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**Review Conference of the Rome Statute**

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**Draft Report of the Working Group on the Crime of Aggression****A. Introduction**

1. The Working Group on the Crime of Aggression held ... meetings on 1, 4, 7 and 8 June 2010. H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (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 have 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. Further operative paragraphs could be added at a later stage, such as a possible review clause. Delegations did not raise specific issues regarding these new elements.

## 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, while some voiced a preference 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 prior* 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 legality as well as 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. Annex 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. Some concern was expressed about 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. It was further argued 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, 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 **further** 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. Annex 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. The point was also made that more time could usefully be spent drafting the Elements of Crimes.

#### **6. Annex III: Understandings regarding the amendments on the crime of aggression**

21. The Chair noted that the draft understandings contained in Annex 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. Delegations were generally 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 Friday, 4 June 2010, the Chair submitted a revised version of the conference room paper. Informal meetings of the Working Group were held on ....

**E. Recommendation**

[to be inserted]

**Annexes**

[to be inserted]

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