



THE ROME STATUTE: A CRITICAL REVIEW OF THE ROLE OF THE SWGCA IN DEFINING THE CRIME OF AGGRESSION

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ABSTRACT

The main theme of this study is how the Rome Statute was created and why, even though article 5 of the ICC Statute brought the prosecution of crimes of aggression under its purview, the court's jurisdiction over such crimes was postponed. In addition, the Special Working Group on the Crime of Aggression (SWGCA), which was particularly influenced by the precedent set by the Nuremberg and Tokyo tribunals, considered the facts and the decisions made in reaching the final description for the crime of aggression. The study will also discuss recent cases involving crimes of aggression that upheld the fundamental rule of individual accountability under international criminal law. The qualitative research methodology has been applied on following article.

Keywords: Rome Statute, ICC, Crime of aggression, SWGCA, international criminal law.

INTRODUCTION

World Wars I and II have a solid connection to how the international community responded to mass atrocities committed by state leaders. Plans were made to bring state heads, generals, and representatives to justice rather than simply grant them amnesty for holding office. However, there was a massive disagreement over whether or not they could be tried for the crimes they had



committed on a global scale. Because of the West Pahlia Treaty, most nations were sovereign, and their leaders and heads of state were exempt from all types of litigation under their national legislations, as implied by the idiom "*The king can do no wrong.*" It ended up taking more than a thousand years to come to the conclusion that states are not abstract entities—rather, criminals are committed by specific individuals. The legal foundation for individual criminal accountability has yet to be established. Nonetheless, it was ultimately decided that each offender should be held responsible for the violations committed by them and that they should be tried before an international permanent criminal court in order to prevent retribution wounds from festering (Sayapin, 2014). There are two categories of individual criminal accountability currently available: criminal accountability and individual accountability. The former, which is the focus of this paper, contracts with a natural person's individual criminal liability rather than that of a synthetic person or conceptual entity. As explained by the latter phrase, a person can be held accountable for their actions or the actions of others. Individual criminal accountability refers to the situation in which a individual is accountable for the crime he or she committed, as contrasted to collective criminal accountability, which is sometimes used to refer to accountability for the illegal actions of another person (Bilsky, 2012, p.355). The main theme of this study is how the Rome Statute was created and why, even though art. 5 of the Statute of ICC brought the prosecution of crimes of aggression under its purview, the court's jurisdiction over such crimes was postponed. In addition, the SWGCA, which was particularly influenced by the precedent set by the Nuremberg and Tokyo tribunals, considered the facts and the decisions made in reaching the final description for the crime of aggression. The study will also discuss recent cases involving crimes of aggression that upheld the fundamental rule of individual accountability under international criminal law.

THE ROME STATUTE'S HISTORY

When the 1998 Rome Conference concluded, there was no general agreement on what constitutes a crime of aggression (Dörmann, 2003). Undoubtedly, the ICC would have jurisdiction over an act of aggression, but there were divergent views on the specifics of the offence. The arguments were primarily focused on the description of the crime and its procedural aspect. At the conclusion of the Rome Conference, participants of the Non-Aligned Movement put forward what appeared to be a reasonable solution (Sayapin, 2021). The ICC was given jurisdiction over aggression, but the description and some requirements for the exercise of that jurisdiction were omitted. As a result, Art. 5 of the Statute of ICC was implemented, which states.

“Crimes within the jurisdiction of the Court: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a)The crime of genocide; (b)Crimes against humanity; (c)War crimes; (d)The crime of aggression.

The Court shall exercise jurisdiction over the crime of aggression once a



provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations” (Arsanjani, 1999)

Since the Rome Statute went into effect on July 1, 2002, it has been up to the upcoming review conference, which will take place no earlier than July 1, 2009, to resolve this issue. The Preliminary Commission for the creation of a ICC was recognized by Negotiated settlement of the Final Act of “*the United Nations Diplomatic Conference of Plenipotentiaries of an International Criminal Court*”, with the main objective of interpretation the crime of aggression (Cassese, 2002).

During its third meeting, the Preliminary Commission established the Working Group on Crimes of Aggression, which is headed by the ICC's judicial officers. This group's only significant accomplishment was an overview of the key viewpoints on the act of aggression that were covered in the Coordinator's Debate Paper from July 11th, 2002. As the second step in the process, the Assembly of States Parties (ASP) established a Special Working Group on the Act of Aggression. Between 2003 and the beginning of 2009, the SWGCA met frequently, and at their final meeting in 2009, they made recommendations for the concept of the crime of aggression that was ultimately accepted at the Kampala Conference (Barriga, 2009).

SWGCA'S ROLE IN THE CRIME OF AGGRESSION

The military tribunals for Nuremberg and Tokyo legal precedents served as the SWGCA's guides as it reiterated in its earliest documents that only high-ranking state lawmakers are subject to the crime of aggression. Criminal charges should not be imposed on individuals who are unable to control their decision to commit a crime (Paulus, 2009). In another key, lower status agents of the state are unable to be informed of aggressive proposals due to their position. They cannot be taken responsible for the crime of aggression because they lack the cognitive component of the mental element of awareness. Most legal scholars who reviewed the work of SWGCA were likely satisfied with this conclusion. The group initially had to choose between two different perspectives on the extent of the conceptual framework. Which echelons of authority make up the leadership circle was the main issue they had to deal with. Furthermore, there was a viewpoint in favor of making criminally reliable all those in a position to have a significant impact on the state's regulations (Kreß, 2009). That would encompass more than just the highest-ranking decision-makers, like social, commercial, and spiritual leadership. Contrary to this, it was recommended that the leadership concept should be more restricted, with the highest-ranking state legislators included and excluding, for example, legal counsel who would not be able to effectively manage the state's military involvement. The objection to the latter recommendation was that by introducing such a standard, it would be more challenging to establish the criminal accountability of individuals who are not in the sphere of direct leaders (Clark, 2009).



The SWGCA considered both perspectives and worked to arrive at a compromise that would satisfy both the worldwide researchers and the states, who should ultimately decide whether or not the interpretation is acceptable. Accordingly, the leadership clause adhered to the Nuremberg precedent while making only minor modifications in the light of the arguments that could not be ignored. Only high-ranking state lawmakers were regarded as "leaders," so the High Command case's "shape or influence" standard was replaced with "direct or control" (Tan, 2021).

THE CONTROL OR DIRECT STANDARD

The Articles on Responsibility Of states serve as the foundation for the words direct and control. Article 17 states the following.

"Direction and control exercised over the commission of an internationally wrongful act A state which directs and controls another state in the commission of an internationally wrongful act by the latter is internationally responsible for that act if: (a) that state does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State" (Heller, 2007).

In 2008, the International Law Commission (ILC) clarified the definitions and articles on responsibility of states (McCaffrey, 2011). Observers noted that the phrase "controls" connoted more than oversight, much less influence or concern over the commission. The phrase "direct" signifies actual, operative direction rather than merely instigation or suggestion. The study finds it rather efficient to make a brief disclaimer now before the research begin the evaluation of the terms. According to the International Court of Justice (ICJ), the United States was responsible for actions taken by the Contra guerillas in Nicaragua in 1986 by using the concept of effective control (International Court of Justice, 1986). Despite this, the formal requirement from which the "effective control" standard originates is somewhat unsuitable for this situation because it has nothing to do with the actions of particular people but rather the behavior of entire states. Despite this, it may still prove to be somewhat helpful in interpreting the criteria for what defines leadership in the act of aggression. ICJ ruled that:

"at least at one period, (Contra forces) been so dependent on the United States that it could not conduct its crucial or most significant military and paramilitary activities without the multifaceted support of the United States" (International Court of Justice, 1986).

In this instance, the alliance among both Contra forces and the US administration was put to the test. Because the Paramilitaries were "so dependent" on the US and could not carry out their activities without it, the Court concluded that the US Government seemed to have direct control over the Contra forces. Additionally, the connection between both the potential offender



(individual) and state policy is in question when it comes to the description of the crime of aggression. If researchers follow the ICJ's explanation, authors might reach the following consequences: if an individual played a significant role in committing an act of aggression and that act would not have happened without that individual, then that individual has actual control over the political as well as military engagements of a country. SWGCA's leadership benchmark demonstrates that both direct and control encapsulate verifiable power over state conduct. Individual criminal responsibility would not result from simply being influenced by someone in a position of authority.

When determining who is subject to criminal prosecution, the term "*control*" should be used to describe individuals without whose assistance a state action that qualifies as an act of aggression would not be carried out. The ICJ's interpretation, which was previously described, led to this conclusion. Furthermore, the direct solution of the leadership clause ought to bar those who have the ability to persuade decision-makers without having actual authority over state policy. The crime of aggression cannot be committed by the assistants, advisers, best friends, or spouses of high-ranking state officials since "directs" does not mean mere incitement or suggestion, but rather precise instructions to operative kin. An individual who is solely responsible for a state's military or political strategy is unlikely to hold the same position of power as one who is capable of exerting control over the state.

New V. Old Pro Et Contra

The act of aggression is a crime against individuals, according to Art. 8bis of the ICC Statute. The eagerly anticipated definition is composed of three parts and differs from its usual counterpart in at least two ways. One of those novelties is the new leadership clause, which states that even if someone engages in unlawful behavior (*actus reus*) and has the knowledge needed and intent (*mens rea*) to do so, they cannot be held accountable for aggression if they are not in a role to direct or control governmental policy. The ICC standard differs significantly from the one used in the WWII post-trials because the ICC standard's "*shape or influence*" rule was broader and individuals who met these standards could not be considered to have direct or indirect control (Bujuklic, 1998). A number of academics supported the latter idea because, according to them, committing an act of aggression is only criminally responsible if the perpetrators were in military or political leadership positions and the attack was organized or planned (Politi, 2017). Only those with authority to make decisions on behalf of a state could perpetrate the crime of aggression. As a result, individuals acting in a personal capacity and low-ranking political and military authorities should be exempt from criminal prosecution.

The control as well as direct standard is preferred over the form or impact in terms of application of the explanation presented above. In truth, there are individuals who are not directly connected to the political system who have the potential to shape or even impact governmental policy. Based on the German historian Heike B. Görtemaker's story, Eva Braun was Adolf Hitler's main character



in his private life. Upon the end of the war, he imagined living with her in Linz and passing command on to a younger man. Despite keeping her identity a secret for most of the war, she gradually rose to prominence within Hitler's inner circle. For instance, Braun was certain to be aware of Hitler's plans to invade Poland, according to Görtemaker. Given the character of their relationship, it is possible to speculate about Eva Braun's impact on Hitler and how it may have formed or influenced Third Reich strategy. Because she met the requirements for "*shape or influence*," she could be charged if she survived the post-war court cases (Görtemaker, 2010).

Another defence of the control as well as direct concept is now being made. The concept, in this case, is stricter than the one in the High Command case. There are numerous challenges involved in preparing forms or impacts because of the complexity of the process. From having a concept that is too broad and would subject a large number of individuals to criminal responsibility on the one hand, to having a difficult time establishing who was involved outside the decision-making process on the other hand. There is one significant argument that must be kept in mind against the direct and control standard while applauding the elimination of all the flaws inherent to the form or influence notion. Personal economic actors and representatives of third states, as per Heller, could never meet the control as well as direct standard (Weisbord, 2009). Contrary to the author's perspective, I tend to concur with other lawyers who assert that by integrating the direct or control necessity into the conceptual framework, the concept would be enhanced. As part of this interpretation, leaders who are not occupying formal positions would also be included, but who could, through informal means, control a state's military or political intervention. Economic and religious authorities may be held accountable for aggressive behavior in order to achieve this goal (Heller, 2007).

CRIMINAL RESPONSIBILITY: ACTUS REUS AND MENS REA

Sir Edward Coke established *Actus reus* and *Mens rea* as pillars of criminal law in his Academic Institutions of The Law of England (1779). Acts do not constitute guilt unless the mind is also guilty. This is the meaning of the expression *actus non facit reum, nisi Mens fit rea*. According to the theory, there are two requirements that must be met for violence to exist. According to local legislation, a person's guilt or innocence depends on whether they were the ones who actually committed the offense (*actus reus*) and whether they had the intent to commit it (*Mens rea*) (Smith, 1978). The Model Penal Code refers to these surrounding elements of the crime as the behaviour, the circumstances, and the result, and many contemporary penal codes have established levels of *Mens rea* known as modes of moral responsibility (conduct, attendant circumstances, result). There is also a complex and difficult nature to the scope of international law due to the long-standing reluctance of States to create a permanent and universal system of international criminal law. The Nuremberg and Tokyo tribunals and subsequent proceedings laid the foundation for criminal accountability on an individual basis, but these tribunals and subsequent proceedings did not provide a system of criminal law doctrine, which compelled us to turn to local law because international law cannot be directed or assisted by any other source in



establishing a judicial system. It is accurate that the military conflict tribunals and other temporary international tribunals had to refer to national legislation for guidance (Robinson, 2017). *Actus reus* and *Mens rea* are legal terms used by the former Yugoslavia and Rwandan tribunals to denote the objective and subjective components of crimes that fall under their purview. The Trial Chamber of ICTY in *Mucić et al.* ("Čelebići") held:

"The principles of individual criminal responsibility enshrined in Article 7, paragraph 1, of the Statute reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the International Tribunal is not limited to persons who directly commit the crimes in question. Instead, as stated in the Report of the Secretary-General: all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible" (Krzan, 2016).

The ICTY chamber's remark, which was previously mentioned, makes clear that *Actus reus* is not always required to establish an international crime. Deronji's Trial Chamber determined in yet another ruling that:

"Using the word "committed" does not mean that the Accused physically committed any of the crimes charged personally" (Jalloh, 2012).

In Gacumbitsi Appeals, the ICTR's appeals chamber determined:

"In the context of genocide, however, 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime" (Koursami, 2018).

In Lukić and Lukić Trial Chamber, the court held:

"Committing a crime covers physically or directly perpetrating a crime or engendering a culpable omission in violation of criminal law."

INDIVIDUAL CRIMINAL LIABILITY FOR AGGRESSION: RECENT CASES

A strategy to prosecute individuals who had committed the greatest offence against humanity, worldwide morality, and treaties was formed under Article 227 of the Treaty of Versailles in 1919, but it was unsuccessful due to *ex post facto*. It is appropriate to cite that the crime of aggression was only reserved for "*policymakers*" prior to World War II court cases. Critics argued that lower state authorities lacked the necessary *Mens rea* (psychological element) due to their situation; they



might not be aware of their country's aggressive strategies. This interpretation led to confusion pertaining to individual criminal accountability for this crime. Therefore, it would be against the justice's best interests to charge those individuals with attack (Mellink, 2022).

Case Laws

High Command

Wilhelm von Leeb and 12 others were defendants in United States of America v. Nuremberg Military Tribunal, referred to as the "High command case." The perpetrators were alleged with four counts for example (1) Crime against peace; (2) War crimes; (3) Crime against humanity and (4) Committing crimes in counts one, two, and three using a coordinated scheme or conspiracy. According to the first count of the indictment, the defendants and their drivers were involved in wars of aggression and the beginning of such conflicts, which violated Article II of Control Council Law (CCL) No. 10.

The Kellogg Brand Pact of 1928, whose preamble forbade the use of force in the contracting parties states' fundamental existing international relationships, was cited by the tribunal despite the defendants' use of the defence of "*ex post facto*" as a notion of "*Nullem crimen sine lege*." The sitting judge also mentioned that aggressive war has been prohibited by customs and other treaties. Defining these opinions was the Mutual Assistance 1923 draught of the League of Nations, which declared that all declarations made in agreements, traditions, and other worldwide pacts proclaimed war as both an international ethical violation and a crime. Additionally, the judge decided that the cause of the war could be used to determine whether it was an aggressive as well as defensive conflict. First, the intent and goal behind the war. Second, did those who made national policy intend to commit crimes? Thirdly, was the military conflict used to carry out that national policy? As a result, the judge determined that defendants are not guilty of count one of the charges, which is a crime against peace. Since intent and knowledge are components of the component of aggressive war, all components must be present for a defendant to be found guilty of such charges. Furthermore, the ability to influence and shape such policy is just as important as having the necessary knowledge. Therefore, if defendants participated in a war but were unaware that it was being planned and prepared as an illegal as well as aggressive war, they cannot be held accountable for an aggression crime. He is criminally responsible for such crime if, after the war had begun, he learned that it was an aggressive war and continued to take part. In this case, the tribunal made it clear that only people with "*policy level*" authority could be found guilty of the crime of aggression. For instance, international criminal law adopted the "*shape and influence*" leadership standard for the first time (Douglass, 1972).

KRUPP et al.

On July 31, 1948, this case was brought before the US Military Tribunal in Nuremberg against



twelve defendants, including Alfred Krupp, the company's owner and Bertha Krupp's son. Four counts were filed against the defendants, including (1) Planned, prepared, commenced, and conducted an aggressive war (2) Plundering and plundering. (3) Prisoners of war and slave labor are among the crimes committed, and (4) Committing a crime against the peace is part of a conspiracy. In their pleadings, the defendants claimed that the evidence presented was inadequate. Because the competent and pertinent evidence in the case did not establish beyond a reasonable suspicion that either defendant was guilty of the offense, the trial court acquitted the defendants for counts one and four of the indictment (Cassese, 2013).

Kuala Lumpur War Crimes Commission v. George W Bush and others (CP. 2011)

Due to their involvement in the Iraq “War, George W. Bush and Tony Blair were found guilty of crimes against peace, crimes against humanity, and genocide by a tribunal made up of five judges after the Kuala Lumpur War Crimes Commission (KLWCC)” spent two years investigating the matter (Ruslim, 2019).

As a result of plotting, preparing for, and invading the sovereign state of Iraq on March 19, 2003, the Chief Prosecutor of the United States government and the Chief Executive of the United Kingdom were accused of committing Crimes against peace. In violation of the Charter of the United Nations and international law, the defendants were convicted of committing crimes against peace. Nuremberg's Charter requires the tribunal to continue the defendants' trial in absentia according to Article 12:

“Tribunal shall take proceedings against a person charged with crimes set out in article of this charter IN HIS ABSENTIA, if he has not been found or if the tribunal, for any reason, finds it necessary, in the interest of justice, to conduct the hearing in his absence.”

The commission concluded that the accused's actions were wholly illegal and contrary to the UN charter. It also asserted that they acted dishonestly because no evidence of WMD in Iraq or ties to al-Qaeda was presented. As a result, the tribunal ruled that the charges against the accused more than a four-day time from November 19 to 22 of 2013 were established beyond a reasonable doubt. “(1) The accused are guilty as charged, (2.) The tribunal in accordance to Article 31 of our charter, recommend to the commission to file reports with the international criminal court against two accused. (3) The tribunal in accordance with Article 32 recommend to the commission that the name of the two convicted criminals be included in the commission’s register of war criminals and published accordingly” (MacCarrick, 2018).

CONCLUSION

When the Rome Statute was made in 1998, it was imperative to have a clear definition and provision for the crime of aggression. In response to this request, the preparatory commission



formed the WGCA in order to obtain provisions relating to the crime of aggression in accordance with articles 121 and 123 of the Statute. Following several meetings, the ASP established the SWGCA, which, after several meetings, drafted a proposal on the definition of the crime of aggression and held a meeting in Kampala in response to that proposal. During the Kampala conference in 2010, the jurisdictional provision and the acquisition of the crime of aggression provision were completed. It may be challenging for the international community, as well as the ICC, to prosecute those responsible for the aforementioned crime, but some of Nuremberg Tribunal judgements as well as rulings from the ICTRY and the ICTY do provide the ICC with additional tools to prosecute those responsible for similar crimes. The Kaula-lampur war tribunal also offers guidance on how to prosecute those responsible under Art. 8bis of the Rome Statute for the crime of aggressive war to the international community, particularly the ICC.



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