

# **RESPONSIBILITY FOR AGGRESSION/ THE CRIME OF AGGRESSION**

**CONFERENCE IN CAMPALA –  
BEFORE AND AFTER**



DOMINIKA DRÓŹDŹ

**RESPONSIBILITY FOR AGGRESSION/  
THE CRIME OF AGGRESSION**

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BEFORE AND AFTER**

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**ABBREVIATIONS:**

EC – Elements of Crimes

GA – General Assembly

ICC – International Criminal Court

ICJ – International Court of Justice

ICTR – International Criminal Court for Rwanda

ICTY – International Criminal Court for the former Yugoslavia

NAM states - Non-Aligned Movement

NATO – North Atlantic Treaty Organization

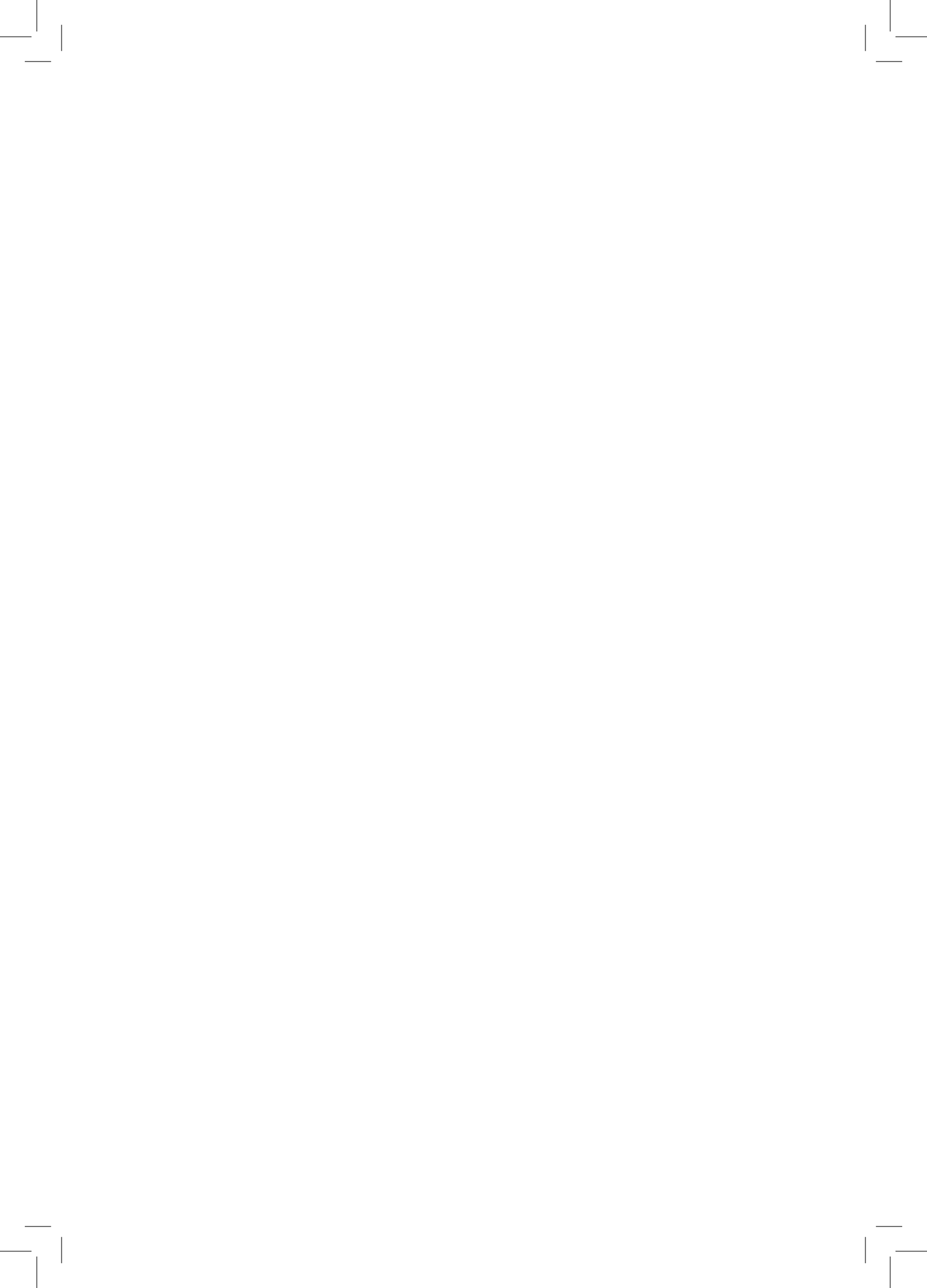
R2P – Responsibility to Protect

SC – Security Council

SWGCA - Special Working Group on the Crime of Aggression

UN – United Nations

WGCA - Working Group on the Crime of Aggression





## GENERAL COMMENTS

The subject of responsibility for aggression is usually linked with the liability of the state, since the aggression against the state – not against an individual – was defined as first. It was the state which was treated as the primary subject of international law, it was granted the rights and obligations, and it bore responsibility. The concept of aggression was established on the basis of public international law, and the UN was responsible for the limited use of military force. Problems with the regulation of principles of state responsibility appear to involve a long process to adapt these rules to the principles of contemporary international law.

An individual is also a subject of international law, but a secondary one. It has not only the rights under international law, but also duties; the responsibility is related to, *inter alia*, international criminal law. In 2001, the General Assembly formulated the memorandum on the provisions concerning the liability of states and on separating the provisions from the regulation on the responsibility attributed to individuals acting on behalf of the state (which would relate to Art. 58 of the Draft Code of Crimes against the Peace and Security of Mankind). Similar wording was used in the draft Art. 4 of the Code of Crimes against the Peace and Security of Mankind.

Individual criminal responsibility stems from the end of World War II, as part of the transformation of international law. As a result of these processes, individuals have become subjects of international law. The result of international law evolution is providing individuals not only with rights, but also responsibilities.

The main feature that distinguishes the crimes of states from the crimes of individuals, listed in a special category of crime, and the related importance of these crimes, is the involvement of the state bureaucratic apparatus in committing these crimes<sup>1</sup>. The title issue, thus, concerns two autonomous legal regimes<sup>2</sup>.

State and individual responsibility regimes may and should be treated separately. It is demonstrated in the Convention on the Prevention and

<sup>1</sup> Cf. N.H.B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford Monographs in International Law, 2005, p. 112.

<sup>2</sup> A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 16.

Punishment of the Crime of Genocide, which separately regulates the obligation of extraditing a natural person or his judgment<sup>3</sup>, while a separate provision stipulates the interpretation and implementation of the Convention, including disputes relating to the state responsibility for genocide<sup>4</sup>.

A crime against peace is included in the international criminal law system as a crime which all others derive from<sup>5</sup>. The basis for the issue is initiating the war and adopting criminal liability for its triggering; the problem has become a subject of interest to the international community in the 20th century. It often relates to the supreme state representatives who are held responsible for the crime of aggression. An additional issue, which should therefore be brought up, is the question of exempting (or the opposite) the persons with immunities from the responsibility. As it is easily noticeable, the state's responsibility and the individual's responsibility overlap each other.

Although the International Law Commission had been looking for common elements for criminalising aggression committed by the state, and the UN General Assembly wanted to combine the idea of the state and individual criminal responsibility trying to find a use for the definition of aggression created by the Assembly in the context of individual criminal responsibility, these attempts turned out to be fruitless, whether due to imprecise definition of international law violations or international act, which provokes questions about a political nature of this act<sup>6</sup>.

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<sup>3</sup> Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide. Cf. N.H.B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford Monographs in International Law, 2005, p. 112.

<sup>4</sup> Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide.

<sup>5</sup> Cf. T. Cyprian, J. Sawicki, *The Nuremberg law*, Warsaw-Krakow 1948, p. 234.

<sup>6</sup> P. Wilson, *Aggression, Crime and International Security; Moral, political and legal dimensions of international security*, Routledge Taylor & Francis Group London and New York, 2009, pp. 84-85.

## 1. OUTLINE OF DEVELOPMENT OF STATE RESPONSIBILITY AND INDIVIDUAL CRIMINAL RESPONSIBILITY IN THE LIGHT OF CRIME OF AGGRESSION

There were some cases of crimes against law and nations which went down in history; the concept was related to the crime of piracy, which, however, as stated, is not a 'true international crime'<sup>7</sup>. Among other crimes of this nature one may include trafficking of women and children, drug trafficking, trade in obscene publications, any destruction or damage to submarine cables and foreign currency counterfeiting.

International crimes committed by individuals have always derived from the actions of the state, because its creators were individuals or national authorities, or the crimes resulted from the policy or choices indirectly supported by the state<sup>8</sup>. This connection between the individual and the state is highlighted in case of the crime of aggression.

Initially, the first theories considered the individual as an agent of the country. The responsibility, thus, was borne by the state through its representatives. Currently, this concept should be considered obsolete. It led to the conclusion that only states bear responsibility<sup>9</sup>. Nowadays, committing an international crime by the individual may simultaneously mean committing a crime by the state.

If a state encourages or at least tolerates forgery, and in this way it is involved in committing that act, then in these circumstances forgery becomes an interstate crime. This principle was adopted in 1887. According to the principle: 'The law of nations requires each national government to maintain precautionary principles for preventing the prohibited acts committed in the territory of the state against another state, and it is responsible to punish the country which under its jurisdiction counterfeits

<sup>7</sup> M. Mocavain, *International criminal jurisdiction*, Student Law Review, no. 32, 1951-1952, p. 35.

<sup>8</sup> U. Leanza, The Historical Background [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 8.

<sup>9</sup> Cf. all paragraph: A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 16.

money of another state'<sup>10</sup>. Under the U.S. law, forgery – similarly to piracy – is treated as an organized crime offence. The cases when the individual was considered as an agent of its own state, which was held responsible on the basis of classical international law, could be assessed as exceptional<sup>11</sup>. Today, although international crimes are 'committed usually by state authorities or the state turning a blind eye to or tolerating the crime is responsible for it, the state's responsibility for the action forming an international crime is not a sine qua non condition for the existence of an international crime'<sup>12</sup>. It is not as much about whether the state can or not be responsible for a prohibited act, but it is about whether you can or not continue the repression, even if in some cases the state must be held responsible<sup>13</sup>. It means that other circumstances come into play, e.g. those related to the need to ensure the state peace and safety, i.e. the best solution for people living in that country<sup>14</sup>.

The responsibility of the individual was considered under national law<sup>15</sup>. The unity of the state in international law enabled the adoption of such solution. Simultaneously, the individual acting on behalf of the state government could not assume personal responsibility<sup>16</sup>. Due to hierarchical character and subordination, which were the inspiration for the international criminal law,

<sup>10</sup> M. Mocavanin, *International criminal jurisdiction*, Student Law Review, no. 32, 1951-1952, p. 35.

<sup>11</sup> A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford University Press 2009, p. 16.

<sup>12</sup> U. Leanza, *The Historical Background*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 9.

<sup>13</sup> Ibidem.

<sup>14</sup> Cf. H. M. Weinstein, L. E. Fletcher, P. Vinck, P. Hazan, *Stay the Hand of Justice: Whose Priorities Take Priority?*, [in:] R. Shaw, L. Waldorf, P. Hazan (eds.), *Localizing Transitional Justice. Interventions and Priorities after Mass Violence*, Stanford University Press, 2010; K. Chiedu Moghalu, *Prosecute or Pardon, Between Truth Commissions and War Crimes Trials*, [in:] J. Currey, *Peace v. Justice. The dilemma of transitional justice in Africa*, University of KwaZulu – Natal Press, 2009; M. Affa'a Mindzie, *Transitional Justice, Democratisation and the Rule of Law*, [in:] J. Currey, *Peace v. Justice. The dilemma of transitional justice in Africa*, University of KwaZulu – Natal Press, 2009; *A Path to Peace and Justice: Ghana's National Reconciliation Commission in Retrospect*, [in:] J. Currey, *Peace v. Justice. The dilemma of transitional justice in Africa*, University of KwaZulu – Natal Press, 2009; J. L. Hirsch, *Peace and Justice: Mozambique and Sierra Leone Compared*, [in:] J. Currey, *Peace v. Justice. The dilemma of transitional justice in Africa*, University of KwaZulu – Natal Press, 2009; K. Greenwalt, *Amnesty's Justice*, [in:] R. Rotberg, D. Thompson, *Truth v. Justice*, Princeton University Press, 2000.

<sup>15</sup> U. Leanza, *The Historical Background* [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 8.

<sup>16</sup> Cf. all paragraph: A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford University Press 2009, p. 16.

national criminal law is not directly translated to international criminal law; the international law is based on the principle of sovereign equality of its members<sup>17</sup>.

The principle adopted for the purposes of international criminal law, which allows the use of criminal law in international law, was called 'the principle of public law sanctioned by the use by civilized nations' as defined by Webster in 1841 in the MacLeod case which long remained a leading reference protecting against court consideration of the case and relating to the bodies operating under the mantle of power. The case was interpreted as a proposal to treat the state as the only entity that could assume responsibility for international acts of evil committed by one of its agents<sup>18</sup>. International law, however, does not refer to the sanction in its criminal meaning. In the face of international crimes, the sanction is to restore the violated law, such as to prevent crimes (in case of aggression – e.g. to prevent the initiation of wars) or to eliminate the consequences of crimes<sup>19</sup>.

Kelsen assumed that an example of collective responsibility is typical of primitive societies. Instead, he proposed a step towards creation of individual responsibility based on guilt which eventually was to replace the casuistic collective responsibility of the state. Kelsen anticipated that international and national law would be replaced by the unity of the universal community of law. The Kelsen's assumption turned out to be too far-fetched, as even though individual criminal responsibility derived from the responsibility of the state, still it was not the time for it to stand apart<sup>20</sup>. The proper time was the need to sentence the perpetrators of the events of 1919.

The need for establishment of an international court to sentence those responsible for the most serious crimes of aggression was noticed at the beginning of the last century in connection with the outbreak of World War I and the magnitude of losses that it brought. At the peace conference

<sup>17</sup> Cf. U. Leanza, *The Historical Background*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate 2005, p. 11.

<sup>18</sup> Cf. all paragraph: A. Bianchi, *State Responsibility*..., p. 16.

<sup>19</sup> Cf. U. Leanza, *The Historical Background* [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 11.

<sup>20</sup> Cf. all paragraph: A. Bianchi, *State Responsibility*..., p. 16. According to the newer concepts, individual responsibility is combined with reparations when the responsibility for the crimes of the state remains insignificant. Although the action against an individual person, whose conduct caused the unjust international act, was listed in Art. 37 of the draft articles on state responsibility as a form of satisfaction which can be used by the evil-making state to meet its obligations by providing reparations, it certainly is one of the consequences that should be associated with the regime of liability provided for in Art. 41 under the provisions on state responsibility. This theory is not consistent with international practice. A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese, *Companion to International Criminal Justice*, Oxford University Press, 2009, p. 16.

in 1919, it was decided for the first time to adopt the principle of the accountability for war crime offenders before the international court.

The issue of accountability for war criminals was finally settled in four articles of Part VII of the Treaty of Versailles<sup>21</sup> (Articles 227-230). The provision of Art. 227 states that: 'The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor'<sup>22</sup> for a supreme offence against international morality and the sanctity of treaties<sup>23</sup>. Therefore, they wanted to set up a special tribunal to try the accused, at the same time assuring him the necessary guarantees essential to the right of defence. Everything ended up only on declaration – the Dutch refused to extradite the Emperor who, therefore, was never tried and lived up to Hitler's rise to power and the birth of the Third Reich.

It is believed that the crime of aggression has its origins in the Treaty of Versailles of 1919, the provisions of which related to the planned trial of Wilhelm II, which, however, never came to effect. Wilhelm II was to be tried for unspecified acts constituting a supreme offense against international morality and the sanctity of treaties. As stated, including the crime in the Treaty was more valuable than its contents. It was acknowledged that the war is a crime and evil. One could interpret it going 'beyond empty words of Art. 227 of the Treaty of Versailles'<sup>24</sup>.

Other German criminals of World War I were to be brought before the German courts or the Allied and Associated States courts, and if they were to be held responsible for crimes against the citizens of several countries – before international courts which were supposed to consist of representatives of the countries concerned. These trials, however, did not come to effect, except for the so called Leipzig trials, which, moreover, were described as a 'Leipzig farce'<sup>25</sup>.

Article 227 of the Treaty was based on a report prepared at the request of the Plenary Session of the Peace Conference of 25 January 1919 by a spe-

<sup>21</sup> The Treaty of Versailles was published in: Journal of Laws of 1920, No. 35, item 200.

<sup>22</sup> As stated above, the thesis of 'commander in chief' responsibility for everything that happened under his power referred to old theories of unjust war and relied on Bellini and Victoria, Vattel and Grotius. They wanted to set up a special court to investigate the responsibility of the commander in chief and believed that the lack of precedents in this case was not an obstacle to its implementation. The law of nations (as public international law was then determined), as opposed to national law, is just being created. Cf. T. Cyprian, J. Sawicki, *The Nuremberg law*, p. 28. M. Mocavainin, *International criminal jurisdiction*, Student Law Review, no. 32, 1951-1952, p. 35. Cf. H. Olasolo, *The criminal responsibility of senior political and military leaders as principals to international crimes*, Oxford and Portland Oregon, 2009, pp. 1-13.

<sup>23</sup> As cited in: T. Cyprian, J. Sawicki, *The Nuremberg law*, p. 14.

<sup>24</sup> R.L. Griffiths, *International Law, the Crime of Aggression and the Jus Ad Bellum*, International Criminal Law Review 2, 2002, Kluwer Academic Publishers. Printed in the Netherlands, p. 303.

<sup>25</sup> Cf. T. Cyprian, J. Sawicki, *The Nuremberg law*, p. 28.

cially created Commission for Accountability of War Makers and implementing punishment<sup>26</sup>. The Commission's report led to the conclusion that Germany and Austria-Hungary violated deliberately the neutrality of Belgium and Luxembourg guaranteed by the Treaty, and planned a war intentionally<sup>27</sup>. In conclusion, the report stressed that it would be desirable to provide future criminal sanctions for serious offenses against basic principles of international law<sup>28</sup>.

In the period between World War I and II, the matter of determining the principles of accountability for international crimes was more of interest to scholars and international law organizations than to national governments or international organizations. Drafts of international criminal codes and international jurisdiction focused on the crime of aggressive war and responsibility for the crime before an international court. But in most of drafts, states were held internationally responsible<sup>29</sup>.

In order to systematise the information presented, it is worth recalling that the definition of aggression was of interest to the Assembly of the League of Nations, starting from its fourth session. The work on definition of aggression resulted in adoption of resolution 3314 at the 29<sup>th</sup> session.

The period between the sessions was dedicated to the concept of the aggressor and the aggression. In the early twenties of the twentieth century, some attempts were made to define the aggressor which was to be expressed in the mutual assistance treaty of 1923 and the so-called Geneva Protocol for the pacific settlement of disputes. These drafts, however, did not meet with wide support. It was not until the beginning of the thirties, during the Geneva Conference on Disarmament, when M. Litvinov brought up that attempts to define the aggressor without prior determination of aggression are doomed to failure. Therefore, one can accede to conclusion that 'the road to hell is paved with good international conventions'<sup>30</sup>.

It seems that lack of definition of sanctions could become a reason to initiate World War II, since the initiation of World War I had met with impunity of perpetrators, which may be proved by failure to punish them<sup>31</sup>. Even proceeding in accordance with the standards of international conventions lacking sanctions for recipients of these standards did not provide stability in the world, since it ensured impunity.

<sup>26</sup> Printed in A.J.I.L. (1920), p. 95.

<sup>27</sup> R.L. Griffiths, *International Law, the Crime of Aggression and the Ius Ad Bellum*, International Criminal Law Review 2, 2002, Kluwer Academic Publishers. Printed in the Netherlands, p. 303.

<sup>28</sup> Ibidem.

<sup>29</sup> Cf. L. Gardocki, *Zarys prawa karnego międzynarodowego*, Warszawa 1985, p. 32.

<sup>30</sup> G. Robertson, *Crimes against humanity*, p.197.

<sup>31</sup> Similarly. T. Cyprian, J. Sawicki, *The Nuremberg law*, Warsaw-Krakow 1948, p. 234.

On the other hand, however, the efforts of theorists of law, international law associations and the UN Commission on war crimes did not remain unnoticed. The outbreak of World War II missed eventually the opportunity to establish the International Criminal Court and the systematic development of the system of international criminal law. Wiser and experienced after World War I, when the principles of repression against war criminals had been developed only after the armistice, the allied governments began to issue statements warning the Germans and announcing the punishment of war criminals, and lawyers started to develop legal principles under which criminals would be brought to justice<sup>32</sup>.

Out of all documents (e.g. agreements, declarations or governmental statements) signed during or after World War II, it was primarily the London Agreement which led to the indictment of the German leaders for crimes under the subject-matter jurisdiction of the ICC. At the London Conference, Justice Jackson stated that 'from the perspective of the United States, the European war was an unlawful attack on international peace and order'<sup>33</sup>.

A concept of crime against peace was, however, created by Finland. This notion was subsequently used while sentencing the leaders for war crimes during the trials in Finland<sup>34</sup>.

The result of declarations, discussions and deliberations was the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the so-called London Agreement)<sup>35</sup> signed on July 8, 1945. In the Article 1, it heralded establishment of the International Military Tribunal for the trial of war criminals<sup>36</sup>. The Annex to the London Agreement was the Charter of the International Military Tribunal<sup>37</sup> (also called the IMT Charter) specifying both the main principles of criminal liability, procedure and structure of the Tribunal. Besides the issue of criminal prosecution of individuals, there was considered a

<sup>32</sup> Cf. T. Cyprian, J. Sawicki, *The Nuremberg law*, p.75.

<sup>33</sup> N. Boister, R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press 2008, p. 119.

<sup>34</sup> Cf. L. M. Surhone, M. T. Tennoe, S. F. Henssonow (ed.), *Nuremberg defense. Defense (legal), Nuremberg Trials., World War II, War Crimes, Nuremberg Principles, Command Responsibility, War of Aggression, Nuremberg Laws, Nuremberg Code*, Betascript publishing 2011, p. 75.

<sup>35</sup> Journal of Laws of 1947, No. 63, item 367. Poland entered the Agreement on September 25, 1945 and ratified it on June 25, 1947. The Agreement came into force on August 8, 1945. Its signatories are 23 states.

<sup>36</sup> In practice, only German criminals were sentenced, besides Seyss-Inquart and Kaltenbrunner (they were both Austrian). Cf. T. Cyprian, J. Sawicki, *The Nuremberg law*, Warsaw-Krakow 1948, pp.46-47 and 60.

<sup>37</sup> Both the London Agreement and the IMT Charter were published in the Journal of Laws No. 63 of 1947. Both legal acts are included in the study by M. Flemming, *International military law. Set of documents*, Warsaw 1978, pp. 371-376.



possibility of accountability of legal persons which were to include the countries on whose behalf, or with whose support, the international crimes had been committed. During the conduct of proceedings by the Nuremberg Tribunal, there was considered a responsibility of the German state and the persons acting on behalf of the state as its officers during the war<sup>38</sup>.

The International Military Tribunal at Nuremberg was supposed to convict, among other things, the perpetrators of the crime against peace which became a subject of consideration on the part of practitioners and theorists of public international law, which in the future developed into international criminal law. The concept of aggression in international public law was of interest to representatives of the doctrine for a long time. Quoting the IMT judgment on Ministries, it was confirmed that ‘aggressive wars and invasions have been violations of international law from time immemorial’. The criminalization of the crime of aggression provided much controversy, as when it was determined that aggression had been committed, then – according to states – it led to the limitation of their sovereignty.

Moreover, as stated by B. Ferencz, at the time of proceedings conducted by the Nuremberg Tribunal it was not specified how to understand the term ‘aggression’<sup>39</sup>. However, in the judgment of the IMT at Nuremberg the chief U.S. prosecutor Robert H. Jackson stated: ‘To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole’<sup>40</sup>. It is believed that it is a reflection of the failures associated with judging the German emperor<sup>41</sup>.

The crime of aggression was included in the IMT Charter, but not without controversy. An aggressive war stemmed from the aforementioned notion of *act*

<sup>38</sup> Cf. U. Leanza, *The Historical Background* [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 10. These concepts were not abandoned; the considerations were continued creating the doctrine representatives and the UN proposals, which presented an idea of the international criminal court authorised to judge natural and legal persons, as well as the states on whose behalf the crimes were committed.

<sup>39</sup> M.A. Shukri, *Will Aggressors Ever be Tried Before the ICC?*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate 2004, p. 34.

<sup>40</sup> The IMT judgment, 1948, vol. 14, par. 318.

<sup>41</sup> Cf. M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: Between States’ Interests the tension and the Pursuit of International Justice*, [in:] *The Oxford Companion to International Criminal Justice*, eds. S. Cassese, Oxford University Press 2009, p. 134, R. L. Griffiths, *International Law, the Crime of Aggression and the Ius Ad Bellum*, *International Criminal Law Review* 2, 2002, Kluwer Academic Publishers. Printed in the Netherlands, p. 303, H. T. King, *Nuremberg and crimes against peace*, *Case Western Reserve Journal of International Law* 2010, vol. 41:273, p. 274 and W. A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the „Supreme International Crime”*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate 2004, p. 18.

*of state*. Until World War II *act of state*, however, had not led to criminal responsibility of individuals<sup>42</sup>. This new approach was primarily based on the work of William C. Chanler, a member of the Secretariat of War, next to Henry Stimson who brought to adoption of U.S. policy, while Chanler, in turn, belonged to the first people who were in favour of adoption of individual criminal responsibility for participation in a war of aggression. Chanler sought to introduce criminal responsibility for initiating a war of aggression. This argument stemmed from Chanler's considerations on the Kellogg-Briand Pact of 1928, under which the war was treated as an instrument of national policy. On 3 January 1945 Chanler's approach was approved by President Roosevelt, and later included into the American proposal concerning war crimes.

The United States was therefore in favour of introducing the crime of aggression in the broad understanding of the concept meaning. France and the Soviet Union initially wanted to exclude this international crime from the IMT Charter, proposing instead the aggression of the Axis Nations against other states<sup>43</sup>. France believed that the crime of aggression was not included in international law. Therefore, according to Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, both of the above-mentioned countries had difficulties in 'capturing' aggression, which was recognized by the authors as opposed to self-defence. These difficulties in identifying the crime shifted to the problem in placing the crime of aggression in the ICC Statute<sup>44</sup>. The definition *a contrario* was as much difficult to specify as the concept of self-defence itself – to which reference should be made – is vague. As indicated in earlier chapters, it is impossible to introduce the definition *a contrario*, if not every use of force by the state entitles to self-defence and not every use of force is aggression, although one can try to defend the thesis according to which self-defence always takes place in the event of an act of aggression committed by the other party to the conflict, and the act of aggression is the basis for self-defence. This thesis, however, is not consistent with the concept of anticipatory defence.

Representatives of the Soviet Union proposed to include within this crime only actual violations of the law by the Germans, without general use. H.T. King stated that perhaps the Russians had feared the extension of charges to the violations committed by them. The French pointed out, however, that they wished to reduce the charges to those set out in the Treaty<sup>45</sup>.

<sup>42</sup> H.T. King, *Nuremberg and crimes against peace*, Case Western Reserve Journal of International Law 2010, vol. 41:273, p. 273.

<sup>43</sup> Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law. Cases and Commentary*, Oxford University Press 2011, p. 238.

<sup>44</sup> Cf. op.cit.

<sup>45</sup> Cf. H.T. King, *Nuremberg and crimes against peace*, Case Western Reserve Journal of Interna-

In a speech before the American Society of International Law Justice Jackson pointed out the need for a fair trial. A suggestion of Samuel Rosenman caused that Justice Jackson took the function of negotiator. The Justice clearly called for the establishment of an international tribunal. Sometimes his views were in conflict with other major powers. Usually, he managed to convince the others to his ideas. Jackson prepared an American proposal concerning crimes against peace and conspiracy to initiate a war of aggression<sup>46</sup>. The term ‘conspiracy’ was established on the basis of laws of the United States of America. It was essential in cases of committing multi-person crimes, such as bank robbery, matters related to organized crime or economic crime. In the Pinkerton case before the U.S. court, it was found that ‘after joining the conspiracy, the actions of one participant may be assigned – in accordance with the law – to each member of the group’<sup>47</sup>. The doctrine created on this basis is called *Pinkerton liability*<sup>48</sup>. According to this concept of conspiracy, it is an *inchoate crime*, and its constitutive element is an agreement between the members of a criminal group. For the first time, the concept of conspiracy and participation in criminal organizations was combined with public international law by the International Military Tribunal at Nuremberg<sup>49</sup>.

A British delegate E.L. Woodward found this concept faulty. He pointed out, moreover, that it is difficult to infer the intention of diplomatic documents. Similarly to the Russian and French delegation, he believed that it would be better to concentrate on war crimes and other offences<sup>50</sup>. As a result, however, it was assumed that Article 6 of the IMT Charter would provide a criminal liability for ‘complicity in the plan or conspiracy for the accomplishment of any of the above acts’<sup>51</sup>. France and the Soviet Union did not agree, therefore, to include conspiracy to initiate a war of aggression in the Charter, as the conspiracy had not been included in the Napoleonic Code. Jackson managed, however, to overcome the countries reluctance to conspiracy as an independent offense<sup>52</sup>.

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tional Law 2010, vol. 41:273, p. 276.

<sup>46</sup> Cf. H.T. King, *Nuremberg and crimes against peace...*, p. 276.

<sup>47</sup> *Pinkerton v. United States Case*, 328 U.S. 640 (1946) [for:] J. D. Oblin, *Incitement and conspiracy to commit genocide* [in:] P. Gaeta (ed.), *The UN Genocide Convention. A Commentary*, Oxford University Press 2009, p. 209.

<sup>48</sup> J.D. Oblin, *Incitement...*, p. 209.

<sup>49</sup> A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford University Press 2009, p. 16.

<sup>50</sup> H. Shawcross, *On Aggressive War and the evolution of the Law of Nations, December 4, 1945*, [in:] M. R. Marrus, *The Nuremberg War Crimes Trial, 1945-46; A Documentary History*, Boston New York, 1997, p. 127.

<sup>51</sup> Cf. Art. 6 of the IMT Charter (Journal of Laws of 1947, No. 63, item 367).

<sup>52</sup> Cf. H. T. King, *Nuremberg and crimes against peace*, Case Western Reserve Journal of International Law 2010, vol. 41:273, p. 276.

Finally, the Charter contains a following definition of the crime of aggression: ‘(...) The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (a) crimes against peace, namely: planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing (...)’<sup>53</sup>.

However, the IMT Prosecutor’s Office at Nuremberg had a different opinion than the view of the above mentioned delegates and ‘adopted its own interpretation of the German ‘project’<sup>54</sup>. It had own approach to the issue of responsibility for a crime against peace. It found the intention in documents discovered by the Americans in the summer of 1945, comprising of the notes by Friedrich Nossbach – Hitler’s adjutant – taken during the conference held in the Reich Chancellery in Berlin, November 5, 1937, at which several defendants were present. Hitler presented the plans perceived as ‘his last will and testament’<sup>55</sup>. His goal was to create ‘Lebensraum’<sup>56</sup>. The Nossbach memorandum became evidence in the case of crimes against peace, presented by Shawcross on December 4, 1945<sup>57</sup>.

For the first time in the IMT judgment there was created a separate, autonomous status of natural persons as subjects of law, who have duties ‘exceeding the boundaries’<sup>58</sup>. The IMT also had to resolve two major issues associated with this provision: whether the crime of aggression had already been established in international law (which is related to the need to respect *nullum crimen sine lege*) and what the scope of definition of the crime of aggression was.

An answer to the first question one can find in the judgment of 30 September-1 October 1946 on Goering and others case. The IMT had to disprove accusations of defendants’ lawyers that the principle of *nullum crimen sine lege* had been violated. According to Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, it should be regarded as irony to refer to the lack of this very principle which was discarded in Germany and replaced with the principle of *nulla poena sine lege*, which was to consist in ‘being duly punished regardless of incomplete-

<sup>53</sup> Art. 6 of the IMT Charter.

<sup>54</sup> H. Shawcross, *On Aggressive War and the evolution of the Law of Nations, December 4, 1945*, [in:] M. R. Marrus, *The Nuremberg War Crimes Trial, 1945-46; A Documentary History*, Boston New York, 1997, p. 127.

<sup>55</sup> Ibidem.

<sup>56</sup> Cf. L.M. Surhone, M.T. Tennoe, S. F. Henssonow (ed.), *Nuremberg...*, p. 75.

<sup>57</sup> H. Shawcross, *On Aggressive War...*

<sup>58</sup> A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford University Press 2009, p. 16.

ness of the law'<sup>59</sup>. According to Reich Minister of Justice Franz Guertner<sup>60</sup>, 'national socialism imposes new responsibilities on criminal law, involving the execution of true justice'. Meanwhile, the defendants claimed that 'the fundamental principle of international and national law is that there is no punishment without pre-existing law', i.e. 'nullum crimen sine lege, nulla poena sine lege'. It was explained that post facto punishment is biased toward the law of civilized nations, no sovereign power defined the war of aggression, no punishment was determined for committing it, and no court was created to judge and convict the perpetrators.

In the judgment of 30 September-1 October 1946 on Goering and others case the IMT stated that the principle *nullum crimen sine lege* does not limit sovereignty. The IMT responded to such argumentation as follows: Firstly, it was noticed that the principle *nullum crimen sine lege* does not limit sovereignty, but it is a general principle of law. To demonstrate that it is unfair to punish those who in spite of treaties and assurances attacked neighbouring states without warning is obviously untrue; in such circumstances the attacker must know that is doing wrong, and far from being unjust it would be injustice if the evil that he does remains unpunished. Among the treaties that had been violated by the defendants, there were listed the Briand-Kellogg Pact, the Draft Treaty on Mutual Assistance of 1923, the Geneva Protocol of 1924, the Declaration concerning wars of aggression of 24 August 1927, and the unanimous Resolution of 18 February 1928.

The Nuremberg and Tokyo IMTs were fighting the tension between legality and request to accuse defendants of the evil. The Prosecutor's Office attached great importance to the question of existence of the crime of aggression before the start of the Nuremberg trials. This case can also raise doubts today<sup>61</sup>. The same general principle of law, i.e. *nullum crimen sine lege*, was also included in the Tokyo IMT Charter.

The issue of *nullum crimen sine lege* was also brought up in a separate opinion of the Tokyo IMT (U.S. et al. v. Araki et al.) formulated by Bernard Victor Aloysius Roeling on November 12, 1948. There was considered the issue 'concerning the construction and the possibility of constructing a concept of crime as such by the London Agreement and the IMT Charter.

(...) The positive international law that existed at that time leads us to interpret the crime of aggression specified in the Charter in a special way. It can be

<sup>59</sup> Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, *International Criminal Law. Cases and Commentary*, Oxford University Press 2011, p. 54.

<sup>60</sup> Ibidem.

<sup>61</sup> R. versus Jones case of 2006. Cf. *International Criminal Law. Cases and Commentary*, Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, Oxford University Press 2011, p. 240.

assumed that the Allies did not intend to create rules in breach of international law. This indicates compliance with international law of the IMT Charter’.

Crimes under international law are related to the concepts having different meanings. Besides those mentioned above, one can also indicate acts comparable with political crimes under national law, where a decisive element was rather danger of committing the crime than guilt, where the perpetrator was perceived as an enemy, not a villain, and where the background for punishment was political ground, not criminal law.

In such a way the crime against peace, which is defined in the IMT Charter, should be understood. Determination of the crime against peace, formulated in the IMT Charter, is consistent with international law. There is no doubt that this concept having a nature of ‘crime’ has some implications with regard to appropriate punishment.

It seems that the Nuremberg Judgment refers to a concept similar to ‘the crime against humanity’. Although the judges considered attributing the crime against peace to the offenders, the initiation of war of aggression recognised as the supreme international crime and different from war crimes in that it contains in itself the accumulated evil in its entirety, the defendants who were found guilty of committing crimes against peace, and those who were not, or were found partially guilty of committing conventional war crimes were sentenced to imprisonment (i.e. Hess, Doenitz, Raeder, Funk and von Neurath).

As long as a dominant principle in crime against peace is a dangerous nature of the person who committed the crime, the punishment should be determined by security considerations.

In this case, the death penalty should not be applied in relation to any of the persons found guilty of committing crime against peace<sup>62</sup>. An essential element of the crime was, therefore, a danger of committing it, which was transferred to a discussion on the nature of the defendant. A judge formulating a dissenting opinion acknowledged that the Tribunal should take into account a dangerous nature of the offender at sentencing. It seems that the judge was about the risk of committing such an offense by the perpetrator in the future, since he wrote about security matters. He could think about the increased likelihood of planning and initiating such crime in the future, which would be assigned to the perpetrators. There would be considered preventive reasons. In addition, the factor determining ‘more lenient’ punishment in relation to death penalty was

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<sup>62</sup> A separate opinion of the Tokyo IMT (US et al. v. Araki et al.) formulated by Bernard Victor Aloysius Roeling on 12 November 1948 [for:] *International Criminal Law. Cases and Commentary*, Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, Oxford University Press 2011, p. 59.

the fact that the perpetrators did not commit conventional war crimes, which paradoxically decided about more lenient punishment. The perpetrators, therefore, would not be punished for committing an offense with the features of the crime of aggression, but for planning, directing and initiating the crime. That would allow creating a contemporarily known division between leaders who plan to commit a crime and perpetrators. The aforesaid judge would aim at more lenient punishment for those responsible for causing a danger of committing the crime than for its perpetrating.

Although a perpetrator does not commit the crime, it seems that the danger associated with the crime of aggression, for which the responsibility is borne by the perpetrator, deserves a more severe punishment compared with a penalty for a prohibited act.

As to the second issue, the IMT stated that Hitler had created a plan for the conquest of territories to form a larger land of Germany and in order to implement this plan he had initiated war against the 12 states. The aim of the Nazis was, therefore, the preparation to initiate a war of aggression. The defendants were to be conspirators aiming at such purpose<sup>63</sup>.

When it comes to Poland, Hitler stated: 'Poland has taken the position that I wanted (...). I am only afraid that at the last moment some *Schweinehund* (pig dog) will make a proposal for mediation'. 'I will give a propaganda reason to initiate war, no matter whether convincing or not. The command to start will be scheduled for Saturday morning'. It was the first September 1939 – the beginning of World War II.

There was also raised a question who should bear the responsibility for committing the crime of aggression. An approach according to which only one person can be held liable for the crime of aggression should be regarded as unreliable. Even if the plan to commit this crime was developed by one person, its execution involved a number of people. Hitler could not lead a war of aggression alone. He collaborated with civilian statesmen and military leaders, diplomats and businessmen. They cannot be considered innocent if they joined the plan deliberately. Therefore, they could not excuse themselves that they were only a tool used by Hitler<sup>64</sup>.

This reasoning provokes other questions. If the state is involved in conducting a war of aggression, the question is whether everyone taking part in the war for their country bears a criminal responsibility or these are only leaders. If an affirmative answer is given to the last part of the question, then such answer

<sup>63</sup> H. Shawcross, *On Aggressive War...*

<sup>64</sup> Cf. A. Cassese, G. Acquaviva, M. Fan and A. Whiting *International Criminal Law. Cases and Commentary*, , Oxford University Press 2011, p. 239.

involves the question of what kind of leaders. The IMT Charter did not answer the above questions; criminal responsibility evolved to recognition that it should be borne by the highest-ranking representatives of the German authorities. To this end, it was necessary to prove their knowledge (awareness) and participation in committing the crime. Again, it is worth quoting the results of the trial which was carried out against the accused of committing the crime against peace. Out of the 22 accused, the crime was attributed to 12 people, and 10 persons were acquitted of the charges<sup>65</sup>.

In the judgment of the Nuremberg Tribunal it was stated that ‘aggression – by definition – is a multi-person crime, which could give a trigger to take consideration on agreement between the perpetrators leading to the initiation of a war of aggression. It was therefore concluded that, in accordance with customary law, conspiracy to initiate a war of aggression is a crime<sup>66</sup>. The IMT at Nuremberg charged the persons participating in preparatory activities for the crime of aggression<sup>67</sup>. It was also underlined that: Incitement to commit a crime against peace, war crimes, crimes against humanity and aiding and abetting the crime are only a preliminary form, a special technical way of committing the above crime, but not a new type of crime<sup>68</sup>. Participation in conspiracy and plan awareness should be included among prerequisites of liability for participating in a conspiracy to initiate a war of aggression<sup>69</sup>.

The Nuremberg judges took a conservative position with regard to conspiracy to commit a war of aggression. The Tribunal acquitted 14 of 22 accused of the charge of conspiracy. It convicted 12 of 16 accused of crimes against peace, and acquitted four persons<sup>70</sup>.

As stated by H. T. King, the IMT’s approach to the crime of aggression was problematic. There were no concepts that could be used to deal with aggression and conspiracy to commit a war of aggression. The IMT limited its statement on aggression to the words of ‘the supreme international crime’, which basically meant that it embraced all war crimes, as stated by H.T. King<sup>71</sup>. ‘The Tribunal

<sup>65</sup> Ibidem

<sup>66</sup> J. D. Oblin, *Incitement and conspiracy to commit genocide*, [in:] P. Gaeta (ed.), *The UN Genocide Convention. A Commentary*, Oxford University Press 2009, p. 209.

<sup>67</sup> I. Bantekas, S. Nash, *International Criminal Law*, 3<sup>rd</sup> ed., New York 2008, p. 35.

<sup>68</sup> T. Cyprian, J. Sawicki, *The Nuremberg law*, Warsaw-Krakow 1948, p. 385

<sup>69</sup> I. Bantekas, S. Nash, *op.cit.*, p. 35.

<sup>70</sup> H.T. King, *Nuremberg and crimes against peace*, Case Western Reserve Journal of International Law 2010, vol. 41:273, p. 276.

<sup>71</sup> Cf. H.T. King, *op.cit.* W.A. Schabas, *Origins of the Criminalization of Aggression: How Crimes Against Peace Became the „Supreme International Crime”*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 18.



did not conduct a rousing discussion on aggression as such<sup>72</sup>, and it did not specify the elements of the crime<sup>73</sup>. One of them was a soldier's rank or position of a politician. This meant that the hierarchy order in the country had not been determined, according to which individuals would be prosecuted. No response was therefore given at what level of political leadership one should be to hear the charge of committing a crime against peace, whether it would mean that every decision-maker would have to bear responsibility for taking part in the crime against peace. This question seems to bother lawyers dealing with the crime of aggression until today.

The American and French Military Tribunals also judged 'minor' representatives of the German authorities, business representatives and servicemen. These tribunals confirmed the status of the crime of aggression in international law. It was also reconsidered who should be held criminally responsible for the crime of aggression. The charges of committing the crime were filed against the defendants in the Ministries case which concerned the former representatives of the German government. The remaining defendants in cases before these Tribunals were exonerated of the charge of committing the crime of aggression. In the aforementioned Ministries case three persons were convicted for committing the crime of aggression. They were found guilty because they had known about (had been aware of) the plans of aggression, and had acted possessing this knowledge to shape and develop them. This reasoning led to the conclusion that in the case of the crime of aggression only supreme leaders can be held criminally responsible for the crime.

The Tokyo International Military Tribunal, appointed in the Far East, also provided for a crime against peace (a crime of aggression). The Charter of the International Military Tribunal for the Far East was not, admittedly, a copy of the Nuremberg IMT Charter, but it adopted the wording of the essential provisions<sup>74</sup>.

Its legal basis was the regulation of the Supreme Commander of the Allied Powers in the Far East General D. MacArthur of January 19, 1946, issued under the multilateral agreement between China, France, the Netherlands, Canada, New Zealand, the USA, the Great Britain, Australia and the USSR (later a group of these countries was extended by India and the Philippines)<sup>75</sup>. For the Tokyo

<sup>72</sup> H.T. King, *Nuremberg and crimes against peace*, Case Western Reserve Journal of International Law 2010, vol. 41:273, p. 276.

<sup>73</sup> Ibidem

<sup>74</sup> Cf. L. Gardocki, *Zarys prawa karnego międzynarodowego*, Warszawa 1985, p. 60; J. Nowakowska-Małusecka, *Odpowiedzialność karna...*, p. 19.

<sup>75</sup> Nowakowska-Małusecka, *Odpowiedzialność karna.....*, p. 19.

IMT a more important aim – according to its originators – was to judge those responsible for the Japanese aggression<sup>76</sup>.

The competence of the Tribunal was to judge Japanese war criminals<sup>77</sup>. This meant the implementation of findings of the London Convention<sup>78</sup>. Their trial lasted from 29 April 1946 to 12 November 1948<sup>79</sup>. 28 people were indicted, but the verdict concerned only 25, of which seven were sentenced to death and 16 to life imprisonment<sup>80</sup>.

The Japanese Emperor Hirohito was not tried for allowing his country to join the war on the German side<sup>81</sup>. In spite of suggested plans that the basic assumption would be prosecuting the perpetrators of the crime of aggression<sup>82</sup>, it could not be implemented. As noted by M. Cherif Bassiouni, General D. MacArthur was more interested in ruling Japan than judging the Emperor<sup>83</sup>. Therefore, in his opinion, the Emperor's family also escaped responsibility for crimes committed by its members. An example was the murder of the inhabitants of the Chinese city of Nanjing under the leadership of Emperor's uncle, when 250 thousand civilians were killed<sup>84</sup>.

<sup>76</sup> N. Boister, R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press 2008, p. 119 along with the references quoted therein.

<sup>77</sup> J. Nowakowska-Małusecka, *Odpowiedzialność karna...*, p. 19.

<sup>78</sup> N. Boister, R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press 2008, p. 120.

<sup>79</sup> J. Nowakowska-Małusecka, *Odpowiedzialność karna...*, p. 19.

<sup>80</sup> Cf. *Japanese People Convicted the International Crime of Aggression: Hideki T J, Sadao Araki, Hiroshi Shima, Kenji Doihara, Kniaki Koiso*, Books LLC 2010.

<sup>81</sup> Emperor granted immunity and found to be a witness. At the same time, for committing the crime of aggression has been convicted of his closest subordinate – Kido. Cf. P. Wilson, *Aggression, Crime and International Security*, Routledge London and New York, 2009, p. 63.

<sup>82</sup> N. Boister, R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press 2008, p. 117.

<sup>83</sup> M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: Between States' Interests the tension and the Pursuit of International Justice*, w: *The Oxford Companion to International Criminal Justice*, eds. S. Cassese, Oxford University Press 2009, p. 134.

<sup>84</sup> M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: Between States' Interests the tension and the Pursuit of International Justice*, in: *The Oxford Companion to International Criminal Justice*, eds. S. Cassese, Oxford University Press 2009, p. 134. The proceedings against the Japanese General Yamashita are worthy of attention. The proceedings were conducted not before the Tokyo IMT, but before a military committee established by General MacArthur in the Philippines. It comprised of soldiers lacking the legal knowledge. General Yamashita was charged for the crimes committed by Japanese troops, which he nominally headed but had no knowledge of their activities. Five American members of the committee found Yamashita guilty because he 'should have known'. This standard of superior's liability was never used anymore. Cf. W. H. Parks, *Command Responsibility for War Crimes*, Military Law Review 1973. The superior's liability is considerably important in the context of ruling on the crime of aggression, where one must rule on the liability of the most important people in the country and one of the preconditions for such liability is to meet the 'should have known' element. It should, however, be considered

There could be recorded difficulties which the judges of the Tribunal had to face; they referred to the lack of evidence of committing the crime of aggression. Most of the records were destroyed before Americans landing<sup>85</sup>.

Both before judgment by the IMT and Tribunals established after World War II, ruling in Nuremberg under the Control Council Law No. 10 and in the later period there was no ruling in cases of crimes against peace. It seems that there were two reasons for this state of affairs. They concerned the need to clarify the definition and the absence of an international tribunal authorised to judge this crime.

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whether the same standards of superior's liability will be in force with respect to responsibility for the crime of aggression. With regard to the case of General Yamashita, the reference is made to General MacArthur, who – due to his experience in the Philippines (he had to flee to the island of Corregidor, leaving his troops) – wanted to punish the Japanese general properly. The U.S. Supreme Court refused to grant habeas corpus, while a dissenting opinion was expressed by Murphy and Rutledge. Summing up the case of General Yamashita, Bassiouni stated that 'it is impossible not to admire those judges whose then views are so instructive today'. L. May, *Aggression and crimes against peace*, Cambridge University Press 2008, p. 207.

85 Cf. P. Wilson, *Aggression, Crime and International Security*, Routledge London and New York, 2009, pp. 63-64.



## 2. WORKS ON THE DEFINITION OF AGGRESSION AND THE CRIME OF AGGRESSION FROM 1946 TO 2011

An international criminal responsibility for committing international crimes was taken into account in the second place, just after the state's responsibility<sup>86</sup>. Deliberations on definitions of crimes of aggression undertaken by the Committee of International Law, included in the chapter II of the present dissertation lead to this conclusion. At the same time, there were works in progress on forming an individual's responsibility in the statute of International Criminal Court.

After 1951 there was no proceeding in the crime of aggression except for the *R. versus Jones* case in 2006. This case concerned protesters against the war in Iraq, which they found illegal and wanted it to end. They were accused of committing an offence relying on damage to property and violation of other people's rights. In the context of this case, the House of Lords was supposed to consider a legal status of the crime of aggression in international law. In a decision concerning this case, Lord Bingham reviewed a development of crimes of aggression and reached a conclusion that similarly as in the *Tadić* case, when it was applied to genocide, in this case it is also impossible that the crime of aggression had existed before the Second World War. In his opinion, the notion of a crime of aggression came into being towards the end of the 20<sup>th</sup> century<sup>87</sup>. "However, as deliberations connected with this crime and quoted by Lord who was mentioned above confirm merely the status of crime of aggression in international common law, no one provided a subsequent definition of this crime"<sup>88</sup>. Conclusions drawn from treaties between 1928 and 1942 show the need for protection from international wars<sup>89</sup>. Therefore, inclusion of the crime of aggression in ICC's jurisdiction was not an innovative conception since the crime of aggression just as genocide or war crimes constitute common law<sup>90</sup>.

<sup>86</sup> cf. P. Wilson, *Aggression, Crime and International Security*, Routledge London and New York, 2009, p. 85.

<sup>87</sup> Cf. A. Cassese, G. Acquaviva, M. Fan and A. Whiting *International Criminal Law. Cases and Commentary*, Oxford University Press 2011, p. 240.

<sup>88</sup> Ibidem

<sup>89</sup> U. Leanza, *The Historical Background* [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 4.

<sup>90</sup> C. Kreß, *Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to A. Paulus*, EJIL, vol. 20, no. 4, 2010, p. 1132.

### 2.1. WORKS ON THE DEFINITION OF AGGRESSION TO THE NINETIES OF THE LAST CENTURY

The United Nations War Crimes Commission was supposed to initiate the proceedings involving the criminals of the party defeated in the World War II and to deal with the legal matters related to determining whether an aggressive war is an act of crime. The issue was difficult because of the then international law, which provided only limiting of the use of force by the states. Pertinent arguments regarding the criminalization of aggression were presented in 1944 by Dr. Bohuslav Ečer from Czechoslovakia. According to his opinion, the aggressors wanted to enslave other states in order to destroy their civilizations and subjugate populations for race, political or religious reasons<sup>91</sup>. According to the presented definition of aggression:

The aforementioned Commission did not come to an agreement. Lack of consensus was due to differing views on aggression. As a result, two reports were issued. The author of the first of them was a representative of the Great Britain – Arnold McNair. He believed that aggression is not a war crime. Ečer – the author of the second report – believed that other crimes under the Commission authority are associated with war crimes. Accepting the crime against peace as a part of the Nuremberg Tribunal jurisdiction remained undetermined until the 1945 London Conference<sup>92</sup>.

There were made efforts to implement a crime of aggression into the Offences Code. For this reason National Assembly set up Commission for Definition of Aggression<sup>93</sup>.

In August 1944, the further efforts on creation of the abovementioned organization were made. There was proposed the establishment of an organization, the priority of which would be ‘to maintain international peace and security through international cooperation for designing the conditions of stability and the need for peaceful and friendly relations among nations necessary for the maintenance of peace and security’<sup>94</sup>. Complying with these objectives, the provisional proposals stipulated a ban to use the

<sup>91</sup> See S. Sayapin, *The Crime of Aggression in International Criminal Law. Historical Development, Comparative Analysis and Present State*, Springer 20014, p. 39.

<sup>92</sup> S. Sayapin, *The Crime of Aggression in International Criminal Law. Historical Development, Comparative Analysis and Present State*, Springer 20014, p. 39.

<sup>93</sup> B. Ferenc, *Ending impunity for the crime of aggression*, Case W. Res. Journal International Law, 2009, vol. 41:28, p. 282.

<sup>94</sup> O. Solera, *Defining...*, p. 46.

armed force, as they provided for the forces of the organization to ensure and implement such a ban.

The U.S. proposals for creation of an international organization<sup>95</sup> did not mention the term 'aggression'. It seems, therefore, that the Forces of the Executive Council of this organization were not interested in taking into account the term, in return, arguing that the function of the new organization was to identify threats to the peace or breach of the peace and to take directions for further actions (behaviours).

The Soviet Union stressed, however, its previous efforts to define the concept of aggression in 1930, noting that the concept of aggression should be included in the final proposal. The concept of 'breach of the peace' seemed to be insufficient from the state's point of view. The United States was reluctant to include the concept of aggression in the Statute of the organization, ascertaining that the idea of aggression is contained within the idea of breach of the peace; however, it followed the proposal of the Soviet Union.

The Soviet and Chinese delegations made further efforts to include the concept of aggression into the draft Statute of the organization. They requested the inclusion of the elements of aggression to persuade the UNSC to place them in its decisions.

On August 8, 1945 the leaders of the victorious countries met in London to agree on further proceedings related to post-war political organization and to establish policy and criminal proceedings against major criminals of the defeated party<sup>96</sup>. The UN War Crimes Commission was preparing the ground for future proceedings and gathering evidence. The standpoints of the victorious states were not uniform. The Great Britain noticed that the functioning of the Tribunal was a way for justification of the defendants. France and the United States wanted to document the crimes committed. The Soviet Union had to face the problem of the non-aggression pact signed with Germany in 1939 and the invasion of Poland, Finland and the Baltic countries<sup>97</sup>.

There were made efforts to implement a crime of aggression into the Offences Code. For this reason National Assembly set up Commission for Definition of Aggression<sup>98</sup>.

<sup>95</sup> See O. Solera, *Defining...*, pp. 46-47.

<sup>96</sup> Information relating to the London Conference was included in the next section of this paper.

<sup>97</sup> S. Sayapin, *The Crime of Aggression in International Criminal Law. Historical Development, Comparative Analysis and Present State*, Springer 2014, p. 40.

<sup>98</sup> B. Ferenc, *Ending impunity for the crime of aggression*, Case W. Res. Journal International Law,

In November 1950 in the resolution 378/b(V) National Assembly equipped Commission for International Law in mandate allowing to lead discussion over issue concerning the crime of aggression<sup>99</sup>. Objections of the USSR to define the crime of aggression were referred by J. Spiropoulos (a special commentator of the Commission for International Law) during works on the Definition of Aggression Code in 1951: "When people talk about crime, they know what it means, but when it comes up to process of defining it, they must overcome difficulties that are impossible to overcome at present times(..) For these reasons we suggest that Commission for International Law withdraws from attempts to define the notion aggression. This kind of attempts would be a waste of time"<sup>100</sup>. Spiropoulos claimed that the definition including all cases of aggression cannot be created, especially that methods of aggression are continuously changing<sup>101</sup>. This commentator paid attention to a need for concerning the responsibility of states and individuals<sup>102</sup> what provokes reflection that in the first place was put state's self-interest only later he heeded individual's responsibility<sup>103</sup>. The Project of Offences Code and Status of International Crime Tribunal weren't formed in isolation.

On 29<sup>th</sup> December 1952 the resolution 688 was established, according to which there was set Commission for drawing up definition of aggression. A delay in works on the Offences Code was connected with acceptance of resolution RB 898 which concerned works on the project of status of Tribunal to form the aggression definition by the UN Assembly and taking up deliberations on the Crime Code from 1953<sup>104</sup>.

In 1969 General Assembly accepted project of resolution defining aggression. Initially this project was criticized by General Assembly because of lack of

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2009, vol. 41:28, p. 282.

<sup>99</sup> U. Leanza, *The Historical Background* [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 5.

<sup>100</sup> P. Wilson, *Aggression, Crime and International Security*, Routledge London and New York, 2009, p. 85.

<sup>101</sup> Cf. U. Leanza, *op.cit.*

<sup>102</sup> P. Wilson, *op.cit.*

<sup>103</sup> In 1948 the UN Assembly appealed to Commission for International Law to study possibilities of creating an international judicial authority to judge defendants alleged to have committed genocide or other crimes over which jurisdiction would be given by this authority also international conventions. However, this request refers only to individual criminal responsibility. The special commentator referred to states and individuals as subjects in relation which there should be the transnational criminal court. It was included in a recommendation report where it was highlighted that UN Security Council should be such authority. When a project of status of International Criminal Tribunal was formed in 1953, it constituted only about an individual's responsibility. Cf. P. Wilson, *op. cit.* p. 87.

<sup>104</sup> P. Wilson, *op. cit.*, p. 86; U. Leanza, *op. cit.*, p. 5.



elements based on which there could be conducted test of aggression's acts. It was noted that such expression like "manifest violation"<sup>105</sup>, elements that would be essential to acknowledge act as aggressive, deliberations on range of use of force to be able to recognized as responsible for a violation of use of force on a large scale.

There were three projects of definition of aggression prepared, on which Special Commission was working. First one was prepared by the Soviet Union, second by Colombia, Cyprus, Ecuador, Ghana, Guiana, Haiti, Madagascar, Spain, Uruguay, Uganda and Yugoslavia (so called Thirteen States), third one by Australia Canada, Italy, Japan, the USA, Great Britain ( so called project of six forces).

Every project took into account interest of states that were drawing it up. The Soviet Union wanted to keep under control satellite territories, that's why they pressed for the widest definition of aggression. Moreover they claimed that there was no possibility to recognize sovereignty of territories occupied by using force. The project of Six Forces claimed that in the interest of Six Forces lies placing in definition of aggression such notions as: "an innate right to individual or collective self-defense" what was raised as a main principle by the USA due to undertaken by this state "interventions". Raised differences didn't stay in a way of accepting the definition of aggression in the resolution<sup>106</sup>.

The aggression was defined in the mentioned in Chapter 1 resolution from 1974. General Assembly decided to use "former definition of aggression, the project of the Status from 1953, the project of Crime Code from 1954 as well as politically responsibility of a state for a crime of aggression"<sup>107</sup>. This resolution is named as "Definition of aggression". The definition was preceded with a preamble. Subsequent articles don't stand against the article 39 UN.

The Soviet Union stated that an aggressor should use the armed forces as first. What is more, Security Council for the fundamental assumption accepted the need for enumeration of acts recognized as aggressive. Western states in turn initially were against defining the aggression. Lately they accepted that including by Security Council other criteria than priority to use force was possible. Moreover they made an assumption that it was also crucial not to close the catalogue of acts constituting aggression. The Soviet Union and western states based then on opposing principles. It was clear for the states that there was no need to determine precisely standards of law<sup>108</sup>.

<sup>105</sup> O. Solera, *The definition of the crime of aggression. Lessons not learned*, Case Western Reserve Journal of International Law 2010, vol. 42: 801, p. 804.

<sup>106</sup> Cf. U. Leanza, op. cit., p. 6.

<sup>107</sup> Cf. P. Wilson, op. cit., p. 88.

<sup>108</sup> Cf. O. Solera, op. cit., p. 804.

In the article 3(g) of Security Council 's resolution from 1974 there were mentioned acts counted among acts of indirect aggression. They were objects of deliberation of International Court of Justice in the Nicaragua case<sup>109</sup>.

The case connected with the article 3(g) of the resolution concerns two examples of indirect aggression. The first one covers sending by the state armed bands, groups, irregular units or mercenaries. Behavior of the state would rely on using force by sending irregular forces with the help of citizens and mercenaries. They differ from the armed forces of this country in lack of uniforms, their actions are not directed by staff suitable for the regular armed forces in this state. These types of actions can be attributed to a state sending armed bands, groups, irregular units or mercenaries. It can be stated that actions of these units, armed bands, groups, irregular units or mercenaries on the international level may be attributed to a sending state, therefore actions acknowledged as hostile and recognized as action of indirect aggression, if it going to be linked with a loss for state-victim, including its sovereignty, political independence, territorial integrity<sup>110</sup>.

It is worth pondering over intensions of a state, If sending those subjects was intentional with intention to violate sovereignty, political independence, territorial integrity of a state. That is why there should be tested an intention of acting armed bands, groups, irregular units or mercenaries and assess a causal relationship between a state and other subjects. Deliberations will be useful also on the ground of international crime law, determining a basis for potential judgment of leading offenders. Both sides take part in a bigger undertaking, hence they have awareness and will to act or abandon. This conception does not settle the contribution of a state to actions of mentioned subjects. A subject side is then unspecified. The border is a necessity to differentiate subsequent example of indirect aggression.

According to U. Leanza, the second case makes it difficult to assess an action as nonfeasance or aggression, as the article concerns a substantial involvement (fr. Engagement) of a state. Seriousness linked with use of armed bands, irregular units or mercenaries is similar in both cases. The nature of use of force in the second case is different due to its substantial involvement<sup>111</sup>.

U. Leanza found that from a subjective point of view participation involves an intentional action or nonfeasance, author's awareness of committing an unlawful

<sup>109</sup> In this case ICJ recognized definition of aggression in the resolution from 1974 reflected international customary law.

<sup>110</sup> Cf. U. Leanza, *op. cit.*, p. 7.

<sup>111</sup> *Ibidem*

act as well as perception and will to act. From an objective point of view relations between irregular units and behavior of a state are based on a state's contribution to activity of those units<sup>112</sup>.

On the strength of this resolution aggression is "an use of the armed forces by a state against sovereignty, territorial integrity or political independence other state as well another way at variance with the Charter of the United Nations". The quoted formulation constitutes essence of the definition of aggression. Therefore aggression concerns a state in the international public law. One of the elements of a state is its population. The International Military Tribunal in Nuremberg forcibly paid attention to an individual's role in committed crimes. It became obvious that individuals take responsibility for their actions corresponding to a state's responsibility when talking about crime of aggression. There were taken next steps that helped to define crime of aggression. The article 5 of the Definition of Aggression can be evoked to deliberations on elements taken from the resolution from 1974 which constitutes that aggression is a crime against international peace and it brings about international responsibility<sup>113</sup>. Persons who worked out the content of the Definition appealed to issues from legislative-international point of view, not from the criminal law<sup>114</sup>.

Among authorities which competence include work on definition of aggression crime, there were: International Law Commission, Working Group on the Crime of Aggression and its successor SWGCA. They based their work on an analysis of resolution 3314 paying special attention to implement for national orders<sup>115</sup>. International Law Commission dispensed with task expressed in this way before announcement of project of crimes against peace and mankind's safety. Working Group on the Crime of Aggression (WGCA) and SWGCA continued working on implement this resolution, in spite of different proposals suggested by Committee ad hoc and the Preparatory Commission<sup>116</sup>.

Even though the article 5 of the Definition could have constituted an incentive to works on code and tribunal, it was only difficult beginning of further efforts<sup>117</sup>. A concept of plot in above-mentioned shape did not survive cold war<sup>118</sup>. This period did not create favorable conditions to work on a permanent

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<sup>112</sup> Ibidem

<sup>113</sup> Cf. P. Wilson, *op. cit.*, p. 89.

<sup>114</sup> Ibidem

<sup>115</sup> Cf. O. Solera, *op. cit.*, p. 805.

<sup>116</sup> Ibidem

<sup>117</sup> Cf. P. Wilson, *op. cit.*, p. 88.

<sup>118</sup> O. Solera, *op. cit.*, p. 805.

International Criminal Court<sup>119</sup>. The only possibility was to take issues with an expert nature<sup>120</sup>.

The adjudication of International Court of Justice in a case of Nicaragua is dated in 1985. Judge Schwebel, the chairperson of ICJ who that time was the representative of the USA by Special Commission for questions about defining aggression, revealed that resolution 3314 was rather “an interpretation of General Assembly of understanding regulations of the Charter of the United Nations referring to use of force”<sup>121</sup>. Although the resolution makes a guideline, is a product of those times what is confirmed by political elements included, it is still in a whole international custody law.

At this point it is worth adding that works on Code’s project were started yet during cold war, when there started thinking about introducing new project of crime. There was set the Special Commentator who put forward nine thematic reports between 1983 and 1991. The Special Commentator introduced in 1985 temporary regulations to amend project of Crime Code. From the text of the project there were excluded regulations concerning interpretation and proof<sup>122</sup>.

International Law Commission gave its own definition of aggression. It was a project to the Status of International Criminal Court. According to this definition: “Aggression means an act committed by a person who is the leader or an organizer with reference to use of the armed forces by a state against territorial integrity or political independence of other state as well as any other way at variance with the Charter of the United Nations.

An alternative project:

Crime of aggression is committed by a person who is in charge entitling to an effective control, has a possibility to run political/military actions in his state against other state at variance with the Charter of the United Nations by using force, threatening or violating sovereignty of a state, territorial or political independence.

Acts that created aggression were mentioned in the letter placed in paragraph 3 of resolution 3314, 1974”<sup>123</sup>.

<sup>119</sup> look P. Wilson, op. cit., p. 87.

<sup>120</sup> Cf. R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe.*, Warszawa 2000, p.299.

<sup>121</sup> M.A. Shukri, *Will Aggressors Ever be Tried Before the ICC?*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate 2004, p. 35.

<sup>122</sup> S. Barriga, C. Kreiss (ed.), *The Travaux Préparatoires of the crime of aggression*, Crime of aggression library, Cambridge University Press 2012, p. 6.

<sup>123</sup> M.A. Shukri, op. cit., p. 35 [for:] Part of the draft Statute of the International Criminal Court.

## 2.2. WORKS ON THE DEFINITION OF AGGRESSION TILL THE NINETIES OF THE LAST CENTURY

### 2.2.1. The ad hoc commission in 1995

In 1995 the International Law Commission accepted a project of the Statue in the 46<sup>th</sup> session and decided to call a conference of proxies to consider possibilities of forming an international criminal court. On the authority of the Commission's recommendations the General Assembly made a decision to form an ad hoc committee to which all UN states or special agencies had right to join. In addition to this, they were supposed to survey material and administrative issues appearing from the project of the statue prepared by the International Law Commission, as well as consider decisions/preparations for an international conference of proxies.

The Ad Hoc Committee debated in New York from April till August 1995, where the Statute of the International Law Commission was under debate. In the first session of the Ad Hoc Committee there was pondered a question of arrangements for an international conference which was supposed to concern forming jurisdiction over international law. It was recognized that consideration of issues connected with the crime of aggression would cause difficulties. Nevertheless, it was noticed that the crime of aggression should be included in the project of the statute, in which the Tribunal's jurisdiction over the crime of aggression should be linked with actions of the UN Security Council as part of the Charter of the United Nation's chapter.

The discussion took similar shapes as deliberations on the notion of aggression in the sixties and seventies of the last century<sup>124</sup>. Both issues mentioned above were taken into consideration: the definition of the crime of aggression and the relationship between jurisdiction over the crime of aggression and the UN Security Council. As part of the debate on the definition of the crime of aggression, sources of law were used. Among other things, there were taken into account the London Agreement signed on the 8<sup>th</sup> of August 1945, the Resolution defining aggression and the definition of aggression accepted by the International Law Commission in 1991. The first from the mentioned legal instruments concerned specific events from the Second World War's history – German actions leading to the Second World War<sup>125</sup>. The definition was formulated with thinking about suing the offenders of those actions.

However, a part of the states considered that works on the definition of the crime of aggression would delay an acceptance of the resolution. Moreover,

<sup>124</sup> O. Solera, *Defining the crime of aggression*, Cameron May 2007, p. 337.

<sup>125</sup> Ibidem, p. 338.

it was weighed up that mentioned law sources were useless or impractical<sup>126</sup>. Nonetheless, the Preparatory Commission introduced three options related to defining aggression as the crime included in the Tribunal's objective jurisdiction before the conference concerning appointing International Criminal Court took place. The first option related to a general approach, i.e. the definition of aggression passed in art. 1 of the 3314 resolution so that copying the text of the resolution would be able to adjust to an individual's actions committing the crime. The second option is the copied 3314 resolution including the above-mentioned list of acts. The third option reduced aggression to use of force coming down to create a military occupation of an annexed territory of another state or a part of it by military forces attacking the state<sup>127</sup>.

Debate on these conceptions did not lead the states to the consensus<sup>128</sup>. According to O. Solera, the charter of the International Military Tribunal was useless "because it referred to an aggressive war which was started and characterized as such; in contrast, a potential definition would have to concern a difficult question of a possible justification of self-defense or a humanitarian intervention. Regarding the definition of aggression dated in 1974, it was not supposed to concern an individual criminal responsibility. The asked question was related to reference to two tools of an aggressive war – as the opposite of an act of aggression – assuming a still acceptable test and taking into consideration art. 2 of the Geneva Conventions dated in 1949. The definition of aggression was kept on perceiving as pointless at penal aims due to the unclosed catalogue of acts of aggression included in art.3"<sup>129</sup>. Additionally, in this report one made a distinction between an aggressive war with a criminal dimension and acts of aggression connected with the state's responsibility and they are considered as a transgression. The commission was given a difficult task to combine an individual's crime responsibility with acts of aggression when this notion was continually developing.

The second question that raised during the Committee's talks was the issue involving jurisdiction over the crime of aggression and the UN Security Council. One part of the delegation referred "on the one hand to the problem of UN SC's responsibility for keeping the peace and safety and its role in determination of acts of aggression, on the other hand to responsibility shed on law courts to

<sup>126</sup> Ibidem, s. 337.

<sup>127</sup> Cf. R. Kuźniar, *Prawa człowieka. Prawo, instytucje, stosunki międzynarodowe.*, Warszawa 2000, p.299.

<sup>128</sup> M.A. Shukri, op. cit., p 36.

<sup>129</sup> Ibidem, s. 37.

create an individual crime responsibility for the same action”<sup>130</sup>. The states that rejected a possibility to leave making decisions about acts of aggression, while law courts would pronounce about an individual crime responsibility, noted the issue of independence of the judiciary. They raised a question how law courts should behave, if a head of state was indicted. A law court pronounces a head of state not guilty, UN SC determines in advance that the state committed an act of aggression. In the report there was considered also a situation when a law court independently determined committing an act of aggression regardless of the UN SC’s entitlements<sup>131</sup>.

The previous decisions about committing an act of aggression can be lined with the defendant’s relying on the fact of excluding unlawfulness (*justification*<sup>132</sup>) before the court, in this case it would be self-protection<sup>133</sup>. The last one is connected with actions of the state. Therefore, it settles the influence of UN SC on rulings given by law courts in case when the first issues a resolution on the strength of the art. 37 Charter of the United Nations due to art. 51 of the Charter of the UN. The states, which did not want the subordination of courts to the UN SC, objected to such concepts. It was assumed that courts would lose their independence and objectivity, since they had to take into account decisions given by political body as the UN SC.

### 2.2.2. The Preparatory Committee of ICC

Works on the definition of aggression which was supposed to be included in the Statute of ICC, began together with the setting up process of the ICC. Talks about the crime of aggression started by the Iran’s proposition in the name of NAM states (*Non-Aligned Movement*) involving the continuation of works on the crime of aggression’s theme.

A number of divergences between 160 states debating on creating the Statute of the ICC respecting content of the definition and conditions of jurisdiction over this crime, rescheduled voting for seven years on the resolution’s text concerning above issues. In that time there were Commissions created among which it was debated on the definition of aggression and conditions of its jurisdiction<sup>134</sup>.

During the Rome Conference the crime of aggression was in the centre of attention. The basis for works on the crime of aggression became the

<sup>130</sup> Report of the Ad hoc Committee on the Establishment of an International Criminal Court, UN doc.A/50/22, 1995, par. 64

<sup>131</sup> O. Solera, op. cit., s. 338.

<sup>132</sup> Report of the Ad hoc Committee on the Establishment of an International Criminal Court, UN doc.A/50/22, 1995, par. 70.

<sup>133</sup> O. Solera, op. cit., p. 339.

<sup>134</sup> Ibidem, p. 339

mentioned-above definition included in the project of Code of Crime passed in 1996 by the International Law Commission. This project served as a condition for multilateral negotiations in Rome which rejection would mean lack of support of the European Union as well as 30 states of NATO<sup>135</sup>. During the Rome Conference former Nuremberg prosecutors were in favor of including the definition of aggression in the Statute of the ICC. However, as it was claimed “the crime of aggression should be excluded [from the agenda – note D.D.] in the phase of creating the Statute”<sup>136</sup>. Although, since they did not want to omit the crime, it was took in the crimes covered with jurisdiction of the ICC (art. 5 of the ICC’s Statute).

In the process of negotiations, two contentious issues came up: first of all a need (or lack of it) for involving this crime into the Statute, secondly – role of the UN Security Council in statement of existence of the crime of aggression and thirdly – defining this crime<sup>137</sup>.

After all, the project of the crime of aggression was practically eliminated from the Statute two days before the end of the Conference<sup>138</sup>. The definition of aggression and need for criminal proceedings in the case of aggression as well as requirements connected with this issues, caused many controversy during works on the ICC’s Statute.

Thanks to support given by several European states, the crime of aggression came up for debate and placed in the Statute, included in objective jurisdiction next to genocide, crime against humanity, war crimes. Nevertheless, there was a gap between the crime of aggression and other crimes. In the Statute there was placed a suitable regulation on the crime of aggression:

“Art. 5.2. The Court carries out jurisdiction with reference to the crime of aggression as soon as a resolution in accordance with art. 121 and 123 defining this crime and determining conditions of the Court’s jurisdiction over the crime are passed. The above-mentioned resolution should be in accordance with appropriate resolutions of the Charter of the United Nations”<sup>139</sup>.

When the Preparatory Committee was set up with the last act of the Rome Conference, it started its first session between 16<sup>th</sup> and 26<sup>th</sup> February 1999. It would seem that the Committee was going to take up issues connected with Elements of Crimes and Rules of Procedures and Evidence.

<sup>135</sup> Ibidem, p. 450-534.

<sup>136</sup> cf. E. Leclerc-Gagné, M. Byers, *A question of intent: the crime of aggression and unilateral humanitarian intervention*, Case Western Reserve Journal of International Law; 2009, Vol. 41 Issue 2/3, p. 379.

<sup>137</sup> M. Płachta, *Międzynarodowy Trybunał Karny*, Zakamycze 2004, p. 452.

<sup>138</sup> Ibidem.

<sup>139</sup> M.A. Shukri, op. cit., p. 37.



The Arab states, especially the NAM states, raised an issue of the aggression, nonetheless the priority issue was the mentioned-above question linked with Elements of Crimes and Rules of Procedures and Evidence. The problem of aggression was not then covered with the mandate of this Committee. However, Lebanon, Libya, Iraq, Bahrain, Syria, Oman, Sudan, Yemen on the last day of the session introduced the document<sup>140</sup> concerning an understanding of the aggression's issue by these states. The document referred to the resolution 3314, supplemented with an attack on people's right to self-defense as an act of aggression. Self-protection was connected with the notion of aggression because when one of the sides (a state) acts in self-defense protecting its sovereignty, political independence or territorial integrity, it is protection against the second side's aggression. Therefore, it seemed logical that such regulation was going to be placed in the definition of aggression. Though it is worth considering who would have to make decisions about self-defense/aggression when the situation had required assessment paying special attention to both those institutions practically at the same time. Several states which would have decided to take up actions in self-defense against another state, could be justified, since they had acknowledged the decision was right for their interest and could have started an aggressive war (and officials making such decision committing the gravest crime – the crime of aggression) or taken up actions in an anticipatory self-defense predicting actions of the first state. It could be debated if the UN SC would have been empowered to settle the fact of self-defense, whereas the ICC committing the crime of aggression, when self-defense and aggression had been jointed with the facts assessed from different perspectives – legal-international and criminal, if they were thinking about the definition of the crime of aggression for the purpose of the ICC's Statute. It would have meant a need for discussion on relationship between the UN Security Council and the ICC. What is more, as it has been indicated above, it would be difficult to discuss about the penal aspect since the list of acts mentioned in resolution 3314 has not been closed.

The aim motivating the project's authors so linked with need for including this theme into the next session. The NAM sustained interest of the aggression's subject, hence as a result there was introduced a compilation of suggestions concerning the crime of aggression's theme.

Mister Kirsh, the president of the Preparatory Committee, was asked by Arab ambassadors to pay greater attention to issues concerning aggression during the session between July and August in 1999. A coordinator of this session did not attach great significance to aggression because of reluctance of some states. The

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<sup>140</sup> Ibidem.

pressure of the NAM's movement persuaded the coordinator to introduce complicated offers of the definition of aggression. Among them were propositions of the Preparatory Committee gathered in years 1996-1998 in front of the Rome Conference, the offer from a diplomatic conference on forming International Criminal Court in 1998, from the Rome Conference, from the Preparatory Commission since the first session in 1999<sup>141</sup>.

There also appeared a document prepared by the Russian Federation according to which aggression became acknowledged as preparation, starting, conduct of the aggressive war. In turn, Germany in its proposition placed particular emphasis on the element of occupation, what could exclude some of the act mentioned in the resolution 3314. It was not acceptable for majority of the states, many of them do not accept some of these acts to this day<sup>142</sup>.

On the session dated from November to December 1999, works on propositions concerning the definition of aggression were continued, as well as conditions on which the Court should carry out jurisdiction and the role of the UN Security Council. There were expressed propositions of another states: Columbia, Greece, Portugal, New Zealand, Romania, Bosnia and Herzegovina.

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<sup>141</sup> Document PCNICC/1999/DP.11.

<sup>142</sup> M.A. Shukri, *op. cit.*, p. 37.

### 2.2.3. Works of the Working Group for the crime of aggression

The tenth session of the Preparatory Committee was also dedicated to the crime of aggression issue. The results of the Working Group were summed up and they were ponder over further course of the definition of aggression. There was general agreement that there was need for forming a working group which competence would include continuation and ending of works on the crime of aggression<sup>143</sup>. The composition of this group and dates of appointments were considered. As a result it was acknowledged that to the group would belong all the member states of ICC's Statute together with the principal of equality.

The appointments were supposed to be during ordinary sessions of the States' Assembly or on different dates if the Assembly would take it for necessary.

Substantive matters taken care of by the Working Group, were connected with documents on the definition of aggression prepared by the coordinator as well the project prepared by State of Samoa. Both documents were supposed to introduce the Working Group's achievements to date.

In 2008 the Working Group revealed the Discussion Paper, in which there was presented the definition of aggression<sup>144</sup>.

For the Statute's aims it was accepted that the crime of aggression meant planning, preparation, starting or performing by the person effectively controlling them or managing political and military state action which was indeed an act of aggression and through its character, weight or scale clearly violated the Charter of the United Nations.

Samoa's proposition concerned a complex of hallmarks of the crime of aggression e.g. being aware of will to the crime of aggression, modal circumstances, behavior and its consequences, that is these elements which were mentioned in art. 30 of the ICC's Statute.

Both propositions – the coordinator's and Samoa's, which was represented by professor Roger Clark, were both in accordance with aggression performed by the state and the crime of aggression was to be committed by an individual (a natural person). So first the act of aggression and then committing the crime of aggression by an individual should be stated. There was already no agreement for a list of aggression acts<sup>145</sup>.

<sup>143</sup> cf. To the whole paragraph: M.A. Shukri, op. cit., p. 38.

<sup>144</sup> cf. According to the whole paragraph: M.A. Shukri, Ibidem, s. 38; M. Politi, *The debate within the Preparatory Commission for International Criminal Court*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate 2004, p. 44.

<sup>145</sup> cf. M.A. Drumbl, *The push to criminalise aggression: Something lost Amid The Gains*, Case W. Res. J. Int'l L. 2009, vol. 41.:291, s. 292; D. M. Fereencz, *Bringing the crime of aggression within the active jurisdiction*, Case W. Res. Journal International Law, vol. 42:531, s. 531-541; K.J. Heller, *Retreat from Nuremberg. The Leadership Requirement in the Crime of Aggression*, The European Journal of

The crime of aggression mentioned in art. 8 bis had a controversial character for many states. A. Wyrozumska found that : “In spite of the fact that punishment for the crime of aggression has its own history in the international law, it was doubted that there was a possibility to connect an individual criminal responsibility with aggression – mostly understood as state’s act”<sup>146</sup>.

Therefore, we can say about three approaches to the crime of aggression. There were three views formulated.

First of them wanted to limit jurisdiction of the ICC to the most serious cases mentioned in the Charge of the United Nations. The first approach to the matter was connected with a general conception based on common law (it can be said that was also based on the 3314 resolution). That is why it was desired to exclude border incidents what, however could cause doubts as a border incident could be the beginning of serious military actions.

Second in a row referred to judging clauses in the ICC’s Statute (art. 1, 5 and 17). It was an enumerative approach based on the UN’s model lined with the enumerative calculation of acts of aggression.

The third conception assumed that every act of aggression constitutes a serious violation of law, including the Charter of the UN. The recipient of the third approach would be the UN Security Council. The Council would determine and define individual acts of aggression<sup>147</sup>.

Ultimately the Group came to conclusion that not every use of force meant aggression, what was previously the guideline on creating the definition of aggression.

The first approach sometimes combined with the second one to illustrate the responsibility model, could account on the biggest support. The definition based on the first approach referred to a permanent with *core crimes* in the ICC’s Statute, whereas the second approach corresponded to evolution in international criminal law, while the third approach would have been connected with an ad hoc establishment of responsibility for acts of aggression by the UN Security Council and risk of arbitrary making decisions<sup>148</sup>.

Finally, the crime of aggression was mentioned among crimes under the objective jurisdiction of the ICC in the Statute of this Court, but the definition was

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International Law, vol. 18, no. 3, 2007, s. 478; A. Reisinger Corracini, *The International Criminal Court’s Exercise of Jurisdiction over the Crime of Aggression at Last... in Reach... Over Some*, Goettingen Journal of International Law No 2, 2010; A. Reisinger Corracini, *Consent, Aggression and the International Legal Order*, SLS 2010.

<sup>146</sup> cf. M.A. Drumbl, op. cit., p. 293.

<sup>147</sup> M. Plachta, *Międzynarodowy Trybunał Karny*, Zakamycze 2004, p. 211.

<sup>148</sup> A. Wyrozumska, *Statut Międzynarodowego...*, p. 10.

not present: the Court's jurisdiction in this aspect was suspended till complementation of the Statute with the definition of this crime as well as clarification the conditions on which it would be able to judge its offenders<sup>149</sup>. The resolution defining this crime "should be in accordance with suitable resolutions of the Charter of the United Nations". It is certainly difficult to find what lies behind this formulation.

In the proposition of the definition of aggression there was excluded causing the war started because of violation international agreements, whereas there stayed causative/ factual forms of doing this act (planning, participation), but aggression itself was not defined<sup>150</sup>. None of the authorities dealing with this issue did not explain it so far. Therefore, it should be referred to the discussion of representatives of science<sup>151</sup>.

The ICC's Statute, section 2, art. 5 was added in the last phase of negotiations; it was a result of confidential talks and was not consulted by all states, though put to the vote right away. That is why there appear some doubts about it. They concern not only the conformity to art. 2 (4), but also art. 39 of the Charter of the UN. So, then there were deliberations if the definition of aggression had to take into account the role of the UN Security Council and assume previous statements about existence of aggression by the UN Security Council<sup>152</sup>. It seems that here is a hidden trap – at bottom, the Court's jurisdiction would be then dependent on political decisions of the UN Security Council<sup>153</sup>.

It is worth mentioning here that two regular members of the UN Security Council – the USA and China – to this day do not want to ratify the treaty establishing the Court; Russia also did not ratify the Statute, limited itself only to signing it. That is why deliberations of commissions appointed to works on defining the crime of aggression took into consideration also stands of the USA and Russia – members of the UN Security Council.

It should be mentioned how the definition of aggression was perceived at the moment of passing its project.

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<sup>149</sup> cf. E. Leclerc-Gagné, M. Byers, *A question of intent: the crime of aggression and unilateral humanitarian intervention*, Case Western Reserve Journal of International Law; 2009, Vol. 41 Issue 2/3, p. 379.

<sup>150</sup> A. Paulus, *Second Thoughts on the Crime of Aggression*, The European Journal of International Law, Vol. 20, nr 4, p. 1120.

<sup>151</sup> cf. J. H. Goldstein, *Aggression and crimes of violence*, Oxford University Press, New York 1986.

<sup>152</sup> cf. respecting the entirety A. Wyrozumska, op. cit., p. 10.

<sup>153</sup> cf. Ibidem, s. 10, Although A. Wyrozumska stated that „Surely we must be realistic, from which it appears that there is necessity for referring the definition of aggression to a contemporary structure of the international order”.

In 2010 there was continuation of deliberations on relation between the offence connected with an individual responsibility and the state's responsibility<sup>154</sup>. So there appeared a question how to have jurisdiction in the presence of a such constructed crime. The individual responsibility presupposes an aggressive war waged by a state or an international non-state subject and an organization (e.g. a rebel group)<sup>155</sup>. Currently a statement if a state in engaged in an aggressive war belongs to the UN Security Council<sup>156</sup>.

The institution of the UN Security Council since the beginning of the negotiations has been connected with political connotations. It was also considered how the relation between above decisions concerning statement about being an aggressive war or nonfeasance and accusations of committing the crime of aggression should look like. It was under debate if accusation by the ICC's prosecutor was dependant on decisions made by the UN Security Council as well as if those decisions could be made by the prosecutor's office of the UN Security Council independently.

It was also deliberated if the UN Security Council should have a monopoly on making decisions and which of the cases should be handed over to the ICC to be taken care of by the ICC's prosecutor<sup>157</sup>.

In the end, during the negotiations the decision was made that an opinion of the UN Security Council's members may settle recognition of act of aggression, what may decide about statement committing the act of aggression. The ICC's prosecutor may conduct proceedings in the case of the crime of aggression. Members of mentioned commissions came to this conclusion after seven years of the debate on the theme of aggression and conditions of its performing.

On the 12<sup>th</sup> of June 2010, after seven years of negotiations, for the purposes of the ICC<sup>158</sup>, the crime of aggression and conditions of jurisdiction of this crime were defined. On that day, states – sides of the ICC's Statute (StICC), which participated in the StICC Inspection Assembly in Uganda (Kampala), made also decision that the article defining the crime of aggression will enter into force the earliest in 2017, provided that one year earlier at least 30 states – sites of the StICC ratify it. The elaboration herein is aimed to introduce issues connected

<sup>154</sup> A. Cassese, G. Acquaviva, M. Fan and A. Whiting, op. cit. p. 240. See: A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, [in:] A. Cassese (ed.), *The Oxford Company International Criminal Justice*, Oxford – New York 2009, p. 16-24.

<sup>155</sup> A. Cassese, G. Acquaviva, M. Fan and A. Whiting, op. cit. p. 240.

<sup>156</sup> cf. art.2(4) as well as art. 39 of the Charter of the UN.

<sup>157</sup> Hans-Peter Kaul and LIU Daqun, *Implications of the Criminalisation of Aggression*, FICHL Policy Brief Series No. 2 (2011).

<sup>158</sup> RC/Res.6 on 16th June 2010 r., annex 3, point 4.

with the crime of aggression's definition (draft of art. 8 bis StICC<sup>159</sup>) passed during the StICC Inspection Assembly in Uganda (Kampali). Issues discussed below will also concern conditions of jurisdiction (draft of art. 15a of the StICC\*).

During the Conference in Kampali, there were three options considered. Jurisdiction of the crime of aggression was taken into account and conditions of its fulfilling along with the role of UN Security Council were taken into account. Secondly, one should have agreed on the content of the definition of aggression based on the Working Group's definition the revised version, nevertheless the issues connected with conditions of jurisdiction will be sent to a new Working Group on the crime of aggression to carry out further considerations. That is why it was assumed that further comprehensive deliberations on the definition of the crime of aggression would be carried out by a new group working on mentioned problems. The USA were the only state openly supporting this approach<sup>160</sup>.

A sensitive definition did not give any directions how one should treat preceding or preventive events against proliferation of weapons of mass destruction. Therefore, "a strike of the USA and Israel on the suspicious Iranian program concerning Iranian nuclear weapons could determine the crime of aggression"<sup>161</sup>. Hence the sensitive definition is connected with consequences for the ICC. It raises controversy for using the force lawfully. As an example of the controversy, the author indicated using the force by France in Côte d'Ivoire or British and Polish invasion of Iraq in 2003. It is about states-sides of the ICC's Statute. The next example is Russian invasion of Georgia in 2008<sup>162</sup>.

The main element of the Conference was stocktaking which was used by non-governmental organizations (NGOs)<sup>163</sup>.

The resolution passed in Uganda consists of the preamble which message is an idea to initiate jurisdiction concerning the crime of aggression as soon as possible. In addition to this, the above-mentioned resolution states that one should ratify or pass changes in the ICC's Statute in an equal way, in accordance with art. 5a of the Statute of ICC included in the Annex 1 of this resolution. Before ratification each state has right to feature the declaration mentioned in art. 15 (bis) (4) of the Statute of ICC, under which the

<sup>159</sup> The StICC term means the Statute of International Criminal Court taking into account potential amendments included in resolution RC/Res.6 dated on 16<sup>th</sup> June 2010.

<sup>160</sup> Vijay Padmanabhan, *From Rome to Kampala. The U.S. Approach to the 2010 International Criminal Review Conference*, Council on Foreign Relations, Council Special Report No.55, April, 2010, p. 14-15.

<sup>161</sup> Ibidem.

<sup>162</sup> Ibidem, p 16. Georgia is one of the states-sides of ICC's Statute.

<sup>163</sup> W.A. Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press 2012, p. 204.

state declares that does not accept jurisdiction with reference to the crime of aggression. The resolution states as well about need for passing Elements of the Definition of Aggression included in the Appendix 2 of this resolution. One has also decided to check above-mentioned alterations within seven years since the Court starts functioning with changes in the Statute due to jurisdiction concerning the crime of aggression. To the resolution was also attached the Appendix 3 Understandings involving amendments to the Rome Statute of the ICC regarding the crime of aggression. One of them finds that aggression is the most serious and the most dangerous form of using the force and establishing if the act of aggression has been performed requires pondering over all circumstances of the specific case including a weight of considered acts and their consequences in accordance with the Charter of the UN.

The project of the definition of aggression (draft of art.8 bis the ICC's Statute) will be introduced taking into account a division into aggression and an act of aggression and as part of it also a division with hallmarks of the crime of aggression into a subjective element, an objective element, an object of protection (coup). So "a wide definition of aggression along with narrowing the crime of aggression to serious violations"<sup>164</sup> was adapted.

On the strength of art.8 bis (1) the draft of the Statute of ICC for the purpose of this Statute, the crime of aggression means planning, preparations, initiation or performing by a person being able to effectively control or direct political or military actions throughout an act of aggression which because of its nature, weigh or scale obviously violates the Charter of the UN. The structure of this article in the Paragraph 1 is based on the Charter of the UN. Similarly, according to language of art.8 (1) the Statute of ICC, the article is based on the Charter of the UN.

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164 Vijay Padmanabhan, *From Rome to Kampala. The U.S. Approach to the 2010 International Criminal Review Conference*, Council on Foreign Relations, Council Special Report No.55, April, 2010, p. 16.



### 3. THE CRIME OF AGGRESSION - THE DEFINITION

The draft of article 8 of the Rome Statute of the International Criminal Court (hereinafter referred to as the ICC) defines the crime of aggression as felony committed by a perpetrator/perpetrators. The crime of aggression should, however, be separated from the acts of aggression, committed by a state, but it lacks justification, such as self-defence or authorization by the UN's Security Council<sup>165</sup>. An act of aggression committed by a state provokes a discussion on responsibility of an entity for the crime of aggression. Apart from the UN's Security Council there are also mentioned other authorities that are important for the international community.

In accordance with the project of changes in the Rome Statute of the ICC, the term „manifest“ (i.e. „to manifest“, „to disclose“) must be objective. It is claimed that the project of the definition of the crime of aggression introduces a threshold clause, according to which punishability for the crime of aggression is limited to cases dependant on the character, gravity and scale of an infringement, being „the manifest infringement“ of the United Nations Charter. The only difficulty pertains to the interpretation of the word „manifest“.

Not all states participating in the works of the Working Group regarded putting the threshold clause as necessary. The final shape of the accepted solutions was dictated by the need to relieve the ICC from dealing with trivial cases. The parties have agreed to the threshold clause in exchange for skipping the reference on the existence of the aggressive crime being actually the prime condition allowing to recognize a felony as the crime of aggression. Further, the list of acts of aggression was not supposed to contain all positions enumerated in the resolution of aggression<sup>166</sup>.

One may conclude that this way the term of the crime of aggression has been limited to the most serious cases, excluding border incidents. Such example cannot, however, be taken for granted, as the accompanying terms of “character”, “gravity” and “scale” allow for wide range of interpretation in every case.

<sup>165</sup> See: D. de Ruiter, W. van der Wolf (ed.) *Aggression and International Criminal Law*, International Courts Association Press, 2011, p. 24.

<sup>166</sup> R. Clark, *Amendments to the Rome Statute of the International Criminal Court considered at the First Review Conference at the Court, Kampala, 31 May – 11 June 2010*, Goettingen Journal of International Law vol. 2, nr 2, 2010, p. 698.

The draft of article 8 enacts the threshold clause, that limits the punishability of an act of aggression to the gravest cases. These are the ones that are defined through their character, gravity and scale and constitute a manifest infringement of the UN's Charter. The main ambiguity may, however, appear while attempting to define the word „manifest”. During the works of the Working Group there even appeared voices that the threshold clause is superfluous, because every act of aggression does form a manifest infringement of the UN's Charter and should not be excluded from the definition proper. What seemed, however, more important was the view that the clause would relieve the ICC from dealing with border incidents and trivial cases. The use of the notions „gravity” and „scale” in defining the crime of aggression allows to easily exclude border incidents, whereas the term „character” unfortunately falls under the category of the undefined ones. The Rome Statute of the ICC does include other indeterminate notions used in the definition of crime. One can find these in article 6 („with the intention to destroy the whole national group or a part of it”), or in article 7 of the Rome Statute („massive or systematic attack”) <sup>167</sup>.

According to article 41 of the Project, the elements of the crime of aggression can be outlined as follows:

- behavior – the perpetrator has planned, prepared and executed an act of aggression;
- circumstances – the perpetrator was in a position allowing to exercise control over or direct the political or military action of a state that committed an act of aggression by virtue of article 42 of the Project;
- occurrence – an act of aggression, understood as the use of military force of one state against sovereignty, territorial integrity or political independence of another state, or an act in any other way contrary to the UN's Charter, that has been committed;
- subject (awareness) – the perpetrator was aware of the fact that the factual circumstances did not legalize the use of military force in the light of article 43 of the Project;
- gravity – an act of aggression was a manifest infringement of article 44 of the Project due to its character, gravity and scale <sup>168</sup>.

According to D. de Ruiter and W. van der Wolf the elements of the crime of aggression cover *actus reus* and *mens rea* (i.e. objective and subjective elements, accordingly) and the completion an act of aggression involves criminal liability.

<sup>167</sup> J. Olejniczak, *Propozycja definicji zbrodni agresji, warunków wykonywania jurysdykcji przez MTK i elementów definicji zbrodni agresji*, Wrocławskie studia erasmiańskie. Zeszyty Studenckie marzec 2011, p. 28-29.

<sup>168</sup> J. Olejniczak, op.cit.

When it comes to an act of aggression, one must prove that the participation in it was intended<sup>169</sup>. This element will be fulfilled, provided that a person continues to participate with full awareness of the aggressive war being intended<sup>170</sup>.

### 3.1. THE SUBJECT

In accordance with the resolution from 1974, aggressor is the state that used force. As in case of the crime of aggression the subject is an entity, then the perpetrator would be the subject entitled to use force on behalf of a state. The so-called „rule of the first shot” would impose evidence to the contrary on the defendant, which would be inconsistent with article 67 paragraph 1 of the Rome Statute of the ICC. Therefore, the rule of the first shot has not been included in the definition of the crime of aggression.

Aggression, treated as a crime, cannot, therefore, be committed by a physical person in isolation from the state. As indicated by U. Leanza, being an international crime, aggression is strictly related to a state<sup>171</sup>, whose official, acting on behalf of this state as a military or political leader, is committing this crime<sup>172</sup>. People who could be held responsible for the crime are not only the state leaders, but also other officials being in charge of the state. In accordance with the project of the criminal code from 1996 and the real nature of aggression, the circle of people that should be called to account has been limited to leaders and organizers, as, following the standpoint of the International Law Commission, this crime is committed always at the command of an official holding the highest position in military, political or economical structure of a state.

Such solution has also been accepted by the designers of the definition of the crime of aggression for the purpose of the Rome Statute of the ICC. Within the meaning of article 1 of its Statute, the International Criminal Court exercises its jurisdiction towards persons who have committed the gravest international crimes, the crime of aggression indubitably being one of them<sup>173</sup>. Needless to say,

<sup>169</sup> D. de Ruiter, W. van der Wolf (eds.) *Aggression and International Criminal Law*, International Courts Association Press, 2011, p. 20.

<sup>170</sup> Ibidem.

<sup>171</sup> U. Leanza, *The Historical Background* [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, p. 8. N.H.B. Jørgensen has put a similar statement in her monograph, claiming that what is most important is the responsibility of the state for the crime, together with the responsibility of leaders and organizers. N.H.B. Jørgensen, *The Responsibility of States for International Crimes*, Oxford Monographs in International Law 2005, p. 151-152.

<sup>172</sup> M.A. Shukri, *Will Aggressors Ever be Tried Before the ICC?*, [in:] M. Politi, G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression*, Ashgate 2004, p. 36.

<sup>173</sup> Art. 1 of the Rome Statute of the International Criminal Court.

the crime of aggression has been acknowledged by the judges of the International Military Tribunal in Nuremberg as the gravest crime<sup>174</sup>.

Definition of the crime of aggression accepted in Uganda restricts the circle of people that could be called to account for committing this crime. The crime of aggression has been recognized as the so-called *leadership crime*<sup>175</sup>. This very term indicates special features that should characterize a perpetrator of the crime of aggression, limiting the list of subjects to persons being in charge of military or political actions of the state, or having control over its territory. Due to the fact that the definition of the crime of aggression includes the consecutive elements of this crime, that is planning, control, assistance, the subject of the crime would be an organizer, head offender, assistant and instigator. According to J. Olejniczak, this would comply with the former experience gained during the military trials in Nuremberg<sup>176</sup>. On the other hand, it seems that people playing an important part in the financial or economical life of a state have been ruled out, unless they held a due position in the state's government.

The person mentioned in the project of article 8 of the Rome Statute of the ICC should take up actions against a state and not other physical person, corporation or organization. According to the note referring to the crime of aggression in the project of the Elements of the Crime Definition included in the Appendix II of the Resolution RC/Res. 6, more than one person can control or be in charge of political or military actions of a state. A. Cassesse has indicated three most conspicuous features of aggression: first of all, it is never committed by an entity acting on their own, secondly it is always an outcome of collective actions taken up by a group of people; and, last but not least, it always involves civil or military leaders or non-governmental leaders, that is the ones who have planned and organised the crime<sup>177</sup>.

On the other hand, it is more significant when a subject does have a real possibility to control or be in charge of political or military actions of a state. The perpetrator does not necessarily have to be a person performing the highest functions in the government or state, i.e. the president, minister etc. This would mean that of greater significance would be functions appointed as a direct result of military actions of a state and that these

<sup>174</sup> J. Olejniczak, op.cit.

<sup>175</sup> See: R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for JCC Exercise of Jurisdiction Over It*, European Journal of International Law, volume 20 no 4 November 2009, p. 1105.

<sup>176</sup> J. Olejniczak, op.cit.

<sup>177</sup> A. Cassesse, *International Criminal Law*, Oxford University Press 2008 (second edition), p. 159.

assure the possibility of taking control in the state and later – to concoct the aforementioned plan.

Prof. Clark claimed<sup>178</sup> that the concept, according to which the subjects of the crime of aggression can only be the persons that are in charge of state actions is inadequate to the standpoint presented by the International Military Tribunals in Nuremberg and Tokio<sup>179</sup>. The specialists further claimed that the requirements related to control or being in charge of military or political actions of a state should be replaced by shaping and influencing these actions<sup>180</sup>. It would be good to accept this conception. The project of the definition of the crime of aggression is not defined in a precise way.

Within the meaning of the definition of the crime of aggression outlined in the Rome Statute of the ICC, an aggressor could also be a businessman or entrepreneur possessing appropriate funds and means needed to control a territory<sup>181</sup>. The above theory has gained support on the part of public prosecutors of the US and France at the end of the World War II, when those states mutually agreed that industrial leaderships could actually be responsible for committing the crime of aggression<sup>182</sup>. Nevertheless, none of entrepreneurs has ever been convicted for committing a crime of aggression<sup>183</sup>.

K. J. Heller mentions cases examined by the International Military Tribunals in Nuremberg and Tokyo as examples where the concept of „*shape and influence*” has been incorporated<sup>184</sup>. The first of the two examples was the lawsuit of the main perpetrators of the Axis powers. Two charges pressed concerned the crime against peace. The Tribunal has acknowledged that Adolf Hitler did not commit the crime against peace alone, but collaborated with statesmen, military commanders, diplomats and businessmen.

Despite the above, two entrepreneurs (Hjalmar Schacht and Albert Speer) were found not guilty. The reasons for the judgment in Schacht's lawsuit were

<sup>178</sup> See: op. cit. R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its elements and the Conditions for JCC Exercise of Jurisdiction Over It*, European Journal of International Law, volume 20 no 4 November 2009, s. 1105.; K. J. Heller, op. cit.

<sup>179</sup> A similar standpoint was presented by the following countries: Cambodia, Thailand, Sierra Leone and Belgium; K. J. Heller, *Retreat from Nuremberg. The Leadership Requirement in the Crime of Aggression*, The European Journal of International Law, vol. 18, no. 3, 2007, p. 479.

<sup>180</sup> K. J. Heller, op. cit. p. 479-480.

<sup>181</sup> R. Clark, op. cit.

<sup>182</sup> R. Bank, *The Role of German Industry: From Individual Criminal Responsibility of Some to Broadly Shared Responsibility for Compensatory Payments*, [in:] H. R. Regimbogin, C. J. M. Safferling (eds.), *The Nuremberg Trials. International Criminal Law Since 1945*, K. G. Saur, Muenchen 2006.

<sup>183</sup> R. Clark, *Amendments to the Rome Statute of the International Criminal Court considered at the First Review Conference at the Court, Kampala, 31 May – 11 June 2010*, Goettingen Journal of International Law vol. 2, nr 2, 2010, p. 697.

<sup>184</sup> K. J. Heller, op. cit., p. 479-480.

that he was said to have contributed substantially in the growth of Germany's military potential. His efforts would have been of criminal character only if they had formed a part of a common plan of aggressive war, or if he had been aware of such plan. Public prosecutor's office has stated that Albert Schacht did not belong to Hitler's internal circle of people directly engaged in creating the common plan<sup>185</sup>. Otherwise, he could have been charged with the crime of aggression. In conclusion, perpetrators of the crime of aggression would not necessarily have to perform the highest functions in their state in order to be able to get charged with the crime in question.

Terrorists, groups of rebels, businessmen, religious groups (all being the so-called *non-state actors*)<sup>186</sup> could also be assigned the realization of some elements of the crime of aggression, provided that those non-state actors were aware of their behavior consisting in controlling the actions of a state that would lead to the crime of aggression. Perhaps it was assumed that it would be possible to judge terrorists for their crimes, including the crime of aggression against the United States of America. However, as M. Bassiouni has stated, „Who is a terrorist for some, will be a hero for others”<sup>187</sup>. It is, therefore, hardly possible to objectively assess a situation, as the final assessment will depend on one's standpoint. The definition of the crime of aggression sets objective criteria, which exclude non-state actors that are not in charge of state actions or have no control over its territory.

The responsibility for the crime of aggression could also be assigned to the so-called *Warlords*, who play a vital role in a state being in a non-international armed conflict. The state in conflict is then geographically or financially dependant on countries supplying weapon and money, which are thereby contributing to the intensification of the conflict. It is widely assumed that *Warlords* are in power to control military situation in the state and to influence the development of its political and military condition. Their actions might thus be contradictory to their own country's interest, as they would act against it and not against a foreign country. One may also assume that military and political situation of the other state may be conditioned by the actions of *Warlords*, however in their strategy it would be pushed to the second plan. Thus, such crime could fall under the category of auto aggression<sup>188</sup>. *Warlords* might also send rebels to a neighbour-

<sup>185</sup> K.J. Heller op. cit., p. 481.

<sup>186</sup> *Defining Aggression: An Opportunity to Curtail the Criminal Activities of Non State Actors*, Brooklyn Journal of International Law, vol. 36:2, p. 647.

<sup>187</sup> M.C. Bassiouni, *International Terrorism and Political Crimes*, Springfield 1975, p. 485, [after:] T. Aleksandrowicz, *Terroryzm międzynarodowy*, Warszawa 2008, p. 17.

<sup>188</sup> Similarly, the crime of genocide against one's own citizens is often referred to as *autogenocide*.

ing state, thereby committing the crime of aggression against another country, within the meaning of draft of article 8a of the Rome Statute of the ICC<sup>189</sup>.

What comes to the foreground, is, however, the responsibility of the state, in which Warlords operate. It is then highly probable that such state would be classified as one of the *failing States*<sup>190</sup>, and its responsibility would be highly dubious. Judging a warlord would be in the jurisdiction of a domestic court that might render an independent and impartial judgment or remain under the influence of the warlord's opponents. The judgment of the domestic court would not, however, need to be in compliance with the standpoint of the UN's Security Council.

The subjects of the crime of aggression could also be those persons, who only usurp the rights to be in charge of a state, which would, in fact, decide about their real aptitude to take control over a territory.

The person being in charge of the actions on a state territory would be the subject of the crime of aggression instigating this crime. The person encouraging to this crime would be the instigator, whereas the person helping would be the assistant. It is of utmost importance to remember about the structure of the so-called *joint criminal enterprise*, covering the conspiracy leading to the crime of aggression, within which „the leaders, organizers, instigators and accomplices participating in creating and / or executing a common plan or conspiracy in order to commit a crime, are responsible for every deed related to the execution of the plan in question”<sup>191</sup>.

As has already been mentioned, *warlords*, thanks to their financial and military possibilities, could take control in the so-called „failing states”. Meanwhile, according to the definition of the crime of aggression, the people responsible would be those being in charge of the state actions, and such persons are denied the power even if they performed the highest functions, which, in fact, is in compliance with the theory that it is not possible to control failing states. Should this be the case, then the actions

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For *autogenocide* see: D. Dróżdż, *Zbrodnia ludobójstwa w międzynarodowym prawie karnym*, Warszawa 2010;

<sup>189</sup> The state, from which rebels were sent would then be committing an indirect aggression. See: T. Ruys, *“Armed Attack” and Article 51 of the UN Charter. Evolutions in Customary Law and Practice*, Cambridge University Press 2010, p. 383.

<sup>190</sup> See: A. Rashid, *Pakistan on the brink. The future of Pakistan, Afghanistan and the West*, Penguin Books 2012; A. Rashid, *Descent into Chaos, Pakistan, Afghanistan and the threat to global security*, Penguin Books 2009; A. Rashid, *Taliban*, I.B.Tauris 2011.

<sup>191</sup> Fragment of art. VI of the International Military Tribunal's Charter. This fragment has been quoted in the light of considering the responsibility for the crime of aggression according to the model presented. The project of the definition of the crime of aggression may form the basis for the assessment of this crime according to the very model.

of such people could not form the part of the definition of the crime of aggression.

Despite the existence of the rule of complementarity and the state priority to adjudicate, it would be difficult to assess a verdict passed by a court of a failing state as impartial. Nonetheless, such court may have a different standpoint from that of the UN's Security Council - it will not infringe the law, but will be binding for this territory<sup>192</sup>.

At this point one may raise questions about the responsibility of a failing state and its leaders. Presumably, such situation might be qualified as releasing the state from responsibility, especially when other countries would have no further interest in repressing the already fallen state<sup>193</sup>.

From the point of view of the international law, the UN's Security Council is the right organ to decide whether or not there has been committed a crime of aggression. If the UN's Security Council confirms the lack of awareness and ability to control on the part of the state leaders, then the state will not be charged with the responsibility for committing the crime of aggression.

It is also probable that the actions of some of the leaders might bear features of the crime of genocide, war crimes, crimes against humanity and even crimes of aggression. However, due to the fact that the notions forming the definition of the crime of aggression are rather vague, simple and unequivocal classification is not possible. Further, one must take into account the impact a warlord might have on his/her country and whether they would have the real power.

A state that is facing difficulty controlling the power on its own territory might ask another country (or countries) for help, which, consequently, would mean help in the form of humanitarian intervention or fulfilling the concept of responsibility to protect<sup>194</sup>.

Other states might be willing to respond to the request for help voiced by the state, on the territory of which there have been reported incidents of human rights infringement and international crimes. Whether or not the actions of an intervening state (or states) comply with the features of the crime of aggression will be assessed by the UN's Security Council or the ICC. The latter will find it challenging to voice its opinion on a

<sup>192</sup> See: A. Cassesse op. cit., p. 155-158.

<sup>193</sup> See: U. Leanza, op. cit., p. 7.

<sup>194</sup> To find more on „failing states” see: A. Ghani, C. Lockhart, *Fixing Failed States, A framework for rebuilding a fractured world*, Oxford University Press, 2009.



situation that is not within the interest of the UN's Security Council<sup>195</sup>. The general assumption was to release the ICC from dealing with cases of poorer significance to the world peace and security. This issue did not remain unnoticed on the part of delegates<sup>196</sup>, therefore there were formed two paragraphs of „understandings” accepted for the purpose of creating the definition of the crime of aggression<sup>197</sup>.

According to the regulations proposed, the crime of aggression is the most severe and dangerous form of illegal use of force. Whether or not this very crime has been committed entails considering all circumstances of a case. Only the first judgments issued will help to interpret the notions of „control” and „be in charge of” state actions when it comes to committing the crime of aggression.

The above standpoint was adopted by delegates that were taking part in works on defining the crime of aggression held in the Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University from June 11<sup>th</sup> to 14<sup>th</sup> 2007<sup>198</sup>. Nevertheless, this point of view changed and the possibility to see the non-governmental perpetrators (except for the persons being in charge of or controlling state actions) as responsible for the crime of aggression was rejected. According to R. Clark, the accepted solution seems to be favorable for the US<sup>199</sup>.

State organs, that is state officials, being in charge of or controlling military or political state actions can be subjected to liability for the crime of aggression. Criminal liability will also be imposed on those who instigate this crime or are responsible for other forms of the crime of aggression, which will be outlined further in more detail.

The people involved may be those, who are high in rank in jurisdiction, executive or legislative power. In line with article 42 of the project of convention on state responsibility „Every person or entity can be a power organ, as long as they have been assigned such role or status on the power of the internal state regulations”. Following the project from 2010, the

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<sup>195</sup> G. Yang, *International Criminal Court: A Judicial Guarantee for International Peace and Security*, FRICHL Publication Series no. 5 (2012), p. 99.

<sup>196</sup> Statement by Harold Koh to the Conference, 4 June 2010, available at <http://www.state.gov/s/l/releases/remarks/142665.htm> (last visited 19 August 2010).

<sup>197</sup> *Understandings* for the project on the crime of aggression.

<sup>198</sup> Liechtenstein Institute on Self-Determination, Woodrow Wilson School, Princeton University, from 11th to 14th June 2007, Doc. ICCASP/6/SWGCA/INF.1 (2007) at 3, paragraph. 12. Liechtenstein was the first state to have accepted amendments to the Rome Statute of the International Criminal Court.

<sup>199</sup> R. Clark, *op. cit.*, p. 699.

subject of the crime of aggression is a person, who has been assigned the status of state organ within the norms of the internal law. This function allows the person to be in charge of military or political state actions or to control state territory. It could be a good solution to explain who can be the subject in the case of the crime of aggression, who can control or direct to commit the crime of aggression, because it should not be everyone who can control or direct the state, but someone in a position effectively to exercise control over or to direct the political or military action of a State. (draft of Art. 25 (3) bis. of ICC Statute). On the other hand, when the person takes a position which entitles him or her to control or administer the state, draft of Art. 8a of the ICC Statute does not specify what the nature of the position would be. It could therefore be a businessman as mentioned by R. Clark<sup>200</sup>.

### 3.2. THE SUBJECT PARTY

C. Byron claims that article 30 of the Rome Statute of the ICC has been drawn up for the purpose of those crimes that have not been defined in international treaties, or the subject party of which has not been determined in any of the international treaties before the acceptance of the Statute of the International Criminal Tribunal for the former Yugoslavia, the statute of the International Criminal Tribunal for Rwanda and the Rome Statute of the ICC<sup>201</sup>. This concerns the crime against humanity and some of the war crimes.

The above remark may refer to the definition of the crime of aggression designed on June 12<sup>th</sup> 2010 (RC/Res.6 dated June 16<sup>th</sup> 2010 r., appendix 3, point 4), for which the rules of criminal liability drawn up in the Rome Statute of the ICC find application. During the Rome Conference the former prosecutors from Nuremberg opted for including the definition of the crime of aggression in the Rome Statute of the ICC. Nevertheless, the final decision taken was that „the crime of aggression should be excluded from the Statute at the very first stage of its creation”<sup>202</sup>. Further, one of the most vital arguments voiced during the Rome Conference was that the

<sup>200</sup> R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its elements and the Conditions for JCC Exercise of Jurisdiction Over It*, European Journal of International Law, volume 20 no 4 November 2009, s. 1105.

<sup>201</sup> C. Byron, *War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court*, Manchester and New York 2009, p. 5.

<sup>202</sup> M. Plachta, 2004, *Międzynarodowy Trybunał Karny, tom I*, Zakamycze 2004, p. 452.

crime of aggression is not defined in a way that would allow to include it in the Rome Statute”<sup>203</sup>.

Article 30, paragraph 1 of the Rome Statute of the ICC provides that, unless stated otherwise in the Statute, criminal responsibility will be imposed on the one, who purposefully realises the elements of crimes covered by the subject jurisdiction of the ICC. Further paragraphs of this regulation refer to three elements directly related to the intention of committing a crime. Those are the following elements: the deed, the effect and circumstances. Paragraph 3 of article 30 of the Rome Statute of the ICC defines the notion of awareness. Further, the definition of such words as „intent” and „consciously” is explained in paragraphs 2 and 3 of the very article. Unless stated otherwise in the Statute, a person acts intentionally when:

- a. he or she aims at committing the deed,
- b. he or she aims at evoking a certain effect or is aware of such effect being a natural outcome of consecutive events<sup>204</sup>.

The term „aims at” indicates the lack of unintentionality on the part of the perpetrator, who commits the deed consciously. As the perpetrator wants to be in charge of his/her actions, they have to be aware of the circumstances accompanying the deed. Therefore, the term „intent” covers also the awareness of the circumstances of the act. The person acts with the so-called „direct intent” (*dolus directus*).

Article 30 (2) (a) of the ICC Statute refers to a situation, in which a person does not agree to the additional effects, but is fully aware of their inevitability or wishes the effects to occur. Therefore, „unless stated otherwise, article 30 of the Rome Statute of the ICC does not refer to crimes committed unintentionally or with conceivable intent. In accordance with article 30 (2) (b) of the Statute, the need for a perpetrator to be aware of the effects occurring in normal sequence of events or to have<sup>205</sup> the intent to cause effects, exclude both forms of the subjective responsibility”<sup>206</sup>.

The term „consciously” appears in article 30 of the Rome Statute of the ICC in all three paragraphs. In paragraph 1 it forms one of the elements

<sup>203</sup> Ibidem.

<sup>204</sup> See: D. Drózd, *W sprawie art. 30 Statutu MTK*, [in:] A. Koperek (ed.), *Polityka międzynarodowa a globalizacja – wybrane aspekty*, Vol. XIII, No. 3, Łódź 2012.

<sup>205</sup> Compare: M. Plachta in reference to the term „intend to” in the Polish translation of article 30 of the Rome Statute of the International Criminal Court: M. Plachta, *op.cit.*, t. II, Kraków 2004, p. 83, footnote 41.

<sup>206</sup> See: G. Werle, Fr. Jessberger, W. Burchards, V. Nerlich, B. Cooper, *op.cit.*, p. 114.

of a crime under the jurisdiction of the ICC, for which a person can be held criminally responsible. Paragraph 2 states that „a person wishes to evoke such effect or is aware of the effect occurring in natural sequence of events”. Further, in paragraph 3, the notion „consciously” should be understood in accordance with the definition of awareness.

G. Werle, Fr. Jessberger, W. Burchards, V. Nerlich, B. Cooper have unanimously claimed that a deed consisting in preparation, instigation or leading an aggressive attack (i.e. when the perpetrator is committing a crime against peace) should be committed purposefully and with full awareness<sup>207</sup>. In other words, the perpetrator should be aware of the use of military force on the part of the state in a form being in contradiction with the UN’s Charter<sup>208</sup>.

In the project of article 8 (a) of the Rome Statute of the ICC there have not been put any elements of the subject party, that would in any way indicate that the regulation states otherwise than article 30 of the very Statute. Hence the conclusion that it is necessary to apply the resolutions under article 30 of the Rome Statute of the ICC. Due to the fact that art. 8a does not contain additional subjective elements within its content, the provision of art. 30 of the ICC Statute should be used for the crime of aggression, unless otherwise provided by specific regulations. It seems that they have not been included in the draft article on the crime of aggression. It would be a paradox, since this crime should be treated as the most serious of international crimes, and for its demonstrating it would be enough to prove that the perpetrator has awareness or intent to commit it.

Doubts as to the application of Art. 30<sup>209</sup> have been expressed by the Commission dealing with the amendment of the EC (Elements of Crime Definition). A perpetrator would have to know that the state laws remain in conflict with the UN Charter, which can lead to unwanted consequences, i.e. relying on the mistake of law, claiming that he or she has been

<sup>207</sup> G. Werle, Fr. Jessberger, W. Burchards, V. Nerlich, B. Cooper, *Principles of International Criminal Law*, T.M.C. Press 2005, p. 399.

<sup>208</sup> Compare: International Criminal Court ICC-ASP/7/SWGCA/INF.1. Assembly of States Parties Distr.: General, 19 February 2009, Seventh session (second resumption), New York 9-13 February 2009; Discussion paper on the crime of aggression proposed by the Chairman (revision January 2009) and project of art. 8 (a) of Elements of Crime, 28 May 2009, 18:00, Informal inter-sessional meeting on the crime of aggression, 8-10 June 2009, Non-paper by the Chairman on the Elements of Crimes, Annex I.

<sup>209</sup> The Explanatory Note in Appendix II of the 2009 Chairman’s Non-Paper on the Elements of Crimes (n 12): R. Clark, *Chapter 30, The Crime of Aggression*, 2013, p. 21, in mail from Roger Clark, 12.08.2013, p. 13.

misled by the adviser, or the perpetrator was blind to the illegality of his/her actions<sup>210</sup>.

It was mentioned in Chairman's Explanatory Note: [A] mental element requiring that the perpetrator positively know that the State's acts were inconsistent with the Charter of the United Nations (effectively requiring knowledge of law) may have unintended consequences. For example, it may encourage a potential perpetrator to be willfully blind as to the legality of his or her actions, or to rely on disreputable advice supporting the legality of State acts, even if that advice is subsequently shown to have been incorrect<sup>211</sup>.

### 3.3. THE OBJECT

The third element of the project of the crime of aggression would be an act of aggression committed by a state, as outlined in paragraph 2 of article 8 *bis* of the project in question. This paragraph should cover the list of acts of aggression based upon article 1 and 3 of the Definition from 1974, which is confirmed by the practice of the UN's organs<sup>212</sup>.

First and foremost, it is worth mentioning that the project of the crime of aggression refers in the first instance to state actions. According to M. Anderson, this is an improper interpretation<sup>213</sup>. Noah Weisbord claimed similarly: "[The best (. . .) approach (. . .) is to read the word 'State' dynamically and incrementally to include state-like entities.]"<sup>214</sup>. Professor Weisbord was not convinced about the dynamic concept of statehood, however, it seemed to be the most appropriate means allowing to broaden the definition of the crime of aggression so that it covers states and state-like entities<sup>215</sup>. On the one hand, this concept enables to provide a more complex definition of the crime of aggression. On the other hand, since

<sup>210</sup> Ibidem, par. 14, 18.

<sup>211</sup> "The Note, para 21, points to a connection between the defence of mistake and the requirement that only 'manifest' violations of the Charter are made criminal. Some instances of mistake will be washed out under the manifest requirement". R. Clark, *Chapter 30, The Crime of Aggression*, 2013[in:] C. Stahn, G. Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2013, s. 21, in mail from Roger Clark, 12.08.2013, s. 13.

<sup>212</sup> N. Strapatias, *Aggression*, [in:] W.A. Schabas, N. Bernaz, *Rutledge Handbook of International Criminal Law*, Routledge 2011.

<sup>213</sup> International Criminal Court [ICC], Assembly of States Parties, *The Crime of Aggression*, Annex I, art. 8 *bis*, ICC Doc. RC/Res.6 (advance version June 28, 2010), M. Anderson, *Reconceptualizing Aggression*, *Duke Law Journal*, Vol 60:411, p. 412.

<sup>214</sup> Noah Weisbord, *Conceptualizing Aggression*, 20 *DUKE J. COMP. & INT'L L.* 1, 30 (2009).

<sup>215</sup> M. Anderson, *Reconceptualizing Aggression*, *Duke Law Journal*, Vol 60:411, p. 412.

it is dynamic and therefore prone to changes, and the criminal law entails precise terminology, the meaning of the attributes of the crime of aggression should not leave any room for free interpretation. Including state-like entities into the definition would be an answer to an accusation about constantly changing reality and the necessity to create a definition adequate to that very reality<sup>216</sup>. This is of great significance, as state actions would be juxtaposed with the actions of an entity. What should, however, be taken into account is the customary law of aggression, which does not undergo dynamic changes. In line with article 8 of the Rome Statute of the ICC, state-like entities, others than those outlined in the Statute, do not form the subjects of the crime of aggression.

The acts enumerated in the draft of article 8 *bis* of the Statute of the ICC are similar to the deeds falling under the category of aggression according to the UN's resolution from 1974. Nevertheless, from the point of view of the contemporaneity, the list of the acts in the UN's resolution from 1974 is not comprehensive. In accordance with the resolution of the UN's Security Council defining aggression, the above-mentioned acts did not constitute a closed catalogue, allowing the Security Council to assess a deed that was not mentioned in the resolution as an act of aggression, or, to the contrary, recognize that in a given situation an act of aggression has not been committed. Due to the principle of legality (article 22 of the Rome Statute of the ICC), the catalogue of acts fulfilling the term of the crime of aggression in the draft of article 8 of the Rome Statute of the ICC is closed.

Object elements have been outlined in the draft of article 8 *bis* of the Rome Statute of the ICC and are covered in seven points included in the resolution 3314 from 1974. These are:

- “(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;

<sup>216</sup> See: A. Paulus, *Second Thoughts on the Crime of Aggression*, The European Journal of International Law, Vol. 20, nr 4, p. 1119.

- (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

1. amount to the acts listed above, or its substantial involvement therein”.

Stepping outside the list of acts already enumerated in the resolution from 1974 was taken into account. The proponents of this solution claimed that such act could be exemplified by maritime blockades being against the international law<sup>217</sup>. The compromise achieved in 2010 did not, however, manage to add to the list any other deeds apart from the ones outlined *explicitly* in the resolution 3314 from 1974<sup>218</sup>. A contradictory concept, leaving out the acts apart from the explicitly mentioned in the resolution might lead to an infringement of the rule of *nullum crimen sine lege*<sup>219</sup>. On the other hand, the regulations establishing the new acts could enter into force only after the amendments to the Statute have been ratified. Nonetheless, as mentioned above, the customary law of the crime of aggression does not undergo dynamic changes, therefore the list of aggressive acts is of closed character.

What seemed to be a priority for the US, was not to introduce any changes in the Statute of the ICC in order to activate the jurisdiction of the crime of aggression. As stated by Vijay Padmanabhan, „The lack of any clear standards for the definition of the crime of aggression may threaten the proper and effective functioning of the ICC for the protection of the

<sup>217</sup> G. Werle, F. Jessberger, W. Burchards, V. Nerlich, B. Cooper, *Principle of International Criminal Laws*, T.M.C. Asser Press, Haga 2005, p. 402.

<sup>218</sup> See: A. Bianchi, *State Responsibility and Criminal Liability of Individuals*, in: A. Cassese (ed.), *The Oxford Company International Criminal Justice*, Oxford – New York 2009, p. 16-24.

<sup>219</sup> See: K. Indeck, *Zasada nullum crimen sine lege w prawie karnym międzynarodowym*, [in:] L. Gardocki, M. Królikowski, A. Walczak-Żochowska, (ed.), *Gaudium in litteris est. Księga jubileuszowa Pani Profesor Genowefy Rejman*, Warszawa 2005. For the rule *nullum crimen sine lege* in the Statute of the ICC check: M. Królikowski, *Odpowiedzialność karna jednostki za sprawstwo zbrodni międzynarodowej*, Wydawnictwo sejmowe 2012, p. 111-117.



business of the USA”<sup>220</sup>. Unlike bestial crimes, the features of which are well-known, „the right to use force is more vague”<sup>221</sup>. Those crimes may be the only ones to be described as crimes of aggression, „and it is of utmost importance that those crimes remain the only ones”. According to W. A. Schabas<sup>222</sup>, decades will pass before any legal proceeding on the crime of aggression takes place. There have been very few events since 1945 that could be qualified as only bearing traits of the crime of aggression<sup>223</sup>.

H. Kaul has mentioned the latest breaches of the law that shocked the world and he expressed his deep incomprehension for the conservative approach of many delegates that excluded state-like entities from the proposition on the definition of the crime of aggression<sup>224</sup>. According to Vijay Padmanabhan, „the definition proposed refers to a very vague legal status enumerating only acts that might be considered aggressive, without defining when such acts are illegal. The definition is not formed in the same way as cases of self-defence or humanitarian necessity, therefore an unequivocal categorization of the use of force as aggression is not possible. It is also not clear whether the interventions of NATO in Kosovo in 1999 can be considered as aggression, or whether the action of Israel and the US was an act of aggression, or perhaps if it can be justified as an act of self-defense”<sup>225</sup>.

It is, however, difficult to share the view with the above-quoted author-ess that categorising the use of force as aggression is not possible, especially

<sup>220</sup> A. Bianchi, op. cit., p. 15.

<sup>221</sup> Vijay Padmanabhan, *From Rome to Kampala. The U.S. Approach to the 2010 International Criminal Review Conference*, Council on Foreign Relations, Council Special Report No.55, April, 2010, p. 15.

<sup>222</sup> W.A. Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press 2012, p. 204.

<sup>223</sup> See: W. A. Schabas, op. cit.

<sup>224</sup> See: Hans-Peter Kaul and LIU Daqun, *Implications of the Criminalisation of Aggression*, FICHL Policy Brief Series No. 2 (2011). States are abstract forms. Entities, being physical persons, are creative, capable of taking up individual actions. Organizational units are abstract forms by law and have been given such status by a man. Legal actions can be taken by a physical person on behalf of such organizational unit. Criminal liability would be imposed on a physical person acting on its own or on behalf of an organizational unit. Regulations of the London Agreement and the Statute of the International Military Tribunal enabled to see a group as criminal: L. Gardocki, *Zarys Prawa Karnego Międzynarodowego*, Warszawa 1985, p. 39. Responsibility was put on individuals, who bore it personally or due to a group membership of criminal character. See: D. Drózd, *Międzynarodowe Trybunały Karne (geneza, skład, jurysdykcja, postępowanie, działalność)*, Wydawnictwo SWSPiZ Łódź 2011, p. 24-26. From the point of view of history, there were examples that gave basis in the Statute of the International Military Tribunal to treat groups, organizations and organizational units as state-like entities bearing criminal liability. However, it seems better to call for account an individual, rather than abstract forms. See: L. Gardocki, op. cit., p. 50, 55.

<sup>225</sup> Vijay Padmanabhan, op. cit., p. 15.



that aggression was already acknowledged as the use of force<sup>226</sup>. This notion has been created for the purpose of judging people responsible for the events covered by temporal and subject jurisdiction of the International Military Tribunal in Nuremberg or Tokio. In case of the term of aggression, it is vital to make reference both, to the international public law and criminal law, although with respect to the definition of aggression in the resolution of the UN's Security Council, criminal law was not a must. Vijay Padmanabhan did not make any reference to criminal law, despite using the notion of „crime“. A crime will be committed as long as its key attributes are fulfilled. The list of acts outlined in article 8 *bis* of the Rome Statute of the ICC forms potential subjective features of the crime of aggression.

Since, as H. Kaul has commented, the main goal of the international law is to protect the international community against serious peace infringements, it is hardly justifiable why physical persons acting for and on behalf of state-like entities would be absolved from criminal liability for committing acts that obviously fulfill the attributes of the crime of aggression<sup>227</sup>. Whether or not the role of state-like entities will be taken into consideration will largely depend on the practice of courts and tribunals.

In line with article 8a of the Rome Statute of the ICC, the UN's Security Council is the first to decide whether or not a crime of aggression has taken place. Similar examples were added next to the ones presented by Vijay Padmanabhan, with an exception that they do not cover all cases that could possibly be regarded by the UN's Security Council as acts of aggression<sup>228</sup>.

Aggression is using force against another state, despite the argument to the contrary that the aggression proper has not been defined. Some German citizens were punished after the World War II for certain acts committed against other states. Those acts referred to such activities as planning, preparing, instigating and executing war. War, just as much as aggression, is an indeterminate notion.

Further, there were also emphasized forms in which aggression may be displayed. These forms will be described in more details later in this study.

Cyprian and Sawicki understood war as „evil, the consequences of which affect not only the states directly involved in the conflict, but the

<sup>226</sup> *Understanding no 1* to the project of the crime of aggression at Rome Statute of the ICC.

<sup>227</sup> Hans-Peter Kaul and LIU Daqun, op. cit.

<sup>228</sup> B. Ferenc, *Ending impunity for the crime of aggression*, Case W. Res. Journal International Law, 2009, vol. 41:28, p. 282.

whole world”<sup>229</sup>. The above-mentioned sentence seems accurate despite the passing of time.

### 3.4. ELEMENTS OF THE SUBJECT OF PROTECTION (ATTACK)

Features of the subject of protection (attack) of aggression are sovereignty, political independence and territorial integrity. Elements of the subject of protection (attack) can be found in the first sentence of the draft of Art. 8 bis (2) of the ICC Statute. They include sovereignty, territorial integrity and political independence of a state. Such conclusion can be drawn from paragraph 2 of draft of Article 8 bis (2) of the ICC Statute, which provides that for the purpose of paragraph 1, the act of aggression means 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.

### 3.5. CIRCUMSTANCES EXCLUDING LIABILITY DUE TO LACK OF ILLEGALITY OR GUILT

International criminal law gives various reasons for exemption from criminal liability. In case of unattributed criminal liability, in spite of committing a crime by a person, an international community makes a distinction between the circumstances excluding criminal liability due to lack of illegality or guilt. In case of need for the use of the circumstances, international criminal law is based on national law<sup>230</sup>. As stated by E. Sliedregt, the only circumstance excluding criminal liability, which does not derive from national law and is of an exclusively international nature, is a reference to the order<sup>231</sup>.

In addition, the Court may consider ‘another ground for excluding criminal responsibility other than those referred to in paragraph 1 (Art. 31 of the ICC Statute – note by D.D.) where such a ground is derived from applicable law as set forth in Article 21 (of the ICC Statute – note by D.D.). The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence’<sup>232</sup>. The ICC Statute

<sup>229</sup> T. Cyprian, J. Sawicki, *Materiały Norymberskie*, Spółdzielnia Wydawnicza „Książka” 1948, p. 157.

<sup>230</sup> Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, Oxford University Press 2011, p. viii.

<sup>231</sup> Ibidem.

<sup>232</sup> Article 31.3 of the ICC Statute.

thus provides a possibility to refer to other circumstances than those mentioned in Art. 32 of the ICC Statute<sup>233</sup>. Among the circumstances not mentioned in Art. 32 of the ICC Statute there are listed: *belligerent reprisals*<sup>234</sup>, *tu quoque*<sup>235</sup>, and *military necessity*<sup>236</sup>. They do not apply, however, to the crime of aggression.

In the ICC Statute there is no division between the circumstances excluding liability due to lack of illegality or guilt. It is, however, assumed that the circumstances excluding criminal responsibility due to lack of illegality include defence of necessity<sup>237</sup> and the state of necessity excluding illegality.

Among circumstances excluding responsibility due to lack of guilt one can find immaturity, the state of intoxication, insanity, order, mistake of fact and ignorance of illegality of an act (mistake of law)<sup>238</sup>. Although the ICC Statute does not distinguish between the circumstances excluding criminal liability due to lack of guilt or illegality, one could base on national legislation of countries around the world. E. Slidregt referred, for example, to Anglo-American and Continental legislation and addressed the IMT, ICTY and ICTR jurisdiction as well as the ICC regulations<sup>239</sup>.

The person holding a political position may want to avoid bearing responsibility for the crime of aggression; then, he or she should immediately withdraw – when he or she realizes that takes part in the conspiracy to initiate a war of aggression, as the ruling on Tokyo case provides<sup>240</sup>.

<sup>233</sup> Cf. Article 31, item 3 of the ICC Statute.

<sup>234</sup> It is a justifiable infringement of the law of armed conflict. Elies van Slidregt, op. cit., p. 261.

<sup>235</sup> It is closely related to the previously mentioned circumstance. It means literally an eye for an eye, a tooth for a tooth. It refers to war crimes. An enemy is not expected to behave in accordance with international law. Elies van Slidregt, op. cit., p. 263.

<sup>236</sup> This circumstance can be identified with choosing evil between military and humanitarian interests. A military necessity differs in the same way from force majeure. It always refers to a conscious choice to ignore the rule of law. Elies van Slidregt, op. cit., pp. 264-265.

<sup>237</sup> A. Cassese, *International criminal law*, Oxford University Press 2008 (second edition), pp. 259-262.

<sup>238</sup> Cf. P. Grzebyk, *Criminal responsibility for the crime of aggression*, Warsaw University Presses, Warsaw 2010, p. 262-268, English Edition, 2013, Routledge pp. 207-212.

<sup>239</sup> Cf. Elies van Slidregt, *Individual Criminal Responsibility in International Law*, Oxford University Press 2011, p. 243.

<sup>240</sup> D. de Ruiter, W. van der Wolf (eds.) *Aggression and international criminal law*, International Courts Association Press, 2011, p. 21. Cf.: S. Barriga, *The crime of Aggression*, [in:] M. Natarajan (ed.), *International Crime and Justice*, Cambridge University Press 2011, pp. 331- 332.

### 3.5.1. Defence of necessity and self-defence as circumstances excluding criminal responsibility due to lack of illegality (justifications)

Defence of necessity are defined as follows: ‘The person acts to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph’<sup>241</sup>.

In the state-to-state relations there should be used the term ‘self-defence’ mentioned by some defendants to justify their behaviour. In the individual-to-individual relations it is advisable to use the term of defence of necessity. One must meet the following conditions:

- An action in self-defence is taken in response to direct and actual attempt on the life of the person or another person;
- There is no other way to prevent crime or to stop it;
- Unlawful action of another person is not caused by a person acting in self-defence;
- An action in self-defence must be proportionate to the crime which the person responded to<sup>242</sup>.

An example of the judgment in which the ICTY referred to self-defence is the Kordić and Cerkez case<sup>243</sup>, in which the defender referred to the defendant’s action in self-defence responding to the policy of Muslim force aggression<sup>244</sup>. The Trial Chamber rejected this argument, stating that ‘a military action taken in self-defence does not lead to justification of serious violations of international humanitarian law’<sup>245</sup>.

In this context, it is only worth noting that it is justified to initiate a military action in self-defence, but one cannot justify the conduct of these actions while committing violations of international humanitarian law. The principle of proportionality will never be preserved in such situation.

<sup>241</sup> Art. 31.1 of the ICC Statute.

<sup>242</sup> A. Cassese, G. Acquaviva, M. Fan and A. Whiting, *International Criminal Law. Cases and Commentary*, Oxford University Press 2011, p. 461.

<sup>243</sup> *International Criminal Law. Cases and Commentary*, Antonio Cassese, Guido Acquaviva, Mary Fan and Alex Whiting, Oxford University Press 2011, p. 461.

<sup>244</sup> ICTY, Kordić and Cerkez case, Par. 448.

<sup>245</sup> ICTY, Kordić and Cerkez case, Par. 452.

In the case of the crime of aggression (*ius ad bellum*), it is not about the principles which should govern war crimes (*ius in bello*)<sup>246</sup>. The crime of aggression is not committed by a soldier on the battlefield, but by the leader of the state<sup>247</sup>.

Similar observations and conclusions can be applied to the necessity treated as a circumstance excluding liability due to lack of illegality. The situation will be different when the circumstance excludes only guilt, as explained below. E. Sliedregt has defined precisely which circumstance gives grounds to justify the act and which excludes the guilt of the person.

Since the ICC Statute has not determined the nature of circumstances excluding criminal responsibility, two possibilities come into play – the circumstance excluding criminal responsibility due to lack of illegality or guilt, as, for example, it is provided by the Polish Penal Code in the case of the necessity. Including regulations relating to self-defence and the necessity in one rule might suggest that in both cases it is all about the circumstance excluding criminal responsibility due to lack of illegality. The necessity has been regulated by two provisions, i.e. Art. 31.1. b) and Art. 31.1 c) of the Statute of ICC. Depending on the circumstances of the case, the Court states – if necessary – which circumstance is concerned.

### 3.5.2. Circumstances excluding liability due to lack of guilt (excuses)

The IMT did not distinguish between a circumstance excluding criminal responsibility due to lack of illegality and a circumstance excluding criminal responsibility due to lack of guilt<sup>248</sup>. It must be assumed that similar concerns will bother the ICC in case of the crime of aggression.

Limitation of will or choice was considered a circumstance excluding criminal responsibility in rulings by the IMT and subsequent courts (e.g. the Eichmann case). During the trials, the defence stated before the IMT that the use of element of the circumstance constituting lack of freedom of choice meant that the defendant had acted under the threat of political pressure from the Nazi leaders or security services<sup>249</sup>.

The foregoing considerations indicate that the defendants could be treated as executors of leaders' commands, and their responsibility for the crime of aggression would not be taken into account if they were not recognised as perpetrators of this crime.

<sup>246</sup> Cf. S. Barriga, *The crime of Aggression*, [in:] M. Natarajan (ed.), *International Crime and Justice*, Cambridge University Press 2011.

<sup>247</sup> Ibidem.

<sup>248</sup> Elies van Sliedregt, op. cit., p. 249.

<sup>249</sup> Op. cit., p. 250.

On the other hand, on this basis lower level commanders could request for mitigation of punishment, as it would be difficult to prove that they were not aware of the objectives pursued by the leader<sup>250</sup>. According to IMT judgment, command execution may be grounds to mitigate the punishment, but not to exclude liability<sup>251</sup>.

As mentioned, the IMT failed to make a precise distinction between circumstances excluding criminal liability due to lack of illegality and guilt. With regard to the crime of aggression combined with the circumstance excluding criminal liability, the circumstance would apply to people receiving and executing commands, that is not the entities forming and organizing the crime of aggression, but the perpetrators. A. Cassese described the perpetrators of the crime of aggression as follows: low-ranking perpetrators are not responsible for the crime of aggression (as it would be difficult to hold a pilot who flies over a hostile territory, executing the plan of aggression, liable for the crime of aggression, unless he was aware of illegality of his action and its criminal nature). A common responsibility for this crime is taking part in a joint criminal enterprise or the initiation of this crime<sup>252</sup>. Taking into account previous considerations on the crime of aggression and superior's liability, the responsibility of the perpetrator will not be considered at all for the crime of aggression. It is different when a lower-level commander proves that he was not aware of an aggressive nature of his superior orders that would accomplish the plan of the crime of aggression and in order to exempt himself from criminal responsibility he invokes the circumstance of action at the behest and under duress on the part of his superior. According to the IMT judgement on Friedman case, 'a command could affect the mitigation of punishment'<sup>253</sup>.

Examples of circumstances which are provided in the judgments of international criminal courts (IMT, ICTY) are circumstances excluding criminal responsibility due to unlawful command<sup>254</sup>. This fact is related

<sup>250</sup> Cf. A. Cassese, *International criminal law*, Oxford University Press 2008 (second edition), p. 271.

<sup>251</sup> Elies van Sliedregt, op. cit., p. 249.

<sup>252</sup> A. Cassese, *International criminal law*, Oxford University Press 2008 (second edition), p. 159. S. Barriga assumed that in accordance with the ICC Statute, participation of the perpetrator of the crime of aggression in a conspiracy or a joint plan is not taken into account. The author considered the types of liability of first and second order, such as aiding and abetting, assuming that the perpetrator meets other criteria of the crime typical of the leader. S. Barriga, *The crime of Aggression*, [in:] M. Natarajan (ed.), *International Crime and Justice*, Cambridge University Press 2011, pp. 331- 332.

<sup>253</sup> The Nuremberg IMT judgement on Friedman case. A fragment placed [in:] Elies van Sliedregt, op. cit., p. 249.

<sup>254</sup> The fact that the Defendant acted pursuant to order of his Government or of a superior

to duress addressed to subordinates, as provided in Art. 33 of the ICC Statute. To free oneself from criminal liability there must be met three conditions:

1. the person was under a legal obligation to obey orders of the Government or the superior in question,
2. the person did not know that the order was unlawful,
3. the order was not manifestly unlawful (Article 33 of the ICC Statute).

Orders to commit genocide or the crime against humanity are manifestly unlawful (Article 33.2 of the ICC Statute).

*Duress*, as underlined above, may constitute a circumstance excluding criminal responsibility due to lack of illegality or guilt. The origin of these solutions can be found in the Anglo-Saxon law or continental law (e.g. German, French or Polish law). Such distinction can be traced in jurisdiction by the ICJ which did not attach much importance to the legal consequences of such distinction. The use of such circumstance for crimes against humanity and war crimes was – according to Tribunals jurisdiction – controversial<sup>255</sup> and raised doubts. The complexity and difficulty of the circumstance in the ICC Statute are visible if one takes into account the complexity of the structure in the national law of each country<sup>256</sup>. The scale and nature of the circumstance are apparent if one takes into account putting self-defence and *duress* into one provision (the person did not act solely in self-defence, but in defence of another person or property), and the conditions for the use of the first one are listed below. In accordance with Art. 31 d) of the ICC Statute, ‘the person shall not be held criminally responsible if at the time of the offense (...) the act which constitutes a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

- made by other persons; or
- constituted by other circumstances beyond that person’s control’.

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shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires. Article VIII of the IMT Charter. L. Gardocki, *Outline of international criminal law*, Warsaw 1985, p. 38.

<sup>255</sup> Cf. M.R. Lippan, *The Development and Scope of the Superior Orders Defense*, Penn State International Law Review, p. 185, Elies van Sliedregt, op. cit., p. 243.

<sup>256</sup> Elies van Sliedregt, op. cit., p. 249.

It is difficult to imagine convincingly a situation in which it is the person holding the highest state position who would have to face the state of threat or danger acting on his or her psyche to such an extent that he or she would have no choice to behave differently. One could only refer to the IMT jurisdiction which in certain circumstances took into account the duress that must be sudden, real and unavoidable<sup>257</sup>. The jurisdiction also determined duress as ‘a hybrid structure with features of evil and duress’<sup>258</sup>. Such situation would not occur in case of making the decision to initiate war or hostilities, unless such person has no actual control over the actions of the subordinates and does not make such decisions alone, being under the influence of other people.

Another circumstance is insanity. In accordance with Art. 31 a) of the ICC Statute, ‘the person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law’. Determination of the circumstance indicates the possibility to recognise it as the circumstance excluding from criminal responsibility due to lack of illegality in the first part of this definition<sup>259</sup>, while the second part indicates the circumstance excluding criminal responsibility due to lack of guilt<sup>260</sup>. This confirms again the above consideration regarding possible dual treatment of the circumstance, which may result from its manifold treatment by national legislators. In the Celebici case heard by the ICTY a reference to such circumstance constituted grounds to mitigate the punishment<sup>261</sup>. Okawa was recognized insane and sent for psychiatric treatment<sup>262</sup>.

A state of intoxication is formulated similarly; according to the wording of Article 31 par. 1 b): ‘the person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or

<sup>257</sup> Einsatzengruppe case.

<sup>258</sup> U.S. vs. Flick and others.

<sup>259</sup> Such assessment is shown in the wording ‘that destroys that person’s capacity to appreciate the unlawfulness’, not lack of guilt, while a similar wording as in the second part of the definition is ‘consistent’ with the definition of insanity by Polish law (lack of capacity to appreciate the significance of the act or direct one’s actions (...)), regarded as a circumstance excluding criminal responsibility due to lack of guilt.

<sup>260</sup> Cf. Art. 31, par. 1 of the Polish Criminal Code. Cf. Elies van Sliedregt, *Individual Criminal Responsibility*..., pp. 215-216.

<sup>261</sup> Cf. Elies van Sliedregt, op. cit., p. 227.

<sup>262</sup> P. Grzebyk, *Criminal responsibility for the crime of aggression*, Warsaw University Presses, Warsaw 2010, p. 263.



her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court'. The state of intoxication should not be taken into account in case of the crime of aggression, as it is difficult to imagine involuntary intoxication for a perpetrator of the crime of aggression, who is planning, preparing or initiating the crime<sup>263</sup>. On the other hand, one could take into account the situation in which such person has been brought to this state by his or her subordinates so that they could deprive him or her of ability to behave consciously and understand the significance of the actions<sup>264</sup>. The ICC Statute also provides a mistake of fact and a mistake of law. In accordance with Art. 32.1 of the ICC Statute, a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element (a subject party, according to translation by M. Płachta<sup>265</sup>). Mistake of fact appears to be a significant circumstance excluding criminal responsibility. It is easy to imagine a situation in which the leader of the country is misled by false information, based on which he or she will believe that another country is going to attack the state's territory<sup>266</sup>.

In turn, a mistake of law is defined as follows: 'A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element (a subject party, according to translation by M. Płachta<sup>267</sup>) or as provided for in Article 33'.

In the event of a mistake of law one can refer to ignorance of the law even in case of the highest representatives of the authorities, especially considering the interpretation of concepts such as self-defence<sup>268</sup>. For this reason, the debates on the elements of the crime of aggression have resulted in the conclusion that due to the burden of crime there will be

<sup>263</sup> W. A. Schabas, *An Introduction to the International Criminal Court*, 3<sup>rd</sup> ed., Cambridge–New York 2007, p. 112.

<sup>264</sup> Patrycja Grzebyk assumes that the Court will undoubtedly not deal with cases of alcohol or drug abusers. P. Grzebyk, *Criminal responsibility...*, p. 263.

<sup>265</sup> M. Płachta, *International Criminal Court*. Vol. 2, p. 85.

<sup>266</sup> Y. Dinstein, *War, aggression and self-defence*, 4<sup>th</sup> ed. Cambridge University Press 2005, p. 138.

<sup>267</sup> M. Płachta, *International Criminal Court*. Vol. 2, p. 85.

<sup>268</sup> Y. Dinstein, *War, aggression and self-defence*, 4<sup>th</sup> ed. Cambridge University Press 2005, p. 139.

considered only cases when a violation of the UN Charter is apparent in terms of degree, burden and nature of the law violation<sup>269</sup>.

As noted by R. Clark, states will want to justify the participation in hostilities and avoid criminal responsibility. In the case of individuals, they will try to take advantage of an open list of circumstances excluding criminal responsibility due to lack of illegality or guilt. R. Clark, however, has doubts about the legitimacy of such actions of the state. The Prosecutor's Office should be prepared to reject such arguments<sup>270</sup>.

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<sup>269</sup> Similarly P. Grzebyk, *Criminal responsibility...*, p. 265. 'However, as rightly pointed out in the debate on the elements of the crime of aggression, the reference to a mistake of law will be extremely difficult in the trial before the ICC, if one takes into account that the Court has to judge only obvious violations of the UN Charter, not borderline cases'.

<sup>270</sup> Cf. R. Clark, *Alleged Aggression in Utopia: An International Criminal Law Examination Question for 2020*, [in:] W. Schabas, Y. McDermott, Ashgate Research Companion, p. 66.

#### 4. FORMS OF THE ACT OF THE CRIME OF AGGRESSION IN THE JURISDICTION OF INTERNATIONAL CRIMINAL COURTS

In accordance with solutions of the Nuremberg IMT Charter, a perpetrator could incur criminal responsibility for planning, preparation, incitement and initiation of a war of aggression. There is also provided a possibility to bring to justice for participation in a common plan or conspiracy to initiate a war of aggression.

Criminal law distinguishes between individual fault and personal guilt. The Nuremberg Tribunal had to consider assigning guilt to a group of individuals. It considered two concepts – conspiracy and participation in a criminal organization – in order to try the Nazi leaders<sup>271</sup>. Article 6 of the IMT Charter provides a criminal responsibility for ‘participation in a common plan or conspiracy for the accomplishment of any of the acts’<sup>272</sup>. The concept of conspiracy as an inchoate crime<sup>273</sup> was perceived by some judges of the Tribunal – in particular from countries not related to *common law* (i.e. France) – as highly controversial and contrary to the principle of individual criminal responsibility<sup>274</sup>. The judgment of the Nuremberg Tribunal stated that, in accordance with common law, conspiracy to initiate a war of aggression is a crime. It was also acknowledged that conspiracy requires an agreement between the parties, hence ‘aggression is a multi-person crime by definition’<sup>275</sup>. Parties to the agreement do not have to meet in person; the only requirement is a mutual agreement as to what is to be done.

T. Cyprian and J. Sawicki presented in their book entitled ‘The Nuremberg Materials’ (‘Materiały Norymberskie’) various forms of

<sup>271</sup> H. der Wilt, *Joint criminal enterprise and functional perpetration* [in:] A. Nollkaemper, *System criminality in international criminal law*, Cambridge 2009, p.163.

<sup>272</sup> Cf. Art. 6 of the IMT Charter (Journal of Laws of 1947, No. 63, item 367).

<sup>273</sup> H. der Wilt, *op. cit.*, p.163.

<sup>274</sup> J. D. Oblin, *Incitement and conspiracy to commit genocide* (in:) P. Gaeta (ed.), *The UN Genocide Convention. A Commentary*, Oxford University Press 2009, p.209.

<sup>275</sup> H. der Wilt, *op. cit.*, p. 161.

participation in the crime of aggression under the IMT Charter (common plan, preparation for aggression, aggression planning, initiating and waging a war), and they believed that 'the Charter provides a conspiracy as a separate crime in only one case provided for in Art. 6 item a, which relates to crime against peace'<sup>276</sup>.

The initiation of a war of aggression is the first form of committing aggression mentioned by T. Cyprian and J. Sawicki. 'Triggering a war of aggression is not (...) an ordinary crime of the violation of international order, but it is the major international crime which differs from the others in that it contains all of them in itself'<sup>277</sup>. This would mean, according to the authors, that these crimes are included in the initiation of a war of aggression. One could go so far as to say that they may lead to the initiation of a war of aggression. Similar comments could therefore be made to planning and preparation of a crime of aggression. Forms of committing aggression could meet the features of a crime against humanity or war crimes. These three crimes are linked with each other by lack of respect for a human life, while war crimes and crimes against humanity may lead to the crime of aggression. It might be objected that such scheme is surely a huge simplification, but it was useful for the purpose of trying the perpetrators of World War II in Europe. Meeting the features of a prohibited act of war crimes gives rise to the conclusion that the war has already been initiated and may lead to its initiation in a different territory. Meeting the features of a prohibited act of the crime against humanity indicates that the existence of one of the groups is threatened. The need of extermination of a social group can result in initiating war by the highest representatives of the authorities and the associated extermination in other territories. Another form of committing aggression, quoted by these authors, was waging a war of aggression.

Similar assumptions were adopted for the purposes of the Tokyo IMT. In the United States vs. Araki Sadao case there were distinguished five forms of crime against peace. They are: 1) planning, 2) preparing, 3) starting a war of aggression, 4) initiating a war of aggression or a war in violation of international law, agreements and treaties. The fifth form was: 5) participation in a conspiracy or a common plan to commit the crime of aggression<sup>278</sup>.

<sup>276</sup> T. Cyprian, J. Sawicki, *The Nuremberg Materials*, Publishing Cooperative 'Książka' 1948, pp. 157-158.

<sup>277</sup> Ibidem, p. 157.

<sup>278</sup> R.J. Pritchard & S.M. Zaide eds., 1981, *THE TOKYO WAR CRIMESTRIAL* vols. 20 & 21,

Certain forms of crime overlap each other to some extent; the relationship can be seen, for example, between participation in a common plan and preparation, which is why in *the United States v. Hermann Wilhelm Goering* case the Prosecutor submitted the same evidence to support the contention that the offender had committed a crime against peace by planning it and using the common plan. This Tribunal examined committing both forms at the same time, recognizing them as the same. The Tokyo Tribunal also stated that planning and preparation for crime against peace should not be considered separately, without undermining the validity of the allegations<sup>279</sup>. In addition, the Prosecutor submitted the same evidence to support the contention of participation in a common plan and preparation to commit the crime of aggression, which then was confirmed by the Tokyo Tribunal. Only Judge Jaranilla disagreed with the above Tribunal's considerations. Judges Roelling and Bernard formulated dissenting opinions – they stated that the forms of preparation and planning of the war of aggression coincided with the alleged conspiracy.

As noted by Nicolaos Strapatsas, Judge Anderson adjudicating in the *United States v. Alfried Felix Alwyn Krupp von Bohlen und Halbach* case (the Krupp case) perceived differently a relationship of certain forms of a crime against peace. He stated that the allegation of participating in conspiracy coincides in practice with charges of taking part in a common plan<sup>280</sup>. He also recognised that the crime of planning, preparing and starting a war of aggression is consistent with the crime of conspiracy. The Prosecution challenged the views of Judge Anderson in *the United States v. Wilhelm von Leeb* case (the *High Command* case). The Prosecution admitted that it had not considered whether the crime of conspiracy was identical with the crime of planning, preparing and starting a war of aggression, while initiating was a separate offense.

The Prosecution pointed out that although the IMT had recognised both crimes of planning and preparing as the same, it had treated them

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[for:] Nicolaos Strapatsas, *Is Article 25(3) Of The ICC Statute Compatible With The Crime Of Aggression*, Florida Journal Of International UW, vol. 19, p. 163.

<sup>279</sup> As to all paragraph cf.: Nicolaos Strapatsas, *Is article 25(3) of the icc statute compatible with the crime of aggression*, Florida Journal Of International UW, vol. 19, p. 164.

<sup>280</sup> As to all paragraph cf.: Nicolaos Strapatsas, op. cit., p. 164. Contrary cf. Rajiv K. Punja, Memorandum for the office of the prosecutor of the ICTY issue: what is the distinction between "joint criminal enterprise" as defined by the ICTY case law and conspiracy in common law jurisdictions?, FALL 2003, pp. 9-10. The author stated that the concept of common plan is convergent with the concept of agreement, but it does not constitute an essence of conspiracy, as it is in case of agreement.

differently and come to different conclusions when considering the individual guilt of defendants. The Prosecution did not dispute that the crime of conspiracy was not identical with the crime of planning, preparing and starting the crime of aggression, while an offence of initiating the crime of aggression was a separate crime. Although the Prosecution recognised both crimes as the same, it treated them differently and came to different conclusions when considering individual criminal responsibility for both offenses<sup>281</sup>.

Judge Anderson sentenced Funk and Frick for committing the crime of planning, preparing and starting the war of aggression, but acquitted of the offence of initiating the crime of aggression. The Prosecution acknowledged that the difference between conspiracy and preparation, planning and initiating a war of aggression is only theoretical in nature<sup>282</sup>.

In the High Command case the Tribunal did not make such distinctions; it did not deal with charges of conspiracy as the Prosecution had not submitted new evidence which would fall outside of the evidence on the crime of planning, preparing and starting the war of aggression. The Tribunal found another point of overlapping forms of the crime of aggression on each other. It acknowledged that the initiation of the crime of aggression is defined as commencement of military actions. When some people initiate the crime of aggression, others may be involved in the initiation of a war of aggression and bear responsibility for it. Therefore, there is no need to bring to justice for initiation and commencement of a war of aggression at the same time<sup>283</sup>.

The defendant bore criminal responsibility for planning and preparing if he or she had met the features of crime committed with intent and awareness. The intention presupposes knowledge (awareness) which can exist regardless of the intention<sup>284</sup>. *Animus aggresionis* is a very important element for the crime of aggression, because its existence causes transformation of armament in the element of preparation for the crime of aggression<sup>285</sup>.

According to the Tokyo IMT, conspiracy to initiate a war of aggression can be determined when two or more persons enter into agreement to

<sup>281</sup> As to all paragraph cf.: Nicolaos Strapatsas, op. cit., p. 164.

<sup>282</sup> As to all paragraph cf.: ibidem.

<sup>283</sup> As to all paragraph cf.: Nicolaos Strapatsas, op. cit., p. 166.

<sup>284</sup> Cf. David K. Piragoff, *Article 30: Mental element* [in:] O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, C.H. Beck- Hart-Nomos, 2008.

<sup>285</sup> As to all paragraph cf.: Nicolaos Strapatsas, op. cit., p. 166.

commit the crime. The conspiracy may be accompanied by planning or preparing for the crime of aggression. Perpetrators have a purpose and they plan and prepare the crime of aggression.

Not all Japanese organizers/conspirators were members of the conspiracy to commit the crime of aggression at the beginning, while others, although initially active, stopped their activity before meeting the features of the crime. Both of them were brought to criminal responsibility, as they were aware of committing the crime of aggression<sup>286</sup>.

During negotiations on the text of the IMT Charter, there was expressed reluctance to the American idea of ‘a common plan or conspiracy’<sup>287</sup>. ‘Sources of responsibility for a joint criminal enterprise can be traced in the concept of >>conspiracy<<, but the conspiracy does not provide a ground for the theory developed by the ICTY in the Tadić case’<sup>288</sup>. Although the concept of a common plan is consistent with the concept of agreement, it does not constitute the essence of conspiracy, as happens in the case of agreement. A more appropriate statement would be the notion of complicity<sup>289</sup>.

The concept of conspiracy as an inchoate crime was perceived by some judges of the Tribunal – in particular from countries not related to *common law* (i.e. France) – as highly controversial and contrary to the principle of individual criminal responsibility<sup>290</sup>. The judgment of the Nuremberg Tribunal stated that, in accordance with common law, conspiracy to initiate a war of aggression is a crime. It was also acknowledged that ‘aggression is a multi-person crime by definition’<sup>291</sup>. Participation in conspiracy and plan awareness should be included among prerequisites of liability for participation in conspiracy leading to the initiation of a war of aggression. The Nuremberg IMT limited charges to persons participating in the preparatory activities leading up to the crime of aggression<sup>292</sup>.

<sup>286</sup> As to all paragraph cf.: Nicolaos Strapatsas, *op.cit.* p. 171.

<sup>287</sup> H. Shawcross, *On Aggressive War and the evolution of the Law of Nation, December 4, 1945*, [in:] M. R. Marrus, *The Nuremberg War Crimes Trial, 1945-46; A Documentary History*, Boston New York, 1997, p. 127. Cf. Joint Criminal Enterprise

<sup>288</sup> Prosecutor v. Tadić, IT-94-1, decision of the Appeals Chamber as of 15 July 1999, par. 185-229. For: N. H. B. Jørgenson, *Criminality of organizations under international law*, [in:] A. Nollkaemper, H. van der Wilt, *System Criminality in International Law*, p. 209.

<sup>289</sup> Cf. Rajiv K. Punja, *Memorandum for the office of the prosecutor of the ICTR issue: what is the distinction between “joint criminal enterprise” as defined by the ICTY case law and conspiracy in common law jurisdictions?*, Fall 2003, pp. 9-10.

<sup>290</sup> J. Oblin, *Incitement...*, p. 209.

<sup>291</sup> *Ibidem*.

<sup>292</sup> I. Bantekas, S. Nash, *International Criminal Law*, 3<sup>rd</sup> ed., New York 2007, p. 35.

Conspiracy was also determined in narrow and broad senses of the word. In the narrow sense, one should understand the conspiracy to commit a crime against peace. The Tokyo IMT, however, did not avoid linking the concept of ‘conspiracy’ with a crime against humanity or war crimes, giving it a new broader meaning (the doctrine<sup>293</sup> assumes that it is conspiracy in a broad sense of the word) .

Based on the achievements of the Nuremberg IMT and jurisdiction of other tribunals established immediately after World War II, one can distinguish three criteria of international law on conspiracy:

1. existence of a plan associated with participation of at least two persons;
2. clear outline of a criminal purpose of the plan;
3. formulation of a plan cannot be too remote from the decision and action<sup>294</sup>.

According to Ilias Bantekas and Susan Nash, the crime of conspiracy, as defined by international tribunals established after World War II, was considered as a mode of responsibility, not as a inchoate crime<sup>295</sup>.

The concept of conspiracy in the above form, however, did not survive the Cold War<sup>296</sup>. Its development was recorded in subsequent years, but seeking a better term for this evolving concept it was called complicity-conspiracy, as it contained aiding and abetting<sup>297</sup>.

After World War II, along with the start of the Cold War, the work on definition of aggression and progress in the development of international criminal law became significantly harder<sup>298</sup>. The year of 1992 was a turning point for this branch of law, then, in fact, the Security Council established the Commission for the Former Yugoslavia, but it did not provide the state with necessary support and resources.

The term ‘conspiracy’ was also introduced to the Statutes of the ICTY and ICTR. It should be, however, pointed out that the term ‘conspiracy’

<sup>293</sup> A. Nollkaemper, H. van der Wilt, *System of criminality in international criminal law*, p. 361. R. Cryer, H. Friman, D. Robinson, E. Wilmschurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, p. 305.

<sup>294</sup> I. Bantekas, S. Nash, *International Criminal Law*, 3<sup>rd</sup> ed., Routledge-Cavendish 2008, p. 35, [for:] Krupp case, 10 Law Reports of Trials of War Criminals (LRTWC) 69, 110, 113.

<sup>295</sup> Ibidem, p. 35.

<sup>296</sup> Ibidem.

<sup>297</sup> H. der Wilt, *Joint criminal enterprise and functional perpetration*, [in:] A. Nollkaemper, H. van der Wilt, *System criminality in international criminal law*, Cambridge 2009, p.161.

<sup>298</sup> Cf. M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: Between States' Interests the tension and the Pursuit of International Justice*, [in:] *The Oxford Companion to International Criminal Justice*, eds. A. Cassese, Oxford University Press 2009, p. 137.



appears in the Statutes of the ICTY and ICTR twice – once as a punishable act<sup>299</sup> (conspiracy to commit genocide) as specified in Art. 2 (3) of the ICTR Statute and in Art. 4 (3) of the ICTY Statute, and the second time as a form of criminal liability under Art. 7 (1) of the ICTY Statute and Article 6 (1) of the ICTR Statute.

As mentioned above, conspiracy is not a mode of responsibility<sup>300</sup> in international criminal law. Modes of responsibility can, however, include a joint criminal enterprise, the doctrine of which was created by the ICTY in the Tadić case.

*Ad hoc* tribunals were functioning during the formation of the International Criminal Court Statute. The doctrine and jurisdiction of the tribunals had an impact on the work on the ICC Statute under formation, while the work on the Statute was reflected in the doctrine and jurisdiction of the tribunals mentioned above.

An example of the impact of the tribunals' jurisdiction on the shape of the ICC Statute were deliberations on introduction of a conspiracy as an inchoate crime or a joint criminal enterprise as a form of crime. Two solutions were proposed in response to the need for including the conspiracy into the ICC Statute. The first proposal assumed that the conspirators accept the plan, but the execution of conspiracy is irrelevant (conspiracy as an inchoate crime), while the second one anticipated that the conspirator commits an act of conspiracy (conspiracy as a mode of responsibility in the form of the concept adopted by the Nuremberg Tribunal)<sup>301</sup>.

Article 25 of the ICC Statute refers to individual criminal responsibility. 'Under the new ethical trends, for illegal activity the individual shall be individually responsible, regardless of liability which shall be borne by the state, as such'<sup>302</sup>. It would be different in case of the crime of aggression, where in accordance with provision on the crime, firstly, as a rule, the SC determines whether aggression has been committed, and when a positive answer is given, the evaluation of criminal responsibility of individuals belongs to the ICC.

<sup>299</sup> Cf. Art. III of the Convention on the Prevention and Punishment of the Crime of Genocide. As to whole cf. W.A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge–New York 2006, p. 183. Cf. also: *Prosecutor v. Krstić*, case No. IT-98-33-T, decision of the Trial Chamber as of 2 August 2001, par. 391.

<sup>300</sup> J.D. Oblin, *Incitement and conspiracy to commit genocide* [in:] P. Gaeta (ed.), *The UN Genocide Convention. A Commentary*, Oxford University Press 2009, p. 209.

<sup>301</sup> I. Bantekas, S. Nash, *International Criminal Law*, 3<sup>rd</sup> ed., Routledge Cavendish 2007, p. 36.

<sup>302</sup> E. Karska, *International responsibility of individuals*, Lecture materials, academic year 2010/2011, p. 2.

**Article 25****Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
  2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
  3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
    - a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
    - b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
    - c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
    - d. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      - Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      - Be made in the knowledge of the intention of the group to commit the crime;
    - e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
  - Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
- 3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 25e) of the ICC Statute provides as follows: ‘A person, in respect of the crime of genocide, directly and publicly incites others to commit genocide’<sup>303</sup>. Article 25 f) provides as follows: ‘A person attempts to commit such a crime by taking action that commences its execution (...), but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute (...) if that person completely and voluntarily gave up the criminal purpose’<sup>304</sup>.

S. Barriga claimed that according to the ICC Statute, participation of a perpetrator of the crime of aggression in the conspiracy or common plan is not taken into account as a form of committing the crime of aggression. The author considered the first and second modes of responsibility, such as aiding and abetting, assuming that the offender meets other features of the crime relevant to the leader<sup>305</sup>.

In accordance with Art. 25.4, ‘no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law’. The construct of draft Article 8 bis of the ICC Statute implies the need to check first whether there has been committed aggression in the light of public international law, which is not contrary to the provisions of the ICC Statute. If the SC states that the aggression has occurred, the ICC could consider international and criminal responsibility of the individual. Only then, when the SC does not take a position on this matter, the ICC can deal with committing aggression and the crime of aggression. Article 25 provides the forms of the crime of aggression listed in the draft of Art. 8bis of the ICC Statute.

Similar considerations as above could therefore be applied to *mens rea* of the crime. Since the above observations may indicate the possibility of conviction of individuals for their participation in a *joint criminal enterprise*, such a possibility can be taken into account for the crime of aggression,

<sup>303</sup> M. Plachta, *International Criminal Court*, Vol. 2, Zakamycze 2004, p. 79.

<sup>304</sup> Ibidem.

<sup>305</sup> S. Barriga, *The crime of Aggression*, [in:] M. Natarajan (ed.), *International Crime and Justice*, Cambridge University Press 2011, pp. 331-332.

as there are provisions making it possible<sup>306</sup>. According to C. Byron<sup>307</sup>, Article 30 of the ICC Statute was introduced for the needs of those crimes that had not been defined in international treaties or the subject party of which had not been established in any of the international treaties before the adoption of the Statutes of ICTY, ICTR and ICC. This applies to crimes against humanity and certain war crimes. This finding could refer to the crime of aggression drafted on 12 June 2010 (RC/Res. 6 of 16 June 2010, Annex 3, section 4) which the principles of criminal responsibility provided for in the ICC Statute will apply to.

At the Rome Conference the former Nuremberg prosecutors pronounced for the inclusion of the definition of aggression to the ICC Statute; however, it was considered that 'the crime of aggression should be excluded at the stage of the Statute formation'<sup>308</sup>. One of the arguments raised at the Conference was that 'the concept of aggression is not defined in a way that allows its inclusion into the ICC Statute'<sup>309</sup>. It is noteworthy that G. Werle, Fr. Jessberger, W. Burchards, V. Nerlich and B. Cooper agreed that an act of preparation, initiation or execution of the crime of aggression should be committed with intent and awareness<sup>310</sup>. The perpetrator should be aware of the use of armed forces by a state against the Charter of the United Nations<sup>311</sup>.

Criminal liability for the crime of aggression would be borne by anyone who controls or directs the activities of the state. There are no additional elements that define the subject of the crime except as indicated above, there is nothing about the position in a state that is provided by people committing the act of aggression. Usually these people are the most important in their state. It would be a paradox, since this crime should be treated as the most serious of international crimes, and for its demonstrating it

<sup>306</sup> Cf. A. Cassese, *International criminal law*, Oxford University Press 2008 (second edition), p. 159.

<sup>307</sup> C. Byron, *War crimes and crimes against humanity in the Rome Statute of the International Criminal Court*, Manchester and New York 2009, p. 5.

<sup>308</sup> M. Płachta, *International Criminal Court*, Vol. 1, Zakamycze 2004, p. 452.

<sup>309</sup> Ibidem.

<sup>310</sup> G. Werle, F. Jessberger, W. Burchards, V. Nerlich, B. Cooper, *Principle of International Criminal Laws*, T.M.C. Asser Press, Haga 2005, p. 399.

<sup>311</sup> Cf. International Criminal Court ICC-ASP/7/SWGCA/INF.1. Assembly of States Parties Distr.: General, 19 II 2009, Seventh session (second resumption), New York 9-13 February 2009; Discussion paper on the crime of aggression proposed by the Chairman (revision January 2009) and the draft Art. 8 (a) Elements of Crime 28 V 2009 18:00, Informal inter-sessional meeting on the crime of aggression, 8-10 June 2009, Non-paper by the Chairman on the Elements of Crimes, Annex I.

would be enough to prove that the perpetrator has awareness or intent to commit it, as the draft article defining the crime of aggression does not provide additional subjective elements about the intent. There should be applied art. 30 of the ICC Statute, unless art. 8 bis provides otherwise.

Due to the fact that the draft of art. 8bis does not contain additional subjective elements within its content connected with intent of the crime of aggression, the provision of art. 30 should be used for the crime of aggression, unless otherwise provided by specific regulations. It seems that they have not been included in the draft article on the crime of aggression..

A superior will not bear criminal responsibility if he or she could not prevent a crime, or when he or she has taken all necessary and reasonable measures but the crime was committed anyway<sup>312</sup>. 'International law cannot require the superior to do the impossible. The superior may be held criminally liable only if he or she has failed to take measures within his or her competence'<sup>313</sup>.

It has not been resolved yet how to treat the case of the crime of aggression as compared to the superior's responsibility there is no jurisdiction that could provide an example of how to apply the definition of the crime of aggression to a military superior<sup>314</sup>. This issue was brought up during a discussion led by the Special Working Group on the Crime of Aggression<sup>315</sup>.

According to the draft definition of the crime of aggression as of 2002, the representatives of the above mentioned Working Group came to the conclusion that the issue of superior's responsibility should not be taken into account when applying the draft of Article 8 bis of the ICC Statute<sup>316</sup>. In accordance with the draft, the crime of aggression could be committed only by the highest state representatives<sup>317</sup>, which excludes the possibility of applying Art. 28 of the ICC Statute.

<sup>312</sup> G. Werle, F. Jessberger, W. Burchards, V. Nerlich, B. Cooper *Principle of International Criminal Laws*, T.M.C. Asser Press, Haga 2005, p. 135.

<sup>313</sup> *Prosecutor v. Musić and others*, case No. IT-96-21-T, decision of the Trial Chamber as of 16 November 1998, par. 395.

<sup>314</sup> M. L. Nybondas, *Command Responsibility and its Applicability to Civilian Superiors*, The Hague 2010, p. 176.

<sup>315</sup> Official Records of the Assembly of States Parties to the Rome Statute of International Criminal Court, First Session, 3-10 September 2002, Resolution ICC-ASP/1/Res.1.

<sup>316</sup> Official Records of the Assembly of States Parties to the Rome Statute of International Criminal Court, First Session, 3-10 September 2002, Resolution ICC-ASP/1/Res.1, Annex III, par. 13.

<sup>317</sup> Cf. M. L. Nybondas, *Command Responsibility and its Applicability to Civilian Superiors*, The Hague 2010, p. 176.

However, one can assume that under Art. 28 of the ICC Statute the superior is held liable not for the acts of his or her subordinates, but for the failure to control the subordinates, which indicates that in this case the superior's responsibility is of an individual nature. The superior is responsible for his or her act, i.e. failure to duly control the behaviours of the subordinates. A perpetrator is not responsible for someone else's act but for his or her omission in exercising control over subordinates. In this case, the supervisor shall not be liable for the crime of aggression committed by his or her subordinate in charge of military or political operations within their competence. If the appropriate burden can be attributed to the subordinate's behaviour, one should consider holding such person liable for the crime of aggression, when in fact he or she directed or exercised control over the activities of the state. This would extend the circle of entities liable for the crime of aggression.

The wording of draft of Article 8bis does not exclude such possibility, as it is not directly provided that only the highest representatives shall be liable for the crime of aggression. Instead, one can come to the conclusion that the responsibility for committing the crime of aggression is only borne by the persons exercising actual control or directing the activities of the state. The subordinate shall be responsible for the aggression committed, while the superior shall bear responsibility for the failure to exercise control duly under Art. 28 of the ICC Statute.

States are abstract creations. Individuals being natural persons are creatively thinking creatures, capable of taking independent actions. Organizational units are abstract creations by virtue of law, which have been granted the status by the man. Acts in law may be performed for an organizational unit by a natural person. A criminal liability may be borne by a natural person acting on his/her behalf or on behalf of the organizational unit. The provisions of the London Agreement and the IMT Charter made possible to recognise the group as criminal, and therefore the 'sui generis conviction of organization'<sup>318</sup>. The responsibility was borne by individuals either personally or due to belonging to a group/organization of a criminal nature<sup>319</sup>. Historical examples provided the grounds in the IMT Charter to treat groups, organizations and organizational units as non-state actors incurring criminal liability, but it is better to hold individuals – and not abstract creations – criminally liable; for the injured person it would be

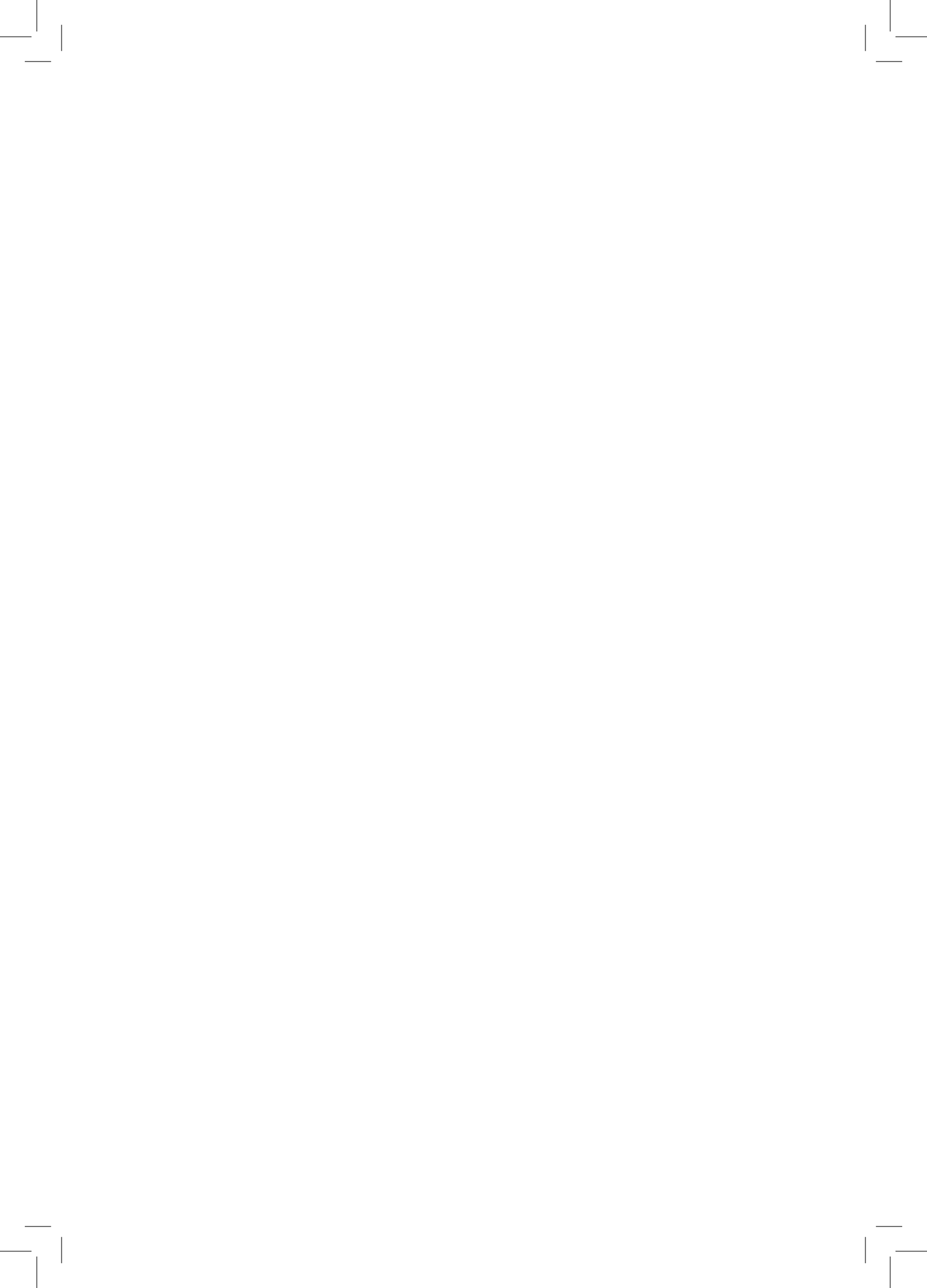
<sup>318</sup> L. Gardocki, *An outline of international criminal law*, Warsaw 1985, p. 39.

<sup>319</sup> See D. Drózdź, *International Criminal Courts (the genesis, composition, jurisdiction, procedures, and operations)*, SWSPiZ Publishing Łódź 2011, pp. 24-26.

better to punish natural persons rather than giving declarations which do not result in measurable outcomes. On the other hand, however, it would be worth to recognise that the activities of such non-state actors shall be prohibited if the members of these entities control or direct the actions constituting the crime of aggression<sup>320</sup>. One could also take preventive measures to assess – from a legal point of view – the activities of the organization (non-state entity) whose actions lead to the arrangement of an international crime (such as the crime of aggression). It is better to cease or prevent the activities of such organization ahead of time, or else they can lead to unwelcome results. These would have to be the organizations whose activities relate to the sovereignty and independence of the state. These arguments would justify the termination of their legal existence.

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<sup>320</sup> See L. Gardocki, *An outline of...*, pp. 50, 55.





## 5. CONDITIONS OF EXERCISING JURISDICTION OVER THE CRIME OF AGGRESSION. AMENDMENTS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Material jurisdiction was over the crime of genocide, the crime against humanity, the war crimes and the crime of aggression. It could applying to all these crimes although the crime of aggression was not defined<sup>321</sup>.

The exercise of jurisdiction over the crime of aggression was put off until when the Assembly of States Parties to the ICC Statute defines the crime of aggression<sup>322</sup>. Further delayed exercise of jurisdiction over the crime of aggression is associated with the draft regulations of the ICC Statute adopted in 2010 at the Kampala conference<sup>323</sup>.

It was assumed that the time of defining the crime would come soon, as evidenced by Art. 5 (2) of the ICC Statute<sup>324</sup> and to this end the relevant bodies working on the draft definition of the crime of aggression were appointed. The second sentence of Art. 5 (2) of the ICC Statute was added in the last days of the Conference.

Although the language used in Art. 5 (2) can be considered as complex, the conditions for exercising the crime of aggression constituted a greater problem for delegates<sup>325</sup>. Before the creation of the UN Charter, a final and legally binding decision of the Nuremberg or Tokyo IMT was sufficient to establish that the crime of aggression had been committed. With the creation of the UN Charter, the decision shall be taken by the SC. The UN Charter provides in Article. 39 that 'the Security Council shall determine the existence of any threat to the peace, breach of the peace, or

<sup>321</sup> W.A. Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press 2012, s. 201.

<sup>322</sup> Cf. Art. 5 (2) of the ICC Statute.

<sup>323</sup> A. Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression at Last... in Reach... Over Some*, Goettingen Journal of International Law No 2, 2010, p. 769.

<sup>324</sup> R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its elements and the Conditions for ICC Exercise of Jurisdiction Over It*, European Journal of International Law, volume 20 no 4 November 2009, p. 1113.

<sup>325</sup> W.A. Schabas, op. cit., p. 201.

act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Five permanent members of the SC were convinced that it was the SC who would have a monopoly on this issue; three of them are not parties to the ICC Statute. The other delegates, however, were opposed to the use of the ICC Statute to make reinterpretations of amendments to the UN Charter<sup>326</sup>.

Separating the contents of the crime of aggression from the conditions of its exercise should be considered as the greatest success of the countries deliberating on determining its definition<sup>327</sup>.

The hardest part was to define the temporal jurisdiction over the crime of aggression in relation to the situation of both the accused persons and states and to the application of the definition of the crime of aggression perceived in relation with the States Parties to the ICC Statute and the Non-Parties.

In accordance with the resolution providing the amendments to the ICC Statute, they were to be made in accordance with Art. 5 (2) of the ICC Statute. However, the information was introduced that such interpretation of the ICC Statute should be prevented. The record on the need to take account of the Art. 5 (2) of the ICC Statute was included in the version of June 10, 11.00 p.m. in the Non-paper by the President of the Assembly. Earlier versions only assumed that the Review Conference would decide on the adoption of the amendments. The document as of June 10, 11.00 p.m. can be treated as the first. The President's document was presented after incorporating the record on Art. 121 (5) and Art. 12 of the ICC Statute into the text by the President. Simultaneous introduction of the amendments related to Art. 5 (2) may suggest that the amendments are made to show explicitly that the references to Art. 121 (5) and Art. 12 of the ICC Statute should be treated separately<sup>328</sup>.

'The SC monopoly has been limited by three trigger mechanisms, referred to in Article 13 of the ICC Statute'<sup>329</sup>. According to Astrid Reisinger Coracini, the pre-Kampala agreements include: the adoption of three trigger mechanisms associated with Art. 13 of the ICC Statute and

<sup>326</sup> Cf. W.A. Schabas, *op. cit.*, pp. 201-202.

<sup>327</sup> R. Clark, *op. cit.*, p. 1113.

<sup>328</sup> C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge 2013, p. 263.

<sup>329</sup> Hans-Peter Kaul and LIU Daqun, *Implications of the Criminalisation of Aggression*, FICHL Policy Brief Series No. 2 (2011).

of the draft Article 15bis(1) of the ICC Statute; acceptance of responsibility by the UNSC in accordance with the UN Charter; the adoption of the SWGCAdrafts related to Article 15 bis(2) and (3) of the ICC Statute SWGCA; the presentation of an additional filter to determine the state act of aggression (the draft Article 15 bis(3) and (4) of the ICC Statute SWGCA); securing judicial independence (the draft Article 15 bis(5) of the ICC Statute SWGCA))<sup>330</sup>. Article 13 of the ICC Statute<sup>331</sup> shall be entirely used. The above-mentioned belated exercise of jurisdiction can be applied to the three trigger mechanisms. There is no further divergence from the Statute in the case when the UNSC refers to the situation. Exceptions occur only in relation to the situation brought up by a State Party or to *proprio motu* investigations<sup>332</sup>.

The President of the Review Conference presented to the delegates a package of amendments just before midnight on the last day of the meeting. Not all delegates were present. There was a shortage to reach the threshold of two thirds of the States Parties. The Great Britain and France – the parties to the ICC Statute – voted for the proposed amendment without any protests. A radical move is that trying the crime of aggression may take place without prior authorization by the Security Council<sup>333</sup>.

The role of the Security Council is to decide whether the Court should sentence for the crime of aggression. The Court must wait six months before the start of the trial if it does not get the green light from the SC. The SC also has the right to block the trial on the crime of aggression, but only temporarily, by adopting a special resolution once a year. The extent of jurisdiction over the crime of aggression is narrower compared to general principles relating to the crimes within the subject-matter jurisdiction of the ICC Statute. Leaders may be the subjects of the crime of aggression committed against another State Party to the ICC Statute<sup>334</sup>.

W. A. Schabas mentioned the advantages of a wide extent of jurisdiction which allows the Court to deal with the aggression committed by the State Non-Party against the State Party. Such a solution has not led to an

<sup>330</sup> A. Reisinger Coracini, *Consent, Aggression and the International Legal Order*, SLS 2010, p. 15.

<sup>331</sup> Cf. S. A. Williams, W.A. Schabas, *Art. 13. Exercise of Jurisdiction*, [in:] O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, C.H. Beck-Hart-Nomos 2008.

<sup>332</sup> A. Reisinger Coracini, *op. cit.*, p. 14.

<sup>333</sup> W.A. Schabas, *op. cit.*, p.202.

<sup>334</sup> Meanwhile, in case of other crimes within the ICC Statute jurisdiction (e.g. crimes of genocide), the leaders of the States Non-Parties to the ICC Statute may be held criminally liable if the crime has been committed in the territory of the State Party to the ICC Statute.

agreement. Perhaps the adopted solution will allow the States Non-Parties to the ICC Statute to accede to the Statute. This would be a way to ensure the Court's authority allowing the judgment of aggression when committed by a State Party, while in acceding state is a victim<sup>335</sup>.

W.A. Schabas expressed doubts as to whether the position of the permanent members of the SC was a bluff or an expression of political shifts and changes in the world<sup>336</sup>. The Great Britain and France could wish to express favour for the proposed definition of the crime of aggression, the will to fight against impunity, terrorism and unrest in the world, which lead to armed conflicts. On the other hand, they could count on non-ratification of the resolution by the requisite majority of countries<sup>337</sup>. If a threshold of 30 countries that have ratified the amendments to the ICC Statute is not reached on 1 January 2016, the Assembly of States Parties may also take place, and the voting on introduction of the provisions on the crime of aggression into the ICC Statute may be carried out, but it will not cause that the provisions on the crime of aggression come into force<sup>338</sup>.

According to the abovementioned resolution, Art. 5 (2) of the ICC Statute has been deleted, and the Draft introduces Art. 8 bis and 15(a) of the ICC Statute. The amendments would be made to Art. 9, 20(3), 25(3) of the ICC Statute.

In the preamble to Resolution RC/Res.6 of 16 June 2010 it was decided that the provision defining the crime of aggression shall enter into force at the earliest in 2017 if it is ratified by at least 30 States Parties to the ICC Statute a year earlier. The number of states that must ratify the amendments to the Statute results from the requirements provided for in paragraph 2 of the draft Article 15 bis and ter of the ICC Statute<sup>339</sup>. In turn, paragraph 3 provides that the new regulations may take effect not earlier than on 1 June 2017. Then, the States shall vote in accordance with Art. 121 (3) of the ICC Statute, according to which two thirds vote of the States Parties is required to entry into force of the provisions on the crime of aggression, provided that at least 30 States would have ratified the amendment to the ICC Statute one year before the date of meeting of

<sup>335</sup> Cf. W. A. Schabas, *op. cit.*, p.203.

<sup>336</sup> *Ibidem*, p.202.

<sup>337</sup> Cf. *op. cit.*

<sup>338</sup> Hans-Peter Kaul and LIU Daqun, *Implications of the Criminalisation of Aggression*, FICHL Policy Brief Series No. 2 (2011).

<sup>339</sup> Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized Draft Text of the Elements of Crimes, UN Doc PCNICC/2000/1/Add.2 (2000).

the Assembly of States Parties<sup>340</sup>. If this condition is met, the States Parties to the ICC Statute which express their consents to the jurisdiction over the crime of aggression will be covered by the jurisdiction over the crime of aggression; the States which submit a declaration excluding the crime of aggression from their subject-matter jurisdiction will not be bound by these amendments. It will be convenient for the states from a political point of view<sup>341</sup>. It can be stated that the consent of the permanent SC Members, as referred to below, was not obliging in its nature, since by submitting a declaration one may waive the exercise of jurisdiction over the crime of aggression. All states are subject to the judgment of public opinion on the issue of accepting or rejecting the exercise of jurisdiction over the crime of aggression, therefore, it will depend a lot on a geopolitical situation of the country. It should be assumed that the states-victims are willing to adopt such solutions; however, they would have to observe the position of potential allies, among which permanent members of the Security Council can be found.

Article 5 (2) was still crucial for interpretation of the mentioned resolution, as its contents pointed to the importance of the crime. This Article does not require any amendments to the provision on the crime of aggression. From this point of view, Articles 121 and 123 were the ground for discussions on the amendments to the ICC Statute. In addition, Art. 121 (5) was taken into account.

As stated by W. A. Schabas<sup>342</sup>, at the Kampala conference Article 121 of the ICC Statute was opted for, as this Article could be used when making amendment or implementing the solutions adopted during the conference. The roles of Art. 121(3), Art. 121(3) and (4) and Art. 121 (3) and (5) in the adoption of amendments to the ICC Statute were considered<sup>343</sup>. If the entry into force of the mechanism was required, the wording of Art. 121 (5)<sup>344</sup> precludes its application to the crime of aggression. The Article could be applied to all crimes within the subject-matter jurisdiction of

<sup>340</sup> As to all paragraph: D. Sheffer, *Adoption of the Amendments on Aggression to the Rome Statute of the International Criminal Court*, <http://iccreview.asil.org/>.

<sup>341</sup> Cf. W.A. Schabas, op. cit., p. 204.

<sup>342</sup> Ibidem, p. 203.

<sup>343</sup> A. Reisinger Coracini, *Consent, Aggression and the International Legal Order*, SLS 2010, p. 8.

<sup>344</sup> Art. 121 (5) states that 'any amendment to Articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory'.

the ICC. (...) However, even if such an argument could be adopted for the purposes of the crime of aggression, it would be questionable why a procedural component of the provision on the crime of aggression would have the same impact on this procedure<sup>345</sup>. Doubts were also raised by the last sentence of Art. 121 (5). According to one interpretation, it was a confirmation of the first sentence of this Article, i.e. those State Parties that have not accepted the amendment shall not be bound to this amendment. The second interpretation provided the limitation of the Court's jurisdiction when the crime of aggression is committed by a national of a State Non-Party or in the territory of a State Non-Party which have not accepted the amendment<sup>346</sup>.

According to Astrid Reisinger Coracini, „Of these Articles, only Article 121 (3) relates to adoption, providing that the adoption of an amendment “on which consensus cannot be reached shall require a two-thirds majority of States Parties”<sup>108</sup>. During the general debate most States Parties emphasized their preference for a consensus adoption of the provision on the crime of aggression. But many clarified that consensus meant also to previously compromise”. Despite these assurances, the potential threat of a vote was never entirely discarded, even if it was subject to wild speculations whether a qualified majority could be reached. The quorum of Article 121 (3) could have been easily identified as the proper provision without such an addition. But the explicit reference to Article 5 (2) may provide further elements for the interpretation of the Resolution. It recalls the mandate to complete the Rome Statute by adopting a provision on the crime of aggression. During the negotiations one option repeatedly put forward for the procedure activating the Court's jurisdiction over the crime of aggression was the simple adoption of a provision in accordance with Article 5 (2) in order to complete the Statute”<sup>347</sup>.

Article 5 (2) of the ICC Statute ‘was supposed to refer to Art. 121 (3) of the ICC Statute for the establishment of a quorum requirement, but it was not a mandate for the use of the procedure to amend the provision. Execution of the entire procedure of amendment on the crime of

<sup>345</sup> 2004 Princeton Report, *supra* note 31, Conclusions after para. 18; reaffirmed *e.g.* by November 2008 SWGCA Report, *supra* note 74, para. 18, for: A. Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression at Last... in Reach... Over Some*, Goettingen Journal of International Law No 2, 2010, p. 766.

<sup>346</sup> A. Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression at Last... in Reach... Over Some*, Goettingen Journal of International Law No 2, 2010, p. 766.

<sup>347</sup> *Ibidem*, p. 768-769.

aggression can be activated without additional entry into force<sup>348</sup>. The Review Conference did not go further than beyond the adoption of the resolution RC/Res.6 of 16 June 2010, which provided, inter alia, the definition of the crime of aggression for the purpose of the ICC Statute.

D. Ferencz pointed out that Article 121 (3) of the ICC Statute is a general principle to introduce amendments by consensus or a majority of two thirds vote of the Assembly of States Parties to the ICC Statute. There is also a possibility to apply Articles 121 (4) and 121 (5) of the ICC Statute which allow – using the procedures provided for therein – the entry into force of these amendments<sup>349</sup>.

The SWGCA was going to use one procedure to start applying the crime of aggression. Most states were sceptical to adopt such a position, but the ICC believed that the crime of aggression is already one of the crimes falling within the Court's subject-matter jurisdiction and it expressed the favour for the application of Art. 121 (4) for the inclusion of the crime of aggression into the Statute<sup>350</sup>. This provision shall enter into force for all States Parties one year after instruments of ratification have been deposited by seven-eighths of them, which in turn will lead to the entry into force of these regulations.

As contemplated by Roger Clark<sup>351</sup>, a matter of interpretation may concern whether the provision on aggression is amended by deleting it in a way which causes an inability to exercise the Court's jurisdiction over one of the crimes provided for in the Statute (Art. 5(1)) or this issue applies only to the countries that have adopted the amendment, or the issue concerns only the states which have approved the amendment, or whether the clause included in Art. 5(2) provides mechanisms to complete the work of the ICC. This reasoning led to the conclusion drawn by R. Clark, under which it would be an amendment to the Statute, and not to Article 5, and seven eighths vote of States Parties is necessary to ratify the amendment, which would take a lot of time<sup>352</sup>.

Objections were raised by many other countries that did not want to allow the provision to enter into force with respect to all countries. To avoid

<sup>348</sup> Ibidem, p. 764.

<sup>349</sup> D.M. Ferencz, *Bringing the crime of aggression within the active jurisdiction*, Case W. Res. Journal of International Law, 2009, vol. 42:531, p. 534.

<sup>350</sup> A. Reisinger Coracini, op. cit., p. 766.

<sup>351</sup> R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its elements and the Conditions for JCC Exercise of Jurisdiction Over It*, European Journal of International Law, volume 20 no 4 November 2009, p. 1115.

<sup>352</sup> Ibidem.



stagnation in the negotiations, more creative solutions were taken into account. Some countries, however, did not want to move away from the outdated concepts. Adoption of the solution associated with Art. 121(5) was dependent on the interpretation of the second sentence of this provision, including the wording on the exercise of jurisdiction ‘under Article 12 of the ICC Statute’<sup>353</sup>.

According to a narrow understanding of this provision, there should not appear any interpretation problem, and the mention of Article 121 of the ICC Statute would confirm its application. If, however, the last sentence was understood as establishing a special jurisdiction regime for crimes within the proposed amendments to the Statute, which required the determination of two connecting factors, it would still be questionable whether such a regime would apply to the crime of aggression with – firstly – its previous inclusion in the ICC jurisdiction, secondly, the approval of the States Parties to the Court’s jurisdiction over the crime of aggression by virtue of the ratification, and thirdly, the fact that exercising jurisdiction – pursuant to which the Court may exercise jurisdiction over the crime of aggression – does not lead to but only confirms the jurisdiction of the Court in accordance with Art. 12 of the ICC Statute<sup>354</sup>. ‘If Article 121(5) of the ICC Statute was to be understood as: a) amending Art. 12 of the ICC Statute and b) applying even to the crime of aggression, the reference to Art. 12 made in Art. 15(4) of the ICC Statute should be interpreted as a component part. In this sense, there would be exceeded a limiting effect of Art. 121(5) of the ICC Statute, the last sentence, by the principle of *lex posterior* and *lex specialis* when it comes to the Court exercising jurisdiction over the crime of aggression committed by a national of a state or in the territory of a State Party which has not accepted the amendment. According to this interpretation, one could raise a question whether a consensual adoption of the Resolution could be construed as a waiver of the rights of the States Parties, which these states recognized previously as their own, or whether to achieve this effect, the States Parties must ratify the amendments’<sup>355</sup>. However, it brought up another question whether it means that the amendment to Article 121 (5) of the ICC Statute, the last sentence, would be the grounds to initiate the procedure under Art. 121

<sup>353</sup> Cf. S. A. Williams, W. A. Schabas, *Article 12. Preconditions to the exercise of jurisdiction*, [in:] O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, C.H. Beck-Hart-Nomos 2008.

<sup>354</sup> A. Reisinger Coracini, op. cit., p. 768.

<sup>355</sup> Ibidem, p. 769.



(4) of the ICC Statute, or whether as a set for the crime of aggression it should be associated with Art. 121 (5) of the ICC Statute.

Article 121 (5), the last sentence, should be undoubtedly used in the case of states which have not ratified the amendments. Amendments to Art. 5, 6, 7 and 8 would therefore be effective only with respect to those states which have ratified the amendment<sup>356</sup>.

A. Reisinger Coracini concludes that the effect does not correspond to the expectations of those who created the concept of the crime of aggression and to the conditions of its exercise when determining the opt-out system for the States Parties<sup>357</sup>. The author assumes that only the States Parties to the ICC Statute which have ratified the amendments to the ICC Statute may submit a declaration on non-acceptance of these amendments. The grounds for this statement is that the opt-out declarations are included in the amendments which relate only to those states which have ratified the amendments to the ICC Statute<sup>358</sup>. Declaration of non-acceptance would be difficult for a logical explanation, because if a state has ratified the amendments, it should accept their application with respect to itself, especially in the light of Art. 120 of the ICC Statute<sup>359</sup>. Meanwhile, the explanations in OP1 suggest that the States Parties may submit opt-out declarations without ratifying the amendments to the ICC Statute<sup>360</sup>. As it turns out, submission of declarations concerning unratified treaties is nothing new<sup>361</sup>.

According to the Review Conference in Kampala, it was stated that: 'It decides to adopt, in accordance with Article 5, paragraph 2 of the ICC Statute, the amendments to the Statute contained in Annex 1 of the resolution, which are subject to ratification or acceptance and shall enter into force in accordance with Art. 121, paragraph 5; and notes that any State Party may lodge a declaration referred to in the draft of Art.15 bis prior to

<sup>356</sup> D.M. Ferencz, *Bringing the crime of aggression within the active jurisdiction*, Case W. Res. Journal International Law, 2009, vol. 42:531, p. 534.

<sup>357</sup> A. Reisinger Coracini, op. cit., p. 769.

<sup>358</sup> A. Reisinger Coracini, *More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression"*, 2.07.2010, [www.ejiltalk.org](http://www.ejiltalk.org), 11.01.2010.

<sup>359</sup> Cf. A. Reisinger Coracini, *More Thoughts on "What Exactly was Agreed in Kampala on the Crime of Aggression"*, 2.07.2010, [www.ejiltalk.org](http://www.ejiltalk.org), 11.01.2010.

<sup>360</sup> C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge 2013, p. 253.

<sup>361</sup> C. McDougall, op. cit., pp. 253-254, A. Reisinger Coracini, *The International Criminal Court's Exercise of Jurisdiction over the Crime of Aggression at Last... in Reach... Over Some*, Goettingen Journal of International Law No 2, 2010, p. 778.

ratification or acceptance'<sup>362</sup>. This would mean dispelling the above mentioned doubts and a possibility of solving the issue of Articles 5, 12 and 121 of the ICC Statute. Article 5 of the ICC Statute on the crime of aggression was introduced to the Statute in its original version. The reference to Art. 12 of the ICC Statute in conjunction with Art. 5 of the ICC Statute entails two consequences: according to Art. 12, the states accept the jurisdiction of the Court with respect to the crimes referred to in Art. 5 of the ICC Statute. This suggests a different approach towards the crime of aggression, i.e. not the approach as in accordance with the original wording of Art. 5 of the ICC Statute, thereby the state accepts different contents of the crime of aggression. The crime of aggression was, in fact, included in a separate provision (the draft of Art. 8 bis of the ICC Statute). Secondly, a reference to Art. 12 of the ICC Statute would appeal to the importance of the ICC jurisdictional regime, which, according to C. McDougall, would mean compliance with a positive interpretation of Art. 121 (5) of the ICC Statute or creating – based on references to Art. 5 (2) and Art. 12 (1) of the ICC Statute – a special exception to negative interpretation of the second sentence relating to the crime of aggression – *lex posterior lex specialis*<sup>363</sup>.

A trial on the crime of aggression would therefore be conducted by the ICC, not by a national court under the principle of complementarity, which in this situation is not applied.

A requirement to be fulfilled in accordance with Art. 12 of the ICC Statute is to submit a referral by a State Party or the proprio motu procedure (Art. 13 of the ICC Statute). In accordance with Art. 13 of the ICC Statute, a situation is referred to the Prosecutor by a State Party in accordance with Art. 14 of the ICC Statute. Implementation of the crime of aggression would occur in accordance with Art. 15 ter of the ICC Statute, like in the case of Art. 15 bis, as above, in the case of Art. 12 of the ICC Statute<sup>364</sup>. One can also pay attention to a blunder made in the wording of Art. 15 bis 4, since according to its literal interpretation, a State Party that has not ratified the amendments to the ICC Statute shall be bound by the provisions of the ICC Statute just after entry into force of the Statute ratified by at least 30 states by the end of 2005. The blunder was supposed to be eliminated by the President's issuance of the Review Conference of

<sup>362</sup> R. Clark, Chapter 30, *The Crime of Aggression*, s. 21, in mail from Roger Clark, 12.08.2013.

<sup>363</sup> C. McDougall, op. cit., pp. 252-253.

<sup>364</sup> Cf. S. Barriga, *An anatomy of the negotiation process in Kampala and where to go from there – enforcing the crime of aggression as a challenge for national and international jurisdictions*, SLS2013.

10 April 2010<sup>365</sup>. The creators of the amendments pointed out that their idea was the lack of jurisdiction over the crime of aggression in the absence of amendments ratification by the States Parties to the ICC Statute. If a State Party has not committed any aggression and it has been presumed the aggression committed by a State Party which did not ratify the amendments to the ICC Statute, then a lawyer would have an argument for the defence of the state<sup>366</sup>/individual against whom the accusation of committing the crime of aggression has been formulated<sup>367</sup>.

**Article 15 bis states<sup>368</sup>:**

**Exercise of jurisdiction over the crime of aggression**

**(State referral, *proprio motu*)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. 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.
4. 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.

<sup>365</sup> President of the Review Conference on Article 15 bis (4) “*Under this approach, this would not constitute an “opt out” of the amendment, much rather it would be a declaration that would affect a State Party’s acceptance already given under article 12 (1). So this approach is very strongly based on article 12 of the Rome Statute and the very specific manner in which the crime of aggression is already reflected in the Rome Statute.*” Kampala, 10 June 2010, S. Bariga, *An anatomy of the negotiation process in Kampala and where to go from there – enforcing the crime of aggression as a challenge for national and international jurisdictions*, SLS 2013.

<sup>366</sup> These are States that ratified ICC’s Statute and did not ratify amendments to it, neither applied opt-out clause. Compare: R. Clark, *Alleged Aggression in Utopia: An International Criminal Law Examination Question for 2020*, [in:] W. Schabas, Y. McDermott, Ashgate Research Companion 2013, pp. 77-78.

<sup>367</sup> R. Clark, op. cit., pp. 69-77.

<sup>368</sup> Compendium 3rd.01.ENG.

5. 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.

As mentioned above, according to Barriga, these states does not have implementation over the crime of aggression<sup>369</sup>. According to R. Clark, who represented Samoa during Kampala, it would be better to accept statement contrary to S. Barriga's statement. R. Clark would like to accept literally concept of amendment of art. 15 bis 4. According to Prof. Clark, it would be the only way to accept without any prejudice amendments over the crime of aggression as he mentioned lack of consensus and would like to save the concept of the crime of aggression. According to S. Barriga, states would have automatic jurisdiction over States Parties while the adoption of amendments to ICC's Statute .

According to art. 15bis 5, "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".

The draft of Art. 15 bis 6 states, "Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents".

According to the draft of art. 15 bis 7, "Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression".

According to the draft of art. 15 bis 8, "Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in Article 15, and the Security Council has not decided otherwise in accordance with Article 16.

There should be paid attention to additional powers – as compared to the current ones – of the Prosecutor who in the absence of the SC decision on the occurrence of the act of aggression might state that there is a need to conduct pre-trial proceedings on the crime of aggression. Qualified

<sup>369</sup> Cf. S. Barriga, *An anatomy of the negotiation process in Kampala and where to go from there – enforcing the crime of aggression as a challenge for national and international jurisdictions*, SLS 2013.

staff of the Prosecutor's office would deal with drafting a request for authorization from the Pre-Trial Chamber, as in accordance with the draft of Art. 15 bis (8) of the ICC Statute such authorization is obligatory to allow the Prosecutor to initiate pre-trial proceedings.

According to the draft of Art. 15 bis (9), determination of an act of aggression by a body other than the Security Council shall be without prejudice to the Court's own findings under the ICC Statute (draft of Art. 15 bis (9) of the ICC Statute). The draft of Art. 15 bis (10) of the ICC Statute is not bound to other provisions relating to the exercise of jurisdiction over other crimes provided for by Art. 5 of the ICC Statute.

The amendments would rather satisfy the expectations of the aforementioned states afraid of such evaluation of their activities by the international community. The States Parties having doubts as to the evaluation of their international politics and its consequences may submit a declaration and thereby protect their authorities against the ICC. Similar restrictions are provided for in the case of the States Non-Parties to the ICC Statute. It would seem that, paradoxically, the risk of committing the crime is so real, and not, as predicted by W.A. Schabas, almost unreal<sup>370</sup>. The amendments all the more restrict a possibility to investigate the crime of aggression by the ICC; in practice, this would be almost equal to impossibility of convicting anyone with the introduction of so many restrictions and the known positions of the U.S., China or Russia. Those wishing to pursue justice regardless of the SC decision are left with a feeling of disappointment.

The draft of art. 15 bis 9, "A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

The draft of art. 15 bis 10 provides, " This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

*"The following text is inserted after article 15 bis of the Statute:*

**Article 15 ter provides<sup>371</sup>:**

**Exercise of jurisdiction over the crime of aggression  
(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in ac-

<sup>370</sup> Cf. W.A. Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press 2012, p. 204.

<sup>371</sup> Compendium 3rd.01.ENG.

cordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
  3. 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.
  4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
  5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.
- 5. The following text is inserted after article 25, paragraph 3 of the Statute:*
- 3 bis* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

*6. The first sentence of article 9, paragraph 1 of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.

*7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

*The following text is inserted after article 25, paragraph 3, of the Statute:*

- 3 bis.* In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

*6. The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:*

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 bis.

*7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:*

3. No person who has been tried by another court for conduct also

proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court.

In RC/Res.6 (*advance version*), there is placed Annex III called Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression.

According to understandings referrals by the Security Council provides:

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.
2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

**What is more, among the understandings there were:**

**Jurisdiction *ratione temporis***

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

**Domestic jurisdiction over the crime of aggression**

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.
5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

**Other understandings**

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concer-



ned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a “manifest” determination. No one component can be significant enough to satisfy the manifest standard by itself.<sup>372</sup>

The gravity and scale are being eliminated as smaller cases not judged by ICC. Character of cases shows Tribunal would not judge cases from grey sphere. However, according to R. Clark, there are humanitarian interventions within this sphere. That is why the concept of responsibility to protect was discussed during the conference<sup>373</sup>. Both cases (gravity and character) are included within reached compromise also are controversial<sup>374</sup>. Pointing out, whether the crime of aggression is committed, demands considerations on all circumstances of the crime of aggression including gravity and scale of these crimes and their consequences, according to UN Charter<sup>375</sup>.

The gravity and scale eliminate minor cases from the judgment of the International Criminal Court (ICC). The character of a case decides whether or not the ICC will deal with it. And the ICC will not deal with issues belonging to the so-called „grey area“. However, as observed by R. Clark, humanitarian interventions also belong to the grey area. It is hard to say whether they are not always so serious as crime of aggression. That is why it would be good to know when humanitarian interventions are justified<sup>376</sup>.

In Kampala there was also considered the concept of the Responsibility to Protect, which has not yet been polished up<sup>377</sup>. Both attributes, that is

<sup>372</sup> RC/Res.6 (*advance version*), Page 6. Annex III, Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression.

<sup>373</sup> Compare: A. Hehir, *The responsibility to protect. Rhetoric, Reality and The Future of Humanitarian Intervention*, palgrave macmillian 2012, s. 50-54; A. Hehir, *Humanitarian Intervention. An Introduction*, Palgrave 2010, s. 113-125.

<sup>374</sup> R. Clark, *Alleged Aggression in Utopia: An International Criminal Law Examination Question for 2020*, [in:] W. Schabas, Y. McDermott, N. Hayes, Ashgate Research Companion, s. 67.

<sup>375</sup> Amendments of ICC Statute and Understandings are placed in: C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge 2013, s. xxiii-xxix.

<sup>376</sup> Por. O. Ramsbotham, T. Woodhouse, H. Miall, *Contemporary Conflict Resolution*, 3.ed. polity 2012, s. 172. 330-332.

<sup>377</sup> See: A. Hehir, *The Responsibility to Protect. Rhetoric, Reality and The Future of Humanitarian Intervention*, palgrave macmillian 2012, p. 50-54; A. Hehir, *Humanitarian Intervention. An Introduction*, palgrave 2010, p. 113-125.



gravity and scale, though controversial, form the achieved compromise<sup>378</sup>. „Surely, human and material losses will be counted up, nevertheless, the most conspicuous will be the pain and grievance of those, who survived. Of great significance will also be the territory affected by the military actions conducted during the intervention”.<sup>379</sup> Whether or not a crime of aggression has taken place depends on several aspects that need to be carefully looked into. These would include the gravity, scale and consequences of the actions, in accordance with the UN's Charter<sup>380</sup>. Still there are no Charter on humanitarian interventions that are not crimes of aggression and there is no knowledge on preconditions of them.

Justified intervention should be proportionate according to principle of proportionality. The principle of necessity should be respected. When the political situation in the country is complicated and unstable, and it is impossible to get the consent of the state, a decision should be made by the UNSC at the presence of observers from foreign countries. The rules of the use of force are respected, like in case of self-defence.

The principle of complementarity would still be in force, in accordance with its adaptation to new circumstances related to the potential inclusion of the crime of aggression into the ICC Statute. The amendments were introduced at the Kampala Conference in 2010.

Article 17 would apply to all crimes within the ICC jurisdiction, including the crime of aggression. Given the primacy of the states, the ICC would perform its duties in a normal mode, embracing within its jurisdiction all crimes listed in the ICC Statute and taking into account that the state may not want or not be able to deal with the matter, in this case the crime of aggression. This would mean that the state may not want to take measures to introduce provisions into national law which would penalise aggression; the inability of the victim state to conduct investigation on this case would result from Art. 17 (3) of the ICC Statute and could be a consequence of an act of aggression committed against this state<sup>381</sup>.

<sup>378</sup> R. Clark, *Alleged Aggression in Utopia: An International Criminal Law Examination Question for 2020*, [in:] W. Schabas, Y. McDermott, N. Hayes, Ashgate Research Companion, p. 67.

<sup>379</sup> J. Olejniczak, *Propozycja definicji zbrodni agresji, warunków wykonywania jurysdykcji przez MTK i elementów definicji zbrodni agresji*, Wrocławskie studia erasmiańskie. Zeszyty Studenckie, March 2011.

<sup>380</sup> Projects of changes in the Rome Statute of the International Criminal Court and the *Understandings* published in: C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge 2013, p. xxiii-xxix.

<sup>381</sup> See S. Sayapin, *The Crime of Aggression in International Criminal Law*, Springer 2014, pp. 299-300.



## 6. THE DEFINITION OF THE CRIME OF AGGRESSION VERSUS THE RULES OF RESPONSIBILITY IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT.

Once the definition of the crime of aggression is accepted, the general regulations will not change. Nevertheless, other rules of the Statute of the ICC should apply to the version of the crime of aggression defined in that very Statute<sup>382</sup>. In line with the Preamble of the Statute, „States Parties of this Statute agreed to the fact that the most severe crimes of international scale cannot go unpunished, and that it is of utmost importance to provide effective prosecution thereof. This can be achieved through intensification of international collaboration. States Parties are determined to put to an end the impunity of perpetrators of those crimes and to contribute to their prevention in the future, reminding that each and every State is obliged to execute penal jurisdiction towards people responsible for international crimes”. The execution of the above tasks requires a great deal of support on the part of domestic courts. Every State Party is committed to executing jurisdiction on subjects liable for committing international crimes quoted in article 5 of the Rome Statute of the ICC<sup>383</sup>.

Emphasis has been put on the relation between the international jurisdiction and the international peace (paragraph 7 of the Rome Statute's Preamble), which, consequently, built up a necessity to gradually create mature methods of close correlation between the two issues. Usually, international crimes are committed during armed conflicts, hence the need to stop states from instigating them<sup>384</sup>. To confirm the above deliberations the following statement has been quoted in the Rome Statute's Preamble: „All State Parties should restrain from using force or threat thereof against territorial integrity and political independence of whichever state, or act

<sup>382</sup> See: R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its elements and the Conditions for JCC Exercise of Jurisdiction Over It*, *European Journal of International Law*, volume 20, no 4, November 2009, p. 1106.

<sup>383</sup> O. Triffterer notices that the notion of „international crimes”, has been given a broader meaning in comparison with that of „core crimes” in article 5 of the Statute. O. Triffterer, *Preamble* [in:] O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, C.H.Beck- Hart-Nomos 2008, .p. 11.

<sup>384</sup> See: O. Triffterer, *Op. cit.*

in any other way that is in contradiction of the regulations of the UN's Charter".<sup>385</sup>

„The Review Conference (...),

1. Recognises the primary responsibility of States to investigate and prosecute the most serious crimes of international concern;
2. Emphasizes the principle of complementarity as laid down in the Rome Statute and stresses the obligations of States Parties flowing from the Rome Statute;
3. Recognises the need for additional measures at the national level as required and for enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community;
4. Notes the importance of States Parties taking effective domestic measures to implement the Rome Statute (...);
5. Encourages the Court, States Parties and other stakeholders, including international organizations and civil society to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern (...).

Due to the introduction of another crime to the Rome Statute, it is vital to consider its reference to the already existing regulations of the Rome Statute. The principle of *nullum crimen sine lege* (the principle of coincidence, *nulla poena sine lege*, the principle of retroactivity, *rationae personae*) are the first rules quoted in articles 22, 23 and 24 of the ICC's Rome Statute. Those rules together form the principle of legalism, which should be differentiated from the principle of *nullum crimen sine lege* in the international law. This principle does not concern „the protection of an entity against the intervention of public authorities in liberty”, but „the limitation of the discretion of judges to step outside the borders of rational foreseeing a possible meaning of Statute regulations”.<sup>386</sup> The role of the principle of *nullum crimen sine lege* in article 22 of the Rome Statute is similar to that in domestic law<sup>387</sup>. The draft of Article 8 bis describes attributes of the crime of aggression, developed in the Elements of the Definition of the Crime of Aggression (currently in the project thereof). The article specifies the limits of judicial interpretation, that cannot ignore the obligations guaranteed by the principle *nullum crimen sine lege* within the jurisdiction of the ICC.

<sup>385</sup> Ibidem.

<sup>386</sup> B. Broomball, *Nullum crimen sine lege* [in:] O. Triffterer (ed), op. cit.

<sup>387</sup> Ibidem.

Doctrinal concepts portrayed during the works on amendments to the Rome Statute should give way to the accepted statutory solutions. One should apply article 22 paragraph 2 of the Rome Statute, according to which „The definition of crime should not be interpreted literally and cannot be broadened by means of analogy. In case of ambiguity, the definition should be interpreted for the benefit of the suspect, defendant or convict”. This regulation emphasizes the difference between the international criminal law and the international public law, by virtue of which a general rule of the international law would allow the application of acting *per analogiam*. „This is because in the structure of the subsystem of the international law directed to criminal liability of an individual, basic conclusion concerns the collision between the requirements of the material justice (the need for punishment) with the main criteria used to authenticate legalism of execution of that liability. As per usual, the first of the above-mentioned qualities is the preferred one”.<sup>388</sup> On the other hand, in case of the crime of aggression one should take into account differences between the application of the international public law directed to a state and the international criminal law directed to an individual. Those differences will be even more conspicuous if one includes the need to have it approved by the UN’s Security Council that a crime of aggression did take place (in line with the regulations of article 8 bis – an act of aggression)<sup>389</sup>, by virtue of the regulations of the international public law directed to a state, when the ICC, dealing with an entity’s liability, takes over the case on the second stage. In the first case, the UN’s Security Council could make use of the reasoning *per analogiam*, which is not forbidden by the international public law. In the second case, the principle of *nullum crimen sine lege* forbids broader interpretation through analogy. The application of this principle does not refer to law formation, but rather to its interpretation. It fills up well legal loopholes and definitions. In accordance with the strict construction of this regulation, the prohibition to broaden the meaning of its attributes *per analogiam* refers only to the definition of crime, in this particular case – to the crime of aggression. Whether or not this specific construction will be used in other circumstances, depends on the interpretation of the ICC, the rules of Rome Statute and generally on the law applied in a given case<sup>390</sup>.

<sup>388</sup> M. Królikowski, *Odpowiedzialność karna jednostki za sprawstwo zbrodni międzynarodowej*, Wydawnictwo sejmowe 2012, p. 112.

<sup>389</sup> Refer to article 39 of the UN’s Charter. D. de Ruiter, W. van der Wolf (eds.), *Aggression and International Criminal Law*, International Courts Association Press, 2011, p. 22. K. Kittichaisarree, *International Criminal Law*, Oxford University Press, 2009, p. 218.

<sup>390</sup> See: B. Broomball, *Op. cit.*

The prohibition to reason *per analogiam* mainly refers to modern crimes, hence the introduction of article 22.2 of the Rome Statute of the ICC, which was supposed to be formed by the Congregation of States Parties. Therefore, judges cannot anticipate legislators' decisions, nevertheless their being innovative can be acceptable, as long as law formation stays within the approved pattern. It proves the significance of analogy, acknowledged as a vital tool in creating the importance of the Rome Statute<sup>391</sup>. The above hints should be referred to the judges of the ICC, who will be bound to interpret the meaning of the definition of the crime of aggression, already modelled on the solutions approved by the Statute of the International Military Tribunal and applied by the judges of this Tribunal, but newly specified in order to pinpoint the attributes of this crime. This aspect could, for instance, be used to make the definition of the subject of the crime of aggression more precise, through enumeration and limitation at the same time of subjects capable of committing such a crime. In line with a literal interpretation of this regulation, the subjects of the crime of aggression will not be those persons who have lost their posts, but still that had an impact on committing the crime. The subjects of the crime of aggression will also not include entrepreneurs, who, thanks to their financial background, might have contributed to committing the crime. They would have a real power over a given territory, even if deprived of any support from state's authorities. Such decision will be made by judges of the ICC, and despite the lack of any fixed regulations in the Rome Statute, similar deliberations were made by the judges of this Court in cases concerning the crime of aggression. It is assumed that the judges of the ICC will continue their deliberations if the regulations on the crime of aggression enter into force.

Paragraph 3 of article 22 of the Rome Statute of the ICC states that „it does not contradict acknowledging any kind of behaviour as a crime on the basis of the international law, irrespectively of the Statute in question”. As the principle *nullum crimen sine lege* belongs to general rules of the international law, the outcomes of applying this rule are restricted to the Statute only. Article 22 further protects against possible misunderstandings that might arise as an answer to the question whether the Rome Statute only codifies international criminal prohibitions or exhausts them to the full. Criminal liability of an individual was created by virtue of international law before the Rome Statute of the ICC was formed. Hence, the principle

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<sup>391</sup> Ibidem.

of legalism, as a rule independent of article 22 of the Rome Statute, will be applied to particular crimes in order to determine their occurrence and range<sup>392</sup>.

Further, article 23 of the Rome Statute of the ICC states that (**Article 23 Nulla poena sine lege**) “A person convicted by the Court may be punished only in accordance with this Statute”. Irrespective of the content of *Understanding*, that points out the need to include the character and gravity of the crime<sup>393</sup>, the limit for the discretionary organs of the ICC (which cannot impose a penalty that is not included in the Statute) is still in force. Article 23 also constitutes a form of protection against the possibility to impose the same penalties on perpetrators by domestic courts. Deprivation of the right to vote or to run a business activity form extra punishments in the light of article 23 of the Rome Statute, and therefore they are forbidden<sup>394</sup>.

Article 24 of the Rome Statute states that (**Article 24 Non-retroactivity ratione personae**):

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply<sup>395</sup>.

Article 24 of the Statute complements the principle of the coincidence expressed in article 22 paragraph 1: unlawfulness and penalty while committing the deed”<sup>396</sup>. This regulation stems from „the intention to differen-

<sup>392</sup> See: B. Broomball, Op.cit.

<sup>393</sup> Compendium 3rd.01.ENG. Similar regulations were subjected to criticism during the works on the International Criminal Court in 1950s. There was a demand to determine penalties precisely, just like in the criminal code. In 1951 in the project on the code of the crime against peace and safety, a decision was made that a penalty should be determined by the ICC executing its jurisdiction over the charged individuals, with the gravity of the crime taken into account. Criticism of that crime led the UN's General Assembly to conclude that penalties should be imposed taking into consideration instructions given in the regulations of the domestic law. - W.A. Schabas, *Op. Cit.* It is worth mentioning that on the power of the principle of complementarity included in the Rome Statute, domestic courts have the priority in judging the perpetrators of international crimes. Only when a state refuses to judge such perpetrator or is unable to do so, does the judgement of this person remain within the responsibility of the ICC.

<sup>394</sup> W.A. Schabas, op. oit.

<sup>395</sup> Compendium 3rd.01.ENG.

<sup>396</sup> M. Królikowski, op. cit. **Article 22 of th ICC Statute, Nullum crimen sine lege:**

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated,

tiate the rules of the Rome Statute and the jurisdiction of the ICC”.

Another principle has been expressed in article 25 of the Rome Statute and refers to forms, in which a crime is committed. Whether it was necessary to keep, change or reject article 25 (3) of the Rome Statute was discussed during the works of the Group of the Preparatory Commission. During the discussion the coordinator based his reflections on the solutions accepted in the Statute of the International Military Tribunal, according to which a perpetrator was responsible for planning, preparation and initiation of aggressive war seen as a crime against peace (an equivalent to the current crime of aggression). In the proposal included in coordinator’s document, there was a firm statement that article 25 (3) would not apply to the crime of aggression, which gave the impression that the construction of the crime of aggression and forms of committing the crime were mutually exclusive<sup>397</sup>.

What was also taken into account were earlier projects of the crime of aggression prepared by the Commission of the International Law, which also included the threat of committing a crime of aggression. Nevertheless, the above concept was eventually rejected. It was agreed that acts of aggression can be taken into account only as the so-called *completed acts*, which was in line with the definition of aggression and excluded attempted aggression. R. Clark emphasized that in unique cases a leader is attempting to participate in aggression, but is not able to do that. Due to that, the regulations on attempted aggression have not changed.

Another issue worth consideration is the so-called *inchoate conspiracy* in committing aggression. Nevertheless, an indirect compromise has been achieved not to follow the pattern practised by the judges of the International Military Tribunal in Nuremberg<sup>398</sup>.

One of the regulations of the Rome Statute, the application of which, in line with the project of article 8 bis, became the main interest of the representatives of law doctrine, is article 28 of the Statute in question. In line with the project of the definition of the crime of aggression from 2002, representatives of the aforementioned Working Group have come

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prosecuted or convicted.  
Compendium 3rd.01.ENG.

<sup>397</sup> See: Nicolaos Strapatsas, *Is article 25(3) of the ict statute compatible with the crime of aggression*, Florida Journal Of International Law, vol. 19, p. 159. The article of Nicolaos Strapatsas is to justify the need of application of article 25 (3) also in case of the crime of aggression.

<sup>398</sup> See: R. Clark, *Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It*, European Journal of International Law, volume 20 no 4 November 2009, p. 108-109.



to a conclusion that superior's responsibility should not apply when the draft of article 8 bis of the Rome Statute is to be applied<sup>399</sup>. Following the main idea behind the project, the crime of aggression could be committed only by the highest-in-rank state leaders. This would automatically exclude other subjects holding posts that are lower in hierarchy from the circle of potential perpetrators. According to M. L. Nybondas, if the need to include perpetrators to leaders highest in rank has not been placed in the definition of the crime of aggression, it would mean that in actual fact applying article 28 of the Rome Statute is pointless<sup>400</sup>. Such an interpretation would not exclude the possibility to use article 25 of the Rome Statute, in which other forms of responsibility have been outlined (, for example instigation).

Another article taken into account in the deliberations on the crime of aggression will be Article 30 of the Rome Statute. In the light of the regulations outlined in the Statute of the ICC, one should refer to the content of Article 30 while considering the intent to commit one of the crimes covered by the object jurisdiction of the Statute in question.

Subject element of the crime of aggression may refer to Article 30 of the Rome Statute. The application of article 30 should relate to proving a perpetrator that he committed a deed with intent or awareness thereof, unless a regulation defining the crime of aggression states about a unique intent to commit this crime. G. Werle, Fr. Jessberger, W. Burchards, V. Nerlich, B. Cooper have claimed that the incorporation of such terms as: „intent”, „intentionally”, „willful”, „willfully” or „wantonly” introduces new subject elements both, to the Rome Statute and to the Elements of the Definition of the Crime of Aggression, which may be in contradiction to the regulations of Article 30 and should be considered individually<sup>401</sup>.

G. Werle, Fr. Jessberger, W. Burchards, V. Nerlich, B. Cooper have also pointed out that the regulations differing from article 30 may also be (according to Article 21 of the Rome Statute), the Elements of the Definition of the Crime of Aggression and the regulations of the customary law<sup>402</sup>. The regulations of the Elements of the Definition of the Crime of Aggression enumerate the following: behavior, consequences, circumstances and, in some cases, unique attributes of the subject party of the

<sup>399</sup> Ibidem.

<sup>400</sup> M.L. Nybondas, *Command Responsibility and its Applicability to Civilian Superiors*, The Hague 2010, p. 176.

<sup>401</sup> G. Werle, F. Jessberger, W. Burchards, V. Nerlich, B. Cooper, *Principles...*, op. cit., p. 107.

<sup>402</sup> Ibidem, p.106.

deed. Paragraph 2 of the Introduction to the Elements of the Definition of the Crime of Aggression indicates that, unless stated otherwise, one should apply article 30 of the Rome Statute<sup>403</sup>. Taking into account the ICC experience, a conclusion may be drawn that Art. 30 is applied when there are no other specific provisions relating to mental element in the regulations of the ICC Statute, the Elements of Crime or customary law<sup>404</sup>.

Because there is no additional mental element in Art.30 connected with the intent this provision should be applied to draft art. 8a of the Statute of ICC, unless otherwise is provided. There should be applied Art. 30 of the ICC Statute, unless art. 8a provides otherwise. It would be a paradox, since this crime should be treated as the most serious of international crimes, and for its demonstrating it would be enough to prove that the perpetrator has awareness or intent to commit it. As mentioned above, A. Cassese has mentioned 'a special intent' (*dolus specialis*), recognizing that the intent is related to the crimes committing of which brings the perpetrator closer to achievement of the objective by undertaking specific behaviour. For example, a perpetrator has the intent to destroy, in whole or in part, a national, ethnical, racial or religious group in case of crime of genocide.<sup>405</sup> In the case of the crime of aggression the perpetrator's behaviour would lead to the violation of sovereignty, independence and inviolability of the state which would determine an additional subjective element of the crime of aggression according to the law of resolutions of SC, the law on UN Charter, customary law. As mentioned above, it could be *dolus specialis* of the crime of aggression, which would match the burden of this crime and its characteristics (the most serious crime in the world).

One should remember that there is considered the responsibility of an individual, while the responsibility of the state does not raise doubts as it has been established previously by the Security Council or the Pre-Trial Division.

Article 31 of the Rome Statute refers to circumstances excluding fault or illegality. The following circumstances have been enumerated: mental illness, mental disability, intoxication, necessary defence, state of necessity and absolute coercion. This regulation could prove applicable in unique cases, as emphasised by R. Clark<sup>406</sup>. R. Clark has also pointed to Article 21

<sup>403</sup> Por. Wprowadzenie do EDZ, tłum. za: M. Płachta, *Międzynarodowy Trybunał Karny, tom II, Zakamycze 2004*, s. 181.

<sup>404</sup> See: Clara Darnagard, *Individual criminal Responsibility for Core International Crimes*, 2008, s. 172.

<sup>405</sup> Antonio Cassese, *International Criminal Law*, (second edition), Oxford 2008, p. 65.

<sup>406</sup> R. Clark, op. cit.

(3) of the Rome Statute<sup>407</sup>, as a rule on the basis of which it is possible to apply circumstances not mentioned in Article 31. “Proceeding concerning this kind of basis is regulated in the Rules of Procedure and Evidence”<sup>408</sup>. As a circumstance excluding the unlawfulness, not mentioned in Article 31 of the Rome Statute, one may take instigation of the so-called “just” war, which, according to the authoress, makes such war legal<sup>409</sup>.

Following the translation of M. Płachta, by virtue of Article 32 (1) of the Rome Statute “Mistake as to the fact creates the grounds for excluding criminal liability only when it excludes the subject party. For the subject party one should refer to the above-mentioned article 30”.

“Mistake is a contradiction to intent and awareness”<sup>410</sup> of circumstances that occurred, in the light of which the use of force was against the regulations of the UN’s Charter. R. Clark has noticed that in the Preamble to the Rome Statute it has been stated that by the term “to manifest” one should understand “objective qualification”<sup>411</sup>, since “there is no need for the perpetrator to make legal judgment of the obvious infringement upon the UN’s Charter. The ICC will be the proper organ to make the final judgment (qualification) of the elements of the committed deed”<sup>412</sup>.

In line with article 33 of the Rome Statute, (**Article 33, Superior orders and prescription of law**):

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - a. The person was under a legal obligation to obey orders of the Government or
  - b. the superior in question;
  - c. The person did not know that the order was unlawful; and
  - d. The order was not manifestly unlawful.

<sup>407</sup> Ibidem.

<sup>408</sup> Article 31(3) of the Rome Statute.

<sup>409</sup> See: D. de Ruiter, W. van der Wolf (eds.), *Aggression and international criminal law*, International Courts Association Press, 2011, p. 22. K. Kittichaisaree, *International Criminal Law*, Oxford University Press, 2009, p. 218. C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge 2013, p. 281; See: K. Indeck, *Samoobrona wobec zamachu terrorystycznego*, [in:] *Praktyczne elementy zwalczania przestępczości zorganizowanej. Nowoczesne technologie i praca operacyjna*, L. Paprzycki, Ż. Rau (ed), p. 401.

<sup>410</sup> R. Clark, op. cit.

<sup>411</sup> Ibidem.

<sup>412</sup> Introduction to the Elements of Crime after changes, note 4, paragraph 4.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Judging from the content of Article 33 of the Rome Statute, one may assume that the defence counsel may invoke this regulation only if they represent the defendant charged with a war crime. At this point, it would seem obvious to include the crime of aggression into paragraph 2 of Article 33, right next to the crime against humanity and crime of genocide. Further, according to *Understanding*, the crime of aggression should be classified as the most serious crime, nevertheless in Kampala such decision was not made<sup>413</sup>.

Article 33 evoked a series of doubts in R. Clark, who claimed it was one of the worst designed legal regulations. He emphasized that this article could apply in case of war crimes, but never with the crime of aggression<sup>414</sup>. "The nature of the crime of aggression excludes invoking this regulation"<sup>415</sup>.

Since the crime of aggression has been acknowledged as the most serious crime, then a natural and obvious step would be to consider illegal issuing commands to commit such a crime.

The Elements of Crime are to be an asset to the ICC while applying the draft of Article 8 bis of the Rome Statute<sup>416</sup>. They should form a support mainly to those judges, who employ the rules of the Rome Statute. Therefore, one should take into account the role of the ICC that is entitled to use discretionary powers to the extent applicable<sup>417</sup>.

The rules of the Elements of Crimes refer to the following: behavior, consequences, circumstances and, occasionally, special attributes of the subject party. In case of the crime of aggression behavior is defined via planning, preparation, instigation and execution of an act of aggression<sup>418</sup>. Element 2 refers to circumstances, according to which a person should be able to effectively control political or military actions of a state committing

<sup>413</sup> Members of the group working on the definition of the crime of aggression in Kampala were close to make a decision, but there lacked some binding conclusions during *Informal Inter Session*.

<sup>414</sup> R. Clark, op. cit.

<sup>415</sup> Ibidem.

<sup>416</sup> Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized Draft Text of the Elements of Crimes, UN Doc PCNICC/2000/1/Add.2 (2000).

<sup>417</sup> E. Gadirov, *Article 9, Elements of Crime*, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court. Observers, Notes Article by Article*, Nomos Verlagsgesellschaft 1999, p. 309.

<sup>418</sup> The project of Element 1., changed, of the Elements of Crime, article 4.

a crime of aggression<sup>419</sup>. Article 30 of the Rome Statute applies to both of the above-outlined Elements. Element 1 must lead to achieving a desired result; a person acting according to Element 2 needs to be aware of his / her position in the hierarchy. Element 3 reiterates requirements related to an act of aggression. “An act of aggression – the use of force by one state against sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the UN’s Charter – has been committed”. Element 5 refers most probably to circumstances<sup>420</sup>, stating that “an act of aggression due to its character, gravity and scale constitutes a serious infringement of the UN’s Charter”. The very last Element concerning the crime of aggression in the Elements of Crime states that “a perpetrator must be aware of the real circumstances clearly violating the UN’s Charter”<sup>421</sup>. It will entail proving to the perpetrator the awareness of the circumstances of committing a crime of aggression.

<sup>419</sup> The project of the Element 2., changed, of the Elements of Crime, article 4.

<sup>420</sup> R. Clark, *op. cit.*

<sup>421</sup> *Ibidem.*



## SUMMARY

The definition of the crime of aggression (crime against peace) has only been included in the Statute of the International Military Tribunal. It did not, however, appear in the Statute of the International Criminal Court. This crime has been included in the subject jurisdiction of the ICC, next to the crime of genocide, crime against humanity and war crimes. Nevertheless, the crime of aggression has not been defined, despite intentions and plans to do so. Further, there have not been specified any conditions of jurisdiction with reference to this crime.

Apart from the above, also the role of the UN's Security Council was taken into account in the project of the crime in 1994. Then, the International Law Commission stated that "the ICC may only accuse of the crime of aggression if the UN's Security Council has previously determined the occurrence of this crime in a given state. This concept has been rejected by arab states and developing countries, but supported by the western countries and permanent members of the Security Council. Some states should not at all be included in the Statute"<sup>422</sup>.

In 1996 there worked the Commission *Ad Hoc* and in the years 1996-1998, the Preparatory Commission. The works on the crime of aggression have begun within a conference described as the Rome conference in 1998. The first phase of negotiations covers the years 1999-2002, whereas the second phase follows from 2003 to 2009. The so-called Special Working Group has worked out an agreement concerning the definition of the crime of aggression. During the third phase (spring 2009 to spring 2010) the Convention of States Parties of the Rome Statute focused their efforts on the proposal presented by the Special Group. Consolidation of support has evoked a heated debate over the most vital questions raised during the Conference in Kampala, Uganda from May 31<sup>st</sup> to June 11<sup>th</sup> 2010<sup>423</sup>.

Years 1995-2011 could be described as a preparatory period in defining the crime of aggression. In 2003 a Working Group was formed in order to create the definition of the very crime in relation with the preparatory

<sup>422</sup> S. Barriga, C. Kreiss (ed.), *The Travaux Préparatoires of the crime of aggression*, Crime of aggression library, Cambridge University Press 2012, p. 6.

<sup>423</sup> Ibidem.

works of the Rome Statute. Negotiations lasted until 2011. All in all, one may conclude that a consensus on the definition of this crime and its jurisdiction has finally been achieved. The regulations will enter into force if they are ratified by thirty states parties of the Rome Statute one year before January 1<sup>st</sup> 2017. Only then will it be possible to carry out voting on including in the Rome Statute regulations concerning the definition of the crime of aggression. In line with the above, the ICC should execute jurisdiction in pursuance of the decision taken after January 1<sup>st</sup> 2017 and accepted by the same majority of votes as with the decision on amendments to the Rome Statute<sup>424</sup>. Thus, it can be assumed that in 2016 at least thirty states parties will ratify regulations in question. Governmental and non-governmental organizations, theoreticians and practitioners of law should use the oncoming period of time to convince other states to the need of ratification of new regulations concerning the crime of aggression. Indubitably, including the crime of aggression in the Rome Statute of the ICC is a step forward towards the victory over impunity in the world.

It is worth mentioning that the UN's Security Council, obviously not interested in acknowledging the existence of the crime of aggression, will not be able to impair a preparatory proceeding once an ICC prosecutor recognises a justified legal basis to conduct such a proceeding and the Preparatory Chamber entitles the prosecutor to do so. Prosecutor's Office must then be prepared to take up new tasks related to the crime of aggression. Well-qualified lawyers should be employed in order to share their knowledge of *ius ad bellum*<sup>425</sup>.

Should this be the case, the role of the ICC would significantly increase, because if the UN's Security Council did not make any decision, the ICC would be authorized to decide on its own whether or not an act of aggression took place. Then the UN's Security Council would cease to be the only subject entitled to confirm that an act of aggression did occur and the ICC could not be accused of being dependent on political decisions made by the Security Council. The UN's Security Council would not constitute a filter for decisions, but it would rather be the so-called Pre-trial Division consisting of six judges<sup>426</sup>. At this point it is worth emphasizing that the

<sup>424</sup> See: McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge 2013, p. 281.

<sup>425</sup> Ibidem, p. 291.

<sup>426</sup> R. Clark, *Chapter 30, The Crime of Aggression*, 2013, s. 21, [in:] C. Stahn, G. Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2013, in mail from Roger Clark, 12.08.2013, s. 237-238.



lack of any decision on the part of the UN's Security Council does not at all prejudice the possibility to conduct a proceeding in a case concerning the crime of aggression. Negative decision excludes any efforts on the part of prosecutor's office of the ICC to acknowledge the existence of an act of aggression and closes proceeding on the crime of aggression. States members of the UN's Security Council may use their right to declare that they do not agree to jurisdiction relating to the crime of aggression before the amendments from June 14<sup>th</sup> 2010 to the Rome Statute have been accepted. France was the member state to have used this right.

The crime of aggression is the most serious crime. Although, including this crime in the Rome Statute of the ICC was taken into account, it took seven years to debate over its definition. Finally, a compromise was achieved during the conference in Kampala, Uganda. On June 16<sup>th</sup> 2010 there was accepted a resolution on the crime of aggression, conditions in which its jurisdiction could be executed and elements of the definition of the crime of aggression (resolution RC/Res 6). This crime may be committed by a person able to control or being in charge of political and military actions of a state. The object scope of this crime is very close to the resolution on the crime of aggression. Further, in order to determine a deed as a crime of aggression, it has to be committed with intent and awareness. Doubts as to the application of Art. 30 of the Statute of ICC<sup>427</sup> have been expressed by the Commission dealing with the amendment of the EC (Elements of Crime). A perpetrator would have to know that the state laws remain in conflict with the UN Charter, which can lead to unwanted consequences, i.e. relying on the mistake of law, claiming that he or she has been misled by the adviser, or the perpetrator was blind to the illegality of his/her actions<sup>428</sup>.

States show little interest in ratification due to a number of doubts as to the rightness of the accepted solutions. Lichtenstein officially supports the proposals of amendments to the Rome Statute, whereas other states are advanced in the process of ratification of those amendments<sup>429</sup>. Smaller

<sup>427</sup> The Explanatory Note in Appendix II of the 2009 Chairman's Non-Paper on the Elements of Crimes (n 12): R. Clark, *Chapter 30, The Crime of Aggression*, 2013, p. 21, in mail from Roger Clark, 12.08.2013, p. 13.

<sup>428</sup> Ibidem, par. 14, 18.

<sup>429</sup> Changes in the Rome Statute of the ICC have been ratified by the following states: Lichtenstein, Samoa, Trinidad and Tobago, Luxembourg, Estonia, Botswana, Germany, Uruguay. The states advanced in the ratification process are: Argentina, Australia, Austria, Belgium, Brasil, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Dominican Republic, Ecuador, Georgia, Greece, Italy, Lesotho, Malta, the Netherlands, Panama, Peru, Portugal, Romania, Senegal, Slove-

countries would be ready to ratify the changes, especially with technical support of the *Global Institute for the Prevention of Aggression* or Lichtenstein<sup>430</sup>. Then, the ratification threshold of thirty states could be achieved. One may only wonder whether the original goal behind the ratification of the crime of aggression will be accomplished, since only smaller, less influential states will express their interest in the case, whereas the real decision-makers (able to instigate aggression) will refuse to ratify the amendments.

It is also vital to specify territorial affiliation of all spots in the world. Therefore, Great Britain or Argentina have issued a notification asking to include to their territories specific areas, for which those two countries feel responsible<sup>431</sup>. Another significant aspect seems to be defining statehood of those territories, which currently are not acknowledged as states.

The delay in ratification was also caused by the need to first implement the crime of aggression into domestic legislations. Croatia and Slovenia have implemented into their home legislations the crime of aggression worked out in line with the project accepted in Kampala<sup>432</sup>, which is still feasible for the majority of countries until 2017. Currently, only states parties of the Rome Statute of the ICC are involved in issues related to the crime of aggression.

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nia, Spain, Switzerland. Finland, Guatemala, Japan and Latvia are at the first stage of the ratification process; R. Clark, *Chapter 30...*, op. cit.

<sup>430</sup> See: C. McDougall, op. cit.

<sup>431</sup> *Ibidem*.

<sup>432</sup> R. Clark, *Chapter 30...*, op. cit.

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