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**African Union Mission to the United Nations**

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**“The Text of the Amendment Proposal”**

﻿Good morning. It is a pleasure to be asked to present as part of today’s important seminar.

I would like to thank the Missions of Switzerland and Sierra Leone to the United Nations for co-organizing today’s meeting and I am delighted that the Global Institute for the Prevention of Aggression (GIPA), which I convene, could also serve as a co-organizer. I assumed the position of Convenor of GIPA, taking over from Don Ferencz, son of the last living U.S. Nuremberg Prosecutor, Benjamin Ferencz, who many of you may have known. Ben spent decades of his life writing on the imperative of prosecuting the crime of aggression.

I also would like to thank the African Union for hosting our meeting, and the Global Challenges Foundation (Sweden) and the Federal Department of Foreign Affairs of Switzerland for their financial support. I would particularly also like to thank David Donat Cattin, acting on behalf of the Global Institute, for his organizational work putting together today’s conference.

I will address the text of the proposed amendment. For any attendees who would like additional background reading, I have a document entitled “Selected Writings by Experts of the Global Institute for the Prevention of Aggression” and welcome your taking a copy.

General Jurisdiction under the Rome Statute

You will all know the jurisdictional regime under the Rome Statute as to the crimes of genocide, war crimes, and crimes against humanity. It covers:

* Crimes committed on the territory of a State Party, RS art. 12(2)(a)
* Crimes committed by a national of a State Party, RS art. 12(2)(b)
* Ad hoc declarations, RS art. 12(3)
* UN Security Council referrals, RS art. 13(b)

Jurisdiction as to the Crime of Aggression

The crime of aggression can also be the subject of Security Council referrals as provided for in Rome Statute article 15 *ter* and this is not at issue, nor is the definition of the crime in article 8 *bis*.

It is regarding State Party referrals or where the Prosecutor acts *proprio motu*, that we have a different and far more limited jurisdictional regime for the crime of aggression compared to the jurisdiction of the ICC over the other three Rome Statute crimes.

Given the seriousness of the crime of aggression (which involves “manifestly” violating the UN Charter’s use of force provisions), and the massive amount of harm that can be inflicted by commission of the crime, there is no jurisprudential reason for this discrepancy in jurisdiction.

You will also by now be aware that it is two paragraphs in Rome Statute article 15 *bis*, adopted in Kampala in 2010, that are largely responsible for this divergent treatment. They are:

* Art. 15 *bis* para 4: providing for a State Party to be able to opt out of jurisdiction vis-à-vis the crime of aggression
* Art. 15 *bis* para 5: providing that the crime of aggression committed on the territory, or by nationals, of non-States Parties is excluded from jurisdiction.
* Additionally, Art. 12(3) *ad hoc* declarations were eliminated in Kampala.
* There is also an interpretive question as to how to read the Kampala crime of aggression amendments and under one reading there are additional restrictions on jurisdiction.

The Amendment Proposal
In an earlier options paper, one saw the suggestion of deleting articles 15 *bis* (4) and (5) and having a simple reference that Rome Statute article 12 would instead apply. That would be one possible way to effectuate the harmonization amendment.

The Global Institute and the Group of Friends, believe that the better option is what is now proposed in the text presented by Germany, Costa Rica, Sierra Leone, Slovenia and Vanuatu. These states have suggested the following text:

Amendments to article 15 *bis* of the Rome Statute

*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.

The first paragraph is basically a quote of Rome Statute article 12(2); the second paragraph is largely a quote of Rome Statute article 12(3). Insertion of this language would restore the general jurisdictional regime under the Rome Statute.[[1]](#footnote-1)

Replication of the language of article 12

Why should one replicate the language of article 12 in this way rather than having a simple reference to article 12? I do not want to get too technical, except to say that there is some ambiguity in the Rome Statute and if States Parties are to restore the crime of aggression to the general jurisdictional regime of the Rome Statute, you would want to overcome the ambiguity.

The amendment in Kampala entered into force under the first sentence of article 121(5) but the second sentence of article 121(5) basically suggests that States Parties are not free to design a different jurisdictional regime for the crime of aggression. Remember that article 5(2) of the Rome Statute said that State Parties *were free* to set forth conditions for the exercise of jurisdiction over the crime of aggression. It is for the purpose of being clear that one is overcoming the second sentence of article 121(5) that states would want to spell out the text of article 12 in the amendment; otherwise there will be ambiguity on the interaction of the harmonization amendment and the 2nd sentence of article 121(5).

If the text of the harmonization amendment spells out how article 12 applies, that would create *lex specialis* that would overcome the general language (*lex generalis*) of article 121(5) second sentence. I know the question of jurisdiction will be developed more extensively during the next panel, so I will not address it further.[[2]](#footnote-2)

Article 12(3) declarations

The proposed amendment text would also expressly restore article 12(3) ad hoc declarations. Restoring such declarations would be part of harmonizing the crime of aggression’s jurisdiction with that of the other Rome Statute crimes, since article 12(3) declarations are presently available to establish jurisdiction vis-à-vis the three other Rome Statute crimes.

During a recent meeting of the Working Group on Amendments, the question arose whether a single State Party’s ratification of the harmonization amendment would allow for the use of article 12(3) declarations to start. I wanted to respond that article 12(3) declarations will only be restored *if all States Parties agree with that approach* (if the harmonization amendment is adopted by consensus), or 2/3rds of States Parties if the amendment is adopted by vote. The question made it sound as if one State Party could cause article 12(3) declarations to be restored, but restoration of article 12(3) declarations would only occur if Rome Statute States Parties agree to this.[[3]](#footnote-3)

The interpretative question

As to the interpretive question I referred to earlier, I am not going to go into all the details, although I would be pleased to address them in more detail in the question and answer segment if there is interest.

In brief, the interpretive question is basically if you need one of the aggressor *or* victim State Party to have ratified the Kampala crime of aggression amendments and not to have opted out of jurisdiction for jurisdiction to exist (known as the broad interpretation of the Kampala amendments), or *both* the aggressor *and* victim State Party to have ratified the Kampala crime of aggression amendments and neither to have opted out of jurisdiction (the narrow interpretation of the Kampala amendments).

If States Parties in July do adopt the text as proposed, it would eliminate this interpretive question as one would return to the general article 12 jurisdictional regime where jurisdiction would exist where *one* State Party ratifies the Kampala amendments, as amended—*either* the victim *or* aggressor State Party—which would create jurisdiction over the crime of aggression committed on the territory of, or by a national of, that State Party.

Conclusion

In conclusion, the text of the harmonization amendment proposal is not complex. It basically quotes Rome Statute article 12. Adoption of the amendment would harmonize the ICC’s jurisdiction over all four Rome Statute crimes, which decreases selectivity and double-standards.

You have seen how limited the crime of aggression’s jurisdiction is currently. The crime right now is like law sitting on a shelf unable to be utilized. In the judgment of the international military tribunal at Nuremberg, the crime of aggression was termed “the supreme” international crime because it contains within itself the totality of all the other harms and crimes that follow from the aggression. Truncated jurisdiction is antithetical to the potential gravity of the crime.

The crime of aggression provides another route to enforce article 2(4) of the UN Charter through the regime of individual criminal responsibility. All states are already bound by the UN Charter’s use of force provisions; thus, they should have no defensible argument why their leaders should be able to manifestly violate the UN Charter’s use of force provisions without facing potential ramifications. For the ICC to be able to exercise only limited jurisdiction over the crime of aggression also means other states are not protected against aggression being committed against them in the way they should be.

When there is no meaningful jurisdiction before the ICC vis-à-vis the crime of aggression, then the question of ad hoc tribunals will arise, as we have recently seen. But an ad hoc approach is never the best approach because it has the problem of selectivity. It was to get away from this ad hoc approach of the tribunals of the 1990s that states established the ICC, and it was envisioned already in 1998 in the Rome Statute that the crime of aggression would be prosecuted before the ICC. It weakens the ICC not to have meaningful jurisdiction over this crime; in the future, issues of additional ad hoc tribunals will inevitably arise (or there will simply be impunity), if the ICC is unable to meaningfully investigate and prosecute the crime of aggression.

Thus, it is for States Parties to decide whether you believe there should be enough jurisdiction that this crime can be meaningfully enforced and deterrence against the commission of the crime of aggression potentially created. Delegates, you have an historic opportunity to “make history” and help rein in aggressive war and other acts of aggression, but deterrence cannot be created where there is no jurisdiction to prosecute.

Thank you.

1. Some procedural differences would still remain, such as the role of the Pre-Trial Division in authorizing the opening of an investigation on the basis of a State Party referral or where the Prosecutor acts *proprio motu*. There is also, for example, the requirement that the Office of the Prosecutor first ascertain whether the UN Security Council has made a determination of an act of aggression in the situation in question. See RS, art. 15 *bis* (6)-(8). [↑](#footnote-ref-1)
2. An alternative view is that the second sentence of RS article 121(5) is simply inapplicable, so one does not need to reach any argument about *lex specialis* or *lex generalis.* [↑](#footnote-ref-2)
3. To more directly answer the question, it could be entry into force for the first State Party of the harmonization amendment that restores the use of article 12(3) declarations. Note, however, that article 12(3) declarations were eliminated in Kampala in 2010 by adoption of the Kampala crime of aggression amendments; thus, the date of adoption of the harmonization amendment would be another possible start date. (The difference may not be significant, as there likely will be a first ratification of the harmonization amendment close in time to the date of its adoption.) The text of the proposal that would restore article 12(3) declarations, of course, is a proposal, and further modifications could be negotiated by States Parties. [↑](#footnote-ref-3)