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Preparatory Commission for the International Criminal Court
Working Group on the Crime of Aggression
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Proposal submitted by Bosnia and Herzegovina, New Zealand and Romania

Definition of the crime of aggression

1. **A person commits the crime of aggression who, being in a position to exercise control over or direct the political or military action of a State, intentionally and knowingly orders or participates actively in the planning, preparation, initiation or waging of aggression committed by that State.**

2. **For the purposes of the exercise of jurisdiction by the Court over the crime of aggression under the Statute, aggression committed by a State means the use of armed force to attack the territorial integrity or political independence of another State in violation of the Charter of the United Nations.**

Commentary

General approach

In the interests of clarity and precision, the definition separates the concept of the crime of aggression, for which there is individual criminal responsibility, from the concept of aggression by a State. Article 5, paragraph 2, of the Rome Statute requires only that the crime of aggression be defined. However, because aggression by a State is a precondition to the prosecution of an individual for the crime, it is necessary to make clear in the Statute itself what type of action on the part of a State will trigger individual criminal responsibility and open the way to a prosecution in the International Criminal Court.

Paragraph 1 — The crime committed by an individual

Paragraph 1 defines the crime of aggression for which an individual may be prosecuted in the Court. This definition draws on the definition of the International

Law Commission in its Draft Code of Crimes against the Peace and Security of Mankind (1996), which in turn drew on provisions in the Nürnberg and Tokyo charters. Some aspects of the definition can also be found in other proposals currently before the Preparatory Commission.

The definition is to be used for the purpose of prosecuting an individual and therefore needs clarity and certainty in order to satisfy fundamental criminal law requirements, including the *nullum crimen sine lege* rule. Paragraph 1 is therefore intended to describe both the class of persons to which the crime applies and the nature of the proscribed conduct:

(a) To whom does this crime apply?

Unlike the other crimes within the jurisdiction of the Court, the crime of aggression is directed at a specific, limited class of persons. It is intended to be a leadership crime. The perpetrator must therefore be someone who is in a position to exercise control over or to direct the political or military action of a State.

(b) *Actus reus*: what does the perpetrator have to do?

The perpetrator must "order or participate actively" in one or more of the following activities:

- The planning of aggression by the State of which the person is a leader;
- The preparation for aggression by such a State;
- The initiation of aggression by such a State;
- The waging of aggression by such a State.

Strictly speaking, it might not be necessary to mention "planning, preparation and initiation" specifically, as conduct of this nature could be caught by reference to article 25 of the Statute. However, issues arise about the extent to which that article should apply in the context of this crime given that, as noted above, it is directed at a more limited class of persons than the other crimes. Therefore, it seems clearer, as well as being consistent with historical antecedents, to specify in the definition itself the precise nature of the conduct that is to be caught.

(c) *Mens rea*: what is the mental element?

The *actus reus* must be committed "intentionally and knowingly". The perpetrator must have known and intended that his or her conduct would be part of or would contribute to aggression by the particular State. As in the case of a prosecution for crimes against humanity, it would not be necessary to prove that the perpetrator had knowledge of all the details of the aggression at the time the relevant conduct occurred.

Once again it is not strictly necessary to include the mental elements in the definition itself as the default provision in article 30 of the Statute could be relied upon. However, there are advantages in setting out all the elements in the draft at this time in order to see how the crime fits together as a whole. (This approach was also taken in relation to some other crimes within the jurisdiction of the Court.)

(d) Contextual circumstance: State aggression must have occurred

The final phrase in paragraph 1, "aggression *committed* by that State", is intended to ensure that no prosecution takes place unless there has actually been aggression on the part of the perpetrator's State. Planning for aggression that is never carried out would not be enough to found individual criminal responsibility for this crime. This paragraph does not go into any further detail about the nature of the State's conduct as these aspects are dealt with separately in paragraph 2.

Paragraph 2 — Aggression by a State

Paragraph 2 deals with the precondition of aggression committed by a State and defines this term for the limited purpose of the International Criminal Court exercising its jurisdiction over the crime of aggression. This paragraph draws a distinction between the conduct of a State that may constitute a violation of article 2, paragraph 4, of the Charter of the United Nations (and so give rise to *State* responsibility) and the conduct of a State that is sufficiently serious in nature to require the individuals responsible to be held to account in a criminal court.

The definition is not operative beyond this limited purpose and, as such, has no effect on existing definitions elaborated for other purposes and for other audiences (such as the Definition of Aggression adopted by the General Assembly in its resolution 3314 (XXIX)).

The proposed definition is, however, firmly based on these other definitions and descriptions of aggression as they reflect customary international law. Where it departs a little from these antecedents is in trying to establish the point on the spectrum of illegal acts of States at which there should be *individual* criminal responsibility before the International Criminal Court. This is done by the choice of the phrase "the use of armed force *to attack* the territorial integrity or political independence of another State". In discussions at earlier sessions of the Preparatory Commission it was suggested that there are a number of uses of force that, while of questionable legality in international law, should not be the subject of a prosecution in the International Criminal Court. The examples given include fisheries enforcement action and isolated border incidents. As with the crimes already defined in the Rome Statute, the proposed definition is therefore directed at conduct that can be regarded as amounting to one of the most serious crimes of concern to the international community as a whole.