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**Assembly of States Parties**

Distr.: General  
14 May 2008

Original: English

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**Resumed sixth session**

New York  
2-6 June 2008

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

**Explanatory note**

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

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

a merely procedural authorization (option 2).

7. Alternative 2 provides previously discussed options for the Court to proceed in the absence of a Security Council determination.

8. Given the central role of General Assembly resolution 3314 for the definition of aggression it is suggested to reproduce the text of that resolution as an annex to the Rome Statute. This question requires further discussion.

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

## Annex

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

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

1. Delete article 5, paragraph 2, of the Statute.<sup>2</sup>

2. Insert the following text after article 8 of the Statute:

#### **Article 8 bis Crime of Aggression**

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>3</sup>

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.<sup>4</sup>

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

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

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<sup>1</sup> A preliminary discussion of the issue of the applicable entry into force procedure was held in earlier intersessional meetings in Princeton (see the report of the 2005 meeting, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth session, The Hague, 28 November to 3 December 2005* (International Criminal Court publication, ICC-ASP/4/32), annex II.A, paras. 5 to 17; and the report of the 2004 meeting, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third session, The Hague, 6-10 September 2004* (International Criminal Court publication, ICC-ASP/3/25), annex II, paras. 13 to 19).

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

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

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

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

3. *Insert the following text after article 15 of the Statute:*

**Article 15 bis**

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

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, subject to the provisions of this article.
2. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

**Alternative 1**

3. In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression,

*Option 1 – end the paragraph here.*

*Option 2 – add:* unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation in respect of a crime of aggression.<sup>5</sup>

**Alternative 2**

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

*Option 1 – end the paragraph here.*

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

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

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

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

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

4. *Insert the following text after article 25, paragraph 3, of the Statute:*

**3 bis**

In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.<sup>6</sup>

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

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

*The General Assembly,*

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

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