Seminar of Legal Advisors of Permanent Missions
to the UN of States Parties to the Rome Statute and
International Law Experts on the Crime of Aggression
African Union Permanent Mission to the UN, 13 June 2025

Analysis and Open Discussion on Options Concerning Entry into Force of the Amendments

***Astrid Reisinger Coracini*, University of Salzburg**[1]

(check against delivery)

Excellencies, ladies and gentlemen.

Allow me at the outset to express my appreciation to the Permanent Missions of Sierra Leone and Switzerland as well as to GIPA, the Global Institute for the Crime of Aggression – in particular *Professor Jennifer Trahan* and *Dr David Donat Cattin* - for organizing this timely and most relevant Seminar in preparation of the July Special Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court and for inviting me to join the conversation. It is a true honour and pleasure to be able to address you today.

[[2]On 4 April 2025, a cross-regional group of States, Costa Rica, Germany, Sierra Leone, Slovenia, and Vanuatu transmitted a proposed amendment to the Secretary General of the United Nations – as depository of the Rome Statute (hereinafter 'harmonization amendment'). The proposal was circulated a few days later,[3] exactly three months before the scheduled beginning of the mandatory review of the Kampala amendments at the special session of the Assembly of States Parties on 7 July in New

[1] *Dr Astrid Reisinger Coracini*, Senior Scientist, University of Salzburg; Adjunct Lecturer, University of Vienna (Austria); member of the Austrian delegation to the Kampala Review Conference and to the Assembly of States Parties of the International Criminal Court; views expressed are those of the author and do not necessarily reflect the views of the Austrian government. Contact: astrid.reisingercoracini@plus.ac.at.
[2] The following passage was omitted from the oral presentation, as its content had already been sufficiently covered by previous speakers; it was retained in the written version for the sake of completeness.
[3] United Nations Treaty Database, C.N.162.2025.TREATIES-XVIII.10 (Depositary Notification) CN.1https://treaties.un.org/doc/Publication/CN/2025/CN.162.2025-Frn.pdf62.2025-Eng.pdf, https://treaties.un.org/doc/Publication/CN/2025/CN.162.2025-Frn.pdf.

York. This circulation three months prior to the special session was an imperative procedural precondition, as set out in Article 121 (2) of the Rome Statute, which enables State parties to decide whether to take up the proposal in July.[4]

The proposed amendment is as ambitious as it is modest.

It is ambitious as it aims at the full harmonization of the jurisdictional regime of the crime of aggression with the default jurisdictional regime applying to the other core crimes. At the same time, it is modest, as it targets precisely those provisions which open a gap in the Court's exercise of jurisdiction over the crime of aggression. That is Article 15*bis* paragraphs 4 and 5.

While explicitly based on the Court's default exercise of jurisdiction in accordance with Article 12, Article 15*bis*, which deals with State referrals and *proprio motu* investigations, contains far-reaching exemptions.

Allow me to recall the two most flaring ones.

The first exception is a mandatory one, relating to non-State parties. It excludes a crime of aggression arising from an act of aggression committed by a non-State party (para 4) as well as a crime of aggression committed by nationals or on the territory of a non-State party (para 5) from the court's exercise of jurisdiction. These provisions override the Rome Statute's default jurisdictional links as formulated in Article 12 (2) and exclude the application of Article 12 (3) – that is the *ad hoc* acceptance of the Court's jurisdiction by a non-State party – to the crime of aggression.

The second exemption is facultative in nature and relates to State parties. The ICC *can* exercise its jurisdiction over a crime of aggression arising from an act of aggression by a State party – unless the State party in question has previously declared that it does *not* accept such jurisdiction. States parties have thus the possibility to opt out of the Court's

[4] "No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants."

exercise of jurisdiction over the crime of aggression. A possibility that has been used by Kenya and Guatemala – two State parties that have not (yet) ratified the Kampala amendments.

In addition to this facultative opt-out regime, we have witnessed a controversy arising in the aftermath of the Kampala Review Conference, whether the Court may or may not exercise its jurisdiction over a crime of aggression committed by a national or on the territory of a State party that has *not* accepted the Kampala amendments. The infamous discussion over a possible application of Article 121 (5) second sentence in clear contradiction to the language of Article 15*bis* (4).

Leaving aside this controversy for the moment, it is well understood that there are clear limitations to the Court's exercise of jurisdiction over the crime of aggression compared to the Court's default jurisdictional regime over genocide, crimes against humanity and war crimes.

As elaborated in detail by *Professor Trahan* (Panel II), the proposed harmonization amendment addresses these deviations by deleting the current text of Article 15*bis* paragraphs 4 and 5 and by introducing language that mirrors Article 12 paragraphs 2 and 3. As a consequence, the Court's default jurisdictional regime would apply without doubt to the crime of aggression. It markedly contrasts Article 121 (5) second sentence and thus makes it abundantly clear that the conditions for the exercise of jurisdiction over the crime of aggression are exclusively governed by Article 12 (as incorporated in the amended Article 15*bis* (4)).

The proposed amendment was submitted with the clear understanding that the text will be subject to negotiations and may thus see modification.

The proposed amendment is also a torso in that it only deals with the core substantive aspects of the harmonization amendment. It does not tackle the relationship of the harmonization amendment with the Kampala amendments, and, most importantly, it leaves open the question of entry into force. This was a deliberate choice, given diverging opinions regarding the applicable entry into force regime for the harmonization

amendment among State parties. Meanwhile, a group of States has submitted a "Draft Resolution on the Crime of Aggression, Article 15bis Rome Statute, dated 5 June 2025, which tackles some of the open issues and is currently under consideration by the Working Group on Amendments to the Rome Statute.][5]

My contribution will build on the presentations of *Professor Nsereko* and *Ambassador Wenaweser* (Panel I), who took us on a journey into the past, to Rome in 1998 and to Kampala in 2010. The review of the Kampala amendments, and that includes the entry into force of the harmonization amendment, cannot be discussed without a clear understanding of the compromise adopted in Rome to include the crime of aggression as one of the crimes falling within the jurisdiction of the ICC and at the same time providing a mandate to negotiate a provision on the crime of aggression including a definition of the crime and the conditions for the Court's exercise of jurisdiction (Article 5 of the Rome Statute as adopted in 1998).[6]

Article 5 (2) foresees that such a provision shall be *adopted* in accordance with Article 121. The ordinary meaning of Article 5 (2) thus leads us to Article 121 (3) of the Rome Statute which foresees that amendments must be *adopted* by consensus or by a majority of 2/3 of State parties. Article 5 (2) does neither specify nor refer to an entry into force procedure.

This led delegations in the Special Working Group on the Crime of Aggression to argue that the inclusion of a provision on the crime of aggression was *not* to be treated as a formal amendment but a *mere completion* of the Statute that would not require ratification. Adoption by the Assembly of States Parties or a Review Conference would suffice. This understanding is also in line with Article 12 (1) of the Statute which confirms

[5] End of omitted passage.
[6] "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."

that States - upon ratification of the Statute - accept the Court's jurisdiction over all four categories of crimes listed in Article 5– including the crime of aggression.

You may easily imagine that the idea of an immediate entry into force upon adoption without ratification could not find a majority among States. But even if one accepts the requirement of ratifications, it must be acknowledged that Article 5 (2) does not provide any further guidelines other than hinting at Article 121, which includes two distinct entry into force mechanisms.

Article 121 (5) first sentence provides for a subjective entry into force mechanism. Amendments to Articles 5, 6, 7, and 8 enter into force only for those States that accept them, one year after the deposit of their instrument of acceptance. It is accompanied by a second sentence which formulates conditions for the exercise of the Court's jurisdiction over "amended crimes"[7] that deviate from the court's default jurisdictional regime under Article 12.

With a view to all other articles (not of an institutional nature), Article 121 (4) foresees an objective entry into force mechanism. Once adopted by consensus or by a majority of 2/3 of State parties, an amendment enters into force for all State parties when 7/8 of them have ratified it. At the same time, the Statute offers States that have *not* accepted the amendment the possibility to withdraw from the Statute with immediate effect (Article 121 (6)). In her presentation, *Professor Grzebyk* alluded to how this high threshold may translate into numbers. Nonetheless, it should also be kept in mind that the exact number of required States is a moving target as it depends on the number of State parties at the relevant time.

The result of the uncertainty stemming from Article 5 (2) of the Statute was an excruciating discussion in the process leading to Kampala, as to whether or not the adoption of a provision on aggression would constitute an amendment to Articles 5, 6, 7, or

[7] *A Reisinger Coracini*, "'Amended Most Serious Crimes': A New Category of Core Crimes within the Jurisdiction but out of the Reach of the International Criminal Court?", Leiden Journal of International Law, 21 (2008), 699–718.

8. From a literal interpretation, this was not the case. Clearly, Article 8*bis* is not an amendment to Article 8 but reflects a legal technique to introduce new provisions into a legislative text without needing to renumber all subsequent articles. An argument that emerged for the application of Article 121 (5) was that, under a contextual reading, paragraph (5) should apply generally to amendments to the Court's subject matter jurisdiction.

Eventually, the Kampala amendments included the deletion of Article 5 (2) and thus a formal, albeit unnecessary, amendment to one of the articles, triggering the application of Article 121 (5).

Still, the arguments that the deletion of Article 5 (2) is covered by Article 121 (5) and the insertion of Article 8*bis* might be covered by Article 121 (5) under a contextual reading offer no legal justification why *all* amendments concerning the crime of aggression, including the purely procedural provisions of Articles 15*bis* and 15*ter*, should enter into force under Article 121 (5) first sentence. States expressed, however, a general understanding before and in Kampala that all amendments relating to the crime of aggression, which form the "provision on the crime of aggression" as mandated in Article 5 (2) should enter into force under the same procedure.

The potential application of Article 121 (5) sparked a further discussion, whether the mandate to determine conditions for the exercise of jurisdiction for the crime of aggression in accordance with Article 5 (2) would in any way be restricted by the conditions for the exercise of jurisdiction formulated for amended crimes in the second sentence of Article 121 (5).

The Kampala Review Conference decided by consensus that the Kampala amendments should enter into force in accordance with the subjective entry into force procedure provided in Article 121 (5) first sentence with an understanding that the mandate of Article 5 (2) allowed the drafters to freely determine the conditions for the Court's exercise of jurisdiction over the crime of aggression, independent of the conditions formulated in the second sentence of Article 121 (5). Thus, even by deviating from or

excluding the application of the second sentence for the purpose of a provision on aggression.

Now, how may the entry into force decision taken in Kampala on the basis of Articles 5 (2) and 121 85) first sentence of the Rome Statute inform our understanding of an entry into force mechanism for the harmonization amendment?

The harmonization amendment aims at amending Article 15*bis* paragraphs (4) and (5) of the Rome Statute. One may therefore argue that, at first sight, these provisions do not constitute an amendment to Articles 5, 6, 7, and 8. It would therefore seem that the Rome Statute's default amendment regime of Article 121 (4) would apply.

However, on a closer look, this may not be the only option.

It is a well-established legal principle that an initial act and an eventual act of revocation or modification must be passed upon the same legal authority. The *actus contrarius* principle could serve as a justification to apply the same procedure that was previously used to introduce a provision to amend said provision. In other words, the harmonization amendment could enter into force under the same mechanism as the Kampala amendments.

This is particularly true for State parties that have accepted the Kampala amendments. For them, Article 15*bis* has already entered into force in accordance with Article 121 (5) first sentence.

Furthermore, Article 15*bis*, despite its procedural nature, forms an integral part of the provision on aggression mandated by Article 5(2), the deletion of which triggered the application of Article 121 (5) first sentence in Kampala.

For non-Kampala States, acceptance of the harmonization amendment, which could not happen without a simultaneous acceptance of the substance of the Kampala

amendments, would lead to the deletion of Article 5 (2) of the Rome Statute and thus literally amend Article 5.[8]

The consensus decision of Kampala to apply the entry into force mechanism of Article 121 (5) first sentence to all elements of the provision of aggression could also be understood as subsequent State practice for amendments relating to the provision on aggression.

This is not to argue that applying the entry into mechanism of Article 121 (5) first sentence to the harmonization amendment is the *only* legally sound way. But it is argued that plausible legal arguments can be made for the application of both amendment mechanisms, Article 121 para (4) and para (5) to the harmonization amendment. As a result, as before and in Kampala, State parties enjoy a certain degree of discretion regarding the identification of the entry into force mechanism that will be used.

From a policy point of view, two aspects should be kept in mind.

The objective entry into force mechanism (Article 121 (4)) requires an enormously high threshold. The harmonization amendment would only enter into force once 7/8 State parties have ratified it. The advantage of this procedure would be the uniform application of the harmonized jurisdictional regime for all State parties. The disadvantage lies in the difficulty, if not impossibility, to reach the 7/8 threshold. The harmonization amendment might remain a symbolic act and never become effective.

The subjective entry into force mechanism in accordance with Article 121 (5) on the other hand would allow for a gradual expansion of the Court's jurisdictional reach. By

[8] Due to time restraints, this intervention does not cover the relationship of the harmonization amendment and the Kampala amendments in detail. Suffice it to say that non-Kampala States – in order to provide the Court with a jurisdictional link and profit from the harmonized jurisdictional regime - must ratify the substance of the Kampala amendments. It is for the Assembly of State Parties to decide whether the two amendments shall be subject to ratification as a package (in that case, non-Kampala States would need to formally ratify both amendments) or whether the contents of the Kampala amendments would be included in the operative part of the harmonization amendment, which would then in itself be a further argument to apply the entry into force in accordance with Article 121(5).

ratifying the harmonization amendment, States could position themselves under the legal protection of the Court's jurisdiction should they fall victim of a crime of aggression.

The application of the entry into force mechanism of Article 121 (5), however, bears the danger of a renewed discussion of the potential application of its second sentence.

In order to achieve full harmonization, the resolution introducing the harmonization amendment would ideally clarify the non-applicability of the second sentence of Article 121 (5). If this clarity cannot be achieved, the question of the Court's exercise of jurisdiction over a crime of aggression committed on the territory or by a national of a non-Kampala State party against a Kampala State would remain for the Court to decide (as it is the case under the current jurisdictional regime).

As argued above, the clear language of the proposed amendment, as circulated via the Secretary General of the United Nations, would strengthen the interpretation of the non-applicability of these limitations.

I will conclude here in the interest of time. I thank you for your attention and look forward to our further discussion.

Thank you.