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**Discussion paper on the crime of aggression proposed by the
Chairman (revision January 2009)****Explanatory note**

1. The revised discussion paper contained in the annex is submitted following the discussions held by the Special Working Group on the Crime of Aggression (SWGCA) during the seventh session of the Assembly of States Parties (14 - 22 November 2008). It is based on the previous discussion paper (2008 Chairman's paper)¹ and takes into account the discussions held since. As in the past, it is prepared without prejudice to the positions of delegations and intended to facilitate the work of the Special Working Group.

2. In accordance with previous decisions of the Assembly, the SWGCA will have to complete its work at the second resumption of the seventh session of the Assembly (9-13 February 2009). This version of the discussion paper will serve as the basis for the final outcome of the SWGCA, and is therefore presented in a manner which should allow the SWGCA to adopt a as clean text as possible to be forwarded to the Assembly of States Parties.

3. The discussion paper contains a very limited set of changes as compared to the previous version. Given the nature of this paper, all footnotes have been removed from the text. Draft article 15 bis has been renumbered and includes two new technical additions (paragraphs 3 and 5), dealing with issues on which agreement had already been reached in previous meetings and which were already implied in the previous version of the discussion paper.² It is understood that the Review Conference would adopt the amendment on aggression as an annex to an enabling resolution. A short draft for such a resolution is provided in the Chairman's paper. At a later stage, preambular language could be inserted, as well as other operative paragraphs as needed. The amendment clause dealing with the question of entry into force is contained in the draft resolution, in order to limit the annex to the actual amendment to the Rome Statute.

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Resumed sixth session, New York, 2-6 June 2008* (International Criminal Court publication, ICC-ASP/6/20/Add.1), annex II, appendix.

² See SWGCA November 2008 report, paragraph 26, in: *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session, The Hague, 14-22 November 2008* (International Criminal Court publication, ICC-ASP/7/20), vol. I, annex III.

Draft resolution
(to be adopted by the Review Conference)

The States Parties to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”),

(Insert preambular paragraphs)

1. *Decide to adopt the amendments to the Statute contained in the annex to the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute;*

(Add further operative paragraphs as needed)

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

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

Article 8 bis
Crime of aggression

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

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;

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

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

Article 15 bis

Exercise of jurisdiction over the crime of aggression

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

Option 1 – end the paragraph here.

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

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

Option 1 – end the paragraph here.

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

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

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

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