply. A preference was also expressed for the “positive understanding” of article 121, paragraph 5, of the Statute. Under this approach, the acceptance by the alleged aggressor State would not be required, thus providing for a broader scope of jurisdiction.

13. Some delegations, while in principle favoring the application of article 121, paragraph 4, of the Statute, raised the idea of using both procedures for entry into force, thereby staggering over time the Court’s exercise of jurisdiction for the crime of aggression. Article 121, paragraph 5, of the Statute would be applied to the definition as well as to the provisions dealing with Security Council referrals. The exercise of jurisdiction based on Security Council referrals would thus begin one year after the deposit of the first instrument of ratification or acceptance. Once seven-eighths of States Parties ratified the amendments on aggression, the remaining two jurisdictional ‘triggers’ (State Party referral and *proprio motu*) would enter into force for all States Parties based on article 121, paragraph 4, of the Statute. In this context, the idea was raised to enhance the jurisdictional filter of

the Pre-Trial Chamber (draft article 15 *bis*, paragraph 4, Alternative 2, Option 2). A supplementary idea was put forward that would allow the Court to proceed with investigations based on a State Party referral or proprio *motu* even before the entry into force for all States Parties, namely with respect to States that had already ratified the amendments and thus consented to the Court's exercise of jurisdiction.

14. These ideas were welcomed by some delegations as a creative attempt to attract consensus. It was suggested flexibility was needed regarding the entry into force mechanisms, as the respective provisions in the Rome Statute seemed to be ambiguous and not to apply well to the crime of aggression, which was already contained in article 5 of the Rome Statute. Other delegations expressed concern about the legal and technical feasibility of an approach that would draw on elements of both paragraphs 4 and 5 of article 121 of the Statute. Concern was expressed that a creative interpretation of these provisions could harm the Court's credibility. Further consideration needed to be given to these ideas, preferably on the basis of a fully developed draft text to better understand them.

3. Attachment I: Amendments on the crime of aggression

15. As requested by the Chair, the discussions focused on the outstanding issues contained in draft article 15 *bis*. Some delegations used the opportunity to reiterate their support for the definition of the crime of aggression contained in draft article 8 *bis*, recalling the delicate compromise achieved over many years through a deliberative and transparent process that was open to States Parties and non-States Parties on an equal footing.

16. With respect to the definition of aggression contained in draft article 8 *bis*. The suggestion was made to adopt an understanding clarifying that efforts to prevent war crimes, crimes against humanity or genocide were not "manifest" violations of the Charter of the United Nations. However, another view was expressed that the threshold of a manifest violation contained in draft article 8 *bis* should be deleted, since any act of aggression manifestly violated the Charter. Furthermore, a view was expressed that the definition on aggression would not reflect customary international law and that this should be recognized in the understandings. Only the most serious forms of illegal use of force constituted aggression. The definition might need to be revisited in case of a future review of the amendments on aggression.

4. Exercise of jurisdiction over the crime of aggression (draft article 15 *bis*)

17. Discussions focused on the outstanding issues contained in paragraph 4 of draft article 15 *bis* (jurisdictional filters). The arguments raised in this regard were amply reflected in previous Working Group reports on the crime of aggression. Those delegations that referred to paragraphs 1, 2, 3, 5 and 6 expressed their strong support for these paragraphs, which contained agreements on important issues.

18. Some delegations reiterated their preference for Alternative 1, which provides that the Prosecutor may only proceed with an investigation in respect of a crime of aggression where the Security Council has made a determination of aggression (Option 1) or where the Security Council has otherwise requested the Prosecutor to proceed with the investigation in respect of a crime of aggression (Option 2). A number of arguments raised in the past in support of this position were recalled: It was stated that the Security Council pursuant to article 39 of the Charter of the United Nations had the exclusive competence to determine that an act of aggression had been committed. Article 5, paragraph 2, of the Rome Statute required the amendments on the crime of aggression to be consistent with the Charter. A constructive relationship between the Court and the Security Council was essential, especially with regard to the crime of aggression, as divergent findings on the occurrence of a State act of aggression could undermine the legitimacy of both. It was also suggested that Alternative 1 was consistent with the goal of achieving universal ratification of the Rome Statute.

19. Other delegations reiterated their preference for Alternative 2, which would allow the Prosecutor to proceed under certain conditions in the absence of a determination of aggression by the Security Council. Strong support was expressed for Option 2, which would give the role of jurisdictional filter to the Pre-Trial Chamber. Delegations in favour of this internal judicial filter stressed the need for the Court to be able to act independently and to avoid politicization, with a view to ending impunity. It was argued that this approach would respect the primary role of the Security Council in determining an act of aggression. It was also submitted that the internal judicial filter could be enhanced. Some concern was expressed that the waiting period contained in Alternative 2 (six months) might be too long. The view was also expressed that the procedure for the crime of aggression should not differ from the existing procedures for the other three crimes.

5. Attachment II: Amendments to the Elements of Crimes

20. Some delegations took the opportunity to express their satisfaction with the draft amendments to the Elements of Crimes, which enjoyed wide consensus. A view was expressed that more time could usefully be spent drafting the Elements of Crimes.

6. Attachment III: Understandings regarding the amendments on the crime of aggression

21. The Chair noted that the draft understandings contained in attachment III of the conference room paper had previously been discussed in the Special Working Group on the Crime of Aggression, but had now for the first time been brought together as a single document. Delegations generally welcomed the understandings, which provided useful clarifications to the draft amendments on the crime of aggression.

7. Referrals by the Security Council

22. The first understanding would clarify the moment from which the Court would be allowed to exercise jurisdiction over the crime of aggression on the basis of a Security Council referral. Two main options were provided in this regard (adoption of amendments/entry into force). No detailed discussion was held on this choice, which would mainly depend on the applicable procedure for entry into force and which would equally apply to the third understanding. Some delegations expressed the view that these understandings should refer to the entry into force of the amendments on aggression rather than their adoption. However, the opposite view was also expressed, which was seen as consistent with the wording of article 5, paragraph 2, of the Statute.

23. The second understanding would clarify that, in case of a Security Council referral, the consent of the State concerned would not be required. Delegations did not express concerns about these two understandings.

8. Jurisdiction *ratione temporis*

24. The third and fourth understanding would clarify the application of article 11 of the Statute (non-retroactivity) to the crime of aggression. Delegations did not express concerns about these two understandings.

9. Acceptance of the amendments on the crime of aggression

25. The fifth and sixth understanding would clarify the application of the second sentence of article 121, paragraph 5, of the Statute to the amendments on the crime of aggression. Delegations discussed the two alternatives contained in the sixth understanding (“positive” versus “negative” understanding) in connection with the discussion on the applicable procedure for entry into force (cf. the discussions and arguments reflected in paragraphs xxx above, with further references). No strong concerns were raised in respect of the fifth understanding, which would clarify that the

acceptance of the amendments on the crime of aggression by the alleged aggressor State would suffice for the Court to exercise jurisdiction, even where the victim State had not accepted the amendments. Nevertheless, it was also suggested that the consent of a victim State may be appropriate or necessary in certain situations.

C. Chair's non-paper on further elements for a solution on the crime of aggression

26. The Chair noted that the non-paper contained a number of elements that could be helpful in addressing certain issues regarding the draft amendments on the crime of aggression. Delegations generally welcomed the ideas contained therein, especially to the extent that they could help forge an agreement.

1. Timing of exercise of jurisdiction

27. The non-paper suggested that a provision delaying the Court's exercise of jurisdiction over the crime of aggression could address concerns expressed by some delegations. Some delegations expressed interest in this idea. Some submitted that, while they did not consider it necessary, it might help allay fears that the Court may be too young to exercise jurisdiction over the crime of aggression. It was cautioned, however, that the delay ought not to be too long. The comment was made that no such provision was necessary in connection with article 121, paragraph 4, of the Statute. Some support was also expressed for the immediate entry into force of the amendments on aggression.

2. Review clause

28. The non-paper suggested that a review clause might be useful to accommodate concerns of delegations that have shown flexibility in their position on the exercise of jurisdiction. Several delegations were open to this idea. It was submitted that the review period should be relatively long to allow for a proper assessment of the Court's exercise of jurisdiction over the crime of aggression. Some delegations stressed that they did not consider such a clause necessary, but that it could be acceptable if it would help attract consensus. However, it was also suggested that such a clause might only delay the resolution of outstanding issues, create instability in the interim and impact domestic criminal law.

3. Domestic jurisdiction over the crime of aggression

29. The non-paper suggested that the consequences of adopting amendments on the crime of aggression for the exercise of domestic jurisdiction could be addressed in the understandings (see the detailed explanations in paragraph 4 of the non-paper). Specifically, the understandings could clarify that the amendments on the crime of aggression created neither the right nor the obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State. In general, support was expressed for such an understanding. This was an important issue and the current drafting was useful. It was submitted that the drafting could be further improved.

D. Further proceedings of the Working Group

30. Following the discussions held in the Working Group on 4 June 2010, the Chair submitted two revised versions of the conference room paper. Informal meetings of the Working Group were held on 7 and 8 June 2010.

E. Recommendation

31. At its last meeting, on 9 June, the Working Group decided to forward the conference room paper contained in Appendix I to the Plenary of the Review Conference of the Rome Statute for its consideration.

Appendix I

Conference Room Paper on the Crime of Aggression (document RC/WGCA/1/Rev.2)

Draft resolution: The crime of aggression

The Review Conference,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,¹

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in attachment I of 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 [**except for amendment 3, which shall enter into force in accordance with article 121, paragraph 4, of the Statute**];²
2. *Also decides* to adopt the amendments to the Elements of Crimes contained in attachment II of the present resolution;
3. *Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in attachment III of the present resolution;
4. *Calls upon* all States Parties to ratify or accept the amendments contained in attachment I.

(Add further operative paragraphs if needed)³

¹ *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.

² **The suggestion has been made that all amendments could enter into force for the Court immediately upon adoption by the Review Conference, in accordance with article 5, paragraph 2 of the Statute, while entering into force for States Parties one year after their respective ratification in accordance with article 121, paragraph 5, of the Statute. Consequently, the Court could receive Security Council referrals in principle immediately after adoption, while *proprio motu* investigations and State referrals would depend on the necessary ratifications.**

³ Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 *bis*.

Attachment I

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

(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression **in accordance with article 13 (a) and (c)**, subject to the provisions of this article.¹
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.²
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, provided that the Pre-Trial Chamber³ has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;
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.

¹ The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

² The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

³ The suggestion has been made to enhance the internal filter, e.g. by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process.

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

Article 15 ter

**Exercise of jurisdiction over the crime of aggression
(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression **in accordance with article 13 (b)**, subject to the provisions of this article.⁴
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. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression.⁵
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:

⁴ The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

⁵ The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

Attachment II

Amendments to the 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. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person¹ 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 that established that such a use of armed force was inconsistent 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 that established such a manifest violation of the Charter of the United Nations.

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

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

Referrals by the Security Council

1. 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].
2. 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.

Jurisdiction *ratione temporis*

3. 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].
4. 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.

Domestic jurisdiction over the crime of aggression

4 *bis*. It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

[The paragraphs below are only relevant in case the amendments are adopted in accordance with the amendment procedure set out in article 121, paragraph 5, of the Rome Statute:]

Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State not required where the aggressor State has accepted 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.
6. *[Alternative 1 – “positive” understanding: jurisdiction without acceptance by the aggressor State]* 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 – “negative” understanding: no jurisdiction without acceptance by aggressor State] 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.

[Insert possible further understandings]

Appendix II

Conference Room Paper on the Crime of Aggression (document RC/WGCA/1/Rev.1)

Draft resolution: The crime of aggression

The Review Conference,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,¹

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in attachment I of 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;
2. *Also decides* to adopt the amendments to the Elements of Crimes contained in attachment II of the present resolution;
3. *Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in attachment III of the present resolution;
4. *Calls upon* all States Parties to ratify or accept the amendments contained in attachment I.

(Add further operative paragraphs if needed)²

¹ *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.

² Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 *bis*.

Attachment I

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.¹
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.²
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, provided that the Pre-Trial Chamber³ has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15;
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:

¹ The suggestion has been made to add a paragraph delaying the exercise of jurisdiction, e.g. "The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression." Such a paragraph would only be relevant in case article 121, paragraph 5, of the Statute were to be applied.

² The suggestion has been made to allow the Prosecutor to proceed with an investigation in respect of a crime of aggression if so requested by the Security Council in a resolution under Chapter VII of the United Nations Charter.

³ The suggestion has been made to enhance the internal filter, e.g. by involving all judges of the Pre-Trial Division or by subjecting the decision of the Pre-Trial Chamber to an automatic appeals process.

Attachment II

Amendments to the 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. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person¹ 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 that established that such a use of armed force was inconsistent 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 that established such a manifest violation of the Charter of the United Nations.

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

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

Referrals by the Security Council

1. 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].
2. 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.

Jurisdiction *ratione temporis*

3. 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].
4. 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.

Domestic jurisdiction over the crime of aggression

4 *bis*. It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

[The paragraphs below are only relevant in case the amendments are adopted in accordance with the amendment procedure set out in article 121, paragraph 5, of the Rome Statute:]

Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State not required where the aggressor State has accepted 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.
6. *[Alternative 1 – “positive” understanding: jurisdiction without acceptance by the aggressor State]* 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 – “negative” understanding: no jurisdiction without acceptance by aggressor State] 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.

[Insert possible further understandings]

Appendix III

Conference Room Paper on the Crime of Aggression (document RC/WGCA/1/)

A. Explanatory Note

1. The present Conference Room Paper is submitted by the Chair with a view to facilitating the remaining work on the crime of aggression. The paper contains a proposed draft outcome for the Review Conference on the crime of aggression, including the following elements:

- a) **The draft enabling resolution on the crime of aggression**, as forwarded to the Review Conference by resolution ICC-ASP/8/Res.6, with an added short preamble and additional operative paragraphs relating to the Elements of Crimes (OP 2) and the understandings regarding the interpretation of the amendments (OP 3), as well as the customary call for ratification or acceptance of the amendments (OP 4);
- b) **The draft amendments to the Rome Statute on the crime of aggression** (attachment I), as forwarded by resolution ICC-ASP/8/Res.6;
- c) **The draft amendments to the Elements of Crimes** (attachment II), as forwarded by resolution ICC-ASP/8/Res.6;
- d) **Draft understandings regarding the interpretation of the amendments** on the crime of aggression, as previously discussed by the Special Working Group on the Crime of Aggression, notably at its last session in February 2009.¹

2. The present paper thus sets out a complete framework of texts to successfully conclude the work on the crime of aggression at the Review Conference. All of the text elements contained in this paper, including the draft understandings contained in attachment III, have previously been discussed in the context of the Special Working Group and the Assembly of States Parties.

3. The focus of our efforts at the Review Conference should be on bridging the remaining gaps. A number of additional elements that could be helpful in this regard and that could be added to this framework are submitted in a separate non-paper.

¹ February 2009 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 (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, paragraphs 27-41 (“Other substantive issues regarding aggression to be addressed by the Review Conference”).

B. Draft resolution: The crime of aggression

The Review Conference,

***Recalling* paragraph 2 of article 5 of the Rome Statute,**

***Recalling* also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,**

***Recalling* further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,²**

***Taking note* of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,**

1. ***Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in appendix I of 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;**

2. ***Also decides* to adopt the amendments to the Elements of Crimes contained in appendix II of the present resolution;**

3. ***Further decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in appendix III of the present resolution;**

4. ***Calls upon* all States Parties to ratify or accept the amendments contained in appendix I.**

(Add further operative paragraphs if needed)³

² *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.

³ **Such as, e.g., a possible review clause. Such a review clause could also be included in the Statute itself, e.g. in article 5, paragraph 2, or in draft article 15 bis.**

Attachment I

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:

Attachment II

Amendments to the 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. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person¹ 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 that established that such a use of armed force was inconsistent 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 that established such a manifest violation of the Charter of the United Nations.

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

Attachment III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

Referrals by the Security Council

1. 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].
2. 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.

Jurisdiction *ratione temporis*

3. 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].
4. 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.

[The paragraphs below are only relevant in case the amendments are adopted in accordance with the amendment procedure set out in article 121, paragraph 5, of the Rome Statute:]

Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State not required where the aggressor State has accepted 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.
6. *[Alternative 1 – “positive” understanding: jurisdiction without acceptance by the aggressor State]* 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 – “negative” understanding: no jurisdiction without acceptance by aggressor State] 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.

[Insert possible further understandings – see separate non-paper]

Appendix IV

Non-paper by the Chair on further elements for a solution on the Crime of Aggression (document RC/WGCA/2)

1. The present non-paper submitted by the Chair contains a number of elements that may be helpful in addressing certain issues regarding the draft amendments on the crime of aggression and are therefore recommended to the consideration of delegations.

2. **Timing of the entry into force of the amendments:** Concerns have been raised at the prospect of an early entry into force of the amendments on the crime on aggression in case article 121, paragraph 5, of the Statute was to be applied. Such concerns could possibly be addressed by a provision specifying that the Court should begin exercising jurisdiction over the crime of aggression at a later stage only. Such a provision would not as such affect the timing of the entry into force of the amendments, but would effectively delay the Court's exercise of jurisdiction. Such a provision would therefore have to be placed in draft article 15 *bis* and could read:

Article 15 bis
Exercise of jurisdiction over the crime of aggression

[...]

7. *The Court may exercise jurisdiction only with respect to crimes of aggression committed after a period of [x] years following the entry into force of the amendments on the crime of aggression.*

3. **Review clause:** The suggestion has been made that in the search for a compromise on the outstanding issues regarding the conditions for the exercise of jurisdiction, a review clause may be necessary to accommodate the concerns of delegations that have shown flexibility in their position. Such a review clause could be added to draft article 15 *bis*:

Article 15 bis
Exercise of jurisdiction over the crime of aggression

[...]

8. *The provisions of this article shall be reviewed [x] years after the Court may exercise jurisdiction over the crime of aggression.*

4. **Domestic jurisdiction over the crime of aggression:** Concerns have been raised that the consequences of adopting the amendments on the crime of aggression for the domestic exercise of jurisdiction over this crime are unclear, thus raising questions regarding the application of the principle of complementarity. The Special Working Group concluded at its early stages that no changes to article 17 of the Rome Statute – regarding inadmissibility of cases before the Court – were necessary when incorporating the crime of aggression.¹ This conclusion, however, does not address the question whether the amendments on the crime of aggression would, legally or effectively, require or encourage States to exercise domestic jurisdiction over the crime of

¹ 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 20-27.

aggression with respect to acts of aggression committed by *other* States, based on either the passive personality principle (as a victim State) or based on an assumption of universal jurisdiction. In fact, article 17 of the Rome Statute merely refers to “a State which has jurisdiction” over crimes, but does not address the question as to when States should establish such jurisdiction. The issue could possibly be addressed by adding a relevant paragraph to the understandings contained in annex III of the draft outcome on the crime of aggression:

It is understood that the amendments address the definition of the crime of aggression and the conditions under which the Court shall exercise jurisdiction with respect to this crime for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute. The amendments shall therefore not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Appendix V

Non-papers submitted by delegations

A. Non paper submitted by the delegations of Argentina, Brazil and Switzerland as of 6 June 2010¹

Draft resolution on the crime of aggression

The Review Conference,

[...]

1. *Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in annex I of the present resolution, which are subject to ratification or acceptance **simultaneously through one single instrument of ratification or acceptance, and that amendments 1, 2, 4, 5 and 6** shall enter into force **one year after the deposit of one instrument of ratification or acceptance** in accordance with **article 121, paragraph 5**, of the Statute **and amendment 3 shall enter into force one year after the deposit of instruments of ratification or acceptance by seven-eighths of States Parties in accordance with article 121, paragraph 4, of the Statute.**

[...]

Annex I: Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

(Security Council referral)

1. *Article 5, paragraph 2, of the Statute is replaced by the following text:*

2. The Court may exercise jurisdiction over the crime of aggression **as defined in article 8 bis**, in accordance with article 13, **paragraph (b)**, subject to the provisions of this paragraph.

a) Where the Prosecutor **examines a situation referred to him or her by the Security Council and** 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.

b) Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

c) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression, 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.

d) 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.

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

¹ This non paper builds on the Chairman’s Conference Room paper of 5 June 2010. New language is in bold.

2. *The following text is inserted after article 8 of the Statute:*

Article 8 bis
Crime of aggression
 [...]

3. *The following text is inserted after article 15 of the Statute:
 (State referral, proprio motu)*

Article 15 bis
Exercise of jurisdiction over the crime of aggression

1. The Court may exercise jurisdiction over the crime of aggression **as defined in article 8 bis** in accordance with article 13 **(a) and (c)**, 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. 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, 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;
 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:

B. Non paper submitted by the delegation of Canada as of 8 June 2010²

Article 15 bis

[...]

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. Where the Security Council has not made such a determination within six (6) months after the date of notification and where a State Party has declared its acceptance of this Paragraph, at the time of deposit of its instrument of ratification or acceptance or at any time thereafter, the Prosecutor may proceed with an investigation of a crime of aggression provided that
 - (i) 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;and
 - (ii) [all state(s) concerned with the alleged crime of aggression][the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused of the crime] have declared their acceptance of this Paragraph.

² This proposal is intended as contributing towards an eventual compromise package. As such it is compatible with other proposals that may assist in a consensus resolution, such as a potential provision allowing for a delay in the ability of the Court to exercise its jurisdictional competence.