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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

Conditions for exercise of jurisdiction over the crime of aggression

1. The Court shall exercise its jurisdiction with respect to the crime of aggression in accordance with the Statute and in a manner consistent with the Charter of the United Nations, in particular, Articles 10, 24 and 39.

2. Where, in accordance with article 13 (b) of the Statute, the Security Council refers to the Prosecutor a situation in which the crime of aggression appears to have been committed, the Prosecutor shall proceed with the case in accordance with the Statute and the Rules of Procedure and Evidence.

3. Where either:

(a) In accordance with article 14 of the Statute, a State Party refers to the Prosecutor a situation in which a crime of aggression appears to have been committed; or

(b) In accordance with article 15 of the Statute, the Prosecutor intends to proceed with an investigation *proprio motu* in respect of the crime of aggression, the Court shall first ascertain whether the Security Council has made a determination under Article 39 of the Charter as to the existence or otherwise of aggression committed by the State concerned.

4. If the Security Council has made a determination that aggression has been committed by the State concerned, the Prosecutor shall proceed with the case in accordance with the Statute and the Rules of Procedure and Evidence. If no Security Council determination exists, the Court shall notify the Security Council of the situation before the Court so that the

Security Council may take action, as appropriate, under Article 39 of the Charter.

5. Where the Security Council does not make a determination under Article 39 or invoke article 16 of the Statute within six months from the date of notification, the Court may request the General Assembly to seek an advisory opinion from the International Court of Justice, in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court of Justice, on the legal question of whether or not aggression has been committed by the State concerned.

6. In situations where no action is taken within the period specified in paragraph 5, the International Criminal Court may proceed to exercise its jurisdiction over the crime of aggression in accordance with the Statute and the Rules of Procedure and Evidence if the International Court of Justice either:

(a) Gives an advisory opinion that aggression has been committed by the State concerned; or

(b) Makes a finding in proceedings brought under Chapter II of its Statute that aggression has been committed by the State concerned.

Commentary

At the 7th meeting of the Preparatory Commission, Bosnia and Herzegovina, New Zealand and Romania submitted a proposal on the conditions under which the International Criminal Court could exercise its jurisdiction over the crime of aggression (PCNICC/2001/WGCA/DP.1). The proposal would give the International Court of Justice a role in determining the precondition to the exercise of jurisdiction by the International Criminal Court, namely that a State has committed aggression. However, before the ICJ could become involved, the Security Council would have a period in which to consider its options. The present document is a revision of the earlier proposal and is intended to address some of the concerns and issues raised.

Paragraph 1 — The framework

While this paragraph is not strictly necessary, it seems useful to begin by setting out the framework within which the International Criminal Court exercises jurisdiction over the crime of aggression (and in that way to elaborate what is meant in article 5 (2) of the Rome Statute). Articles 10 and 24 of the Charter of the United Nations are general Articles that describe the roles of the General Assembly and the Security Council respectively (both of which potentially have a role in situations involving aggression). Article 39 is singled out because it deals specifically with the Security Council's duty to determine, inter alia, acts of aggression by States and to make recommendations or decide on measures for the maintenance or restoration of international peace and security. This paragraph remains essentially the same as the first version of the proposal, the only change being the addition of the reference to Article 10, in recognition of the role of the General Assembly.

Paragraph 2 — Referral by the Security Council

Paragraph 2 makes it clear that where the Security Council decides to refer a situation involving aggression to the Court under article 13 (b), nothing more is required to establish the precondition that aggression has been committed by the State concerned. However, even where a situation is referred in this manner, the Prosecutor must still conduct a thorough investigation to see whether there is sufficient evidence to bring charges against particular individuals.

The paragraph has been amended to align the text more closely with the wording of article 13 (b) of the Statute. It also makes it clearer that what is contemplated here is the referral of situations that appear, at the time of referral, to involve possible crimes of aggression.

Paragraph 3 — Referral by a State Party and investigations *proprio motu*

Paragraph 3 covers the other two ways in which the International Criminal Court can become seized of a situation involving the crime of aggression: where a State Party refers a situation to the Court, or where the Prosecutor initiates an investigation *proprio motu*.

In these situations the Court must first ascertain whether there is any relevant determination by the Security Council acting under Article 39. The paragraph does not go into detail about how the Court would make this inquiry. However, it is envisaged that the most likely route is by way of the Secretary-General of the United Nations, and that this would be done in accordance with relevant procedures in the Relationship Agreement between the United Nations and the International Criminal Court.

The overall aim of the paragraph remains the same as in the first version. The language has been amended to follow more closely the wording of the relevant provisions of the Statute, and the format has also been changed. The final part of the paragraph makes it clearer that the objective of the Court's inquiry is to ascertain whether the Security Council has made an Article 39 determination to the effect that aggression of the kind specified in paragraph 2 of the definition[1] has been committed by the State concerned. (The type of aggression needed for the purposes of prosecuting an individual for the crime of aggression is "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".)

Paragraph 4 — ICC to notify the Security Council if no determination exists

Paragraph 4 deals with various scenarios where the Court's inquiries reveal that there is or is not a relevant Security Council determination.

If there is an existing determination by the Security Council to the effect that the State in question has committed aggression, then the precondition has been met and the Prosecutor may proceed with the investigation and prosecution in the usual way. If, however, the Security Council has determined that there has not been aggression, then that is the end of the matter for the purposes of a prosecution in the ICC.

[1] See PCNICC/2001/WGCA/DP.2.

If, however, the inquiries reveal that there is no Security Council determination of any kind, the Court must formally notify the Security Council (once again using applicable procedures in the Relationship Agreement) of the situation before it so that the Security Council has an opportunity to consider its options.

Paragraph 5 — If no action is taken within six months, an ICJ advisory opinion may be requested

Paragraphs 5 and 6 set out the circumstances in which the Prosecutor can continue with a case in the absence of a Security Council determination that the State concerned has committed aggression. The Security Council must first have time to consider whether or not to make a determination under Article 39 or to make use of article 16 of the Statute (to defer the matter for 12 months). In the first version of the proposal, the period for this consideration was 12 months. However, in order to streamline the process this has been reduced to 6 months, which is consistent with the deferral period given to States considering national investigations under article 18 (3).

The paragraph then sets out a process to enable a request to be made to the International Court of Justice for an advisory opinion if the Security Council has taken no action by the end of the period. In accordance with Article 96 of the Charter, this request would need to be made by the General Assembly. The proposal envisages that the General Assembly would do so following notification by the Court. It is considered that the General Assembly would be able to consider the issue under Articles 10, 11 and 14. (Another option that may be worth considering is whether the General Assembly could provide a standing authorization to the ICC to trigger requests for advisory opinions. This would further streamline and depoliticize the process. The details of such a standing authorization would need to be carefully considered to ensure compatibility with the governing provisions of the Charter and would probably require amendment of the Relationship Agreement between the United Nations and the International Criminal Court.)

The request would be for an advisory opinion on whether, as a matter of international law, the conduct of the State concerned amounted to "aggression" as that term is defined in paragraph 2 of the definition.[2] An opinion by the International Court of Justice is simply an advisory opinion for the purposes of establishing whether the International Criminal Court has jurisdiction to proceed with the prosecution of an individual. This is a preliminary question only. The International Court of Justice is not concerned with issues relating to the guilt or innocence of an individual, those being matters for the International Criminal Court. Moreover, as the advisory opinion is given for this limited purpose it does not bind the affected States inter se. If any legal consequences are to follow from the aggression for States concerned, that would be determined in the context of proceedings between those States.

Paragraph 6 — If the ICJ decides there has been aggression, the ICC can proceed

The final paragraph sets out the two situations in which the International Criminal Court may proceed with a case at the end of the six-month period in the

[2] Ibid.

absence of a Security Council determination. The first situation is where the International Court of Justice gives an opinion, following a request referred to in paragraph 5, that the conduct constitutes aggression as defined. In the first version of the proposal, the International Court of Justice would have given its advisory opinion to the General Assembly, the requesting body, which would then have to decide whether to authorize the International Criminal Court to proceed. There were concerns in the Preparatory Commission that this process could take a long time. On reflection, it seems appropriate for the General Assembly to take into account, at the time it decides to request an advisory opinion, that if the International Court of Justice decides that aggression has been committed, the International Criminal Court should proceed without further delay. There would not need to be a reference back to the General Assembly.

The proposal has also been developed to incorporate the possibility that the International Court of Justice might also make such a determination in the context of its contentious jurisdiction under Chapter II of its Statute. The Prosecutor would have no role in seeking such a determination (as the matter would be between the States concerned), but the ICC should be able to use such a finding to satisfy the precondition required for the exercise of its jurisdiction.