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Kampala  
31 May – 11 June 2010**Conference Room Paper on the Crime of Aggression****A. Explanatory Note**

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

- a) **The draft enabling resolution on the crime of aggression**, as forwarded to the Review Conference by resolution ICC-ASP/8/Res.6, with an added short preamble and additional operative paragraphs relating to the Elements of Crimes (OP 2) and the understandings regarding the interpretation of the amendments (OP 3), as well as the customary call for ratification or acceptance of the amendments (OP 4);
- b) **The draft amendments to the Rome Statute on the crime of aggression** (annex I), as forwarded by resolution ICC-ASP/8/Res.6;
- c) **The draft amendments to the Elements of Crimes** (annex II), as forwarded by resolution ICC-ASP/8/Res.6;
- d) **Draft understandings regarding the interpretation of the amendments** on the crime of aggression, as previously discussed by the Special Working Group on the Crime of Aggression, notably at its last session in February 2009.<sup>1</sup>

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

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

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<sup>1</sup> February 2009 Report of the Special Working Group, contained in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II, paragraphs 27-41 (“Other substantive issues regarding aggression to be addressed by the Review Conference”).

**B. Draft resolution: The crime of aggression**

*The Review Conference,*

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

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

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

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

1. ***Decides* to adopt the amendments to the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4 / 5] of the Statute;**

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

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

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

(Add further operative paragraphs if needed)<sup>3</sup>

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<sup>2</sup> *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009* (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II.

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

## Annex I

### Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression

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

**Article 8 bis**  
**Crime of aggression**

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

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

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

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

**Article 15 bis**

**Exercise of jurisdiction over the crime of aggression**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.

2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

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

4. **(Alternative 1)** In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

*Option 1 – end the paragraph here.*

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

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

*Option 1 – end the paragraph here.*

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

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

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

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

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

4. *The following text is inserted after article 25, paragraph 3 of the Statute:*

**3 bis** In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

5. *The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:*
  1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.
  
6. *The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*
  3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

## **Annex II**

### **Amendments to the Elements of Crimes**

#### **Article 8 *bis* Crime of aggression**

##### **Introduction**

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

##### **Elements**

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person<sup>1</sup> in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

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

## Annex III

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

#### Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute once the amendment on aggression [is adopted by the Review Conference/has entered into force].

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13 (b) of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

#### Jurisdiction *ratione temporis*

3. It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed after the amendment [has been adopted by the Review Conference/has entered into force].

4. It is understood, in accordance with article 11, paragraph 2, of the Statute, that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after the entry into force of the amendment for that State, unless that State has made a declaration under article 12, paragraph 3.

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

#### Acceptance of the amendment on the crime of aggression

5. *[Acceptance by the victim State not required where the aggressor State has accepted jurisdiction]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed by a State Party that has accepted the amendment on aggression.

6. *[Alternative 1 – “positive” understanding: jurisdiction without acceptance by the aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute does not prevent the Court from exercising jurisdiction in respect of an act of aggression committed against a State Party that has accepted the amendment.

*[Alternative 2 – “negative” understanding: no jurisdiction without acceptance by aggressor State]* It is understood that article 121, paragraph 5, second sentence, of the Statute prevents the Court from exercising jurisdiction in respect of an act of aggression committed by any State that has not accepted the amendment.

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