

THE CRIME OF AGGRESSION: COMPLEXITIES IN DEFINITION AND ELEMENTS OF CRIME

Maskun*

Department of International Law, Faculty of Law Universitas Hasanuddin, Makassar
Jalan Perintis Kemerdekaan Km. 10 Tamalanrea, Makassar, Sulawesi Selatan 90245

Abstract

The infamous complexity of having a proper definition for crime of aggression began a long time ago. A working definition has been discussed by experts and scholars from time to time. However, they have not reached into a common understanding, including the International Law Commission. The amendment to the Rome Statute, taking place on June 12, 2010, was expected to deal with the problems of definition. In addition it will also be a guidance to categorize such a crime as a crime of aggression, particular in terms of elaboration of elements of crime of aggression.

Keywords: *crime of aggression, elements of crime.*

Intisari

Kompleksitas pendefinisian kejahatan agresi telah terjadi sejak beberapa tahun yang lalu. Definisi kejahatan agresi telah diperdebatkan oleh para ahli termasuk didalamnya Komisi Hukum Internasional, namun hingga kini perdebatan terus terjadi. Hasil amandemen atas Statuta Roma yang berlangsung di Kampala Uganda 12 Juni 2010 akan menjadi jalan keluar untuk mengatasi perdebatan dimaksud. Di samping itu, amandemen tersebut dapat menjadi rambu-rambu dalam menguraikan elemen kejahatan agresi, sehingga kejahatan yang diduga sebagai kejahatan agresi dapat diuraikan dengan takaran yang baku (*standard*) menurut hukum internasional.

Kata Kunci: kejahatan agresi, elemen kejahatan.

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* Correspondence address: maskunmaskun31@gmail.com.

A. Introduction

Crime is not a new concept in the history of human civilization. In the moment of human creation the Devil defied God's decree that all creatures bow down to his new creation, human. This defiance was then furthered into the promise by the Devil to persistently tempt humans until the end of time. The conflict of interests between humans and the Devil is viewed as the embryo of crime stemming from jealousy, pride and rage. In its further stages of development, the modus operandi of crimes advanced as human civilization flourished. Crimes and the existence of society become 'two sides of the same coin'. In this context Agus Raharjo¹ explained that crimes in fact grow and develop within the society, for there will be no crime without the society.

The development of theories of crime has also been significant, yet that does not mean that crime will vanish from the face of the earth. This is because crime is human nature, and it will keep developing significantly in line with the development of the society. This is almost in accordance with Freud's² argument, which is that the (human's) desire to destruct is just as strong as the desire to love. Freud may have been right, but there was a subsequent argument which states that the balance between the desire to destruct and that to love can be influenced by the human surroundings (external factor). Lorenz³ in his argument put forward that human aggression is an instinct driven by an eternal energy source; not always caused by external stimuli. Therefore,

it can be concluded that destructiveness (crime) always exists in each human; the problem is how to minimize the very natural potential lying within every individual. In this case said destructiveness will also be influence by the human surroundings.⁴

The crime of aggression is one of the crimes which displays human's aggressive side which tends to destruct. According to history, the crime of aggression has occurred all throughout ancient civilization, the Middle Ages and the modern era,⁵ but none of the perpetrators were given a legally certain punishment – this is due to the fact that stipulations regarding aggression are still very crucial and complex, as well as invoking a variety of interpretations. For example: the North Korean aggression of South Korea, the World War II aggressions – which later gave birth to the Nuremberg Trials, the Iraqi aggression of Kuwait in the mid-90s, the American aggression of Afghanistan, and many other cases in which it was indicated that the aggression was conducted with a technological basis.

Recent examples of aggression can be seen, inter alia, in the 2005 outsourcing by the Chinese government to commit cyber-piracy against the United States.⁶ In 2007 Estonia sustained a cyber-attack, suspected to have been Russian,⁷ which paralyzed its governmental and trade networks. Approximately one million government computers were infected in the Distributed Denial-of-Service (DDoS) attacks.⁸ Similar DDoS attacks happened in 2008 during the war between Georgia

¹ Agus Raharjo, 2002, *Cyber Crime: Pemahaman dan Upaya Pencegahan Kejahatan Berteknologi*, Citra Aditya, Bandung, pp. 29-30.

² Erich Fromm, 2000, *Akar Kekerasan*, Pustaka Pelajar, Jakarta, p. xv.

³ *Ibid.*, p. 8.

⁴ See David B. Henry, *et al.*, "A Return Potential Measure of Setting Norms for Aggression", *American Journal of Community Phycology*, Vol. 33, No. 2, June 2004, p. 131. In this case Henry *et al.*, argued that the social context plays a significant role in the development of aggression and violence.

⁵ The characteristics of the crime of aggression are always based on the Nuremberg Trials, which have been a form of references in International Criminal Law. Donald M. Ferenz put forward a scientific proof that a Swiss legal scholar Emmerich de Vattel in his book the Law of Nations in 1758 argues that the characteristics of the crime of aggression have induced horror, bloodshed, theft, rape and other forms of crime. In the end the perpetrators were deemed guilty of violating general human rights and threatening/breaching the peace. See Donald M. Ferenz, "The Crime of Aggression: Some Personal Reflections on Kampala", *Leiden Journal of International Law*, Vol. 23, No. 3, 2010, pp. 905-908.

⁶ James P. Farwell and Rafal Rohonzinski, "Stuxnet and the Future of Cyber War", *Survial*, Vol. 53, No. 1, February-March 2011, p. 26.

⁷ Katherine C. Hinkle, "Countermeasures in the Cyber Context: One More Thing to Worry About", *YJIL Online*, Vol. 17, No. 4, Fall 2011, p. 13.

⁸ *Ibid.*

and Russia, in which Moscow was the base for multiple campaigns of the Russian army.⁹

Similarly, the Iranian nuclear facility in Natanz was attacked by the computer virus Stuxnet, paralyzing approximately 60,000 computers.¹⁰ It was very dangerous that the uranium plant was targeted – not only did it violate Iranian sovereignty, it also compromised the safety of the human civilization. According to Kevin Hogan, Senior Director of Symantec, 60% of the infected computers in the world are located in Iran and the main target of the attacks is the Iranian government's nuclear installation.¹¹ The Russian computer security company Kaspersky Lab concluded that such sophisticated attacks can be done “with State support” and it was suspected that Israel and the United States might be involved.¹²

Unlike Stuxnet, which infected computers and networks, at the end of May 2012 a new type of virus called ‘Flame’ was found to have been developed as a spying agent by way of infiltration to and exfiltration of information into computers and networks. Countries have been developing Flame for intelligence purposes toward one another.¹³

Even with the abovementioned development, the perpetrators of aggression cannot

consequently be punished. This is on account of the complexities in the definition of the crime of aggression, which has from time to time undergone debates, making it difficult in finding uniformity of opinion the way it is with the other international crimes: genocide, crimes against humanity, and war crimes.¹⁴ This will be the focus of this essay: the complexities in definition and the elements of the crime of aggression.

B. Discussion

1. Complexity in Definition of the Crime of Aggression

The crime of aggression is not generally mentioned in the Charter of the United Nations (UN). However, up to now in dealing with perpetrators of international crimes, including the crime of aggression, the UN Member States resort to Article 2(4) of the UN Charter:¹⁵

“All members shall refrain in their international relation from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.”

This Article is viewed as a way of the UN Member States in making an assessment of whether a State has committed the crime of

⁹ James P. Farwell and Rafal Rohonzinski, *Op.cit.*, p. 26. See also UN News Centre, “Estonia Urges UN Member States to Cooperate Against Cyber Crimes”, <http://www.un.org/apps/news/story.asp?NewsID=23977&Cr=general&Cr1=debate&Kw1=general+assembly&Kw2=&Kw3>, accessed on 05 October 2012.

¹⁰ James P. Farwell and Rafal Rohonzinski, *Op.cit.*, pp. 23-26. Stuxnet is a computer worm, whose existence was found in July 2-1. This malware targets the Siemens software and other software in the Windows operating system. This was not the first time a cracker targets the industry system, but this is the first malware found to be spying and disrupting the industry system, as well as the first one to attach the Programmable Logic Controller rootkit. The worm initially spread sporadically, but contains specialized malware contents designed only to target the Siemens Supervisory Control and Data Acquisition (SCADA) system, which controls and supervises specific industry systems. Stuxnet infected the PLC by modifying the Step-7 software used to reprogram the software.

¹¹ Reuters, “2-Cyber Attack Appears to target Iran-tech Firms”, <http://www.reuters.com/article/2010/09/24/security-cyber-iran-idUSLDE68N1OI20100924>, accessed on 10 October 2012.

¹² *Ibid.*

¹³ David P. Fiddler, “Recent Developments and Revelations Concerning Cyber Security and Cyberspace: Implications for International Law”, *ASIL*, Vol. 16, No. 22, June 2012, p. 1. See also Thomas Erdbrink, “Iran Confirms Attack by Virus that Collects Information”, *N.Y. Times*, 29 May 2012. See also Kim Zeiter, “Researchers Connect Flame to US-Israel Stuxnet Attack”, *Wired.com*, accessed June 2012.

¹⁴ See the types of international crimes as provided by Bassiouni, such as aggression, genocide, crimes against humanity, war crime, unlawful possession or use or emplacement of weapons, theft of nuclear material, mercenaries, apartheid, slavery and slave-related practices, torture and other forms of cruel, inhuman, or degrading treatment, unlawful human experimentation, piracy, aircraft hijacking and unlawful acts against international air safety, unlawful acts against the safety of maritime navigation and the safety of platforms on high seas, threat and use of force against internationally protected persons, crimes against united nations and associated personnel taking of civilian hostages, unlawful use of the mail, attacks with explosives, financing of terrorism, unlawful traffic in drugs and related drug offenses, organized crime, destruction and/or theft of national treasures, unlawful acts against certain internationally protected elements of the environment, international traffic in obscene materials, falsification and counterfeiting, unlawful interference with submarine cables, and bribery of foreign public officials.

¹⁵ See the Charter of the United Nations, Article 2(4). See also Katharine C. Hinkle, *Op.cit.*, p. 12.

aggression. Nevertheless, the fact is that the construction of Article 2(4) has not yet been able to bridge the debates on the definition of the crime of aggression so as to make it a standard reference the way other international crimes have.¹⁶ Therefore, in order to discuss in detail the complexity in defining the crime of aggression we need to look at the flow of history.

The definition of the crime of aggression is indeed very crucial and complex. It has invoked different interpretations both from the many States and the many scholars of international law. In essence, it is suspected that aggression has occurred in armed conflict since centuries ago,¹⁷ yet international law was not explicit in prohibiting the States to commit aggression until the conclusion of the Kellogg-Briand Peace Pact of 1928,¹⁸ and even in the Pact a straightforward definition was not included.¹⁹

A proposal to define the crime of aggression was once put forward by the Soviet Union in 1933 during a disarmament conference held on its initiative.²⁰ In this conference the Soviet government submitted its report to the Security Committee on 24 May 1933 containing a draft Convention and its Protocol. The Soviet Union recommended to its neighbouring States and the States who have signed it on 3 July 1933²¹ the following draft definition, comprising such actions as: a) A declaration of war against another State; b) Armed invasion, with or without a war against the territory of a State; c) Attacks through land,

sea and air of a territory, ships and airplanes of another State; d) Blockade at the shores or ports of another State; e) Aide toward an armed troupe formed in the territory of a State and occupying the territory of another.

Following this Soviet-backed conference the attempt at defining the crime of aggression was followed through by experts, including at the end of World War II at the Nuremberg Trials, where the crime of aggression at that time was referred to as crime against peace, which is the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreement or assurances, or participation in a common plan or conspiracy for the accomplishment of any foregoing.”²²

The formulation for the crime of aggression in the Nuremberg Trials was a source of reference by the States, even though of course it needed improvement.²³ Subsequently the UN through a Special Committee established to define the definition of aggression submitted a definition of 8 articles to the UN General Assembly in April 1974.²⁴ The resulted General Assembly Resolution 3314 (XXIX) of 14 December 1974 is regarded as a legal document.²⁵ Article 1 of this Resolution states:

“Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.”

¹⁶ See Article 5 of the Rome Statute on the International Criminal Court, which provides that (1) the jurisdiction of the Court must be limited into the most serious crimes according to the international community, which in this case are: a) genocide; b) crimes against humanity; c) war crimes; d) crime of aggression. (2) the Court exercise jurisdiction with regards to the crime of aggression subject to Articles 121 and 123 which define and determine the conditions in which the Court can exercise jurisdiction over the crime. These definition and determination must be in accordance with the relevant provisions in the Charter of the United Nations.

¹⁷ See Robert L. O’Connell, “Of Arms and Men: A History of War, Weapons, and Aggression”, in Michael J. Glennon, “the Blank-Prose crime of Aggression”, *the Yale J. of Int’l Law*, Vol. 35, No.71, 2010, p. 72.

¹⁸ See General Treaty for Renunciation of Wars as an Instruments of National Policy Art. I Aug 27, 1928, 46 Stat.2343, 94 L.N.T.S. 57 (hereinafter Treaty for Renunciation of War).

¹⁹ Michael J. Glennon, *Op.cit.*, p.73.

²⁰ See Mattias Schuster, “The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword”, *14 Crim. L.F.*, Vol. 4, No. 1, 2003.

²¹ Sumaryo Suryokusumo, 1987, *Organisasi Internasional*, Universitas Indonesia Press, Jakarta, p. 26.

²² Michael J. Glennon, *Op.cit.*, p. 74.

²³ Antonio Cassese, “On Some Problematical Aspects of the Crime of Aggression”, *Leiden JIL*, Vol. 20, No. 1, 2007, p. 842.

²⁴ Sumaryo Suryokusumo, *Op.cit.*, p. 26.

²⁵ M. Cherif Bassiouni, “Historical development of Prosecuting Crimes Against Peace”, in M. Cherif Bassiouni, 1987, *International Criminal Law, Vol. III Enforcement*, Transnational Publishers Inc., New York, p. 27.

This formulation no longer considers the problem of recognition or whether the State is a UN Member. Besides, the term “State” also includes a “group of States”, whereas sovereignty, territorial integrity and political independence are the essential attributes of a State as an integrative entity as well as a subject of international law.²⁶

Article 2 of this Resolution speaks with regard to the fact that the first use of armed forces by a State in such a manner against the UN Charter will serve as evidence of aggression, even though the Security Council may decide that the determination that an act of aggression has been committed is not justified in light of the circumstances.²⁷ Article 3 provides the acts which, irrespective of the existence of any declaration of war, shall be deemed as act of aggression:²⁸

a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; c) The blockade of the ports or coasts of a State by the armed forces of another State; d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; g) The sending by or on behalf of a State of armed bands,

groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Article 4 provides that the aforementioned list of acts is not exhaustive and that the Security Council can determine any other act in accordance with the Charter, whereas Article 5 of the Resolution states that: a) No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression. b) A war of aggression is a crime against international peace. Aggression gives rise to international responsibility. c) No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 7 regulates the following:

“Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.”

This formulation for aggression ended up passing unanimously at the General Assembly in its session on 14 December 1974, although there are still views that the definition contained therein is still imperfect and not inclusive so as to cause multiple interpretations. The most important is how the UN can guarantee that the act of aggression will not be conducted against a State and how the UN can guarantee the existence

²⁶ Suryokusumo, *Op.cit.*, p. 26.

²⁷ *Ibid.*

²⁸ See Resolution 3314 (XXIX) of the United Nations General Assembly 14 December 1974.

of sanctions for the States which have threatened the peace, breached the peace, or committed an act of aggression.²⁹

Another doubt-inducing question arising from the definition of aggression based on this Resolution is the absence of mention on the individual and State responsibility in the crime of aggression.³⁰ This is due to the fact that the Resolution 3314 differentiates acts of aggression requiring international responsibility with war aggression delivered as crimes against peace. In this case the Resolution has discounted individual responsibility in the act of aggression.³¹

Another thing scholars debated upon was the fact that the definition of aggression was only contained in a UN General Assembly Resolution, therefore making its legal powers unclear. A General Assembly Resolution is *externacorporis* in nature, in that it is recommendatory and does not have binding legal powers the way a Security Council Resolution has. Criticisms toward this General Assembly Resolution have motivated the UN's International Law Commission (ILC) to formulate the definition for the crime of aggression by incorporating the principles of the Nuremberg Tribunals into a Draft Code for Crimes against Peace in 1996. Here the ILC quoted the Nuremberg principle as well as the UN Charter, the base of which is individual responsibility, and not the General Assembly Resolution 3314.³² This 1996 attempt still did not manage to produce a standard formulation, because after World War II there was no international tribunal established to try States under charge of the crime of aggression. The UN Security Council preferred establishing international tribunals to settle international crimes occurring in the Former Yugoslavia and

Rwanda. These tribunals did not include the crime of aggression as one of its mandate crimes, while crimes of aggression were suspected to have occurred in both Rwanda and the former Yugoslavia.³³

The attempt at perfecting the definition for the crime of aggression continued in the International Criminal Court (ICC), which began operation in 1998 and whose jurisdiction includes the crime of aggression. Article 5 of the Statute of the ICC provides that the jurisdiction of the Court shall comprise only of the crimes considered by the entire international community to be the most serious, which include the following crimes: genocide; crimes against humanity; war crimes; and crime of aggression.

Article 5(2) further states that the Court shall exercise jurisdiction over the crime of aggression subject to the provision of Articles 121 and 123, which explain that the Court shall first determine the definition of the crime the conditions in which it can exercise its jurisdiction with respect to this particular crime. Such determination must be in accordance with the relevant provisions in the Charter of the United Nations. The definition as mandated by Article 5 of the ICC Statute was very difficult to materialize. This was why there were efforts at amending Article 5(2) of the Statute. A Special Working Group on the Crime of Aggression (SWGCA) was subsequently tasked to submit a proposal on the crime of aggression.

After a long and winding road the SWGCA Review Conference, which had been held since 2002, formulated a definition for the crime of aggression in 2010. Annex I of the amendment to the Rome Statute provides for the deletion of Article 5(2). The formulation in Article 5(1) was

²⁹ Quincy Right, "the Preventive of Aggressions", *AJIL*, Vol. 50, No.1, 1956, p. 514.

³⁰ Antonio Cassese, *Op.cit.*, p. 862.

³¹ Karl M. Fletcher, "Defining the Crime of Aggression: Is There an Answer to the International Criminal Court's Dilemma," *Air Force Law Review*, Vol. 65, No. 3, 2010, p. 238.

³² *Ibid*, p. 239. See also Antonio Cassese, *Op.cit.*, p. 862. Article 16 of the Draft Code for Crimes against Peace stipulates that, "An individual who as leader or organizer actively participates in orders the planning, preparation, initiation or waging of aggression committed by a state, shall be responsible for a crime of aggression" (UN Doc.A/51/332).

³³ Karl M. Fletcher, *Op.cit.*, p. 240.

then incorporated into Article 8 bis Crime of Aggression, which in entirety states that:³⁴

- (1) For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in position actively to exercise control over or to direct the political or military action of a state, of act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United nations.
- (2) For the purpose of Paragraph 1, “act of aggression” means the use of armed forced by a state against the sovereignty, territories integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United nations.

In this context the SWGCA identified three primary elements in defining the crime of aggression, which are: commission by an individual; state action in the commission of aggression; and a leadership crime.³⁵

At a glance the definition from the SWGCA Conference has accommodated the long-standing interests of the many parties regarding the definition of aggression. Nevertheless, debates remain on-going especially with regard to the jurisdiction of the Court. Article 15 of the ICC Statute says that the jurisdiction of the Court shall be effective on the Member States following their acceptance of the amendment one year after the deposit, whether in the form of ratification or acceptance by third party. In case the Member States have not or do not accept the amendment, the Court cannot exercise its jurisdiction over the crime. This means, the jurisdiction of the Court does not apply to States who have not ratified the Statute when a crime of aggression occurred to its national or in its territory.³⁶

Beside the complexities in the definition of crime and the jurisdiction of the Court, the other thing much debated upon with regard to the definition of the crime of aggression is the commission of the crime through technological means. Additional to the above complexities is the absence of emerging norms, especially in the context of whether cyber-attacks or cyber-wars may qualify as armed attack.

2. Elements of Aggression

Elements of a crime are basically the elaboration of what is formulated in the definition. These elements must be able to be explained in detail and clarity so as to fulfil the elements of the crime in its entirety. If the elements of crime are not fulfilled, it cannot be legally proven that the alleged perpetrator did in fact commit the crime charged against him. In the context of the crime of aggression, the elements are the following:

a) Objective Elements

Customary international law generally prohibits all forms of act of aggression in the context of international wrongful acts or criminal acts. This is pursuant to the definition in the UN General Assembly Resolution 3314 of 1974.³⁷ In this case the objective elements of the crime of aggression include:³⁸ (1) Invasion or attack by the armed forces of a State against the territory of another State or part thereof; (2) Bombing by the armed forces of a State against the territory of another State or the use of any weapon by a State against the territory of another State; (3) Blockade at the port or shore of a State by the armed forces of another State; (4) Armed attack by a State through land, sea or air at the airport of another State; (5) The use of armed forces of a State which are currently in the territory

³⁴ Muladi, 2011, *Statuta Roma Tahun 1998 Tentang Mahkamah Pidana Internasional Dalam Kerangka Hukum Pidana Internasional dan Implikasinya Terhadap Hukum Pidana Nasional*, Alumni, Bandung, p. 314.

³⁵ See the Coalition for the International Criminal Court, “The ICC and The Crime of Aggression”, <http://www.iccnw.org>, accessed 10 October 2012.

³⁶ Kriangsak Kittichaisaree, 2002, *International Criminal Law*, Oxford University Press, New York, p. 420. See also Muladi, *Op.cit.*, p. 314.

³⁷ Antonio Cassese, *Op.cit.*, p. 847.

³⁸ See also Muladi, *Op.cit.*, pp. 313-314.

of another State, with the consent of the receiving State, which do not conform to the conditions expressed in the agreement between the two States or any expansion of presence of the armed forces in that territory not in accordance with the agreement between the two States; (6) Act by a State to allow its territory, under order from another State, to be used by another State to commit an act of aggression against a third State; (7) Send of or on behalf of a State a group of armed troupes or mercenaries who commit against another State armed attacks in such gravity as to strengthen the acts mentioned above or their substantial involvement thereof.

Customary international law seems to consider aggression as an international crime in that it includes planning or organization, or preparation, or participation in the first use of armed force by a State or a non-State entity or other entity against the sovereignty or political independence of another State and against the UN Charter, committed in a large scale and having a serious impact.³⁹ Customary international law puts the responsibility over an act of aggression onto States, for example: the Israeli aggression to Iraq in 1981 was a violation of the prohibition of the use of force. In this case responsibility was not placed upon individual, even though factually the act of aggression was committed as a collective act of individuals.

In the Rome Statute of the ICC the objective elements can be seen in Article 8 bis (Annex II to the Amendment of the Statute): (1) The perpetrator planned, prepared, initiated or executed an act of aggression. (2) The perpetrator was a person in a position effectively to exercise control over or to direct the political or military action of the

state which committed the act of aggression. (3) The act of aggression – the use of armed force by a state against sovereignty, territorial integrity or political independence of another state[...]

These elements are naturally different from what has been formulated in customary international law. This is because now individual can be demanded responsibility over the act he committed, especially in context of the office/position he held in his commission of crime. Therefore, there is a connection between the individual and the State in terms of their responsibilities over the crime of crime of aggression charged against them.

b) Subjective Elements

The subjective elements of the crime of aggression lie in the criminal intent. This intent must be displayed by the perpetrator in the form of his or her participation in the planning and combat. Intent must be based on the awareness of the scope, significance and consequence of the crime of aggression he or she is committing.⁴⁰ In this case the responsibility incurred not only from the State, but can also be from a leading military official or a State official or even an individual with the knowledge of the plan for a crime of aggression. In this context, see also the trials for the war criminals before the international military tribunals at Nuremberg.

A crime of aggression must be done with a special intent on gaining territorial advantage and/or to obtain economic advantage or on direct intervention into the internal affairs of another State. The implementation of special intent can be seen in the General Treaty of Paris for the Renunciation of War, 27 August 1928, known also as the Kellogg-Briand Pact.⁴¹

³⁹ Antonio Cassese, *Op.cit.*, p. 847. See also Muladi, *Op.cit.*, p. 315.

⁴⁰ Antonio Cassese, *Op.cit.*, p. 848.

⁴¹ *Ibid.*

In Article 8 of the ICC Statute it was mentioned that “the perpetrator was aware of the factual circumstances that established [...]” The word “aware” shows the subjective element in which the perpetrator is cognizant of the act he is committing. The word “aware” means the perpetrator has both **intent** and **knowledge**. Article 30 further elaborated the subjective elements by mentioning a “mental element”. This mental element means that an individual must be held responsible for the crime under the jurisdiction of the Court if the material element is committed with intent and knowledge. Intent here refers to the conduct and the consequence thereof, whereas knowledge refers to the awareness that the crime is in the current condition or that a consequence shall entail from the commission of the crime.⁴²

Conduct basically refers to the commission of the crime, while consequence is the result of conduct. However, both of the subjective or material elements often overlap one another. Whereas “conduct” and “consequence” can be clearly defined, “circumstances” is not. “Circumstances” is quite difficult to define, including by the drafters of Article 30. The term “circumstances” has the connotation along the

lines of ‘know it when we see it’, meaning it can be observed once the crime of aggression has been committed.⁴³ Circumstances make up an important legal factor in the environment where the perpetrator committed a crime, including the crime of aggression. Therefore, in the context of Article 30, circumstances refer to contextual circumstances.

C. Conclusion

Complexities in defining the crime of aggression have been developing through the ages. Nevertheless, up to now the debate on the definition for the crime of aggression which satisfies the interests of all parties is still on-going. The definition from the SWGCA Conference is hoped to be able to accommodate the aspirations of the relevant parties with regards to the definition for the crime of aggression, although debates are still on-going with respect to the jurisdiction of the Court. The amended Article 15 of the ICC Statute provides that the jurisdiction of the Court with respect to the crime of aggression shall be effective for the Member States once the amendment is accepted by the States one year following its deposit, whether through ratification or acceptance.

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⁴² Roger S. Clark, “Rethinking Aggression as a Crime and Formulating Its Elements: The Final Work-Product of the Preparatory Commission for International Criminal Court”, *LJIL*, Vol. 15, No. 4, 2002, p. 863.

⁴³ *Ibid.*, p. 867.

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