June 10, 2010

# Final Drafts on the Amendments for the Crime of Aggression for the Rome Statute of the International Criminal Court

**By**

**David Scheffer***

**David Scheffer, co-managing editor of the Cambodia Tribunal Monitor and an expert commentator, is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University School of Law. He was the U.S. Ambassador at Large for War Crimes Issues (1997-2001) and led the U.S. delegation in the U.N. negotiations for the International Criminal Court during his ambassadorship. This blog appears originally in the ASIL Blog on the ICC Review Conference (http://iccreview.asil.org).*

*Kampala, Uganda (June 10, 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.

Over the last 24 hours, delegations to the Review Conference on the Rome Statute of the International Criminal Court have received three separate drafts on the crime of aggression. This blog walks the reader through each of the three drafts sequentially. You will read below the flow of my own absorption of these proposals as they appeared and how I thought about revising them in real time to reach a constructive outcome. The most important draft is the third and last one, circulated at 11 p.m. Thursday evening, June 10. This is the final non-paper by the

President of the Assembly of States Parties, Ambassador Christian Wenaweser, and seeks to present a near-final compromise text, with only a couple of options left in brackets. I explain this third most critical draft, which all delegations are reviewing overnight, last. You may want to skip straight to Part III below to get to the meat of the final debate for Friday morning at 11:30 a.m. here in Kampala. But if you want a detailed review of how the drafting has evolved over the last 24 hours to the point of the Thursday evening non-paper, you may want to read Parts I and II below. This blog also picks up where I left off in my blog of last evening.

## Part I

Late Wednesday evening, June 9, a draft revision of Article 15bis in Rev. 2 began to circulate among delegations and was formally circulated on Thursday morning, June 10. It was an intriguing proposal of considerable promise. But there also were some issues that the mid-Thursday non-paper of Ambassador Wenaweser modified and which are explained in Part II below.

The Wednesday night compromise was prepared by Canada and some other delegations whose identities I was never quite certain of. The fresh language on Wednesday evening would require that the entire regime of amendments for the Review Conference be categorized under Article 121(5), so that amendments would come into force for each State Party one year after that State Party's ratification of the amendments unless otherwise modified in the amendments themselves. This is challengeable under strict treaty interpretation because if there is an amendment to any article other than one of the subject matter jurisdiction articles (5, 6, 7, or 8), such an amendment should fall under Article 121(4) ratification procedures. Article 121(4) amendments require ratification by 7/8ths of the States Parties before they enter into force. What appeared to be suggested in the evening of June 10 was to dump all of the amendments into an Article 121(5) procedure by virtue of simply saying so in the Review Conference resolution introducing the amendments for approval of 2/3rds of the Assembly of States Parties pursuant to Article 121(3). That may appear easy but it raises some treaty law issues. Some of those questions can be addressed by identifying all amendments into an extended Article 5 and/or Article 8 and thus stay within the

Article 121(5) framework. This is critical because the real compromises are being structured around Article 15 in terms of jurisdictional filters for the crime of aggression. Thus I awaited the late morning discussions with great curiosity as to how this would pan out.

The essence of the Wednesday evening compromise was as follows:

Article 15bis in Rev. 2 refers to the exercise of jurisdiction over the crime of aggression where Articles 13(a) and (c) are the referral mechanisms. That means where a State Party refers a situation (Article 13(a)) or where the proprio motu prosecutor initiates an investigation with the approval of the Pre-Trial Chamber (Article 13(c)), then the process is triggered for ICC action. The proposal stipulated:

1. For each State Party that ratifies the amendments, the Section 13(a) and (c) referral options are triggered five years after entry into force of the amendments for that State Party. That means, pursuant to Article 121(5), a total of six years after the act of ratification occurs for such State Party.
2. The jurisdictional filter provisions of 15bis in Rev. 2 remain unchanged, namely the Security Council filter followed by the Pre-Trial Chamber filter.
3. Then the real game begins. The proposal confirms Article 12 preconditions of jurisdiction for any eligible State Party (one that has ratified the amendments) and thus lock that in. But there is an opt-out, namely that if the State Party has filed a "declaration of non-acceptance of the jurisdiction of the Court under this paragraph 4 of this Article [15bis]." This incorporates the Article 121(5)(negative) concept into the new Article 15bis.
4. The timing of delivery of such a declaration by the State Party is important. The declaration must be filed with the U.N. Secretary-General no later than December 31, 2015. Any State that ratifies or accedes to the Rome Statute after that date must file the declaration of non-acceptance on the date of ratification or accession.
5. Such a declaration may be withdrawn by the State Party at any time, thus triggering the jurisdiction of the Court over that State Party for the crime of aggression.

6. Finally, and very significantly, there is the key provision that the Court shall not exercise its jurisdiction over the crime of aggression as provided in the article (namely, for state referral and proprio motu prosecutor investigations) when committed by a non-party State or its nationals.

We were all left to ponder this clever and constructive proposal overnight. But it was never formally presented to the Review Conference, for Ambassador Wenaweser's non-paper would quickly appear on Thursday morning.

## Part II

At 11 a.m. on June 10, Ambassador Wenaweser distributed a new non-paper on the crime of aggression. It incorporated some of the Wednesday evening proposal features, but was of a different character.

First, the non-paper made the critical choice that the entire set of amendments would be governed by Article 121(5) entry-into-force procedures. This was a significant step, as it removed the amendments from the 7/8ths State Party approval requirement of Article 121(4). This might suggest either an interpretation that amendments associated with the crime of aggression can occur throughout the Rome Statute (such as Article 15) and still fall within the scope of Article 121(5) amendment procedures for the introduction of new crimes. I do not recall in Rome thinking through what might need to be done to non-subject matter articles of the Rome Statute each time States Parties agreed to introduce a new crime, but there is logic to the argument that any new crime may require fiddling with other provisions in the Rome Statute to create a coherent and holistic document for the operation of the Court. On the other hand, a rigid view might suggest that any amendment outside of Articles 5, 6, 7, or 8 would trigger Article 121(4) procedures (of 7/8ths State Party approvals).

Second, the non-paper revises the Article 15bis language for State Party and proprio motu prosecutor jurisdictional triggers by embracing some of the Wednesday evening ideas but with varied language. The new language had difficulties. A new 1bis under Section 1 of Article 15bis reads as follows, but the language is brackets is how I would have proposed it be revised: "The Court may,

in accordance with article 12, exercise jurisdiction with respect to [the crime of aggression arising from] an act of aggression committed by a State Party, unless that State has lodged a declaration of non-acceptance [of the jurisdiction of the Court over the crime of aggression] with the Registrar." This provision preserves the integrity of Article 12 pre-conditions to jurisdiction but it does carve out those specific State Parties that choose to declare their non-acceptance of the Court's jurisdiction for the crime of aggression. That is entirely within the original intent of Article 121(5). It also is important to state accurately the Court's jurisdiction over the crime of aggression, for which individuals are held accountable, and not over an act of aggression which is committed by States and helps frame the crime of aggression jurisdiction.

The mid-Thursday non-paper proposes a new Section 1ter in Section 1 of Article 15bis. It reads as follows: "The Court may not exercise jurisdiction with respect to an act of aggression committed by a Non-State Party." This language caused some heartburn among delegations. Optically, it looks like a literal benefit to non-party States (or "Non-State Parties"). It suggests that non-party States have a green light to commit aggression. The far more preferable language, in my opinion, is that proposed on Wednesday night, but with the additional requirement that any non-party State desiring to enjoy non-liability for aggression under the Rome Statute would have to sign a declaration of non-acceptance and lodge it with the Registrar, publicly. The shame factor alone will cause some non-party States to pause. But such a step should prove important politically for such governments as Japan, which I suspect cannot sell the amendments to its public if they give North Korea a free ride. Rather, there has to be some public shaming of North Korea, compelling them to sign a declaration of non-acceptance on aggression liability.

Just as with the rights and privileges of complementarity under the Rome Statute, non-party States have to interact with the ICC in order to fully take advantage of complementarity and thus avoid the Court's jurisdiction in certain situations. Similarly, requiring the non-party States to file the declaration of non-acceptance is a reasonable request for the considerable benefit of non-liability.

Therefore, I consider more preferable a Section 1ter that would have read: "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 as provided for in this article when committed by that State's nationals or on its territory, provided such State has lodged a declaration of non-acceptance of the jurisdiction of the Court over the crime of aggression with the Registrar."

A footnote (4) in the non-paper raises the prospect of a Security Council referral under Article 13(b) as an additional vehicle for triggering the Prosecutor's powers in Article 15bis. I believe that is entirely logical provided the referral is made as a Council statement or determination on an act of aggression. Thus, I would revise Section 3 to read (with new bracketed language), the following:

"Where the Security Council has made such a determination [or has referred a situation of aggression to the Prosecutor pursuant to Section 13(b)], the Prosecutor may proceed with the investigation in respect of a crime of aggression."

The next decision point in the non-paper is whether to retain Alternative 1, which would deny the Prosecutor any right to proceed with the investigation in respect of a crime of aggression if the Security Council makes no determination (or perhaps there is no Security Council referral). Alternative 1 received scant support during the earlier discussions. Although it is a long-standing imperative for Permanent Members of the Security Council, I would not be surprised if the conference replaces it with Alternative 2 and the Pre-Trial Chamber on Friday.

The non-paper reiterates the earlier wording on the Pre-Trial Chamber. I simply repeat my suggestion that one way to accommodate at least some Permanent Members' interests and, frankly, to remain faithful to the U.N. Charter and to the primacy of the Security Council, would be to add at the end of Alternative 2 either "….unless the Security Council decides otherwise" or "…unless the Security Council determines by adoption of a resolution under Chapter VII of the U.N. Charter that no such investigation shall be authorized or initiated." This preserves a "red light" function for the Security Council to step in once the Pre-Trial Chamber begins to act and to stop the proceedings. That act alone would constitute Security Council engagement on the act of aggression, although probably of a negative character. At least the Council will have been compelled to act if it was concerned about the matter proceeding in the Pre-Trial Chamber and with the Prosecutor. This would confirm that the Security Council

does not have exclusive power regarding judicial determinations on aggression but it does have primary power to intervene when it so decides to do so.

`Regarding Article 15ter, which addresses Security Council referrals, the non-paper had an option to delete three paragraphs and basically gut the provision of any need for the Prosecutor to seek a determination on an act of aggression from the Security Council. Whether or not that large deletion survives, there may need to be additional language to accommodate the reality of Section 13(b) referrals, namely that the Council would make a determination on aggression in the context of the referral resolution itself (as opposed to a free-standing determination). Here is how I would handle the issue:

In Section 1 of Article 15ter, it would be revised (with new bracketed language) as follows: "The Court may exercise jurisdiction over the crime of aggression in accordance with article 13(b) [and the provisions of this article]."

This would fold into such jurisdiction the basic article 13(b) right of Security Council referral and the supplemental points established in Article 15ter.

Then, the Prosecutor could proceed with an investigation under one of two scenarios: 1) where the Security Council determines, apart from its Section 13(b) referral resolution, that an act of aggression has been committed; and 2) within the context of a referral of a situation by the Security Council in an article 13(b) referral. Section 3 of Article 15ter thus would read, with new bracketed language: "Where the Security Council has made such a determination, [including in the context of a referral of a situation by the Security Council in accordance with article 13(b)], the Prosecutor may proceed with the investigation in respect of a crime of aggression." I think that would be a more realistic formulation of what the Security Council should address in an article 13(b) referral scenario.

## Part III

On Thursday evening, June 10, Ambassador Wenaweser's newly revised non-paper was circulated among delegations. This is the critical document that sets the stage for the end game on Friday. It reflects non-stop bilaterals and consultations held throughout Thursday. I found it an encouraging document and I

believe it holds some promise for a widely-acceptable outcome on Friday, but key decisions will have to be made in the interim.

The draft resolution deciding to adopt the amendments on aggression now reflects, in operative paragraph 1 of that resolution, that the decision is being taken pursuant to Article 5(2) of the Rome Statute. That is a technical clarification.

The next revision also is in operative paragraph 1 and simply clarifies that any State Party's declaration of non-acceptance of the crime of aggression under Article 15bis (see below) may be lodged prior to that State Party's ratification or acceptance of the amendments under its domestic law and procedures. This imposes a logical discipline on precisely when to file the necessary declaration in order avoid the Court's jurisdiction for the State Party regarding the amendments. It is consistent with the declaration privilege for non-party States under Article 12(3) of the Rome Statute. Also, the declaration of non-acceptance of jurisdiction could be lodged with the Registrar after the State Party has ratified the amendments on aggression under the new Section 1ter of Article 15bis, but it must be lodged before the particular crime of aggression arising from an act of aggression has been committed by the State Party. Otherwise, a tardy declaration, following the commission of the crime, would be without effect regarding that act.

The non-paper then presents a series of critical revisions to the language of Article 15bis, which concerns exercise of jurisdiction over the crime of aggression in the event of a State Party referral or proprio motu prosecutor-initiated investigation following approval by the Pre-Trial Chamber.

A new Section 1bis to Article 15bis reads: "The Court may exercise jurisdiction only with respect to crimes of aggression committed at least five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties." This responds to the delegations pressing for some determinate period of delay prior to entry into force of the crime of aggression and sets up two goalposts for that purpose. The first is five years after the Review Conference, assuming the amendments are adopted on Friday, and thus in 2015. So there would be no activation of the crime of aggression under State Party or proprio motu prosecutor referrals any earlier than 2015. That conforms to earlier concepts. The additional requirement of 30 States Parties having ratified or accepted the amendments is a significant concession to delegations wary of activating the crime of aggression

until an impressive number of States Parties had embraced it. This is particularly important because the amendment procedures are following Article 121(5) rather than 121(4) (7/8ths State Party ratifications required for entry into force) rules for entry into force. The number of 30 may be arbitrary, and it does appear to modify Article 121(5), but it reflects a workable compromise.

The non-paper then proposes a substantially revised Section 1ter for Article 15bis. It reads as follows: "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."

Section 1ter first clarifies that the Court's jurisdiction is over a crime of aggression, but one that arises from an act of aggression committed by a State Party. That is an important distinction, as the ICC prosecutes individuals and not States. It also loops back to the definition's description of what constitutes an act of aggression and what constitutes a crime of aggression.

Then there is the all-important opt-out privilege for any State Party to lodge a declaration of non-acceptance of the jurisdiction of the Court for the crime of aggression. Here the non-paper locks in the fact that non-acceptance must be demonstrated by a written declaration lodged with the ICC Registrar, and that will be a publicly transparent act. Some States Parties may not want to be seen as taking such a potentially provocative step, so there is a shame factor at work here. Nonetheless, this option reflects the Article 121(5) opt-out procedure and thus it must be part of the equation.

Finally, Section 1ter makes the obvious point, under Vienna Convention treaty law, that the declaration of non-acceptance can be withdrawn by the State Party at any time, thus activating potential liability for the crime of aggression for nationals of that State Party. But Section 1ter requires any State Party that has filed a declaration of non-acceptance to consider withdrawing it within three years. That is strictly a procedural request, but there is no obligation to withdraw the declaration.

A new Section 1quarter reads: "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." This language is essential for the support of non-party States at the Review Conference and it corrects the flaw in Article 121(5) that addresses only the privilege of States Parties to opt out of new crimes while leaving non-party States exposed to potential liability for the crime of aggression.

I suspect that when new crimes are considered in the future, this principle of non-coverage of non-party States will be repeated. Interestingly, however, this logic did not prevail with the adoption of the new prohibited weapons for non-international armed conflicts embodied in the amendment to Article 8, namely poison or poisoned weapons, asphyxiating, poisonous or other gases, and expanding bullets, etc., which was adopted Thursday evening as the historic first amendment to the Rome Statute. That amendment makes no such explicit concession to non-party States and thus does not seek to correct Article 121(5) with respect to those new weapons for non-international armed conflicts. No delegation raised any objection tonight to that omission. I can understand why. These weapons already are included in Article 8(2)(b) for international armed conflicts, without anyone raising any real fuss, and this amendment is a logical extension of such weapons to non-international armed conflicts. So they are barely considered "new" weapons; rather they are long-standing weapons in the Rome Statute now introduced into an additional scenario of armed conflicts.

The non-paper next addresses the all-important two alternatives for final jurisdictional filters when there are State Party referrals or proprio motu prosecutor investigations. Alternative 1 survives, which stops the prosecutor's investigation if there is no determination by the Security Council on an act of aggression committed by the State concerned. The new language reads: "(Alternative 1) In the absence of such a determination, the Prosecutor may not proceed with the investigation in respect of a crime of aggression, [unless the Security Council has, in a resolution adopted under Chapter VII of the Charter of the United Nations, requested the Prosecutor to proceed with the investigation.]"

The new bracketed language reflects the possibility that the Security Council could refer a situation to the prosecutor requesting him or her to proceed with the

investigation. This is very constructive as it opens the door not to a determination that an act of aggression has occurred (which the Security Council has rarely ever done), but to the Security Council essentially delegating to the prosecutor the job of investigating a situation and, one might presume, pursuing charges of the crime of aggression against individuals. There remains a bit of constructive ambiguity here, as the new language is not requiring the Security Council resolution to state that an act of aggression has occurred or even to describe the situation of atrocity crimes as necessarily constituting aggression. But I read it to mean the Security Council has to specify in the text of the Chapter VII resolution that the prosecutor is to investigate the crime of aggression.

Alternative 1 as now drafted with bracketed language is a remarkable shift and one that should be seen as encouraging to the Permanent Members of the Security Council. It actually keeps Alternative 1 in play before the Review Conference, at least until Friday. I remain skeptical that even such improved language can turn the tide against Alternative 2, which has had such overwhelming support among delegations here in prior days. But we shall see.

Alternative 2 has been revised in the non-paper to require that the authorization for commencement of an investigation by the prosecutor must be granted by the Pre-Trial Division (consisting of all of the Pre-Trial judges) and not just the smaller Pre-Trial Chamber. This revision reflects an earlier proposal that had been stated as a footnote. This should give some additional comfort to skeptics of Alternative 2 by requiring a larger number of judges to approve of the prosecutor's investigation of the crime of aggression in the event the Security Council does not make a determination.

Alternative 2 also now includes a final bracketed clause that permits the prosecutor's investigation (authorized by the Pre-Trial Division) to proceed only if the Security Council does not decide otherwise. The provision reads:
"(Alternative 2) 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 does not decide otherwise.]"

The bracketed clause is a "red light" that invites the Security Council to "decide" that the investigation proceeds no further. The form in which such a decision can be taken is left ambiguous, which provides some flexibility for the Council in the future. This is a very constructive compromise provision, one that might bridge the divide to the Permanent Members of the Security Council. The bracketed wording confirms the primacy of the Council on matters of aggression, while leaving intact the Pre-Trial Division's role and thus acknowledging, if ever so indirectly, that the Council does not have exclusive authority (particularly in judicial matters) regarding aggression. This is the point so many delegations stressed, and this revision accommodates that point of view while protecting Council equities.

The new Article 15ter, which covers Security Council referrals under Article 13(b) of the Rome Statute, has been greatly simplified. The core principle to bear in mind here is that the Security Council must adopt a Chapter VII resolution to refer a situation of aggression to the prosecutor and when it does so, the Council can stipulate coverage of not only States Parties that have ratified the amendments, but also States Parties that have not so ratified the amendments and non-party States.

The new operative Section 2 of Article 15ter reads: "The Court may exercise jurisdiction only with respect to crimes of aggression committed at least five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty State Parties." This provision simply mirrors what the resolution confirms in operative paragraph 1 regarding the temporal roll-out of liability for the crime of aggression.

Thus, Article 15ter no longer requires that there be a separate determination on an act of aggression by the Security Council, as the Chapter VII referral resolution essentially addresses that point. The Council can act as it chooses, but if it adopts such a resolution it can word that resolution as an Article 13(b) action referring a situation of aggression to the prosecutor.

Finally, a revised Annex III to the resolution covering understandings to the amendments introduces the five year/30 State Parties temporal factor into two key components of the understandings. First, Understanding 1 delays ICC jurisdiction

for a Security Council referral until at least five years after the Review Conference and only when 30 States Parties have ratified the amendments. That removes any concern that suddenly, as of Friday evening, the Court would be open for business on the crime of aggression if the Security Council referred a situation of aggression to it. There had been that theory and concern, but this revision eliminates that possibility.

Understanding 3 ensures that the principle of non-retroactivity of criminal jurisdiction is upheld. It reads: "It is understood, in accordance with article 11, paragraph 1, of the Statute, that the Court has jurisdiction only with respect to crimes of aggression committed five years after the adoption of the amendments on the crime of aggression and one year after the ratification or acceptance of the amendments by thirty States Parties." So there is no need to worry about reaching back to July 1, 2002, when the ICC was operationalized, as the start point for the temporal jurisdiction over the crime of aggression. An Article 12(3) declaration by a non-party State cannot somehow trigger the Court's jurisdiction over the commission of the crime of aggression prior to this temporal start point, assuming that Understanding 3 is fully respected by the ICC judges in an interpretive exercise.

All of this detail should not obscure the reality that Ambassador Wenaweser's non-paper tonight is a momentous document, one that has the potential of finally operationalizing the crime of aggression under the Rome Statute. There is compromise language that bridges long-held and divergent points of view.

The last international prosecutions for crimes against the peace, or aggression, occurred at Nuremberg and Tokyo 65 years ago. On Friday, June 11, 2010, we may witness approval of amendments that launch the International Criminal Court on a path towards similar prosecutions of the crime of aggression in the future. For me, it has been a 17 year journey that began in 1993. I was senior counsel to U.S. Permanent Representative to the United Nations, Dr. Madeleine Albright, and it was my task to introduce and explain the crime of aggression to relevant federal agencies in the Clinton Administration as the U.N. International Law Commission began to incorporate the crime into its draft of the statute for an international criminal court (which was adopted by the ILC in 1994).

I do not know yet what will transpire on Friday in Kampala, but I will watch it with great interest and reflection on all that has transpired over the years.