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## BRINGING THE CRIME OF AGGRESSION WITHIN THE ACTIVE JURISDICTION OF THE ICC

Donald M. Ferencz\*

*Although aggression is listed among the four core crimes within the purview of the International Criminal Court (ICC), the Court has thus far been powerless to exercise jurisdiction over the crime. The Rome Statute of the ICC prohibits the Court from doing so until provisions are adopted defining the crime and setting forth the conditions under which jurisdiction may be exercised. A review conference is scheduled for 2010, where this issue is expected to be addressed. The following article discusses the significant differences between various amendment protocols specified within Article 121 of the Rome Statute and explores how such differences may be strategically relevant to the adoption of provisions on aggression. Regardless of the amendment regime employed in making the crime of aggression actionable before the ICC, the author concludes that adoption of provisions on aggression are an important step in strengthening the rule of law and the Nuremberg principles.*

### I. INTRODUCTION

When the Rome Statute of the International Criminal Court (ICC) was adopted on July 17, 1998, it included provisions granting the ICC jurisdiction over four core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>1</sup> The first three of these crimes are defined within the Statute itself and were, from inception, brought within the

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<sup>1</sup> Article 5(1) identifies the four core crimes as genocide, crimes against humanity, war crimes, and the crime of aggression. In this article, the Rome Statute of the International Criminal Court will be referred to simply as “the Statute or the Rome Statute” and the International Criminal Court itself will be referred to either as “the Court” or “the ICC.” See Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute], available at [http://www2.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www2.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf) (identifying the four core crimes as genocide, crimes against humanity, war crimes, and the crime of aggression).

Court's active jurisdiction.<sup>2</sup> By contrast, the Statute provides that the Court's jurisdiction over the crime of aggression cannot be exercised until such time as a provision is adopted by the member countries of the Assembly of States Parties (ASP)<sup>3</sup> defining the crime and establishing the conditions under which the Court may exercise its jurisdiction.<sup>4</sup>

The challenge of developing proposals for such further provisions relating to the crime of aggression has been vested in a subgroup of the ASP, known as the Special Working Group on the Crime of Aggression.<sup>5</sup> The Working Group has met in both formal and informal sessions, where representatives from States Parties, along with certain non-States Parties and NGO observers, have endeavored to craft workable proposals on the crime of aggression for consideration at a Review Conference, expected to be held in 2010. It is at such a Review Conference that the States Parties

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<sup>2</sup> See *id.* arts. 5(1), 6, 7, 8 (listing the four core crimes and setting forth the definitions of genocide, crimes against humanity, and war crimes).

<sup>3</sup> The ASP, established pursuant to Article 112, is the administrative body with general management oversight responsibility for the various organs of the Court. See *id.* art. 112.

<sup>4</sup> Article 5(2) specifies that:

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.

*Id.* art. 5(2). This provision was a compromise reached in 1998 at the Rome Conference, stemming from the fact that the question of whether to include aggression within the jurisdiction of the Court was highly contentious; hence, the issue of how to trigger the Court's active jurisdiction over the crime was left for later resolution. It should be noted that Article 5(2) refers to Article 121, but does not clarify which paragraphs, in particular, of Article 121 are intended to be followed. This omission is significant, since paragraphs four and five of Article 121 are mutually exclusive as to their application. For an article written immediately preceding the Conference of Rome, see Michael P. Scharf, *Rome Diplomatic Conference for an International Criminal Court*, A.S.I.L. INSIGHTS (June 1998), available at <http://asil.org/insights/insigh20.htm> (last visited Nov. 5, 2009).

<sup>5</sup> What is now known as the Special Working Group on the Crime of Aggression was established pursuant to proposals made via the ASP in 2002. The Working Group is the successor to what was previously referred to as the Working Group on the Crime of Aggression, which had begun the task of developing proposals on the crime of aggression during the Preparatory Commission for the International Criminal Court. See Preparatory Comm'n for the Int'l Criminal Court, *List of Documents of the Report of the Preparatory Commission*, U.N. Doc. PCNICC/2002/2/Add.2 (July 24, 2002), available at <http://untreaty.un.org/cod/icc/prepcomm/report/prepreportdocs.htm>. For a "user-friendly" overview of relevant documents pertaining to the work of both the Working Group on the Crime of Aggression and the Special Working Group on the Crime of Aggression, including background information, see Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=aggression> (last visited Nov. 5, 2009). In this article, the Special Working Group on the Crime of Aggression (SPWGCA) will be generally referred to simply as "the Working Group."

will decide whether to move forward with bringing the crime of aggression within the active jurisdiction of the Court.

Against this backdrop, on September 26, 2008 the Case Western Reserve University School of Law hosted a symposium on the crime of aggression, providing a forum where international law experts met to explore a number of critical issues still confronting the Working Group.<sup>6</sup> It was my privilege to chair one of the symposium panels, entitled *A Roundtable Discussion About the Process by Which Aggression is Included in the Statute and Its Effect on Non-Party States*.<sup>7</sup> Among the most significant aspects of this admittedly rather arcane-sounding topic is that, depending upon the placement of proposed provisions on aggression within the Statute, the Court's effective jurisdiction over the crime of aggression may vary quite dramatically. This article will highlight some of the key technical issues raised during the panel discussion and will offer several personal observations regarding enabling the Court, at long last, to exercise its active jurisdiction over the crime of aggression.<sup>8</sup>

At the outset of any discussion of this topic, a clear distinction must be drawn between the general rule of how amendments to the Statute are *adopted*—and, therefore, become part of the textual fabric of the Statute—as opposed to how amendments actually *enter into force* for States Parties—and, therefore, become legally effective and enforceable from a juridical point of view.

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<sup>6</sup> See generally 41 CASE W. RES. J. INT'L L. (2009) (Nos. 2 & 3).

<sup>7</sup> The Case Western Reserve University School of Law is located in Cleveland, Ohio. The symposium was held at the Frederick K. Cox International Law Center and is viewable in its entirety as a webcast at <http://law.case.edu/centers/cox/webcast.asp?dt=20080926&type=flv&a=0> [hereinafter Webcast]. The link to the webcast of the specific panel that I moderated may be found at <http://law.case.edu/centers/cox/webcast.asp?dt=20080926&type=flv&a=6>. The panellists in our roundtable discussion were Professor M. Cherif Bassiouni of DePaul University College of Law in Chicago, Illinois (who served as Chair of the Drafting Committee at the Rome Conference); Professor Roger Clark, of Rutgers University Law School in Camden, New Jersey (who was directly involved during the Rome Conference in drafting various provisions, including Article 121 of the Statute); Astrid Reisinger Coracini, Lecturer, Institute of International Law and International Relations, University of Graz, Austria; and Stefan Barriga, Counsellor/Legal Adviser, Permanent Mission of Lichtenstein to the U.N. (whose Ambassador, Christian Wenaweser, served as the Chair of the Working Group on the Crime of Aggression). Their summary biographical details are set forth on the Case Western Reserve School of Law website at [http://law.case.edu/lectures/files/2008-2009/20080926\\_WCROSym-Agenda-SpeakersBios.pdf](http://law.case.edu/lectures/files/2008-2009/20080926_WCROSym-Agenda-SpeakersBios.pdf).

<sup>8</sup> I say "at long last" because it was as far back as December 11, 1946 that the General Assembly of the U.N., in G.A. Res. 95(I), affirmed the Nuremberg Charter and the International Military Tribunal judgment and called for the codification of an international criminal code based on the principles of international criminal law embodied therein. See G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1946).

The general rule for *adoption* of substantive amendments to the Rome Statute is found in Article 121(3), which provides that amendments may either be adopted by way of consensus or by a two-thirds vote of the ASP.<sup>9</sup> Articles 121(4) and 121(5) govern the procedures by which such amendments *come into force*, and they differ markedly as to their effects.

For example, pursuant to Article 121(5), amendments to Articles 5, 6, 7 and 8 of the Statute will only be effective as to crimes committed *on the territory of or by the nationals of* States Parties who independently ratify such amendments.<sup>10</sup> Thus, if the proposed provisions on aggression come within the ambit of Article 121(5), States Parties would appear to be able to exempt themselves from the application of such provisions—with respect to the Court's jurisdiction under Article 12, but not necessarily with respect to situations referred by the Security Council<sup>11</sup>—merely by electing not to independently ratify them, and they need not withdraw from the Statute itself to do so.

By stark contrast, Article 121(4) provides that amendments not covered by Article 121(5) shall enter into force for *all* States Parties after ratification of such amendments by a seven-eighths vote of the members of the ASP.<sup>12</sup> Because of this, if an amendment is seen as coming within the purview of Article 121(4), such amendment could potentially come into force with respect to *all* States Parties, including States Parties opposed to it. In such case, States Parties opposed to the amendment have two choices: they may either do nothing, thereby accepting its coming into force as to them, or they may elect to completely withdraw from the Statute, thereby ceasing to be States Parties.<sup>13</sup>

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<sup>9</sup> Article 121(3) provides that “[t]he adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.” ICC Statute, *supra* note 1, art. 121(3).

<sup>10</sup> Article 121(5) provides that:

Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. 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.

*Id.* art. 121(5).

<sup>11</sup> For a discussion of Articles 12 and 13, *see infra* notes 26, 27.

<sup>12</sup> Article 121(4) provides that “[e]xcept as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.” ICC Statute, *supra* note 1, art. 121(4).

<sup>13</sup> For withdrawal procedures, *see id.* arts. 121(6), 127. With respect to the issue of withdrawal from the Statute, it should be noted that Article 120 does not allow for reservations to the Statute. Therefore, a State Party may not “cherry-pick” as to which amendments it will

Before proceeding to a discussion of the issues raised by the symposium panel which I chaired, a few words are in order regarding a major policy issue which has confronted the Working Group relative to the issue of the Court's jurisdiction over the crime of aggression. Article 39 of the U.N. Charter vests the Security Council with authority to determine whether an act of aggression by a State has occurred.<sup>14</sup> Relying on this, representatives of each of the permanent members of the Security Council, as well as a number of States Parties, have posited that there can be no exercise of jurisdiction by the Court over the crime of aggression without some sort of pre-determination by the Security Council that an act of aggression by a State has occurred.<sup>15</sup> When the General Assembly, in resolution 3314, adopted a

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accept and not except—leaving complete withdrawal from the Statute as the only permitted option should a State Party find that it does not wish to be bound by amendments which have become effective under provisions of the Statute other than Article 121(5).

<sup>14</sup> See U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

<sup>15</sup> With respect to this issue, it is noteworthy that the U.S. sent its first-ever delegation to meetings of the ASP in November 2009, where U.S. concurrence in this position was clearly enunciated. See Stephen J. Rapp, U.S. Ambassador at Large for War Crimes Issues, Speech to the Assembly of States Parties (Nov. 19, 2009), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-GenDeba-USA-ENG.pdf). Of the five permanent members of the Security Council, only the U.S. had failed to send representatives to attend meetings of the Working Group; representatives from France, the U.K., Russia, and China all actively participated. For a summary of the issues discussed by the Working Group since the Case Western symposium met in September 2008, see International Criminal Court, Special Working Group on the Crime of Aggression of the Assembly of States Parties, *Special Working Group on the Crime of Aggression*, Annex III, ICC-ASP/7/20, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/SWGCA/ICC-ASP-7-20-Ann.III%20English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-7-20-Ann.III%20English.pdf) (reporting on meetings of the SPWGA held during November 2008) (last visited Nov. 5, 2009); International Criminal Court, Special Working Group on the Crime of Aggression of the Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression*, Annex II, ICC-ASP/7/20/Add.1, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ICC-ASP-7-20-Add.1-SWGCA%20English.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ICC-ASP-7-20-Add.1-SWGCA%20English.pdf) (reporting on meetings of the SWGCA held in February 2009); International Criminal Court, Assembly of States Parties, *Informal Inter-Sessional Meeting on the Crime of Aggression, Hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, at the Princeton Club, New York, from 8 to 10 June 2009*, ICC-ASP/8/INF.2 (2009) (the first twenty-five pages of which are appended hereto as an addendum to this article). For the most recent discussions within the Working Group prior to the Case Western symposium, see International Criminal Court, Special Working Group on the Crime of Aggression of the Assembly of States Parties, *Report of the Special Working Group on the Crime of Aggression*, Ann. II, ICC-ASP/6/20/Add.1, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/SWGCA/ICC-ASP-6-20-Add1-AnnexII-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/ICC-ASP-6-20-Add1-AnnexII-ENG.pdf) [hereinafter June 2008 Report]. See also *Informal Inter-Sessional Meeting on the Crime of Aggression 8–10 June 2009, Non-paper by the Chairman on the Conditions for the Exercise of Jurisdiction*, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/SWGCA/Non-paper-conditions-jurisdiction-28May2009-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/SWGCA/Non-paper-conditions-jurisdiction-28May2009-ENG.pdf)

definition of aggression by consensus in 1974, it paid due deference to this principle, fully recognizing, certainly at least as its powers under Chapter 7 of the U.N. Charter are concerned, that the Security Council has the right to determine whether acts which might presumptively constitute acts of State aggression would, in fact, be so characterized.<sup>16</sup> In opposition to this view, others in the Working Group have argued that a pre-determinative role for the Security Council with respect to whether an act of State aggression has occurred may hamper the independence of the Court, that such a role would be inconsistent with the impartial judicial functioning of the Court, and that such a role is not mandated by the U.N. Charter.<sup>17</sup>

## II. REVIEW OF ROUNDTABLE ISSUES

As discussed above, the Rome Statute allows for markedly different regimes with respect to the application of the Court's exercise of jurisdiction over the crime of aggression, depending upon whether provisions on aggression are adopted as a matter of amendment to Articles 5, 6, 7, and 8 or whether such provisions on aggression come into the Statute via some other means.

On its face, Article 121(5) signifies a clear intention, at least insofar as amendments to Article 5 are concerned, to give States Parties the right to opt out of prospective provisions pertaining to the crime of aggression without having to withdraw from the Statute to do so.<sup>18</sup> Yet, by its express terms, Article 121(5) applies only in case of "amendment" to the articles of the Statute currently delineating or defining the core crimes.<sup>19</sup> The question of whether a provision completing the mandate found in Article 5(2) respecting aggression will be deemed to constitute an "amendment" to Article

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(a 2009 revision of a discussion paper on the crime of aggression proposed by the Chairman) [hereinafter Chairman's Non-paper].

<sup>16</sup> See G.A. Res. 3314 (XXIX), U.N. Doc. A/9631 (Dec. 14, 1974), available at <http://www.un.org/documents/ga/res/29/ares29.htm>.

<sup>17</sup> See June 2008 Report, *supra* note 15. For a discussion of whether the Security Council has exclusive authority under the U.N. Charter to determine the existence of acts of aggression beyond the scope of its Chapter 7 powers under the U.N. Charter, see Mark S. Stein, *The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council's Power to Determine Aggression?*, 16 *IND. INT'L & COMP. L. REV.* 1 (2005) (discussing and concluding that the Security Council does not have such exclusive authority). Advance copies of Professor Stein's article were disseminated to the Working Group when it met at an informal session at Princeton University in the summer of 2005. See also Carrie McDougall, *When Law And Reality Clash—The Imperative of Compromise in the Context of the Accumulated Evil of the Whole: Conditions for the Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression*, 7 *INT'L CRIM. L. REV.* 2, 3 (2007).

<sup>18</sup> See ICC Statute, *supra* note 1, art. 121(5).

<sup>19</sup> *Id.*

5 within the meaning of Article 121(5) was raised by our panelists and is particularly relevant, since much of what has thus far been proposed within the Working Group has contemplated adopting provisions on aggression which would come into the Statute *outside* of Article 5 itself.

With respect to this issue, Professor Bassiouni initially observed that, while “legal imagination has no bounds,” the notion that a provision on aggression would not be deemed to be “an amendment” within the meaning of Article 121(5) “is doubtful,” and that, therefore, “any way you look at it” language which adds to—as opposed to modifies—the existing language of Article 5 “is subject to the opting out provision that we have in 121(5).”<sup>20</sup> A contrary view was strenuously expressed by Professor Clark, who argued that insofar as the contemplated provisions on aggression thus far discussed within the Working Group are proposed to fall elsewhere in the Statute—that is, outside of Article 5 itself—they are clearly to be governed by the rules found in Article 121(4) because they simply do not constitute a literal amendment to Article 5.<sup>21</sup> He recognized, however, that the inclusion of an amendment on aggression within the Statute may be politically untenable if it does not allow an “opt-out” mechanism, such as is found in Article 121(5).<sup>22</sup> Because of this, he initially suggested that it may be necessary to consider possible amendment of Article 121(4) to allow for such an “opting-out” possibility, yet his concluding remarks were much more in the direction of amending Article 5 itself to bring the contemplated provisions on aggression more squarely within the ambit of Article 121(5)’s “opt-out” regime.<sup>23</sup>

Among the various issues highlighted by Ms. Reisinger Coracini was the prospect of jurisdictional inconsistency between treatment of nationals of non-States Parties and those of States Parties who have opted out of the Court’s general jurisdiction over the crime of aggression.<sup>24</sup> For example, Article 121(5) may be read to exempt nationals of non-accepting

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<sup>20</sup> Professor Bassiouni’s remarks may be viewed online. See Webcast, *supra* note 7. It should also be mentioned that, as a general matter, he expressed the view that the complexity and variety of potential regimes being considered with respect to the exercise of the Court’s jurisdiction over the crime of aggression may be likened to swiss cheese, giving rise to multiple standards of justice, rather than a uniform application of criminal law. Because of this, he questioned whether the crime of aggression should be brought within the active jurisdiction of the Court rather than simply be left as is, with symbolic, rather than operational, effect within the Rome Statute. Moreover, he cautioned that to have a regime on aggression that does not apply equally to all is to risk eroding the legitimacy and credibility of the Court itself, so as to possibly undermine its reputation with respect to enforcement of the other three core crimes.

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*



States Parties from prosecution for the crime of aggression, *even if committed on the territory of an accepting State Party*.<sup>25</sup> But does it not seem highly incongruous that such nationals should be put in a better position than the nationals of non-States Parties who could be subject to the Court's jurisdiction—under the rules set forth in Article 12 of the Statute—for the very same conduct?<sup>26</sup> And what of referrals to the Court by the Security Council under Article 13(b) of the Statute; would the reach of the Court's jurisdiction incident to such referrals not, as a matter of logic, “trump” the exemption provisions for nationals of State Parties who have opted out of the crime of aggression under Article 121(5)?<sup>27</sup> The resolution of these problems, in Ms. Reisinger Coracini's view, with Professor Clark initially seeming to concur,<sup>28</sup> may best be achieved by adopting all relevant amendments on aggression under the rubric of Article 121(4), so as to engender consistency as to the effect of such amendments.<sup>29</sup>

Our final panelist was Stefan Barriga, the legal counsel to the Permanent Mission of Liechtenstein to the U.N. He pragmatically observed

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<sup>25</sup> ICC Statute, *supra* note 1, art. 121(5).

<sup>26</sup> Article 12(2) of the Statute provides, in pertinent part:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred, or . . . .
- (b) The State of which the person accused of the crime is a national.

*Id.* art. 12(2) (emphasis added). For a brief discussion of Article 13, see *infra* note 27.

<sup>27</sup> Article 13 of the Statute provides that:

The court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;* or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

ICC Statute, *supra* note 1, art. 13 (emphasis added).

<sup>28</sup> See Webcast, *supra* note 7.

<sup>29</sup> Unrelated to this point, during our open discussion at the end of the roundtable presentations Ms. Reisinger Coracini referenced the fact that Croatia has a specific provision on aggression within its criminal code. For anyone who may be interested, it may be found online at the website of the International Humanitarian Law and International Criminal Law section of the T.M.C. Asser Institute, [http://www.wihl.nl/finals/Croatia/HR.L-PC.Penal%20Code%20\(extracts\).1998.pdf](http://www.wihl.nl/finals/Croatia/HR.L-PC.Penal%20Code%20(extracts).1998.pdf).

that the question of whether a provision on aggression will be adopted ultimately involves considerations rooted in power, politics, and sovereignty, and in *what can be agreed to* at the Review Conference, regardless of the “correct” legal interpretation pertaining to the technical issues addressed during our roundtable.<sup>30</sup>

With this in mind, Mr. Barriga raised two additional issues for consideration, the first of which concerns parity between countries that are States Parties and countries that, while not yet States Parties, might join the ASP in the future. His first issue questioned if States Parties at the time of the Review Conference are deemed to have the right, pursuant to Article 121(5), to opt out of the Court’s jurisdiction over aggression conferred under Article 12, should countries which become States Parties at a later time not have the same right?<sup>31</sup>

His second observation regarding issues which may warrant further exploration relates to the question of *where* the crime of aggression will ultimately be deemed to be committed—that is, whether the provisions on aggression will be crafted so as to provide that the crime is deemed to be committed on the territory of the victim state, versus the territory of the aggressor state.<sup>32</sup> In this regard, Mr. Barriga pointed out that, since the crime of aggression is a *leadership* crime involving activities that normally occur on the territory of the aggressor state—that is, where the planning occurs—it may be more tenable for certain non-States Parties as well as States Parties which opt out under Article 121(5) if the crime is deemed to be committed on the *aggressor’s* territory.<sup>33</sup> In such case, Article 12’s general preconditions to the exercise of jurisdiction by the Court would not be met; therefore, other than with respect to referrals by the Security Council provided for in Article 13, the Court would generally lack jurisdiction over the crime of aggression for non-assenting states nationals.

Mr. Barriga’s comments were followed by those of Ambassador Christian Wenaweser, the Chairman of the Working Group, who, from the audience, remarked that the ratification regime under Article 121(5) will likely be less objectionable to the permanent members of the Security Council (the P-5) than the seven-eighths ratification regime found in 121(4), which, once achieved, binds all States Parties.<sup>34</sup> He expressed the clear view that Article 121(5)’s opt-out regime offers the balance that may be needed to overcome P-5 concerns, in the event that proposed amendments on ag-

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<sup>30</sup> See Webcast, *supra* note 7.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

gression empower the Court to prosecute the crime without Security Council pre-clearance as to whether such prosecutions may proceed.<sup>35</sup>

### III. CONCLUDING THOUGHTS

I was born in Nuremberg, Germany, and I am the son of a former prosecutor at the Subsequent Proceedings there.<sup>36</sup> I have grown up with a lifelong awareness that aggressive war is something that ought to be curtailed, if possible, through the rule of law. I appreciate that there are legitimate differences of opinion regarding perceived procedural ambiguities within the Rome Statute. So, too, are there divergent views as to which strategies may be most effective in terms of their political viability with respect to the crime of aggression.

My own sense is that the ASP would do well to embrace an approach consistent with Article 121(5), comporting with the apparent intention of its drafters and in deference to the reality that not all States Parties are yet prepared to be bound by the Court's general jurisdiction over the crime of aggression. At the same time, under Article 121(5), at least some States Parties *could* elect to be so bound, thereby sending a message to would-be perpetrators of the crime of aggression that the world in which they may operate with impunity is shrinking. By contrast, the seven-eighths threshold, all-in-or-all-out, requirement of Article 121(4) provides a much easier target for those who may wish to use their influence to undermine adoption of a provision on aggression, since under Article 121(4) a minority of just over one-eighth of the ASP membership can thwart the will of even an overwhelming majority of States Parties.<sup>37</sup>

In light of the divergence of views among the P-5 and non P-5 States Parties as to which mechanisms for the exercise of jurisdiction may be preferable, and in order to overcome any perceived ambiguities as to whether Articles 121(4) or 121(5) apply, I would propose that the provisions on aggression are adopted in a manner which clarifies that they are intended to be construed as coming within the ambit of Article 121(5).

Common sense and moral, as well as legal, outrage at aggressive war certainly tends in the direction of giving victim states the right to insti-

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<sup>35</sup> *Id.* Without wanting to sound in any way glib, I would be remiss if I failed to mention that, reacting to Professor Bassiouni's contention that "swiss cheese" is to be avoided (*see supra* note 20), Ambassador Wenaweser (of Liechtenstein) emphasized his comfort level with the application of Article 121(5) by reminding all those present that "I'm not from a part of the world where swiss cheese is looked down upon." *See* Webcast, *supra* note 7.

<sup>36</sup> My father, Benjamin Ferencz, was the Chief Prosecutor of what has come to be known as The Einsatzgruppen Case, where defendants were convicted for the ruthless murder of over one million innocent civilians. For his writings on the crime of aggression, please view his website at <http://benferencz.org/>.

<sup>37</sup> *See* ICC Statute, *supra* note 1, art. 121(4).

gate prosecution of those who perpetrate the crime of aggression. Yet, as Mr. Barriga observed, if the crime is deemed to be committed on the territory of the *victim* state, then those who prefer not to opt-in to the Court's jurisdiction under Article 121(5) may be motivated to discourage forward progress with respect to activating the Court's exercise of jurisdiction over the crime for fear of possibly seeing their own nationals prosecuted under the territorial rules of Article 12.

With this problem in mind, several years ago I circulated a private paper to a number of delegates to the Working Group suggesting that, insofar as the opt-in provisions of Article 121(5) are tantamount to an opt-out regime for non-assenting states, a possible hybrid solution might be to pursue adopting two separate amendments on aggression, each of which would be subject to the rules of Article 121(5). One such amendment could vest the Court with jurisdiction over the crime of aggression pursuant to the existing provisions of Article 12, with such amendment *only* effective as to those State Parties which specifically ratify it. A second, alternative, amendment might be crafted which would grant the Court jurisdiction under Article 12, *but subject to specific pre-clearance by the Security Council* in one form or another. Once again, such amendment would only be effective as to State Parties which choose to ratify it.<sup>38</sup> Presumptively, State Parties declining to adopt either amendment would be completely beyond the reach

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<sup>38</sup> In the most recent Chairman's non-paper, a somewhat similar approach—at least in terms of its effect—is offered for consideration: that is, to allow Article 121(4), rather than 121(5), to control as the mechanism for adoption of a provision on the crime of aggression, but to couple such an approach with a specific opt-out regime, whereby States Parties (and possibly even non-States Parties) could affirmatively opt out of the Court's jurisdiction for whatever period of time may suit them. *See* Chairman's Non-paper, *supra* note 15, ¶¶ 11, 12. This paper states, in pertinent part:

The Group's reports refer to the idea of requiring that the alleged aggressor State has accepted the Court's jurisdiction over the crime of aggression by way of an *opt-in declaration*. The requirement of such a declaration would effectively limit the Court's jurisdiction on the basis of State referrals and *proprio motu* investigations to cases of alleged aggression by States Parties that have accepted the amendment on aggression *and* have made a declaration accepting the amendment.<sup>8</sup> As a consequence, the difference in the application of either paragraph 4 or 5 of article 121 to the amendment on aggression would be strongly diminished: Either way, no State Party could be subject to the Court's jurisdiction on aggression against its will.

The idea of a declaration could be further adapted in order to increase the likelihood that the Court would indeed have jurisdiction over the crime of aggression in future cases. Instead of requiring an opt-in declaration, States could be given the possibility of making an *opt-out declaration* regarding the crime of aggression similar to article 124 of the Statute. In order to fully address sovereignty concerns, such a declaration could possibly be renewable, and possibly be open for non-States Parties as well.

*Id.* (emphasis in original) (footnote omitted).

of the Court's jurisdiction on aggression, other than pursuant to a Security Council referral.<sup>39</sup>

Such a two-track approach acknowledges that certain countries may be prepared to accept the Court's exercise of jurisdiction over the crime of aggression only if Security Council pre-clearance is a prerequisite to such exercise of jurisdiction. In a two-amendment approach, when, and if, the time is right, State Parties which have opted for the more conservative, Security Council pre-clearance approach, could, at least theoretically, at a later time reconsider their position without the need for any additional action by the ASP; they could simply subsequently ratify the broader jurisdictional amendment, which would then apply to crimes committed on their territory or by their nationals even without Security Council pre-clearance.

At Nuremberg, the crime of aggression was characterized as "the supreme international crime."<sup>40</sup> One would hope that the truth of these poignant words will be enough to carry the day at the Review Conference and that consensus will be reached as to a regime on aggression which is acceptable to all concerned. Those who offer their best efforts to help bring this crime within the reach of the law—indelibly branding aggressive war-making with the stigma of illegality that it so richly deserves—will know, at least, that they have tried.

It is to be hoped and, by those who pray, prayed that this will be a generation in which the foundation of the law will provide a firm anvil upon which humankind may move forward in the process of beating its swords into ploughshares.<sup>41</sup> Granting the ICC active jurisdiction over the crime of aggression may prove a critical step on that path.

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<sup>39</sup> As to the question of non-States Parties, my own view is they should be no worse off than States Parties and, therefore, that the provisions on jurisdiction over the crime of aggression should not bind them unless they have elected to be so bound.

<sup>40</sup> The judgment of the International Military Tribunal, under the heading *The Common Plan or Conspiracy and Aggressive War*, reads, in relevant part, as follows: "To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." See Nuremberg Military Tribunal, Judgment and Sentences, Oct. 1, 1946, reprinted in 41 AM. J. INT'L L. 172, 186 (1947).

<sup>41</sup> See Isaiah 2:4 (The New Oxford Annotated Bible with the Apocrypha: Revised Standard Version) ("He shall judge between the nations, and shall decide for many peoples; and they shall beat their swords into plowshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more.").

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**Eighth session**The Hague  
18-26 November 2009

**Informal inter-sessional meeting  
on the Crime of Aggression, hosted by the Liechtenstein Institute  
on Self-Determination, Woodrow Wilson School,  
at the Princeton Club, New York, from 8 to 10 June 2009**

**I. Introduction**

1. Pursuant to a recommendation by the Assembly of States Parties and at the invitation of the Government of Liechtenstein, an informal inter-sessional meeting on the Crime of Aggression was hosted by the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, on the premises of the Princeton Club, New York, United States of America, from 8 to 10 June 2009. Invitations to participate in the meeting had been sent to all States, as well as to representatives of civil society. H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein (Jordan) chaired the meeting.

2. The participants in the informal inter-sessional meeting expressed their appreciation to the Governments of Denmark, Finland, Germany, Liechtenstein, Mexico, the Netherlands, Sweden and Switzerland for the financial support they had provided for the meeting and to the Liechtenstein Institute on Self-Determination at Princeton University for hosting the event and the financial support.

3. The participants noted with appreciation that the meeting was held on the premises of the Princeton Club in New York, thereby enabling the presence of delegations that had in the past been denied permission to travel to Princeton to attend previous inter-sessional meetings of the Special Working Group on the Crime of Aggression (hereinafter "the Group").

4. The present document does not necessarily represent the views of the governments that the participants represent. It seeks to reflect the opinions expressed on various issues pertaining to the crime of aggression on the basis of the proposals for a provision on aggression elaborated by the Group and adopted on 13 February 2009.<sup>1</sup> It is hoped that the material in the present report will facilitate the future work of the Assembly of States Parties on the crime of aggression, in particular during the upcoming eighth session, to be held in The Hague from 18 to 26 November 2009.

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<sup>1</sup> See February 2009 SWGCA report, 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, appendix I.

5. The discussions were held on the basis of two papers submitted by the Chairman: a non-paper on the Elements of Crimes<sup>2</sup>, as well as a non-paper on the conditions for the exercise of jurisdiction.<sup>3</sup> The Chairman introduced both non-papers and recalled the significant progress that had been made by the Group, culminating in the adoption of the Group's final report in February 2009. He underlined that the future work on aggression should focus on the outstanding issues left over from the Group, as well as the Elements of Crimes. The Chairman furthermore noted that the participation of both States Parties and non-States Parties was essential, despite the fact that the Group no longer existed as such. The future format of the work on aggression would have to be decided by the Assembly of States Parties at its next session.

## II. Non-paper on the Elements of the crime of aggression

6. The Chairman recalled earlier discussions on the drafting of the Elements of the crime of aggression and expressed his appreciation to the delegations of Australia and Samoa, which had prepared a first draft of the Elements, as well as to the delegation of Switzerland, which had organized a small informal retreat on this topic.<sup>4</sup> This work formed the basis for the Chairman's non-paper on the Elements of Crimes, which was submitted to facilitate discussions.

7. The Chairman recalled the drafting of the existing Elements of Crimes<sup>5</sup>, which had been a very useful exercise in that it deepened the understanding of the definition of the crimes. He recalled that the purpose of the Elements of Crimes was to assist the Court in the interpretation and application of the definitions of crimes<sup>6</sup>, including by clarifying the precise mental element required in accordance with article 30 of the Rome Statute.

8. In introducing the non-paper, the Chairman explained that the Elements of the crime of aggression would be added to the existing Elements of Crimes. Therefore, the existing general introduction to the Elements of Crimes would also apply to the crime of aggression. The non-paper suggested that the general introduction would require a technical amendment, replacing the words "articles 6, 7 and 8" with the words "articles 6, 7, 8 and 8 bis". Otherwise, the general introduction could be applied to the crime of aggression without further modification. No objections were raised to this suggested technical amendment and no proposals were made to further modify the general introduction to the Elements of Crimes.

9. Appendix I of the non-paper contains the draft Elements of Crimes, which include a special introduction to the Elements of the crime of aggression. The Chairman explained that such a special introduction could provide additional guidance in relation to several issues related to the proposed Elements. In order to facilitate a focused discussion, the Chairman suggested taking up each paragraph of the special introduction in the context of the Elements to which they relate.

### General comments on the draft Elements

10. Overall, the draft Elements were considered to form a good basis for future work and their structure met with general support. It was observed that the Elements were a list of all material and mental elements that the Prosecutor had to prove in any given case. The draft adhered to the logic of article 30 of the Rome Statute by listing material and mental elements.

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<sup>2</sup> See annex II.

<sup>3</sup> See annex III.

<sup>4</sup> Held in Montreux, Switzerland, from 16-18 April 2009.

<sup>5</sup> *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 II.B.

<sup>6</sup> Article 9 of the Rome Statute.

The material elements could be categorized as conduct, consequence or circumstance, and were followed by the corresponding mental elements (intent and knowledge). The default rule of article 30 automatically applied to any material element to which no specific mental element was expressly attached. It was observed that it was sometimes difficult to clearly categorize a material element (in particular proposed Element 3, as well as proposed Element 5). Nevertheless, that theoretical distinction had no practical effect as long as there was agreement on the required mental element.

11. It was observed that the order of the draft Elements followed the general structure of the Elements of Crimes (conduct, consequences and circumstances are generally listed in that order),<sup>7</sup> with the exception of Element 2, which was clearly a circumstance element, but one that was very closely related to the perpetrator and his or her conduct. Some delegations queried whether the order of Elements 3 to 6 could be changed. In response, it was noted that Element 3 contained the material element of the act of aggression, to which Element 4 provided the respective mental element. Similarly, Element 5 contained the material element of the threshold of a manifest violation of the United Nations Charter, to which Element 6 provided the mental element. It was important to have each mental element follow immediately after the material element to which it related; otherwise the default rule contained in article 30 of the Rome Statute would automatically apply to that material element.

12. Regarding the special introduction to the Elements of the crime of aggression, it was observed that similar introductions precede the other Elements of Crimes. A suggestion was made to consider whether the statements contained in the introduction were not better placed in a new section following after the Elements, as they were not really introductory in nature.

#### **Proposed Element 1: The conduct element**

13. Proposed Element 1 sets out the conduct element for the crime of aggression by describing the conduct of the perpetrator. The non-paper notes that, since the nature of Element 1 as a conduct element was sufficiently clear, the draft did not contain any express mental element. The default mental element in article 30, paragraph 2(a), of the Rome Statute would therefore apply: the person had intent where that person “means to engage in the conduct”. While there was only limited discussion on proposed Element 1, no objections were raised with respect to its drafting.

#### **Proposed Element 2: The leadership clause**

14. As noted in the non-paper, proposed Element 2 reflects the leadership nature of the crime and is a circumstance element. In accordance with article 30, paragraph 3, of the Rome Statute, the perpetrator must therefore have been aware that he or she was in a position effectively to exercise control over or to direct the political or military action of the State that committed the act of aggression. The non-paper suggests that the application of article 30 is sufficiently clear and that there is therefore no need to articulate an express mental element attaching to Element 2.

15. Proposed Element 2 furthermore contains a footnote, clarifying that, with respect to any particular situation involving an act of aggression, more than one person may be in a leadership position. Some drafting changes were explored with respect to proposed Element 2. It was suggested to delete the word “a person” and to move the footnote to the

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<sup>7</sup> See paragraph 7 of the general introduction to the Elements of Crimes, in *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 II.B.



word “perpetrator”. There was, however, only a brief discussion on this suggestion, and no such changes to the draft were subsequently made.

### **Proposed Elements 3 and 4: The State act of aggression**

16. Proposed Element 3 describes the material element of the State act of aggression. It draws from the language of draft article 8 bis, paragraph 2, of the Group’s proposals by referring to “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”. It was noted that Element 3 contained the core of the definition of the State act of aggression and was not intended to, and indeed could not, by virtue of article 9 of the Rome Statute, change the definition of the State act contained in the Group’s proposals. This was confirmed by the first paragraph of the special introduction, which clarified the understanding that “any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression”. This way, the lengthy article 8 bis, paragraph 2, would not have to be reproduced in its entirety in the Elements.

17. Proposed Element 4 then sets out the mental element required for Element 3 and suggests a “factual circumstance” element. The Chairman explained that such a type of element was used frequently in the context of certain crimes against humanity and war crimes where legal concepts were involved. Proposed Element 4 would thus require that the perpetrator was aware of the factual circumstances that establish the inconsistency of the State’s use of armed force with the United Nations Charter. The reference to factual circumstances would avoid unintended consequences of a stricter standard, which could encourage a potential perpetrator to be wilfully blind as to the legality of his or her actions. Paragraph 2 of the special introduction clarified this concept further by stating that there was “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”. It was noted that this approach had been taken in respect of other crimes within the Court’s jurisdiction as well (see e.g. Element 3 of the war crime of pillaging).

18. Some delegations questioned the use of the term “being aware” in Element 4 and whether it was different from “knowing”. In response, it was pointed out that article 30 of the Rome Statute equated “knowledge” and “awareness”, and that the existing Elements of Crimes used the latter term to denote the former. It was questioned whether factual circumstances might include developments taking place at the United Nations. The view was expressed that the existence or non-existence of a Security Council resolution on the use of armed force was indeed a relevant “factual circumstance”, but that Element 4 did not require the Prosecutor to prove that the perpetrator made any specific legal assessment regarding the content of such a resolution.

19. With reference to a discussion raised in paragraph 2 of the special introduction, it was noted that the mental element contained in Element 4 did not include a standard of negligence. This was considered appropriate in light of article 30 of the Rome Statute and the definition of the crime of aggression. In a common law system, Element 4 would require actual knowledge, rather than constructive knowledge or imputed knowledge.

20. Some delegations suggested that the link between Elements 3 and 4 could be spelled out more clearly through drafting changes, in particular by using the word “such” in Element 4, similar to its use in Element 6. In the context of this discussion, it was further suggested to refer, in Element 4, to the factual circumstances establishing the “act of aggression”, rather than to the “inconsistency of the use of armed force by the State with the Charter of the United Nations”. Furthermore, it was suggested to use the past tense (“established”) rather than the gerund (“establishing”) or the present tense (“establishes”). While some participants argued that “establishing” would be more appropriate, as it would better fit with the timing of

the events (e.g. the planning that precedes the actual act of aggression), others preferred the past tense, which was commonly used in the existing Elements of Crimes.

21. Following those discussions, the Chairman suggested to change proposed Element 4 to read: “The perpetrator was aware of the factual circumstances that established such an act of aggression.” However, it was observed that the proposed language might cause difficulties in the relation between Elements 1 and 4. One of the concerns expressed was that the judges might misread the new formulation to imply that the mental element of intent (the default rule applying to Element 1) applied to all the material elements of the crime of aggression, including the inconsistency of the use of force with the Charter of the United Nations. The Chairman therefore reverted to the previous formulation, with only minor drafting changes: “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”.

22. The suggestion was also made to change paragraph 2 of the special introduction to read “...there is no requirement to prove that the perpetrator has made a legal evaluation as to the *existence of the act of aggression*”. Some participants cautioned, however, that the previous wording of paragraph 2 of the special introduction was very precise in that it specified the legal evaluation referred to, namely the legal evaluation of the inconsistency of the use of armed force by the State with the Charter of the United Nations. The previous language was eventually retained with some editorial changes: “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.”

#### **Proposed Elements 5 and 6: The threshold of a manifest violation of the United Nations Charter**

23. Proposed Element 5 describes the threshold requirement contained in draft article 8 bis, paragraph 1, which requires that the act of aggression “by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations”. Proposed Element 6 suggests, based on the same considerations as those regarding Elements 3 and 4 above, a requirement that the perpetrator was aware of the “factual circumstances that established such a manifest violation of the Charter of the United Nations”. Paragraph 4 of the special introduction further clarifies this concept by stating that 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”.

24. In the context of the discussion on Elements 5 and 6, some delegations reiterated their view that the provisions on aggression should not contain such a threshold requirement, whereas others recalled their position in favour of the threshold clause.<sup>8</sup> It was, however, understood that any change to the threshold requirement would have to be made in the draft amendment on the crime of aggression, and that Elements 5 and 6 adequately reflected the threshold clause currently contained in draft article 8 bis, paragraph 1. Some delegations noted that Elements 4 and 6 appeared repetitive. In response, it was noted that these Elements dealt with two different qualifiers: Element 4 dealt with the legal qualification that established the use of armed force as an act of aggression, and Element 6 dealt with the legal qualification that established an act of aggression, by its character, gravity and scale, as a manifest violation of the United Nations Charter. The latter qualification was relevant to determine

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<sup>8</sup> See the discussions and arguments in the February 2009 SWGCA report, 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, paragraph 13; and in the June 2008 SWGCA report, in *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, paragraphs 23-29.

whether the Court had jurisdiction and would exclude situations that could fall within a legal grey area, but was without prejudice to other legal avenues that the victim State might want to pursue, such as a ruling by the International Court of Justice on the act of aggression.

25. In the context of both Elements 5 and 6, paragraph 3, of the special introduction states that the term “manifest” is an objective qualification. It was noted that a similar clarification could be found in the special introduction to the Elements of the crime of genocide. Some delegations raised questions regarding the meaning of the term “objective” in this context. In response, it was submitted that the Court’s determination as to whether the act of aggression constituted, by its character, gravity and scale, a “manifest” violation would be decisive, rather than the perpetrator’s legal assessment. It was suggested that the Court would apply the standard of a “reasonable leader”, similar to the standard of the “reasonable soldier” which was embodied in the concept of manifestly unlawful orders in article 33 of the Rome Statute.

26. A suggestion was made to delete the word “legal” from paragraph 4 of the special introduction. It was argued, in particular, that the evaluation of the manifest nature of the Charter violation could be a “value judgment” in the sense of paragraph 4 of the general introduction to the existing Elements of Crimes. It might therefore be better to simply refer to an evaluation, rather than a legal evaluation, in order not to set the bar too high for the Prosecutor and the judges. The suggestion did not, however, meet with the agreement of other participants, who found the current formulation of paragraph 4 of the special introduction to be accurate. It was also pointed out that the same phrase was used in the special introduction to the Elements of War Crimes.

27. The suggestion was made to replace the phrase “As a result of” with the phrase “With respect to” in paragraph 4 of the special introduction, as well as in paragraph 2 of the special introduction, since that was the usual way of referencing the Elements in the special introductions. The suggestion met with initial agreement, while some caution was also expressed. It was explained that the previous wording was intended to ensure, out of an abundance of caution, that the “factual circumstance” element contained in Element 4 was indeed the relevant mental element for the act of aggression throughout all the Elements, despite the fact that the term “act of aggression” also appeared in Element 1. For greater clarity, it was eventually agreed that the words “As a result of” or “With respect to” should be deleted from paragraphs 2 and 4 of the special introduction. With regard to paragraph 3, it was also agreed that the phrase “With respect to elements 5 and 6” would be deleted since “manifest” only appears in those two elements.

### **Changes to the draft Elements of Crimes**

28. The Chairman circulated revised draft Elements of Crimes (annex I), reflecting the various changes outlined in the paragraphs above.

### **III. Non-paper on the conditions for the exercise of jurisdiction**

29. The Chairman introduced the non-paper on the conditions for the exercise of jurisdiction, which was aimed at facilitating discussions on the major outstanding issues. These were primarily reflected in draft article 15 bis, paragraph 4, of the Group’s proposals, but also linked to the question of the entry into force procedure (article 121, paragraph 4 or 5). The Chairman suggested that the inter-sessional meeting should be used to intensify the dialogue on how to bridge the gap on the outstanding issues, including on the basis of new ideas and suggestions.

30. The Chairman noted that the non-paper contained the following three underlying considerations for the discussion, based on past work of the Group, which had to be kept in mind:

- a) All three existing trigger mechanisms would apply to the crime of aggression;
- b) In the case of a Security Council referral, the Court could exercise jurisdiction over the crime of aggression irrespective of the consent of the State concerned; and
- c) In case of a State referral or *proprio motu* investigation, the territoriality or nationality requirement of article 12, paragraph 2, of the Statute would apply. Since the crime of aggression was typically committed on the territory of both the aggressor and the victim State,<sup>9</sup> it was therefore useful in the discussion to refer to either an alleged aggressor State or an alleged victim State, rather than to a State of territoriality.

31. The non-paper contains in its appendix a number of concrete questions suggested by the Chairman. These questions are reprinted in italics below, in the context of the respective discussions.

**1. Consent of the alleged aggressor State as condition for the exercise of jurisdiction<sup>10</sup>**

**Acceptance of the amendment on the crime of aggression by the alleged aggressor State**

32. The Chairman noted that consent of the alleged aggressor State was only relevant to State referrals and *proprio motu* investigations. Acceptance of the amendment on aggression was one way a State could express its consent to the Court's exercise of jurisdiction with respect to any future investigation into an act of aggression allegedly committed by that State. One basic question was therefore: *Should the Court be able to exercise jurisdiction with respect to a crime of aggression on the basis of a State referral or proprio motu investigation where the alleged aggressor State has not accepted the amendment on aggression, or is not a State Party to the Rome Statute?*

33. Participants' views on this question were divided. Some participants answered negatively, stating that the alleged aggressor State must have accepted the amendment on aggression. Such an approach would indeed differ from the approach taken in the Rome Statute with respect to other crimes, but that distinction was justified by the nature of the crime of aggression and by the need to find a politically acceptable solution. It was further argued that only the application of article 121, paragraph 5, of the Statute would give States Parties the opportunity to choose to agree to the Court's jurisdiction. Under international law, no treaty obligations could be created for non-States Parties. The point was made that States Parties that have not accepted the amendment and non-States Parties should also be treated equally, and that therefore the "negative" understanding<sup>11</sup> of the second sentence of article 121, paragraph 5, of the Statute should prevail. Some participants argued that, in addition to the requirement that the alleged aggressor State has accepted the amendment, the Security Council should retain a strong role.

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<sup>9</sup> While the issue was not further discussed, the view was expressed that the crime of aggression was not typically committed on the territory of both the aggressor and the victim State. Rather, the individual conduct would typically only take place on the territory of the aggressor State.

<sup>10</sup> The headings of this part of the report are identical to the headings in the non-paper by the Chairman on the conditions for the exercise of jurisdiction (see annex III). The view was expressed that these headings were not sufficiently accurate, in particular with regard to the notion of "consent by the aggressor State" which had not previously been understood as forming part of the discussion on the conditions for the exercise of jurisdiction.

<sup>11</sup> See paragraph 9 of the non-paper by the Chairman on the conditions for the exercise of jurisdiction (annex III).

34. Some participants answered the question more broadly: They agreed that the Court should only have jurisdiction over States that were bound by the amendment. The amendment had to have entered into force for the alleged aggressor State, which, in case of article 121, paragraph 4, of the Rome Statute, could happen without the State's acceptance of the amendment.

35. Some participants indicated their flexibility on this question in case a consensus emerged on one or the other answer. It was also noted that the question involved some very difficult policy choices as to what was best for the International Criminal Court and for universal ratification of its Statute. A political compromise was therefore needed. In this context, the idea of reciprocity was mentioned: Both the alleged aggressor and victim State would have to be bound by the amendment on aggression. That would, on the one hand, raise the bar even higher, but still might make the solution more attractive, as it would allow the Court to fully investigate the actions of both parties to the conflict. In addition, the idea was raised that both the alleged aggressor and victim State would indicate the acceptable jurisdictional filters<sup>12</sup> upon their acceptance of the amendment, and that such filters would only apply to the extent that there was reciprocity between the relevant States. There was no thorough discussion of the idea of reciprocity, while a view was expressed that such an idea was not suitable for the Rome Statute, whose primary focus was not the regulation of mutual obligations between States, but the pursuit of individual criminal justice.

36. Some participants answered the question above affirmatively, arguing that otherwise a victim State that had accepted the amendment on aggression would not be protected against aggression, and that some States would have the privilege of shielding their nationals from the Court. A system that required the consent of the future aggressor State would not have any deterrent effect. Ending impunity for the most serious crimes of international concern was the primary purpose of the Court. It was noted that in accordance with article 12 of the Rome Statute, the territory of the victim State would already provide the necessary jurisdictional nexus and, in this connection, a way should be found for the Court to exercise jurisdiction over the crime of aggression, at least in respect of crimes committed on the territory of the victim State. If the consent of the alleged aggressor State was required, the Court might never be able to exercise jurisdiction, except in case of Security Council referrals. It was pointed out that the Court would only prosecute individuals, not States, and that any such individual would otherwise be subject to the domestic jurisdiction of the victim State where the crime was committed. The Court's jurisdiction was therefore delegated to it by the victim State. Furthermore, the view was held that such a requirement would establish two different jurisdictional systems within the Rome Statute, which should be avoided. Such different jurisdictional systems would amount to a reservation to the Statute, which was prohibited under its article 120. In response, it was noted that article 5, paragraph 2, of the Statute explicitly envisaged the possibility of different conditions for the exercise of jurisdiction over the crime of aggression. The view was also expressed that States Parties to the Rome Statute had already consented to the Court's jurisdiction over the crime of aggression, as reflected in article 5 of the Rome Statute. In response, it was noted that subject-matter jurisdiction had to be distinguished from jurisdiction *ratione personae*.

37. Some participants suggested that the conditions for the exercise of jurisdiction be discussed separately from the entry into force procedure. In this context, it was suggested that article 121, paragraphs 4 and 5, of the Rome Statute would not apply at all. Instead, article 5, paragraph 2, of the Rome Statute only required that a provision be "adopted in accordance with articles 121 and 123". There was no need for ratification of such a provision once it was adopted by the Review Conference in accordance with article 121, paragraph 3, of the Statute.

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<sup>12</sup> The term "jurisdictional filters" refers to the possible role of the Security Council, Pre-Trial Chamber, General Assembly and/or International Court of Justice and is first introduced in the non-paper by the Chairman on the exercise of jurisdiction (annex III).

This procedure would, however, still allow for additional mechanisms dealing with the conditions for the exercise of jurisdiction, such as jurisdictional declarations or the possibility of *ad hoc* consent by non-States Parties. Once there was an agreement on the political questions, such as the question of consent of the alleged aggressor State, this procedural approach could prove to be useful. In response, it was pointed out that such an approach, which was contrary to normal international practice, could create problems at the domestic level, where the acceptance of the Court's jurisdiction and the incorporation of the crime of aggression into domestic law would require a constitutional process of ratification and failed to distinguish between the entry into force of the amendment and its entry into force for a particular State. In this context, it was also suggested that such a provision adopted by the Review Conference could contain a clause delaying its entry into force by one or two years, in order to allow States to make the necessary changes to their domestic laws.

### **Other ways of addressing the issue of consent by the alleged aggressor State**

38. The Chairman noted that the question of consent was closely related to the issue of the entry into force procedure (article 121, paragraph 4 or 5). In the past, some delegations had raised concerns regarding the option of using article 121, paragraph 4, since that provision would allow the amendment on aggression to enter into force with respect to States Parties that had not accepted the amendment and possibly against their will, once the amendment was otherwise ratified by seven-eighths of States Parties. In this context, the Chairman raised the following question: *Could the idea of an opt-in declaration, in addition to the requirement that the alleged aggressor State be bound by the amendment on aggression, address the concerns of those delegations that have expressed difficulty with using the entry into force procedure of article 121, paragraph 4, of the Statute?*

39. There was only limited discussion of this question. Some participants who favoured article 121, paragraph 5, stated that they could accept the application of article 121, paragraph 4, if combined with an opt-in declaration, as the effect would be similar to that of article 121, paragraph 5. It was, however, noted that this would significantly delay the Court's jurisdiction on the basis of any of the three triggers, including possibly the Security Council trigger, which would become effective only one year after the acceptance of the amendment on aggression by seven-eighths of States Parties. Such an opt-in declaration would also be contrary to the spirit of article 121, paragraph 4. Some participants who favoured the use of article 121, paragraph 4, of the Rome Statute expressed the view that no such opt-in requirement should be added.

40. The Chairman raised the idea that, instead of an opt-in declaration, States could be given the possibility of making an opt-out declaration regarding the crime of aggression, similar to article 124 of the Statute. In order to fully address sovereignty concerns, such a declaration could possibly be renewable, and possibly be available for non-States Parties as well. *Could the idea of an opt-out declaration be further explored to serve as a bridge between the wish for a broad base of Court jurisdiction over the crime of aggression and the wish to respect sovereignty concerns?*

41. There was only limited discussion of this question. Some participants expressed interest in the idea of an opt-out declaration, combined with a system that would otherwise not require that the alleged aggressor State has accepted the amendment on aggression. Such an approach would strongly reduce the number of States who were beyond the Court's jurisdictional reach, as it would exclude only those States who took an active step to that effect. A system that required potential aggressor States to accept the amendment would not be effective: It was unlikely that such States would move to take such a step. An opt-out declaration, however, reversed that default situation and provided an incentive for States to reflect on the amendment and to come to a decision as to whether they could live with the amendment or not.

42. The Chairman noted that a determination of an act of aggression by the International Court of Justice (ICJ) in contentious proceedings could only be made on the basis of the prior consent of the alleged aggressor State to the ICJ's jurisdiction. *Could a link to the ICJ's consent-based contentious jurisdiction address concerns regarding the consent of the alleged aggressor State, at least in an indirect way?*

43. There was only limited discussion of this question. The view was expressed that such instrumentalization of the ICJ would be legally problematic and not work in practice, as the ICJ would try to avoid use of the term "act of aggression". Furthermore, the ICJ's involvement could significantly delay the proceedings. It was also suggested that the link between a State's consent to the ICJ's jurisdiction (which may lead to a determination by the ICJ of an act of aggression) and that State's consent to the ICC's jurisdiction over the crime of aggression was too indirect to serve a useful purpose.

## **2. Jurisdictional filters**

44. The Chairman recalled that delegations still had divergent views on the question of the jurisdictional filter to be applied in draft article 15 bis, paragraph 4. He suggested deepening the discussions by addressing some specific scenarios.

### **Self-referral by the aggressor State**

45. The Chairman noted that one such scenario was the self-referral by the aggressor State itself, e.g. following a change of government in that State. *If a State would refer a situation to the Court specifically for the purpose of prosecuting its own former leader(s) for a crime of aggression committed by that State, would there still be a need for a jurisdictional filter?*

46. The views on this question were divided. Some participants favoured the application of a jurisdictional filter in this scenario. Some specifically noted the role of the Security Council under the United Nations Charter, while others referred to the useful role of other filters, such as the Pre-Trial Chamber or the General Assembly. Jurisdictional filters were meant to ensure that the Court was not seized with frivolous or politically motivated cases, thereby protecting the Court. Such situations could also arise in case of self-referrals by the aggressor State, precisely as a consequence of the change of government. It was noted that a requirement of consent by the alleged aggressor State and the issue of the jurisdictional filters were inter-related in certain ways, but that politically acceptable solutions had to be found in respect of both: A solution to one issue would not simply take care of the other.

47. Other participants expressed the view that no jurisdictional filter was required in such a situation in light of the alleged aggressor State's consent, as expressed by the referral of the case to the Court. In such a case, the Rome Statute already provided for filters against politically motivated investigations through the respective roles of the Office of the Prosecutor and the Pre-Trial Chamber. The view was also expressed that the question related to several jurisdictional filters of a very different nature, which made it difficult to provide a single answer. In this context, some participants recalled their general opposition to any kind of jurisdictional filter for the crime of aggression.

### **Referral by the Security Council**

48. The Chairman raised the scenario in which the Security Council would refer a situation to the Court without having made a determination of aggression. It could appear that only other crimes had been committed, or there could be other reasons why the Security Council did not make a determination of an act of aggression. *Where the Court is seized with a situation only because of a Security Council referral, could it be argued that the Security*

*Council should retain the priority right to determine an act of aggression (or at least to give the “green light”) – as the Council might otherwise simply choose not to make a referral at all?*

49. There was only limited discussion of this question. Some participants argued that even in case of a Security Council referral, the Council’s inaction regarding a determination of an act of aggression should not block the investigation into a crime of aggression. It was recalled that the Security Council could always suspend an investigation or prosecution under article 16 of the Rome Statute, which was sufficient to address any possible concerns by the Council. It was also argued that assigning such a priority right to the Security Council might result in one-sided prosecutions, whereby the crimes of only one side to the conflict might be prosecuted (e.g. war crimes committed in the course of a war against an aggressor), while the other side could enjoy impunity for the act of aggression.

50. Some participants thought that it was premature to contemplate this scenario. Others found that it was purely hypothetical to assume that the Security Council would make a referral as described above. However, the opposite view was also expressed, in particular as a non-international armed conflict might turn out to be of an international nature on the basis of new evidence.

51. It was observed that the scenario described above could be seen as a “qualified” referral by the Security Council: The Council would be allowed to refer a situation to the Court, but at the same time to reserve its approval of an investigation into a crime of aggression for a later stage. The Prosecutor would in any event be allowed to proceed with investigating with respect to the three other crimes, but in the absence of a later determination of aggression by the Council (or in the absence of a “green light”), the investigation into a crime of aggression could not proceed. It was questioned whether such a qualified referral was compatible with article 13 (b) of the Rome Statute. At the same time, it was pointed out that the possibility of such a qualified referral was inherent in the current text of alternative 1 of draft article 15 bis, paragraph 4.

52. The view was expressed that it should be easy to concede that the Security Council should be allowed to retain control over the question of aggression, if the Council’s referral was the only manner in which the Court’s jurisdiction was triggered in the first place.

#### ***Proprio motu investigation and referral by the victim State***

53. The Chairman suggested to continue discussion on the various options for jurisdictional filters with a view to identifying avenues toward a compromise, and briefly raised further questions contained in the non-paper. There was, however, no further discussion on these questions. These and other issues will thus have to be taken up in the context of the future work of the Assembly of States Parties on the crime of aggression.



## **Annex I**

### **Draft 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 II

### Non-paper by the Chairman on the Elements of Crimes

1. The present non-paper is aimed at facilitating the discussions at the Princeton Club on the Elements of the crime of aggression and reflects the progress made during the substantive discussions on the definition of the crime since the circulation of the draft Elements in 2002.<sup>1</sup> It follows up on the work done pursuant to the mandate of the Preparatory Commission, as set out in resolution F of the Final Act of the Rome Conference,<sup>2</sup> and the Special Working Group on the Crime of Aggression (hereinafter “the Group”), pursuant to resolution ICC-ASP/1/Res.1 of the Assembly of States Parties on “The Continuity of work in respect of the crime of aggression”,<sup>3</sup> also referred to in paragraph 30 of the report of the Group of November 2008.<sup>4</sup> This non-paper is intended to promote in-depth consideration of the Elements as part of the overall process leading up to the Review Conference.

2. A discussion paper, prepared by Australia and Samoa, was informally distributed at the last meeting of the Group in February 2009 and thereafter considered at a small informal retreat on the Elements of Crimes for the crime of aggression, held at Montreux, Switzerland, from 16-18 April 2009. A brief summary of the discussions at the retreat has been circulated separately. During this retreat, several options for possible Elements were envisaged, and a number of drafting ideas were suggested.

3. The present non-paper builds on this work and contains a draft of the Elements in **appendix I**, as well as detailed explanations in **appendix II**. It is submitted by the Chairman for the purpose of facilitating discussions.

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<sup>1</sup> Discussion paper on the definition and elements of the crime of aggression, prepared by the Coordinator of the Working Group on the Crime of Aggression (PCNICC/2002/2/Add.2).

<sup>2</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).

<sup>3</sup> *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.

<sup>4</sup> *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.

## **Appendix I**

### **Draft 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. As a result of Element 4, there is no requirement to prove that the perpetrator has made a legal evaluation as to the inconsistency with the Charter of the United Nations of the use of armed force by the State.
3. With respect to Elements 5 and 6, the term “manifest” is an objective qualification.
4. As a result of Element 6, there is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation.

##### **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 establishing the inconsistency of the use of armed force by the State 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 establishing 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.

## Appendix II

### Explanatory note

#### I. The existing general introduction to the Elements of Crimes

1. The existing general introduction to the Elements of Crimes explains several issues relating to the Elements of Crimes. For example, it clarifies the relationship between the Elements and other general principles in part 3 of the Statute, explains several issues of terminology and comments on the structure of the Elements.

2. The proposals of the Group contain a draft amendment to article 9 of the Rome Statute that would add a reference to the crime of aggression.<sup>1</sup> Paragraph 1 of the general introduction to the Elements of Crimes would require a similar amendment, replacing the words “articles 6, 7 and 8” with the words “articles 6, 7, 8 and 8 bis”.

3. It is considered that the other parts of the general introduction can be applied to the Elements for the crime of aggression without further modification.

#### II. The special introduction for the Elements of the crime of aggression

4. The existing Elements of Crimes contain, in addition to the general introduction, “special” introductions to each crime under the Court’s jurisdiction. This non-paper suggests such a “special” introduction for the crime of aggression which is intended to provide additional guidance in relation to several issues arising from the proposed Elements of the crime of aggression.

5. Paragraph 1 clarifies that the whole of the definition of an act of aggression in draft article 8 bis, paragraph 2, continues to apply, despite the fact that the language of proposed Element 3 focuses only on part of this definition. As it would be cumbersome to repeat the whole definition in Element 3, paragraph 1 clarifies that the Elements do not alter that definition.

6. Paragraph 2 makes clear that proposed Element 4 proposes a mental element of “knowledge of fact” in respect of the inconsistency of a State use of force by a State with the Charter of the United Nations. This clarifies that the perpetrator is not required to have knowledge of the legal doctrine and rules used to evaluate whether a State use of force is inconsistent with the Charter of the United Nations, but is only required to have awareness of the factual circumstances establishing this inconsistency. A parallel can be found in the first dot point of paragraph 3 of the “special” introduction for the Elements of war crimes which clarifies that the last two elements of war crimes do not impose a requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international.

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<sup>1</sup> See February 2009 SWGCA report, paragraph 26, 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.

7. Paragraph 3 clarifies that the use of the term “manifest” in proposed Elements 5 and 6 is an objective qualification. In other words, the Court’s determination whether the particular violation of the Charter of the United Nations is objectively a “manifest” violation is decisive, rather than whether the perpetrator considered it to be a manifest violation. A parallel can be found in the second dot point of the “special” introduction for the Elements of genocide.

8. Paragraph 4 serves a similar function in respect of proposed Element 6 as paragraph 2 serves in respect of proposed Element 4.

### **III. Scheme and principles of proposed Elements for the crime of aggression**

9. The draft Elements in appendix I follow the scheme and principles of the existing Elements of Crimes for genocide, crimes against humanity and war crimes. These Elements usually list conduct, consequence and circumstance in that order, with particular mental elements, where required, listed after the relevant conduct, consequence or circumstance.<sup>2</sup> In order to present elements which flow logically, the sequencing of proposed elements in appendix I is slightly different from this general ordering.

10. Article 30, paragraph 1, of the Rome Statute requires that, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Read together with paragraph 2 of the general introduction to the Elements of Crimes, this means that where no reference is made in the Elements to a particular mental element for any particular material element listed, the relevant mental element set out in article 30 – intention, or knowledge, or both – applies. Usually, intention applies to a conduct or consequence element, and knowledge applies to a circumstance or consequence element.

### **IV. Proposed Elements 1 and 2: The individual’s conduct and the leadership requirement**

11. The wording of proposed Elements 1 and 2 draws directly from the relevant parts of draft article 8 bis, paragraph 1, of the proposals for a provision on aggression, elaborated by the Special Working Group on the Crime of Aggression.<sup>3</sup>

12. *Proposed Element 1* sets out the conduct element for the crime of aggression. Applying article 30 to the crime of aggression would mean that the perpetrator must have intended (that is, meant) to plan, prepare, initiate or execute the act of aggression (article 30, paragraph 2 (a)). The mental element of knowledge will not be applicable here as proposed Element 1 is a conduct element, and not a circumstance or consequence element. Since the application of article 30 is sufficiently clear here, there is no need to articulate an express mental element attaching to proposed Element 1.

13. Proposed Element 1 implies a degree of causation between the perpetrator’s involvement and the occurrence of the State act. However, given the range of factual situations in which the question of causation might be relevant in a particular case, it does not seem feasible to outline a general test specifying the nature or degree of causation required, but preferable to leave this matter to the Court to determine according to the facts of a particular case before it.

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<sup>2</sup> *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 II.B, paragraph 7.

<sup>3</sup> See February 2009 SWGCA report, 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, appendix I.

14. *Proposed Element 2* is a circumstance element, that is, it describes a circumstance in which the conduct in proposed Element 1 is to have taken place. Applying article 30 to proposed Element 2, this means that the perpetrator must have known (that is, been aware) that he or she was in a position effectively to exercise control over or to direct the political or military action of the State which committed an act of aggression. Since the application of article 30 is sufficiently clear here as well, there is no need to articulate an express mental element attaching to proposed Element 2.

15. The footnote in Element 2 clarifies that, in respect of a particular act of aggression, more than one person who meets the leadership requirement described in Element 2 may be potentially liable for a crime of aggression. For example, where a joint decision to commit an act of aggression is made by two persons who are both “in a position effectively to exercise control over or to direct the political or military action” of a State, both persons may be potentially liable for the crime.

## V. Proposed Elements 3 and 4: The State act of aggression

16. *Proposed Element 3* describes the State act of aggression. The proposed element draws closely on the language of draft article 8 bis, paragraph 2, in the Group’s proposals.<sup>4</sup> However, the wording has been modified slightly to avoid the use of the active voice. This follows the drafting technique used in the existing Elements of Crimes according to which the active voice should only be used in relation to the conduct of an individual perpetrator.<sup>5</sup> This is intended to avoid any confusion which may arise from the use of the active voice in relation to the acts of the State, which may suggest that the acts of the State constitute a “conduct” element.

17. As explained further in paragraph 5 above, paragraph 1 of the “special” introduction clarifies that the whole of the meaning of “act of aggression” as set out in article 8 bis, paragraph 2, is intended to apply also here.

18. Historical precedents (for example, the *High Command Case*<sup>6</sup>) required a high degree of knowledge of the State’s aggressive war to establish individual criminal responsibility. However, a mental element requiring that the perpetrator positively knew that the State’s acts were inconsistent with the Charter of the United Nations (effectively requiring knowledge of law) may have unintended consequences. For example, it may encourage a potential perpetrator to be wilfully blind as to the legality of his or her actions, or to rely on disreputable advice supporting the legality of State acts even if that advice is subsequently shown to have been incorrect. Also, mental elements requiring knowledge of the law are regularly avoided in domestic legal systems as they are often difficult to prove to the required standard.

19. To overcome some of the disadvantages of an express knowledge of law requirement, proposed Element 4 is instead a “factual circumstances” element, a type of element which is used frequently in the Elements of Crimes for certain crimes of humanity and war crimes which involve legal concepts.<sup>7</sup> Proposed Element 4 requires that the perpetrator was aware of

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<sup>4</sup> Ibid.

<sup>5</sup> See for example, Element 3 of the war crime of pillaging in article 8 (2) (b) (xvi), which reads “[t]he appropriation was without the consent of the owner” rather than “[t]he owner did not consent to the appropriation”.

<sup>6</sup> *United States of America v. Wilhelm von Leeb et al.* (the *High Command case*), Judgement, 27, 28 October 1948. See also the very useful work of the Preparatory Commission in its Historical Review of Developments Relating to Aggression, Table 6 - Knowledge (PCNICC/2002/WGCA/L.1 and Add.1).

<sup>7</sup> For example: factual circumstances establishing the lawfulness of a person’s presence in an area (Elements of Crimes, article 7 (1) (d) crime against humanity of deportation or forcible transfer of population, Elements 2 and 3); the protected status of a person under the Geneva Conventions (see Elements for most of the war crimes, for example article 8, (2) (a) (i) war crime of wilful killing,

factual circumstances pointing to the inconsistency of the State's use of armed force with the United Nations Charter. Although this requirement stops short of requiring knowledge of the illegality of an act of aggression, it strives for an appropriate balance between the need to ensure criminal liability where the perpetrator is fully aware of the factual circumstances surrounding the State act and the need to avoid the disadvantages of a strict "knowledge of law" approach outlined above.

20. To satisfy proposed Element 4, it would not be sufficient merely to show that the perpetrator knew of facts indicating that the State used armed force. It would also be necessary to show that the perpetrator knew of facts establishing the inconsistency of the use of force with the Charter of the United Nations. Examples of relevant facts here could include: the fact that the use of force was directed against another State, the existence or absence of a Security Council resolution, the content of a Security Council resolution, the existence or absence of a prior or imminent attack by another State.

21. Specifying a mental element of "knowledge of factual circumstances", as opposed to a mental element of "knowledge of law" may, in principle, have the effect of limiting the availability of certain mistake of law arguments.<sup>8</sup> However, such mistake of law arguments would be very difficult to advance anyways, given that only "manifest" Charter violations, and no borderline cases, would fall under the Court's jurisdiction due to the threshold requirement in article 8 bis, paragraph 1. In any event, a perpetrator could still raise a defence of mistake of fact as to this element under article 32, paragraph 1, which, if proven, would result in acquittal.

22. A further point for consideration is that in a number of the Nuremberg trials, in addition to actual knowledge, the Tribunal considered the possibility of inferring or imputing knowledge.<sup>9</sup> Paragraph 3 of the general introduction to the Elements already clarifies that the Court may infer the existence of such knowledge from relevant facts and circumstances. In addition, however, States may wish to consider whether the Nuremberg jurisprudence supports (and whether there would be any utility in incorporating) a knowledge element which expressly allows knowledge to be imputed, or specifies a "should have known" threshold for the mental element (i.e. a negligence element). While a culpability element of negligence is used in the Elements of Crimes in relation to certain genocide and war crimes offences,<sup>10</sup> the compatibility of such elements with the definition of aggression would require further discussion.

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Elements 2 and 3); or the existence of an armed conflict (see Elements for most of the war crimes, for example Article 8 (2) (a) (i) war crime of wilful killing, Element 5).

<sup>8</sup> Article 32, paragraph 2, provides that "[a] mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime ...".

<sup>9</sup> See references to *Hess*, *Schacht*, *Bormann* and *IG Farben* cases in Table 6 (note 6, above).

<sup>10</sup> The relevant crimes are: genocide by forcibly transferring children (article 6 (e)); war crime of improper use of a flag of truce (article 8 (2) (b) (vii)-1); war crime of improper use of a flag, insignia or uniform of the hostile party (article 8 (2) (b) (vii)-2); war crime of improper use of the distinctive emblems of the Geneva Conventions (article 8 (2) (b) (vii)-4); war crime of using, conscripting or enlisting children (article 8 (2) (b) (xxvi)); and war crime of using, conscripting and enlisting children (article 8 (2) (e) (vii)). The mental element of negligence, found in the Elements of Crimes, has been applied by Pre-Trial Chamber I of the Court in a number of decisions, for example: Decision on the Confirmation of Charges, *Lubanga*, PTC 1, 29 January 2007 (ICC 01/04-01/06); Decision on the Confirmation of Charges, *Katanga and Ndugjolo Chui*, PTC 1, 30 September 2008 (ICC 01/04-01/07). The consistency of the negligence elements with the Statute has not yet been fully argued in the Court.

## VI. Proposed Elements 5 and 6: The threshold requirement

23. *Proposed Element 5* describes the threshold requirement in draft article 8 bis, paragraph 1, that the State act of aggression be a manifest violation of the Charter of the United Nations in order to attract individual criminal responsibility.

24. *Proposed Element 6* sets out a specific mental element for proposed Element 5. Instead of repeating the full phrase found in the definition and in proposed Element 5 of an act which “by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations”, Element 6 uses the term “such a manifest violation of the Charter of the United Nations”.

25. The requirement for knowledge in proposed Element 6 stands in addition to that in proposed Element 4. This is because there may be instances where an accused is aware of facts establishing that a State use of force is an act of aggression, but not aware of other facts establishing that this act of aggression constitutes, by its character, gravity and scale, a manifest violation of the Charter of the United Nations. For example, an accused may be aware of a movement of some troops across a State border but not aware of the scale of the attack. For this reason, a separate mental element for Element 6, requiring knowledge of factual circumstances establishing a manifest violation, is appropriate.

26. As mentioned in paragraph 7 above, paragraph 3 of the “special” introduction clarifies that the term “manifest” in proposed Elements 5 and 6 is an objective qualification, that is, it is a matter for the Court to determine. Furthermore, paragraph 4 of the “special” introduction confirms that there is no requirement to prove that the perpetrator made a legal evaluation as to the threshold requirement, since proposed Element 6 requires only awareness by the perpetrator as to relevant facts.



## Annex III

### Non-paper by the Chairman on the conditions for the exercise of jurisdiction

#### I. Introduction

1. The present non-paper is aimed at facilitating discussions at the Princeton Club with respect to the major outstanding issues regarding the “conditions for the exercise of jurisdiction” over the crime of aggression. These outstanding issues are primarily reflected in draft article 15 bis, paragraph 4, of the proposals for a provision on aggression, elaborated by the Special Working Group on the Crime of Aggression (hereinafter “the Group”).<sup>1</sup> The February 2009 report of the Group notes in this respect that this paragraph requires “further discussion, including on the basis of new ideas and suggestions”.<sup>2</sup> The issue of the entry into force procedure (article 121, paragraph 4 or 5) is directly linked to this question.

2. It is suggested that delegations use the inter-sessional meeting to exchange views on possible ways of finding an acceptable solution for the outstanding issues, including on the basis of such new ideas and suggestions. Due to the very complex nature of the issue and the numerous variables related to the discussion, the Chairman suggests that participants address specific *questions (printed in italics below)*, dealing with specific scenarios and based on a number of considerations that can be extracted from the previous work of the Group.

#### II. Some underlying considerations for a discussion on outstanding issues

3. **All three existing trigger mechanisms** apply to the crime of aggression. Based on draft article 15 bis, paragraph 1, the Prosecutor could conduct a preliminary investigation into a crime of aggression after the use of any of the three existing trigger mechanisms: State referral, Security Council referral, or *proprio motu*. The trigger mechanism needs to be distinguished from the question of a **jurisdictional filter** that arises only at a later stage, as envisaged by draft article 15 bis, paragraphs 2-4.

4. In case of a **Security Council referral**, the Court could exercise jurisdiction over the crime of aggression **irrespective of the consent of the State concerned**. This follows from article 13 (b) of the Statute, and this has also been the clear understanding in the Group.<sup>3</sup> The issue of the territoriality or nationality requirement (article 12, paragraph 2) does not arise in the context of a Security Council referral.

5. In case of a **State referral or proprio motu investigation**, the **territoriality or nationality requirement of article 12, paragraph 2**, of the Statute applies. In these two cases, jurisdiction is based on the consent (i.e. consent to be bound by the Rome Statute and the amendment on aggression) of either the State of nationality or territoriality. In this context, it is important to note that a crime of **aggression is typically committed on the territory of both the aggressor and the victim State**.<sup>4</sup> For the sake of clarity in discussions

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<sup>1</sup> See February 2009 SWGCA report, 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.

<sup>2</sup> *Ibid.*, paragraph 19.

<sup>3</sup> *Ibid.*, paragraphs 28 and 29.

<sup>4</sup> The Group has addressed the issue of territoriality of the crime in previous reports, see February 2009 SWGCA report, paragraphs 38 and 39, 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,*

relating to questions of territoriality, it is therefore useful to refer to an alleged aggressor State (usually the State of nationality and territoriality of a crime of aggression) and to an alleged victim State (usually the State of territoriality of a crime of aggression).

### III. Suggested structure for a discussion on outstanding issues

6. The Chairman suggests that the outstanding issues be discussed in a clear and substantive manner, in order to facilitate a full understanding of all delegations' positions and to explore ways toward an acceptable solution. At this stage, it would appear useful to focus that discussion on the substantive concerns of delegations, rather than on the technical language intended to address these concerns. The following remarks, as well as the questions contained in the appendix, are aimed at structuring and facilitating such an open discussion. Two central topics are identified in this context: the question of **consent by the alleged aggressor State** (an issue closely related to the choice of either paragraph 4 or 5 of article 121 of the Statute); and the question of **jurisdictional filters** (reflected in draft article 15 bis, paragraph 4).

7. It is important to note that the issue of consent by the alleged aggressor State and the issue of jurisdictional filters are strongly interlinked, and that the options for each issue should be discussed with the various options for the other issue in mind. The interplay of both issues has far-reaching consequences for the Court's jurisdiction in a given case.

### IV. Consent of the alleged aggressor State as condition for the exercise of jurisdiction

8. The question of consent by the alleged aggressor State needs to be addressed only with respect to State referrals and *proprio motu* investigations. No such consent would be required in case of a Security Council referral based on the Council's authority under Chapter VII of the United Nations Charter.<sup>5</sup>

#### 1. Acceptance of the amendment on the crime of aggression by the alleged aggressor State

9. One manner in which a State could express its consent to the Court's exercise of jurisdiction with respect to any future investigation relating to an act of aggression allegedly committed by that State would be the acceptance of the amendment on aggression itself. Currently, the Group's proposals reflect two approaches to this question:

- a) **The alleged aggressor State's acceptance of the amendment on aggression would not be required** in the following two cases: First, if **article 121, paragraph 4**, of the Statute would govern the entry into force of the amendment on aggression; and second, if **article 121, paragraph 5**, of the Statute would govern the entry into force, combined with a "**positive**" **understanding** of its second sentence.<sup>6</sup> In both cases, the victim State's

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19-23 January and 9-13 February 2009 (International Criminal Court publication, ICC-ASP/7/20/Add.1), chapter II, annex II; and November 2008 SWGCA report, paragraphs 28 and 29, 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.

<sup>5</sup> November 2008 SWGCA report, paragraphs 28 and 29, 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.

<sup>6</sup> Such as an understanding to be contained in the enabling resolution stating 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". See February 2009 SWGCA report, paragraphs 34-37, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions)*,

acceptance of the amendment on aggression would suffice to establish the territorial link required by article 12, paragraph 2 (a), of the Statute. This is the approach taken by the Rome Statute with respect to other crimes where a situation involves more than one State.

- b) **The alleged aggressor State's acceptance of the amendment on aggression would be required** if article 121, paragraph 5, of the Statute would govern the entry into force, combined with a “negative” understanding of its second sentence.<sup>7</sup> In this case, the aggressor State's acceptance of the amendment on aggression would be required to establish either the territoriality or nationality link of article 12, paragraph 2, of the Statute.

## 2. Other ways of addressing the issue of consent by the alleged aggressor State

10. Irrespective of the issue of acceptance of the amendment on aggression, the Group's proposals and reports contain some options that would, under some circumstances, effectively introduce a requirement of direct or indirect consent by the alleged aggressor State.

11. The Group's reports refer to the idea of requiring that the alleged aggressor State has accepted the Court's jurisdiction over the crime of aggression by way of an **opt-in declaration**. The requirement of such a declaration would effectively limit the Court's jurisdiction on the basis of State referrals and *proprio motu* investigations to cases of alleged aggression by States Parties that have accepted the amendment on aggression and have made a declaration accepting the amendment.<sup>8</sup> As a consequence, the difference in the application of either paragraph 4 or 5 of article 121 to the amendment on aggression would be strongly diminished: Either way, no State Party could be subject to the Court's jurisdiction on aggression against its will.

12. The idea of a declaration could be further adapted in order to increase the likelihood that the Court would indeed have jurisdiction over the crime of aggression in future cases. Instead of requiring an opt-in declaration, States could be given the possibility of making an **opt-out declaration** regarding the crime of aggression similar to article 124 of the Statute. In order to fully address sovereignty concerns, such a declaration could possibly be renewable, and possibly be open for non-States Parties as well.

13. A role for the International Court of Justice (ICJ) as a jurisdictional filter could also be regarded as a requirement of indirect consent by the alleged aggressor State: The determination of an act of aggression by the ICJ under draft article 15 bis, paragraph 4, alternative 2, option 4, could be made in **contentious ICJ proceedings**, which are consent-based.

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*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>7</sup> Such as an understanding to be contained in the enabling resolution stating 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”. See February 2009 SWGCA report, paragraphs 34-37, 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.

<sup>8</sup> February 2009 SWGCA report, paragraph 9, 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.

## V. Jurisdictional filters

14. The various options for jurisdictional filters contained in draft article 15 bis, paragraph 4 (Security Council, Pre-Trial Chamber, General Assembly, International Court of Justice), would each constitute a condition for the exercise of jurisdiction and should be looked at in connection with the issue of consent addressed above.

15. During previous discussions in the Group, delegations voiced different preferences regarding the alternatives and options contained in draft article 15 bis, paragraph 4. In order to deepen those discussions, it is suggested to address some specific scenarios separately:

### 1. Self-referral by the aggressor State

16. A situation could arise in which a State, that has committed aggression against another State, would be willing to refer the situation to the Court, e.g. following a change of government in the aggressor State.<sup>9</sup> The aggressor State might, for practical reasons, be unable to carry out the investigation and prosecution, while having all domestic laws in place to prosecute its former leader(s) for the crime of aggression.

### 2. Referral by the Security Council

17. The Security Council could refer a situation to the Court without making a determination of aggression. It could appear that only other crimes under article 5 of the Statute have been committed, or there could be other reasons why the Security Council did not make a determination of an act of aggression. If the Court would nevertheless be allowed to prosecute a crime of aggression on the basis of such a general Security Council referral, then the Security Council might choose not to make such a referral at all.

### 3. *Proprio motu* investigation and referral by the victim State

18. The alternatives and options contained in draft article 15 bis, paragraph 4, have so far been mainly discussed with *proprio motu* investigations and referrals by the victim State or by third States in mind. It is suggested to discuss the various options with specific regard to their respective potential as part of a compromise solution.

19. The above discussion (paragraphs 8-13) on the requirement of consent by the alleged aggressor State could usefully be taken up in the context of the jurisdictional filter again, with the benefit of just having discussed the latter issue in detail.

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<sup>9</sup> Possibly through a declaration in accordance with article 12, paragraph 3, of the Statute.

## Appendix

### Questions for discussion

#### I. Consent of the alleged aggressor State as condition for the exercise of jurisdiction

Security Council referral	State referral and <i>proprio motu</i>
<p><i>(Consent of the alleged aggressor State not required)</i></p>	<p><b>Acceptance of the amendment on the crime of aggression by the alleged aggressor State</b></p> <ol style="list-style-type: none"> <li>1. <i>Should the Court be able to exercise jurisdiction with respect to a crime of aggression on the basis of a State referral or proprio motu investigation where the alleged aggressor State has not accepted the amendment on aggression, or is not a State Party to the Rome Statute?</i></li> <li>2. <i>Could the concerns of those delegations that prefer, in principle, a requirement that the alleged aggressor State has accepted the amendment on aggression be addressed differently through other consent-based elements or through the jurisdictional filter?</i></li> </ol> <p><b>Other ways of addressing the issue of consent by the alleged aggressor State</b></p> <ol style="list-style-type: none"> <li>3. <i>Could the idea of requiring an opt-in declaration, in addition to the requirement that the alleged aggressor State be bound by the amendment on aggression, address the concerns of those delegations that have expressed difficulty with using the entry into force procedure of article 121, paragraph 4, of the Statute?</i></li> <li>4. <i>Could the idea of an opt-out declaration be further explored to serve as a bridge between the wish for a broad base of Court jurisdiction over the crime of aggression and the wish to respect sovereignty concerns?</i></li> <li>5. <i>Could a link to the ICJ's consent-based contentious jurisdiction address concerns regarding the consent by the alleged aggressor State, at least in an indirect way?</i></li> </ol>

**II. Jurisdictional filters**

Security Council referral	State referral and <i>proprio motu</i>
<p>1. <i>Where the Court is seized with a situation only because of a Security Council referral, could it be argued that the Security Council should retain the priority right to determine an act of aggression – as the Council might otherwise simply choose not to make a referral at all?</i></p>	<p>2. <i>If the prior consent of an alleged aggressor State were required (e.g. through acceptance of the amendment, or a declaration, or indirectly via contentious ICJ proceedings), would there still be a need for a jurisdictional filter in case of State referrals and proprio motu investigations?</i></p> <p>3. <i>If a State would refer a situation to the Court specifically for the purpose of prosecuting its own former leader(s) for a crime of aggression committed by that State, would there still be a need for a jurisdictional filter?</i></p> <p>4. <i>Which of the elements contained in draft article 15 bis, paragraph 4, could serve as part of a compromise solution? Where exactly does the compromise lie in each of these elements? Which other suggestions relating to the jurisdictional filter could be helpful in the search for a compromise?</i></p> <p>5. <i>Would any of the jurisdictional filters contained in draft article 15 bis, paragraph 4, have to be combined with a requirement of consent by the alleged aggressor State?</i></p>