

## Annex II

### 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 seven meetings on 2, 3, 4 and 6 June 2008. Ambassador Christian Wenaweser (Liechtenstein) served as Chair of the Special Working Group.
2. The Secretariat of the Assembly of States Parties provided the substantive servicing for the Group.
3. The discussions in the Special Working Group were held on the basis of the revised discussion paper proposed by the Chairman (“2008 Chairman’s paper”).<sup>1</sup> The revised discussion paper was submitted following the discussions held by the Special Working Group during the sixth session of the Assembly of States Parties (30 November to 14 December 2007). It is based on the previous discussion paper (“2007 Chairman’s paper”)<sup>2</sup> and reflects the progress made since.
4. At the first meeting of the Special Working Group, the Chairman introduced the 2008 Chairman’s paper. He recalled that the Group was open to participation by all States on an equal footing, and encouraged an interactive discussion. Delegations were especially encouraged to comment on issues that had not been thoroughly discussed in recent sessions. These included the procedure for entry into force of amendments on aggression; the suggested deletion of article 5, paragraph 2, of the Statute; the application of article 28 of the Statute to the crime of aggression; the suggested inclusion of the text of United Nations General Assembly resolution 3314 (XXIX) as an annex to the Rome Statute; and the Elements of Crimes. While the Chairman drew particular attention to these issues, delegations were invited to comment on all the substantive issues addressed in the 2008 Chairman’s paper.
5. Delegations welcomed the progress made by the Group since the sixth session of the Assembly of States Parties in 2007. The 2008 Chairman’s paper was considered a sound basis for further discussion.

#### II. Procedure for entry into force of amendments on aggression

6. The Group considered the question of the entry into force of the amendments concerning the crime of aggression, namely, whether paragraph 4 or paragraph 5 of article 121 of the Rome Statute should apply. Both alternatives garnered some support, and some delegations indicated their flexibility on this issue pending the outcome of the work on the content of the amendments.
7. There was broad support for the idea that all the amendments dealing with aggression should enter into force pursuant to the same procedure. However, the view was also expressed that draft article 15 bis could, due to its procedural nature, enter into force in accordance with article 121, paragraph 4, while the other amendments could enter into force in accordance with article 121, paragraph 5. Some delegations considered that this would lead to undesirable results, since the definition of aggression would then enter into force earlier than the rules for the exercise of jurisdiction.

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<sup>1</sup>Appendix.

<sup>2</sup>ICC-ASP/5/SWGCA/2, annex.

### **The approach of article 121, paragraph 5 (“opt-in”)**

8. Under this approach, the amendments on the crime of aggression would enter into force only for those States Parties that had accepted them, thus providing for an “opt-in” to the Court’s exercise of jurisdiction over the crime of aggression.

9. It was argued that this approach should be adopted since article 121, paragraph 5, dealt with amendments to the core crimes under the Statute, and referred specifically to article 5 of the Statute, which included the crime of aggression. This procedure should apply to all crimes to be added to the Court’s jurisdiction, as well as amendments to existing crimes. This approach would furthermore respect the sovereign decision of States to be bound by the amendment or not, which in turn would promote the universality of the Rome Statute. The opposite approach, under paragraph 4, could lead to the withdrawal of some States Parties from the Statute, which would be undesirable.

10. It was further cautioned that the procedure in article 121, paragraph 4, might delay the entry into force of the amendments or even prevent the Court indefinitely from exercising jurisdiction over this crime, if just over one-eighth of States Parties failed to ratify the amendment. In turn, the “opt-in” approach would have the advantage that the Court could exercise its jurisdiction immediately regarding those States that accepted the amendment, without having to wait for acceptance by seven-eighths of States Parties.

11. In the context of the “opt-in” approach, the question was raised whether States that became parties to the Rome Statute after the incorporation of the provisions on the crime of aggression into the Statute would have a choice on whether to accept the amendment on aggression, or whether they would have to subscribe to the Statute as amended. The view was expressed that the Statute was ambiguous in this regard, and that the issue would have to be clarified by the Assembly of States Parties. It was also observed that the French wording of the Statute seemed to suggest that the “opt-in” approach would apply to both current and future States Parties. Support was expressed for the “opt-in” approach to apply to all States, as this would best serve the goals of promoting the universality of the Statute and respecting State sovereignty.

12. It was pointed out that the Working Group should consider amending article 121, paragraph 5, of the Statute by adding articles 8 bis and, possibly, 15 bis to the list of articles mentioned in article 121, paragraph 5.

### **The approach of article 121, paragraph 4 (“opt-out”)**

13. According to this approach, once seven-eighths of the States Parties have ratified or accepted an amendment to the Rome Statute, the amendment enters into force for all States Parties at once and binds future States Parties as well. In accordance with article 121, paragraph 6, any State Party that has not accepted the amendment may withdraw from the Statute. It was argued that this approach would guarantee the universal application of the crime of aggression and protect the integrity of the Statute. This approach would also reflect the intentions of the drafters of the Rome Statute in that article 5 of the Statute already provided for jurisdiction of the Court over the crime of aggression; States Parties had already taken a decision to accept the Court’s jurisdiction over the crime of aggression, and it was therefore unwarranted to treat the crime of aggression as a new crime. Furthermore, the amendments proposed would not affect the text of article 5 of the Statute, since they concerned the inclusion of articles 8 bis and 15 bis as separate new articles.

14. It was also noted that the approach under paragraph 5 would create a special regime for the crime of aggression, which should be avoided. Like genocide, crimes against humanity and war crimes, aggression was a core crime recognized in the Statute and under customary international law.

### **III. Suggested deletion of article 5, paragraph 2, of the Rome Statute**

15. While some delegations reserved their position on the question of article 5, paragraph 2, of the Statute, no objection was raised regarding its suggested deletion.<sup>3</sup> It was pointed out that this paragraph would indeed become obsolete after the adoption of a provision on the crime of aggression.

16. The view was expressed that the issue would depend on whether the “opt-in” or “opt-out” approach was applied to the entry into force of the provision on the crime of aggression. It was further suggested that the wording of article 5, paragraph 2, might have to be changed instead of deleted.<sup>4</sup> However, this suggestion was opposed by some delegations on the grounds that it would make the matter unnecessarily complicated.

### **IV. The crime of aggression – defining the individual’s conduct**

#### **Definition of the individual conduct and leadership clause (draft article 8 bis, paragraph 1)**

17. Draft article 8 bis, paragraph 1, in the 2008 Chairman’s paper defines the individual “crime” of aggression. The first part of this paragraph, ending with “act of aggression which”, reflects the progress made in previous discussions regarding the definition of the individual’s conduct, which was brought in line with the Nuremberg precedent, and the leadership clause. This part of the paragraph met with general agreement.

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

18. There was general agreement on the inclusion of draft article 25, paragraph 3 bis, which would ensure that the leadership requirement would not only apply to the principal perpetrator, but to all forms of participation.

#### **Application of article 28 to the crime of aggression**

19. The Special Working Group considered the question raised in the 2008 Chairman’s paper of whether the application of article 28 (responsibility of commanders and other superiors) should be explicitly excluded with respect to the crime of aggression. Article 28 provides for the criminal responsibility of commanders and other superiors for crimes of aggression committed by subordinates whom they failed to effectively control.

20. Some delegations indicated that nothing needed to be done in that respect, since article 28 would in any event never be relevant to the crime of aggression. That crime was typically “actively” committed by leaders under the forms of participation of article 25, paragraph 3, of the Statute, and rarely involved a “passive” superior who could be prosecuted for failure to exercise control over his or her subordinates, as provided for in article 28. If such a situation did indeed occur, for example, in the case of a group of leaders, the application of article 28 should be left to the discretion of the judges. Furthermore, it was recalled that article 28 already applied to the other crimes contained in

<sup>3</sup> Article 5, paragraph 2, reads: “The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

<sup>4</sup> The proposal reads: “2. The Court shall exercise jurisdiction over the crime of aggression  
Option 1: one year after the instruments of ratification or acceptance of the relevant amendments to the Statute have been deposited with the Secretary-General of the United Nations by [seven-eighths] of the States Parties, in accordance with article 121, paragraph 4.  
Option 2: with respect to States Parties which have accepted the relevant amendments to the Statute in accordance with article 121, paragraph 5.”

the Statute and that there was not necessarily a reason to distinguish the crime of aggression in that respect.

21. The view was also expressed that the application of article 28 to the crime of aggression should indeed be excluded, since this article relied upon the mental elements of negligence (regarding military commanders) and recklessness (regarding civilian superiors), whilst the mental element required under draft article 8 bis, paragraph 1, was intent and knowledge. It was agreed, however, that explicit exclusion of the application of article 28 was not indispensable.

## **V. The act of aggression – defining the conduct of the State**

22. The definition of the State act of aggression is contained in draft article 8 bis, paragraph 2, and should be read in conjunction with the threshold clause at the end of draft article 8 bis, paragraph 1, linking the State act of aggression to the individual crime of aggression.

### **Qualifying the act of aggression (threshold clause in draft article 8 bis, paragraph 1)**

23. The threshold clause in article 8 bis, paragraph 1, of the 2008 Chairman's paper would limit the Court's jurisdiction to cases where the act of aggression "by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

24. Delegations supporting this threshold clause noted that it would appropriately limit the Court's jurisdiction to the most serious acts of aggression under customary international law, thus excluding cases of insufficient gravity and falling within a grey area. This approach would garner the widest possible support for the definition of the crime of aggression, which was necessary for achieving universality.

25. Other delegations expressed flexibility on the threshold clause. They did not object to its language, but considered that it would not add much to the Statute. A gravity threshold applicable to all crimes already existed in the Statute, namely, in the preamble and in articles 1, 5 and 17.

26. Other delegations suggested deletion of the threshold clause. They argued that any act of aggression was grave and constituted a manifest violation of the Charter of the United Nations. It was therefore inconsistent to exclude certain acts of aggression from the Court's jurisdiction for lack of gravity or sufficient scale. Furthermore, the threshold clause was too ambiguous in its wording and might be subject to broad interpretation.

27. It was further observed that the clause in article 8 bis, paragraph 1, contained a higher threshold by referring to a "manifest violation of the United Nations Charter", compared to the definition of the State act of aggression in article 8 bis, paragraph 2, which referred to the use of armed force in a "manner inconsistent with the Charter of the United Nations". It was suggested that these two provisions should be harmonized in order to avoid complications. It was also noted that the existence of both thresholds would complicate the drafting of the Elements of Crimes. In this context, the suggestion was made that the phrase "For the purpose of paragraph 1" should be deleted from the beginning of paragraph 2, and a reference to General Assembly resolution 3314 (XXIX) should be inserted in its place. The reference to General Assembly resolution 3314 (XXIX) should be deleted from the second sentence of paragraph 2.

28. A proposal was also made to delete the threshold clause from paragraph 1, combined with a shorter paragraph 2 containing a reference to United Nations General Assembly resolution 3314 (XXIX) as a whole.<sup>5</sup> Some delegations opposed this proposal and expressed the opinion that it did not take into account the progress made on this question over the last few years and would therefore constitute a significant step back in the work of the Group. Although views had differed on the need for a threshold, a critical mass of delegations had, over the years, decided in favour of its inclusion. Its removal would constitute a fundamental change to the definition of aggression for the purposes of the Statute. Delegations supporting the proposal stressed that the crime of aggression should be incorporated into the Statute in a systematic rather than piecemeal manner. Removing the threshold clause advanced that objective.

29. In connection with the discussion on the threshold clause in paragraph 1, a number of delegations called for the deletion of footnote 3 of the 2008 Chairman's paper. This footnote reflects a proposal to add the following phrase to draft article 8 bis, paragraph 1, further describing the act of aggression: "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof." The opposite view, however, was also expressed by those who called for its inclusion in the 2008 Chairman's paper.

### **The reference to General Assembly resolution 3314 (XXIX) in draft article 8 bis, paragraph 2**

30. The wording of draft article 8 bis, paragraph 2, defining the State act of aggression was generally considered a step in the right direction as compared to the previous version contained in the Chairman's non-paper of 2007.<sup>6</sup> A number of arguments raised<sup>7</sup> in the discussion of that paper, in particular regarding the nature of the reference to resolution 3314 (XXIX) and the nature of the list of acts, were repeated in the context of the discussion on the 2008 Chairman's paper.

31. Some delegations considered draft article 8 bis, paragraph 2, to constitute the best possible compromise, as it fulfilled several requirements: it was precise enough to respect the principle of legality; it covered only the most serious crimes; it was sufficiently open to cover future forms of aggression; and it was clearly understood that this definition only served the purpose of individual criminal responsibility under the Rome Statute. The Security Council and other organs thus remained free to continue to apply their own standards to the crime of aggression. The reference to resolution 3314 (XXIX) was considered appropriate, as that resolution was a carefully negotiated instrument that reflected current customary international law.

32. Some delegations stated that the purpose of General Assembly resolution 3314 (XXIX) was to provide guidance to the Security Council in its determination of acts of aggression and some therefore preferred not to refer to it specifically. Furthermore, the current reference appeared to import all provisions of the resolution, including articles 2 and 4, into the Statute. This might, in effect, allow the Security Council to create new types of acts of aggression for the purpose of the Statute, thereby infringing on the prerogatives of States Parties. In this context, it was observed that article 6 of the Statute, while incorporating its definition of genocide, did not refer specifically to the Genocide Convention.

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<sup>5</sup> The proposal reads: "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. 2. '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 in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974."

<sup>6</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex III, appendix IV.

<sup>7</sup> *Ibid.*, annex II.

33. A proposal was recalled to add the word “unlawful” before the phrase “use of armed force” in draft article 8 bis, paragraph 2. This was intended to make clear that not all uses of armed force constituted aggression, in particular, in case of self-defence. Some participants objected to this suggestion, stressing that the wording of General Assembly resolution 3314 (XXIX) should not be changed.

#### **The nature of the list of acts in draft article 8 bis, paragraph 2**

34. Some delegations observed that it was not sufficiently clear whether the list was an “open” or “closed” list. Those delegations that supported the drafting of paragraph 2 expressed their understanding that the list of crimes was, at least to a certain extent, open. Acts other than those listed could thus be considered acts of aggression, provided that they were of a similar nature and gravity to those listed and would satisfy the general criteria contained in the chapeau of paragraph 2. In this connection, it was stressed that the right balance had been struck in the Chairman’s paper by including a generic definition in the chapeau of paragraph 2, along with the non-exhaustive listing of acts of aggression. Furthermore, article 22, paragraph 2, of the Statute had to be applied in the interpretation of this provision, requiring that the definition of a crime be strictly construed.

35. Some delegations expressed concern that the current wording was restricted to the use of armed force, thus excluding non-conventional measures of warfare, such as economic embargoes or cyber attacks. A proposal was recalled that included references to financial and/or commercial restrictions and other forms of attacks that could affect the political or economic stability or exercise of the right to self-determination or violate the security, defence or territorial integrity of one or more States.<sup>8</sup>

36. It was also recalled that, at the sixth session of the Assembly, a proposal had been made to add a subparagraph at the end of the list that would read: “Any other act of a similar character which the Security Council determined under article 4 of resolution 3314 (XXIX) to have constituted an act of aggression.”<sup>9</sup>

## **VI. Inclusion of General Assembly resolution 3314 (XXIX) as an annex to the Statute**

37. There was general agreement not to include the text of General Assembly resolution 3314 (XXIX) as an annex to the Statute. The inclusion was deemed to be redundant since draft article 8 bis was a sufficient basis for the definition. It was observed that the legal status of such an annex would be unclear, in particular when taking into account the different legal nature of a resolution adopted by the General Assembly and a multilateral treaty with binding effect. Furthermore, there were no precedents for including such an annex in a multilateral treaty. Some delegations indicated their flexibility on this question, without, however, advocating the inclusion of General Assembly resolution 3314 (XXIX) as an annex to the Statute.

## **VII. Conditions for the exercise of jurisdiction**

### **Early stages of the investigation**

38. In the discussion on draft article 15 bis of the Chairman’s paper, there was general agreement on the wording of paragraph 1, which states that an investigation into a crime of aggression can be triggered by all three existing mechanisms in article 13 of the Statute (State referral, Security Council referral, initiation of an investigation by the Prosecutor *proprio motu*).

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<sup>8</sup> ICC-ASP/6/SWGCA/WP.1.

<sup>9</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex II, paragraph 21.

39. There was also wide agreement on the wording of paragraph 2, with some questions being raised and suggestions made. According to this paragraph, the Prosecutor, having concluded that there was a reasonable basis to proceed with the investigation, would have to ascertain whether the Security Council had made a determination of an act aggression and notify the Secretary-General of the United Nations of the situation before the Court. It was suggested that language should be added making clear that the Prosecutor might indeed proceed with his investigation in case such a determination existed. While this was already implied in the current wording of draft article 15 bis, it would be beneficial to make it explicit. Following a preliminary discussion, a revised wording was suggested for a new paragraph 2 bis: "If the Security Council has made such a determination, the Prosecutor may proceed with the investigation." There was general agreement to include this language in the discussion paper, on the understanding that this would not preclude the Prosecutor from proceeding under alternative 2 in case the Security Council did not make a determination of aggression. Furthermore, it was suggested that changing the sequence of the sentences in draft article 15 bis, paragraph 2, would make the provision clearer, without changing its content.

40. It was further suggested that the required format of the Security Council's determination of aggression should be specified under this paragraph, similar to the requirement for a Chapter VII resolution in alternative 1, option 2, and article 13 of the Statute. However, the view was also held that a Chapter VII resolution was not required under alternative 1, option 2.

41. It was also recalled that the Special Working Group had in the past already agreed that any determination of aggression by an organ outside the Court would not be binding for the purpose of individual criminal prosecution.<sup>10</sup> It was suggested that this important consideration should be explicitly reflected in the text.

42. A question was raised as to the sequence of the procedural steps to be undertaken according to draft article 15 bis, paragraph 3, in relation to the procedural steps required under articles 18 and 53 of the Statute. They appeared to be overlapping.

### **Procedural alternatives and options in the absence of a Security Council determination**

43. Paragraph 3 of draft article 15 bis contains a number of procedural alternatives and options in the absence of a Security Council determination of aggression. The Chairman explained that this text was intended to represent in a clear and structured manner the various positions of delegations on this contentious topic and thus to reflect the current state of the discussions. He recalled that the positions of delegations on this question were well known and that the 2008 Chairman's paper did not attempt to advance the substantive discussion thereon. Delegations generally welcomed the structure of paragraph 3 and stated their divergent preferences regarding the various alternatives and options contained therein, in line with their positions on the question of the exercise of jurisdiction and, in particular, the role of the Security Council. The arguments on this question are amply reflected in previous reports of the Special Working Group, and many delegations refrained from reiterating them in detail.

44. While some delegations indicated that they could only accept alternative 1, option 1 (no investigation in the absence of a Security Council determination of aggression), others supported only alternative 2, option 1 (the Prosecutor may proceed in the absence of a Security Council determination, without any role given to other organs). The various intermediary options (alternative 1, option 2; alternative 2, options 2, 3 and 4,) also received varying levels of support, in particular, with a view to bridging the gap between those positions that were the furthest apart. In sum, every single alternative and option received some support, as well as some opposition. It was therefore held that it would be too early at this stage to delete any of the alternatives and options.

<sup>10</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Sixth session, New York, 30 November - 14 December 2007* (International Criminal Court publication, ICC-ASP/6/20), vol. I, annex III, paragraph 54.

Furthermore, the view was expressed that draft article 15 bis could be deleted in its entirety, since no special procedure was required for the crime of aggression. It was also held that the Court should be empowered to pronounce itself on acts of aggression independently if the Security Council failed to perform its role within a certain period of time.

45. Some delegations indicated that the time frame for a Security Council determination of aggression contained in alternative 2 (“[6] months”) was too long. Suggestions were made to limit this time frame to three months or even less. Concern was expressed that evidence in the hands of an aggressor might be destroyed in the interim between an investigation commencing and being able to proceed.

46. It was suggested that the language in alternative 2, option 2, could be simplified to read as follows: “in accordance with article 15”. All of the procedural steps to be followed pursuant to this option were already described in article 15, and it was therefore not necessary to add further details specifically for the crime of aggression.

47. A proposal was made, based on article 2 of General Assembly resolution 3314 (XXIX), to add another procedural element to draft article 15 bis, which would allow the Security Council to effectively stop an ongoing investigation. This would require a resolution under Chapter VII of the United Nations Charter indicating that it would not be justified to conclude that an act of aggression had been committed.<sup>11</sup> It was different from article 16 of the Rome Statute in that it did not provide a temporary, but a definitive halt to the investigation, and in that it recognized the right of the Security Council to determine that a situation did not amount to an act of aggression. Some delegations, on a preliminary basis, expressed interest in the proposal, which was also referred to as a “red light” proposal. Caution was expressed, however, that this proposal would not meet the concern of those delegations that considered the Security Council’s determination of aggression to be an exclusive power. The opposite concern was also raised, namely that this proposal would have a detrimental effect on the independence of the Court. The view was also expressed that this approach would differ only marginally from article 16 and might in fact dilute the application of article 16 under the Statute. Reference was made to the controversial discussions on article 16 of the Rome Statute, which should not be reopened. It was further questioned whether the Security Council did indeed have the competence to determine that aggression had not been committed, and whether it would be appropriate to make such a negative Security Council determination binding for the Court.

48. No objections or suggestions were raised regarding the wording of paragraph 4.

## **VIII. Elements of Crimes**

49. The Chair invited comments on the way forward regarding the drafting of the Elements of Crimes. The 2008 Chairman’s paper no longer included the previous draft Elements, since that text appeared outdated compared to the rest of the Chairman’s paper and was therefore more likely to create confusion than to provide clarity. The Group was invited to offer comments on the process leading to the adoption of the Elements.

50. Most delegations considered it necessary to draft and adopt Elements of Crimes, both in accordance with article 9 of the Statute and with resolution F of the Final Act of the Rome

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<sup>11</sup> 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 [6] 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.”



Conference.<sup>12</sup> It was, however, also questioned whether Elements were needed at all, given that the Assembly intended to include a precise definition of the crime of aggression.

51. Some delegations expressed the view that the Elements of Crimes should be drafted once an agreement on the provisions on the crime of aggression had been reached. Other delegations held the view that the provisions on the crime of aggression and the Elements of Crimes should be submitted as a package to the Review Conference. Consequently, work on the Elements should be conducted in parallel to the work on the substantive provisions on the crime of aggression.

52. It was pointed out that the two approaches could be reconciled, bearing in mind that the discussions on the crime of aggression must conclude at least one year prior to the Review Conference. It was suggested that the work on the Elements of Crimes could take place after the Special Working Group had concluded its work. In this context, it was pointed out that areas of disagreement after the conclusion of the work of the Special Working Group would likely be limited to the question of exercise of jurisdiction, while the discussions on the Elements would focus or be limited to article 8 bis. The view was also expressed, however, that some procedural elements might also be part of the discussion of the Elements.

53. It was noted that article 9 of the Statute, which sets out the procedure for the adoption of Elements of Crimes, did not refer to the crime of aggression. It was therefore unclear whether the same procedure would have to be followed, and whether the Elements could indeed be adopted by the Assembly of States Parties sitting as a Review Conference. In response, it was observed that article 9 was not applicable and that the Review Conference was free to take a decision on the matter, bearing in mind the content of resolution F of the Final Act of the Rome Conference. It was further suggested that article 9 might have to be amended.

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<sup>12</sup> *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998*, (UN doc. A/CONF.183/13, vol. I).

## Appendix

### Discussion paper on the crime of aggression proposed by the Chairman (revision June 2008)\*

#### Explanatory note

1. The revised discussion paper contained in the attachment is submitted following the discussions held by the Special Working Group during the sixth session of the Assembly of States Parties (30 November to 14 December 2007). It is based on the previous discussion paper<sup>1</sup> (2007 Chairman's paper) and takes into account the developments and discussions held since its submission. It is prepared without prejudice to the positions of delegations and intended to facilitate the future work of the Special Working Group.
2. The first part of the revised paper, referring to the procedure for entry into force of the amendment as well as to the possibility of deleting article 5, paragraph 2, of the Statute, mainly serves as placeholder, since these issues have not been thoroughly discussed.
3. The suggested insertion of a new article 8 bis, paragraph 1, taken together with draft article 25 (3 bis), reflects the progress made thus far on the definition of the individual's conduct, the "crime" of aggression.
4. Draft article 8 bis, paragraph 2, reflects the progress in the discussions on the definition of the State "act" of aggression. The draft is based on the assumption that United Nations General Assembly resolution 3314 (XXIX) should serve as the basis for such a definition. While there have been different views on the question whether such a reference should be limited to certain articles of that resolution, and whether the list of acts enumerated should be "open" or "closed", the suggested formulation is intended to bridge this gap.
5. Draft article 15 bis on the exercise of jurisdiction is an attempt at refining the language previously contained in paragraphs 4 and 5 of the 2007 Chairman's paper, while clearly reflecting the different positions on this issue in alternatives and options. The suggested language in paragraph 1 did not give rise to any controversy in previous consultations. Paragraph 2 is merely a slightly refined version of paragraph 4 of the 2007 Chairman's paper.
6. Paragraph 3 is presented in two alternatives. Alternative 1 makes the proceeding of an investigation into a crime of aggression conditional upon an active decision of the Security Council, namely either a substantive determination of aggression by the Council (option 1), or a merely procedural authorization (option 2).
7. Alternative 2 provides previously discussed options for the Court to proceed in the absence of a Security Council determination.
8. Given the central role of General Assembly resolution 3314 for the definition of aggression it is suggested to reproduce the text of that resolution as an annex to the Rome Statute. This question requires further discussion.

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\* Previously issued as ICC-ASP/6/SWGCA/2/Rev.1.

<sup>1</sup> ICC-ASP/5/SWGCA/2, annex.

9. Other issues requiring further discussion are, among others, the question whether the application of article 28 (responsibility of commanders and other superiors) should be explicitly excluded with respect to the crime of aggression, as well as the drafting of Elements of Crimes. A preliminary draft for Elements of Crimes was originally included in the 2002 Coordinator's paper and reproduced in the 2007 Chairman's paper. These Elements have not been thoroughly discussed in the past. Given the progress in other parts of the discussion, they are likely to create more confusion than clarity and have therefore not been reproduced.

## Attachment

### Draft amendments to the Rome Statute of the International Criminal Court

*The amendments below are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5], of the Rome Statute.<sup>1</sup>*

1. *Delete article 5, paragraph 2, of the Statute.<sup>2</sup>*
2. *Insert the following text 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.<sup>3</sup>
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.<sup>4</sup>

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;

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<sup>1</sup> A preliminary discussion of the issue of the applicable entry into force procedure was held in earlier intersessional meetings in Princeton (see the report of the 2005 meeting, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The Hague, 28 November to 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32), annex II.A, paragraphs 5 to 17; and the report of the 2004 meeting, *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 13 to 19).

<sup>2</sup> The question whether article 5, paragraph 2, should indeed be deleted has not been thoroughly discussed.

<sup>3</sup> An earlier proposal to add the phrase: “such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof” remains on the table. See however the reference to similar terms in draft article 8 bis, paragraph 2 (a).

<sup>4</sup> The 2007 Chairman’s paper referred explicitly to [articles 1 and 3 of] resolution 3314, without however reflecting any substantive provision of that resolution. The approach taken in this paragraph, which now refers to resolution 3314 in its entirety, while quoting the list of acts, could serve as a compromise.

- (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. *Insert the following text 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.

*Alternative 1*

3. 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.<sup>5</sup>

*Alternative 2*

3. 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;

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<sup>5</sup> Option 2 is based on previous discussions regarding an additional option which would constitute a merely procedural “go-ahead” from the Security Council without a substantive determination that an act of aggression has occurred, but with an explicit authorization for the Court to investigate in respect of the crime of aggression. In case of a Security Council referral under article 13 (b) of the Rome Statute, such an authorization could be contained in the resolution referring the situation to the Prosecutor.

*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.

4. 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. *Insert the following text 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.<sup>6</sup>

5. *Insert the following text as an annex to the Statute:*

**United Nations General Assembly resolution A/RES/3314 (XXIX)  
Definition of Aggression**

*The General Assembly,*

*Having considered* the report of the Special Committee on the Question of Defining Aggression (... *insert the complete text of the resolution*).

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<sup>6</sup> The wording of this paragraph could be refined to further align it with the existing provisions of article 25, in particular, by replacing the generic reference “the provisions of this article” with specific references to the applicable paragraphs and sub-paragraphs.