

**Statement by the United States of America Regarding the Crime of Aggression
at the Resumed Eighth Session of
The Assembly of States Parties of the International Criminal Court**

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Thank you, Mr. Chairman, and thank you for your outstanding leadership. On behalf of the United States, let me recognize and pay tribute to those who have been involved in this review process. The extensive work that you have done stands as an important contribution to our collective thinking over the many decades on the critical issue of the Crime of Aggression. We are especially grateful for the gracious way that you have welcomed us back to conversation with the States Parties, and we have benefited greatly from your experience.

When the U.S. Observer delegation addressed the Assembly of States Parties (ASP) last November, we noted that, having been absent from previous ASP meetings, one of our main aims was to listen and learn, to gain a better understanding of the issues being considered by the ASP and of the workings of the International Criminal Court. We listened carefully in The Hague and again during this resumed session. We have learned from the listening and we have benefited from your many thoughtful observations and insights.

At the same time, as Ambassador Rapp noted in The Hague, although the United States had not attended previous ASP meetings, we have hardly been silent in the face of crimes against the basic code of humanity. For decades we have worked, and we will continue to work, with other States to ensure accountability on behalf of victims of such depredations. Our historic commitment to the cause of international justice remains strong. As Ambassador Rapp said this morning, we believe we have a keen interest in — and much to contribute to — the success of the cases before the ICC. Although the United States is not a party to the Rome Statute, the Obama Administration has been actively looking at ways that we can assist the ICC in fulfilling its historic charge of providing justice to those who have endured crimes of epic savagery and scope. We would like to meet with the Prosecutor to examine specific ways that the United States might be able to support the prosecutions already underway.

But as we have indicated in our conversations with many of you over these past few months, we are concerned that this moment of new engagement between the United States and the Court takes place at a time when this body is considering amendments that could divert the ICC from its core mission and politicize this young institution. Wisely, a number of those

amendments have been set aside for the time being, but our concern remains with respect to the proposal to adopt the amendments on the Crime of Aggression.

Yesterday and today, we have listened carefully to the wide range of comments, and we have been struck by the diversity of views that have been expressed with regard to the two questions posed by the Chair. As a number of other States have commented, we have not heard a clear consensus on either the wisdom of state consent to prosecution or on which filter mechanism would best serve the States Parties' interests.

As we have informed the Chair, with respect to the first question he posed, even if one were to look to consent as a basis for exercising jurisdiction, we believe that the crime of aggression fundamentally differs from the other three crimes under the Court's jurisdiction—genocide, war crimes, and crimes against humanity. As the International Law Commission recognized when it looked at this issue in 1996, a state whose leaders are accused of aggression must consent to jurisdiction to be tried in another state's courts. We believe that it follows that the International Criminal Court's jurisdiction over such cases, when it derives from national jurisdiction, must similarly require the consent of the State that is accused of aggression.

With respect to the Chair's second question, our views are well-known: that investigation or prosecution of the crime of aggression should not take place absent a determination by the UN Security Council that aggression has occurred. The UN Charter confers on the Security Council the responsibility for determining when threats to peace and security, including aggression, have taken place. We are concerned by the confusion that might arise if more than one institution were legally empowered to make such a determination in the same case, especially since these bodies, under the current proposal, would be applying different definitions of aggression.

Mr. Chairman, while the two questions you have posed are important, and have yielded a wide range of answers, we respectfully submit that they are not the only questions that must be answered before Kampala. We recognize the difficulties of raising these questions now, having not participated in the previous discussions. But I hope you all appreciate that we do not believe the Court's interests would be best served if we were to remain silent. We have heard from many of you questions about the proposals concerning the crime of aggression that should be taken up between now and Kampala.

The first set of questions are raised by the terms of the definition itself—the manner in which the State act of aggression, the threshold clause, and the individual crime of aggression are set out in the proposed amendments—including the degree to which they may depart from customary international law.

A second set of questions relates to how such a crime would potentially affect the Court at this point in its development. Mindful of the challenges the ICC now faces in securing justice for those who committed crimes against humanity, genocide, and war crimes, we are concerned—as many of you are—about the new burdens this would place on the Court. How would the still-maturing Court be affected if its Prosecutor were mandated to investigate and prosecute this crime, which by its very nature, even if perfectly defined, would inevitably be seen as political-- both by those who are charged, as well as by those who believe aggressors have been wrongly left uncharged? To what extent would the availability of such a charge place burdens upon the Prosecutor in every case, both those in which he chooses to charge aggression and those in which he does not?

Third, would adopting the crime of aggression at this time advance or hinder the key goals of the stocktaking exercise: complementarity, cooperation and universality? As my colleague Ambassador Rapp has said, the United States appreciates the important work that has been undertaken by the focal points who are preparing the stocktaking exercise at Kampala. But with respect to complementarity, do we want national courts to pass judgment on public acts of foreign states that are elements of the crime of aggression? Would adding at this time a crime that would run against heads of state and senior leaders enhance or obstruct the prospects for state cooperation with the Court? And will the States Parties enhance the prospects for universality of the Court by moving to adopt this politicized crime at a time when there is genuine disagreement on such issues?

This raises the fourth and most important set of questions: Has a genuine consensus yet emerged to finalize a definition of the crime of aggression, or do we need further work and discussion? And what outcome in Kampala will truly strengthen the Court at this critical moment in its history?

Mr. Chairman, this decision would bring about an organic change in the Court's work. Because this is such a momentous decision for this institution, we should leave no stone unturned in search of genuine consensus. My delegation looks forward to discussing these important issues with as many of you as possible over these next few days here in New York, and in the remaining period between now and the Kampala Review Conference.

Thank you, Mr. Chairman.