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Discussion paper proposed by the Chairman

Explanatory note

1. The early circulation of the discussion paper contained in the annex is intended to assist participants in their preparation for the resumed fifth session of the Assembly of States Parties (January 2007), by allowing them to study the paper in detail before discussing it. This brief note serves the purpose of explaining the approach the Chairman has adopted in drafting this revised paper. It also indicates areas where further progress might be feasible at an early stage and explains some of the decisions made in drafting the paper.

2. The discussion paper is a reflection of the discussions held over the past years, in particular in the framework of the intersessional meetings at Princeton University. While the Princeton meetings were not conclusive in every respect, they have certainly advanced the discussions, and the discussion paper is an attempt to capture this progress.

3. The discussion paper follows the format of the 2002 Coordinator's paper¹ in that it only covers the draft provisions for the crime of aggression itself and its elements of crime. At the same time, it also indicates where amendments might have to be made to other parts of the Statute, in order to allow for a smooth incorporation of the provisions on the crime of aggression into the Statute.

4. While thus reflecting the progress made, the revised paper does not attempt to further advance the discussions by eliminating all options that reflect minority views. It would appear though that the options in the revised paper can perhaps be further reduced after another round of discussions at the next session of the Assembly of States Parties. Alternative views are usually indicated in square brackets, in some cases also in footnotes. There is no distinction of substance between the two ways of reflecting such views. The choice between square brackets and footnotes was merely one of drafting technique.

5. One of the main features of the revised paper is the distinction between two different approaches that have emerged in the course of the discussions in Princeton, i.e. the "differentiated" and the "monistic" approach. While the Princeton discussions revealed a trend towards the former, it seemed certainly appropriate to reflect both approaches in the discussion paper. The options concerning the use of the verb under variant (a) can likely be reduced after further discussion.

¹ ICC-ASP/5/32, annex II, appendix I.

6. Paragraph 3 of the discussion paper offers the two different options of dealing with the provisions of part 3 of the Rome Statute, depending on whether the differentiated or the monistic approach is adopted. There is no need, under either of the options, to continue reflecting article 33 of the Rome Statute on superior orders and prescription of law.

7. As indicated in the discussion paper itself, no changes were made to part II of the paper dealing with the elements of crime. This was done because the elements were never discussed at the Princeton meetings. Given the changes in the discussion paper on the draft provisions themselves, part II is thus outdated and does not reflect the progress made in part I. It should therefore be considered as a mere placeholder and used for reference purposes only.

Annex

Discussion paper on the crime of aggression proposed by the Chairman

I. Definition of the crime of aggression and conditions for the exercise of jurisdiction

*Insert new article 8 bis (entitled “Crime of Aggression”) into the Rome Statute:*¹

*Variant (a):*²

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person (leads) (directs) (organizes and/or directs) (engages in) the planning, preparation, initiation or execution of an act of aggression/armed attack

Variant (b):

1. For the purpose of the present Statute, a person commits a “crime of aggression” when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person orders or participates actively in the planning, preparation, initiation or execution of an act of aggression/armed attack³

continue under both variants:

[which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations] [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].

2. For the purpose of paragraph 1, “act of aggression” means an act referred to in [articles 1 and 3 of] United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974.

under variant (a) above:

3. The provisions of articles 25, paragraph 3 (f), and [28] of the Statute do not apply to the crime of aggression.⁴

¹ The question as to whether the amendments are adopted under article 121, paragraph 4 or 5, requires further discussion.

² Variant (a) reflects the “differentiated” approach, under which article 25, paragraph 3, *does* apply to the crime of aggression, with the exception of subparagraph (f). Further options for the wording of this paragraph under the differentiated approach are contained in the report of the 2006 Princeton meeting (see ICC-ASP/5/32, annex II, appendix I). Variant (b) represents the “monistic” approach, under which article 25, paragraph 3, in its entirety *does not* apply to the crime of aggression.

³ The proponents of the language “armed attack” (or alternatively “use of force”) for paragraph 1 advocate, along with this formulation, also the deletion of paragraph 2 as a whole.

⁴ Under variant (a), which foresees that article 25, paragraph 3, *does* apply with the exception of subparagraph (f) (“attempt”), a new subparagraph could be added to article 25 which re-confirms that the forms of participation described in article 25, paragraph 3, subparagraphs (a) to (d), apply only to persons who are in a position effectively to exercise control over or to direct the political or military action of a State.

It is widely agreed that article 28 is not applicable by virtue both of the essence and the nature of the crime. However, there is not yet any agreement whether or not non-applicability needs to be specified.

under variant (b) above:

3. The provisions of articles 25, paragraph 3, and [28] of the Statute do not apply to the crime of aggression.

4. Where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the Court shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court.⁵

5. Where the Security Council does not make such a determination within [six] months after the date of notification,

Option 1: the Court may proceed with the case.

Option 2: the Court may not proceed with the case.

Option 3: the Court may, with due regard to the provisions of articles 12, 14 and 24 of the Charter, request the General Assembly of the United Nations to make such a determination within [12] months. In the absence of such a determination, the Court may proceed with the case.

Option 4: the Court may proceed if it ascertains that the International Court of Justice has made a finding in proceedings brought under Chapter II of its Statute that an act of aggression has been committed by the State concerned.

II. Elements of the crime of aggression (as defined in the Rome Statute of the International Criminal Court)⁶

Precondition

In addition to the general preconditions contained in article 12 of the present Statute, it is a precondition that an appropriate organ⁷ has determined the existence of the act of aggression required by element 5 of the following Elements.

Elements

1: The perpetrator 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 as defined in element 5 of these Elements.

2: The perpetrator was knowingly in that position.

3: The perpetrator ordered or participated actively in the planning, preparation or execution of the act of aggression.

4: The perpetrator committed element 3 with intent and knowledge.

⁵ It has been suggested that paragraphs 4 and 5 should be redrafted in order to differentiate between the trigger mechanisms reflected in article 13.

⁶ The Elements in part II were not thoroughly discussed and have therefore been reproduced without any change from the 2002 Coordinator's paper, even though this leads to some obvious inconsistencies. The Elements therefore mainly serve the purpose of a placeholder, at this juncture of the debate.

⁷ See options 1 and 2 of paragraph 2 of part I. The right of the accused should be considered in connection with this precondition.

5: An “act of aggression”, that is to say, an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, was committed by a State.

6: The perpetrator knew that the actions of the State amounted to an act of aggression.

7: The act of aggression, by its character, gravity and scale, constituted a flagrant violation of the Charter of the United Nations,

Option 1: Add “such as a war of aggression or an aggression which had the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof”.

Option 2: Add “and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof”.

Option 3: Neither of the above.

8: The perpetrator had intent and knowledge with respect to element 7.

Note:

Elements 2, 4, 6 and 8 are included out of an abundance of caution. The “default rule” of article 30 of the Statute would supply them if nothing were said. The dogmatic requirement of some legal systems that there be both intent and knowledge is not meaningful in other systems. The drafting reflects these, perhaps insoluble, tensions.