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Friday's Proposed Compromises on the Amendments for the Crime of Aggression

By

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Kampala, Uganda (June 11, 2010) Cambodia is a State Party to the Rome Statute of the International Criminal Court. Some of the operation and jurisprudence of the Extraordinary Chambers in the Courts of Cambodia is influenced by the work of the International Criminal Court. Therefore, it might be of interest to those following the ECCC to understand what is transpiring regarding the Review Conference of the Rome Statute of the International Criminal Court, being held in Kampala, Uganda.

At 2:25 p.m. on Friday, June 11, Ambassador Wenaweser, the President of the Assembly of States Parties, briefly convened the plenary to announce that there would be another round of consultations and a reconvening of the plenary at 4:30 p.m. He also circulated two pages of revisions to his non-paper of Thursday. In this blog I describe only the proposed revisions to the non-paper described in Part III of my last blog.

The Friday afternoon revisions concern only the new Article 15bis and new Article 15 ter that establish the jurisdictional filters for the crime of aggression. The first proposed revision targets new Article 15bis (State Party and proprio motu prosecutor referrals) and eliminates Alternative 1 from Section 4 (no investigation unless perhaps, as it was in brackets yesterday, the Security Council adopts a Chapter VII Security Council resolution requesting the prosecutor to proceed with the investigation into the crime of aggression). Alternative 1 has always been the preferred Security Council Permanent Member choice, as it confirms the exclusive authority of the Security Council over determinations of the act of aggression. However, as previously explained in earlier blogs, that formulation of exclusivity attracts very little support among the vast majority of the States Parties.

The new language thus invokes Alternative 2 from yesterday but with an interesting qualification on the "red light" role of the Security Council. The proposed revision reads: "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 Thursday non-paper formulation of Alternative 2 had bracketed the "red light" reference to the Security Council but not specified that it must be a resolution that meets the requirements of Article 16 of the Rome Statute. By specifying Article 16, Ambassador Wenaweser is somewhat weakening the Security Council's grip on the process because Article 16 has a one-year time limit, at the end of which the Council either has to vote to renew the suspension of the Court's investigation into aggression or, failing that, the investigation presumably may proceed with the Pre-Trial Division's blessing. That procedure imposes an annual burden on the Security Council, one that it may or may not wish to confront at the end of each year with respect to the particular situation of alleged aggression at issue. I can understand how this formulation may be more attractive to those concerned about Security Council powers. But I also understand how it may raise concerns among the Security Council Permanent Members about the annual need to return to the issue and lodge their votes if the issue remains of vital concern to the Council.

Nonetheless, this is a compromise formulation that will need to be seriously considered. It sustains the Security Council's primacy on aggression and yet permits the ICC to move forward with aggression if the Council so determines by *not* adopting an Article 16 resolution.

The next proposed revision of Section 4 of Article 15bis adds a new provision, Section 4bis, which reads: "The Court may not exercise jurisdiction over the crime of aggression in accordance with article 15bis until States Parties so decide no earlier than 2017." This is an explicit time lock of at least seven years on any investigation of the crime of aggression under the regime of State Party referrals or proprio motu prosecutor investigations. Thereafter, the States Parties will have to convene to decide when to activate the Court's jurisdiction over aggression regarding these Article 13(a) and (c) referrals.

The logic of this revision may flow from the spirit of Article 124, which is a seven year opt out on war crimes available to States Parties upon ratification. It may also find its origins in Article 123(1), which requires a Review Conference seven years after entry into force of the Rome Statute (namely, this Kampala conference, albeit almost eight years following the entry into force date of July 1, 2002).

Further, the new revisions include a reformulation of the right of a State Party to lodge a declaration of non-acceptance of the jurisdiction of the Court over a crime of aggression. I read the language of yesterday, retained in this proposed revision, to mean that the declaration of non-acceptance must be lodged with the Registrar prior to the commission of the crime of aggression, and not after it takes place. However, some might read the wording that the "State Party has previously declared" to mean a declaration previous to the Court being seized with jurisdiction over the particular alleged crime of aggression. I doubt the latter makes much sense.

The new revision replaces the last sentence of the Thursday non-paper Section 1ter with this: "After a period of seven years, such declaration shall expire, unless it is affirmed. The declaration may be withdrawn at any time." So this is a significant revision, as it would require a renewal of a declaration of non-acceptance every seven years, meaning a formal declaration of non-acceptance

filed with the Registrar every seven years. The shame factor may easily kick in for a State Party that keeps holding out on its own exposure to the crime of aggression. The second sentence simply states the obvious, namely that the declaration may be withdrawn voluntarily at any time. Gone is yesterday's rather confusing language coaxing States Parties to consider, within three years of filing a declaration, the idea of withdrawing the declaration.

Finally, there is one proposed revision to new Article 15ter, which governs Security Council referrals under Article 13(b) to the Court regarding aggression. The new language would revise Section 2 to read, "The Court may exercise jurisdiction over the crime of aggression in accordance with article 15ter seven years after the adoption of the amendments on the crime of aggression, unless States Parties decide otherwise." This would seem to require that yesterday's Section 2 is substantially revised so that the seven year period commences seven years after the adoption of the amendments by the Review Conference, and thus in 2017 if such approval is obtained today. This schedule can be modified if the States Parties so decide in the future. There is no suggestion here of requiring at least 30 States Parties to ratify the amendments, as proposed yesterday (alongside a five year period of non-jurisdiction). However, there is a footnote on the page that states "consequential changes would have to be made to draft article 15ter, paragraph 2." Whether that means some of the original language (such as the 30 State Party ratification hurdle) should remain in play remains uncertain. We will have to see how this is explained at 4:30 p.m. today.

That is where things stand now as the sun begins to descend in the sky here in Kampala. I may not be able to post again until Saturday when either final language is adopted or there is some collapse in the negotiations and the conference ends inconclusively. Let's see what happens in the coming hours.