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**Preparatory Commission for the International Criminal Court  
Working Group on the Crime of Aggression**

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**Suggestions made orally by Italy on 13 March 2000  
with regard to a structure for discussion on the crime  
of aggression**

1. In November-December of last year, and indeed also today, we had a very useful debate on the crime of aggression. Delegations were able to further clarify their positions, and to address the compilation of proposals prepared by the Secretariat, as well as the consolidated text produced under your guidance. In this context, we are especially grateful to the delegation of Colombia for the proposal that was just introduced. Inevitably, the consolidated text contains several options, variations and square brackets. At the same time, it gives us a solid and concrete basis for our work, in the form of a rolling document that can be refined and simplified following the progress in our discussions. We look forward to an equally fruitful outcome of the present session, and we are encouraged by the constructive atmosphere that has prevailed in our Working Group.

2. The first problem that we are facing now is the method of work. Where do we go from here, and how should we proceed? Needless to say, Mr. Chairman, we fully rely on your leadership and advice. In any event, we think it may be useful to indicate some of the possible alternatives. An ambitious goal for the next three weeks would be to reduce, to the extent possible, the options, variations and square brackets in the text. More realistically, we should aim at preparing grounds for shortening and further consolidating the text by the end of the June session.

3. In this perspective, the first alternative is to continue to discuss the crime of aggression, and comment on the entire consolidated text, without having set any specific plan or order of business. We wonder, however, whether this would be the best solution. What seems important, at this stage, is to avoid a repetition of general statements, and to have instead a closer look at the most controversial points that emerge from the text before us. Also, the focus should be kept on the relevant legal aspects, but without losing sight of the need for solutions that could enjoy general agreement. In our view, this can be done in two ways: one is to go through the text,

and examine the different options and variations in the same order in which they are listed, respectively as regards definition and the relationships with the Security Council. The other possibility is to isolate a few crucial questions, and analyse them with a view to finding those elements of convergence that would eventually allow us to advance and simplify the text.

4. As we said, we are ready to go along with your suggestions. However, we do have a preference for the “thematic approach”, namely, for identifying some fundamental aspects of the crime of aggression, and discussing them in a given order. The main reason is that by examining one by one the different options, delegations may feel encouraged to simply restate their positions and preferences for this or that formulation. Moreover, there are issues that cut across the questions of definition and the relationships with the Security Council, and may thus influence both aspects of the crime of aggression. Especially in this case, the thematic approach seems to be more suitable for achieving progress.

5. The next question relates naturally to what specific points need to be addressed, and in which order. Most of these points are already well known and do not require special explanations. Also, the order that we would like to suggest could be changed in accordance with other views, and should not be seen as a straitjacket for the debate. In particular, delegations should be allowed to comment on more than one cluster, if they find it necessary.

(a) First, we should continue to focus on the question of a general definition of the crime of aggression versus the inclusion of a detailed list of acts, as contained in resolution 3314 of 1974. This clearly remains the core issue with regard to definition. Several delegations have already expressed their views, mainly on the value of the Nuremberg Charter for defining aggression, and on the relevance of the 1974 resolution for the purposes of individual criminal responsibility. It would be important to pursue this dialogue and to hear as many opinions as possible. We may also want to clarify the advantages and disadvantages of each of the two solutions from the standpoint of the effective functioning of the Court. In other words, are there legal or practical reasons that suggest a preference for the flexibility allowed to the Court by a general definition over the approach based on resolution 3314? Or does seeking full respect for the principle of legality remain, as for the other crimes under the Statute, the best guarantee for the actual persecution and punishment of the crime of aggression? This is, in our view, an extremely important aspect of the discussion.

(b) Secondly, we should fully explore the possibility of a compromise on the question of definition, based on the selection of some of the acts listed in resolution 3314. Also on this point, there is room for further discussion, which should concentrate on specific suggestions for elements to add to the German proposal, which is reflected in one of the variations in the consolidated text.

(c) There is then the issue of the conditions for the exercise of the Court’s jurisdiction. Here, if one looks at the various options, it is easy to conclude that an increasing number of points deserve our attention. The first question remains whether the determination by the Security Council on the existence of an act of aggression by a State should be a necessary prerequisite of the Court’s intervention. But then, depending on the answer to this question, there are other important issues at stake. For example: What happens in case of failure by the Council to determine that an aggression by a State has occurred? Would the Court be entitled to proceed

when certain requirements are met and what are these requirements? More generally, what is the exact meaning of the reference in article 5 (2) of the Rome Statute to the “relevant provisions of the Charter of the United Nations”? We feel that, while some clear positions of principle have been expressed in the Working Group, a thorough review of these and other aspects may still be useful.

(d) Moreover, we should address another problem, which is also connected with the conditions for the exercise of the Court’s jurisdiction, but has wider implications, I refer to the legal effects on the functions of the Court of the Security Council’s determination that an aggression was committed by a State. Should the Council’s decision be construed as a procedural condition, which would leave the Court free to determine in each case all aspects that are relevant for purpose of individual criminal responsibility? Or should the decision of the Council be binding on the Court as regards the commission of aggression by a State, and should the court be left to decide only upon the degree of participation of the accused as a leader, organizer or planner? The answer to this question could have an impact also on the issue of definition. In fact, it is our impression that the more we aim at protecting the independence of the Court in the exercise of its judicial functions, the more we need to ensure, as a balance, that the acts of aggression are specifically indicated in the Statute. But again, this remains an open question.

(e) Lastly, Mr. Chairman, the crime of aggression should be considered in light of the principle of complementarity. In particular, we should ask ourselves whether the provisions of the Statute concerning admissibility and related challenges to the Court’s jurisdiction will be applicable, and to what extent, to the crime of aggression. Also, what would happen to complementarity in case of possible divergences between the definition of aggression in the Statute and in national legislations? What would be the type of definition that could reduce the risk of such inconsistencies? Here, once again we see a link between definition and other issues concerning the crime of aggression: a link that we feel it would be worthwhile to explore.

6. In conclusion, we wish to emphasize that our intent was simply to offer a contribution to advancing the discussion on aggression. At the same time, we are totally flexible in our approach and we are ready to consider, in this spirit, all other thoughts and proposals.