

Resumed Fifth Session of the Assembly of States Parties to
the Rome Statute of the International Criminal Court
SWGCA, 30 January 2007, 10am-1pm

Informal and Unofficial Notes from the ASP
SWGCA, 30 January 2007 (Morning Session) – Formal Meeting

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Chairman: Good morning everybody, as announced yesterday, we will continue this morning our discussion on the discussion paper that I have presented at the beginning of the meeting and we are at this point discussing the draft provisions that relate to the conditions for the exercise of jurisdiction and these are contained in paragraphs 4 and 5. We have commenced our discussion on these two draft positions yesterday and will continue to do so this morning. I will first, Could you please take your seats? Thank You.

I will first give the floor to the delegate of Belgium to present the proposal contained in document ASP/5/SWGCA/WP.1 to already offer some preliminary, obviously preliminary comments on this proposal, in the course of this discussion. Belgium of course will explain that proposal themselves, but it does relate in particular to paragraph 4 in my paper, so this is a good moment for introducing it, since it is now available in the room and I trust that you have all seen it. Afterwards I will go back to my speaker's list as announced yesterday; my first speaker after Belgium will be Libya.

Belgium: *(translated from French)* Thank you Mr. Chairman. Firstly, thank you for agreeing to give my delegation the floor this morning so that the proposal which was submitted orally during the first part of this session of the Assembly last year can be explained in greater detail now that the text is available in all of our languages. As you said, Mr. Chairman there is indeed a clear link between the document which you very usefully submitted yesterday and the proposal which we are submitting today. However, I would state clearly what the objective and the content is of our proposal. On a preliminary basis, and by stressing the fact that this is a preliminary comment, I would like to stress, as is said in the explanatory note, that this is not a national position which Belgium is putting on the table today, rather it is a draft text to give us food for thought as to what we should consider during our work, and that is the procedure which will make it possible for the Court to deal with the crime of aggression and the procedure which is going to lead the Court from the point where the case is before us to the point where a trial has begun and the position has been taken to hold a trial. As I said, this does not yet exist in detail in our document. And that is logical because we haven't ever really talked about it. But it seems useful to us to give you a document which can help you to embark on this discussion. So what we are proposing as I say is food for thought. It's a framework, it's a bit like you can add things you can take things away. It is something that could be potentially useful for our work.

So the reflection underlying this proposal is that the procedure which should be established for the crime of aggression would have no meaning if it were not linked to the

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procedure which already exists today for war crimes, crimes against humanity, genocide. We based ourselves on Articles 13, 14 and 15 of the Statute which establishes the procedure for the Court for these three other categories of crimes, so that we do have something to refer to when we deal with the crime of aggression. The basic philosophy of this is to allow our Working Group to think about various procedures for bringing a case before the Court depending upon the body which brings it before the Court, that is the channel.

So, as I say it is provided for in Article 13 bis and the following Articles. We base ourselves on the possibility of saying that this is something where we can add elements or move elements. We base ourselves on the idea that there are three situations: one where Security Council informs the Court; another when a State Party informs the Court; and a third by the Prosecutor acting on his or her own initiative. In 14 bis and 15 bis, we use very comparable procedures, which we have for the three other categories of crimes when we talk about the procedure within the Court. The main difference between the three other categories of crime, and the crime of aggression is that the filter within the Court exists in the case of war crimes, crimes against humanity and genocide solely for ex proprio motu initiatives of the Prosecutor.

When the Court has a case brought before it by the Prosecutor, that filter, we are proposing it be extended. It is a filter not only when the Prosecutor is acting on his or her own initiative and informs the Court but also when a State Party informs the Court. Why? Simply because we have heard the broad majority of views of this committee which stresses the danger of politicization of a procedure before the Court relating to the crime of aggression and that is much more significant in this case than in other cases, than for other crimes already under the competence of the Court, to ensure that any case brought before the Court should be based upon a competent and legal basis.

We are not reinventing the wheel here; we have not been very original. Many delegations, as we heard yesterday, want that anything related to the crime of aggression should be based on the logic of the current Articles and not deviate from the text of the Statute except when it is absolutely necessary. That is why the filter we are proposing is also the filter of the Pre-Trial Chamber. Because this can be a particularly delicate situation in political terms, we cannot play with strictly politically-motivated cases brought before the Court. We think it should be a Pre-Trial Chamber made up of six judges who determine the possibility of initiating a proceeding. In our system in Belgium, but I think I have found out that this exists in many States, when a superior court is ready to take a decision on a very sensitive legal element, the court of justice does not act through a simple chamber, but through the entire body and that is why, rather than making an initial decision depend on a Pre-Trial Chamber, we are proposing that that decision be taken by the Pre-trial Division in full session, that is the six judges. We could envisage that that Chamber might express its views by a majority or by unanimity; We would be inclined more towards unanimity. An appeal to this decision, of course, would be possible before the Appeals section, which of course is just made up of one chamber, so ultimately there would be 11 judges out of 18 who would have to take an initial

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decision on the judicial nature of a crime being brought before the Court, thus avoiding any politicization of a trial of the crime of aggression.

The text before delegations on page 3 onwards has the key elements which are different from the current text of the Statute. This shows to what extent a much stricter framework would exist and could be established for a crime of aggression without disrupting the current Statute. At this stage, I will not go into more detailed explanations. I think the most important thing is that delegations should read this proposal, particularly the explanatory note.

And now, with your permission, I would like to talk about the link between this proposal and the text which you have submitted. The text which you have submitted to us ultimately relates to competence in Paragraph 4 of your proposal. We can imagine quite clearly that a text which receives agreement on Paragraph 4 could be introduced as a subparagraph of Article 13 *bis* which would explain the way in which the Court could notify a crime of aggression to the Security Council. As for Paragraph 5, it covers more the problem of the determination, of what is called in French “*constat*”, to see whether a body outside the Court should determine whether there is an existence of an act of aggression, before the Court expresses its views.

Obviously, the logic of the Belgium proposal can be looked at either in parallel with the problem of determination or it can stand by itself without dealing anymore with the issue of determination, since, as was stressed yesterday very eloquently by the distinguished representative of Sweden and the representatives of Samoa and Greece, this problem of determination does cause clear legal and political difficulties. Whether we decide at the end of the day to keep those elements on the determination in our compromise or consensus text or not, in any case, we will have to provide Articles on the internal procedures of the Court and this paper by Belgium can serve there.

If you would allow me to say a few more words, I would like to talk about Belgium's position to continue the reflection in our debate. So, I would come back to Paragraph 5 of your proposal. Belgium continues to have major questions about the conformity of a determination with the respect for certain rules of international law. Of course like you all, we read the Charter and Article 24 of the Charter gives primary competence to the Security Council for to the maintenance of international peace and security. But like you, we also read Article 11 of the Charter, which indicates that the General Assembly also has competence on the subject. Of course, we also, like you, read Article 12, which stresses that the Security Council can have a situation brought before it and, once the matter is before the Security Council, the General Assembly no longer has the right to speak on the subject. Then there is Resolution 377, the blanket resolution which allows the General Assembly nevertheless to have a role of recommendation, including on the matter of aggression, when the Security Council has that item on its agenda but is unable to act due to a veto. It is also interesting to note how very recently the International Court of Justice, in an opinion which is quite well known, referred to the Charter and the rest of international law, it was the advisory opinion of the Court. So that shows that indeed, if

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we discuss the problem of determination, we must decide which body is competent – the General Assembly or the Security Council or the International Court of Justice – because, since 1986 in the decision on military and paramilitary activities in Nicaragua, the Court qualified the situation as an act of aggression whereas the Security Council said nothing at the outset. So the International Court of Justice also has joined the dance, if I can put it that way. So, ultimately, we have this problem with the determination, with extremely sensitive difficulties and particularly dangerous ones for our work, where we have to juxtapose the General Assembly, the Security Council and the ICJ against each other. And we respect the Charter too much and the main bodies of the United Nations to want to put our finger there., to tackle this thorny issue too rashly. We must also protect the responsibilities and competencies proper to each organ and avoid those organs taking decisions successively, decisions which may then be contradictory to each other.

I apologize for having been so lengthy Mr. Chairman but it seemed to me useful to help States to understand first the thrust of Belgium's proposal, not as being a national position but rather being an element of food for thought to help us think about the procedure which we should set up at one point or another for the Court, outside the debate on determination. And also to recall that this debate on determination is creating some difficulties, legal difficulties, both in the interpretation of the Charter, where it leads us, - and that would be a potentially dangerous debate -, but also with respect to certain fundamental rules of human rights, which we must all adhere to since we are member states particularly to the Covenant on Civil and Political Rights, and with respect to the independence of the International Court of Justice and the ICC, and also the rights of the accused and the rights of the victims. Thank you.

Chairman: Thank you very much for that proposal and for your introduction. Now you have heard the introduction made of the proposal presented by Belgium. The rationale of this proposal is reflected in footnote 5 of my paper, because indeed, as indicated by the delegate of Belgium, he had already alluded to his proposal when we last met in The Hague.

Now, I will go back to my speakers list. You can obviously offer your preliminary thoughts on the proposal you have just heard and I would otherwise continue to encourage you to address the two Paragraphs in their entirety but also in particular to perhaps offer your thoughts on Options 3 and 4 in Paragraph 5, which will be very helpful to me in my further thinking in how to develop this paper. Obviously Options 1 and 2 cannot be changed at this point. While I am obviously also interested in your thoughts on those, if you can comment on Options 3 and 4, that would be very helpful to me. Ok now, with this, I open the floor and my first speaker is Libya, you have the floor.

Libya: (*translation from Arabic*) Thank you Mr. Chairman, good morning colleagues in the meeting. My statement will be precise and will relate to Paragraph 5 of the working document and the four options contained in that paragraph. In this respect we would state again that the regime of the Rome Statute has given great competence to the Security Council in that it can make a deferral for 12 months. Many Parties have been concerned

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about the independence of the Court because of that. My delegation is expressing its viewpoint.

Today, we need to stress the independence of the Court if the Security Council has not taken a decision and has not made a determination as to whether a State has committed an act of aggression. The Council acts with political motives rather than legal motives, clear political motives, due to the dominance of the five permanent member states which have a special right, namely the veto right, which means that the Council has become politicised following the interest of those States. Our previous experience confirms what has just been said. My delegation suffered aggression in April 1986 and the Council did not assume its responsibilities and did not do what it should have. We have seen the likewise acts of aggression against the Lebanese and Palestinian people and nothing was done by the Council for the same reasons which I have just mentioned.

This is why Option 1 in my delegation's view is the most appropriate one to ensure international criminal justice. However we are flexible and could accept the third option, which gives the General Assembly an important role in this matter, because within the General Assembly states are equal. Thank you.

Chairman: Thank you very much. I next give the floor to the Russian Federation.

Russian Federation: (*Translation from Russian*) Thank you Mr. Chairman. As you have requested we would just like to make comments on Paragraphs 4 and 5 of your document. As regards the proposal made by the distinguished delegate of Belgium, of course we will study it very carefully, but at this stage we will refrain from comments on it.

Mr. Chairman, as regards Paragraph 4, as a whole it does not cause us any major problems. We feel that the Court and the Prosecutor in particular should play an active and proactive role in situations where there are grounds to believe that a crime of aggression has been committed. Of course, it would be incorrect to say that the Prosecutor should wait passively for the referral of a situation and wait for action from the Security Council as regards any matter which has been brought before them for consideration. We are ready to discuss the wording which would provide for a particular mechanism for a dialogue and interaction between the Prosecutor and the Security Council in such situations.

However, Mr. Chairman, we are convinced, and this position is well-known, that a crime of aggression cannot have been committed by an individual or by a group of individuals without there being an act of aggression by one State against another. The establishment of the fact of an act of aggression is the prerogative of the Security Council, which is quite clearly set out in the Charter of the United Nations. In this connection, moving on to Paragraph 5, the only acceptable option is Option 2. We are convinced that the Court cannot proceed with a case against an individual for the commission of a crime of aggression without the clearly expressed agreement of the Security Council. Any other Option would simply contradict the Charter of the United Nations and the system for the

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maintenance of international peace contained therein. So I repeat, Mr. Chairman, we are ready to work on the basis of Option 2. Possibly a different wording could be found, but the principle must remain the same. And in this connection, neither the 1st nor the 3rd nor the 4th Option are acceptable to us, and cannot be. Thank you.

Chairman: I thank you very much, my next speaker is Norway.

Norway: Thank You Mr. Chairman. When considering the first 3 paragraphs of the discussion paper you submitted to us yesterday, we have a firm ground under our feet, we had clearly the main articulations of a broad acceptable solution to the definition of the crime. That did not only seem to us to be in sight, but possibly within our grasp. Now you have asked us to comment on the next two paragraphs in your discussion paper, and that is what I am going to do now, and those paragraphs of course concern the conditions for the exercise of jurisdiction. And it doesn't take much insight or experience nor does one need to be a rocket scientist to see possibly that this is where the main difficulties may lie.

We have to play our good faith, and never lose sight of the interests of the Court and the effectiveness of the Court. My delegation believes in this context that it might be useful to consider that the choice of a jurisdictional triggering mechanism for this specific institution, the ICC, must rest on a deliberate choice to be made on the basis of considered judgement to be made by States Parties taking into consideration all relevant factors, legal as well as practical. It is not merely an exercise of legal applications and rules, nor a pure discussion of legal coherence.

We would like to focus first on Paragraph 4 and while we agree entirely with the idea in Paragraph 4, we may be a little puzzled by the formulation of the two sentences. What does it really mean to say that the Prosecutor "intends to proceed"? Then comes, „the Court shall ascertain ...“ Who is the Court, who are we speaking of? When and how shall it ascertain whether the Security Council has made a determination of an act of aggression? We believe that if the Security Council has made a determination, then within the framework of Article 39 of the Charter, - there won't be many doubts about that. It won't be very resource-consuming or time-consuming to find out about that – that would basically follow from the wording of the resolution of the Security Council and it would certainly qualify part of the decision taken under the Charter.

I should like to add that we will study very carefully the suggestions from Belgium. We haven't had time to consider it and study it carefully, we will do that certainly.

But one brief comment. When Article 39 of the Charter speaks of the determination of the Security Council, and the Council shall determine the existence of an act of aggression for instance, this is not a judicial pre-qualification, as we know it from the realm of legal process in our national systems for instance. The exact wording of Article 39 in the French text is *constate, constatation*, not *pre-qualification*. The determination of an act of aggression by the Council, an act of aggression committed by a state, is

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eminently a political determination based on facts made by the Council. That is at least the traditional way we read Article 39. It is a separate question as to whether an accused person can raise any legal defenses. Of course, an accused can raise a number of legal defenses as to whether the crime has been committed by the individual concerned. We believe these are two quite different issues in fact.

So we are really struggling with the wording of Paragraph 4. What are we actually intending to say? If we take a practical perspective, we believe that if the Council has made the determination of an act of aggression, there will be a likelihood that the Council will also have taken, or will be in process of taking some binding measures under Chapter VII. Thus, the actual situation at the time would in some likelihood be that actions by the ICC would be one element of the broader context of actions taken by the international community. And whether the Council has made a determination, that would be public knowledge, it would be well-known. We really would question whether we need to invent procedures to ascertain that fact. And we will certainly refrain a little from engaging in a situation where the Court wants to interpret what the Council has said, if the Council has, for example, merely determined the existence of a threat against peace and security, which is something different from an act of aggression.

Mr. Chairman, the wording of the second sentence of Paragraph 4 is also somewhat puzzling to us, although we fully support the idea behind it. But if the Council has not made a determination of an act of aggression, shall the Court really have a duty, as it is phrased, to notify the Council of a situation? Is this really on par with the role of Secretary-General of the United Nations under Article 99 of the Charter for instance to submit to the Security Council information which might be relevant for its work? Of course, we favor dialogue between the Court and the Council. We believe that that interaction is going to be very important.

Mr. Chairman, my delegation sounds a little bit destructive right now, let me take a more constructive mode. We believe that Paragraph 4 may suit our purpose and the comments we made have mainly to do with drafting. But at the same time, the question that excites our imagination is really the following. Isn't there in fact, and it's a question I would like to put to this room, isn't there agreement in this room about at least the following: If we rephrase parts of Paragraph 4 in more precise jurisdictional language, something to the effect of "The Court may exercise its jurisdiction in respect of the crime of aggression, if the Security Council has made a prior determination of an act of aggression committed by the State concerned, without prejudice to Article 16 of the Statute", of course" I am now considering only the contents of Paragraph 4, I haven't engaged into Paragraph 5 as yet, but the thought-provoking and possibly provocative question is: Would there not be general agreement on this in this room without prejudice toward Paragraph 5, that, if the Council has made such a determination and does not invoke Article 16, that the Court should actually be allowed to proceed?

My delegation would like to ask from a very practical point of view in this context whether - one of the real challenges for the Court will be with regard to this kind of

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crimes - in the context of an ongoing armed conflict, wouldn't issues of how to conduct investigations, ensure state cooperation under Part 9 of the Statute and a number of other issues, be quite daunting? Wouldn't it, from a purely practical perspective, not speaking in terms of legal philosophy here, wouldn't it be practical to have backing of the Security Council in such a situation? The same consideration would apply with regard to non-compliance with judgments of the International Court of Justice; the system of the Charter is that such situations could be brought before the Council. Now, it is not only a rhetorical question but a very practical one. Isn't there within the context of Paragraph 4 some practical basis for an emerging consensus, possibly, that if the Council has made such a prior determination, that there would be a jurisdictional basis for exercising activities of the Court?

Now stating the positive, the obvious, if my delegation is not mistaken, the new Paragraph 4 would leave intact the discussion of Paragraph 5. It is quite a different issue whether one wishes for additional possibilities of triggering the jurisdiction of the Court. We will ourselves listen very carefully to the debate and informal discussions on this issue and we will revert to this at a later stage. But the questions we would like to put to the room is whether simply, if we all agree on that element which underpins the thinking, the philosophy behind Paragraph 4, wouldn't there be a basis for saying that there might be a common basis of agreement in order to ensure activities of the Court with regard to the crime of aggression with the backing of the Security Council.

This is not a formal proposal from my delegation, and we will not submit any text because we have not really have an answer to that question as yet. But the gist of it would be that Paragraph 4 might be revisited in language which is more familiar from clauses that have to do with jurisdictional triggering, which basically do not address the intentions of a Prosecutor, nor some sending of mail between the Court and the Council, but rather whether the Court has jurisdiction under a particular situation. The only intention my delegation has in making these remarks is in trying to be constructive. Thank you very much, Mr. Chairman.

Chairman: Thank you very much. I believe certainly that there are different ways of drafting Paragraph 4 and am certainly very interested in hearing the comments because even though you have said you don't intend to submit any language, at some point during your statement you have read out something that can be considered a draft. I am sure people have listened carefully to it and I certainly agree that the crucial problem here does exist in the situation where there is no determination by the Security Council. So I am very interested in comments from the room. I next have Germany.

Germany: Thank you Mr. Chairman, with regard to the question of the role of the Security Council, I would like to make the following comments. We were first of all very happy to see in your paper a clear distinction between the definition of the crime on the one hand and the conditions for the exercise of jurisdiction on the other. We have been following the debate on this issue very carefully throughout the years. We have come to the conclusion that, under international law, the exercise of the ICC's jurisdiction should

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not be dependent on any other body such as, in particular, the United Nations Security Council. Therefore, like many delegations who spoke before us, we clearly are in favour of Option 1 in Paragraph 5 of your paper. The position underlying Option 1 is justified by the completely different functions attributed to the UN Security Council and the ICC respectively. The Security Council, as the UN organ bearing the main responsibility for the maintenance of international peace and security, is a political body. The Council is part of the collective security system of the UN Charter; it is not, however, entrusted with the competence to exclusively authorize a criminal investigation. By contrast, the ICC is a judicial institution that is responsible to decide on matters of individual criminal responsibility. Both institutions have to fulfil their distinct functions independently of each other. Our view is supported by the practice of the United Nations. Both the General Assembly and the International Court of Justice pronounced in part on the issue of aggression in their spheres of competence without any prior determination by the Security Council. We also noted that in the past the Security Council rarely referred to the act of aggression. Therefore, to provide for the ICC's dependence on Security Council authorization might even hinder the proper functioning of the Court in the fight against impunity of perpetrators of acts of aggression. Furthermore, we are of the view that the solution suggested in option 1 is also supported by the fundamental principle of equality before the law, a principle to which all delegations have always attached great importance. Finally, the Rome Statute defines the role of the Security Council in relations to the Court already in a well balanced manner. This holds particularly true for Article 16.

My delegation was reassured in our support for Option 1 by yesterday's clear majority in favour of a high threshold for the definition of a state act of aggression. If this can be achieved, the Security Council, according to our opinion, will not be needed as a, let's say, procedural safeguard.

I want to raise a further point. If at the end of the day a consensus should emerge to build the definition of this crime on Resolution 3314, one crucial element must be kept in mind. A general reference to Resolution 3314 would include, of course, its Article 4. But this provision makes the list in Article 3 of that resolution a non-exhaustive one and empowers the Security Council to determine that other acts would constitute acts of aggression. This would partly reverse the clear distinction between procedure and substance, which was, according to our opinion, a major achievement in our work so far. In addition it would contravene the principle of *nullum crimen sine lege*. Therefore, if the reference to 3314 should be retained, we would strongly advocate to limit this reference to Articles 1 and 3 of the Resolution.

In this context, we also took note of the very interesting and helpful proposal by the Belgium side which of course needs further study from our side.

In conclusion, we would like to join the group of those speakers who argued against Options 3 and 4 for the reasons just outlined, and also given so eloquently yesterday by our distinguished colleague from Greece. Thank you Mr. Chairman.

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Chairman: Thank you very much; the Netherlands.

Netherlands: Thank you Mr. Chairman. You have asked us to comment on Paragraphs 4 and 5 of the proposed Article 8 *bis* and more particular, on Options 3 and 4 of Paragraph 5, probably to see whether there is still support for Options 3 and 4 or whether they can be deleted.

In addition, Samoa has asked us whether we can agree to the deletion of Option 4(b) of the 2002 paper. This Option 4(b) was based on a proposal by my delegation introduced almost five years ago. To start with Samoa's question, as we have said yesterday, this new discussion paper is a fair reflection of, in particular, our Princeton discussions. In Princeton, there was not sufficient support for Option 4(b) to justify retaining it in the paper. We can live with that. However, our main concern is that we can delete options but not the underlying problem. This problem is the following:

A crime of aggression can only be committed if there is a corresponding act of aggression by the state concerned. Both the 2002 and the present discussion paper emphasize that this is, first of all, for the Security Council to decide. This is in our opinion the right starting point in view of the powers of the Security Council under the UN Charter. This is important, as Article 5(2), last sentence, of the Rome Statute reminds us that the provision we are working on, the proposed Article 8 *bis*, must be consistent with the relevant provisions of the UN Charter. In addition, this starting point is in line with the key elements in the United Nations reform discussion of one and a half, two years ago. This key element was that the task is not to find alternatives to the Security Council as a source of authority, but to make it work better. So it is right, that it is first of all for the Security Council to decide whether or not an act of aggression has been committed.

But, what if the Security Council does not so decide? Well the obvious answer is essentially, that, if this happens, then apparently, there has not been an act of aggression. Normally, there should be nothing wrong or unfair in this, it is daily practice in international organizations in which powers have been attributed to international organs and decisions are taken on the basis of these powers in accordance with the relevant decision-making rules. And it may be legally and politically very relevant that Security Council does not take a decision, as happened for example four years ago in the Iraq crisis.

Therefore, Option 2 of Paragraph 5 seems right and there does not seem to be the need to go to alternatives such as Options 3 and 4 and the now deleted Option 4(b). However, there is a widespread concern in this room that the Security Council may not be able to determine that aggression has taken place, while the international community generally believes that there has been aggression. There may be exceptional cases of a shocking situation crying out for action, as was said in the context of the 2001 Canadian Responsibility to Protect Report. It is for such cases that alternatives such as Options 3 and 4, and now deleted Option 4(b), are written. We can delete these options but

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unfortunately we can't delete the underlying problem. Aggression has clearly occurred in exceptional cases, but the Security Council is unable to act, because, for example, of use or threat of use of the veto. This is where the General Assembly and the International Court of Justice come into play. Not surprising, as these principal organs of the UN also have the power to determine that aggression has occurred.

From a legal perspective, the situation is clear. It is first of all for Security Council to make an aggression determination, but this is not an exclusive competence of the Security Council. First, the General Assembly may also make such determinations, and it has done so in practice. Second, the International Court of Justice may also do this, and it has almost done this in December 2005 in the DRC v. Uganda case. However, while there can be no doubt that the General Assembly and ICJ have the general power to make aggression determinations, it is still open for us in this Special Working Group to decide whether only the Security Council shall have the power to make an aggression determination for the purpose of triggering the jurisdiction for the ICC, or also the General Assembly and/or the ICJ. In the future, no matter what the outcome of our discussions will be, the General Assembly and the International Court of Justice may decide that an act of aggression has been committed. But it is for us to decide whether this should have ICC implications.

Now, where does this leave us? Let me be more concrete, and I apologize for speaking at such length. First of all, we need to recognize that the deletion of options may not delete the underlying problem. Secondly, if this is recognized, we need to look for alternatives, and it is in this context also that I welcome the Belgian proposal that has just been introduced and on which we will comment later.

But for now, with regard to our Options 3 and 4 in the discussion paper, let me just mention that there is of course a simpler way to refer to a possible role for the General Assembly and the ICJ. Option 2 could be extended as follows "the Court may not proceed with the case, unless it asserts that the General Assembly or the International Court of Justice has made a determination of an act of aggression committed by the state concerned." Of course, this could also be presented as a separate option, for example an option that may also come in the place of options 3 and 4. So at the end of the day, we are also in favor of deleting options as you can see. We are willing to elaborate this idea if there is sufficient support for it. Thank you Mr. Chairman.

Chairman: Thank you very much indeed for your comments and your suggestions. And if the following speakers could also address in particular the drafting proposal made by the Netherlands, that would be most helpful. I next have, the Republic of Korea.

Korea: Regarding to Paragraph 4 and 5, my delegation is in favour of the idea that the Security Council can and should play an important role in making determinations of aggression with regard to acts of the state, in order for the Court to adjudicate individual criminal responsibility of the person concerned. My delegation is, however, of the view, that there should be a way for the Court to exercise its jurisdiction over the crime of

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aggression, if the Security Council fails to exercise its primary responsibility for the determination of aggression in any case where there appears to be an act of aggression. For example the Nuremburg Charter vested the Nuremburg Tribunal with the authority and responsibility to adjudicate crimes against peace without any preconditions on the determination of the aggression by other political organs or bodies. In this context my delegation is in favour of option 1 with respect to Paragraph 5. My delegation may accept it as it is. However the proposal made by the distinguished delegate from Sweden seems to have merits. My delegation does not have any problems accepting certainly the last phrase. Thank you.

Chairman: Thank you very much, Romania.

Romania: Thank you Mr. Chariman. Since this is the first time that my delegation takes the floor at this meeting I would like to say that we are very pleased to see you again chairing over our work and to assure you of this delegation's full cooperation. I would also like to thank you for the effort of providing us with the useful discussion paper that is being considered by this Working Group. We have approached your paper with the understanding that it should accurately reflect the main ideas contained in the previous Coordinator's discussion paper and the achievements reached in the framework of the informal intersessional meetings held in Princeton. I will therefore present some preliminary remarks that reflect this delegation's position on the conditions for the exercise of the ICC's jurisdiction over the crime of aggression .

We share the view that there needs to be a determination that state aggression has occurred before a person can be prosecuted. Such determination should be considered as a precondition for the exercise of the ICC's jurisdiction over the crime. That means as a procedure, or preliminary condition, which should not affect the independence of the ICC in determining first whether the act of aggression is of such sufficient gravity as to entail individual criminal responsibility, in addition to the state responsibility that may follow as a result of such a determination. And, second, the guilt or innocence of the accused.

With regard to the first aspect, we would like to highlight the fact that the part of the definition dealing with the act of aggression is not designed for the use of the UN organ making the preliminary determination, but for the ICC in drawing a distinction between the conduct of the state that may constitute a violation of Article 2(4) of the UN Charter, 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 accountable in a criminal court. It should, therefore, be stressed that that part of the definition would not be operative beyond this limited purpose, and as such, have no effect on existing definitions elaborated for other purposes and for other audiences such as the definition contained in UN General Assembly resolution 3314.

We also recognize that the Security Council has a primary role in making such determinations and we further believe that other principle UN organs, such as the

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General Assembly and the ICJ, could provide a fall-back mechanism in the event that the Security Council does not make such a determination within a reasonable period of time.

Following the structure of Article 13 of the Statute, we envision three possible situations: (1) where the Security Council refers to the Prosecutor in accordance with Article 13(b) a situation in which the crime of aggression appears to have been committed; (2) where a State Party makes such a referral in accordance with Article 14; or, (3) where the Prosecutor intends to proceed with an investigation *proprio motu* in respect of the crime of aggression in accordance with Article 15 of the Statute. In the first situation, the Prosecutor should proceed with a case in accordance with the Statute and the Rules of Procedure and Evidence. 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 a particular individual. In the last two situations, the Court should first assess whether the Security Council has made a determination under Article 39 of the Charter as to the existence or otherwise of an act of aggression. If the answer is yes, the Prosecutor shall proceed with the case; if the answer is no, the Court shall notify the Security Council of the situation before it so that the Council can take appropriate action under Article 39 of the Charter. Where the Security Council does not make such a determination, within say 6 months after the date of the notification, it is worth to revert to other organs, that, in accordance with the UN Charter and their practice, could make such a determination. We, like others, have identified the UN General Assembly and the ICJ.

The Charter does give the Security Council the particular role of determining the existence or otherwise of an act of aggression when deciding whether to take action under Chapter VII. But it makes no reference in that context to the crime of aggression or to the determination of individual criminal responsibility, nor does it follow from the reference to the determination of state aggression that is made that the Council has exclusive jurisdiction to make such a determination for all purposes. Therefore, in these circumstances, the next organ to turn to would be the General Assembly, which could be requested to either make such a determination or to seek an advisory opinion of the ICJ in accordance with Article 96 of the Charter and Article 65 of the Statute of the ICJ.

On the legal question of whether or not an act of aggression has been committed, up to this point, all the options are adequately retained and reflected by the present Coordinator's discussion paper, except for the last one. We wonder why it has been taken out from the previous Coordinator's discussion paper, which reflected all the proposals formally advanced during the intersessionals. Since no decision has been made in this respect during the intersessional meetings to that effect, and, to our knowledge, the sponsors of the proposal reflected by that Option 4 in the previous discussion paper, Romania being one of them, have not given any indication as to their change of position. The option has been discussed during the last intersessional meeting, and we are of the view that, based on those discussions, it should be kept among other options at this stage.

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Consistent with the position expressed until now with respect to the role of the ICJ, including in the proposals previously advanced along with Bosnia-Herzegovina and New Zealand, we are of the view that the ICC may proceed if the ICJ either gives an advisory opinion that an act of aggression has been committed or makes a finding in a contentious case under Chapter 2 of its Statute that an act of aggression has been committed. The ICC should be able to use such a finding to satisfy the precondition required for the exercise of its jurisdiction. We feel that further clarifications are needed at this juncture with regard to the role of an advisory opinion given by the ICJ. It simply is an advisory opinion for the purposes of establishing whether the ICC has jurisdiction to proceed with the prosecution of an individual for the crime of aggression. This is a preliminary aspect only. The ICJ is not concerned with issues relating to the threshold, or to the guilt or innocence of the accused, those being matters for the ICC's consideration.

Last but not least, I would like to thank the distinguished delegate of Samoa, for seeking the clarification of this delegation's position as a co-sponsor of the proposal which has, or one of the proposals which have originated Option 4 in the previous Coordinator's discussion paper.

With regard to the proposal introduced this morning by Belgium, we regard it as an interesting one, and will study it carefully before making any comments. Thank you Mr. Chairman.

Chairman: Thank you. Pakistan.

Pakistan: Thank you Mr. Chairman. Yesterday my delegation couldn't share its views on the first part of the paper, therefore I will seek your indulgence to allow me time for comments on all paragraphs discussed so far. However, my comments will be brief.

Mr. Chairman we would like to join the distinguished colleagues who appreciated your efforts to devise the working paper on the question of definition of the crime of aggression, and the conditions for exercise of jurisdiction. Though the paper follows a narrow approach, yet it incorporates many important ideas stated during the previous sessions including those shared during the Princeton meeting. Mr. Chairman you have clearly paved the way for forward movement. Pakistan is committed to upholding the rule of international law in accordance with the principles of the UN Charter. We strongly believe that there should be no impunity for the most serious crimes of international concern including the crime of aggression.

Traditionally, the crime of aggression has been considered to be committed by states, whereas we favor the principle that jurisdiction should be limited to individuals. We have evaluated both the differentiated and monistic approaches to define the crime of aggression. The differentiated approach is consistent with the earlier approach adopted in the Rome Statute to address war crimes, crimes of genocide and crimes against humanity. However, in the case of a crime of aggression, if we apply the provisions of Article 25 of the Statute, it will broaden the scope of jurisdiction even to those individuals who could

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not be considered part of the leadership circle, thus defeating the near consensus understanding that the crime of aggression is a leadership crime. We also like to draw attention to Article 22 of the Statute. This will underline that the definition of a crime shall be strictly construed and shall not be extended by analogy. Therefore, not on the basis of a specific approach methodology, but due to scope of provisions of Article 25 and its implications, we spoke of the monistic approach, asking for participation to be included within the statutory definition.

The language between the two brackets also present two distinct possibilities. The manifest violation of the Charter, as stated between the first set of brackets, is a high sounding political expression. However, it lacks proper definition. Would it be appropriate that after years of deliberation, we base a definition of a complex legal concept on an undefined political expression? My delegation is inclined to support the addition of language between the second set of brackets at the end of variant B. This approach will also address the concerns related to threshold of the crime. It would be appropriate to highlight that, due to the very nature of the crime of aggression, my delegation will prefer a high threshold.

The Princeton sessions witnessed exhaustive debate on the question of generic and specific approaches to the definition. There are delegations who have even proposed a combined approach, which entails an aggregate list of crimes of aggression with the provision for future additions when required. We are of the view that an open-ended approach will not serve the purpose. Therefore, my delegation supports the drafting approach adopted in the General Assembly Resolution 3314 of 1974. This resolution was adopted after 20 years of negotiations; hence, it reflected the consensus approach adopted to address the fundamental questions of drafting. We are of the view that an agreed and final list of crime of aggression with statutory provisions should be added to the definition. We are also ready to consider a reference to Resolution 3314 in the definition as proposed in the working paper. A specific reference to paragraphs [articles] 1 and 3 will be a preferred option as in ... reference to resolution. A specific reference will indicate forward movement from the 20 year old position and would provide a concise definition.

Mr. Chairman, coming to Paragraphs 4 and 5, my delegation is of the view that trigger mechanism for the crime of aggression should not be different from other crimes under ICC jurisdiction. We have noted that, for some, the role of one organ of the United Nations will politicize justice by a more exhaustive role of the Council probably. We believe the trigger mechanism should be subjected to less and less political pressure. It may be noted that some crimes of serious concern to the international community, in the past, were result of political failures. Therefore, my delegation has taken a consistent position on the role of the Security Council vis-à-vis the ICC. We oppose a selective approach in favor of some member states on the ICC jurisdiction.

We think there is no need to add new provisions in the Statute to complement the role of the Council as proposed in Paragraph 4 and Option 2 of Paragraph 5. The existing

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provision about the role of the Council have held back many member states from becoming parties to the Statute. It is on this backdrop that we find it difficult to support a combination of Paragraph 4 and 5 at this stage. More work is required to streamline the language of Paragraph 4 before a combination could be considered for adoption. We are studying the Belgian proposal with interest to see a way forward. But at this stage, we do not support deletion of Options 3 and 4.

We would like to highlight one aspect of the subject which has still not been discussed. Article 1 of the Rome Statute provides for principle of complementarity between the ICC and national criminal jurisdiction. This principle must be upheld by elaborating the conditions of jurisdiction for the crime of aggression. I thank you Mr. Chairman.

Chairman: Thank you. Chile.

Chile: *(Translation from Spanish)* Thank you very much Mr. Chairman. First of all, my delegation would like to join those who have congratulated and thanked you for the document that you have produced that has been so useful for our deliberations. With regards to Paragraph 4 and 5, which you have asked us to comment on, with regard to Paragraph 4 which regulates the important theme of the independence and the autonomy of the Court, my delegation believes that your text gets very close to an appropriate solution, because there is a balance between the independence of the Court and the competence of other bodies, other than the Court.

However, we do have a certain question about what would happen if the Security Council, due to the exercise of a veto, does not qualify a situation as one of an act of aggression, although from the point of view of criminal justice it might have reached that threshold. So, apparently the Court should not consider that it has jurisdiction, so on the basis of the text, it is not clear what would happen in that case.

With regard to Paragraph 5, my delegation would prefer Option 1. We do not believe it necessary to include Option 2. We support Option 3, we believe that the General Assembly does have competencies with regard to aggression on the basis of the Charter and other resolutions adopted within the framework of the United Nations. So we would have no problem in recognizing these powers of the General Assembly. With regard to the Court's intervention, we find that this is a positive inclusion, but we would like to have greater clarity with regard to what circumstances and what cases would allow for intervention by the Court, the ICJ. From this first drafting it is not that clear, but in principle we would favor the inclusion of the intervention of the International Court of Justice, Thank You.

Chairman: Thank you, South Africa is my next speaker.

South Africa: Since my delegation is taking the floor for the first time, we would like to also express our thanks for your work with regard to the drafting of this discussion paper. We are strongly aware of the importance of the protection of the integrity and

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independence of the Court also with regard to the jurisdictional trigger mechanism. Therefore, we believe there should not be a precondition set by another body. Consequently, we support Option 1 of Paragraph 5.

With regard to the Belgium proposal, we find it interesting and we will study it. The remarks by the Belgian delegate regarding the issue of conformity of the Security Council determination with the rules of general international law and the rights of the accused and victims, we also found very interesting and we consider that this is a matter that requires further consideration and study. Thank you.

Chairman: Many thanks, I give the floor to Algeria.

Algeria: (*Translation from French*) Thank you very much Mr. Chairman. Mr. Chairman, first of all, allow me to thank you for the document which you have presented to us and which very well takes into account the progress which has been made so far.

If you allow me, I'll come back to Paragraph 2 and say that we support mention of all of Resolution 3314, because it is the consensus of the General Assembly on this very delicate issue which we cannot overlook. The references to Articles 1 and 3 only, as suggested by many delegations, would in fact go against the totality of the text, which is in fact in Article 8. And so we should refer to it, so if what we decide is to only mention Articles 1 and 3, we could perhaps at the end of the paragraph add something which says, "without prejudice to Article 8 of Resolution 3314".

With regard to Paragraph 4, I have the following comments. First of all, this paragraph seems very well balanced and gives the Security Council considerable weight, because implicitly it has the possibility of taking a position with regard to a determination and, if it so decides, it can use its authority to put off ICC proceedings as is stated in Article 16. Second, it seems to us that Article 13 does not give priority for the other crimes and, therefore, we should apply the same interpretation for the crime of aggression. Third, we should also recall that the independence of the Court vis-à-vis the political organ, which is the Security Council, is what gives it an important measure of credibility.

The Security Council, if we need to remember it, is not the only body that can qualify an act of aggression, because the General Assembly has done this on two occasions. And outside of its two resolutions, one from the 13 November 1981 and one of 1993 in the case of the invasion of Kuwait by Iraq, the International Court of Justice, in responding to the Nicaraguan military and para-military situation, stated that the Council had political powers which did not predetermine the judicial affairs of the ICJ. So, if the Security Council does not pre-judge the State act of aggression, as in this particular case, the same would apply for individual criminal responsibility in the crime of aggression. I think the International Criminal Court could take inspiration from this case. So, we believe that Option 1 of Paragraph 5 would be the only option, since the Security Council is already included under Paragraph 4. Thank you.

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Chairman: I thank you. Finland.

Finland: Thank you Mr. Chairman. The issue of preconditions for the exercise of jurisdiction is clearly an area where the discussion would benefit from some fresh thinking. And we are therefore grateful to Belgium as well as Sweden and others who have put forward new ideas. As to Options 3 and 4, we belong to those who think that their potential has been exhausted by now and that the focus should shift to elaboration on the relationship between the Security Council and the Court. Having said this, however, it should be added that at the time they were tabled, Options 3 and 4 served a useful purpose in helping the Preparatory Commission to move away from a particularly fruitless debate. But now we agree with those who have said that the time has come to drop these options.

Focusing on Options 1 and 2, it would be useful to look at the concrete questions that would arise if we chose either of them. It is in this sense that I take the proposals already made by Sweden and Belgium. One of the Swedish proposals made yesterday addressed the question of determination by the Security Council. The proposed addition, if I recall it correctly, for the UN Security Council to declare that it does not object to the Court's proceeding with the case, would probably make the process smoother and more expeditious, provided, of course, that we opt for option 2 and require in any event some pronouncement from the Council. It might be more difficult to square the proposed addition with Option 1.

The Belgium proposal on its part addressed the practical issues raised by Option 1, the question raised by Norway, Who is the Court? It differentiates between the three trigger mechanisms and proposes a new theatre for state referral and *proprio motu* initiation of investigations. This can be seen as an effort to make Option 1 more palatable to those who believe it would have the potential to lead to frivolous prosecution. This is very welcome.

The Special Working Group has not yet made up its mind as to which of the 2 options should be retained. It makes sense to work on both of them, trying to exclude the most extreme interpretations. In our view, the mere fact that there are new proposals that highlight different aspects of the problem is positive and may pave the way for further progress. We are certainly willing to discuss all these ideas further. Thank you.

Chairman: Thank you very much, I next have Nigeria.

Nigeria: Thank You Mr. Chairman. Mr. Chairman since this is the first time Nigeria is taking the floor, please I seek your indulgence to permit me to start by expressing, on behalf of the Nigerian delegation, our appreciation for the splendid work you have done in preparing the discussion paper in a concise and succinct manner which has captured the major discussions had on the crime of aggression over the past years. Mr. Chairman, since your proposed discussion paper has no doubt facilitated an increased State understanding of the draft position, and since many States have taken position on the

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variants, I would rush to state the Nigerian delegation's position, and that is that our preference for the differentiated approach, as contained in the discussion paper, that is Paragraph 1 Variant (a) of the Annex.

Mr Chairman, having stated the Nigerian position let me move quickly to this vexed issue that has captured our attention this morning, i.e. the issue of Paragraph 4 and Paragraph 5. The Nigerian delegation, Mr. Chairman, does not accept Paragraph 4, and indeed also Paragraph 5 Options 2-4, which requires a prior determination of the matter by the Security Council absent of which a referral would be made by the Court to the Security Council for its determination.

Mr. Chairman, this proposal would be counterproductive if adopted. First, it would compromise the competence and integrity of the Court to handle this very serious crime fairly, justly as well as expeditiously in accordance with contemporary international law. In other words, in asserting this proposal, we would be mixing justice with international politics and they are strange bed-fellows. Secondly, we must learn the lessons of current history. We have just witnessed butchery in Somalia, Bosnia and Rwanda, without the active intervention of the Security Council. We have also seen States waging war on their citizens, organizing campaigns of ethnic cleansing, as in Darfur, without the Security Council taking a position. Take for example, the issue of Darfur. The USA takes one position, China takes another position. China's, for example, is maybe based on sole economic interests. So, the Security Council is not an objective institution that would handle issues of criminal justice, issues of accountability for violations of human rights. And so, any resort to the Security Council would be to create ..., and it would be like tying the hands of this important Court, the ICC, and frustrating its operation. So, Mr. Chairman, the position of the Nigerian delegation is that we should avoid referring this matter to the Security Council.

Mr. Chairman, if again I might fall back on contemporary history, you see States waging war on their citizens. Bloodshed, we are watching bloodshed in Iraq, again without the intervention of the Security Council. So, I think the sensible approach is the one adopted by Germany. We have to take a position for the fundamental challenge of the serious crime of aggression and at the same time empower the Prosecutor to move decisively and promptly against the perpetrators of this serious crime. If we do not do so, this impunity will continue. And if we don't do this, we will not be protecting humanity and we will not be protecting citizens from the impunity of their leaders or States. This will not operate as a deterrent. Already there are some leaders who think they are beyond international law and international norms, and this is the historic opportunity; we have to put an end to this impunity. And the only way of doing that is strengthening the ICC.

And also the issue of reference to the ICJ; I don't see the value of referring to the ICJ. The ICJ is a permanent court as well as the ICC, which is also a permanent court and there is no order of seniority under the Charter, so I don't see how matters that fall within the jurisdiction of the ICC should first of all be referred to the ICJ for a preliminary determination.

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So, against this background, Mr. Chairman, we assert paragraph 5 option 1, which requires the Court to proceed with the case. And also, we would have the triggering mechanism reflected in Article 13, which can also serve the purpose. This is the stand of Nigeria, Mr. Chairman.

Chairman: Many thanks. New Zealand.

New Zealand: Again we thank you, Mr. Chairman, for your valuable work in providing an updated discussion paper, which is clearly essential to our progress. We welcome the constructive comments of delegations yesterday relating to paragraphs 1-3. We see prospects for moving forward on those parts of the text.

My delegation sees some merit in the broad approach to Paragraph 4, which was suggested by the Norwegian delegate. I would be happy to see his proposal in writing. For Paragraph 4, we will also study the proposals of the distinguished delegations of Sweden and Belgium. For Paragraph 5, in a choice between Option 1 and Option 2, my delegation would support Option 1. We, however, recognize that it would be very challenging to build agreement around option 1. We would not advocate for Options 2 or 3. New Zealand supports the involvement of the International Court of Justice, but not as it is formulated in the current Option 4. We prefer the intent of the formuatoion from Option 4(a) of the 2002 paper. As mentioned today and yesterday, this is an option that Romania, Bosnia and Herzegovina, and New Zealand had lent support to.

We agree with the discussion paper's goal of capturing progress without eliminating all options which reflect different views. We think this approach is especially valid for the most contentious issue of conditions for exercise of jurisdiction. It might not be helpful to take the other options off the table when the only two that might remain, 1 and 2 are so difficult to reconcile. In our view, to be left with only these two options might not necessarily assist our overall progress.

On the ICJ, it is true that its involvement would add another organ to the equation, a point made by some delegations yesterday. My delegation, however, sees that this would offer more benefits than disadvantages. Some of the reasons for this were mentioned by the distinguished delegate from the Netherlands. My delegation considers that contentious legal proceeding relating to State acts might be better left primarily to the ICJ rather than the ICC. The jurisdiction of the ICJ is over States, and the ICJ has a broadly relevant body of jurisprudence and legal expertise as demonstrated by the recent armed activities on the territory of Congo case. For the ICC, such issues could distract it from a core focus on international criminal law. This approach could also be more consistent with the ICJ's role as the primary judicial organ of the UN, and with the relationship of the United Nation's Security Council to the crime of aggression. Advisory opinions do not bind States and should the Security Council consider that proceedings should not commence, it would be able to utilize Article 16 of the Rome Statute.

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In summary, my delegation would prefer not to rule out in principle the advisory ICJ jurisdiction which was represented in Option 4(a) of the 2002 paper. However, we will reflect in particular on the proposal made by the distinguished Netherlands delegate as it relates to an option that would move forward on Options 3 and 4 that would refer to the ICJ. Thank you for the floor, Mr. Chairman.

Sierra Leone: Thank you Mr. Chairman. Mr. Chairman, I'm aware that you are inviting comments on Paras 4 and 5 of your paper. However, may I have your indulgence, since this is the first time I am taking the floor, if you can allow me to make a few remarks on the other parts of the paper you presented. Mr. Chairman, I must confess that your paper is well thought-out and without, which reflect the position of my delegation on this issue of aggression since its commencement a couple of years ago.

Of the two variants which you have proposed in your paper, Variants (a) and (b), my delegation is inclined to support Variant (b) of the paper. If anything, it is our view that in fact, the two variants, (a) and (b), essentially say the same thing. We do not see any profound differences between the two, except in that Variant (a) has more adjectives in brackets. Perhaps, we do not see a difference between the two because we have a simple mind, as rightly suggested by my distinguished friend from the UK. But will you forgive us for having such a simple mind. We believe the differentiated approach, as set out in your paper, is complex and its relationship to Article 25 of the Statute, in our view, will lead to confusion and will lead to changes of the fundamental norms of the Rome Statute, much more so with the proposition of the use of Article 25.

Mr. Chairman, in terms of the threshold, we agree with other delegations who argue that the threshold should be high, in terms of the gravity and seriousness of the act of aggression. In other words, the consequences of the act must go beyond the mounting of an armed attack.

We also support the Court defining the act of aggression with particular reference to GA Resolution 3314. In other words, my delegation supports the amalgamation of the generic and specific approaches.

Mr. Chairman, now let me address your invitation to make comments on Paras 4 and 5. I believe the distinguished Solicitor-General of Nigeria had spoken for my delegation, because the position of my delegation, as far as the issue of the conditions for the exercise of jurisdiction by the Court are concerned, we are not very comfortable with leaving it to the prior determination of the Security Council, as far as the conditions for the exercise of jurisdiction. And the reasons for that are well articulated by the distinguished delegation of Nigeria. If anything, the Security Council in our view does not reflect the current geo-political configurations in the world. It is not a representative body. Therefore, we do not think that it has the competence in a legal matter for it to come out with a determination that will not be tainted politically. Therefore, Mr. Chairman, we have indicated that we are not very comfortable with getting a prior determination of the Security Council.

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Between the options you have enumerated in your paper, my delegation is inclined to look favorably at option 1. Of course we will never support option 2. Options 3 and 4 are also possibilities for consideration by my delegation, but at this stage, we do not have a definitive view.

I understand, having come in late this morning, that there have been proposals from Belgium that we have not seen yet. I have also listened intensely to the statement of the distinguished representative of Norway, and also understand that Sweden has also made some proposals. So, my delegation would wish to see if all the delegations that have made proposals on the conditions of the exercise of jurisdiction by the Court can table their proposals in writing. I understand that the Belgium proposal is in writing, but it's in French. Unfortunately, I don't speak French. I understand a little bit of French, but my English I believe is far better than my French. So, if we could get it in English, that would be very beneficial to my delegation. So I would politely ask all delegations who have made proposals this morning, to table their proposals in writing, so that we can look at them and then possibly opt for one or the other.

But at this stage, Option 2 of Para. 5 is out of the question from my delegation. We are prepared to look at Options 1, 3, and 4 in tandem with the proposals that have been made this morning. I thank you Mr. Chairman.

Chairman: Thank you very much. The Belgium proposal is in fact in English, as well, in the room, I believe in all languages. And that is the only one that has been tabled. And there is also the possibility of making language available without formally tabling it and I certainly encourage that as well, but the Belgium proposal has been tabled and is in English and other languages as well.

France: *[translated from French]* Thank you Mr. Chairman. We're getting to the very core of our discussions and continuity of what I was saying yesterday, and that is that we really must progress with great caution when we come back to this issue, because initially you had discussed technical issues and I think that was in fact what enabled us to make some progress, and now we come back to this subject where initially there was less consensus, to look at it from a more constructive point of view. There is of course the difficulty, even though we've had time to think this through, it seems that some of the objectives are shared by some delegations, but the conclusions they come to are different.

We clearly would like to look at things from a point of view of equality and respect the competence in this case of the Security Council because that is the law. Certainly, at the first stages of this discussion, we were reading, interpreting the Articles in the Charter, Article 24 is one thing, regarding the primary responsibility, but the specific law prevails over the general. And that is the specific responsibility which is in Article 39, which is what prevails here.

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The Norwegian delegate made a very interesting analysis, which I do share and it mentioned the different language versions and it establishes this competence. And nowhere else does the Charter use similar terms to mention competence of the General Assembly in this particular field. The problem referred to when you talk about equality is *nullum crimen sine lege*: In spite of the affirmations here about the differences between act of aggression and the crime and whether or not there is a determination so that one can decide that there is a crime of aggression, I think that there is confusion which persists when you talk about *nullen crimen sine lege*. You're talking about the crime, not the act. So the crime is defined, will be defined in the Statute once we've decided on the definition that we are working on, that will be the law with regard to the crime.

Now, however, with regard to the determination of an act of aggression, and we've looked at different draftings of it and there is reference there to the Charter, because it is in the Charter that we see the mention of the act of aggression. Art. 5 (2) talks about what is in the Charter so we need to discuss the pertinent provisions of the Charter, I think that is quite clear. We are also trying to set aside Option 2, and here is where I would like to come in, and people say that Article 16 allows the Security Council to stop a procedure, but that is not the issue. The issue is the exclusive competence of the Security Council to determine an act of aggression - so Article 16, which allows for the deferral of investigation or prosecution, does not apply in this case. And indirectly, for the same reason, I believe that Option 1 should be dropped, because you could say the contrary

But the problem is also the difference of rhythm of how the Security Council works and the rhythm of the Court. The Council has to face the daily situations and political situation that it's examining, whereas the Court doesn't have that concern, it has all eternity so to speak, and in practice you see this in the way different investigations and procedures are carried out, and you see this with regard to events and the facts that have produced those investigations. Now, we can't say that the Council hasn't taken action in certain cases. When there is a crime of aggression, then there is a context that will exist for the Security Council when it takes a determination, as it already exists for other crimes. And against many forecasts, the Security Council has asked the Court to look into the situation in Sudan. So, you can't say the Security Council has ignored the Court, quite the contrary, it used the competence provided to it in the Court Statute. So, in spite of all the many fears that the Council will not make a determination in certain situations, I think it will take into account this competence of the Court in certain situations with regard to a crime and an act of aggression. And it is this relationship and difference of rhythm, which should lead us to thinking about how to carry out this dialogue, and I think this is where we can look a bit deeper.

The Sweden proposals are interesting. Obviously, I would have to present them to the authorities, but at first glance it would be, I think, in this direction that we would have to work. And the same with Option 2 [the second Swedish proposal?]. It does seem a little bit rigid, but there might be possibilities, so that the relationship between the Security Council and ICC might be rather more congenial and that would benefit both institutions,

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both bodies in their respective vocations. The Court's vocation is that of ensuring, combating impunity, but also according to the preamble, it is an element of the contribution to international stability, indirectly. That is France's view, that there can be no lasting peace if we do not combat impunity and that is the objective that we all seek. So, this dialogue needs to be developed. It needs to be managed. The objectives of the Security Council and the Court must be mutually preserved, and this is for the benefit of the Court, because one cannot see the Court acting in a situation where it will be in conflict or confronting the Security Council, where there might be even an explicit lack of determination on the part of the Security Council, in other words a specific refusal, perhaps not stated as such, but simply the refusal to act with a statement by the Security Council. For example, in a political situation where the Court were to work on the basis of a GA resolution adopted by a very slight majority, that would be risky for the Court, and risks politicization of the Court. So, I would defend Option 2 and I think there is a way here to work on Paras 4 and 5 from the point of view of Option 2 to take into account everyone's point of view.

Chairman: 17 speakers are left on the list. We have a bit over an hour. Ideally, I would like to conclude, obviously the discussion on this, this morning. So if you could speak for 3-4 minutes, that would certainly be ideal.

UK: Mr. Chairman, thank you. I'll try to be brief, in the light of the comments that you have just made. Mr. Chairman, you've asked us to direct our comments to Paragraphs 4 and 5 of the Coordinator's discussion paper. Mr. Chairman, I think it's obvious that these are the most difficult provisions in the discussion paper. We have already heard differing views about Para. 5, and because the UK's views on Para. 5 are well-known, I won't repeat them now.

I think Mr. Chairman, like other speakers, that the most productive way of pursuing this matter is to focus on Para. 4, and I think it's striking that in your discussion paper, that is the only paragraph without, I think, square brackets or distinct options. I think, therefore, that it is clear that we do need to regulate the relationship between the Security Council and the ICC. I think most, if not everyone, agrees with this point. Where we disagree, of course, is how exactly we regulate that relationship. It is though clear that reform of the Security Council, which is well known that the UK is a supporter of, cannot be addressed with amendments to the Rome Statute. So, we think it's wise to focus on Para. 4, and there may be a case for considering whether we can strengthen Para. 4, add more details, clarify it, redraft it generally.

Therefore, we were interested in the suggestions made yesterday by our Swedish colleague. Obviously, we will have to think about them carefully. We have also listened carefully to the proposal put forward by Belgium this morning. Again, we of course cannot react to it today, particularly as it is quite complex. But our immediate reaction is that it does not seem to address the key questions raised by Paras 4 and 5. Nevertheless, it is obviously good that delegations are thinking imaginatively about these issues and I think these are issues we still have to consider further at our next meeting at Princeton.

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So, to conclude, given the continuing differences of opinion on Para 5, we will look forward to a constructive discussion on Para. 4. Thank you.

Liechtenstein: Thank you very much Mr. Chairman. I would first like to briefly react to two comments that have been made on the topic discussed yesterday on the difference between the differentiated and monistic approach. It has been mentioned that there was a preference for the monistic approach, because it seems to better guarantee that the crime of aggression remains a leadership crime. However, in that respect, I would like to submit that there is no difference at all between the monistic approach and the differentiated approach regarding the question of the leadership element. If you look at the monistic approach, in Variant (b), the only element that guarantees that only leaders can be tried is the leadership clause, “when being in a position to effectively exercise control over” etc. If that clause would not be there, you would even have included persons who participate actively in the execution of the act of aggression and that, without any doubt, would even be the small soldier on the field. It is only this leadership clause in the monistic approach that guarantees that only leaders come under the jurisdiction. Otherwise, even under the monistic approach, anybody who participates actively in the execution would come under jurisdiction. And, of course, this leadership clause is contained in both variants word-for-word, so this is the one element that guarantees that only leaders are prosecuted.

Now coming to the topic of today, Paras 4 and 5, I would like to thank the delegation of Belgium for their proposal. One benefit is very clear as to its merit now. It reminds us that the crime of aggression will be included in the Statute, and that it remains there in the environment of the Statute as a whole. That means that, if the current coordinator’s paper would be included in the Rome Statute, of course, Articles 12, 13, 14 and 15 would apply to the crime of aggression as well. And here I would like to come to refer to footnote 5 of the Chairman’s discussion paper. It has been suggested that Paras 4 and 5 should be redrafted in order to differentiate between the trigger mechanisms reflected in Article 13. In short, the current Paras 4 and 5 were, I think, quietly obviously not drafted with the Rome Statute in mind. It seems that this drafting is kind of separate and we should, in light of the conversations we had today, start redrafting these concepts in a way so that they fit into the Rome Statute. That would, I think, lead to opportunities to clarify our thinking as to the role of Security Council, because, if we realize that Article 13 is applicable, then we realize there are several ways of how the Prosecutor could start dealing with a situation.

It could be an investigation *proprio motu*, and I think this is what we were all thinking when we looked at the discussion paper - this formulation that the Prosecutor, when he intends to proceed, he should first ascertain and notify the Security Council. That is clearly formulated with the *proprio motu* investigation in mind. However, there could also be a situation of a State referral. Now, one may wonder if the same considerations apply for a State referral. And here again, we have two different situations. It could be a State referring another State, and one may argue that in that situation the considerations may be similar to the situation of a *proprio motu* investigation. But it could even be a State self-referral. There could be a state that commits an act of aggression against

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another State; there could be regime change in that State and if they want to prosecute the aggressors of the past war, and they want the ICC to help with that proceeding. Why should there be a particular role for the Security Council for something that a country could do by itself but is asking the ICC to help with such an investigation. I'm not giving an answer to this, but it's something we should think about, the possibility of a self-referral.

There's also the possibility of a Security Council referral. If we include Paras 4 and 5 as it is in the Rome Statute, this still entails possibility that the Security Council refers a situation to the ICC Prosecutor and does not make a determination on whether an act of aggression has happened. This is an option for the Security Council and might actually be an option that the Security Council might like, because it would pass on the buck to the ICC and say, well, you deal with that situation, and by the way Prosecutor, please report to us periodically on the progress of your investigation. So, this is a possibility that could happen.

This really, I think, leads to the need for a more precise formulation for Paras 4 and 5. Where exactly does it come in the current proceedings? Who is notifying the Security Council? Probably it would be the Prosecutor, but at what stage of the proceedings? One would think that, if you look at Article 15, that first the Prosecutor would analyze the seriousness of the information received. And only once he concludes that there is a reasonable basis to proceed, that then the duty to notify the Security Council would come into play. But again, the current wording does not specify these open questions.

So, in brief, I would suggest that Paras 4 and 5 should be redrafted to reflect the different trigger mechanisms, to clarify which organ is acting, and at what stage of the proceedings. And I think such redrafting would be very helpful to establish in what ways the Security Council and the ICC can cooperate when there is a suspicion of a crime of aggression. I thank you, Mr. Chairman.

Indonesia: Thank you, Mr. Chairman. Since this is the first time I took the floor, let me join other delegations in commending the work you have done. The discussion paper provides an avenue that makes our discussion more focused. Indonesia attaches great importance to the issue of the crime of aggression. We are planning to accede to the Rome Statute in the near future. Therefore, we follow this matter very closely. We do believe that the completion of the work of the Working Group would give more weight to the Court.

Let me give our preliminary and brief thoughts on Paras 4 and 5 of the discussion paper. We share with other delegates the view that the determination of the act of aggression by an outside body is a most complicated manner. One main fault is that the autonomous nature of the Court is in question. Moreover, the dependency of a legal institution, such as the Court, on a more political body, may also be risked. We are aware of the indispensable role of the Security Council, especially if we refer to Article 16. Therefore, Mr. Charirman, there is a serious concern, especially when the Security Council fails to

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make a determination of an act of aggression. In this regard, it is worth noting that the General Assembly too has a complementary responsibility for peace and security. I believe that these matters should be further discussed thoroughly.

Kuwait: *[translated from Arabic]* Thank you, Mr. Chairman. We thank the delegation of Belgium for the text they have submitted to us this morning. We thank him for explaining the content of the paper and the good ideas contained in it. As my colleague, the representative of Belgium, said namely that the question of the definition of aggression and the elements of the crime can be reached by consensus. However, there remains the question of competence, or the decision regarding the submission of the case to the Court, or initial consideration by the Pre-Trial Chamber, - the reason why it has not been possible to find a definition of the crime of aggression [for earlier inclusion] in the Rome Statute. It is time to do that within the context of the Review Conference. I have heard this view point, although its not widely shared, from several delegations, and this is why we have to be realistic in discussing this question.

Certain delegations should take into account international developments, particularly in terms of state influence at the international level. It's not a question of giving up a right or authority, but rather a question of contributing to international peace and security, for the benefit of the international community as a whole. My delegation supports the idea that it is not necessary to take a preliminary decision by anybody for the Court to assume its responsibility regarding the crime of aggression, including by the Council. So, to remove all political interest from the crime, an interest which might arise at one point or another, the interests of sovereignty and justice must also be taken into account. There is no doubt that we need to reaffirm the independence of the Court to consider crimes which fall under its competence.

As regards to what extent the Court should consider its preliminary decision regardless of where the referral comes from, it should be considered by the Court, without however imposing it on the Court, taking into account the consequences which might arise when the Court reviews its decision, particularly when that matter is before the Security Council. The Security Council is the international body whose decision and resolutions are more political in nature, whereas the ICC is a judicial body whose actions are based on the principles of international law. When the Court considers aggression as an international crime, it also looks at it in absolute terms and objectively. It might come to the conclusion that there is no crime of aggression when the elements of aggression are not there.

And in spite of all, Mr. Chairman, we support the idea that we should add a new Article to the Rome Statute on the preliminary hearing or preliminary decision on the crime of aggression and that Article should contain the various possible options which should be considered in stages. Firstly, the preliminary decision of the Council. That decision should be taken by the Council and, if that it not the case, the decision should be considered by General Assembly or the ICJ. Lastly, the question of whether it is

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necessary to create a tool to investigate the crime of aggression is a new idea which should be considered. Thank you.

Mexico: *[translated from Spanish]* Thank you, Mr. Chairman. In view of your very lengthy list of speakers, I will be very brief and refer exclusively to Paras 4 and 5, which you have put forward in your discussion paper, with regard to the conditions for the exercise of jurisdiction for the crime of aggression. First of all, as my delegation said yesterday in referring to Articles 1 and 3 of Resolution 3314, Mexico believes that it is fundamental that the definition of the crime of aggression give the Court the necessary elements to exercise its judicial function in accordance with the Rome Statute and on the basis of its role in the determination of individual criminal responsibility. So, my delegation believes that the work of this Working Group is to establish the procedural basis for an effective exercise of jurisdiction by the Court with regard to the crime of aggression. At the same time, we believe that it is realistic to give due consideration to the work of other organs, such as the Security Council, within its own mandate of maintaining international peace and security. So, the balance that we must achieve is to, on one hand preserve the independence of the Court, and at the same time, to allow political bodies to carry out their own mandate in accordance with the Charter.

In this context sir, my delegation believes that Paras 4 and 5 should still be carefully discussed so as not to condition the judicial work, but to provide the necessary elements to ensure that its work can be carried forward in all of the procedural elements. The proposal from Belgium perhaps could point to the fact that we need to examine in greater depth a procedural instrument that could give judicial security in examining the crime of aggression in the Court. In looking at Para 4, Mexico could perhaps look at the need before an investigation is launched by the Prosecutor, that there should be a consultation procedure. This would make it known whether the Security Council, according to its mandate on the basis of the Charter, has taken a determination as to whether an act of aggression exists. So, that procedure would allow the Prosecutor to take a stand and we could perhaps redraft Paragraph 4 to reflect more clearly this procedure.

With regard to Paragraph 5, my delegation believes it is necessary to arrive at a text which is in accordance with the Rome Statute, and which indicates the possibility for the Prosecutor to proceed with the investigation mentioned in Paragraph 4, once the consultation procedure with the Security Council has taken place. However, this consultation procedure should in no way become a requirement for a prior and special determination. So, Mexico would favor a different drafting than what is in Para. 5 at the present. In the meantime, in order to make progress in the deliberations, my delegation could, for the time being, accept the idea in Option 1 of Paragraph 5 and we would suggest dropping Option 2. With regard to Options 3 and 4, my delegation believes, as other delegations who have already spoken, that they could be problematic. However, we would reserve the right to come back to these, once discussions on this important issue have reached greater clarity with regard to the concepts that I have already put forward. Thank you very much.

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Greece: Thank you very much, Mr. Chairman. I have asked for the floor to react to certain points made by previous speakers. First, let me address the proposal made by Norway, with regard to the first sentence of Paragraph 4. We find that proposal quite interesting and we take it to be a drafting suggestion mostly which bases itself on the fact that a determination by the Security Council on an act of aggression should be common knowledge. We would caution, however, about one possible inadvertent consequence of the redrafting. If we got the suggestion by Norway right, the inadvertent consequence being that the ICC might appear to have to proceed in all cases where the Security Council has determined that an act of aggression has taken place, which might be a good idea, but which is one that we have not discussed at all so far. This, of course, is the opposite problem of the one we have already envisaged, which is that the Security Council has not pronounced itself as to whether an act of aggression has happened, which is the far more usual situation, as we all know.

Conversely, we do not think that the second sentence of Para 4 constitutes any departure from the Charter, just because Article 99 of the Charter gives the possibility to the Secretary-General to bring to the attention of the Security Council any situation which might constitute aggression. We believe that this does not exclude other possible sources of information, such as a Court, from offering such information to the Security Council. Mr. Chairman, let me clarify that we have taken the Norwegian ideas not to exclude the discussion on Paragraph 5, i.e. that they are not meant to expand on Option 2 alone.

Finally on this, Mr. Chairman, let me support the opinion of Liechtenstein, which was expressed a while ago, concerning the need to address also the possibility of a referral by the Security Council. This is also something that we referred to in our intervention yesterday also.

Going now to the options appearing in 5, Mr. Chairman, we have considered them always as mutually exclusive as this is evidently true of Options 1 and 2. We have heard suggestions, however, particularly from the Netherlands, that there might be room for seeing Options 3 and 4 as alternatives together with option 1. And perhaps this might be worth exploring.

We heard complaints about proposals which have not been reflected in your paper. We have always seen these new discussion papers, like the previous ones, on our part, as one phase in a continually ongoing process, which involves as a necessity, the elimination of ideas or proposals which do not reach a certain level of acceptability or viability, which is of course your responsibility to ascertain. It is only in this way that progress can be achieved. Otherwise we will remain caught in a stagnation of repeating ourselves at infinitum, an experience that this Group has had in the past and which we hope will not repeat.

Finally, with regard to Belgium proposal, we are very attracted to it. We certainly need to reflect on it more, given its complexity. However, having said that, we believe that although it may offer solutions to problems of adherence to rules of human rights law

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which are universally acceptable, it does not relieve us from problems which arise in the context of Paragraph 5, since, as our Finnish colleague has already pointed out, the Belgian proposal places itself squarely, as I understand, within option 1. Thank you Mr. Chairman.

Australia: Thank you very much, Mr. Chairman. We have four points to make in relation to Paras 4 and 5 of your paper. Our first point in relation to Para. 5 is that we continue to support Option 2. In our view, requiring a Security Council determination on a state act of aggression, before the ICC could investigate an individual crime of aggression, would be consistent with Article 39 of the Charter. We thank our French Colleague for his legal analysis of Article 39 and see no point in repeating that. Perhaps more importantly, we regard Option 2 as an important safeguard for the Court. It would protect the Prosecutor and, should the case proceed, later on, the judges, from accusations of political bias to the degree that's possible, as they consider what is an incredibly politically-sensitive issue of whether a state act of aggression has occurred. That for us is really the key.

Our second point here is to agree with a point that Norway made. There is a distinction between the judicial determination of the state act of aggression and the more political determination which the Security Council would make. And certainly that distinction is an important one for us, and we have said in Princeton, as we would regard the Security Council determination as judiciable before the Court, and that is an important safeguard among other things for the accused's rights.

Our third point, Mr. Chairman, is to comment on Options 3 and 4. As others, we don't see much hope for either of these options for the reasons that others have put forward, which, for the interest of time, I will not repeat.

And our fourth and final point is to comment on some proposals that have been put forward by others this morning and yesterday afternoon. First, to consider Sweden's suggestions in relation to Paragraph 4, they struck us as having considerable merit and are certainly ones that we would like to reflect on further.

I also wanted to comment on the Belgium proposal, first kind of alluded to in The Hague and then put forward in more detail today. We very much thank our Belgium colleague for the amount of work he and his colleagues put into this, and for the more fulsome description that we got today. We did offer a very preliminary reaction to the proposal in The Hague, and after hearing more about the proposal today, I would nonetheless repeat the preliminary reaction that we had. I mentioned before that our key concern is not to politicize the ICC. We are not convinced that involving the Pre-Trial Division, together with the Prosecutor, in the very early stage of an investigation of a crime of aggression, would meet that end. In actual fact, we would have some concerns that involving more senior officials of the Court, coming from more than one organ of the Court, and much earlier than some of those officials otherwise become involved, might in fact have quite the opposite effect, and may in fact result in the Court being more politicized, with more

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of the key players being involved in a political decision, than perhaps less politicized. As I said, we need to do more thinking on this, but that, Mr. Chairman, is an initial reaction.

Canada: Thank you, Mr. Chairman. In keeping with your direction we will be very brief. We wanted to issue a general thanks to our colleagues for their insightful and constructive comments over the course of this morning. It's been very helpful to the formulation of these issues and clarification of these issues, and we note in particular the constructive suggestions made by Sweden and Belgium and the Netherlands.

We wanted to note with particular interest the comments made by Norway this morning, which, I think, have raised some very important questions which merit consideration by all of us as we go forward in our deliberations, and has raised a possible approach to identify areas of general agreement, on which we could base our continued discussions. We will continue to follow this very closely and to listen very carefully to our colleagues as they make their comments, but I wanted to make this very preliminary observation. Thank you very much Mr. Chair.

Japan: Thank you Mr. Chairman. With regard to Paragraph 5, the conditions for the ICC to exercise its jurisdiction over the crime of aggression, needs to respect the explicit authority of the Security Council to determine the existence of aggression. At the same time, we should also elaborate on the way that the competencies of the ICC and Security Council can co-exist. Having said that, it is at this stage worth examining the role of the other organs, such as the General Assembly and the ICJ, as long as the actions of those organizations would not impede the power of Security Council under Article 39 of the Charter. We should also bear in mind that the ICC has a character as an independent, judicial organization, and also the fact that the Security Council does not make any determination of an act of aggression does not necessarily mean that there is no such functioning of the Security Council. There could be a case in which the Council implicitly determines the non-existence of an act of aggression. Thank you Mr. Chairman.

Iran: Thank you Mr. Chairman. Since this is the first time my delegation takes the floor, I would like to join other delegates in thanking you as Chairman for your efforts in facilitating these discussions on the crime of aggression by presenting the useful discussion paper. It goes without saying that defining the crime of aggression is of utmost importance, since it gives the necessary basis to further this ultimate goal of putting an end to impunity for the perpetrators of one of the most serious crimes of concern to the international community, which in many respects is the mother of the other three categories of most serious crimes. We should note, however, that any definition whatsoever of the crime of aggression will have deep effects on international norms regarding the use of force, *jus ad bellum*.

Having said that, I have the following comments to make on behalf of my delegation. First, the crime of aggression as distinguished from the state act of aggression, shall be defined as precisely and objectively as possible. A generic definition could not meet

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such a purpose, while the specific approach, which we are inclined to prefer, may prove, at the end of the day, not to be exhaustive enough to cover all possible manifestations of the crime of aggression. Therefore, a combination of both may be of more practical value. Resolution 3314, preferably in its entirety, should be used as a basis for enumerating the constitutive elements of the crime of aggression.

Given the explanation just made by the distinguished delegate of Liechtenstein, we are flexible about the two variants, Variant (a) and (b).

Second, the bottom line of the act of aggression is the unlawful use of force by a State in violation of basic principles and provisions of the UN Charter, including the provision on the peaceful settlement of disputes and those of prohibitions of use of force against the territorial integrity or political independence of a State as stipulated in paras 3 and 4 of Article 2 of the Charter, irrespective of the consequence or outcome, which has, of course, traditionally been territorial annexation or occupation. Even noting that fact, territorial annexation or occupation are only two possible, and hopefully obsolete, objectives or outcome of aggression., We think such objective or result, if the decision is to keep them as elements of the crime, - which we prefer not to do -, should not just be limited to these two cases. Rather, the definition should cover any act of aggression, i.e., actual unlawful use of force, whatever the outcome might be.

With regard to the second part of the discussion paper, we think that the ICC should be granted the independence and autonomy to prosecute the crime of aggression whether or not another UN body including the Security Council has established the State act of aggression or not. The ICC is established as an independent, permanent criminal court, as emphasized in the Statute preamble, after all. It is not legally convenient, nor does it serve the cause of justice, to tie the functioning of the ICC to the decisions of the Security Council, in the practice of which political considerations have influenced its decisions, including those made under Article 39, in particularly determinations of the existence of acts of aggression. Thank you Mr. Chairman.

Kenya: Thank you, Mr. Chairman. My Delegation would like to reiterate its support for the ongoing work of the Working Group on the Crime of Aggression, which shows the necessary political will of States to enable agreement on the definition of this crime. My delegation joins all those delegations supporting Option 1, and in particular the elucidation of the option by the distinguished delegate of Germany. While we recognize that the Security Council has powers under Article 39 of the UN Charter to determine the existence of acts of aggression, such power is not exclusive and does not preclude the Court from making its own determination in assigning criminal responsibility to individuals.

Mr. Chairman the Court is an independent judicial body guided by law and evidence. Its independence should not be eroded by allowing its jurisdiction to be subjected to the whims and shenanigans of a political organ. I need, of course, not give particulars, which I believe are all well within our knowledge. The Court should, of course, respect the

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Council's requests of its jurisdiction in accordance with the provisions of Article 5(2) of its Statute.

With regard to Para 4, Kenya views Paragraph 4 favorably, as it creates a balanced relationship between the Security Council and the Court, while at the same time respecting the Council's authority to determine an act of aggression under the UN Charter. The spirit of the paragraph also allows the Court to exercise its jurisdiction over the most serious crimes. Thank you Mr. Chairman.

DRC: *[translated from French]* Thank you, Mr. Chairman. We've already had the opportunity to express our position on Paras 4 and 5, we don't want to go back over it, except for two comments that we feel are important at this stage in the debate. We've listened very carefully to the proposals put forward by delegates proposing a redraft of Para 4. We also feel that there is a need to think about this without, however, affecting the balance that is already in this paragraph.

There was an issue as to what is the organ between the Prosecutor and the Court that should notify the Security Council and when. Mr. Chairman I think we need to be clear on this, there are a series of measures that the Court should take by way of precaution before it can take a decision on a situation. So, to our view, in view of a determination, and here I'd be flexible with the terms because mention has been made of "*qualification*," of "*constat*," and you also speak legally of "*determination*." I don't think we need to get in to that debate about terminology, but I think we do have to see the existence or the determination of the act of aggression. The Security Council can make that determination. The Court can also make that determination, so you wonder at what specific point the Court should intervene to ascertain whether the Security Council has been able to make a determination. We think the appropriate moment is the confirmation of the charges, because when the charges are confirmed, then at that point you need a determination as to whether the violation you want to prosecute an individual for will be feasible without going into the substance. So, we think that the moment at which the confirmation of charges takes place would be the appropriate time.

Now, we wanted to say something about Paragraph 5. We've said that, and we don't want to go back over what we already said, but you will remember that we said that we had many concerns about Paragraph 5 if you go beyond Option 1, because we had opted for the first option. But we'll still be very flexible with regard to Option 3, because here mention is made of the General Assembly, and I think even Belgium has said, quoting Articles 11 and 12 of the Charter, that there is a sort of shared competence between the Security Council and the General Assembly, although there is a certain hierarchy which means that the Security Council prevails over an eventual intervention by the GA, which would be subsidiary in terms of international peace and security.

So, our concern stands with regard to the intervention of the ICJ. I think some delegations have expressed those concerns. I think one delegation was asking what the exact requirements would be in the case of having recourse to the ICJ. So, Option 4 as

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drafted could merit some attention, but where we have more difficulties, is when you support the idea of referring to the ICJ proceedings in terms of an advisory opinion. We think that is very complex, because the ICJ has a jurisdiction that has its own rules, which are not necessarily the rules that the ICC has. And here I will quote Nigeria who raised this issue in the sense that a sort of hierarchy would be established between the ICJ and the ICC, where the ICC before it proceeds, would have to refer to the ICJ before it could proceed. We don't find this at all acceptable, all the more so since I said that there are a series of principles the ICJ follows which are not necessarily the principles that govern the Statute of our jurisdiction.

So I will take the example of a situation where the ICJ has said it is not competent, in other words, it didn't go into the substance, and the advisory opinion that we would request would then have to deal with what? Because the question would be an issue of substance. So you see, this is a difficulty. Another example—the ICJ responds to the will of the States, it is linked specifically to the will of the States, so then we'd be getting into a conflict. And then, there might be a non-decision, and then what would happen to the advisory opinion? So, I think we have to be very careful here regarding the inclusion of the ICJ in terms of requesting an advisory opinion. Thank you very much.

Cuba: *[translated from Spanish]* Thank you, Mr. Chairman. We need to be brief and I will attempt to be brief, but we've not been able to participate in the Princeton deliberations, and the proposal put forward by my delegation in 2003 officially have in no way been taken on board in your paper, even though we said we'd be prepared to work on the basis of your discussion paper.

With regard to aspects that we're dealing with today, that is the competence of the Court in terms of the crime of aggression: We continue to state that it is an indispensable principle that the ICC, as it administers justice, should be exempt from any type of subordination to other organs or political bodies that might affect its essence, be they States, international organizations, or specific bodies of the UN system. The Court should be completely independent in its judicial competence. And here it is absolutely necessary to differentiate quite logically the competence of the Court over an individual who has committed a crime of aggression from the competence of a UN body with regard to the act of aggression as carried out by a State. And in this context, we also need to point out that the Court should not forget that aggression is one of the most severe violations of international law and should take into account the principal responsibility of the UN in maintaining international peace and security according to the Charter. So, we share, the idea that the Court will not have the competence to question statements of a relevant body of the UN, with regard to the existence or not of an act of aggression by a state. And so, it is necessary to state that this statement or declaration should not automatically give the Court exercise of jurisdiction over that particular crime. So, we believe it is important that the crime of aggression should have no additional requirements other than the procedural elements already included in the Statute for the exercise of jurisdiction with regard to this crime. Our delegation maintains its proposal which says: The Court shall exercise its jurisdiction with respect to a crime of aggression

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in accordance with the provisions in this Statute, including the provisions of articles 12, 13, 17, and 18. The lack of a determination by the Security Council as to the existence of an act of aggression, committed by the State concerned shall not impede the exercise of jurisdiction by the Court's jurisdiction with respect to a case referred to it."

With regard to Para 5 of your document, Sir, we believe that 6 months is an appropriate period of time and this would be in accordance with Article 18(3) of the Statute. And in no way would we be in favor of Option 2, that would go completely against our opinion. And with regard to Option 4, if this were to be decided on, we believe this would put the ICC in a situation of subordination and dependence with regard to the ICJ. And in this context, we would like to point out that both the ICC and the ICJ are international courts that are independent and with different competence and very well-defined competence. So, even though we very much value the advisory opinions from the ICJ and its utility in the interpretation of international law, we believe that the ICC should independently decide whether the acts that have been referred to it constitute acts of aggression or not. And we should say that this determination would only be valid in the substantiation of the case, and would in no way mean a determination of the international responsibility of the state concerned, because the competence of the ICC is limited to individual responsibility. Thank you.

Venezuela: *[translated from Spanish]* Thank you, Sir. Before I make my comments on the issue under discussion, I would like to refer to an unforgivable omission yesterday, when we did not express our solidarity with the delegation of Cuba, which had expressed its concern that it had not been able to participate at the seminar in Princeton. We think that it is the duty of this Working Group to guarantee that all delegations that wish to participate at Princeton be able to do so. And talking about crimes and acts of aggression, we do find ourselves in this situation, and we think it is really unforgivable, and we would like to ensure that this does not happen again, and that this be included in the minutes of our meeting, and that the Group guarantee that all delegations who wish to participate at Princeton be able to do so.

With regard to the exercise of jurisdiction of the Court, we, as have all others, examined this issue, but we are still surprised to hear what is being discussed, because what we are discussing is not a determination. What we are talking about is the scope of the Statute of Rome and the independence of the ICC. The spirit of those who negotiated the Rome Statute pointed out three essential elements, which means that this discussion is in fact a false dilemma in our view. The preamble says, first of all, in terms of importance for us with regard to this issue, says that the Court is independent, permanent, and linked to the UN, but not subject to the UN system - not subject to a body of the UN system. So, in that way, this excludes the whole issue here. When it is said that this international body is linked to the UN system, it is to the system as a whole, not one body, even a principal body. Nowhere in the Statue does it say that.

Another issue that we need to take into account with regard to this so-called determination is that the Statute guarantees international justice and combating impunity.

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To presuppose that its actions would be subordinated to a body that in reality is not going to be able to act in a majority of the situations. And there is another important element. Some delegations have said that if the Court is given the possibility of deciding on the determination, they would fear the politicization of the Court, but the Statute is saying here that the Court would work within the purvey of the most serious of crimes, the gravest of crimes. And I think that that qualifier is more than sufficient to understand that it would be very difficult for the Court. There might be some interest on the part of some personality to present to the Court a crime that is not a transparent one, but the Court would be sufficiently capable to not accept such a case.

So, for our delegation, this issue of the determination is a false dilemma. What we have to ensure is what has been said elsewhere that this crime should be dealt with in similar fashion to the others, and Article 13 is perfectly clear. It does not subordinate. It points to an essential element for our delegation, and that is that the Court decides. Obviously, the State that has been attacked cannot simply be left defenseless. If we were to allow the Security Council to make the determination, then we are leaving the State that has been attacked completely defenseless, and that goes against the spirit and the letter of the Statute of the Court.

The proposal by Venezuela is that, in the Chair's document that will be revised, include as another alternative the contents of Article 13. And that is Article 13 as a whole, and no subordination of the different elements. First of all, the States can refer to the Court a crime of this nature, the Security Council can refer, or the Prosecutor can initiate, because we need to defend the complete integrity of the Rome Statute, and we are conservative in saying this. Because, as several other delegations have said, the Security Council, to grant the Security Council this type of power that is being proposed, then the Security Council would have to change, it would have to be more democratic and have to eliminate the veto power. If the Security Council wishes to have this power of decision, a far more active one within the Court, then it will have to change itself structurally. So Mr. Chairman, we are requesting that in this paragraph we include Article 13 as an alternative to the proposals in the Chair's discussion paper with regard to Paragraphs 4 and 5. And with this I conclude that we do not need to debate the issue of determination. Thank you very much.

Chairman: Thank you. We have a few other speakers on our list, who can take this floor when we resume this afternoon. There will be a new informal paper by the Chair restructuring Para.1.

Morning session ends.