Clarifications regarding the effect of the Kampala amendments on non-ratifying States Parties

This paper is aimed at clarifying questions raised regarding the effect of the Kampala amendments on the crime of aggression on non-ratifying States Parties. It is submitted with a view to assisting the discussions in the facilitation process leading up to the activation decision at the ASP in December 2017.

Negotiation history: *Opt-out* as middle ground between *opt-in* and *no-consent regime*

The question has been raised whether – in the absence of a Security Council referral – the Court may exercise jurisdiction regarding aggression committed by an ICC State Party that has not ratified the Kampala amendments. The topic is not new. In fact, the question whether the consent of the alleged aggressor State should be required had been a core issue of the negotiations from 2004 up to the last days of the 2010 Review Conference. Roughly one half of delegations ("camp consent") wanted an opt-in regime: Only nationals of ICC States Parties that ratified the amendments should be subject to jurisdiction (and nationals of non-States Parties excluded altogether). The other half of delegations ("camp protection") wanted a no-consent regime: The consent of the State of nationality should not be required – in other words, the jurisdiction should simply be the same as for the other three core Rome Statute crimes, in accordance with its standing under the Rome Statute.

Since delegations in Kampala were split on this issue, a middle ground had to be found. The only logical middle ground between opt-in and no-consent was an opt-out regime: Accordingly, Art. 15 *bis* (4) establishes that the Court may exercise jurisdiction regarding an act of aggression committed by an ICC State Party unless that State has previously submitted an opt-out declaration. Furthermore, Art. 15 *bis* (5) entirely excludes jurisdiction with respect to non-States Parties. As an end result, this middle ground was much closer to what was demanded by "camp consent" than what was preferred by "camp protection" – without giving everything to one side.

Legal basis for the opt-out regime: a mandate from Rome

The legal basis for the opt-out regime, and indeed for the many other jurisdictional provisions adopted in Kampala, is primarily Art. 5(2) of the Rome Statute, which gave States Parties the mandate to set out "[t]he conditions under which the Court shall exercise jurisdiction with respect to this crime". Furthermore, the opt-out regime follows the logic of Art. 12(1), which – literally – states that the States Parties to the Rome Statute accept the Court's jurisdiction over the crime of aggression.

The (non) effect of the second sentence of Art. 121(5)

The discussion as to whether the second sentence of Art. 121(5) should apply to the crime of aggression (and therefore require the consent of the State Party of nationality and territoriality, in other words, of both aggressor and victim) is also not new. It was for many years an integral part of the abovementioned negotiations on the question of aggressor State consent. The draft text in Kampala contained until almost the very end of the Conference two alternative draft Understandings on this very question – one to the effect that the second sentence would apply and thus prevent jurisdiction without consent ("negative understanding"), and one to the opposite effect ("positive understanding"). When the opt-out regime was put forward as a compromise, both of these draft Understandings were deleted. Why? Because the question of State consent was now dealt with directly in the text of Art. 15 *bis* (4), which outlined an opt-out regime. After all, an opt-out regime only makes sense if the default position is "in".

Distinguishing *exercise of jurisdiction* and *entry into force*

The notion that the Court may exercise jurisdiction over a national of a State Party that has not ratified the Kampala amendments – which is possible if the territorial State Party has ratified them – should not be difficult to accept for any party to the Rome Statute. After all, the Rome Statute in its entirety is based on the same concept: If genocide, war crimes, or crimes against humanity are committed on the territory of a State Party, the Court may exercise jurisdiction – even when committed by a national of a non-State Party (Art. 12). Under the Rome Statute, including the Kampala amendments, *exercise of jurisdiction* and *entry into force* are related, but separate concepts. The Kampala amendments are not binding on non-ratifying States Parties – but *this alone* does not prevent the Court from exercising jurisdiction regarding their nationals. Such exercise of jurisdiction may of course have a *practical* effect on non-ratifying States Parties (just as some actual current ICC investigations may have on non-States Parties), but it does not – and could not possibly have – a *legally binding* effect on them that would run counter to the Vienna Convention on the Law of Treaties (VCLT).

A second look at the second sentence: interpreting treaty law in context

It has been argued that the second sentence of Art. 121(5) would fully apply to the aggression amendments because of its clear wording. But the wording is only the first element looked at in the interpretation of a provision. It must also be read together with the context, as well as the object and purpose of the treaty (Art. 31 VCLT). Significantly, the Review Conference has explicitly identified a scenario where the – seemingly clear and sweeping – second sentence does not apply: Understanding 2 states that the consent of the State concerned does not matter in case of Security Council referrals. At the level of words only, Understanding 2 would be incompatible with the second sentence of Art. 121(5), and thus highlighting the need for it to be applied in context.

The reason why the second sentence does not apply to the crime of aggression is that it stands in conflict with other provisions of the Statute. One such conflict is with Art. 12(1), according to which States Parties to the Rome Statute have already accepted the Court's jurisdiction over the crime of aggression. Another conflict is with Art. 5(2), which gave States Parties broad discretion in designing the conditions for exercise of jurisdiction. These conflicts can be resolved when Art. 12(1) and 5(2) are seen as the more specific provisions applying to the crime of aggression, i.e. the *lex specialis* prevailing over the more generic provision of the second sentence of Art. 121(5). Furthermore, the second sentence must of course also be interpreted in the context of Art. 15 *bis* (4) itself.

A more detailed look at the context

Art. 15 *bis* (4) states that the Court may exercise jurisdiction over a crime of aggression "in accordance with article 12". To give any meaning to this reference, it must be understood as importing the jurisdictional regime set out in Art. 12(2), which does not require ratification by both the perpetrator's State of nationality and the territorial State. It is sufficient for only one of them – e.g. the victim State – to be party to the amended Statute.

Art. 15 *bis* (4) refers to an "act of aggression committed by a State Party", and does not contain any language that limits its scope to State Party aggressors that have ratified the amendments.

The very first preambular paragraph of Resolution RC/Res.6 recalls paragraph 1 of Art. 12, which stipulates that the States Parties to the Rome Statute accept the Court's jurisdiction over the crime of aggression. This reference was inserted at the same time the opt-out regime was introduced to the

negotiating text – precisely to underscore that the opt-out regime was based on the logic that States Parties had already in principle accepted jurisdiction over the crime of aggression – thus prevailing as *lex specialis* over the general application of the second sentence of Art. 121(5).

PP2 of Resolution RC/Res.6 recalls and OP1 records that the amendments are adopted in accordance with Art. 5(2), which gave States Parties a broad mandate to determine the conditions under which the Court shall exercise jurisdiction with respect to the crime.

OP1 of Resolution RC/Rs.6 confirms that a State Party can lodge an opt-out declaration prior to ratification or acceptance of the amendments. This only makes sense if the Court can indeed exercise jurisdiction with respect to a State Party that has not ratified the amendments.

Art. 15 *bis* (5), which exempts non-States Parties from the ICC's jurisdiction, mirrors the language of Art. 121(5)'s second sentence. Art. 15 *bis* (5) provides that the Court 'shall not exercise jurisdiction' over non-States Parties and provides no exceptions thereto. In contrast, Art. 15 *bis* (4) states that the Court 'may […] exercise jurisdiction over' a State Party 'unless' that Party has lodged an opt-out declaration. This clearly points to the fact that a distinction must be drawn between the operation of the two paragraphs.

Conclusion

The compromise reached in Kampala is in reality not particularly innovative: the usual middle ground between an opt-in regime and a no-consent regime is an **opt-out regime**. Art. 15 *bis* (4) is based on the logic that the second sentence of Art. 121(5) (which describes an opt-in regime) does not apply. To interpret Kampala differently would give any alleged aggressor State the opportunity to shield its leaders from jurisdiction not just once, but twice: There would be no jurisdiction unless it had ratified, and once ratified, it could simply opt-out at any point later. **No delegation ever requested such an opt-in-opt-out regime during the negotiations.**

In any event though, the scope of the issue should be kept in perspective. There is no difference of view about entry into force, only about exercise of jurisdiction. Some delegations are of the view that the second sentence of Art. 121(5) applies to the crime of aggression, others disagree.

However, States Parties that wish to ensure that they will not be subject to the Court's jurisdiction do not have to convince others that the second sentence applies. Instead, they can at any time simply inform the Registrar of their legal position: that they do not accept the Court's jurisdiction over the crime of aggression in the absence of ratification of the amendments. As a result, they will be exempt from jurisdiction with the exact same effect as if the second sentence of Art. 121(5) applied.

It is hoped that these clarifications are considered useful. It should also be noted that in light of the extremely difficult compromise achieved in Kampala, the many obstacles overcome over years of negotiations, and the fact that the amendments provide for a greatly reduced, consent-based jurisdictional regime, the concerns voiced should not be considered of such nature as to endanger the completion of this historic project. Discussions aimed at a better understanding of the Kampala amendments are welcome, but any attempt at re-opening the carefully balanced compromise would be of great concern. Activating the crime of aggression amendments will be the final step in the completion process of the Rome Statute and greatly enhance its prospects for universality.

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Liechtenstein

Annex

Jurisdiction chart: The jurisdictional regime of Art. 15 *bis* (4) can also be summarized graphically as below (both aggressor and victim States are presumed States Parties to the Rome Statute). The chart below highlights the limited nature of the jurisdictional regime of the Kampala amendments when compared to the jurisdictional regime governing the other three core crimes of the Rome Statute.

	Victim State has ratified the amendments	Victim State has not ratified the amendments
Aggressor State has ratified and not opted out	Jurisdiction: **YES**	Jurisdiction: **YES**
Aggressor State has not ratified and not opted out	Jurisdiction: **YES**	Jurisdiction: **NO**
Aggressor State has ratified and opted out	Jurisdiction: **NO**	Jurisdiction: **NO**
Aggressor State has not ratified and opted out	Jurisdiction: **NO**	Jurisdiction: **NO**

Negotiation history chart: The view that the second sentence of Art. 121(5) does apply to the crime of aggression, and that the amendments establish an opt-in system, from which States Parties can then opt out, defies the logic of the negotiations. It would mean that "camp protection" first came all the way over to "camp consent", and then went even beyond. No State ever argued for a system that first requires an opt-in, but then also allows a future aggressor State to easily opt-out. Obviously such a system would provide even less protection than a simple opt-in system, as described in the chart below.

	Camp Consent			Camp Protection
Jurisdiction over States Parties only, provided they **OPT-IN**, but they may then also **OPT-OUT**	~~Jurisdiction over **States Parties** only, provided they **OPT-IN**~~	~~Automatic jurisdiction over **States Parties** only, but they may **OPT-OUT**~~	~~Automatic jurisdiction over all **States Parties**~~	~~Automatic jurisdiction also over **Non-States Parties**~~