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**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> <p>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></p> <p>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></p> <p><b>Other ways of addressing the issue of consent by the alleged aggressor State</b></p> <p>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></p> <p>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></p> <p>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></p>



## II. Jurisdictional filters

Security Council referral	State referral and <i>proprio motu</i>
<p>1. 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?</p>	<p>2. 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 <i>proprio motu</i> investigations?</p> <p>3. 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?</p> <p>4. 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?</p> <p>5. 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?</p>

## **Annex IV**

### **List of Participants**

#### **AFGHANISTAN**

Mr. Mohammed Erfani Ayoob  
*Minister Counsellor, Permanent Mission to the United Nations*

#### **ARGENTINA**

Ms. Silvia Fernández de Gurmendi  
*Director, General Directorate of Human Rights, Ministry of Foreign Affairs*

Mr. Martín Mainero  
*Third Secretary, Legal Office, Ministry of Foreign Affairs*

#### **ARMENIA**

Ms. Karine Khudaverdian  
*Counsellor, Permanent Mission to the United Nations*

Mr. Ara Margarian  
*Counsellor, Permanent Mission to the United Nations*

#### **AUSTRALIA**

Mr. James Potter  
*Senior Legal Officer, Office of International Law, Attorney-General's Department*

Mr. Andrew Rose  
*Counsellor, Legal Adviser, Permanent Mission to the United Nations*

#### **AUSTRIA**

Mr. Michael Baier  
*Head of Subsection on multilateral international law issues, Ministry for European and International Affairs*

Ms. Ulrike Köhler  
*First Secretary, Permanent Mission to the United Nations*

#### **BANGLADESH**

Mr. Mohammad Khastagir  
*First Secretary, Permanent Mission to the United Nations*

**BELGIUM**

Ms. Valérie Delcroix  
*Attaché, Federal Public Service Foreign Affairs, Foreign Trade and Development*

Mr. Gérard Dive  
*Federal Coordinator Belgian Task Force ICC-ICT, Ministry of Justice*

**BENIN**

Mr. Jean Francis R. Zinsou  
*Minister Counsellor, Chargé d'affaires a.i., Permanent Mission to the United Nations*

**BOSNIA AND HERZEGOVINA**

Ms. Sejla Durbuzovic  
*Second Secretary, Permanent Mission to the United Nations*

**BRAZIL**

Mr. Marcos Maurício Toba  
*Second Secretary, Permanent Mission to the United Nations*

**BULGARIA**

Ms. Krassimira Beshkova  
*Second Secretary, Permanent Mission to the United Nations*

Ms. Emilena Popova  
*Counsellor, Permanent Mission to the United Nations*

**BURKINA FASO**

Mr. Sifana Ibsen Koné  
*Counsellor (legal affairs), Permanent Mission to the United Nations*

**CANADA**

Ms. Annemieke Holthuis  
*Counsel, Criminal Law Policy Section, Department of Justice*

Ms. Elizabeth Williams  
*Coordinator, International Criminal Tribunals Unit, Human Rights and Economic Law Division, Department of Foreign Affairs and International Trade*

**CHINA**

Ms. Xiao Mei Guo  
*Director, Department of Treaty and Law, Ministry of Foreign Affairs*

Mr. Liang He  
*Legal Officer, Department of Treaty and Law, Ministry of Foreign Affairs*

**COALITION FOR THE INTERNATIONAL CRIMINAL COURT**

Ms. Enid H. Adler  
*American Bar Association*

Ms. Jutta Bertram-Nothnagel  
*Deputy Secretary-General for Relations with Intergovernmental Organizations, Union Internationale des Avocats*

Ms. Brigitte Chelebian  
*President, Justice Without Frontiers*

Mr. David M. Crane  
*Professor, Syracuse University, American Bar Association*

Mr. Benjamin Ferencz  
*Former Nuremberg War Crimes Prosecutor, Pace Peace Center*

Mr. Donald Ferencz  
*Director, The Planethood Foundation*

Ms. Niamh Gibbons  
*Program Associate, International Criminal Justice Program, No Peace Without Justice*

Mr. Matthew Heaphy  
*Deputy Convener, American NGO Coalition for the ICC (AMICC)*

Mr. Robert Manson  
*Litigation Director, Institute for Law, Accountability and Peace*

Mr. Bill Pace  
*Convener, Coalition for the ICC*

Ms. Deborah Ruiz Verduzco  
*Senior Programme Officer, Parliamentarians for Global Action*

Ms. Param-Preet Singh  
*Counsel, International Justice Program, Human Rights Watch*

Ms. María Eugenia Solís García  
*Member of the Board, Women's Initiatives for Gender Justice*

Ms. Jennifer Trahan  
*Association of the Bar of the City of New York*

Mr. Noah Weisbord  
*Professor of Law, Duke Law School*

Mr. Osvaldo Zavala-Giler  
*Legal Adviser, Coalition for the ICC*

**COLOMBIA**

Mr. Álvaro Sandoval  
*Minister Plenipotentiary, Coordinator of Legal Opinion Division, Ministry of Foreign Affairs*

Ms. Rosa Amalia Zuluaga  
*Minister Plenipotentiary, Permanent Mission to the United Nations*

**COSTA RICA**

Ms. Alejandra Solana  
*Minister Counsellor, Legal Adviser, Permanent Mission to the United Nations*

**CROATIA**

Ms. Ivana Kožar  
*Attaché, Permanent Mission to the United Nations*

**CUBA**

Ms. Anet Pino Rivero  
*First Secretary, Permanent Mission to the United Nations*

**CYPRUS**

Ms. Polly Ioannou  
*Second Secretary, Permanent Mission to the United Nations*

**CZECH REPUBLIC**

Mr. Ales Hanek  
*Adviser (Sixth Committee), Permanent Mission to the United Nations*

Mr. Jan Kubista  
*Third Secretary, Permanent Mission to the United Nations*

**DEMOCRATIC REPUBLIC OF THE CONGO**

Mr. Julien Bongima  
*ICC Expert, Focal Point, Ministry of Foreign Affairs, Ministry of Justice*

Ms. Bibi Maisha-Nyoto  
*Secretary, Focal Point, Office of the President*

Mr. Theophile Kubota Musimanwa  
*Research Officer, Ministry of Justice*

**DENMARK**

Mr. David Kendal  
*Deputy Head of Department, Royal Danish Ministry of Foreign Affairs*

Mr. Martin Mennecke  
*Academic Adviser, Royal Danish Defence College*

**DOMINICAN REPUBLIC**

Mr. Wilmon Martinez  
*First Secretary, Permanent Mission to the United Nations*

Ms. Clara Santana  
*First Secretary, Permanent Mission to the United Nations*

**ECUADOR**

Ms. Verónica Gomez  
*Second Secretary, Ministry of Foreign Affairs*

**EGYPT**

Ms. Namira Negm  
*Counsellor, Permanent Mission to the United Nations*

**ESTONIA**

Ms. Minna-Liina Lind  
*Third Secretary, Legal Adviser, Permanent Mission to the United Nations*

**EUROPEAN COMMISSION**

Ms. Charlotte Luker-Coombs  
*Legal Adviser, Delegation of the European Commission to the United Nations*

Mr. Roland Tricot  
*Legal Adviser, Delegation of the European Commission to the United Nations*

**FIJI**

Mr. Esala Nayasi  
*Second Secretary, Legal Adviser, Permanent Mission to the United Nations*

**FINLAND**

Mr. Arto Haapea  
*Legal Adviser, Permanent Mission to the United Nations*

Ms. Marja Lehto  
*Deputy Legal Adviser, Ministry of Foreign Affairs, Legal Service*

**FRANCE**

Mr. Christian Bernier  
*Special Assistant to the Director of International Organizations, Ministry of Foreign Affairs*

Ms. Patrizianna Sparacino-Thiellay  
*Special Assistant to the Director of the Legal Department, Ministry of Foreign Affairs*

**GERMANY**

Mr. Claus Kress  
*Professor of Criminal Law, University of Cologne*

Mr. Thomas Schneider  
*Head of ICC Unit, Federal Foreign Office*

Ms. Susanne Wasum-Rainer  
*Deputy Director General, Federal Foreign Office*

**GHANA**

Mr. Ebenezer Appreku  
*Legal Adviser, Permanent Mission to the United Nations*

**GREECE**

Ms. Phani Dascalopoulou-Livada  
*Legal Adviser, Head of the Section of Public International Law, Legal Department, Ministry of Foreign Affairs*

**GUATEMALA**

Ms. Ana Cristina Rodríguez Pineda  
*First Secretary (legal affairs), Permanent Mission to the United Nations*

**HUNGARY**

Ms. Orsolya Bartha  
*Third Secretary, Permanent Mission to the United Nations*

**INDIA**

Ms. Neeru Chadha  
*Counsellor, Permanent Mission to the United Nations*

**INTERNATIONAL CRIMINAL COURT,  
SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES**

Ms. Esther Halm  
*Associate Legal Officer, Secretariat of the Assembly of States Parties*

Mr. Renan Villacis  
*Director, Secretariat of the Assembly of States Parties*

**INTERNATIONAL COMMITTEE OF THE RED CROSS**

Mr. Robert Young  
*Deputy Head, Legal Adviser, ICRC Delegation to the United Nations*

**IRAN (ISLAMIC REPUBLIC OF)**

Mr. Esmail Baghaei Hamaneh  
*Second Secretary, Legal Adviser, Permanent Mission to the United Nations*

**IRAQ**

Mr. Riadh Y. Oshana  
*Second Secretary, Ministry of Foreign Affairs*

**IRELAND**

Mr. Trevor Redmond  
*Assistant Legal Adviser, Department of Foreign Affairs, Legal Division*

**ISRAEL**

Ms. Marlene Mazel  
*Special Adviser, Department of International Affairs, Office of the State Attorney, Ministry of Justice*

Ms. Ady Schonmann  
*Deputy Director, International Law Department, Office of the Legal Adviser, Ministry of Foreign Affairs*



**ITALY**

Mr. Roberto Bellelli  
*Legal Adviser, Judge, Embassy of Italy, The Hague*

Mr. Giuseppe Nesi  
*Professor, Legal Adviser, Permanent Mission to the United Nations*

Mr. Salvatore Zappalá  
*Professor, Legal Adviser, Permanent Mission to the United Nations*

**JAMAICA**

Ms. Sheree Chambers  
*First Secretary, Permanent Mission to the United Nations*

**JAPAN**

Mr. Masataka Okano  
*Director, International Legal Affairs Division, Ministry of Foreign Affairs*

Mr. Hideomi Tambo  
*Official, International Affairs Bureau, Ministry of Foreign Affairs*

**JORDAN**

H.R.H. Prince Zeid Ra'ad Zeid Al-Hussein  
*Ambassador, Embassy, Washington D.C.*

Mr. Akram Harahsheh  
*Third Secretary, Embassy, The Hague*

Mr. Mahmoud Hmoud  
*Counsellor, Political and Legal Officer, Embassy, Washington D.C.*

Mr. Eihab Omaish  
*First Secretary, Permanent Mission to the United Nations*

**KENYA**

Ms. Stella Orina  
*First Secretary (legal affairs), Permanent Mission to the United Nations*

**KUWAIT**

Mr. Mohammad Alansari  
*Assistant Undersecretary, Ministry of Justice, Kuwait City*

**LATVIA**

Ms. Kristine Malinovska  
*Counsellor, Deputy Permanent Representative to the United Nations*

**LEBANON**

Mr. Hassan Saleh  
*Counsellor, Permanent Mission to the United Nations*

**LIECHTENSTEIN**

Mr. Stefan Barriga  
*Counsellor (legal affairs), Permanent Mission to the United Nations*

Ms. Leena Grover  
*Adviser, Permanent Mission to the United Nations*

**LIECHTENSTEIN INSTITUTE ON SELF-DETERMINATION**

Mr. Wolfgang Danspeckgruber  
*Director, LISD Woodrow Wilson School, Princeton University*

**LITHUANIA**

Mr. Aidas Sunelaitis  
*Third Secretary, Permanent Mission to the United Nations*

**MADAGASCAR**

Ms. Lydia Randrianarivony  
*Counsellor, Permanent Mission to the United Nations*

**MALAYSIA**

Ms. Shazalina Zainul Abidin  
*Counsellor, Permanent Mission to the United Nations*

**MAURITANIA**

Mr. Ould Youba Mohamed Moctar  
*Deputy Chief of Mission, Chargé d'affaires ad interim, Embassy, Washington D.C.*

**MEXICO**

Mr. Alejandro Alday-González  
*Head of Legal Affairs, Permanent Mission to the United Nations*

Mr. Pablo Monroy-Conesa  
*Deputy Director for International Humanitarian Law, Ministry of Foreign Affairs*

Mr. Víctor Manuel Uribe-Aviña  
*Deputy Legal Adviser, Ministry of Foreign Affairs*

**MONGOLIA**

Mr. Sukhbold Sukhee  
*Second Secretary, Permanent Mission to the United Nations*

**MONTENEGRO**

H.E. Mr. Nebojša Kaludjerović  
*Ambassador, Permanent Representative to the United Nations*

**MOROCCO**

Mr. Ismail Chekkori  
*Counsellor, Permanent Mission of the United Nations*

**NETHERLANDS**

Mr. Niels Blokker  
*Deputy Head, International Law Division, Ministry of Foreign Affairs*

Mr. Just Wiarda  
*Adviser, Ministry of Justice*

**NEW ZEALAND**

Ms. Rachel Maidment  
*Senior Legal Adviser, Ministry of Foreign Affairs and Trade*

**NIGERIA**

Mr. Chile Eboe-Osuji  
*Head of Chambers, International Criminal Tribunal for Rwanda*

Ms. Angela Nworgu  
*Legal Adviser, Permanent Mission of Nigeria to the United Nations*

**NORWAY**

Ms. Susanne Juell Gudbrandsen  
*Adviser, Ministry of Foreign Affairs*

Mr. Martin Sørby  
*Deputy Director General, Ministry of Foreign Affairs*

**PAKISTAN**

Mr. Muhammad Rafiuddin Shah  
*Counsellor, Permanent Mission to the United Nations*

**PALESTINE**

Ms. Feda Abdelhady Nasser  
*First Counsellor, Permanent Observer Mission to the United Nations*

Mr. Ammar Hijazi  
*First Secretary, Permanent Observer Mission to the United Nations*

**PARAGUAY**

Ms. Luz Marina Moreno  
*First Secretary, Permanent Mission to the United Nations*

**PERU**

Mr. Gonzalo Bonifaz  
*Legal Adviser, Permanent Mission to the United Nations*

**PHILIPPINES**

Ms. Janeth Concepción  
*Attaché, Permanent Mission to the United Nations*

**POLAND**

Mr. Wladyslaw Czaplinski  
*Professor for International Law, Warsaw University and Ministry of Foreign Affairs*

Mr. Piotr Dolata  
*Second Secretary, Legal Adviser, Permanent Mission to the United Nations*

**PORTUGAL**

Mr. Joao Madureira  
*Legal Counsellor, Permanent Mission to the United Nations*

Mr. Miguel de Serpa Soares  
*Legal Adviser, Director of the Department of Legal Affairs, Ministry of Foreign Affairs*

**REPUBLIC OF KOREA**

Mr. Tae Hyun Choi  
*Professor of Law, Hanyang University*

Mr. Young Sok Kim  
*Professor of Law, Ewha Womans University*

**ROMANIA**

Ms. Oana Florescu  
*Third Secretary, Legal Adviser, Permanent Mission to the United Nations*

**RUSSIAN FEDERATION**

Mr. Andrey V. Kalinin  
*Second Secretary, Permanent Mission to the United Nations*

Mr. Igor Panin  
*Head of Division, Legal Department, Ministry of Foreign Affairs*

**SAMOA**

Mr. Roger S. Clark  
*Professor of Law, Rutgers University, School of Law, Camden*

Ms. Noelani Manoa  
*First Secretary, Permanent Mission to the United Nations*

**SENEGAL**

Mr. Demba Kandji  
*Director of Criminal Affairs, Ministry of Justice*

**SERBIA**

Mr. Boris Holovka  
*Counsellor, Permanent Mission to the United Nations*

**SIERRA LEONE**

H.E. Mr. Osman Keh Kamara  
*Ambassador, Deputy Permanent Representative (legal affairs) to the United Nations*

**SINGAPORE**

Mr. Joshua Lo  
*Legal Adviser, Permanent Mission to the United Nations*

Ms. Chan Yu Ping  
*First Secretary (political affairs), Permanent Mission to the United Nations*

**SLOVAKIA**

Ms. Eva Šurková  
*Third Secretary, Permanent Mission to the United Nations*

**SLOVENIA**

Mr. Matevž Pezdirc  
*Head of Unit, Ministry of Justice*

Ms. Tjaša Tanko  
*Third Secretary, International Law Division, Ministry of Foreign Affairs*

**SOUTH AFRICA**

Mr. Andre Stemmet  
*Senior State Law Adviser for International Law, Hatfield Court*

Mr. Dire Tladi  
*Legal Counsellor, Permanent Mission to the United Nations*

**SPAIN**

Ms. Concepción Escobar Hernández  
*Legal Adviser, Head of International Law Department, Ministry of Foreign Affairs and Cooperation*

Mr. Fernando Val-Garijo  
*Assistant Professor, International Public Law, Universidad Nacional de Educación a Distancia; Legal Counsel, Ministry of Foreign Affairs and Cooperation*

**SURINAME**

Ms. Miriam Mac Intosh  
*First Secretary, Permanent Mission to the United Nations*

**SWEDEN**

Mr. Per Lennerbrant  
*Senior Legal Adviser, Division for Criminal Law, Ministry of Justice*

Mr. Fredrik Nivaeus  
*Legal Adviser, Department for International Law, Ministry of Foreign Affairs*

Mr. Erik Wennerström  
*Senior Legal Adviser, Division of International Law, Ministry of Foreign Affairs*

**SWITZERLAND**

Mr. Emmanuel Bichet  
*First Secretary, Permanent Mission to the United Nations*

Mr. Jürg Lindenmann  
*Deputy Legal Adviser, Swiss Federal Department of Foreign Affairs*

**SYRIAN ARAB REPUBLIC**

Mr. Mazen Adi  
*First Secretary, Permanent Mission to the United Nations*

**THAILAND**

Ms. Mattanee Kaewpanya  
*Second Secretary, Permanent Mission to the United Nations*

**TRINIDAD AND TOBAGO**

Mr. Eden Charles  
*Counsellor, Permanent Mission to the United Nations*

Ms. Liselle Hamilton  
*Intern, Permanent Mission to the United Nations*

**TUNISIA**

Mr. Adel Ben Lagha  
*Counsellor, Permanent Mission to the United Nations*

**TURKEY**

Mr. Salih Bocac Guldere  
*Head of the United Nations Department, Ministry of Foreign Affairs*

Mr. Resul Şahinol  
*Head of Legal Department, Ministry of Foreign Affairs*

Mr. Esat Mahmut Yilmaz  
*Legal Adviser, Ministry of Foreign Affairs*

**UGANDA**

Mr. Duncan Laki Muhumuza  
*First Secretary, Permanent Mission to the United Nations*

**UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

Mr. Chris Whomersley  
*Deputy Legal Adviser, Foreign & Commonwealth Office*

**UNITED REPUBLIC OF TANZANIA**

Mr. Justin N. Seruhere  
*Minister Plenipotentiary, Permanent Mission to the United Nations*

**VENEZUELA (BOLIVARIAN REPUBLIC OF)**

Ms. Glenna Cabello de Daboin  
*Counsellor, Permanent Mission to the United Nations*

**VIETNAM**

Ms. Ha Nguyen  
*Minister Counsellor, Permanent Mission to the United Nations*

**YEMEN**

Mr. Adel Al-Sheikh  
*Second Secretary, Permanent Mission to the United Nations*

**ZAMBIA**

Mr. Bernard Kang'ombe  
*First Secretary (legal), Permanent Mission to the United Nations*