



GLOBAL INSTITUTE FOR THE
PREVENTION OF AGGRESSION

PROPOSAL FOR THE AMENDMENT OF THE CONDITIONS UNDER WHICH THE INTERNATIONAL CRIMINAL COURT EXERCISES JURISDICTION OVER THE CRIME OF AGGRESSION

Resolution on amendments to article 15 *bis* of the Rome Statute of the International Criminal Court

The Assembly of States Parties,

Recalling that in Resolution RC/Res.6 (2010), under which the Review Conference adopted the crime of aggression amendments, States Parties decided to review those amendments seven years after the beginning of the Court's exercise of jurisdiction over the crime of aggression,

Further recalling that in Resolution ICC-ASP/16/Res.5 (2017), the Assembly of States Parties decided to activate the Court's jurisdiction over the crime of aggression as of 17 July 2018,

Noting that, as of the date of the adoption of this resolution, [45] States Parties have ratified the crime of aggression amendments, and are, inter alia, bound by article 15 *bis* of the Rome Statute of the International Criminal Court as adopted by the Assembly of States Parties under Resolution RC/Res.6 (2010),

Further noting article 121, paragraphs 1 and 2, of the Rome Statute, which permits the Assembly of States Parties to adopt any proposed amendment to the Statute after the expiry of seven years from its entry into force,

Reaffirming the purposes and principles of the Charter of the United Nations,

Resolved to ensure that the Court's personal jurisdiction over the crime of aggression operates in the same manner as regards other crimes included in the Rome Statute as adopted on 17 July 1998;

1. Decides to adopt the amendments to article 15 *bis* of the Rome Statute contained in annex I to the present resolution, which is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph [4][5], of the Statute;

2. Confirms that those States Parties that ratified or accepted the aggression amendments before the date of the adoption of this resolution continue to be bound by article 15*bis*, paragraph 4 of the Rome Statute as adopted by the Review Conference under Resolution RC/Res.6 (2010) [until the amendments contained in annex I to this resolution enter into force for all States Parties (*Note: applicable in the event the amendments are adopted under article 121(4)*)] [until such time as those States Parties ratify or accept the amendments contained in annex I to this resolution (*Note: applicable in the event the amendments are adopted under article 121(5)*)];

3. Confirms that States that subsequently become States Parties to the Rome Statute and accept the aggression amendments will accept those amendments as a whole and as reflected in article 8 *bis* and 15 *ter* adopted by the Review Conference under Resolution RC/Res.6 (2010) and 15 *bis* as adopted by the Assembly under this present resolution;
4. Calls upon all States Parties to ratify or accept these amendments to article 15 *bis*;
5. Urges all States that have not done so to ratify or accede to the Rome Statute as amended, including the aggression amendments.

ANNEX I

Amendments to article 15 *bis*

Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

1. *Article 15 bis, paragraphs (4) and (5) are deleted.*
2. *The following text is inserted after article 15 bis, paragraph (3) of the Statute:*
 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 which 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.

AN EXPLANATION OF THE PROPOSED AMENDMENTS

An overview of the current operation of Article 15 bis

1. Article 5(1)(d) of the Rome Statute of the International Criminal Court (Rome Statute) as adopted in 1998 listed the crime of aggression as a crime within the jurisdiction of the International Criminal Court (ICC or the Court). Article 5(2) of the Rome Statute adopted on 17 July 1998 provided that ‘[t]he 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.’
2. The amendments governing the crime of aggression (articles 8*bis*, 15*bis* and 15*ter*) were adopted by consensus by the Rome Statute Review Conference held in Kampala, Uganda, in 2010, under Resolution RC/Res.6 (2010), which also deleted Article 5(2) of the Statute. As part of the compromise reached in Kampala, a series of restrictions on the ICC’s exercise of jurisdiction over the crime were enacted. Some of these restrictions were linked to the passage of time, or the meeting of requirements that have now been satisfied (see paragraphs 2 and 3 of articles 15*bis* and 15*ter* and Resolution ICC-ASP/16/Res.5 (2017)). The ICC’s jurisdiction in the case of State referral and *proprio motu* investigations, however, continues to be restricted.
3. The first outstanding restriction is found in article 15*bis* (4), which provides that: ‘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.’
4. The proper interpretation of 15 *bis* (4) remains contested. An interpretation put forward in operative paragraph 2 of Resolution ICC-ASP/16/Res.5 (2017) would effectively require both the aggressor and victim States to have ratified the aggression amendments as a precondition to the exercise of the Court’s jurisdiction, in addition to affording States Parties the ability to opt out of Court’s jurisdiction over the crime of aggression (“the narrow interpretation”). However, many States Parties expressed disagreement with this interpretation at the time of the adoption of Resolution ICC-ASP/16/Res.5 (2017), and these States Parties insisted on a reference to judicial independence in operative paragraph 3, leading some experts to the conclusion that the Resolution does not amount to a subsequent agreement for the purpose of Article 31(3) of the Vienna Convention on the Law of Treaties (VCLT), and that the Resolution does not otherwise have determinative effect.
5. The competing interpretation of article 15*bis* (4) (preferred by a majority of States Parties on record, as well as a majority of commentators) asserts that, as long as the aggressor State has not previously opted out of the Court’s jurisdiction, ratification of the aggression amendments by either the aggressor or victim State is sufficient to enliven the Court’s jurisdiction (“the broad interpretation”).
6. The question of the proper interpretation of article 15*bis* (4) (as adopted in 2010) is a complex one, which arguably requires a deep understanding of the negotiating history, the

text of the aggression amendments, the resolution under which they were adopted, and intersecting provisions of the Rome Statute. A number of GIPA's Council of Advisers have written extensively on this issue, and those Advisers are available to provide additional background and expert advice. For the purpose of this brief explanation of GIPA's proposed amendment of article 15 *bis*, however, it can be concluded with certainty that, regardless of whether the narrow or broad interpretation of paragraph (4) prevails, the Court's jurisdiction in respect of States Parties is more constrained than the jurisdictional regime that applies to other Rome Statute crimes, as set out in article 12 of the Statute.

7. The situation is exacerbated by article 15*bis* (5), which provides that: '[i]n 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.' It is uncontroversial that the effect of paragraph 5 is to exclude all crimes of aggression involving a non-State Party as either victim or aggressor from the Court's jurisdiction. This distinguishes the ICC's jurisdiction over the crime of aggression from its jurisdiction over other Rome Statute crimes: it is now well established that the ICC can exercise jurisdiction over the nationals of non-States Parties who commit genocide, crimes against humanity or war crimes on the territory of a State Party, and over the nationals of States Parties who commit genocide, crimes against humanity or war crimes on the territory of a non-State Party.

Why article 15 bis needs to be amended

8. The preamble to the Rome Statute reminds us that the crimes listed in the Statute 'threaten the peace, security and well-being of the world' and records the fact that States were '[d]etermined to put an end to impunity for these crimes and thus to contribute to the prevention of such crimes'. The best way of meeting these goals is to endow the ICC with the broadest possible jurisdiction.
9. This is especially true in the case of the crime of aggression. It is, by definition, a leadership crime, and it is a crime that is frequently committed as part of a State's official policy. This means that those most responsible for crimes of aggression may be able to avoid investigation and prosecution by a domestic court because of immunities they enjoy, and that domestic prosecutions will otherwise encounter a host of legal and political challenges. For this reason, it has often been claimed that the crime of aggression is better suited to an international justice process, such that the ICC, rather than being a court of last resort, may be the preferred, or indeed the only, viable venue, for the investigation and prosecution of crimes of aggression.
10. The strength of these arguments has been made patently obvious in the wake of Russia's acts of aggression against Ukraine. As a result of the restrictions on the ICC's jurisdiction under article 15*bis*, together with the *de facto* unavailability of a Security Council referral, the ICC lacks jurisdiction over crimes of aggression being committed against Ukraine. The acknowledgement that it is imperative that those responsible are held to account has required the international community to work towards the establishment of an hoc tribunal to investigate and prosecute crimes of aggression committed against Ukraine. It is critical that ICC States Parties act to extend the ICC's jurisdiction over aggression in order to address concerns that the proposed special tribunal is an example of selective justice, and, more importantly, to reinforce the prohibition of the use of force by ensuring that there is individual criminal responsibility for manifest violations of the prohibition.

An explanation of the recommended amendments to the ICC's personal jurisdiction over the crime of aggression

11. The objective of GIPA's recommended amendments to article 15*bis* are to bring the ICC's jurisdiction over the crime of aggression into line with the ICC's jurisdiction over the other crimes included in the Rome Statute, as adopted in 1998. In summary, it is recommended that the existing jurisdictional regimes governing States Parties (article 15*bis* (4)) and non-States Parties (article 15*bis* (5)) be deleted, and replaced with provisions that mirror article 12(2) (providing that the ICC's jurisdiction can be enlivened by ratification or acceptance by either the State on whose territory a crime of aggression was committed, or the State of nationality of the alleged perpetrator) and 12(3) of the Statute (enabling the possibility to enliven the Court's jurisdiction over aggression through an ad hoc acceptance of jurisdiction).
12. In GIPA's assessment, it is not possible to bring the ICC's jurisdiction over the crime of aggression into line with the Court's jurisdiction over genocide, crimes against humanity and war crimes through the simple deletion of the restrictive conditions found in 15*bis*. Specifically, the deletion of article 15*bis* as a whole is not recommended, as the article contains other essential provisions, such as those governing the Court's exercise of temporal jurisdiction over the crime of aggression.
13. It is also not recommended that paragraphs (4) and (5) of article 15*bis* be deleted, or replaced with a simple cross-reference to article 12, as this would create an ambiguity as to whether the second sentence of article 12(5) applies. While it is not uncontested, the prevailing view is that the second sentence of article 12(5) (which requires ratification by both the territorial State and the State of nationality) does not apply to the 2010 aggression amendments: rather the *sui generis* regime set out in the current version of paragraphs (4) and (5) of article 15*bis* operates independently of that sentence. As demonstrated by debates over whether a narrow or broad interpretation of article 15*bis* (4) should be preferred (see paragraphs 4 to 6 above), ambiguities can be exploited by those determined to limit the ICC's jurisdiction over aggression. The simple deletion of paragraphs (4) or (5), or the insertion of a bare cross-reference to article 12, thus carries the risk that it could be argued that the second sentence of article 12(5) does apply, which would remove the possibility of arguing that the broad interpretation of article 15*bis* (4) remains open. This would represent a further restriction of the Court's jurisdiction over aggression, which would run counter to what States Parties should be trying to achieve.
14. For completeness, it is noted that a non-State Party that takes advantage of the proposed article 15*bis* (5) to accept the Court's jurisdiction over the crime aggression is not thereby permitted to accept the Court's jurisdiction over the crime of aggression only. The proposed language makes it clear that any acceptance of the Court's jurisdiction must be 'in accordance with article 12, paragraph 3'. The Court's jurisprudence clearly prohibits crime- or perpetrator-specific acceptances of jurisdiction or referrals under article 13. The proposed 15*bis* (5) is intended to make it clear that article 12(3) encompasses the crime of aggression, but does not change the usual operation of that provision.
15. It is also noted that the final sentence of article 12(3) ('[t]he accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9') has not been replicated in the proposal for a revised paragraph (5) of article 15*bis*. This is because the cross-reference to article 12 in the proposed language is sufficient to record the obligation of the State lodging an ad hoc declaration to cooperate with the Court.

Paragraphs (6) to (8) of article 15bis would remain untouched

16. It is noted that paragraphs 6 to 8 of article 15 *bis* contain another requirement unique to the crime of aggression. Specifically, these provisions require either the existence of a Security Council determination that an act of aggression committed by the State concerned, or special authorisation by the Pre-Trial Division of the Court, as a pre-condition to the exercise of the Court's jurisdiction over the crime of aggression in the case of a State referral or *proprio motu* investigation. In recognition of the political sensitivities surrounding the crime of aggression, and noting the need to secure broad support for the proposed revision of the jurisdictional regime, GIPA does not recommend the amendment of these provisions.

The amendment procedure

17. There is some room for debate as to the procedure that should properly govern the entry into force of the proposed amendments, following their adoption by the Assembly under article 121(3).

18. Article 121, paragraph 5, governs amendments to those articles of the Rome Statute that list the crimes in the ICC's jurisdiction and define those crimes. It provides that: '[a]ny 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 the jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.'

19. Article 121(4) is the default entry into force mechanism applying to all other amendments (except amendments to enumerated articles of an institutional nature that are governed by article 122, which is not relevant for current purposes). Article 121(4) provides that: '[e]xcept as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.' Where an amendment enters into force in accordance with article 121(4), any State Party that has not accepted the amendment may withdraw from the Statute under article 121(6).

20. As the proposed amendments are not an amendment of articles 5, 6, 7 or 8 of the Statute, it *prima facie* appears that article 121(4) applies.

21. It is, however, important to bear in mind the history of the aggression amendments. Neither article 121(4) nor article 121(5) were clearly applicable to the entry into force of the aggression amendments, and there was extensive debate over which should apply in the lead up to the Review Conference. Based on the mandate provided to them in article 5(2) of the Rome Statute, States Parties ultimately agreed in 2010 that: (i) the aggression amendments (i.e. both the amendments relating to the definition of the crime, as well as those setting out the conditions under which the ICC can exercise jurisdiction) were to be treated as a package; and (ii) the amendments would enter into force in accordance with article 121(5). As noted above, the prevailing view is also that the second sentence of article 121(5) does not apply to the 2010 aggression amendments: rather the *sui generis* regime set out in the current version of paragraphs (4) and (5) of article 15*bis* operates independently of that sentence. This would continue to be the case if the amendments

recommended by GIPA were adopted by States Parties. The negotiating history thus provides a basis to argue that any further amendment of articles *8bis*, *15bis* or *15ter* should similarly be governed by the first sentence of article 121(5) for reasons of consistency.

22. The fact that States Parties acknowledged at the Rome Statute Review Conference in 2010 that neither article 121(4) or (5) were an exact fit for the aggression amendments, and that article 121(5) was applied in modified form in 2010, also leaves open the possibility that, in considering the amendment of Article *15bis*, States Parties may reach an agreement that an entry into force procedure based on a more creative interpretation of the Rome Statute should be applied. While such a possibility is not expressly referenced in the model amendment recommended by GIPA, the intention behind the bracketed references to article 121(4) and (5) is to leave open the question of the proper amendment procedure. Different members of the GIPA Council of Advisers have considered this issue and some have either already published on it or are in the process of preparing publications. These members stand ready to provide further advice on this issue if that would be useful.

Transitional provisions

23. The adoption of amendments to article *15bis* would raise the issue of the impact of such amendments on those States that have already ratified the aggression amendments (45 at the time of the preparation of this paper). It would be undesirable for any question to be raised as to whether the ICC has lost its ability to exercise jurisdiction as a result of these existing ratifications by reason of the adoption of amendments to the jurisdictional regime. This would be especially important in the event that States Parties determined that those amendments would enter into force in accordance with article 121(4), given that it could be expected to take some time for seven-eighths of States Parties to ratify the new amendments. At the same time, it is necessary to recognise that States Parties would not immediately be bound by the new amendments, but that the amendments would only become binding on them once they have entered into force.
24. As such, GIPA recommends that the resolution under which the proposed amendments are adopted include a transitional provision specifying that the 2010 version of article *15bis* (4) will continue to apply to ratifying States Parties until the new amendments enter into force generally (in the event that article 121(4) is relied upon), or until such time as individual States Parties ratify the new amendments (in the event that article 121(5) is relied upon) (as reflected in OP2 of the proposed resolution). This is arguably the better interpretation of the effect of the amendments as a result of general treaty law. Regardless, a strong argument could be made that the adoption of a resolution containing such an interpretation of the effect of the amendments, assuming it was adopted by consensus and without the type of dissent that accompanied Resolution ICC-ASP/16/Res.5 (2017), would amount to a subsequent agreement for the purposes of article 31(3) of the VCLT.
25. For similar reasons of clarity, GIPA recommends the inclusion of a statement in the resolution as to the version of the Rome Statute available to be ratified by future States Parties wishing to support the aggression amendments (as reflected in OP3 of the proposed resolution).