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Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression

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I. Introduction

1. On 11 June 2010, by resolution RC/Res.6, the Review Conference of the Rome Statute of the International Criminal Court, held in Kampala, Uganda, from 31 May to 11 June 2010, adopted by consensus the amendments on the crime of aggression.¹
2. In accordance with articles 15 *bis* and 15 *ter* of the Rome Statute, the International Criminal Court (“the Court”) may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the above-mentioned amendments by thirty States Parties, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
3. Thirty States Parties had ratified or accepted the Kampala amendments on the crime of aggression as of 26 June 2016. The number of States Parties as of 7 November 2017, is 34.²
4. At its fifteenth session, the Assembly of States Parties (“the Assembly”) decided “to establish a facilitation, based in New York, open only to States Parties, to discuss activation of the Court’s jurisdiction over the crime of aggression, in accordance with resolution RC/Res.6, which will make every effort to reach consensus and will submit a written report directly to the Assembly ahead of its sixteenth session.”³
5. On 20 February 2017, the Bureau appointed Ms. Nadia Kalb (Austria) as facilitator of the discussions on activation of the Court’s jurisdiction over the crime of aggression.

II. Organization of work

6. Meetings were held on 22 March, 24 April, 2 and 27 June, 8 September, 19 October, and 7 November 2017, which were open only to States Parties. The facilitator briefed the Hague Working Group on the progress of discussions in New York via videoconference on 20 July 2017.
7. At the first meeting, on 22 March, delegations agreed that discussions would take the form of an open exchange of views with the possibility of sharing information and raising awareness about the Kampala amendments and the activation of the Court’s jurisdiction over the crime of aggression. States Parties would work towards activating the Court’s jurisdiction over the crime of aggression at the Assembly in December 2017. To this end, the facilitation would make every effort to reach consensus and would submit a written report on the facilitation in advance of the sixteenth session to the Assembly and reflect the different views of delegations. States Parties agreed that the discussions would not result in a renegotiation or reopening of the Kampala amendments.
8. It was also agreed that briefings by experts on the topic would be a useful tool to initiate discussions by providing information well in advance of a decision by the Assembly. Expert briefings were to be balanced and represent existing divergent views; one session would focus exclusively on the question of the scope of the Court’s jurisdiction.

III. Expert briefings and discussions

9. In consultation with States Parties, the following experts were invited to give briefings to delegations: Professor Roger Clark (Rutgers University) and Professor Kevin Jon Heller (SOAS London and University of Amsterdam) on 24 April 2017 and Professor Noah Weisbord (Florida International University) and Professor Dapo Akande (Oxford University) on 2 June 2017. The experts presented their views on the Kampala amendments

¹ *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May - 11 June 2010* (RC/11), part II, RC/Res.6, annex I. For ease of reference, the text of the resolution is reproduced in annex I of the present report.

² https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=en.

³ *Official Records of the Assembly of States Parties of the International Criminal Court, Fifteenth session, The Hague, 16 – 24 November 2016* (ICC-ASP/15/20), vol. I, part III, ICC-ASP/15/Res.5, annex I, para. 18(b).

and the activation of the Court's jurisdiction over the crime of aggression to States Parties and were available for questions and discussions, which focused on:

- (a) the definition of the crime of aggression, its historical background, the elements of crimes and the related understandings;
- (b) the negotiations at the 1998 Rome Diplomatic Conference and the 2010 Review Conference;
- (c) the conditions for the exercise of the Court's jurisdiction; and
- (d) the scope of the Court's jurisdiction with regard to crimes committed by nationals or on the territory of States Parties which have not ratified or accepted the amendments.

10. Delegations generally considered that the expert briefings and discussions had been useful to expand their knowledge and to illustrate legal and policy arguments for various positions, while confirming that there was a large area of convergence of views. The texts of the expert presentations were circulated to all States Parties after the meetings and are available on the ASP-extranet.⁴

IV. States Parties' positions

A. Views on activation of the Court's jurisdiction over the crime of aggression

11. Delegations expressed their general support for activation of the Court's jurisdiction over the crime of aggression at the sixteenth session of the Assembly as well as their commitment to make every effort to do so by consensus. It was recalled that States Parties had resolved to activate the Court's jurisdiction over the crime of aggression as early as possible, and that the conditions for an activation decision had been met. Delegations emphasized that the Kampala amendments were not subject to renegotiation and should not be reopened.

12. Some delegations referred to the historical significance of activating the Court's jurisdiction for international criminal law and the fight against impunity. Activation would reinforce the prohibition of the illegal use of force enshrined in the Charter of the United Nations and would contribute to the prevention of wars, as well as offer judicial protection, to smaller States in particular, from potential acts of aggression.

13. Competing views centered on one specific and important aspect: the scope of the Court's jurisdiction with regard to crimes of aggression committed by nationals of a State Party which has not ratified or accepted the Kampala amendments, arising from an act of aggression targeting a State Party which has ratified or accepted the amendments. It was recognized that this was the core issue to be discussed. Some States Parties presented (joint) position papers setting out their views and reasoning, in particular on the interpretations regarding the Court's exercise of jurisdiction.⁵

14. Given the varying interpretations of the effects of activating the Court's jurisdiction, some delegations underscored that, in their view, it was important to clarify in the activation decision that the Court's jurisdiction over the crime of aggression did not extend to nationals or territories of States Parties which had not ratified or accepted the amendments. In their view, States Parties had the ability and responsibility to clarify this issue for the Court as well as for future States Parties, since criminal prosecutions potentially even of heads of state were at stake. While there was no need to delay activation or to reopen the amendments, legal questions had to be resolved by the Assembly so as not to harm the universality of the Rome Statute or the effective and sustainable functioning of the Court by burdening it with politically difficult issues in an already challenging environment. Some delegations said that they could not support activation without the clarity that non-ratifying States Parties were not bound, due to the risk that the Court's

⁴ <https://extranet.icc-cpi.int/asp/ASP16Session/NYWGActivation%20CoA/Forms/AllItems.aspx>

⁵ These position papers are reproduced in annex II of the present report.

jurisdiction could apply to their nationals, and pointed out that the support of non-ratifying States Parties was required for activation.

15. Some delegations expressed the view that all legal and substantive issues had been resolved at the Review Conference in Kampala, so that activation was a straightforward, procedural matter. Some delegations recalled that the Court would, as a matter of principle, examine the question of its own jurisdiction and questioned whether the Assembly as a body of governance could pronounce itself on this issue. A clarification or interpretation by the Assembly regarding jurisdiction would, in their view, amount to a reopening of the compromise package adopted by consensus at the Review Conference and could not be reconciled with the legal understanding of that agreement. They also stressed that the Court's jurisdiction over the crime of aggression was already more restrictive than over the other Rome Statute crimes, by excluding nationals of non-States Parties and enabling States Parties to declare that they do not accept jurisdiction, thereby excluding their nationals from jurisdiction of the Court with respect to the crime of aggression. They pointed out that an interpretation as requested by some would significantly limit the legal protection afforded by the Court to acts of aggression committed only among the 34 ratifying States Parties and would run counter to enhancing the universality of the Rome Statute.

B. Views on the jurisdiction of the Court over the crime of aggression

16. Some delegations expressed the view that the Court may not, in any circumstance, exercise jurisdiction regarding crimes committed by nationals or on the territory of States Parties which have not ratified the amendments in accordance with article 121, paragraph 5, of the Rome Statute. Others expressed the view that the Court may exercise jurisdiction over crimes of aggression committed by nationals of a State Party which had not ratified the amendments, unless that State Party had previously declared that it did not accept such jurisdiction in accordance with article 15 *bis*, paragraph 4, of the Rome Statute, provided that one of the parties to the conflict had ratified the amendments.

17. Some delegations argued that the key question was not whether States Parties had ratified the amendment, or whether they were bound by it, but rather how the Court derived its jurisdiction under the Rome Statute, namely by virtue of the principles of either territoriality or nationality set out in article 12 of the Rome Statute. It was recalled that, in respect of genocide, crimes against humanity and war crimes, nationals of non-States Parties, for instance, would be subject to the jurisdiction of the Court if they committed such crimes on the territory of a State having ratified the Rome Statute. Similarly, national courts exercised criminal jurisdiction over crimes committed by foreign nationals on their territory. Therefore, the Court would exercise jurisdiction in respect of the crime of aggression if one of the States Parties involved had ratified the aggression amendments, and the other had not declared that it did not accept jurisdiction in accordance with article 15 *bis*, paragraph 4, thereby ensuring a large measure of protection for States Parties which may become victims of aggression. These delegations argued that all parties to the Rome Statute had already accepted the jurisdiction of the Court over crimes of aggression committed by nationals or on the territory of States Parties in accordance with article 12, paragraph 1, over the crimes listed in article 5, which include the crime of aggression. They pointed out the legal basis for the jurisdictional provisions adopted in Kampala was article 5, paragraph 2 of the Rome Statute, which had provided the Review Conference with a mandate to adopt *sui generis* conditions for the exercise of jurisdiction with respect to the crime of aggression. Moreover, according to article 31 of the Vienna Convention, article 121, paragraph 5, of the Rome Statute must be read in the context of articles 12 and 5 of the Statute. They expressed the view that, therefore, only the first sentence of article 121, paragraph 5, relating to the *entry into force* of the amendment applied, since resolution RC/Res.6 referred only to the entry into force of the amendments in accordance with article 121, paragraph 5. The second sentence of article 121, paragraph 5, however, relating to the *jurisdiction* of the Court, was not applicable regarding the crime of aggression since it was incompatible with the more specific provisions applying to the crime of aggression. Moreover, the provision in the second sentence of article 121, paragraph 5, relating to the exercise of jurisdiction over new crimes added to the Rome Statute, had never been meant to apply to the crime of aggression since this crime had been part of the Statute from the very beginning. In this view, to apply the second sentence of article 121, paragraph 5,

would mean that both the aggressor state and the victim state would be required to have ratified the amendments for jurisdiction to be exercised, contrary to key provisions of the Rome Statute relating specifically to the crime of aggression, the amendments, and resolution RC/Res.6.

18. Other delegations argued that States Parties would not have been in a position, at the time of the Rome Conference, to accept in advance the jurisdiction of the Court in respect of a crime whose definition and conditions for exercise of jurisdiction had yet to be agreed. This would run counter to the principle of complementarity and would mean that activation would expose individuals in non-ratifying States Parties to international criminal prosecution where their national parliaments had neither expressed consent nor put in place implementing legislation to enable national prosecutions. A presumption that the amendments would apply to all States Parties by virtue of adoption at the Review Conference, ratification by just over 30 States Parties and subsequent activation would be contrary to principles of treaty law, in particular article 40, paragraph 4, of the Vienna Convention on the Law of Treaties, which provides that an amendment to a treaty is binding only for those States that ratify or accept it. The view was also expressed that the answer to the question whether a national of a State Party which has not ratified the amendments is subject to the jurisdiction of the Court was given in the Rome Statute itself, rather than in the Kampala amendments. These delegations also drew attention to article 121, paragraph 5, of the Rome Statute, which defines the procedure for the entry into force of amendments regarding provisions on crimes and excludes crimes committed by nationals or on the territory of States Parties that have not ratified such amendments from the jurisdiction of the Court, as an exception to article 12, which is a general provision concerning the exercise of jurisdiction and not a specific provision governing amendments. It was stressed that article 121, paragraph 5, was clear in explicitly excluding from the jurisdiction of the Court crimes committed by nationals or on the territory of a State Party which had not ratified or accepted the amendments. It was emphasized that the Kampala amendments were amendments that need to be governed by the applicable amendments procedure of the Rome Statute unless explicitly provided otherwise, and that the Review Conference had agreed that the aggression amendments would be governed by paragraph 5 of article 121, as reflected in the explicit and unrestricted reference to this provision in the resolution adopting the crime of aggression amendments. Therefore, in their view, the Kampala amendments were governed by article 121, paragraph 5, as a whole and it was not tenable to suggest that one sentence applied, but not another. It was further argued that article 5, paragraph 2 of the Rome Statute explicitly provided that any provision allowing the Court to exercise jurisdiction over the crime of aggression would have to be adopted in accordance with article 121. It was in particular recalled that one delegation had consistently voiced concerns during the Review Conference as to the conformity of the aggression amendments with article 121.⁶ Some delegations recalled in this regard that they had already gone on record before the Assembly with the position that they did not consider themselves bound by the amendments on the crime of aggression since they had not ratified them and that, therefore, crimes of aggression committed by their nationals or on their territory were not within the jurisdiction of the Court.

C. Views regarding declarations referred to in article 15 *bis*, paragraph 4

19. Some delegations suggested that a declaration lodged with the Registrar, indicating that a State Party did not accept the jurisdiction of the Court over the crime of aggression, would bring the desired clarity. These delegations stressed that the negotiating history of the amendments during the Special Working Group on the Crime of Aggression as well as during the Review Conference offered clear evidence of the correct legal interpretation of the agreement reached in Kampala. In their view, the amendments agreed as a package reflected a compromise solution, taking into account concerns voiced with regard to jurisdiction over non-States Parties as well as States Parties not wishing to be bound by the amendments. The opt-out clause reflected in article 15 *bis*, paragraph 4, and operative paragraph 1 of resolution RC/Res.6 was an important element of this compromise, as it was introduced to bridge the gap between those States Parties which believed that only the

⁶ *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May – 11 June 2010*, part II, annex VII and VIII.

victim State should be required to have ratified the amendments for the jurisdiction of the Court to apply and those which believed that, in addition, ratification by the State of nationality of the perpetrator should be required. By enabling States Parties to declare that they do not accept the jurisdiction of the Court in respect of crimes of aggression committed by their nationals (“opt-out”), the compromise agreed in Kampala had chosen the middle-ground between two opposing positions. It was explained that the Review Conference had considered the opposing position papers concerning the second sentence of article 121, paragraph 5, (the so-called “positive” and “negative” understandings), which both were ultimately deleted in favor of including the opt-out regime. As a result, in their view the compromise reached at the Review Conference was clear, and jurisdiction of the Court could extend to nationals of those States Parties which had not ratified the amendments, unless they opted out. It was further argued that States Parties were not required to opt in, or ratify, before being able to opt out, as OP 1 of resolution RC/Res.6 states that a State Party can lodge an opt-out declaration prior to ratification or acceptance of the amendments in accordance with article 15 *bis*, paragraph 4, of the Statute. It was emphasized that the option of lodging an opt-out prior to ratification only makes sense if the Court can indeed exercise jurisdiction with respect to a State Party that has not ratified the amendments.

20. Other delegations took the view that too much emphasis was being placed on the negotiating history of the amendments and on concessions or compromises, rather than on legal principles and the plain meaning of the texts. These delegations explained that they had left the Review Conference with a different understanding, namely that the amendments would not apply to those States Parties which would not ratify them. In their view, open legal questions as to the implications of activation remained. These had not been solved during the seven years since the Review Conference, in spite of ratifications by 34 States Parties. It was pointed out that negotiations at the Review Conference could not have the effect of changing treaty rights and obligations. Accordingly, it was important to focus on the ordinary language of the text as there were differing understandings of the negotiating history, since it was also possible to explain the opt-out as something that was available to ratifying States Parties. These delegations questioned how they could be required to take action to opt out of the Court’s jurisdiction if they had not chosen to opt in by ratifying the amendments in the first place. The requirement to opt out would presume consent, which those State Parties had not given, as they had not ratified the amendments. Moreover, the stipulation in resolution RC/Res.6 that any State Party may lodge an opt-out declaration referred to in article 15 *bis* could not imply that a State would be bound by an amendment which it had not ratified, or that it would be required to implement one of the provisions of the amendment, in order to benefit from a provision in the Rome Statute, article 121, paragraph 5, which confirmed that nationals of non-ratifying States Parties were excluded from the Court’s jurisdiction over the crime of aggression. The opt-out provision would be applicable after ratification and it would make sense to utilize it then, since it would provide protection against the crime of aggression committed on their territories to those States Parties which ratify the Kampala amendments and then go on to opt out, while still avoiding jurisdiction of the Court in case of a crime of aggression committed by their nationals. These delegations questioned whether an opt-out declaration would be as simple as presented by some, particularly in view of parliamentary approval required in some States due to its similarity with a reservation to a treaty, as well as other domestic implications. In their view, a clarification as to the jurisdiction of the Court would remove any ambiguity as to whether non-ratifying States would be required to opt-out and how.

21. It was pointed out that one State Party, which has not ratified the amendments, had already declared that it did not accept the Court’s jurisdiction over the crime of aggression and that that declaration had been published by the Registrar.⁷ In this connection, that State Party recalled that it had declared its opt-out subject to difficult internal discussions due to the lack of clarity in the amendments.

22. The point was made that a wide range of options to reach an acceptable compromise solution, including practical solutions around a pragmatic opt-out, should be considered. Some delegations said that a declaration of non-acceptance referred to in article 15 *bis*, paragraph 4, could be utilized as a technical tool to exclude or delay the consequences of

⁷ See https://www.icc-cpi.int/iccdocs/other/2015_NV_Kenya_Declaration_article15bis-4.pdf

activation between activation and ratification, while, for example, implementing legislation was being drafted. They recalled the suggestion of one of the expert briefers for a practical solution for activation encompassing the declarations of non-acceptance of the Court's jurisdiction. In this connection, it was suggested that such a declaration did not require a specific form and could be used to explain the legal reasons why the Court could not exercise its jurisdiction over nationals of States Parties which had not ratified the amendments. It was further proposed that the Assembly could give further guidance to the Registry in this regard.

D. Views on possible elements of an activation decision

23. At the sixth meeting, on 19 October 2017, France and the United Kingdom jointly presented a paragraph as an element of a possible activation decision.⁸ It was explained that this paragraph would clarify the exercise of jurisdiction of the Court over the crime of aggression according to their view that it could not extend over nationals of States Parties which had not ratified the amendments in accordance with article 121, paragraph 5 of the Rome Statute. These delegations expressed the view that this paragraph was an indispensable element for any activation decision, and that they would be able to support activation by consensus only if this clarification were included. Some delegations agreed with this view and emphasized that they would not support an activation decision which left the interpretation of the scope of jurisdiction to the Court. Some delegations supported the paragraph proposed.

24. Other delegations rejected the paragraph presented by France and the United Kingdom. These delegations expressed the view that the paragraph sought to recreate and reopen negotiations at the Review Conference in Kampala, where the same proposal had been replaced by the consensual adoption of the amendments with the opt-out regime. The point was made that the possibility of a vote had not been taken off the table. Some delegations expressed their desire to engage in dialogue and discussions, rather than being presented with a "take-it-or-leave-it" approach which was not conducive to consensus.

25. In response to the proposal made by France and the United Kingdom, the State of Palestine presented a possible element of an activation decision.⁹ It was explained that if reference was to be made, in the activation decision, to issues of jurisdiction, such reference must reflect the understanding reached by consensus at the Review Conference. It was further explained that this proposal quoted article 15 *bis*, paragraph 4, of the Rome Statute stating that the Court could exercise jurisdiction over the crime of aggression committed by a State Party, unless the State Party in question had declared that it did not accept such jurisdiction. Some delegations supported this proposal.

26. The delegation of Switzerland subsequently presented elements which, in their view, should make up a simple activation decision as an alternative to the opposing proposals previously made and could also refer to the positions expressed by delegations reflected in the present report.¹⁰ It was explained that this approach circumvented the question of jurisdiction on which irreconcilable opposing interpretations existed. Some delegations expressed support for a simple activation decision.

27. Some delegations recalled the mandate of the facilitation, which was not to negotiate text proposals. Delegations requested that facilitated discussions should continue with the aim to further consider concrete language of an activation decision.

E. Procedural aspects of an activation decision

28. It was recalled that the Assembly had so far taken its decisions by consensus. It was further recalled that, according to article 15 *bis*, paragraph 3, a two-thirds majority of States Parties was required for an activation decision, which would amount to 82 votes at the time of the sixteenth session of the Assembly.

⁸ The paragraph is reproduced in annex III of the present report.

⁹ The paragraph is reproduced in annex III of the present report.

¹⁰ The paragraph is reproduced in annex III of the present report.

29. The view was expressed that the decision to activate the Court's jurisdiction over the crime of aggression was purely procedural since States had already agreed to activation at the Review Conference, once the 30 required ratifications were in place and no earlier than January 2017, subject to a decision of States Parties.

30. General support was expressed for a separate decision to activate the Court's jurisdiction at the sixteenth session of the Assembly. It was suggested that such a standalone resolution would reflect the importance of the decision and could offer the space to reflect the positions of States Parties.

V. Conclusions

31. The facilitation process with expert briefings and vivid discussions has successfully raised awareness about the amendments on the crime of aggression as well as the implications of the activation decision. The process has also enabled fruitful exchanges of views among States Parties with detailed and thorough explanations of States Parties' positions.¹¹ The discussions during the facilitation demonstrated that important progress has been achieved so far and have revealed a broad convergence of views in all main areas except one:

(a) States Parties agreed that the Kampala amendments should not be renegotiated or reopened.

(b) States Parties are generally in favor of activating the Court's jurisdiction over the crime of aggression at the sixteenth session of the Assembly and that every effort should be made to reach consensus.

(c) States Parties expressed general support for a standalone resolution by the Assembly to activate the Court's jurisdiction.

(d) A divergence of views continues to exist only with regard to the Court's exercise of jurisdiction over crimes of aggression committed by nationals or on the territory of States Parties which have not ratified the amendments.

32. Throughout the discussions, States Parties have expressed their commitment to work together, in a spirit of compromise, to resolve the remaining outstanding issue with a view to activating the Court's jurisdiction over the crime of aggression at the sixteenth session of the Assembly. Discussions have further demonstrated the wish of States Parties to continue their efforts in the framework of the facilitation, making every effort to reach consensus, in the period leading up to and during the Assembly's sixteenth session, including by discussing elements of the decision to activate the Court's jurisdiction.

¹¹ Position papers presented during the facilitation process are reproduced in annex II of the present report.

Annex I

Resolution RC/Res.6*

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

RC/Res.6

The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in appendix I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;
2. *Also decides* to adopt the amendments to the Elements of Crimes contained in appendix II of the present resolution;
3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in appendix III of the present resolution;
4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;
5. *Calls upon* all States Parties to ratify or accept the amendments contained in appendix I.

* See Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010, available at <http://treaties.un.org>.

Appendix I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. *Article 5, paragraph 2, of the Statute is deleted.*
2. *The following text is inserted after article 8 of the Statute:*

Article 8 bis

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. *The following text is inserted after article 15 of the Statute:*

Article 15 bis

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

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

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.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. *The following text is inserted after article 15 bis of the Statute:*

Article 15 *ter*

Exercise of jurisdiction over the crime of aggression (Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. *The following text is inserted after article 25, paragraph 3, of the Statute:*

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.
6. *The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.
7. *The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

Appendix II

Amendments to the Elements of Crimes

Article 8 *bis*

Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person¹ in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

¹ With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Appendix III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.
2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.
7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

Annex II

Position papers submitted by delegations

A. Paper submitted by Canada, Colombia, France, Japan, Norway and United Kingdom (March 2017)

Jurisdiction of the International Criminal Court over the crime of aggression amendments adopted in Kampala

1. Background

1. Under the crime of aggression amendments adopted in Kampala on 11 June 2010 (the “aggression amendments”), the Court can exercise its jurisdiction over the crime of aggression one year after the 30th ratification of the amendments and after a decision by a two-thirds majority of States Parties taken after 1 January 2017. Therefore the States Parties which have not ratified the amendments will, alongside those which have ratified the amendments, be asked to participate in the process of activating the jurisdiction of the Court over the crime of aggression. At the November 2016 Assembly of States Parties (ASP), States Parties agreed to establish a facilitation to discuss activation of the Court's jurisdiction in advance of the ASP in December 2017.

2. Legal issues to be addressed in the facilitation

2. It is our clear view that, as a matter of treaty law, and contrary to an opinion which has been expressed, the Court cannot exercise jurisdiction over nationals of a State or on the territory of a State unless that State accepts or ratifies the aggression amendments. It is essential that this point is clarified before any decision is taken to activate the crime of aggression. This is important for:

(a) *States Parties that have not ratified the aggression amendments.* States Parties that have not ratified the aggression amendments deserve to know whether the aggression amendments will apply to them following activation, especially given the serious implications (i.e. potential penal procedures). Lack of legal clarity could also cause difficulties for States Parties which are considering future ratification in explaining the effect of ratification to their domestic stakeholders (e.g. parliament) and agreeing implementing legislation.

(b) *All States Parties.* All States Parties have an interest in ensuring the ICC legal framework is clear. Lack of legal clarity could prejudice the efficient functioning of the Court and the goal of achieving universal ratification of the Rome Statute.

(c) *The Court.* The issue of whether the Court has jurisdiction over States Parties that have not ratified the aggression amendments should not be presented as a controversial issue which the Court would have the burden to decide.

3. What we seek is clarity on the interpretation of jurisdiction over the crime of aggression going forward and not to re-open the text of the aggression amendments. The activation decision should take place on the basis of an agreed understanding by all States Parties of the effect of that decision. The aggression amendments were adopted by consensus and every effort should be made to ensure that the outcome of the facilitation discussion and the subsequent activation decision should likewise be adopted by consensus. As a report will be submitted to the ASP in accordance with paragraph 18 (b) of annex I of the resolution ICC-ASP/15/Res.5, it should include elements for a standalone activation resolution confirming that the Court cannot exercise jurisdiction over nationals of a State or on the territory of a State unless that State accepts or ratifies the aggression amendments.

4. It is also important that the facilitation agrees the position of new State Parties to the Rome Statute. States which join the ICC in future must know whether by ratifying the Statute they are automatically deemed to ratify or accept the aggression amendments.

3. The effect of activating the aggression amendments with respect to States Parties that have not ratified the amendments

5. Under the principle of the relative effect of treaties laid down in article 34 of the Vienna Convention on the Law of Treaties (VCLT), “A treaty does not create either obligations or rights for a third State without its consent”. This principle is considered a fundamental principle of international law by the International Court of Justice.

6. In addition, regarding amendments to multilateral treaties, paragraph 4 of article 40 of the VCLT stipulates that “The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement”.

7. This rule applies to amendments made to articles 5, 6, 7 and 8 of the Rome Statute. It is reflected in the following provisions of paragraph 5 of article 121 of the Rome Statute: “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”.

8. Paragraph 5 of article 121 clearly applies to the aggression amendments. This is explicitly set out in resolution RC/Res.6 adopted by the Kampala Conference in paragraph 1 of its operative part: “Decides to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: “the Statute”) the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5”.

9. Therefore, in accordance with paragraph 5 of article 121:

(a) The aggression amendments shall only enter into force for the States which have ratified or accepted them one year after the deposit of their instruments of ratification or acceptance; and

(b) The Court shall not exercise its jurisdiction regarding a crime covered by the aggression amendments when committed by nationals of a State Party which has not ratified or accepted the amendments, or committed on the territory of such a State Party.

10. However, an argument has been made that a State Party that has not ratified the amendments should be treated in the same way as a State Party that has, with respect to the exercise of the Court's jurisdiction, if it is alleged that nationals of a State Party committed the crime of aggression on the territory of a State Party that has ratified.

11. According to this argument, the second sentence of paragraph 5 of article 121 would not apply to the aggression amendments, on the basis that the States Parties to the Statute had already accepted in advance that the Court may exercise jurisdiction over any crime of aggression committed by them, pursuant to article 5 and paragraph 1 of article 12. The only way for States which have not ratified or accepted the amendment not to undergo its effect would be to submit an “opt-out” declaration with the Registrar under article 15 *bis* (4).

12. This argument is legally incorrect and does not withstand serious scrutiny:

(a) It runs counter to the wording of paragraph 5 of article 121 of the Rome Statute and that of resolution RC/Res.6 adopted in Kampala which explicitly said the amendments would enter into force in accordance with paragraph 5 of article 121, as well as subsequent resolutions of the Assembly of States Parties (including the latest omnibus resolution), which refer to paragraph 5 of article 121 in its entirety.²

(b) It is inconsistent with the fact that, according to the first sentence of paragraph 5 of article 121, the amendment will have entered into force only for the States Parties which will have ratified them. It would lead to the conclusion that, because of only

² The wording of paragraph 120 of the resolution adopted in 2016 is as follows: “Notes that those amendments are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Rome Statute and notes with appreciation the recent ratifications of the amendments.”

30 or so ratifications and a decision of the Assembly of States Parties, the amendments could apply to all States Parties. This would create an amendment procedure that is simply not stipulated in the Rome Statute.

(c) Article 5 and paragraph 1 of article 12 do not govern entry into force of amendments. Article 5(2) refers explicitly to article 121 applying to the exercise of jurisdiction of the Court on the crime of aggression. Paragraph 1 of article 12 cannot be interpreted as binding the States Parties to any future amendment with regard to crimes listed in article 5, whether in relation to the crime of aggression, or any other crimes under the jurisdiction of the Court.

(d) The fact that resolution RC/Res.6 stipulates that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification does not imply that a State is bound by an amendment that it refuses to ratify.

13. In accordance with paragraph 5 of article 121 of the Rome Statute, which reflects the rule in paragraph 4 of article 40 of the VCLT, any agreement to amend the crimes set out in the Rome Statute may not bind any State already party to the Statute which does not become party to that agreement.

Annex: Relevant sources

1. Rome Statute of International Criminal Court

Article 5

Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

2. The 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.

Article 12

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (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.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
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.
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.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

2. Vienna Convention on the Law of Treaties**Section 4: Treaties and Third States****Article 34**
General rule regarding third States

A treaty does not create either obligations or rights for a third State without its consent.

Article 40
Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
 - (a) The decision as to the action to be taken in regard to such proposal;
 - (b) The negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) Be considered as a party to the treaty as amended; and

(b) Be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

3. Resolution adopting the aggression amendments (RC/Res.6)

[Omitted]

B. Paper submitted by Liechtenstein (April 2017)

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

1. 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.

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

2. 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.

3. 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, article 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, article 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.

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

4. The legal basis for the opt-out regime, and indeed for the many other jurisdictional provisions adopted in Kampala, is primarily article 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 article 12(1), which – literally – states that the States Parties to the Rome Statute accept the Court’s jurisdiction over the crime of aggression.

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

5. The discussion as to whether the second sentence of article 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 article 15 *bis* (4), which outlined an opt-out regime. After all, an opt-out regime only makes sense if the default position is “in”.

4. Distinguishing exercise of jurisdiction and entry into force

6. 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 (article 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).

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

7. It has been argued that the second sentence of article 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 (article 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 article 121(5), and thus highlighting the need for it to be applied in context.

8. 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 article 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 article 5(2), which gave States Parties broad discretion in designing the conditions for exercise of jurisdiction. These conflicts can be resolved when articles 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 article 121(5). Furthermore, the second sentence must of course also be interpreted in the context of article 15 *bis* (4) itself.

6. A more detailed look at the context

9. Article 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 article 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.

10. Article 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.

11. The very first preambular paragraph of resolution RC/Res.6 recalls paragraph 1 of article 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 article 121(5).

12. Preambular paragraph 2 of resolution RC/Res.6 recalls and operative paragraph 1 records that the amendments are adopted in accordance with article 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.

13. Operative paragraph 1 of resolution RC/Res.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.

14. Article 15 *bis* (5), which exempts non-States Parties from the ICC's jurisdiction, mirrors the language of article 121(5)'s second sentence. Article 15 *bis* (5) provides that the Court "shall not exercise jurisdiction" over non-States Parties and provides no exceptions thereto. In contrast, article 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.

7. Conclusion

15. 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*. Article 15 *bis* (4) is based on the logic that the second sentence of article 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.*

16. 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 article 121(5) applies to the crime of aggression, others disagree.

17. *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 article 121(5) applied.*

18. 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.

Annex

1. Jurisdiction chart

The jurisdictional regime of article 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.

	<i>Victim State has ratified the amendments</i>	<i>Victim State has not ratified the amendments</i>
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

2. Negotiation history chart

The view that the second sentence of article 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.

	<i>Camp Consent</i>		<i>Camp Protection</i>	
Jurisdiction over States Parties only, provided they <i>OPT-IN</i> , but they may then also <i>OPT-OUT</i>	Jurisdiction over <i>States Parties</i> only, provided they <i>OPT-IN</i>	Automatic jurisdiction over <i>States Parties</i> only, but they may <i>OPT-OUT</i>	Automatic jurisdiction overall <i>States Parties</i>	Automatic jurisdiction also over <i>Non-States Parties</i>

C. Paper submitted by Argentina, Botswana, Samoa, Slovenia and Switzerland (August 2017)

Activation of the Crime of Aggression

“The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment.” – Robert Jackson, opening speech, Nuremberg Trials (1947)

1. Why the ASP should activate the ICC’s jurisdiction over the crime of aggression at the ASP 16

1. *Activation contributes to the prevention of wars.* To prevent wars is to prevent victims of wars.

2. *Activation reinforces the prohibition of the illegal use of force* enshrined in the UN Charter. Engendering respect for one of the most fundamental and universally recognized rules in international relations is in the interest of the international community as a whole. Contributing to the prevention of the illegal use of force is a collective responsibility of all States that call for activation.

3. *Activation answers a call of history:* A growing number of States from all regions of the world have ratified or are in the process of ratifying the Kampala amendments on the crime of aggression. The Kampala Review Conference in 2010 fulfilled the mandate of the 1998 Rome Conference to complete the Rome Statute. The Rome Conference, in turn, responded to the legacy of the Nuremberg and Tokyo Trials at the end of World War II. Supporting activation is to stand on the right side of history for generations to come.

4. *Activation is reasonable:* The Kampala Review Conference in 2010 led to a consensual and measured outcome, carried by all States Parties:

(a) *The Kampala amendments on the crime of aggression penalize only clear cases of the illegal use of force between States:* the violation of the UN Charter has to be “manifest” by its character, gravity and scale; minor violations and cases of contested legality are excluded.

(b) *The Court will only have jurisdiction over cases arising between States Parties:* at least one State Party needs to have ratified the amendments relating to the crime of aggression. States Parties can opt-out if they wish to be excluded from the exercise of the jurisdiction of the Court.

(c) *The independence of the ICC is preserved:* the judges take the final decision as regards the determination of a crime of aggression.

5. *Activation is the objective of the ASP:* Since Kampala, the ASP has repeatedly determined that it wishes to activate the crime of aggression.

(a) Preambular paragraph 6 of the Kampala resolution (resolution RC/Res.6): “Resolved to activate the Court’s jurisdiction over the crime of aggression as early as possible”.

(b) Operative paragraph 122 of the latest omnibus resolution (resolution ICC-ASP/15/Res.5): “Calls upon all States Parties to consider ratifying or accepting these amendments and resolves to activate the Court’s jurisdiction over the crime of aggression as early as possible, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Rome Statute.”

6. *Activation at the ASP16 is timely:* 70 years after judgement at Nuremberg and 7 years after a historic consensus in Kampala, arguing for postponement is arguing for non-

activation. There is no better time than now to activate the jurisdiction of the ICC over the crime of aggression.

7. *Activation creates an incentive for universality of the Rome Statute:* By ratifying the Rome Statute as amended, States Parties can for the first time in history enable an independent court to investigate and prosecute manifest violations of the UN Charter's prohibition of the use of force directed against their territory. However, a State is also free to ratify the Rome Statute in its 1998 version and on top of that to file an opt-out declaration with the Registrar of the ICC. Activation offers more choices and thus more prospects for universality, not less.

2. Why activation is a straightforward decision

1. *Activation is a binary choice:* All substantive considerations have been dealt with in Kampala through RC/Res.6 in 2010. The only remaining action the Kampala Review Conference gave the ASP to consider is 'turning the light on'. Adopting an operative paragraph according to which the ASP 'decides to activate the jurisdiction of the ICC over the crime of aggression' is all that is necessary.

2. *The Kampala compromise is well-defined:* It narrowly limits the scenarios in which the Court may exercise jurisdiction over the crime of aggression:

(a) *In relation to non-State Parties,* the Court has – in stark contrast to genocide, crimes against humanity and war crimes – *no jurisdiction whatsoever.*

(b) *Among States Parties* – again in stark contrast to the regime governing the other three Rome Statute crimes – both aggressor and victim State need to have given their consent. But crucially, *only one has to have ratified* the crime of aggression. For the other State Party involved, it is sufficient if that State Party *refrained from declaring an opt-out.*

3. *The Kampala compromise is measured:* It is the universal practice of States to exercise national criminal jurisdiction over foreign perpetrators of crimes committed on their territory. Likewise, the ICC is exercising jurisdiction over any perpetrators of Rome Statute crimes committed on the territory of States Parties. The special regime governing the crime of aggression represents nothing more than a restricted version of this well-accepted basis of jurisdiction in as much as it only applies vis-à-vis the nationals of non-ratifying States Parties and not to nationals of any State.

4. *To ask for 'clarification' that the Court cannot exercise jurisdiction in relation to non-ratifying States Parties is to attempt to rewrite the Kampala compromise.* The opt-out compromise was based on a proposal made by Switzerland, Argentina and Brazil on the one hand and Canada on the other. No delegation in Kampala ever proposed that the opt-out regime was meant to only apply to acts of aggression between those States Parties that had already ratified the amendments. The opt-out regime simply does not make sense unless the default position is 'in'.

5. *States Parties can always opt out:* States Parties that feel uncertain about the legal consequences of activation are at all times free to make use of their right to declare an opt-out in accordance with article 15 *bis* (4) of the Rome Statute. Such a declaration ensures that the nationals of States Parties opting-out cannot be prosecuted for the crime of aggression.

Annex: The Kampala compromise in detail

1. The Kampala compromise is nothing more than a restrained version of how the ICC exercises jurisdiction over genocide, crimes against humanity and war crimes

1. Article 12(2) of the Rome Statute provides that the Court can exercise its *jurisdiction over Rome Statute crimes committed on the territory of a State Party or by one of its nationals.* The compromise reached at the Kampala Review Conference in June 2010 was to depart from this regular regime for the special case of the crime of aggression.

2. At the heart of the *Kampala compromise* stands the first sentence of article 15 bis (4) of the Rome Statute (as amended), which encapsulates the so-called *opt-out clause*:

‘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.’

3. This compromise *bridged the gap between two opposing positions* expressed at the Review Conference: those that preferred to apply the regular regime of article 12(2) to the crime of aggression, with the result that the *consent of the ‘victim State’* (the State on whose territory the crime is committed) alone would suffice to imply the Court, and those that believed the *additional consent of the ‘aggressor State’* (the State of nationality of the perpetrator) should be required.

4. The delicate compromise reached presented itself as follows:

(a) *Non-States Parties are entirely exempt.*

(b) *States Parties have to actively declare their dissent* to elude jurisdiction of the Court, on the basis of the opt-out clause of article 15 bis (4).

5. The special jurisdictional regime governing the crime of aggression is therefore *far more restrained* towards non-States Parties (wholesale exclusion with respect to both territoriality and nationality of the perpetrator) and towards reticent State Parties (standing offer to be treated like non-States Parties) *than the jurisdictional regime governing genocide, crimes against humanity and war crimes*, where none of these limitations apply.

6. The Kampala compromise was *adopted by consensus*. No delegation argued in Kampala, as is argued by some delegations today, that *a prior ‘opt-in’* (i.e. ratification) by an aggressor State Party would be necessary *to then retain the option of an ‘opt-out’*. This would have represented an extreme, ‘double-dip’ version of requiring the consent of both victim and aggressor State Party that would have rendered introducing an opt-out clause as a bridging element devoid of any sense and would not have allowed for consensus in Kampala.

7. In other words, the ‘clarification’ of the Kampala compromise sought by some delegations today is entirely *irreconcilable with its negotiation history* of 2010. Notwithstanding this fact, essentially two arguments are put forward why the Kampala compromise could not possibly affect non-ratifying States Parties: lack of compatibility with the general principle of relative effect of treaties and the amendment provisions of the Rome Statute. Both arguments erroneously confuse two separate concepts: entry into force and exercise of jurisdiction.

2. The Kampala compromise and the principle of relative effect of treaties

8. The Kampala compromise is entirely consistent with article 34 and article 40(4) of the Vienna Convention on the Law of Treaties because *just as in the case of genocide, crimes against humanity and war crimes in 1998, the Kampala compromise of 2010 does not create any obligations or rights for third States* without their consent.

9. The regime for the crime of aggression is *based on the universal practice in national justice systems as they are well established for international crimes*: every State criminalizes actions on its territory irrespective of the consent of the State of nationality of the presumed offender. States Parties in Rome authorized the ICC to work on the same basis for Rome Statute crimes.

10. *Becoming a State Party to the Rome Statute always implied*, for all four crimes listed in article 5, *to accept that the International Criminal Court may exercise jurisdiction* when that crime is committed by one of its nationals or on its territory and the State is either unable or unwilling to genuinely prosecute that crime itself. *Article 12(1) of the Statute could not be clearer* in saying that “A State which

becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5”.

11. It is important to recognize that States Parties in Kampala chose to apply *precisely the same logic of territory-based exercise of jurisdiction vis-à-vis the nationals and the territory of non-ratifying States Parties*. After activation, the Court may exercise jurisdiction if the crime of aggression was committed on the territory of a ratifying State Party. That the author of the crime is a national of a non-ratifying State Party is irrelevant.

12. Delegations raising objections to this decision today in fact make *an argument that they never made since 1998 for genocide, crimes against humanity and war crimes in relation to non-States Parties*. It would seem that they never contested that the ICC can exercise jurisdiction over a national of a non-State Party if a Rome Statute crime is committed on the territory of a State Party.

13. In the same vein, the Kampala compromise is fully respectful of the *first sentence of article 121(5) of the Rome Statute, relating to the entry into force of the crime of aggression*. The same point applies in relation to the law of treaties: *in full conformity, the crime of aggression indeed only enters into force for a State Party that has ratified the amendments*.

3. The Kampala compromise and the Rome Statute provisions relating to conditions for the exercise of jurisdiction over the crime of aggression

14. Article 5(2) of the Rome Statute gave States Parties in Kampala the *authority to operationalize the crime of aggression* by adopting provisions on two outstanding issues: definition and conditions for the exercise of the Court’s jurisdiction.

15. It is important to recognize that article 5(2) was applied by States Parties in Kampala as a special provision *giving States Parties the power to adopt sui generis conditions for the exercise of jurisdiction over the crime of aggression*. By virtue of article 5(2), to which RC/Res.6 specifically refers, the Kampala Review Conference would have been entirely within its rights to extend the jurisdictional regime for genocide, crimes against humanity and war crimes to the crime of aggression. Accordingly, States Parties were *at liberty to set conditions that deviated from article 121(5) second sentence*. The latter generally exempts States Parties from amendments to the Rome Statute unless they have accepted these amendments.

16. States Parties in Kampala, however, actually did not at all choose to compromise the underlying rationale of article 121(5) second sentence. According to the Kampala compromise, *a State Party that has not accepted the amendments on the crime of aggression is indeed excluded from the Court’s jurisdiction*. In still keeping with the ordinary meaning of article 121(5) second sentence, *the Kampala compromise only specified that the default assumption is acceptance, not that acceptance is unnecessary or irrelevant*. By lodging an opt-out declaration, a State Party declares its non-acceptance of the Court exercising its jurisdiction. This is precisely what article 121(5) prescribes.

Annex III

Elements of an activation decision presented by delegations

A. Element of an activation decision, presented by France and the United Kingdom

Recalls that in accordance with Article 121 (5) of the Rome Statute, amendments relating to the crime of aggression enter into force with respect to States Parties that have accepted them one year after the deposit of their instrument of ratification or acceptance and that the Court does not exercise its jurisdiction in respect of that crime when committed by a national of a State Party which has not accepted such amendments or in the territory of that State.

B. Element of an activation decision, presented by the State of Palestine

Recalling that article 15 bis, paragraph 4, of the Rome Statute stipulates 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.

C. Elements of an activation decision, presented by Switzerland

The Assembly of State Parties,

PP1 *Recognizing* the historic significance of the consensual decision at the Kampala Review Conference to adopt the amendments to the Rome Statute on the crime of aggression, and in this regard recalling resolution RC/Res.6,

PP2 *Recalling* its resolve to activate the Court's jurisdiction over the crime of aggression as early as possible, and noting with appreciation that the conditions for the activation of the crime of aggression according to paragraphs 2 and 3 of article 15 *bis* and *ter* of the Rome Statute have been met,

PP3 [Place holder to reference the report on the activation of the jurisdiction of the International Criminal Court over the crime of aggression containing all views],

OP1 *Decides* to activate the Court's jurisdiction over the crime of aggression in accordance with paragraph 3 of article 15 *bis* and *ter*;

OP2 *Renews* its call upon all States Parties to ratify or accept the amendments to the Rome Statute on the crime of aggression.
