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**Proposal on the Crime of Aggression**

by

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In an effort to achieve a compromise in the Working Group's examination of the jurisdictional and definitional requirements for activating the crime of aggression in the Rome Statute of the International Criminal Court, I advance a proposal that offers two options. The first option is somewhat unconventional in that it steers the trigger mechanism away from political determinations of aggression *per se* and towards a more pragmatic methodology in terms of how the U.N. Security Council operates. The Security Council rarely resorts to "aggression" terminology and the examples of the now distant past demonstrate its use for less significant acts of aggression while describing wars of aggression with other UN Charter terminology (threats to or breaches of international peace and security, unlawful use of force, etc.). Once the Security Council determines that a threat to or breach of peace and security has occurred, often by condemning it, that determination in a resolution (which need not be a Chapter VII resolution) should be sufficient to trigger a process that can determine whether an act of state-on-state aggression *per se* has occurred, which then would enable the ICC to investigate persons for purposes of individual criminal culpability.

Those permanent members of the Security Council fearful that this methodology would too easily open the door to determinations of state-on-state aggression, which arguably only the Security Council should make pursuant to Article 39 of the U.N. Charter, could remain confident that any determination or condemnation regarding a threat to or breach of peace and security which is adopted by the Security Council in a resolution will not be directed towards any one of them and thus would not lead to a determination of aggression involving any one of them. That result will be of concern to other governments resentful of the powers and protection of the permanent members under the U.N. Charter, but the advantage of the proposal is that it realistically would open up most (perhaps all if the P-5 refrain from aggression) situations of aggression in the future to scrutiny by the ICC if the Security Council or, depending on which bracketed option is agreed to, the ICJ, the U.N. General Assembly, or the ICC itself reaches the preliminary decision that state-on-state aggression has occurred following a determination by the Security Council that a threat to or breach of the peace has occurred. This kind of determination (threat to or breach of the peace) constitutes the *raison d'être* of the Security Council and thus always will be the bread and butter of Council work. I.e., addressing threats to peace and security is the Council's primary job, and thus it is unavoidable. My proposal accepts that reality and uses it to open a logical door to

determination whether state-on-state aggression has occurred. I would argue that the equality of states principle remains intact because this process conforms to the U.N. Charter. Bear in mind that it is always possible that aggression allegedly committed by a permanent member of the Security Council can be adjudicated by the ICJ if the jurisdictional requirements of that court are met, and no one has argued that somehow the procedures of the ICJ violate the equality of states principle.

A further advantage to Option I is that it avoids, at least in significant part, the debate that would predictably arise as to whether the use of armed force constitutes an exception to the Article 2(4) prohibition. If the Security Council determines that a threat to or breach of the peace has occurred, then the Council has for all intents and purposes denied the legitimacy of any rationale for the use of armed force (including self-defense, humanitarian intervention, protection of nationals, counter-terrorism, advancement of democracy, etc.).

Option II preserves a significant role for the Security Council but shares the final determination of whether aggression has occurred with other U.N. organs or the ICC itself. It recognizes that the Security Council may not, indeed probably will not, want to immediately make a determination about aggression but may be willing to trigger a process that enables another U.N. organ, or the ICC, to make that call. It is “passing the buck” to other bodies but in a way that remains within the initial control of the Security Council.

My hope is that negotiators will recognize the considerable latitude afforded the Security Council in these proposals, such that a far broader range of situations which may constitute state-on-state aggression in fact can be brought before the ICC for investigation of individual criminal culpability. This bridge, between those government experts who believe in a central role for the Security Council and those government experts who reject that view, is intended to establish a very pragmatic but disciplined process. I purposely do not include within any definitional structure acts of strictly internal aggression or terrorist or militia acts unconnected to state authority. That is a bridge too far for customary international law and for the ICC’s criminal jurisdiction at this stage, in my view. I also think moving in that direction would break the back of the entire exercise.

I propose a definition for aggression that conforms to the gravity, duration, and context set forth by the International Court of Justice in the *Democratic Republic of the Congo v. Uganda* judgment (2005). How the Security Council, General Assembly, ICJ, or ICC arrive at a determination that state aggression has occurred in any of the options I put forward for the trigger mechanism would be a process that could look to UNGA Resolution 3314 (1974) for guidance and to other principles of customary international law. But for purposes of *individual criminal culpability* determined by the ICC, I propose a singular definition that narrows the exercise to a leadership role (as suggested by the Working Group Chairman last January) in the unlawful military intervention by one State against another State of such gravity and duration as to constitute a grave violation of the prohibition on the use of armed force under Article 2(4) of the U.N. Charter. The Elements of Crimes presumably would flush these words out with some

specific guidance, but this general definition would establish a realistically high bar for investigations and prosecutions of individuals by the ICC. Again, this constitutes a bridge between the two camps that requires each to compromise (beyond “war of aggression” but exclusive of the isolated and pinprick attacks that so often elicit excuses as exceptions to the rule) but in a way that leaves the ICC with a significant range of criminal involvement in aggression to tackle.

I place the trigger and definitional provisions in an amended Article 10 so as to preserve the sequence of Rome Statute provisions.

### **Scheffer Proposal**

#### *New Article 9 of the Rome Statute*

##### **Article 9 Elements of Crimes**

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 10. They shall be adopted...

#### *New Article 10 of the Rome Statute*

### **OPTION I**

##### **Article 10 Rules of International Law/Crime of Aggression**

1. Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
2. The Court may exercise jurisdiction over the crime of aggression in the event:
  - a. the Security Council has determined that an act of aggression has been attempted or committed by one State against a second State, or
  - b. the Security Council has determined the existence of a threat to or breach of the peace as a result of the threat or use of armed force by one State against another State, and thereafter [the Court has determined that an act of aggression has been attempted or committed by the first State against the second State] [the International Court of Justice has delivered an advisory opinion, following the request of the Security Council or the General Assembly, or a judgment concluding that an act of aggression has been attempted or committed by the first State against the second State].
3. With respect to the crime of aggression, the Court may exercise jurisdiction over any person who is or has been in a position effectively to exercise control over or

- to direct the political or military actions (in whole or substantial part) of the State identified by the Security Council in the manner described in paragraph 2 as responsible for such act of aggression or such threat to or breach of the peace as the result of the threat or use of armed force.
4. For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation, or execution of an unlawful military intervention by one State into the territory (land, sea, or air) of another State of such significant magnitude and duration that it constitutes a grave violation of the prohibition on the use of force under article 2(4) of the United Nations Charter, provided that any use of armed force undertaken pursuant to Security Council authorization shall be excluded from such definition.

## **OPTION II**

### **Article 10**

#### **Rules of International Law/Crime of Aggression**

1. Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
2. The Court may exercise its jurisdiction over the crime of aggression if:
  - (a) The Security Council has made a determination that an act of aggression has been attempted or committed by one State against a second State, or
  - (b) The Security Council refers to the Prosecutor, in accordance with article 13, paragraph (b), a situation in which the crime of aggression appears to have been attempted or committed and, prior to the initiation of an investigation in accordance with article 53, the Security Council or the General Assembly has determined by resolution or the International Court of Justice has delivered a judgment or advisory opinion ruling that an act of aggression has been attempted or committed by one State against another State, or
  - (c) The Security Council refers to the Prosecutor, in accordance with article 13, paragraph (b), a situation in which the crime of aggression appears to have been attempted or committed and the Security Council requires in such resolution of referral, as a pre-condition to the initiation of an investigation in accordance with article 53, the decision of the Court that an act of aggression has been attempted or committed by one State against another State.
3. With respect to the crime of aggression, the Court may exercise jurisdiction over any person who is or has been in a position effectively to exercise control over or to direct the political or military actions (in whole or substantial part) of the State identified pursuant to paragraph 2 as responsible for such act of aggression.
4. For purposes of this Statute, “crime of aggression” means the planning, preparation, initiation, or execution of an unlawful military intervention by one State into the territory (land, sea, or air) of another State of such significant

magnitude and duration that it constitutes a grave violation of the prohibition on the use of force under article 2(4) of the United Nations Charter, provided that any use of armed force undertaken pursuant to Security Council authorization shall be excluded from such definition.

*New Article 121(5) of the Rome Statute*

**Article 121**  
**Amendments**

5. Any amendment to articles 5, 6, 7, 8 and 10, paragraphs 2 to 4 of this Statute shall enter into force...