

Discussion Paper

Harmonizing the ICC's Jurisdiction over all Four Rome Statute Crimes

Jurisdictional Limitations in the Kampala amendments on the crime of aggression

The crime of aggression is one of the four crimes over which the ICC has jurisdiction in accordance with Article 5 of the Rome Statute. However, specific conditions for the exercise of jurisdiction over the crime of aggression are established in Articles 15*bis* and 15*ter* of the Rome Statute.

Article 15*ter* of the Rome Statute deals with the referral of a situation by the Security Council and corresponds to the ICC's standard jurisdictional regime over genocide, crimes against humanity, and war crimes. However, Article 15*bis* of the Rome Statute, which deals with the referral of a crime of aggression situation by a State Party or a *proprio motu* investigation by the Prosecutor, currently deviates significantly from the Statute's general jurisdictional regime.

- Article 15*bis* (4) allows States Parties to opt-out of the ICC's jurisdiction over the crime of aggression.
- Article 15*bis* (5) provides an explicit exclusion from the ICC's jurisdiction for crimes committed by nationals or on the territory of Non-States Parties to the Rome Statute.

These provisions significantly limit the ICC's exercise of jurisdiction over the crime of aggression, even though all four Rome Statute crimes are crimes under general customary international law. Therefore, amendments to the Kampala amendments on the crime of aggression are necessary to harmonize the ICC's jurisdiction over all four of the Rome Statute's core crimes.

Application of amendment provisions of the Rome Statute

It is subject to further discussion which amendment provision in the Rome Statute – Article 121 (4)¹ or 121 (5)² – should be chosen to adopt amendments that revise the conditions for the ICC's exercise of jurisdiction over the crime of aggression. The application of Article 121 (4) would mean that new amendments would enter into force for all once accepted by seven-eighths of States Parties. The application of Article 121 (5), foresees the entry into force individually for each State Party that ratifies the new amendments. However, the second sentence of article 121 (5), could limit the ICC's jurisdiction over the crime of aggression, unless specifically addressed.

Amendment proposals to harmonize jurisdiction

The first option presented below is for adoption under Article 121 (4), while the second option presented below is for adoption under Article 121 (5). Both options should allow the ICC to exercise its jurisdiction over the crime of aggression in accordance with the general rule in Article 12 (2) of the Rome Statute and future declarations by non-States Parties accepting the ICC's jurisdiction under Article 12 (3). These are the jurisdictional rules that apply to the ICC's other core crimes and should also apply to the crime of aggression.

¹ 121 (4): Except 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.

² 121 (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.

OPTION 1

Article 15*bis* (4) is amended and Article 15*bis* (5) is deleted.

- 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.~~ (Article 15*bis* (4) AMENDED)
- ~~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.~~ (Article 15*bis* (5) DELETED)

This first option is mostly a simple deletion of the paragraphs that unduly limit the Court's jurisdiction over the crime of aggression, while retaining the existing reference to Article 12 in order to make explicit that it is in fact the Rome Statute's general jurisdictional regime that shall also apply to the crime of aggression.

OPTION 2

This option provides for the adoption of the amendments under Article 121 (5), which comes with the risk that the second sentence of Article 121 (5) would apply and therefore limit the ICC's jurisdiction over the crime of aggression. Namely, there is a view that the second sentence of article 121(5) requires ratification by both the territorial State and the State of nationality, which is not the case for the general jurisdictional regime of the ICC under Article 12 of the Rome Statute.

Article 15*bis* (4) and (5) are therefore replaced by the following text inserted after article 15*bis* (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 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.**

This second option tries to address the risks associated with adopting the amendments under Article 121 (5). While it is not uncontested, there is a view that the second sentence of article 121(5) would represent a restriction of the Court's jurisdiction over the crime of aggression, which does not exist for the other core Rome Statute crimes and would therefore run counter to harmonization efforts.