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On the Cusp of a Final Draft Text for the Crime of Aggression for the International Criminal Court

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Kampala, Uganda (June 9, 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.

The Review Conference has reached a critical juncture that will point governments in a more certain direction within the next 24 hours. Delegations are awaiting the third revised draft of the Conference Room Paper on the Crime of Aggression. Before we reach that stage, it might be helpful to explain what the current second revised draft incorporates, as that will facilitate an understanding of what transpires in the third revision.

Following several days of fielding significant drafting proposals from several delegations, the Chairman, Prince Zeid Al Hussein from Jordan, has an enormous challenge in bridging these last-minute proposals. I had been encouraged on Monday night when the Chairman's second revised composite draft was circulated. He had managed to incorporate the most important elements of the

Argentine-Brazil-Switzerland proposal ("ABS proposal"), which had been introduced on June 4, into his second revised, or "Rev. 2," draft. But the introduction of proposals by Canada and by Slovenia vastly complicated the negotiations, and not necessarily for the better.

In Rev. 2, otherwise known as the "Conference Room Paper on the Crime of Aggression" (RC/WGCA/1/Rev.2 (7 June 2010)), the Chairman artfully accommodated the ABS proposal which bifurcates the rather complicated concept of entry into force of amendments under the Rome Statute. As it stood on its own, the ABS proposal was so complex in its narrative that it was not leadership friendly, i.e., one would not be able to explain it to one's political leadership in three minutes without total frustration by political and military leaders. Rev. 2 tries to simply the proposal by establishing in operative paragraph 1 of the draft resolution introducing the amendments the concept that there are two options: amendments will come into force for all States Parties with 7/8ths of the Assembly of States (Article 121(4)) ratifying the amendments or with the additional privilege to opt-out of the amendments, thus leaving some States Parties free of any liability for the crime of aggression under the Rome Statute (Article 121(5)).

In addition, Rev. 2 suggests that the Court be activated for all of the amendments upon adoption of them at the Review Conference and for all States Parties upon ratification of the amendments by 7/8ths of the States Parties. It further suggests that one year after a State Party has ratified the amendments, then it would become subject to the possibility of a State Party referral or proprio motu prosecutor investigation of the crime of aggression under the Statute.

The Security Council could refer situations of aggression to the Court immediately following adoption of the amendments by a two-thirds vote of the Assembly of States Parties here in Kampala. Such a Security Council referral would be under Chapter VII, pursuant to Article 13(b) of the Statute, and thus cover any State identified in the referral resolution, regardless of whether that State is a State Party and regardless of whether it had ratified the amendments as a State Party or exercised its Article 121(5) privilege to opt-out of coverage. That idea in itself is a radical proposal, but it logically fits within the framework of Rev. 2 and within the UN Charter powers of the Security Council. Ironically, the large number of governments that typically criticize the powers of the Security Council

are on the verge of granting the Council extraordinary power to thrust liability for the crime of aggression onto them (and their nationals) by this weekend pursuant to the Rome Statute provided a Chapter VII resolution to that effect is adopted by the Security Council.

The trade-off appears to be the equally extraordinary power to subject all States Parties to the crime of aggression (with State Party or proprio motu prosecutor referrals) once 7/8ths of the States Parties have ratified the amendments, without the benefit of Article 121(5)'s opt-out privilege. That is where the real negotiating must now center, namely, can the full coverage proposal be adopted alongside retention of Article 121(5)'s privilege (described as a "negative" one here) for any State (not just State Party) to formally opt out of coverage on the newly introduced crime of aggression? If both sides can give a bit on this central point, then there is a compromise in the making. The ABS group must concede that Article 121(5) (negative) survives this process and that there is no amendment of the amendment procedures themselves in the Rome Statute. I.e., they have to accept that 121(4) is not the only amendment procedure for aggression, but that aggression remains an empty box under Article 5 until it is filled with the amendments of this conference. For that reason, Article 121(5)(negative) survives for the opt-out privilege, but that privilege has to be affirmatively declared by the State in order to take advantage of it. That step itself can be a shame factor for any State daring to declare it refuses to be covered by the new crime, but that is shame that certain key nations, such as the United States, would endure in order to lawfully use military force for humanitarian interventions (particularly to stop commission of atrocity crimes), Security Council-authorized actions, and self-defense, including collective self-defense, that are a reality of the 21st Century.

The compromise by the Security Council group is to activate the Court's jurisdiction over an operational crime of aggression immediately (but through the Security Council) and to permit full coverage for States Parties once 7/8ths have ratified the amendments, but with the Article 121(5) (negative) shield retained for those governments (State Party or non-party States) that refuse to be covered. In the latter case, of course, the Security Council always could cover a non-party State with an Article 13(b) referral. The further compromise is to permit State Party and proprio motu prosecutor referrals that will cover those States Parties that

have ratified the amendments, although only one year after each respective ratification.

Rev. 2 sets forth two pathways of referrals of situations of aggression to the Court. The first pathway (Article 15bis) embraces Article 13(a) and (c) referrals and sets forth a staged consideration of those referrals. Stage one is whether the Security Council has made a determination that an act of aggression has been committed by a State Party. If it has, then the Prosecutor can proceed with an investigation. If no such determination has been made, the Prosecutor cannot proceed with an investigation, unless a certain number of months have transpired (probably six) and unless the Pre-Trial Chamber has authorized the commencement of the Prosecutor's investigation. The selection of the Pre-Trial Chamber as the final available "filter of jurisdiction" for the crime of aggression is a relatively radical choice, as the options list used to include the International Court of Justice and even the U.N. General Assembly.

Furthermore, the competence of the PTC judges to handle act of aggression issues (essentially doing the Security Council's job) could be questioned in light of the dominant skills set of criminal law rather than public international law for the ICC judges. It reminds me of the movie, "Butch Cassidy and the Sundance Kids," where Robert Redford and Paul Newman are pursued by a posse for days and Redford keeps turning to Newman and asking, "Who are those guys?!" One might ask the same question of the PTC judges when it comes to determinations on the crime of aggression, which must be preceded with a judgment as to whether an act of aggression between or among States has occurred.

The second pathway of referral is Article 15ter, which covers Security Council referrals and, it is proposed, would be activated for the Court immediately following adoption of the amendments by the Assembly of States Parties in Kampala. Here there is a simple delineation between allowing the Prosecutor to proceed with an investigation when there is an affirmative determination of an act of aggression by the Security Council, and prohibiting any such investigation when there is the absence of such a determination. The Security Council could entrap any State with a Chapter VII resolution and thus override individual State Party ratification hurdles and, of course, cover non-party States under the authority of that enforcement provision of the U.N. Charter. But in the absence of such a direct

Security Council referral to the ICC, the prosecutor would be limited to those States Parties that have ratified the aggression amendments (plus one year) and guided by any Article 121(5) declarations of non-acceptance of the jurisdiction of the Court for the crime of aggression. Footnote 8 on page 5 of Rev. 2 provides the logical clarification that Article 15ter may need to explicitly confirm the option of a Security Council referral and not just a determination that an act of aggression has occurred.

Annex III of Rev. 2 also sets forth proposed "understandings" regarding the amendments on aggression. The most significant are three-fold: First, it is understood that the Security Council can begin referring situations of aggression to the Court either once the amendments are adopted by the Review Conference or upon entry into force of the amendments. Second, there is no retroactivity for the crime of aggression, namely that the Court can only examine a crime of aggression committed either after the Review Conference or after entry into force of the amendments. These alternatives are in brackets so a choice will have to be made.

Annex III also, in paragraph 6, proposes either a "positive" understanding or a "negative" understanding of the second sentence of Article 121(5). A "positive" understanding means that there only need be acceptance of the amendments by the victim States in order to trigger the Court's jurisdiction. A "negative" understanding, which I regard as the logical one and which has considerable support at the Conference, prohibits jurisdiction over a State (including any non-party State) that has not accepted the amendments on aggression, perhaps by way of a formal declaration of non-acceptance filed with the U.N. Secretary-General. One should understand that the drafting oversight in Rome was the opt-out privilege accorded only to States Parties in Article 121(5), rather than to "States" which would have included non-party States with respect to any new crimes added to the Rome Statute. The superior step would be to amend the Rome Statute to correct that flaw, although admittedly it would take longer for an amendment to be adopted (7/8ths of the States Parties would have to ratify the amendment) than for an understanding to be adopted at the Review Conference. The best outcome would have been to achieve both an amendment and an understanding, but that will not occur here. The understanding at least sets the stage for judicial interpretation taking the understanding into account, but not necessarily being bound by it. One

possible step would be to seek an amendment at a future Assembly of States Parties session so as to fortify the understanding.

The Canadian delegation introduced a supplemental proposal on the morning of June 8th. The Canadian proposal would revise the Article 15bis concept in Rev. 2 so as to require that when the Pre-Trial Chamber is poised to take up a decision as to whether to authorize commencement of the investigation in respect of the crime of aggression (because the Security Council has failed to arrive at a determination on an act of aggression), the Prosecutor must first confirm that either "all state(s) concerned with the alleged crime of aggression" have declared their acceptance of the Pre-Trial Chamber's authority to act or that "the state on whose territory the alleged offence occurred and the state(s) of nationality of the persons accused of the crime" have declared their acceptance of the Pre-Trial Chamber's authority to act. Delegations were asked to pick one of those two choices. Very few delegations expressed any support for the first choice ("all state(s) concerned…") and a considerable number supported the second choice ("the state on whose territory…"). But a significant number of states objected to the Canadian proposal, regardless of which option is chosen. So its chances of surviving are doubtful and yet anything can transpire in the coming hours.

A major problem with the Canadian proposal is that it implants a specific state consent and reciprocity requirements on resort to the Pre-Trial Chamber, which raises various international law issues that the United Kingdom delegation described at length (although some delegations sought to rebut those arguments). The Canadian proposal also has the potential effect of eliminating Article 121(5) (negative) from the final package, and that is a consequence that many delegations will not tolerate.

Slovenia proposed its own amendment on June 8th that embraced the first option of the Canadian proposal (which very few States endorsed when discussing the Canadian proposal) but qualified that option by requiring the Prosecutor to seek a Security Council referral of the situation of aggression pursuant to Section 13(b) of the Rome Statute in the event "not all States Parties concerned with the alleged crime of aggression have deposited instruments of ratification or acceptance of the amendment on the crime of aggression..." The Slovenian proposal also seeks another Review Conference to determine whether all States Parties will be covered

by the crime of aggression in the event 7/8ths of the States Parties have ratified the amendments on aggression. This stands in contrast to an option in Rev. 2 that would automatically cover all States Parties when 7/8ths of the States Parties have ratified the amendments on aggression, although that option in Rev. 2 does not necessarily knock out the Article 121(5)(negative) right of exclusion. This particular Slovenian idea may be of some utility in the final negotiations. But I do not see much hope for the rest of the Slovenian proposal.

What might a final deal look like? I have been asked this often by delegates and non-governmental representatives here and as of tonight here is my answer, recognizing that the real decisions for a final document are in the hands of others. I work from the text of Rev. 2, which I assume will be part of Rev. 3 but I suggest the following as end game compromises:

1. The amendments will be brought into force a) in respect of Security Council determinations on an act of aggression, pursuant to Article 121(5) (i.e., one year after ratification for any particular State Party unless the State (including any non-party State) has not accepted the amendment, presumably by declaration) and b) in respect of State Party and proprio motu prosecutor referrals and for all States Parties, whenever the amendments come into force following ratification by 7/8ths of the States Parties (namely, in a manner consistent with Article 121(4)), but with a qualification explained below that permits use of Article 121(5)(negative) for opting out States.
2. With respect to a State Party or proprio motu prosecutor proposal, in the event the Security Council fails to make any determination on an act of aggression, and the Pre-Trial Chamber takes up the issue after six months of inaction by the Security Council, the Security Council can still exercise a "red light" halt to the Pre-Trial Chamber's deliberations by adopting a Chapter VII resolution to that effect. This should alleviate some of the heartburn of the Permanent Members of the Security Council by confirming that the Council can exercise its right to act for the purpose of shutting down the Pre-Trial Chamber's actions, but the Security Council has to act under Chapter VII to do so. This is similar to and in the spirit of Article 16 of the Rome Statute.

3. Article 121(5)(negative) is confirmed in an understanding, so that it applies even when 7/8ths ratifications are achieved and all States Parties are covered, except those that have opted out under Article 121(5)(negative).
4. Regarding the definition of aggression in the amendment incorporating Article 8bis into the Rome Statute, that definition will stand unchanged but there will be three understandings, advanced by the United States delegation, to clarify the meaning of some of the words and clauses in that definition.

The grand compromise described here obviously is problematic at this stage, but it does allow those governments that have stressed the primacy, but not exclusivity, of the Security Council on the crime of aggression to remain very consistent with that argument. Once the Pre-Trial Chamber is introduced into the equation, the non-exclusivity argument prevails. But the primacy argument survives with the "red light" option for the Security Council to step in and re-assert its authority on aggression under the U.N. Charter.

One final point: For years there has been an assumption that a "determination of an act of aggression" by the Security Council must be an affirmative determination that an act of aggression has occurred and, if such a determination is arrived at, then the ICC Prosecutor can proceed to investigate the crime of aggression. If no such affirmative determination is arrived at, then that constitutes no determination at all and there is a vacuum which governments critical of the Security Council have long sought to fill with an additional "jurisdictional filter," such as the Pre-Trial Chamber of the ICC. However, the Security Council could act with a negative determination, namely a resolution is brought to a vote in the Council and it either does not achieve the necessary 9 votes out of 15 (a supermajority as required by the U.N. Charter) or a veto is cast by one of the Permanent Members of the Council (as also provided in the U.N. Charter). Although a defeated resolution is not recorded, obviously, as an adopted resolution, the vote that defeats the resolution is recorded and, in my view, constitutes a negative determination.

That being the reality of the Security Council, if there is a negative determination on an act of aggression (by virtue of the defeat of a resolution seeking to declare an act of aggression), then the ICC Prosecutor should not be able to commence an investigation of the crime of aggression in the relevant situation. If delegations could arrive at an understanding of that character, about both affirmative and negative determinations, then the ultimate step of moving to the Pre-Trial Chamber for a determination on commencing investigation of the crime of aggression would be far more logical and likely more palatable to Security Council members. Otherwise, imagine if a negative determination is arrived at in the Security Council and the Pre-Trial Chamber dares to move ahead by authorizing commencement of investigation of the crime of aggression in a situation that the Council denied, by negative vote, constitutes an act of aggression. The tension, indeed crisis, that could erupt between the Security Council and the ICC would be highly toxic to the future relationship between the ICC and the United Nations.

We shall see in coming hours what emerges from the Chairman as a possible compromise formulation.