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QUESTIONS & ANSWERS: THE PROPOSED AMENDMENT TO HARMONIZE JURISDICTION OVER ALL FOUR ROME STATUTE CRIMES

WHY SHOULD STATES HARMONIZE JURISDICTION? The current ability of the International Criminal Court (ICC) to exercise jurisdiction over the crime of aggression is limited. This is because, absent a Security Council referral, the Court cannot exercise jurisdiction where a non-State Party is involved as either aggressor or victim, and because ICC States Parties have the ability to opt out of the Court's jurisdiction over the crime of aggression.

There is no sound reason for the ICC to have limited jurisdiction over what the Nuremberg Judgment deemed “the supreme” international crime because it contains within itself the totality of all other crimes and harms unleashed by the crime of aggression.¹ The restriction of the ICC's jurisdiction over the crime of aggression is a reflection of power politics and double standards. The importance of the crime of aggression is that it presents one way to help enforce the prohibition of the unlawful use of force—a core norm of the UN Charter (Article 2(4)). In this way, the proposed harmonization of the Court's jurisdiction over the crime of aggression with its jurisdiction over its other crimes would significantly enhance the protection that ICC membership can offer to States Parties.

WHY IS THE CRIME OF AGGRESSION'S JURISDICTIONAL REGIME DIFFERENT? As a result of compromises made during negotiations in 2010, the exercise of the ICC's jurisdiction over the crime of aggression differs from the exercise of the ICC's jurisdiction over its other three crimes (genocide, crimes against humanity and

¹ IMT Judgment, p. 421. For additional reasons to harmonization jurisdiction, see GIPA, https://crimeofaggression.info/wp-content/uploads/GIPA-Proposal-Short_25-September-2023.pdf.² International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, Annex I, ICC Doc. RC/Res.6 (June 11, 2010), <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>. The definition (RS, art. 8*bis*) and the UN Security Council's ability to refer situations that include the crime of aggression (RS, art. 15 *ter*) are not in issue, i.e., it is not proposed that they be amended.

war crimes).² The key differences are that, in relation to State Party referrals and *proprio motu* investigations, States Parties can opt out of the ICC's jurisdiction over the crime (RS art 15*bis* (4)) and the Court cannot exercise jurisdiction over any crime of aggression committed by the nationals of non-States Parties, or on their territory (RS art 15*bis* (5)). Specifically, the relevant provisions state:

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.

The prevailing view is that the ability of States to accept the Court's jurisdiction under Article 12(3) was also eliminated by the Kampala amendments.

A small group of States Parties insisted that the 2017 resolution of the ICC's Assembly of States Parties (ASP) that activated the ICC's jurisdiction over the crime of aggression³ included an interpretation of Article 15*bis* (4) that purports to further restrict the ICC's jurisdiction over the crime, by requiring ratification of the Kampala amendments by both the victim and aggressor State Parties.

However, others consider that the resolution is insufficient to override the text of Article 15*bis* (4), such that ratification or acceptance by *either* the victim or aggressor State is sufficient to enliven the ICC's jurisdiction over the crime.

WHAT WOULD THE PROPOSED AMENDMENT ACHIEVE? The amendment proposal would remove the unique restrictions on the ICC's jurisdiction over the crime of aggression set out in Articles 15*bis* (4) and 15*bis* (5) and instead apply the ICC's ordinary jurisdictional regime. Specifically, the proposed amendment tabled by Costa Rica, Germany, Sierra Leone, Slovenia and Vanuatu provides:

² International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, Annex I, ICC Doc. RC/Res.6 (June 11, 2010), <https://treaties.un.org/doc/source/docs/RC-Res.6-ENG.pdf>. The definition (RS, art. 8*bis*) and the UN Security Council's ability to refer situations that include the crime of aggression (RS, art. 15*ter*) are not in issue, i.e., it is not proposed that they be amended.

³ International Criminal Court, Assembly of States Parties, Activation of the Jurisdiction of the Court Over the Crime of Aggression, ICC-ASP/16/Res.5 (Dec. 14, 2017).

Article 15bis (4) and (5) are replaced by the following text inserted after article 15bis (3):

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression if one or more of the following States have ratified or accepted the aggression amendments, or have accepted the exercise of the jurisdiction of the Court over the crime of aggression in accordance with paragraph 5:

(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.

5. If the acceptance of a State that has not ratified or accepted the aggression amendments, or that is not a Party to this Statute, is required under paragraph 4, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court over the crime of aggression in accordance with article 12, paragraph 3.

WHAT ARE STATES PARTIES BEING ASKED TO DECIDE AT THE SPECIAL SESSION?

They are being asked to consider, discuss and adopt the proposed amendment text and an accompanying resolution. Adoption of the amendment would require, under RS art 121(3), consensus or an affirmative vote by 2/3rds of States Parties.

HOW WOULD THE HARMONIZATION AMENDMENT ENTER INTO FORCE? The Kampala crime of aggression amendments entered into force under RS Art 121.5, first sentence; thus, it is proposed that the harmonization amendment—which is fixing the Kampala amendments—would do the same.⁴ Use of RS Art 121.5, first sentence, means that the harmonization amendment would enter into force for each State Party one year after the deposit of their instrument of ratification or acceptance. Thus, there would be a gradual enlargement/harmonization of

⁴ States Parties recognized in 2010 that no single amendment provision in the Rome Statute was a neat fit for a set of amendments concerning the definition of a crime, the exercise of the Court's jurisdiction over that crime, and a series of subsequent amendments concerning individual criminal responsibility, the Elements of Crimes and the *ne bis in idem* rule. However, States Parties wanted to treat the aggression amendments as a package: they did not want to rely on different amendment provisions for different aspects of the aggression amendments, nor amend the amendment provisions in the Rome Statute. Accordingly, States Parties decided, by consensus, that the aggression amendments would enter into force under article 121.5, first sentence. This is evidence of a subsequent agreement supporting the flexible interpretation of the Rome Statute's amendment provisions, at least for a crime that was included in the ICC's jurisdiction in 1998 (see RS, art. 5 (granting the ICC jurisdiction over the crime of aggression); art. 12.1 (States Parties accept jurisdiction over the crime of aggression)) and for taking a package approach to the adoption of amendments relating to the crime of aggression.

jurisdiction, as States Parties ratify the harmonization amendment, with each State Party able to choose whether or not to do so.

The other potentially applicable amendment provision, RS Art 121.4, sets a high threshold (7/8ths of States Parties). There are currently 125 States Parties: thus, Article 121(4) would presently require 109 States Parties to ratify or accept the harmonization amendment, which could be a target that is virtually impossible to reach, making the amendment dead letter law.

COULDN'T STATES JUST PROSECUTE THE CRIME OF AGGRESSION BEFORE THEIR DOMESTIC COURTS? While a significant number of states include the crime of aggression in their domestic criminal codes, the crime is difficult to prosecute before domestic courts. This is particularly true regarding another state's leaders (and it is leaders who are covered by the leadership clause under the RS Art 8*bis* definition).⁵ Personal immunities prevent a state's head of state, head of government or foreign minister from being prosecuted before foreign domestic courts during their terms in office absent the waiver of immunity.

WOULD THE 48 STATES PARTIES THAT HAVE RATIFIED THE KAMPALA CRIME OF AGGRESSION AMENDMENTS NEED TO RATIFY THE HARMONIZATION AMENDMENT? Yes, if the negotiations are successful, they would need to do so, based on their sovereign decision to be bound by the amendments.

WHAT WOULD BE THE POSITION OF STATES PARTIES THAT HAVE NOT YET RATIFIED THE 2010 KAMPALA AMENDMENTS AND FUTURE STATES PARTIES? Both existing States Parties that have not ratified the 2010 crime of aggression amendments, and future States Parties, that accept the Court's jurisdiction over the crime of aggression after the adoption of the proposed amendment would ratify the aggression amendments, as amended (i.e., as a package).

WOULD THE HARMONIZATION AMENDMENT CREATE SIGNIFICANTLY MORE JURISDICTION BEFORE THE ICC OVER THE CRIME OF AGGRESSION? Yes, jurisdiction over the crime of aggression would largely operate as it does for the other Rome Statute crimes. The ICC would have jurisdiction over crimes committed on the territory of a State Party, or by the national of a State Party,

⁵ The crime applies only to "a person in a position effectively to exercise control over or to direct the political or military action of a State" RS, art. 8*bis*(1).

that has ratified the crime of aggression amendments as amended. The possibility of making an Article 12(3) ad hoc declaration accepting the Court's jurisdiction that encompasses the crime of aggression would also be restored.

It is, however, important to note that there would still be procedural safeguards against politically motivated investigations or prosecutions: in the case of State referrals and *proprio motu* investigations, an investigation could only commence in the event of the Security Council's determination of an act of aggression committed by the State concerned, or authorization by all judges assigned to the Pre-Trial Division in the event that the Security Council does not make such a determination within six months of being notified of the situation before the ICC.⁶ Of course, the crime of aggression is also carefully defined: only acts of aggression that by their character, gravity and scale amount to a manifest violation of the UN Charter amount to the State act element of the crime.⁷ This means that the Court's subject matter jurisdiction is restricted to crimes that involve both serious and clearly unlawful uses of force.

⁶ RS, art. 15*bis* (6)-(10).

⁷ The crime applies only to a "manifest violation of the Charter of the United Nations" by its "character, gravity and scale." RS, art. 8*bis*(1).