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Exercise of Jurisdiction and Entry Into Force of the Amendments on the Crime of Aggression

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Summary:

Entry into force

Entry into force and conditions for the *exercise of jurisdiction* must be distinguished. The entry into force of the amendments is clearly governed by article 121(5), first sentence. The amendments thus enter into force for each ratifying State Party individually, one year after ratification.

Exercise of jurisdiction

Entry into force of the amendments for a particular State Party is however not sufficient for the Court to exercise jurisdiction. The amendments stipulate additional general conditions for the exercise of jurisdiction, which can be summarized as "activation", as well as conditions regarding the legal status of the States involved. They furthermore contain procedural conditions addressing the role of the Security Council.

Activation

Activation requires two steps: (1) The amendments must have been ratified by at least 30 States Parties, preferably by the end of 2015; (2) the Assembly of States Parties must take a one-time decision to allow the Court to begin exercising its jurisdiction. This decision may only be taken after 1 January 2017.

Once the jurisdiction is activated, the Court may exercise jurisdiction over the crime of aggression, but it may have to observe further requirements, depending on the trigger:

Security Council referrals

In case of a future referral of a situation by the Security Council, the Court can investigate all four core crimes, including the crime of aggression, on an equal footing and without any further specific conditions for the crime of aggression. No consent is required by the States involved. The jurisdiction therefore includes acts of aggression involving non-States Parties to the Rome Statute as well as States Parties that have not ratified the amendments.

State referrals and proprio motu investigations

In case of future State referrals or *proprio motu* investigations, particular conditions and procedures regarding the crime of aggression need to be observed:

Non-States Parties – excluded

Acts of aggression that involve non-States Parties to the Rome Statute – whether as victim or aggressor – are categorically excluded from the Court's jurisdiction.

States Parties – opt-out regime

Acts of aggression involving only States Parties are within the Court's jurisdiction provided the following conditions are met:

- The amendments must have entered into force for at least one of the States Parties involved, be it a victim or an aggressor, as the Court would otherwise not be able to apply the amendments.
- The aggressor State Party must not have made use of the possibility to opt-out of the Court's jurisdiction. Such an opt-out declaration must precede the presumed act of aggression itself.

The two above-mentioned conditions allow the Court to exercise jurisdiction in a scenario where only the victim State Party has ratified the amendments, but not the aggressor State Party, provided the latter has not opted out.

The jurisdictional regime for State referrals and *proprio motu* investigations thus establishes a true opt-out system. This approach adopted in Kampala is based on article 12(1), according to which States Parties have already accepted the Court's jurisdiction over the crime of aggression, as well as on article 5(2), which gives States Parties broad powers to define the conditions for the exercise of jurisdiction over the crime of aggression. It remains a consent-based regime, as any (aggressor) State Party may opt-out of the Court's jurisdiction.

The view has also been advanced that article 121(5), second sentence, would apply to the crime of aggression and thus preclude the Court's jurisdiction whenever an act of aggression involves a State Party that has not ratified the amendments on the crime of aggression. This view is however in conflict with a contextual interpretation of the relevant provisions of the Rome Statute itself, nor is it confirmed by relevant provisions of resolution RC/Res.6. It is also not supported by the negotiation history.

The significance of the difference over the relevance of article 121(5), second sentence, should however not be overestimated. The scope of this difference in interpretation is reduced with each ratification, as it only relates to the status of non-ratifying States Parties. Furthermore, any State Party that does not accept the Court's jurisdiction over the crime of aggression in the absence of its ratification could simply inform the Registrar accordingly. Such a communication would indeed prevent the Court from exercising jurisdiction, as there is no requirement under article 15bis (4) to label the opt-out declaration as such.

Role of the Security Council

In case of State referrals and *proprio motu* investigations, the Prosecutor must inform the Security Council and wait up to six months for a determination by the Security Council that indeed an act of aggression has been committed. If no such determination is made, the investigation can nevertheless proceed if authorized by the entire Pre-Trial Division. The Court thus remains entirely independent in its substantive judicial determinations. At the same time, the Security Council retains the procedural possibility to suspend the investigation in accordance with article 16.

I. Introduction

The Kampala compromise on the crime of aggression has frequently been called a historic achievement, and rightly so. The adoption of resolution RC/Res.6, despite its flaws and shortcomings, such as the limited scope of the Court's jurisdiction over the crime of aggression, has filled a deep gap in international law. In 1945, the United Nations Charter unequivocally outlawed the illegal use of force between States. Article 2(4) of the Charter, which contains this prohibition, is arguably the single most important rule of international law. Almost simultaneously, the Nuremberg and Tokyo trials lifted this rule to the level of individual criminal responsibility at the international level, prosecuting and sentencing German and Japanese leaders for crimes against peace. But ever since then, for 65 years, the criminalization of the crime of aggression at the international level remained dormant. The crime of aggression certainly was a crime under customary international law during that time, but for most of this period it lacked an international court that could adjudicate it at the international level. And once the Rome Statute of the International Criminal Court arrived in 1998, it still prevented the Court from exercising its jurisdiction over this crime for lack of agreement over the definition and further conditions for the exercise of jurisdiction. In June 2010, this agreement was finally found. Once States Parties take the decision to fully operationalize this agreement in 2017 or thereafter, individual criminal responsibility for the worst forms of the illegal use of force between States will no longer be dormant at the international level. The ICC will be able to investigate and prosecute what has been labeled the "supreme crime". This is without a doubt a major step forward in the progressive codification of international law, and this greater context should be kept in mind when subjecting the Kampala compromise to critical legal analysis.

With this disclaimer I would like to proceed to the actual topic of this presentation, the exercise of jurisdiction and entry into force of the mechanism. While somewhat technical, this topic is in fact quite interesting for several reasons. Firstly, the conditions for the exercise of jurisdiction remained contentious until the very end of the Review Conference, in contrast to the definition, which had already been agreed to in the context of the Special Working Group on the Crime of Aggression in February 2009. Secondly, the solution found on this topic is somewhat complicated, which of course reflects the difficult compromises that had to be made. Not surprisingly, this complex regime also includes aspects that have been interpreted differently by different people after Kampala. And thirdly, the topic is interesting because it includes two issues – exercise of jurisdiction on the one hand, and entry into force of the amendments on the other – that are sometimes mixed up, even though they are two very different things.

II. Entry into force

So let me start with the easier topic, the entry into force of the amendments. In the process leading up to the Review Conference, and at the Conference itself, there was broad disagreement over how the future amendments on the crime of aggression would enter into force. Delegations advanced three different approaches:

According to one approach, mainly advanced by those who favored a protective regime similar to the one existing for the other three core crimes, article 121(4) of the Rome Statute would govern the entry into force. Accordingly, once seven eighths of States Parties would ratify the amendments, they would enter into force for all States Parties. Article 121(4) also provided a good basis to include jurisdiction over acts of aggression committed by Non-States Parties, provided there was a link to a State Party (more on the nature of this link later).

According to a second approach, mainly advanced by those who favored a regime that would require and respect the consent of the States involved, article 121(5) would govern the entry into force. Accordingly, the amendments would enter into force for each ratifying State Party individually. Article 121(5) furthermore provided a good basis to argue that non-ratifying States Parties would be excluded from the Court's jurisdiction, and that non-States Parties should equally be excluded.

A third approach, again with protective effect, was to amend the Statute on the basis of article 5(2), which would imply that no ratification process was required at all, but that the Court could exercise jurisdiction over this crime once the relevant provisions were "adopted" by the Review Conference.

There is no need at this point to go into the details of these three approaches for entry into force, since Resolution RC/Res.6, by which the amendments were adopted by consensus, provides a clear answer. According to OP1, the Review Conference

"*Decides* to adopt, … the amendments to the Statute contained in annex I of the present resolution, **which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5**; …"

States Parties have thus very explicitly stated their agreement that article 121(5) governs the entry into force of the amendments. The first sentence of article 121(5) addresses the issue of entry into force in the following words (the second sentence does not deal with entry into force, but with the exercise of jurisdiction on the basis of amendments that entered into force under article 121(5); more on this further below):

"Any amendment to articles 5, 6, 7 and 8 of this Statute **shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance**."

This means that the amendments on the crime of aggression enter into force for each ratifying State Party individually, one year after the deposit of the treaty instrument. Liechtenstein for example deposited its instrument of ratification – as the first State Party – on 8 May 2012. Therefore the amendments on the crime of aggression will enter into force for Liechtenstein on 8 May 2013, as can be seen from the Depositary Notification issued by the Secretary-General as depositary of the Rome Statute.

The manner in which the amendments enter into force is thus quite straightforward. What sometimes causes confusion though is the fact that entry into force of the amendments alone has almost no tangible effect.

For example, articles 15 bis and 15 ter will enter into force for Liechtenstein in May 2013. This means that as of that time, Liechtenstein – and the Court – will be "bound" by these provisions and can actually apply them. But applying these provisions means applying paragraphs 2 and 3 of these articles, which contain a number of additional conditions for the Court's exercise of jurisdiction. Together, they put the Court's exercise of jurisdiction even further into the future, namely at least to the year 2017.

In sum, the amendments on the crime of aggression enter into force for each ratifying State Party individually one year after the deposit of the instrument of ratification. In this regard, the amendments on the crime of aggression do not differ from the other amendments adopted in Kampala, namely the amendments to article 8 of the Statute (war crimes). Once entered into force, however, the amendments on the crime of aggression stipulate a number of additional conditions for the exercise of jurisdiction. I would now like to turn to these.

III. Exercise of jurisdiction

The amendments add new articles 15 bis and 15 ter to the Rome Statute, both of which include in their titles the phrase "exercise of jurisdiction over the crime of aggression". In the following, I will go through these paragraph by paragraph. At the same time, articles 15 bis and 15 ter must not be looked at in isolation, but in their whole context. That context is in particular the Rome Statute itself – meaning the 2010 version of the Rome Statute, including the Kampala amendments – but also the resolution by which the amendments were adopted, and also the understandings contained in the resolution. Furthermore, the negotiation history can also be useful in the process of interpretation.

a) Exercise of jurisdiction based on Security Council referrals

Articles 15 bis and 15 ter establish different jurisdictional regimes for State referrals and *proprio motu* investigations on the one hand, and Security Council referrals on the other. Article 15 ter is the less complex of the two provisions, and its first paragraph reads:

> *1. The Court may exercise jurisdiction over the crime of aggression* ***in accordance with article 13, paragraph (b)****, subject to the provisions of this article.*

This paragraph provides the link to the jurisdictional system of the Rome Statute. It states that the Court may in the future investigate the crime of aggression when a situation is referred by the Security Council, but that a few additional conditions apply. This provision simply refers to the mechanism of article 13(b), and therefore does not require that the Security Council specifically refer to a crime or act of aggression in the referral decision. All that is needed is for the Security Council to refer a "situation" to the Court. The Court can then on its own investigate all four core crimes, including the crime of aggression, provided the jurisdiction has been "activated" in accordance with paragraphs 2 and 3.

Activation part 1: entry into force for 30 States Parties

The next two paragraphs deal with what can be called the "activation" of the Court's jurisdiction. These requirements are the same under articles 15 bis and 15 ter, so it is sufficient to discuss them only once.

They were among the last elements found for the compromise, and their main effect is to give the ICC "breathing room". They do not simply delay the Court's exercise of jurisdiction to the year 2017, but require a certain level of political will from States Parties without which the exercise of jurisdiction of the Court could be delayed even further. Paragraph 2 reads:

> *2. The Court **may exercise jurisdiction** only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.*

This paragraph states that the Court "may exercise jurisdiction" one year after 30 ratifications have been reached. It does <u>not</u> state that the amendments "enter into force" after 30 ratifications. To the contrary, as has been shown before, the amendments enter into force for each ratifying State Party individually, and will thus enter into force already in 2013 (for Liechtenstein as the first ratifying State Party). But only once the amendments have entered into force for 30 States Parties the condition contained in paragraph 2 will be fulfilled. In essence, paragraph 2 requires States Parties to show enough commitment and political will to muster 30 ratifications before the Court may exercise jurisdiction.

Activation part 2: future decision by States Parties

Paragraph 3 reads:

> *3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.*

This paragraph contains the so-called activation clause, which was the very last piece of text inserted into the draft amendments in Kampala. This paragraph describes another condition – in addition to 30 ratifications – for the Court to exercise jurisdiction. Again, this has nothing to do with the entry into force of the amendments, which refers to the point in time at which a party to a treaty is bound by its provisions. Instead, paragraph 3 contains a rather peculiar procedure by which States Parties essentially postponed the political decision to activate the Court's jurisdiction in the future, while having agreed already on the legal system that will govern that jurisdiction in the future. The activation clause reflects the fact that some delegations in Kampala were reluctant to operationalize the Court's jurisdiction right away. States Parties will thus have to wait at least until 2017, and then they will have to muster the political will to flick the switch. The majority requirement contained in paragraph 3 – namely two thirds of States Parties (i.e. at least 81 votes at the current level of 121 States Parties, or consensus) – was the result of almost an entire day of haggling. But it actually also has a very good justification: given that at least a two-thirds majority is required to adopt an amendment, it is arguably appropriate to require the same level of political support for a decision to "activate" the amendments.

Activation "as early as possible"

As part of the final compromise, a preambular paragraph was added to Resolution RC/Res.6 that states that the Review Conference is:

> *"Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible"*

Now looking at paragraphs 2 and 3 of articles 15 bis and 15 ter, what is required for the Court's jurisdiction to be activated "as early as possible"? Firstly, States Parties need to get together soon after 1 January 2017 and take an activation decision, preferably by consensus but at least with the support of

two-thirds of States Parties. And secondly, the amendments will have to have entered into force for at least 30 States Parties. But because article 121(5) provides for a one-year period between ratification and entry into force, we would need 30 ratifications not by 1 January 2017, but 30 ratifications by 1 January 2016. And since the UN Office of Legal Affairs is not open on New Year's Day, we would actually need the 30th ratification by the end of 2015.

Relationship to outside organs

The next two paragraphs do not contain conditions for the exercise of jurisdiction. Paragraph 4 actually contains the opposite of a condition for the exercise of jurisdiction, because it states what is not such a condition:

> *4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.*

Paragraph 4 contains a procedural safeguard to ensure due process for the accused, essentially confirming what would otherwise already follow from the Rome Statute, and does not need to be further dealt with here.

Paragraph 5 only clarifies that the specific provisions on the crime of aggression do not in any way impact on investigations regarding the other core crimes:

> *5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.*

This implies in particular that the six-months waiting period contained in article 15 bis (8) – during which the Prosecutor must wait for a potential Security Council decision determining that an act of aggression has been committed – will not affect investigations into other crimes that may have been committed in the same situation.

Conclusion regarding Security Council referrals

Looking back at article 15 ter, one realizes that when it comes to Security Council referrals, the crime of aggression is treated in almost exactly the same way as the other three core crimes. The only real difference is the activation. But once the amendments have entered into force for 30 States Parties, and once the activation decision is taken, there is no difference at all. In other words, once article 15 ter is fully activated, the ICC can receive situations from the Security Council and investigate all four core crimes without having to deal with aggression in any special manner. This is so whether or not the State committing the act of aggression is a party to the Rome Statute or, if it is a party to the Statute, whether or not the amendments are in force for that State.

b) Exercise of jurisdiction based on State referrals and *proprio motu* investigations

Things are not so simple when it comes to State referrals and *proprio motu* investigations. The conditions for these two types of triggers are contained in article 15 bis.

There is no need to address the first three paragraphs of 15 bis, which are analogous to the first three paragraphs of article 15 ter. Paragraph 1 is again not much more than a chapeau, and paragraphs 2 and

3 contain the same general provisions on the activation of the Court's jurisdiction. Theoretically, given that 15 bis and 15 ter are separate articles, one could imagine that only one of the two articles gets "activated", either Security Council referrals, or State referrals and *proprio motu* investigations. Politically, however, that seems extremely unlikely.

Let's thus assume that at some point in the future the amendments will have entered into force for at least 30 States Parties, and that States Parties will have taken the activation decision. There are a number of additional conditions under which the Court could exercise jurisdiction based on a State referral or *proprio motu*. One the one hand, there are substantive conditions relating to the States of nationality and territoriality involved. On the other hand, there are procedural conditions relating to the interplay between the Court and the Security Council.

Conditions relating to the States involved in the act of aggression

The relevant provisions in this regard are paragraphs 4 and 5:

> *4. The Court may,* ***in accordance with article 12****, exercise jurisdiction over a crime of aggression, arising from an* ***act of aggression committed by a State Party****, unless that State Party has previously* ***declared that it does not accept such jurisdiction*** *by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.*
>
> *5. In respect of a State that is* ***not a party to this Statute****, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.*

These two paragraphs establish a jurisdictional regime that is linked to and builds on the existing article 12 of the Rome Statute – meaning that a nationality or territoriality link is required. Article 12 reads:

> *1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*
>
> *2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction* ***if one or more of the following States are Parties to this Statute*** *or have accepted the jurisdiction of the Court in accordance with paragraph 3:*
>
> > *(a) The State on the* ***territory*** *of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*
> >
> > *(b) The State of which the person accused of the crime is a* ***national****.*
>
> *3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.*

The interplay between article 15 bis and article 12 is decisive when determining whether the Court would have jurisdiction in a particular situation, with very different results for non-States Parties on the one hand and States Parties on the other.

Exercise of jurisdiction with respect to non-States Parties

Let's start with non-States Parties. Under the existing jurisdictional regime of article 12, there are two ways in which the Court can exercise jurisdiction with respect to non-States Parties over the other three core crimes. All that is needed is a link to a State Party. If a national of a State Party commits a war crime on the territory of a non-State Party, the Court has jurisdiction. If a national of a non-State Party commits a war crime on the territory of a State Party, the Court has jurisdiction. Again, the link to one single State Party is enough to establish jurisdiction, either by way of nationality or by way of territory.

With respect to the crime of aggression, the opposite is true. The link to one single non-State Party is enough to prevent the Court's jurisdiction. Article 15 bis (5) is very unambiguous in that regard, and as the aggression-specific rule on the issue contradicts and overrules the more general provisions of article 12(2). Acts of aggression involving the nationals or the territory of Non-States Parties are excluded from the Court's jurisdiction over the crime of aggression. It does not matter whether the non-State Party was the aggressor, or whether it was the victim.

Ad-hoc declaration under article 12(3)

What about a non-State Party declaring its ad-hoc acceptance of the Court's jurisdiction over the crime of aggression? In my view, this is not possible. Most importantly, article 15 bis (5) categorically excludes non-States Parties. In addition, article 15 bis (4) only extends the Court's jurisdiction over an "act of aggression committed by a State Party". The exclusion of the ad-hoc declaration under 12(3) is also confirmed by the drafting history of the understandings. At the early stages of the Review Conference, the understandings included an explicit reference to a possible ad-hoc acceptance of jurisdiction, but it was later deleted. In fact, it was deleted on purpose, as some delegations were concerned that such a declaration would be unfair toward State Parties, who could not on their own initiative trigger the Court's jurisdiction against non-State Parties. One only needs to think of a scenario where a State Party finds itself in an armed conflict with a non-State Party: the State Party would not be able to trigger the Court's jurisdiction through a State referral precisely because a non-State Party is involved, but the non-State Party would be able to do so and might find it at some point politically expedient to make use of this possibility – for example at a stage where it may appear to be losing the war.

Preliminary conclusion regarding the exercise of jurisdiction with respect to States Parties

At this stage, one can already conclude that accountability for the crime of aggression, as well as protection against the crime of aggression, is limited to the circle of States Parties (except in the case of Security Council referrals). That is on the one hand a serious limitation and shortcoming, which has its roots in the political compromise that was necessary in Kampala, but it is on the other hand also a potential argument to motivate non-States Parties to join the Rome Statute. In a way, the Kampala compromise resembles a non-aggression pact among States Parties that could in the future be enforced through individual criminal justice.

Next, under what conditions can the Court exercise jurisdiction when States Parties are involved in a crime of aggression? There are several possible scenarios, and I suggest we look at some of them individually.

Scenario 1: Aggression among States Parties that have not ratified the amendments

What if a crime of aggression involves two States Parties, and none of them have ratified the amendments on the crime of aggression? In such a scenario, the Court would not have jurisdiction. The amendments are after all "subject to ratification or acceptance" (Resolution RC/Res.6, OP 1) and only enter into force for those States Parties that have ratified them, one by one. The Court can only apply the amendments with respect to States Parties that are bound by the amendments by way of entry into force (at least in the realm of State referrals and *proprio motu* investigations). And which are the States Parties that must have ratified the amendments for the Court to be able to apply the amendments? The answer follows from the logic of article 12 of the Rome Statute (to which article 15 bis (4) refers): The amendments must have entered into force either for the State of nationality or the territorial State. If none of these States Parties have ratified the amendments, then the Court simply does not get to apply the amendments at all. In this case, the Court only gets to apply the 1998 version of the Statute, which did not yet allow for the exercise of jurisdiction over the crime of aggression.

Scenario 2: Aggression among States Parties that have ratified the amendments

A crime of aggression could involve an aggressor and a victim State that have both ratified the amendments. In this case, there is clearly jurisdiction, except if the aggressor has previously, meaning prior to the act of aggression, opted out of the Court's jurisdiction. Again, the possibility for States Parties to opt out of jurisdiction constitutes a significant departure from the Rome Statute's existing jurisdictional regime.

Scenario 3: Aggression by a State Party that has not ratified against a State Party that has done so

Imagine a situation where the victim State Party has ratified the amendments, but the aggressor State Party has not, and the aggressor State Party has also not deposited an opt-out declaration with the ICC Registrar. Does the Court have jurisdiction? As some of you may know, different interpretations of such a scenario have emerged after the Review Conference, including among States Parties. The underlying issues are complex and will be considered in greater detail in a separate chapter below. Suffice it to say at this stage that this author firmly believes that the amendments allow the Court to exercise jurisdiction in such a scenario.

Scenario 4: Aggression by a State Party that has ratified against a State Party that has not done so

The legal questions arising from scenario 4 are quite similar to those arising from scenario 3, and lead essentially to the same result: ratification by one of the two States Parties involved – in this case ratification by the aggressor State Party – is sufficient to establish a basis for the Court's exercise of jurisdiction. For further details please refer to the separate chapter on this issue below.

The role of the Security Council in case of State referrals and proprio motu investigations

Paragraphs 6, 7 and 8 of article 15 bis read as follows:

> *6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.*
>
> *7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.*
>
> *8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.*

These provisions acknowledge a special role for the Security Council in dealing with acts of aggression. Paragraphs 6 and 7 outline the best-case scenario, in which the Court and the Prosecutor act in tandem. Accordingly, a determination by the Security Council that an act of aggression has been committed is a sufficient condition for the ICC to proceed. Paragraph 8 however also provides for a way forward in case no such determination is made by the Council, irrespective of the reasons for such inaction. In such a case, following six months, the Prosecutor has to go through an additional judicial filter, which was obviously meant to serve as an additional check on the Prosecutor to exclude any perception of a politically motivated investigation. The concept behind this judicial filter is in fact the same as the one behind the existing article 15 of the Rome Statute, which describes the Pre-Trial Chamber's special function in authorizing *proprio motu* investigations. With respect to the crime of aggression, this filter is strengthened even further, because the authorization decision has to be made not just by the three judges of a Pre-Trial Chamber, but by the entire Pre-Trial Division. Overall, and bearing in mind a possible procedural delay of up to six months, these provisions ensure that the Court enjoys the same degree of independence from the Security Council in investigating the crime of aggression as is the case for the other three core crimes.

IV. Special Chapter: Jurisdiction over (aggressor) State Parties that have not ratified the amendments? "Opt-out" versus "Opt-in-then-opt-out"

a) Negotiation history: The logic of a true opt-out system

As mentioned above, the question has arisen whether the Court may exercise jurisdiction under article 15 bis in scenario 3, when only the victim State Party has ratified the amendments, but not the aggressor State Party (or vice versa, as in scenario 4). Before addressing these different interpretations, let me briefly outline the negotiation history in this regard. During the years leading up to the Review Conference, delegations were sharply divided over the question whether some sort of consent by the accused aggressor State would be required for jurisdiction.

Roughly half of the delegations – I will call them "Camp Protection" – wanted a jurisdictional regime that was mainly protective in nature, and with effect beyond just States Parties. They essentially wanted the same degree of protection that the Rome Statute provides already today with regard to the other three core crimes.

The other half of the room, I will call them "Camp Consent", wanted a consent-based regime. For most of them, this meant that States that were not party to the Rome Statute should be excluded altogether, and that nationals of States Parties should only be held accountable if that State had ratified the amendments.

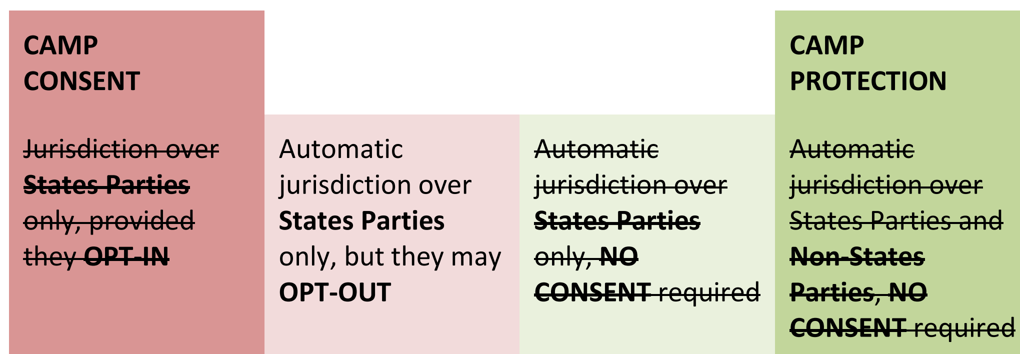
So on one side of the room, the wish was for a **protective system** as was already established by the Rome Statute, and on the other side the wish was for a true **opt-in system**, to safeguard the consent of the States concerned.

CAMP CONSENT			**CAMP PROTECTION**
Jurisdiction over **States Parties** only, provided they **OPT-IN**	Automatic jurisdiction over **States Parties** only, but they may **OPT-OUT**	Automatic jurisdiction over **States Parties** only, **NO CONSENT** required	Automatic jurisdiction over States Parties and **Non-States Parties**, **NO CONSENT** required

A central factor in the haggling over this question at the Review Conference were initiatives by several delegations. On the one hand, the delegations of Argentina, Brazil and Switzerland were advancing proposals for a protective system, and on the other hand Canada was advancing innovative formulas for a consent-based opt-in system. When these delegations came together two days before the end of the Review Conference, they found a compromise among themselves that formed the basis for the subsequent texts issued by the President. The compromise they found was obviously one that was somewhere in between the two positions. It had two main elements:

First, Camp "Protection" – represented here by Argentina, Brazil and Switzerland – accepted that jurisdiction with respect to non-States Parties was excluded altogether. It thus made a big leap toward Camp "Consent", and away from its main interest of a protective system.

Then, the remaining question was how to deal with the question of consent by States Parties. Here, Camp "Consent" – represented here by Canada – took a few steps toward Camp "Protection". It accepted that States Parties do not have to opt into the system to be subject to the Court's jurisdiction. Instead, any aggressor States Parties would have the possibility to opt-out of the system – provided of course the opt-out takes place before the act of aggression. Obviously, such an opt-out system would provide greater protection, as any aggressor State Party would by default be subject to the Court's jurisdiction. Nevertheless, the system would remain entirely consent-based, as it would be extremely easy for any State Party to opt-out of it, by a simple letter to the Registrar.



What I have just outlined is indeed the logic behind article 15 bis, paragraph 4. Any aggressor State Party is, by default, subject to the Court's jurisdiction. It does not have to opt into the system, because under article 12(1), it already accepted the Court's jurisdiction over the crime of aggression. But any State Party is easily off the hook by opting out.

The President of the Review Conference, Amb. Wenaweser, explained this approach in the following words when he made the compromise between Canada and Argentina/Brazil/Switzerland his own and introduced his text that included for the first time the opt-out element:

"Under this approach, this would not constitute an "opt out" of the amendment, much rather it would be a declaration that would affect a State Party's acceptance already given under article 12(1). So this approach is very strongly based on article 12 of the Rome Statute and the very specific manner in which the crime of aggression is already reflected in the Rome Statute."

The last sentence also confirms that this particular approach is only possible for the crime of aggression, which indeed had a very peculiar position in the Rome Statute prior to Kampala – a position that some have described as "half in, half out".

b) The role of article 121(5), second sentence

As I mentioned before, not everybody shares this interpretation of article 15bis, paragraph 4. There is also the view that essentially holds that the Court may not exercise jurisdiction over the crime of aggression with respect to States Parties that have not ratified the amendments on the crime of aggression. The main argument advanced in this respect is the fact that the amendments enter into force in accordance with article 121, paragraph 5. That provision not only stipulates that such amendments enter into force for each ratifying State Party individually one year after ratification. The second sentence of article 121, paragraph 5 also adds a limitation to the Court's exercise of jurisdiction for crimes covered by such amendments. It states:

> *5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance.* ***In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.***

It is argued that the terms of article 121(5), second sentence, are plain and clear and that this sentence applies to the crime of aggression, thus preventing the Court from exercising jurisdiction with respect to an act of aggression committed by a State Party that has not ratified the amendments. If the argument held up, then it would pull the rug from underneath the concept of an opt-out system; instead, it would be an "opt-in-then-opt-out" system.

In the following, I will look at this question in two stages. The first stage is to ask whether the Rome Statute did <u>allow</u> States Parties at the Review Conference to establish a true opt-out system. The second is to ask whether States Parties actually <u>did</u> establish such an opt-out system.

c) Does the 1998 Rome Statute allow for an opt-out regime regarding the crime of aggression?

Now indeed the wording of 121(5) second sentence is plain and clear in requiring an opt-in regime for amendments regarding the definition of crimes. One must however question whether this sentence, which is of a general nature and does not mention the crime of aggression explicitly, is in fact applicable to the crime of aggression. This question arises because other provisions of the Rome Statute, which are also plain and clear in their wording and which explicitly relate to the crime of aggression, contradict article 121(5), second sentence. As a matter of logic, but also as a matter of treaty law, individual provisions of the Rome Statute cannot simply be interpreted in isolation. Article 31(1) of the Vienna Convention on the Law of Treaties provides that "A treaty shall be interpreted in good faith in accordance with the <u>ordinary meaning</u> to be given to the terms of the treaty in their <u>context</u> and in the light of its <u>object and purpose</u>." Consequently, article 121(5), second sentence, must be interpreted in the context of these other relevant provisions.

Reading article 121(5), second sentence, in the context of articles 12(1) and 5(2)

Most important in this respect is article 12, paragraph 1 of the Rome Statute, which reads:

> *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*

This paragraph essentially says that States Parties have already accepted the Court's jurisdiction over the crime of aggression. Obviously, this directly contradicts article 121(5), second sentence, which seems to say the opposite. At the same time, the two provisions are quite different in scope. Article 121(5), second sentence, is a general provision that applies to a broad range of amendments. It applies for example to entirely new categories of crimes that may be added in the future, such as drug crimes, or terrorist crimes. It also clearly applies to amendments to the definitions of crimes already contained in the Rome Statute, such as the amendments to the definition of war crimes that were also adopted in Kampala.

The tension can be resolved if article 12(1) is seen as the *lex specialis* that prevails over the more general rule of article 121(5), second sentence, but only as far as amendments dealing with the crime of aggression are concerned. In other words, the amendments on the crime of aggression acknowledge that article 12(1) of the Rome Statute is not meaningless when it comes to the crime of aggression, but that it carries weight. That was also the rationale why resolution RC/Res.6 begins its preamble by recalling article 12(1) of the Rome Statute, and thus recalling that States Parties have – by joining the Rome Statute – accepted the Court's jurisdiction over the crime of aggression. At the same time, the amendments acknowledge implicitly that some States Parties may not be satisfied with this result, and allow them to opt-out of this system by a simple declaration.

The second relevant provision is article 5(2), which contains even more specific language regarding the manner in which the Court shall in the future exercise jurisdiction over the crime of aggression. It reads:

> *The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.*

This provision contains the procedural and substantive parameters for the adoption of the "provision" on the crime of aggression. Strikingly, the wording of article 5(2) indicates that the provision only needs to follow articles 121 and 123 as far as its "adoption" is concerned, but does not explicitly mention other aspects dealt with by articles 121 and 123, such as entry into force of amendments or the limitation to the Court's jurisdiction under article 121(5), second sentence. Notably, article 5(2) does not state that the conditions for the exercise of jurisdiction over the crime of aggression shall include the limits of article 121(5), second sentence. Instead, it leaves it up to the provision to be adopted by States Parties to set out the conditions for the exercise of jurisdiction, and in doing so confers broad powers upon States Parties to find an aggression-specific solution for this issue. The only substantive limitation foreseen by article 5(2) is that the provision "shall be consistent with the relevant provisions of the Charter of the United Nations".

A brief excursion: article 121(5), second sentence, in the context of Security Council referrals

It is also worth noting that in a different context, States Parties had no difficulty interpreting article 121(5), second sentence, in the context of other provisions rather than in isolation. Namely, States Parties confirmed explicitly that article 121(5), second sentence, does not apply to crimes of aggression in case of Security Council referrals. This statement is contained in Understanding 2, which confirms that in case of Security Council referrals, jurisdiction can be exercised "irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard". This understanding – which was first introduced in 2009 and was never controversial – was considered useful precisely because article

121(5), second sentence could possibly be understood to require such consent, based on the ordinary meaning of that sentence, and when read in isolation rather than in context. Understanding 2 shows that States Parties did not look at article 121(5), second sentence, in isolation when it comes to Security Council referrals. There is no reason to assume that States Parties were not capable of a contextual interpretation of this same sentence in relation to State referrals and *proprio motu* investigations.

In sum, the aggression-specific provisions of article 12(1) and 5(2) contain exceptions to the more general rule of article 121(5), second sentence. Together, they support the premise that States Parties to the Rome Statute have already accepted the Court's jurisdiction over the crime of aggression, and that States Parties had the power to design the conditions for the exercise of jurisdiction in such a way that the provisions on the crime of aggression could be included in the Statute on an equal footing with the other three core crimes. Consequently, States Parties also had the power to establish a more restrictive regime, which is what they did by excluding crimes of aggression committed by nationals of Non-States Parties and by allowing States Parties to opt-out of the regime.

d) Did the 2010 Kampala amendments indeed establish a true opt-out regime?

Several parts of Resolution RC/Res.6 support the interpretation that article 15 bis (4) establishes a true opt-out system for States Parties that may have committed an act of aggression.

The ordinary meaning of the terms of article 15 bis (4)

Relevant is first and foremost the wording of article 15 bis (4) itself, which states that the Court may "*… exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, …"*. This provision is plain and clear: it refers to an aggressor State Party that has not opted out. It does not use the phrase "arising from an act of aggression committed by a State Party <u>that has ratified the amendments on the crime of aggression</u>".

The context of resolution RC/Res.6

The ordinary meaning of article 15 bis (4) is confirmed by OP1 of resolution RC/Res.6, which provides relevant context:

> 1. *Decides* to adopt, **in accordance with article 5, paragraph 2**, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; **and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance**;

This last sentence basically states that any State Party that has not ratified or accepted the amendments on the crime of aggression can submit an opt-out declaration. It thus confirms that an opt-out declaration prior to (and thus irrespective of) ratification is indeed a relevant scenario. If the opposite were true, namely that article 15 bis (4) established an opt-in system for ratifying States Parties only, what would be the point of mentioning that a State Party can already opt out at a moment in time when it has not even opted in yet?

Further relevant context can be found in the first preambular paragraph of resolution RC/Res.6, which recalls article 12(1) of the Statute, thus recalling that States Parties to the Rome Statute have already accepted the Court's jurisdiction over the crime of aggression. Similarly, the phrase "in accordance with article 5, paragraph 2, of the Rome Statute" in OP 1 underlines that States Parties did indeed want to avail themselves of the powers given to them by article 5(2) to decide on the conditions for the exercise of jurisdiction over the crime of aggression.

One possible counter-argument could maybe be found in the phrase in OP 1 that states that the amendments "shall enter into force in accordance with article 121, paragraph 5", from which one might infer that States Parties also meant to apply the second sentence of article 121(5). Such an inference would however be problematic because OP 1 only states that the amendments "enter into force" in accordance with article 121(5). The second sentence of article 121(5), however, does not address how the amendments enter into force, but deals with conditions for the exercise of jurisdiction. Consequently, this second sentence is not included in the reference contained in OP 1. It is also worth noting that resolution RC/Res.6 contains no explicit reference to article 121(5), second sentence, whatsoever; whereas resolution RC/Res.5, adopted only a few hours earlier containing an amendment to article 8 (war crimes), explicitly referred to the application of that sentence by way of a preambular paragraph.

In sum, the ordinary meaning of the terms of article 15 bis (4), as well as the context provided by several provisions of the enabling resolution RC/Res.6, leads to the conclusion that the amendments establish a true opt-out regime that would allow the Court to exercise jurisdiction over an aggressor State Party even if it had not ratified the amendments.

e) Another look at the negotiation history: the illogic of an opt-in/opt-out system

The opposite view, namely that article 121(5), second sentence, does apply to the crime of aggression, and that the amendments establish an opt-in system, from which States Parties can then opt out, defies the logic of the negotiations. It would mean that Camp Protection first came all the way over to Camp Consent, and then went even beyond! During the Review Conference and before, the advocates of a consent-based system simply wanted a strict opt-in system. Not even they argued for a system that first requires an opt-in, but then also allows a future aggressor State to easily opt-out of its past commitment. Obviously such a system would provide even less protection than a simple opt-in system.

	CAMP CONSENT			**CAMP PROTECTION**
Jurisdiction over States Parties only, provided they OPT-IN, but they may then also OPT-OUT	~~Jurisdiction over States Parties only, provided they OPT-IN~~	~~Automatic jurisdiction over States Parties only, but they may OPT-OUT~~	~~Automatic jurisdiction over States Parties only, NO CONSENT required~~	~~Automatic jurisdiction over States Parties and Non-States Parties, NO CONSENT required~~

The logic and indeed the actual course of the negotiations was to find a compromise somewhere between the two extremes, not to add an element that would go even further than one of these two extremes. The challenge was to design a consent-based system that should be as protective as possible. That could only be achieved by a true opt-out system, as described above and as reflected in article 15 bis, paragraph 4.

f) Some perspective and outlook

While I have rather extensively dealt with the meaning of the opt-out system, the significance of the differing interpretations should also not be exaggerated. First of all, it only affects States Parties that have not ratified, and with each ratification, the scope of the dispute becomes less significant. Second, it would ultimately be for the Court to decide whether it has jurisdiction in such a case, as the Court also has to decide difficult issues of interpretations with respect to countless other aspects of the Rome Statute that have given rise to differing interpretations. And finally, there is a very pragmatic solution for those States Parties that do not share the interpretation that the amendments establish an opt-out system. Any State Party that is of that view that article 121(5), second sentence, applies to State referrals and *proprio motu* investigations regarding the crime of aggression, could simply inform the Registrar that for this reason it does not accept the Court's jurisdiction over the crime of aggression until such time that it ratifies the amendments. Obviously, such a declaration would have to be honored in accordance with article 15 bis (4). This provision does not require that the State Party label its communication "opt-out declaration" or the like, nor does it require that the State Party agree with the notion that article 121(5), second sentence, does not apply to the crime of aggression. It simply requires that a State Party declare that it does not accept the Court's jurisdiction over the crime of aggression. And indeed it seems to be the case that those States Parties that are of the view that article 121(5), second sentence, applies to the crime of aggression do not accept the Court's jurisdiction until they ratify the amendments. All that is missing is that this position be communicated to the Registrar.

Finally, I would like to emphasize that this interpretive question should not affect the policy decision of a State Party whether to ratify the amendments or not. The question is in essence about how the Court may in the future interpret this particular feature of the aggression amendments, and one does of course never know for certain how a Court will interpret any provision until it has actually done so – whether that provision causes controversy among States Parties or not. More importantly though, the controversy does not affect the legal position of a State Party that wishes to ratify in a manner that is relevant policy-wise: ultimately, a ratifying State Party has no control over the question whether it will be judicially protected from aggression by another State Party, because any State Party can in any event opt-out of accountability. But only if it ratifies does it increase the chances that such protection will be available.