**ARTICLE 15*bis***

**Activation**

Let me begin by explaining perhaps the least controversial aspect of the aggression amendments: the activation of jurisdiction. The first relevant provision is Art. 15*bis*(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.**

This provision simply makes clear that Article 15*bis* applies only to investigations the OTP initiates *proprio motu* or pursuant to a state referral. Security Council referrals – which I’ll discuss later – are governed by Article 15*ter*.

The next two provisions are more substantive:

**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.**

Although states adopted the definition of aggression at the Kampala Conference by consensus, many were concerned about immediately activating the Court’s jurisdiction. So they decided to impose three conditions on that activation, which are reflected in paragraphs 2 and 3 of Art. 15*bis*:

1. 30 states would have to accept the aggression amendments.
2. One year would have to elapse from the date the 30th state accepted the amendments.
3. 2/3 of the States Parties – the number required for adopting an amendment to the Rome Statute – would have to affirmatively approve the amendments after 1 January 2017.

Palestine became the 30th state to ratify the amendments on 27 June 2016. One year from that date is 27 June 2017. So assuming that the ASP approves the aggression amendments in December, the Court will immediately be able to exercise jurisdiction over the crime of aggression.

**Jurisdiction**

Such a vote seems likely, so the more important question is which acts of aggression will be within the Court’s jurisdiction. As you all know, the applicability of the aggression amendments was the most controversial aspect of the negotiations at Kampala. Here are the relevant provisions in Art. 15*bis*:

**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.**

The meaning of paragraph 5 is not particularly controversial. As the text indicates, the Court will never be able to prosecute acts of aggression committed by non-member states or against non-member states.

This means, of course, that the Court’s jurisdiction over aggression will be different than its jurisdiction over the other crimes in the Rome Statute. In particular, the Court will have no jurisdiction over acts of aggression in two situations where it would have jurisdiction over war crimes, crimes against humanity, and acts of genocide:

1. Where a non-member state commits an act of aggression against a member state. The Court’s territorial jurisdiction would normally apply.
2. Where a member state commits an act of aggression against a non-member state. The Court’s nationality jurisdiction would normally apply.

Many states would have preferred the same jurisdictional regime to apply to all the crimes in the Rome Statute. But insisting on a broader regime for aggression would have made agreement at Kampala impossible – much less consensus.

In contrast to paragraph 5, the meaning of paragraph 4 remains deeply contested. The controversy focuses on how Art. 121(5) of the Rome Statute – governing amendments – should be interpreted. Here it is:

**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.**

There is little doubt that Art. 121(5) applies to the aggression amendments. The Preamble to the amendments specifically says it does.

There is still considerable disagreement, however, about how the two sentences in paragraph 5 relate to each other. On that issue, states and scholars have taken two very different positions:

1. The first camp believes that both sentences apply to the crime of aggression. This is the so-called “negative understanding” position.
2. The second camp believes that only the first sentence applies to the crime of aggression. This is the so-called “positive understanding” position.

I don’t want to tell you which camp is right. You will have another briefing in a couple of weeks concerning that very difficult issue. Instead, I simply want to explain how the Court’s jurisdiction over aggression will differ depending on which interpretation of Art. 121(5) the Court ultimately adopts. Because it will.

The first thing to note is that both camps agree about one situation: where a member-state has filed a declaration with the Registrar specifically opting-out of the Court’s nationality jurisdiction over aggression:

**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.**

If a member-state files such a declaration, it will be in the same position as a non-member state with regard to its own acts of aggression: the Court will not be able to prosecute those acts, even when committed against another member-state.

The question is whether a member-state must file such a declaration in order to ensure that the Court cannot prosecute its acts of aggression. Here the different interpretations of Art. 121(5) matter a great deal.

If the first camp is right and both sentences apply to aggression, a member-state that does not want the Court to have jurisdiction over its acts of aggression does not have to file a declaration opting-out of aggression. All it has to do is not accept the aggression amendments. That follows from the second sentence of Art. 121(5):

**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.**

Notice something important here. If the first camp is correct, a member-state that wants to prevent the Court from prosecuting its acts of aggression has two different ways to accomplish that goal:

1. Refuse to accept the aggression amendments.
2. Accept the aggression amendments and opt out.

Those two choices are not the same, however, concerning acts of aggression committed against the member-state:

1. If the member-state does not accept the aggression amendments, the Court will have no jurisdiction over such acts. The second sentence of Art. 121(5) makes that clear.
2. But if the member-states accepts the aggression amendments and then opts out, the Court will have jurisdiction over such acts. Remember: the opt-out provision in paragraph 4 only applies to *“an act of aggression committed by a State Party.”* It says nothing about acts of aggression committed against a member-state.

A member-state that wants to be protected against aggression but does not want to be prosecuted for committing aggression, in short, has an incentive to accept the amendments and then opt out.

That option only applies, however, if the first camp is right and both sentences of Art. 121(5) apply to aggression. If the second camp is right and the second sentence does not apply, the jurisdictional regime is quite different.

Most importantly, it means that a member-state must opt out in order to ensure that the Court cannot prosecute its acts of aggression. And that is true *even if chooses not to accept the aggression amendments*.

To understand why this is the case, consider the three possible aggression scenarios involving a member-state that has not accepted the amendments and has also not opted out:

**Victim is a Non-Member State = No Jurisdiction**

**Victims is a Non-Accepting State = No Jurisdiction**

**Victim is an Accepting State = Jurisdiction**

**First**, where that member-state commits an act of aggression against a non-member state. There is no jurisdiction in this scenario, because paragraph 5 specifically excludes any act of aggression involving a non-member state, as we have discussed.

**Second**, where the member state commits an act of aggression against another member state that has not accepted the aggression amendments. There is also no jurisdiction in this scenario, because neither the aggressor state nor the victim state has signed up to the aggression regime.

**Third**, where the member state commits an act of aggression against another member state that has accepted the aggression amendments. If the second camp is correct, there is jurisdiction in this scenario, because the victim state has accepted the amendments, thus protecting itself against aggression, while the aggressor state has not opted out of the aggression regime.

So here we have the first practical difference between the two interpretations of Art. 121(5):

1. If the first camp is right, the Court can never prosecute an act of aggression committed by a member-state that does not accept the aggression amendments. So there is no need for such a state to opt out of aggression.
2. If the second camp is right, the Court can prosecute an act of aggression committed by a member-state that does not accept the aggression amendments as long as the victim state has accepted them. To avoid that possibility, a member state must opt out – even if it doesn’t accept theaggression amendments.

There is also a second practical difference. This difference concerns one particular scenario: where the aggressor state has accepted the aggression amendments and not opted out, while the victim state has not accepted the aggression amendments.

In this scenario:

1. There is no jurisdiction if the first camp is correct and both sentences of Art. 121(5) apply, because the victim state’s failure to accept the amendments means – according to sentence 2 – that the Court does not have jurisdiction over an act of aggression committed on its territory.
2. There is jurisdiction if the second camp is correct and only the first sentence of Art. 121(5) applies. In this case, the fact that the aggressor state has accepted the amendments and not opted out means that the Court has jurisdiction over any act of aggression that it commits. So it is irrelevant whether the victim state has accepted the amendments.

**Relationship to Security Council**

So, that’s the basic jurisdictional scheme. Let me end my discussion of Art. 15*bis* by briefly explaining the procedure that applies when the Prosecutor wants to investigate an act of aggression pursuant to a state referral or proprio motu. The relevant paragraphs are 6, 7, and 8:

**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.**

The procedure is actually quite simple. When the Prosecutor wants to investigate an act of aggression, she must notify the UNSG of that fact and then ascertain whether the Security Council has deemed the act in question to be aggressive.

1. If it has, the Prosecutor may proceed with the investigation immediately and the Pre-Trial Chamber’s approval is unnecessary.
2. If it has not, the Prosecutor must wait six months from the date of notification to see if the Security Council will act. If it does not, she may then open the investigation with the approval of the Pre-Trial Chamber.

This system is without prejudice to the Security Council’s Art. 16 power to defer an investigation. So if the Council believes that the act in question is not aggressive, it can pass a resolution deferring the investigation for one year – renewable indefinitely.

It is worth noting that paragraphs 6-8 represent a slight compromise between states at Kampala. The drafters of the paragraphs considered four different relationships between the Security Council and the Court concerning aggression:

1. Making the Court’s exercise of jurisdiction not depend on the Security Council in any way.
2. Requiring the Security Council to find that a state committed an act of aggression – thereby preventing the Court from acting unless the Security Council acted.
3. Requiring the Security Council or the General Assembly to find that a state committed an act of aggression.
4. Requiring the Security Council, the General Assembly, or the ICJ to find that a state committed an act of aggression.

Paragraphs 6-8 of Art. 15*bis* basically adopt the first option. Paragraph 8 simply adds two things:

1. The six-month waiting period.
2. The requirement that, when the Security Council does not act in six months, the Prosecutor must seeks Pre-Trial Chamber approval of the investigation – even when she is responding to a state referral.

**ARTICLE 15*ter***

Article 15*ter* specifically applies to acts of aggression referred to the Court by the Security Council.

**Activation**

The activation provisions for Art. 15*ter* are the same as for Art. 15*bis*:

**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.**

**Jurisdiction**

In contrast to Art. 15*bis*, the applicability of Art. 15*ter* is very straightforward. Simply put, once the Court’s jurisdiction over aggression is activated, the Security Council will be able to refer acts of aggression to the Court in the same way it is currently able to refer war crimes, crimes against humanity, and acts of genocide. So the Security Council will have the power to refer acts of aggression committed by non-member states as well as by states that have either refused to accept the aggression amendments or have accepted them but opted out.

That broader power is confirmed by Understanding 2 of the aggression amendments:

**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.**

**Effect of a Security Council Referral**

Finally, it is worth noting paragraph 4 of Article 15*ter*:

**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.**

This is a provision that concerns the definition of aggression contained in Art. 8*bis*. What it means is that the Prosecutor will be required to prove that the defendant’s state committed an act of aggression even if the Security Council has specifically found – as it normally will when it refers aggression to the Court – that such an act took place.

In other words, a Security Council referral cannot relieve the Prosecutor of her legal burden to prove all of the elements of aggression beyond a reasonable doubt at trial.

**TABLE OF JURISDICTION**

**If sentence Art. 2 of 121(5) applies:**

Non-State Party & Non-State Party —–> No Jurisdiction

Non-State Party & Non-Ratifying State Party —–> No Jurisdiction

Non-State Party & Ratifying State Party —–> No Jurisdiction

Non-Ratifying State Party & Non-State Party —–> No Jurisdiction

Non-Ratifying State Party & Non-Ratifying State Party —–> No Jurisdiction

Non-Ratifying State Party & Ratifying State Party —–> No Jurisdiction

Ratifying State Party OO & Non-State Party —–> No Jurisdiction

Ratifying State Party OO & Non-Ratifying State Party —–> No Jurisdiction

Ratifying State Party OO & Ratifying State Party —–> No Jurisdiction

Ratifying State Party Not OO & Non-State Party —–> No Jurisdiction

Ratifying State Party Not OO & Non-Ratifying State Party —–> No Jurisdiction

Ratifying State Party Not OO & Ratifying State Party —–> Jurisdiction

**If sentence 2 of Art. 121(5) does not apply:**

Non-State Party & Non-State Party —–> No Jurisdiction

Non-State Party & Non-Ratifying State Party —–> No Jurisdiction

Non-State Party & Ratifying State Party —–> No Jurisdiction

Non-Ratifying State Party OO & Non-State Party —–> No Jurisdiction

Non-Ratifying State Party OO & Non-Ratifying State Party —–> No Jurisdiction

Non-Ratifying State Party OO & Ratifying State Party —–> No Jurisdiction

Non-Ratifying State Party Not OO & Non-State Party —–> No Jurisdiction

Non-Ratifying State Party Not OO & Non-Ratifying State Party —–> No Jurisdiction

Non-Ratifying State Party Not OO & Ratifying State Party —–> **Jurisdiction**

Ratifying State Party OO & Non-State Party —–> No Jurisdiction

Ratifying State Party OO & Non-Ratifying State Party —–> No Jurisdiction

Ratifying State Party OO & Ratifying State Party —–> No Jurisdiction

Ratifying State Party Not OO & Non-State Party —–> No Jurisdiction

Ratifying State Party Not OO & Non-Ratifying State Party —–> **Jurisdiction**

Ratifying State Party Not OO & Ratifying State Party —–> Jurisdiction