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Working Group on the Crime of Aggression
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Proposal submitted by Germany

The crime of aggression

A further informal discussion paper

1. What is the purpose of the present paper?

1. The present paper is a further attempt[1] to provide some additional food for thought for the continued opinion-building process among members of the Preparatory Commission.[2] This process is, in the view of Germany, indispensable for reaching the necessary general agreement in order to fulfil the mandate given to the Preparatory Commission in resolution F as contained in annex I of the Final Act of the Rome Conference (A/CONF.183/10), which reads:

> "7. The Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute. The provisions relating to the crime of aggression shall enter into force for the States Parties in accordance with the relevant provisions of this Statute."

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[1] See the informal discussion paper on the crime of aggression submitted by Germany on 11 December 1997 (A/AC.249/1997/WG.1/DP.20), as contained in the compilation of proposals on the crime of aggression (PCNICC/1999/INF/2) of 2 August 1999, pp. 5-9.

[2] In accordance with article 10 of the Statute, nothing in this informal discussion paper can be interpreted as limiting or prejudicing in any way international customary law with regard to the crime of aggression.

2. Being fully aware of the complexity and the many difficult aspects involved in this crime and this mandate, the German delegation hopes that the present paper will contribute to achieving the necessary general agreement for a definition of the crime of aggression as referred to in article 5 of the Statute. While this paper is focused primarily on the question of an appropriate definition, the German side is fully aware that this question is inseparably linked to the second crucial question as contained in article 5, paragraph 2, of the Statute, as well as in the mandate of the Preparatory Commission, i.e., the conditions under which the International Criminal Court shall exercise its jurisdiction with respect to this crime. The latter question, however, is not discussed as such in the present paper.

3. Germany hopes that delegations of Member States will be able to reflect upon the ideas and elements contained in this informal paper and take them into consideration when the Preparatory Commission undertakes further efforts to fulfil its mandate.

2. What should be the general approach with regard to a definition of the crime of aggression?

4. Germany continues to favour a viable, self-contained definition, as short as possible, containing, in accordance with the principle of *nullum crimen sine lege*, all the necessary elements and precise criteria of a full international criminal norm which establishes individual criminal responsibility for this extremely serious crime of concern to the international community as a whole.

5. It is submitted that further efforts for a consensual definition of the crime of aggression must be firmly based on established customary international law. This was precisely the approach taken when defining the crimes contained in articles 6 to 8 of the Statute.

6. Accordingly, when defining the crime of aggression, one should fully take into account indisputable, undisputed and obvious historical precedents of this crime. Relevant historical precedents could include, for example, the wars of aggression waged by Hitler against Poland in 1939 and the Soviet Union in 1941.[3] Such an approach is all the more necessary and justified as the above-mentioned historical precedents led to the first definition ever of the crime of aggression, establishing individual responsibility for this crime in the Charters of the International Military Tribunals of Nürnberg and Tokyo as well as in Allied Control Council [for Germany] Law No. 10.

7. In general, it is submitted that an approach based on experiences, conclusions and lessons to be drawn from indisputable, undisputed and obvious historical precedents of this crime will be the best way to reflect the relevant customary international law based on State practice and *opinio juris* with regard to an appropriate definition of the crime of aggression.

3. What are the characteristics of the crime of aggression?

8. Germany shares the view expressed by many delegations that an aggressive, large-scale armed attack on the territorial integrity of another State, clearly without

[3] It is obvious that before and since then there have been other precedents in which wars of aggression were waged. Nevertheless, for the purpose of the present paper, it does not seem necessary to discuss them.

justification under international law, represents indeed the very essence of this crime.

9. It is submitted that, in the light of indisputable, undisputed and obvious historical precedents, one must above all consider those cases in which one State literally attempts to "take over" or to destroy another State or at least parts thereof with the assembled and well-prepared power of its entire military apparatus.

10. In the light of such precedents, it appears that these cases of aggressive, large-scale armed attacks on the territorial integrity of another State, clearly without any justification under international law, share the following characteristics:

- Such attacks are of a **particular magnitude and dimension** and of a frightening **gravity and intensity**.
- Such attacks regularly lead to the most **serious consequences**, such as extensive loss of life, extensive destruction, subjugation and exploitation of a population for a prolonged period of time.
- Such attacks regularly pursue **objectives**[4] **unacceptable to the international community** as a whole, such as annexation, mass destruction, annihilation, deportation or forcible transfer of the population of the attacked State or parts thereof, or plundering of the attacked State, including its natural resources.

11. Indisputable, undisputed and obvious historical precedents of wars of aggression demonstrate that armed attacks which combine the above-mentioned characteristics are clearly not justified under international law. By the same token, such armed attacks occur "in manifest violation of the Charter of the United Nations".

12. It is therefore submitted that an appropriate definition for the crime of aggression must reflect these very same characteristics.

4. What kinds of violent acts should remain outside the scope of the crime of aggression?

13. It is obvious to all members of the Preparatory Commission that numerous situations of conflict, territorial disputes or other dangerous situations involving the risk of hostilities between various States do persist in many regions of the world. Very often, these unresolved conflicts and tension-laden, hostile and continuously dangerous situations are marked by a series of violent actions and counteractions. In such situations, provoked or unprovoked hostilities continue to flare up from time to time, here and there. Regrettably, in many of these situations, the threat or use of armed force continues to occur, sometimes even quite frequently. This may take the form of border skirmishes, cross-border artillery and air attacks, armed incursions, blockades or other similar constellations involving the use of armed force.

14. In comparison with the aforementioned historical precedents, such use of armed force, even if it is very objectionable or must be condemned in the strongest terms, does not possess the extremely serious characteristics of genuine wars of aggression as described above. Furthermore, in many of these conflicts, it is quite

[4] It is understood that these objectives need not be openly acknowledged by the attacking State, but can be inferred from the relevant facts and circumstances.

difficult, if not impossible, to determine unequivocally who is right or who is wrong in a given situation.

15. It is therefore submitted that these kinds of violent acts should not, in principle, fall within the scope of the crime of aggression as referred to in article 5 of the Statute.

5. What are the common elements in international instruments dealing with aggression?

16. Germany shares the view expressed by most delegations that the decisive documents of reference are:

- Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis — Charter of the International Military Tribunal (Nürnberg Charter), signed at London on 8 August, 1945, and the Charter of the International Military Tribunal for the Far East (Tokyo Charter), proclaimed at Tokyo on 19 January 1946;
- Allied Control Council Law No. 10, 20 December 1945, *Official Gazette of the Control Council for Germany*, vol. 3, p. 22;
- United Nations General Assembly resolution 95 (I) of 11 December 1946, entitled "Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal";
- General Assembly resolution 2625 (XXV) of 24 October 1970, entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations";
- General Assembly resolution 3314 (XXIX) of 14 December 1974, entitled "Definition of Aggression".

17. Compared to these decisive documents, the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind of 1996[5] is of much less importance, as it has not been adopted by States.[6]

18. Obviously, even the key documents of reference differ in their nature and in their historical, political and juridical significance. They also originate from different sources and were elaborated in varying political and historical contexts and for different purposes.

19. It is all the more striking that, notwithstanding this diversity, all these documents contain similarities in their general approach, certain common elements and even some common formulations:

- Article 6 of the Nürnberg Charter and article 5 of the Tokyo Charter define the "planning, preparation, initiation or waging of a **war of aggression**, or a war in violation of international treaties, agreements or assurances, or participation in

[5] *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), chap. II, sect. D.

[6] The same is true for the ILC draft statute for an international criminal court of 1994 (ibid., *Forty-ninth Session, Supplement No. 10* (A/49/10), chap. II, sect. B.5), which is not even mentioned in the above text since article 20 of the draft statute, while referring to the crime of aggression, does not shed any light on the content of this concept.

a common plan or conspiracy for the accomplishment of any of [the acts mentioned above]" as a crime against peace. The Nürnberg Tribunal regarded the law of the Nürnberg Charter as "the expression of international law existing at the time of its creation".[7]

- General Assembly resolution 95 (I) **affirmed** "the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal", which includes the principle in article 6 of the Nürnberg Charter.[8]
- Allied Control Council Law No. 10 defines crimes against peace as the "initiation of invasions of other countries and **wars of aggression** in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a **war of aggression**, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".
- General Assembly resolution 2625 (XXV), annex, states in the second paragraph of principle 1 that "a **war of aggression** constitutes a crime against peace, for which there is responsibility under international law".
- General Assembly resolution 3314 (XXIV), annex, a most important document, deals in eight articles with various aspects of a definition of **aggression**. It seems significant that the only explicit reference in this comprehensive text, where the specific notion of "**crime**" appears as such, is the first sentence of article 5 (2), which reads: "A **war of aggression** is a crime against international peace."

20. It is obvious from the foregoing list of formulations in the documents of reference that the most noteworthy common feature continues to be, over decades, the reappearance of the notion of "**war of aggression**". It is submitted that the use of the term "**war**" — instead of "**act**" — of "aggression" is of great significance. It clearly conveys the idea that the use of armed force must be of the utmost gravity to entail individual criminal responsibility under international law.[9] As early as 1949, this was stressed by the Secretary-General of the United Nations in his memorandum, entitled "The Charter and Judgment of the Nürnberg Tribunal — History and Analysis". In that document the Secretary-General pointed out that the Nürnberg Tribunal had "interpreted the term 'aggressive war' restrictively" by way of "the juxtaposition of aggressive acts or action, on one side, and aggressive wars, on the other".[10] The same approach was taken in the Definition of Aggression as contained in the annex to General Assembly resolution 3314 (XXIX). Given the fact that there was significant opposition by States to categorizing **all the acts** of

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[7] 41 *American Journal of International Law* 216 (1947).

[8] Principle VI (a) (i) of the 1950 ILC Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal (*Yearbook of the International Law Commission, 1950*, vol. II, p. 376) is formulated in precisely the same way as article 6 of the Nürnberg Charter.

[9] This point was rightly stressed by the delegation of the United Kingdom of Great Britain and Northern Ireland in its statement of 12 June 2000 in the Preparatory Commission's Working Group on the Crime of Aggression. Germany agrees with the United Kingdom also in that the use of the term "war" should not be read as referring to the old concept of "formal declarations of war".

[10] United Nations publication, Sales No. 1949 v. 7.

aggression within the meaning of article 3 of that document as **crimes** under international law, the first sentence of article 5 (2) of the Definition of Aggression deliberately restricts the latter term to the case of a **war** of aggression. It follows from this that it would be clearly mistaken to simply transpose the list of **acts** of aggression set out in article 3 (a) to (g) of the annex to resolution 3314 (XXIX) into a definition of the **crime** of aggression. In this respect, it is also worth recalling that the International Law Commission — rightly — considers article 3 to be an instrument dealing with aggression committed by States, not with crimes of individuals and describes it as "designed as a guide for the Security Council, not as a definition for judicial use".[11]

21. There is no evidence whatsoever to suggest that, after the adoption of General Assembly resolution 3314 (XXIX), the crime of aggression under customary international law could have undergone a broadening beyond its narrow content as expressed by the term "war of aggression". In particular, article 16 of the Draft Code of Crimes against the Peace and Security of Mankind should not be read to suggest that such a development has taken place. Although that article, other than the documents of reference adopted by States from the Nürnberg Charter up to General Assembly resolution 3314 (XXIX), does not use the term "**war** of aggression", the commentary to the draft article makes it clear that no change in substance has taken place: The commentary starts off by stating that "the characterization of aggression as a crime against the peace and security of mankind contained in article 16 of the present Code is drawn from the relevant provision of the Nürnberg Charter as interpreted and applied by the Nürnberg Tribunal", and at a subsequent point it stresses that "the action of a State entails individual responsibility for a crime of aggression only if the conduct of the State is a **sufficiently serious violation** of the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations".[12]

22. It can be concluded from the foregoing analysis that the key documents of reference contain common elements suggesting a narrow concept of the crime of aggression, fully in line with what has been identified, in essence, as an aggressive, large-scale armed attack on the territorial integrity of another State, clearly without justification under international law.

6. Do considerations of a legal policy nature coincide with the definition based on customary international law?

23. It has been stressed above that a solution for a generally acceptable definition of the crime of aggression must be firmly based on established customary international law. On that basis, an aggressive, large-scale armed attack on the territorial integrity of another State, clearly without justification under international law, represents indeed the very essence of this crime. It appears that such a result coincides with important considerations of a legal policy nature:

- States seem to share the view that one must strictly avoid the risk that the definition of the crime of aggression somehow negatively affects the legitimate

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[11] *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), p. 72, para. (6) of the commentary to article 20.

[12] *Yearbook of the International Law Commission, 1996*, vol. II, Part Two, chap. II.D, paras. (1) and (5) of the commentary to article 16, p. 42.

use of armed force in conformity with the Charter of the United Nations, whose necessity, maybe unfortunately, cannot be ruled out in the future.

- States seem to fear that a definition of the crime of aggression that was too broad and too open[13] would only increase international tension and turmoil. For example, it would create the most undesirable opportunity to leaders of States involved in a bitter and long-standing territorial dispute, perhaps with sporadically occurring violent border incidents, to accuse each other of having committed the crime of aggression.

- States appear to be anxious to avoid a definition that lends itself to possible frivolous accusations of a political nature against the leadership of another State.

7. What is the *acquis* of previous work which should be preserved?

24. Germany believes that the fruitful *travaux préparatoires* by the Preparatory Committee, at the Rome Conference and in the Preparatory Commission have resulted in broad general agreement on the following points:

(1) Further efforts to elaborate a definition of the crime of aggression for the purpose of the Statute and the definition to be elaborated must be firmly based on established customary international law.

(2) With regard to the essence of the crime of aggression, it presupposes a large-scale, aggressive armed attack on the territorial integrity of another State, clearly without justification under international law.

Furthermore, the following two elements can be considered as being part of the *acquis* of the negotiating process:

(3) There seems to be general agreement that the crime of aggression constitutes by its very nature a leadership crime. The relevant formulation of previous proposals reflecting this aspect, namely, "committed by an individual who is in a position of exercising control or capable of directing political or military action of a State", continues to be appropriate.

(4) With regard to the question of preparation and the necessary degree of completion, it seems accepted that individual criminal responsibility for the crime of aggression presupposes that the required aggressive, large-scale armed attack in question has effectively occurred. This means that preparatory acts or attempts without actually resulting in an aggressive, large-scale armed attack on the territorial integrity of another State should not fall within the scope of the crime of aggression.[14]

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[13] A definition which would cover, e.g., also the violent acts of a more limited nature, as outlined under section 4 above.

[14] It should be noted that the structure of the provision emphasizing this aspect, which was suggested by Germany on 11 December 1997 (A/AC.249/1997/WG.1/DP.20; see footnote 1 above), has remained generally acceptable and has not been criticized up to the present day. It continues to be reflected in various draft proposals on a definition of the crime of aggression and also in the consolidated text (PCNICC/1999/WGCA/RT.1), option 1, para. 3.

8. Concluding remarks

25. Germany, being the author of various proposals for a definition of the crime of aggression, continues to be flexible with regard to the issue of an appropriate definition for the crime of aggression. Therefore, Germany deliberately would like to refrain, at the current stage, from submitting a new concrete proposal for a definition of the crime of aggression. We are, however, convinced that gradually increasing common understanding of the issues discussed in the present paper shared by most delegations will greatly facilitate the fulfilment of the mandate of the Preparatory Commission as stated above.