June 12, 2010

Adoption of the Amendments on Aggression to 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).*

June 12, 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.

Early in the morning of Saturday, June 12, 2010, the Assembly of States Parties reached agreement to amend the Rome Statute of the International Criminal Court so that the crime of aggression will be activated for purposes of prosecution in the future. I will leave to others to describe the hourly drama of the evening stretching into the early morning hours. Here I explain the final components of the compromise that achieved consensus in the conference hall, and this explanation flows from my blog of Friday afternoon posted earlier.

The temporal jurisdiction of the ICC always has been one of the more difficult concepts to understand, as this is a treaty that has many different trigger points for activation of liability for individuals and for the responsibilities of States

Parties, as well as the rights of non-party States. So it was not surprising that in the final hours the entire exercise on the crime of aggression would settle on when the crime would be activated under the Rome Statute. But that is where the compromise finally was struck.

First, the States Parties resolved in the sixth preambular clause of the enabling resolution "to activate the Court's jurisdiction over the crime of aggression as early as possible." This is an aspirational expression of the Assembly of States Parties to take action to ratify or otherwise accept under domestic legal procedures the amendments adopted in Kampala. Though non-binding in and of itself, it is an important signal to the political branches of governments to move forward on locking in the amendments so that the State Party is covered. It also is important to achieve the 30 State Party ratification/acceptance requirement of Section 2 of new Articles 15bis and 15ter.

There is a new Section 3 of new Article 15bis (State Party referrals and proprio motu prosecutor investigations) that sets forth the trigger procedure for activating the temporal jurisdiction of the Court over the crime of aggression for Section 13(a) and (c) initiatives. New Section 3 delays implementation of jurisdiction over the crime of aggression until January 1, 2017. After that date, the Assembly of States Parties have to meet and agree by two-thirds vote (Article 121(3) of the Rome Statute) to activate the crime of aggression. There also has to be at least 30 States Parties that have ratified or otherwise accepted the amendments on aggression one year prior to the date of the Assembly of States Parties affirmative vote in order to move forward with activation of the crime. This requirement arises from Section 2 of new Article 15bis, which states: "The Court may exercise jurisdiction only with respect to crimes of aggression committed on year after the ratification or acceptance of the amendments by thirty States Parties."

It is possible that if by the date of the Assembly of States Parties vote following January 1, 2017, the magic number of 30 ratifying/accepting States Parties had not yet been reached and the one year waiting period has not yet expired, then the Assembly of States Parties still could take the two-thirds vote for activation, but it could not be effective until the 30-State Party ratification/acceptance requirement (plus one year) had been met. I would be

surprised if, by January 1, 2017, the 30-State Party requirement will not have been met. There will be mounting pressure, particularly from the non-governmental groups and certain States Parties, on that number of States Parties to achieve the task by January 1, 2016 (to allow for the one year waiting period).

The number of 30 ratifying/accepting States Parties is not surprising, but it may be challenged as standing in opposition to the requirements of Article 121(4) of the Rome Statute for new amendments. The count under that provision is 7/8ths of all States Parties must ratify/accept the new amendment before it enters into force. This has been debated throughout the last two weeks in Kampala, with the Japanese delegation repeatedly stressing the importance, for any amendment of the jurisdictional filters of the treaty, to adhere to the high bar of Article 121(4). The alternative view, which prevailed, is that all of the amendments fall under Article 121(5) procedures as they are all integral to bring the crime of aggression into force. Of course, the procedures adopted in Kampala stipulate additional procedures to the Article 121(5) rules for amendments of new crimes. In particular the 30-State Party ratification/acceptance rule for the crime of aggression is a new twist to the formula. There will be much commentary on this in years to come, of course, but I doubt judges will be seized with it. Once the Article 15bis or Article 15ter requirements are met, since they are tougher than Article 121(5), the Court will be seized with a case that certainly meets the lower threshold established by Article 121(5). The real issue will be whether defense counsel seeks to achieve a ruling on Article 121(4) requirements for the crime of aggression, and what was adopted in Kampala, in defense of their clients charged with the crime.

In an identical vein, the same temporal trigger procedure is imposed on the Security Council under its Section 13(b) referral procedures, as set forth in new Article 15ter. New Section 3 of new Article 15ter reads: "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." On the reasoned assumption that States Parties will ratify/accept all of the crime of aggression amendments when their respective governments act affirmatively on the matter, we can expect symmetry for temporal jurisdiction on the crime of aggression for all three categories of referral/investigation under Article 13 (State Party referral,

Security Council referral, and proprio motu prosecutor investigations approved by the Pre-Trial Chamber).

New Section 3 of new Article 15ter thus removes the automatic Security Council activation of the Court on the crime of aggression which had circulated as a proposal earlier in the week. Nothing on the crime of aggression will be activated earlier than the year 2017.

Thus, the final compromise and the final text of the approved amendments on aggression was officially adopted early this morning by the Assembly of States Parties. Much hard work lies ahead, of course, to ensure the necessary 30 ratifications/acceptances by States Parties prior to January 1, 2016 (if the aim is to move as soon as possible to activate the crime) and to constitute the Pre-Trial Division, consisting of all of the Pre-Trial Chamber judges, so that there is proper competence in international law and, indeed, the law of war among the judges to examine acts of aggression and the crime of aggression in the event the Security Council does not reach any determination of an act of aggression as explained in Sections 6 and 7 of new Article 15bis (for State Party referrals or proprio motu prosecutor investigations) and the Pre-Trial Division is seized with the issue under Section 8 of new Article 15bis. Furthermore, the Office of the Prosecutor of the International Criminal Court will need to be staffed up with highly competent lawyers and experts in the law of war and military operations (including those with former careers in the armed services) in order to undertake investigations and prosecutions of the crime of aggression. Of course, these factors ultimately will become a budget issue for the Court.

The historical significance of these developments cannot be understated. We have reached yet another plateau in the development of international criminal law and there will be many more to scale in the years ahead, including on the crime of aggression. But this is truly one giant leap. Perhaps, just perhaps, the action in Kampala will finally lock in a credible means to holding powerful individuals, those who intentionally launch massive acts of aggression, accountable for their actions and to instilling, over the years, greater deterrence to the aggressive instincts of insecure leaders. There are those who will be impatient with the wait until at least 2017, but I think in the long view of the future, and of history itself, that is a very tolerable and pragmatic wait.