Annex I

Report of the Credentials Committee[1]

Chairperson: H.E. Mr. Paul Wilke (Netherlands)

1. At its fifth plenary meeting, on 17 November 2008, the Assembly of States Parties to the Rome Statute of the International Criminal Court, in accordance with rule 25 of the Rules of Procedure of the Assembly of States Parties, appointed a Credentials Committee for its seventh session, consisting of the following States Parties: Costa Rica, Estonia, Ireland, Lesotho, Netherlands, Republic of Korea, Serbia, Suriname and Uganda.

2. The Credentials Committee held one meeting, on 20 November 2008.

3. At its meeting on 20 November 2008, the Committee had before it a memorandum by the Secretariat, dated 20 November 2008, concerning the credentials of representatives of States Parties to the Rome Statute of the International Criminal Court to the seventh session of the Assembly of States Parties. The Chairman of the Committee updated the information contained therein.

4. As noted in paragraph 1 of the memorandum and the statement relating thereto, formal credentials of representatives to the seventh session of the Assembly of States Parties, in the form required by rule 24 of the Rules of Procedure, had been received as at the time of the meeting of the Credentials Committee from the following 65 States Parties:

> Afghanistan, Albania, Andorra, Argentina, Australia, Austria, Barbados, Belgium, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burundi, Colombia, Costa Rica, Croatia, Cyprus, Democratic Republic of the Congo, Denmark, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Ireland, Italy, Japan, Jordan, Kenya, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Mali, Malta, Mexico, Namibia, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Republic of Korea, Romania, Serbia, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Suriname, Sweden, Switzerland, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and Uruguay.

5. As noted in paragraph 2 of the memorandum, information concerning the appointment of the representatives of States Parties to the seventh session of the Assembly of States Parties had been communicated to the Secretariat, as at the time of the meeting of the Credentials Committee, by means of a cable or a telefax from the Head of State or Government or the Minister for Foreign Affairs, by the following 26 States Parties:

> Benin, Burkina Faso, Cambodia, Canada, Central African Republic, Chad, Comoros, Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Fiji, Gambia, Guyana, Honduras, Malawi, Mongolia, Niger, Nigeria, Paraguay, Samoa, Senegal, The former Yugoslav Republic of Macedonia, Trinidad and Tobago and Venezuela (Bolivarian Republic of).

6. The Chairperson recommended that the Committee accept the credentials of the representatives of all States Parties mentioned in the Secretariat's memorandum, on the understanding that formal credentials for representatives of the States Parties referred to in paragraph 5 of the present report would be communicated to the Secretariat as soon as possible.

[1] Previously issued as ICC-ASP/7/L.8.

7. On the proposal of the Chairperson, the Committee adopted the following draft resolution:

"*The Credentials Committee*,

Having examined the credentials of the representatives to the seventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court, referred to in paragraphs 4 and 5 of the present report;

Accepts the credentials of the representatives of the States Parties concerned."

8. The draft resolution proposed by the Chairperson was adopted without a vote.

9. The Chairperson then proposed that the Committee recommend to the Assembly of States Parties the adoption of a draft resolution (see paragraph 11 below). The proposal was adopted without a vote.

10. In the light of the foregoing, the present report is submitted to the Assembly of States Parties.

Recommendation of the Credentials Committee

11. The Credentials Committee recommends to the Assembly of States Parties to the Rome Statute of the International Criminal Court the adoption of the following draft resolution:

"Credentials of representatives to the seventh session of the Assembly of States Parties to the Rome Statute of the International Criminal Court

The Assembly of States Parties to the Rome Statute of the International Criminal Court,

Having considered the report of the Credentials Committee on the credentials of representatives to the seventh session of the Assembly and the recommendation contained therein,

Approves the report of the Credentials Committee."

Annex II

Report of the Working Group on the Review Conference

1. The Working Group on the Review Conference was established by the Assembly at the first meeting of its seventh session. Following consultations with the Bureau, the President of the Assembly appointed Ambassador Rolf Fife (Norway) to serve as Coordinator of the Working Group. The Working Group held two meetings, on 20 and 21 November 2008, respectively.

2. The Working Group had before it an interim report of the focal point on the review of the Rome Statute[1], as well as a draft resolution on the venue of the Review Conference.

3. The Working Group agreed to accept the offer of Uganda to host the Conference, scheduled to take place in the first semester of 2010, for a period of five to ten working days, at dates to be established by the Bureau.

4. While supporting the inclusion of the provision referring to unforeseen developments, concern was expressed about the ambiguous nature thereof, which may possibly lead to the revisiting of the issue of the venue of the Conference in the near future.

5. As regards achieving successful dissemination of information about the Court's activities, the Coordinator explained that the holding of a Review Conference should actively contribute to promoting and achieving universality of the Rome Statute.

6. As regards the way forward, the Working Group observed that due consideration would need to be given to substantive issues that are to be discussed at the Conference. In order to advance the consideration of such issues, delegations were invited to consider primarily the provision contained in article 124 of the Rome Statute, as well as the issues raised in resolutions E and F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court and invited the Coordinator to communicate to States Parties a document setting out the proposed timelines and process forward.

7. One delegation indicated that it was considering circulating a text for an amendment to the list of war crimes in article 8 of the Rome Statute, specifically regarding the use of certain weapons, sufficiently in advance of the next session of the Assembly.

[1] ICC-ASP/7/WGRC/INF.1 and Add.1.

Annex III

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 five meetings on 17, 18, 19 and 20 November 2008. Ambassador Christian Wenaweser (Liechtenstein) served as Chair of the Special Working Group (hereinafter "the Group").

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

3. The discussions in the Group were continued on the basis of the revised discussion paper proposed by the Chairman (2008 Chairman's paper).[1] Furthermore, the Chairman submitted an informal note on the work programme, outlining a suggested structure as well as questions for discussions.[2]

4. At the first meeting of the Group, the Chairman introduced the informal note on the work programme. 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 have not been thoroughly discussed in recent sessions, as outlined in the note on the work programme.

II. Procedure for entry into force of amendments on aggression

5. The Group continued and deepened its consideration of the question of the entry into force of the amendments concerning the crime of aggression. In previous meetings, the Group had focused on the question whether paragraph 4 or paragraph 5 of article 121 of the Rome Statute should apply. Both alternatives had in the past received some support, as reflected in the Group's report of June 2008 in paragraphs 6 to 14. Some of the arguments reflected therein were repeated in the context of the discussions described below.

6. As suggested in the informal note on the work programme, the Group focused its discussions on the implications of the application of article 121, paragraph 5, in particular the second sentence of that paragraph. The 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". It was understood that this issue was discussed without prejudice to delegations' positions as to whether paragraph 4 or paragraph 5 of article 121 of the Rome Statute should apply.

Implications of article 121, paragraph 5, for Security Council referrals

7. The Group first discussed how this sentence would apply to investigations into the crime of aggression based on a Security Council referral. Would it preclude such investigations with respect to States Parties that have not accepted the amendment on aggression, thereby giving them preferential treatment over non-States Parties?

[1] ICC-ASP/6/SWGCA/2.
[2] See appendix I.

8. A number of delegations argued that the sentence must be read in conjunction with other provisions of the Statute. A closer analysis of its context, also taking into account the object and purpose of the Rome Statute, would suggest that it did not apply to Security Council referrals. The reference to "nationals" and "territory" clearly related to the preconditions to the exercise of jurisdiction contained in article 12, paragraph 2: That provision established the bases for jurisdiction for State referrals and *proprio motu* investigations, but not for Security Council referrals. Also, it was argued that there was no reason to consider that sentence as a *lex specialis* with respect to the Statute's provisions on jurisdiction. This would be confirmed by a teleological interpretation: The Security Council would have the competence to refer cases involving the crime of aggression to the Court with respect to non-States Parties, and it would therefore be illogical to preclude that possibility with respect to certain States Parties. Given the role of the Security Council under the Charter with respect to aggression, it would furthermore be particularly unconvincing to argue that the Council had less influence in triggering investigations into the crime of aggression than with respect to other crimes. It was recalled that the sentence had been drafted in Rome as a last-minute compromise, thus providing an additional safeguard for those delegations that had expressed concern about the inclusion of State referrals and *proprio motu* investigations in the Statute. Furthermore, article 121, paragraph 5, dealt with the issue of consent to be bound, which was irrelevant in the context of a Security Council referral. Articles 25 and 103 of the United Nations Charter, as well as the wording of any relevant Security Council resolution referring the situation to the Court, were also cited as arguments against such restrictions for Security Council referrals.

9. Other delegations disagreed and pointed out that the language used in the second sentence of article 121, paragraph 5, was strong and specific and that the ordinary meaning of the words contained in that sentence would override other considerations. While this reading may be undesirable from a political perspective, it was nevertheless the only option under the current language of the article.

10. It was generally agreed that the provisions on aggression should not, from a policy perspective, restrict Security Council referrals and should avoid unequal treatment of non-States Parties and States Parties in this respect. It was suggested to clarify the issue in order to remain on the safe side and prevent future legal challenges, as well as the possible conclusion by the Court in a relevant case that it had no jurisdiction. This could be done by way of an amendment to article 121, paragraph 5, or possibly by other means. Caution was expressed, however, at complications that might arise from the need to choose the correct amendment provision for amending article 121, paragraph 5. Furthermore, it was suggested to make that clarification with respect to all crimes, not just with respect to the crime of aggression. Other delegations were of the view that the current text of article 121, paragraph 5, already allowed for an interpretation that prevented differential treatment.

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

11. The Group then considered the implications of the second sentence of article 121, paragraph 5, in the context of State referrals and *proprio motu* investigations. In order to facilitate the discussions, the Chairman submitted an informal illustrative chart [3] outlining the various jurisdictional scenarios that would result from the application of article 121, paragraph 5. A total of nine such scenarios could be devised, depending on whether the aggressor State and the victim State were respectively either (a) a State Party that has accepted the amendment, (b) a State Party that has not accepted the amendment, or (c) a non-State Party.

12. As illustrated in the chart, the second sentence of article 121, paragraph 5, mainly raises questions with respect to scenarios 2 and 4. Scenario 2 refers to an act of aggression committed by a State Party that has accepted the amendment, against a State Party that has not accepted the amendment. Scenario 4 refers to the reverse scenario: an act of aggression committed by a State

[3] See appendix II.

Party that has not accepted the amendment, against a State Party that has accepted the amendment. Delegations commented on whether the Court would have jurisdiction in these and in other scenarios if article 121, paragraph 5, was applied, and on whether the Court should indeed have jurisdiction.

13. Some delegations took the view that the clear language of the second sentence had the consequence of preventing the Court's jurisdiction in case of a State referral or *proprio motu* investigation, if the case involved at least one State Party that had not accepted the amendment on aggression. These delegations answered the question of jurisdiction in the chart's scenarios 2 and 4 with "No" and "No". It was argued that the second sentence of article 121, paragraph 5, clearly implied that a double acceptance of jurisdiction by both the aggressor and the victim State was required. It was acknowledged that this could lead to illogical results, and in particular to a differential treatment between non-States Parties on the one hand, and States Parties that have not accepted the amendment on the other. A victim State that has accepted the amendment would enjoy better protection in case of aggression by a non-State Party than in case of aggression by a State Party that has not accepted the amendment (compare scenarios 4 and 7). And in case of aggression committed by a State Party that has accepted the amendment, a victim State that is not party to the Rome Statute would enjoy better protection than a State Party that has not accepted the amendment (compare scenarios 2 and 3). The delegations advocating for this reading were of the view that the consequences of this reading were undesirable and that a differential treatment should be avoided.

14. Some delegations argued that the Court had jurisdiction in scenarios 2 and/or 4; otherwise there would be discrimination between non-States Parties and States Parties, there would be no incentive to accept the amendment, and victim States would be punished. Some delegations noted that their affirmative answer to scenario 2 was the consequence of the Court's jurisdiction on the basis of the nationality of the alleged offender. It was argued that the second sentence of article 121, paragraph 5, had to be interpreted in light of the object and purpose of the Rome Statute. In this context, it was held that article 121, paragraph 5, applied only to amendments to crimes that were already defined; a literal interpretation of its second sentence was thus not the best solution.

15. While it was understood that the discussion on this topic was preliminary, there was a strong view that the application of article 121, paragraph 5, should not lead to differential treatment between non-States Parties and States Parties that have not accepted the amendment on aggression with respect to State referrals and *proprio motu* investigations. Some delegations suggested that a clarification in the amendment was needed in order to ensure the desired outcome. In this context, some delegations emphasized the advantages of using article 121, paragraph 4, instead of paragraph 5.

16. In the course of the above discussion, the question was raised whether the crime of aggression was usually committed on the territory of the aggressor State or the victim State, or both. The answer to that question, which was considered by the Group separately (see paragraphs 28 to 29 below), had important ramifications for the issue under consideration. Nevertheless, the discussion was largely held on the preliminary assumption that the crime of aggression typically takes place on both territories.

Right of future States Parties to choose to be bound by an amendment on aggression

17. Still in the context of article 121, paragraph 5, the Group revisited the question whether States that become Parties to the Rome Statute after the entry into force of amendments on aggression (future States Parties) would have a choice to accept the amendment on aggression or not, or whether it would apply to them automatically. There was a strong view that future States Parties should be offered that choice if indeed article 121, paragraph 5, were to be applied and the same choice was given to current States Parties. Some delegations took the view that no provision was needed in this respect, since article 40, paragraph 5, of the Vienna Convention on the Law of Treaties provided a clear default rule. Under general rules of international law, the application of

article 121, paragraph 5, would therefore create an opt-out procedure for future States Parties. Other delegations nevertheless suggested to include specific language on this issue. In this context, some delegations reiterated their preference for article 121, paragraph 4, which would provide for equal treatment between current and future States Parties. They emphasized that the application of article 121, paragraph 4, would avoid creating different categories of States Parties and ensure that the crime of aggression was treated on an equal footing with the other crimes. They expressed the view that a unified regime would be desirable from a policy perspective.

Separating the acceptance of the definition from the acceptance of jurisdiction

18. With respect to both amendment provisions (paragraphs 4 and 5 of article 121), the Chairman raised the question whether agreement might be more easily achieved if a State Party's acceptance of the substantive definition of aggression was separated from a State Party's acceptance of the Court's jurisdiction over that crime. There was, however, no support for an approach that would apply different amendment provisions to the different parts of the overall amendment on aggression.

19. In this context, the idea of a declaration of consent to the exercise of jurisdiction was raised. Such a declaration could be given upon ratification of the amendment on aggression or at a later stage. It was pointed out that such an instrument could bridge the gap between paragraphs 4 and 5 of article 121. The amendment, covering both the definition and the conditions for the exercise of jurisdiction, would enter into force in accordance with only one amendment provision, namely article 121, paragraph 4. At the same time, a declaration of consent by the State Party concerned would be required for the Court to exercise jurisdiction based on State referrals and *proprio motu* investigations. There was limited discussion of this idea. It was pointed out that this approach would be complicated and would affect the automatic jurisdiction as currently foreseen in the Statute. Nevertheless, it was also indicated that such an approach might facilitate the acceptance of an amendment.

III. Conditions for the exercise of jurisdiction

20. The Chairman suggested that delegations not revisit past arguments and preferences regarding the conditions for the exercise of jurisdiction that are comprehensively reflected in previous reports of the Group and the 2008 Chairman's paper. Instead, delegations were encouraged to focus on new elements and ideas to bridge the gap.

The "red light" proposal

21. Delegations continued the consideration of the so-called "red light" proposal. The proposal, as initially referred to in paragraph 47 of the Group's report of June 2008, would allow the Security Council to decide to stop an ongoing investigation into a crime of aggression.[4] Furthermore, a provision was added to the revised version of the proposal allowing for a review of such a decision on the basis of new facts, similar to the admissibility review in article 19 of the Rome Statute.[5] It was explained that such a provision would be in line with article 2 of General

[4] The proposal reads: "3 bis. 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, for the purpose of the Statute, 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."

[5] The proposal reads: "3 ter. 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."

Assembly resolution 3314 (XXIX). It would also be different from article 16 of the Statute, which provided for a suspension of the investigation for a limited time only and based on specific political considerations.

22. Overall, there was limited support for the proposal, while some delegations indicated it could be considered at a later stage. The view was expressed that the incorporation of further elements of resolution 3314 (XXIX) might complicate the discussion. Doubts were raised as to whether such a provision, combined with a solution under alternative 2 of the 2008 Chairman's paper, would meet the concerns of those to delegations that favor alternative 1, option 1. It was also observed that article 2 of resolution 3314 (XXIX) was intended for a fundamentally different context. Some delegations saw little value added in comparison with article 16 of the Rome Statute, which was sufficient to enable the Security Council to suspend an investigation into a crime of aggression. Indeed, article 16 could be used to suspend an investigation for reasons contemplated in article 2 of resolution 3314 (XXIX). Given the difficult compromise reached in Rome regarding article 16, caution was expressed against designing a similar mechanism and creating an additional competence for the Security Council under the Statute. Some delegations reiterated their preference for a fully independent Court and considered the proposal incompatible with their position. In this context, it was criticized that the final sentence of the amended proposal contemplated a substantive determination of aggression by the Security Council as a pre-condition for the exercise of jurisdiction.

23. Some delegations argued that the "red light" proposal envisaged a useful dialogue between the Security Council and the Court, which was enhanced by the review procedure, thus going beyond the mechanism contained in article 16. The view was expressed that the proposal simply reflected the existing powers of the Security Council, while enabling the Court to work efficiently. The Court would not have to wait for the Security Council to make a determination of aggression before commencing its work. Nevertheless, this might lead to a situation where the Court would find that an act of aggression has occurred, followed by a contrary determination by the Security Council.

Early determination of aggression by the Pre-Trial Chamber or a Special Chamber

24. In the context of alternative 2, option 2, contained in draft article 15 bis of the 2008 Chairman's paper, the Chair invited delegations to consider the usefulness of providing that the Pre-Trial Chamber, or alternatively a Special Chamber of B-list judges, would have to make a substantive determination that an act of aggression has occurred before the Prosecutor continues with the investigation and a request for an arrest warrant. Such a provision would be in line with alternative 2, options 3 and 4, as both require a substantive determination to be made at an early stage of the investigation. This would create stronger checks or an additional filter on the Prosecutor's action as compared to the role of the Pre-Trial Chamber in article 15, paragraph 4, of the Rome Statute.

25. There was only limited discussion of the suggestion. The view was expressed that the proposed filter would be acceptable, but that it should preferably involve all judges of the Pre-Trial Division. Other delegations recalled their opposition to alternative 2, option 2, and therefore did not wish for additional mechanisms at such an early stage of the investigation. A suggestion reflected in paragraph 46 of the Group's report of June 2008 was recalled, namely to shorten alternative 2, option 2, to read simply "in accordance with article 15".

Technical amendments to draft article 15 bis

26. Following up on suggestions raised in the June 2008 meeting of the Group,[6] the Chairman submitted two proposals for additional language to draft article 15 bis of the 2008 Chairman's paper for inclusion in an updated version of that paper. The proposals were intended to clarify related issues on which agreement had already been reached in previous meetings and which were already implied in the current draft. Delegations did not provide any further comments on their wording. The following paragraphs would thus be added to draft article 15 bis:

> *"2 bis. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression."*
>
> *"3 bis. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's determination of an act of aggression under this Statute."*

IV. Definition of the "crime" and the "act" of aggression

27. In light of the considerable progress made on the definition of the "crime" and of the "act" of aggression, and given that the views of delegations on these issues are comprehensively reflected in paragraphs 17 to 36 of the Group's report of June 2008, the Chairman suggested to focus on new issues and ideas.

The leadership crime of aggression and territoriality

28. The Group discussed the implications of the leadership nature of the crime of aggression for the question of territorial jurisdiction under article 12, paragraph 2 (a) of the Rome Statute. Given that the conduct of a leader responsible for the crime of aggression would typically occur on the territory of the aggressor State, the question was raised whether the crime could also be considered to be committed where its consequences were felt, namely on the territory of the victim State. The answer to that question had important consequences for the application of article 12, paragraph 2 (a), which linked the Court's jurisdiction to "the State on the territory of which the conduct in question occurred". 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, while some delegations required more time to consider the issue. While some delegations expressed the possible need for clarifying language, possibly in the elements of crime, several stated that the Rome Statute was sufficiently clear and that "over-legislating" should be avoided. The reference to "conduct" in article 12 encompassed also the consequences of the conduct. The decision of the Permanent Court of International Justice in the *Lotus* case supported this reasoning. It was also held that the issue should be left for the judges to decide. Furthermore, the drafters of article 12 intended for it to be consistent with article 30, which referred to conduct, consequences and circumstances. Some delegations questioned the need to address this issue with respect to the crime of aggression and emphasized that the issue could also arise in connection with other crimes. It was argued that for all crimes under the Rome Statute, territorial jurisdiction extended to the territory where the impact of the act was experienced. War crimes, for example, could also give rise to cross-border scenarios, such as in the case of the shooting of civilians from across a State border. Introducing a specific provision on territoriality with respect to aggression would bear the risk that an *a contrario* reasoning would be applied to other crimes.

29. The definition of individual conduct was also referred to in this discussion. The reference to "execution" was cited as possibly covering both aggressive conduct and its consequences. Furthermore, the phrase "planning, preparation, initiation or execution" was used mainly for historical reasons; and while it was not ideal in this regard, a modern understanding of territorial jurisdiction would render it unnecessary to add clarifying language to the Rome Statute.

[6] See paragraphs 39 and 41 of the Group's report of June 2008.

V. Elements of crimes

30. The Group followed up on its previous discussion on the Elements of Crimes, as reflected in paragraphs 49 to 53 of the Group's report of June 2008. The Chair and others drew the Group's attention to paragraph 7 of Resolution F of the Final Act of the Rome Conference[7], which states that the Commission "shall prepare proposals for a provision on aggression, including the definition of Elements of Crimes on aggression ...". That mandate was then conferred to the Special Working Group in paragraph 2 of the resolution of the Assembly of States Parties on "The Continuity of work in respect of the crime of aggression".[8] The Chairman asked for comments on the timing of the drafting and adoption of the Elements. He also drew attention to the question whether article 9 of the Statute needed to be amended.

31. In general, delegations favored the adoption of Elements of Crimes for the crime of aggression, while some indicated that Elements were not needed, but also their flexibility in this regard. Views diverged regarding the timing of the drafting and adoption of the Elements. Some delegations expressed concern that the definition of aggression was not sufficiently fixed to merit this effort and preferred to begin drafting after an agreement on a definition. In this context, doubts were expressed whether the Review Conference should adopt Elements. It was also recalled that Elements were not legally binding and would merely assist judges.

32. Other delegations wished to start the drafting process as soon as possible, preferably during the resumed session of the Assembly of States Parties in February 2009, and parallel to the Group's efforts to define the crime of aggression. They recalled the mandate of the Working Group, based on resolution F of the Rome Conference, and expressed the view that the Review Conference should adopt the Elements of Crimes. It was felt that the definition of aggression was sufficiently settled in certain aspects to make the drafting effort worthwhile. Furthermore, a draft set of Elements might deepen the Group's understanding of the current draft definition of aggression, add necessary details to it and even allay concerns that arise from it. It was pointed out that the usual structure of Elements included issues relating to conduct, consequences, circumstances as well as so-called contextual circumstances. The latter could for example include jurisdictional elements, such as the question of territorial jurisdiction. Caution was expressed, however, that the Group should not look to the Elements as a panacea for resolving possible disagreements regarding the definition.

33. It was noted that the Court could exercise jurisdiction over the crime immediately following the adoption of provisions on aggression by the Review Conference, in particular in case article 121, paragraph 5, was chosen to govern the entry into force of the amendment. The adoption by the Review Conference would give the Court subject-matter jurisdiction over the crime in accordance with article 5, paragraph 2, of the Rome Statute, and would enable the Security Council with immediate effect to refer a situation to the Court that includes an act of aggression (see also paragraph 38 below). Therefore, the Elements should be drafted early and, if possible, be adopted together with the amendment on aggression.

34. There was general agreement that article 9 of the Statute ("Elements of Crimes"), would have to be amended to refer to the crime of aggression. It was suggested to either add a reference to article 8 bis to this provision, or to replace the phrase "articles 6, 7 and 8" with a general reference to "crimes within the jurisdiction of the Court". The view was expressed that the latter option would be helpful in the event that other crimes were to be added to the Statute at a later stage.

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

[8] *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.

VI. Preamble and final clauses

35. The Chair indicated that the draft amendment on aggression would require a preamble as well as final clauses, which would be added at a later stage, and invited delegations to discuss some of the elements that they expect to be contained therein. The discussion focused mainly on the question whether a minimum number of ratifications should be required before the amendment on aggression would enter into force, if article 121, paragraph 5, was applied to that amendment.

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

36. Some delegations pointed out that article 121, paragraph 5, does not provide for a minimum number of ratifications and that there was therefore no need for such a requirement. This was consistent with the fact that the obligations would not be reciprocal among States Parties, but would arise between the Court and the State Party concerned. A single ratification of the amendment could therefore activate the Court's subject-matter jurisdiction over the crime of aggression. It was recalled that several States had become parties to the Rome Statute precisely because they understood that the subject-matter jurisdiction of the Court over the crime of aggression would be activated relatively quickly. It was for this reason that article 121, paragraph 5, did not stipulate a minimum number of ratifications.

37. Some delegations expressed interest in requiring a minimum number of ratifications for the entry into force of the amendment on aggression. This was thought to be consistent with international treaty law and practice and would avoid a situation where only a single ratification of the amendment on aggression would activate the Court's jurisdiction with respect to Security Council referrals.

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

38. In the context of this discussion, the point was made that the Court's exercise of subject-matter jurisdiction over the crime of aggression would not begin with the ratification and entry into force of the amendment under either paragraphs 4 or 5 of article 121. Instead, and in accordance with article 5, paragraph 2, and article 121, paragraph 3, of the Statute, the Court would in principle be able to exercise such subject-matter jurisdiction once the amendment was adopted at the Review Conference. As from that moment, the Court could take up investigations into the crime of aggression based on a Security Council referral. However, State Party referrals and *proprio motu* investigations would still require the relevant consent to be bound under either paragraphs 4 or 5 of article 121. Other delegations, however, based their comments on the understanding that the Court could only take up Security Council referrals after the entry into force of the amendment under either paragraphs 4 or 5 of article 121.

Other issues relating to the final clauses

39. Also in the context of the discussion on final clauses, the point was raised that amendments to both paragraphs 4 and 5 of article 121 could be considered in order to provide for the appropriate entry into force mechanism for the amendment on aggression. Furthermore, it was suggested that the final clauses of the amendment could include provisions regarding the entry into force, as long as they were not inconsistent with paragraphs 4 or 5 of article 121. For example, stipulating a minimum number of ratifications in the final clauses to the amendment on aggression would not be excluded by article 121, paragraph 5. Furthermore, article 121, paragraph 4, might seem to allow a final clause providing that the amendment would enter into force for each States Party that has ratified it, as long as it enters into force for <u>all</u> States Parties after 7/8 have ratified it. Nevertheless, doubts were expressed whether the final clauses could vary or add anything to the regime of entry into force provided by article 121.

40. The view was expressed that whilst article 121, paragraphs 4 and 5 appeared to be mutually exclusive, any difficulties could be overcome by appropriate drafting. Some considered that paragraphs 4 and 5 were complementary. However, others were of the view that the application of paragraphs 4 and 5 were mutually exclusive. Viewed this way, it might be possible for different provisions on aggression to enter into force pursuant to different procedures. However, if the jurisdiction provisions on aggression were to enter into force under article 121, paragraph 4, while the definition was adopted under paragraph 5, the Court would likely be unable to exercise its jurisdiction in respect of State referrals and *proprio motu* investigations for a very long period.

41. Some delegations stressed that the final approach taken in the final clauses and with respect to the entry into force of the amendment should allow States Parties that did not agree with the amendment to remain Party to the Statute, rather than have to withdraw from it. It was also suggested that the final clauses should specify that the amendments shall apply prospectively.

VII. Future work of the Special Working Group

42. It was suggested that the time available between the conclusion of the Special Working Group on the Crime of Aggression and the Review Conference should be used for further consultations and to intensify efforts to find compromises on the outstanding issues, in accordance with the relevant provisions of the draft rules of procedure of the Review Conference. For these purposes, it would be beneficial to have another informal inter-sessional meeting in Princeton where the Group had met inter-sessionally with great success in the past.

43. This proposal found strong support among delegations, and it was generally agreed that additional meeting time on the issue of aggression was needed and that an informal meeting in Princeton could serve a useful purpose in this respect. The view was expressed that such a meeting should be conducted, if possible, in the two working languages of the Court in order to facilitate the largest possible participation. The point was also made that a venue other than Princeton may be preferable, given the travel restrictions faced by some delegations.

44. It was agreed that the Chairman of the Group would hold consultations on the possibility of such an informal meeting on aggression open to all interested States, taking into account all issues raised in the course of the discussion. This would then enable the Group to make a decision on this suggestion during the resumed seventh session of the Assembly of States Parties in February 2009.

Appendix I

Informal note on the work programme

The Chairman of the Special Working Group on the Crime of Aggression would like to draw the attention of all delegations to the report of the June 2008 session of the Group (ICC-ASP/6/20/Add. 1, annex II) and the provisional work programme of the seventh session of the Assembly of States Parties. In order to facilitate the preparation for the substantive work of the Group, the Chairman would like to suggest a number of issues on which the Group could usefully focus its work during this session. This list is subject to change depending on the progress in the discussions and without prejudice to other topics which delegations may wish to raise.

1. Procedure for entry into force of amendments on aggression

It is suggested to deepen the discussion on the procedure for the entry into force of amendments on aggression. In particular, the scenario of applying article 121, paragraph 5, raises a number of questions that need to be addressed, inter alia:

(a) What are the consequences of **article 121, paragraph 5, *second sentence*** for the crime of aggression? How would this sentence apply to investigations into the crime of aggression based on a Security Council referral? How would this sentence affect non-States Parties as compared to States Parties that have not accepted an amendment on aggression? How does this sentence affect the Court's jurisdiction in case of aggression against a State Party having accepted an amendment on aggression, committed by a State Party that has not accepted an amendment on aggression, or committed by a non-State Party?

(b) Will current non-States Parties that become party to the Rome Statute after the entry into force of an amendment on aggression be able to choose to be bound by an amendment on aggression or not? (**Opt-in for non-States Parties**; cf. article 40 of the Vienna Convention on the Law of Treaties) Is a separate provision on this issue needed?

Under both scenarios (article 121, paragraphs 4 or 5), would a provision be useful that would **separate** the acceptance of the **substantive amendments** on aggression from the acceptance of the Court's **jurisdiction**? Such a provision could, for example, require a declaration of consent to the exercise of jurisdiction by the State concerned, to be given upon ratification of the amendment on aggression or later. Such a provision could arguably only be required in case of article 13 (a) and (c).

2. Conditions for the exercise of jurisdiction

It is suggested not to re-enter into past arguments that are comprehensively reflected in the various alternatives and options contained in draft article 15 bis (3). Instead, delegations might want to focus on new elements and ideas to bridge the gap:

(a) The idea of an additional procedural element that would allow the Security Council to effectively stop an investigation into the crime of aggression ("**red light**"), in combination with a solution under alternative 2 (allowing the Court to proceed under certain circumstances even in the absence of a Security Council determination of aggression). Cf. paragraph 47 of the June 2008 report of the Group.

(b) In the context of alternative 2, option 2, it could be discussed whether it would be useful to change this provision or add a provision to the effect that the Pre-Trial Chamber (or e.g. a **Special Chamber** of judges, such as a Chamber composed of five B-list judges) would have to make a substantive determination that an act of aggression

has occurred, before the Prosecutor continues with the investigation and a request for an arrest warrant. This would bring this option in line with alternative 2, options 3 and 4, both of which require a substantive determination of aggression at an early stage of the investigation, placing stronger checks on the Prosecutor's actions.

(c) Delegations might wish to raise **other jurisdictional options** which could serve as a basis for compromise, in addition to those already contained in the Chairman's paper.

Furthermore, delegations might want to further discuss some of the suggestions made during the last meeting of the Group relating to draft article 15 bis that seemed to garner significant support:

(a) The suggestion to add language clarifying that the Prosecutor may indeed proceed with his investigation in case of a Security Council determination of aggression (paragraph 39 of the June 2008 report of the Group);

(b) The suggestion to explicitly reflect the principle that any determination of aggression by an organ outside the Court would not be binding for the International Criminal Court (paragraph 41 of the June 2008 report of the Group).

3. Definition of the "crime" and of the "act" aggression

In light of the considerable progress made on the definition of the "crime" and of the "act" of aggression, it is suggested to spend relatively little time on related discussions, and to focus on new issues and ideas.

One such issue arises with respect to the territory on which the "crime" of aggression is typically committed. Given the leadership nature of the crime, the conduct of an individual perpetrator as suggested in draft article 8 bis, paragraph 1 would typically take place on the territory of the aggressor State, while the effect of the conduct would affect the territory of the victim State. What are the consequences for the requirement of territoriality in article 12, paragraph 2 (a), if any? Is an explicit provision required to address this issue?

4. Elements of crime

Previous discussions on the elements of crime should be continued, including the question whether article 9 of the Rome Statute should be amended to refer to the crime of aggression.

5. Preamble and final clauses

The draft amendment on aggression will require a preamble as well as final clauses which will be added at a later stage. Nevertheless, it could be useful to discuss some of the elements that delegations expect to be contained therein, such as the number of ratifications required for entry into force of the amendment (only in case of article 121, paragraph 5), provisions on the opening for signature, withdrawal, etc.

6. Future work of the Special Working Group

Following this session of the Special Working Group, the Group will conclude its work during the resumed seventh session of the Assembly in New York from 9 to 13 February 2009. The follow-up to the Group needs to be discussed, including concrete language on that matter for inclusion in the omnibus resolution. Delegations might also 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 Secretary-General of the United Nations), 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).

Appendix II

Jurisdiction scenarios regarding article 121 (5), *second sentence*[1]

In order to facilitate the discussion regarding 121, paragraph 5, second sentence, the table below attempts to illustrate the scenarios under which the Court would have jurisdiction over the crime of aggression (CoA), triggered by a **State Party referral** or by the **Prosecutor *proprio motu*** (article 13 (a) and (c) of the Rome Statute).

Furthermore, the table does not refer to the possibility for any non-State Party to accept jurisdiction over the crime of aggression *ad hoc* in accordance with article 12, paragraph 3, of the Rome Statute. In this context, the question could be raised whether this possibility is also open to States Parties that have not accepted the amendment on aggression, give the fact that article 12, paragraph 3, only refers to non-States Parties.

The conclusions contained in the table (yes/no) are only intended to stimulate the discussion and do not reflect any common position in the Group.

Article 121 (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."*

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

[1] Illustrative chart submitted by the Chair to facilitate discussion.

Annex IV

Statement by the Hon. Fredrick Ruhindi, Deputy Attorney General/ Minister of State for Justice and Constitutional Affairs of the Republic of Uganda at the sixth meeting of the Assembly, on 20 November 2008

I am grateful for the opportunity granted to make a few remarks in addition to our national statement which was made at the beginning of this session.

My remarks will be limited to the issues pertaining to the Review Conference.

Distinguished Delegates,

Based on solid belief and confidence in the ICC and its mission, Uganda made the first ever state referral to the ICC. Although the warrants of arrest are still outstanding due to reasons beyond our control, we are hopeful that with appropriate regional and international efforts, the desired objective will ultimately be achieved.

As the first State Party to ever make a referral and to offer yet-to-be-matched cooperation to the Court, Uganda stands out as a staunch and proven supporter, promoter and partner of the ICC and its mission.

I would like to reiterate that in its continued efforts to support and promote the ICC and its mission, Uganda has ratified the Agreement on Privileges and Immunities of the Court (APIC). The Instrument of Ratification will be deposited in New York as the national process of ratification has been completed.

At the same time the Uganda Parliament is poised to conclude its consideration of the ICC Bill. I am pleased to report that most of the hurdles that initially slowed down its domestication have now been overcome. My Office is actively seized of this matter to ensure its expeditious finalization.

Distinguished Delegates,

Holding the Review Conference in Uganda presents an opportunity to focus attention on the Rome Statute in the Great Lakes Region where the ICC is most active. Uganda being at the heart of the Great Lakes Region affords a chance to the stakeholders, including State Parties and the vibrant civil society organizations, but most importantly the thousands of victims in this region, to participate in this major outreach event. Considerable debate has been going on about the role of the ICC. The Review Conference offers a great opportunity for better understanding of the importance of the ICC and its mission. Holding the Review Conference in Uganda will enable the Court to be better appreciated by the people to whom it matters most. Fully aware of the important role civil society, in particular the Coalition for the ICC, plays in outreach and other activities of the Court, Uganda intends to work towards broad participation of civil society.

My Foreign Minister will be prepared to formally confirm the binding nature of the contemplated Memorandum of Understanding with regard to the application, mutatis mutandis, of APIC in relation to the preparation for and attendance of the Review Conference.

Distinguished Delegates,

Uganda continues and will continue to play her constructive role in promoting the universality of the Rome Statute, as it has done through the ratification of APIC and commits to do through the expeditious enactment of the implementing legislation. Uganda will actively, through all available means, spread this message to other States Parties.

Allow me to reiterate that in Uganda, the ICC will always have a steadfast, reliable, unwavering and committed partner. On behalf of the Government and people of Uganda I welcome you all to the Pearl of Africa.

Annex V

List of documents

Plenary

ICC-ASP/7/1	Provisional agenda
ICC-ASP/7/1/Add.1/Rev.2	Annotated list of items included in the provisional agenda
ICC-ASP/7/2	Provisional agenda
ICC-ASP/7/3	Report of the Committee on Budget and Finance on the work of its tenth session
ICC-ASP/7/4	Report on appropriate resources for financial investigations under the Court's legal aid programme
ICC-ASP/7/5	Report of the Court on options for outsourcing translation work
ICC-ASP/7/6	Report of the Court on Human Resources, Development of a Human Resources Strategy: Progress Report
ICC-ASP/7/7	Report on budget performance of the International Criminal Court as at 31 March 2008
ICC-ASP/7/8	Report on programme performance of the International Criminal Court for the year 2007
ICC-ASP/7/8/Add.1	Report on programme performance of the International Criminal Court for the year 2007 – Addendum
ICC-ASP/7/8/Add.2	Report on programme performance of the International Criminal Court for the year 2007 – Addendum
ICC-ASP/7/9	Proposed Programme Budget for 2009 of the International Criminal Court
ICC-ASP/7/9/Corr.1	Proposed Programme Budget for 2009 of the International Criminal Court - Corrigendum
ICC-ASP/7/9/Corr.2*	Proposed Programme Budget for 2009 of the International Criminal Court - Corrigendum
ICC-ASP/7/9/Corr.3	Proposed Programme Budget for 2009 of the International Criminal Court - Corrigendum
ICC-ASP/7/10	Financial statements for the period 1 January to 31 December 2007

ICC-ASP/7/10/Corr.1	Financial statements for the period 1 January to 31 December 2007 - Corrigendum
ICC-ASP/7/11	Trust Fund for Victims financial statements for the period 1 January to 31 December 2007
ICC-ASP/7/12	Interim report on different legal aid mechanisms before international criminal jurisdictions
ICC-ASP/7/13	Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2007 to 30 June 2008
ICC-ASP/7/14	Report on budget performance of the International Criminal Court as at 31 August 2008
ICC-ASP/7/15	Report of the Committee on Budget and Finance on the work of its eleventh session
ICC-ASP/7/15/Add.1	Report of the Committee on Budget and Finance on the work of its eleventh session - Addendum
ICC-ASP/7/15/Add.2	Report of the Committee on Budget and Finance on the work of its eleventh session - Addendum
ICC-ASP/7/16	Report on the Court's use of the Contingency Fund
ICC-ASP/7/17	Proposed supplementary budget - preparatory trial activities - *The Prosecutor v. Jean-Pierre Bemba Gombo*
ICC-ASP/7/18	Report of the Bureau on cooperation
ICC-ASP/7/19	Report of the Bureau on the Plan of action for achieving universality and full implementation of the Rome Statute of the International Criminal Court
ICC-ASP/7/21	Report of the Bureau on geographical representation and gender balance in the recruitment of staff of the International Criminal Court
ICC-ASP/7/22	Report of the Oversight Committee on the permanent premises
ICC-ASP/7/22/Add.1/Rev.1	Report of the Oversight Committee on the permanent premises - Addendum
ICC-ASP/7/23	Report on different legal aid mechanisms before international criminal jurisdictions
ICC-ASP/7/23/Add.1	Comparative legal aid budget for fiscal years 2008 and 2009 in the different international criminal tribunals
ICC-ASP/7/24	Report of the Court on family visits to indigent detained persons

ICC-ASP/7/25	Report on the activities of the Court
ICC-ASP/7/26	Report of the Bureau on the arrears of States Parties
ICC-ASP/7/27	Election of members of the Committee on Budget and Finance
ICC-ASP/7/28	Report of the Bureau on an independent oversight mechanism
ICC-ASP/7/29	Report of the Bureau on the strategic planning process of the International Criminal Court
ICC-ASP/7/30	Report of the Bureau on family visits for detainees
ICC-ASP/7/31	Report of the Bureau on the different mechanisms for legal aid existing before international criminal jurisdictions
ICC-ASP/7/32	Report of the Bureau on the assessment of the Regulations of the Trust Fund for Victims
ICC-ASP/7/L.1	Draft resolution of the Assembly of States Parties on the proposed programme budget for 2009, the Contingency Fund, the Working Capital Fund for 2009, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for the year 2009
ICC-ASP/7/L.2	Draft resolution. Amendment to the Financial Regulations and Rules
ICC-ASP/7/L.3	Draft resolution. Amendment to the Rules of Procedure of the Assembly of States Parties
ICC-ASP/7/L.4	Draft resolution. Amendment to the Rules of Procedure of the Committee on Budget and Finance
ICC-ASP/7/L.5	Draft resolution on the venue of the Review Conference
ICC-ASP/7/L.6	Draft resolution on permanent premises
ICC-ASP/7/L.7	Draft Resolution. Strengthening the International Criminal Court and the Assembly of States Parties
ICC-ASP/7/L.8	Draft report of the Credentials Committee
ICC-ASP/7/L.9	Draft report of the Assembly of States Parties to the Rome Statute of the International Criminal Court

Special Working Group on the Crime of Aggression

ICC-ASP/7/SWGCA/CRP.1	Draft report of the Special Working Group on the Crime of Aggression
ICC-ASP/7/ SWGCA/1*	Report of the Special Working Group on the Crime of Aggression

Working Group on the Programme Budget

ICC-ASP/7/WGPB/CRP.1	Draft report of the Working Group on the Programme Budget for 2009 of the International Criminal Court
ICC-ASP/7/WGPB/1	Report of the Working Group on the Programme Budget for 2009 of the International Criminal Court

Working Group on the Review Conference

ICC-ASP/7/WGRC/INF.1	Interim report of the focal point on the review of the Rome Statute
ICC-ASP/7/WGRC/INF.1/Add.1	Interim report of the focal point on the review of the Rome Statute - Addendum
ICC-ASP/7/WGRC/CRP.1	Draft report of the Working Group on the Review Conference
ICC-ASP/7/WGRC/1	Report of the Working Group on the Review Conference