

Crime of Aggression and International Criminal Court: The definition and controversial 'Leadership Clause'

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Abstract

The Assembly of state parties of the International Criminal Court (ICC) adopted the new definition of 'crime of Aggression' on 11th June 2010 at the Kampala Review Conference. The crime of aggression criminalizes the act of state which uses armed force against another state. After a long debate on the definition since Nuremberg Charter the state parties had finally reached to some consensus and adopted this definition. Despite providing the elaborate conditions for the act of crime of aggression under the Rome statutes, there are still some areas which are left unclear, for example, there is no international instrument that provides for effective individual criminal responsibility for crime of aggression. The definition of 'crime of aggression' provided under the ICC statutes in the Kampala conference has failed to take into account the new war theory which has developed during the 20th century. Kaldor points out that new war theory involves blurring the distinction between organized crime, war and human rights violation which are breached not only by state but also by non-state actors.

Keywords: *Crime of Aggression, Non- state actors, International Criminal Court, Contemporary war.*

Introduction

In order to prosecute the criminals of 'war crime,' the allied power launched the United Nations War Crime Commission on October 1943. Although they deliberately excluded the waging of aggressive war, later on, after a span of six months, in the London

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conference, the procedure for prosecution and punishment of war crimes committed during the Nazi Leadership was authorized. The prosecution under the Nuremberg charter were categorised into three crimes i.e., war crime, against humanity and crime against peace. The International Military Tribunal in the case of *USA vs Goering*¹ defines crime against peace as “*to initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from the war crimes in that it contains within itself the accumulated evil of the whole.*” Though the Nuremberg Charter mentioned the term ‘war of aggression’ but the elements of crime were still debatable. Therefore, after this judgment, the acts of aggression which were earlier excluded from the jurisdiction, have become one of the supreme international crimes punishable by the international community.

On July 21, 1998 nation gave their consent to establish a permanent international court by adopting Rome statutes in order to prevent most serious crime which put to an end the impunity for perpetrator of these criminals. Kofi Annan has also supported the statement by saying that “*the adoption of the Rome Statute is a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law*”.² The ICC has jurisdiction to prosecute the four-core crime and crime of aggression is one of those. In the Kampala Review Conference, the nations reached to some consensus on the definition of Crime of Aggression which will come into effect from 1st January 2017.³ Though, the ICC included ‘Aggression’ within their jurisdiction though the definition and condition to exercise jurisdiction is still a debated issue and no uniform consensus has been reached so far. Also, no states have national criminal legislation governing aggression within the framework of ordinary offences such as rape, murder so on.

The definition of Crime of Aggression provided under the Rome statutes is only included the state actors or leaders who are mastermind of the crime provided the leader must be affiliated with the state. The definition does not take into account the non-state actors. Therefore, the ICC has no jurisdiction over the non-state actors who sometimes can be potential threat to territorial integrity of another state. These non-state actors include terrorists, perpetrators of cyber warfare, etc.; therefore, they need not to be affiliated with the state as the technology has become so advanced. As such, the definition is outdated, did

1 The United states of America v Goering, International Military Tribunal, 22 IMT 203, (30th September-1 October 1946).

2 Kofi Annan statement in *opening ceremony of The Preparatory Commission on International Criminal Court*, United Nations Meeting Coverage and Press Release, February 1999. <https://www.un.org/press/en/1999/19990216.12907.html>

3 Marco Milanovic, “Aggression and Legality: Custom in Kampala”, *Journal of International Criminal Justice*, Vol. 10 (2012), p. 165-187.

not take into account the new contemporary acts of crime.

The Nuremberg Charter addressed Crime of Aggression as supreme international crime and not just international crime because it accumulates evil of the whole.⁴ Despite the fact that individual or Non-state actors have a capacity to wage war against another state still ICC do not have jurisdiction over them. Therefore, the definition is unworkable and dangerous because it does not meet the present reality of international armed conflict. There are also some new contemporary issues which should be included under the purview of crime of aggression but has been left behind such as cyber warfare. Now a days, a new mode of war which involve generally non-state actors targets territorial integrity of another state and go unpunished in international law.

Therefore, in this paper, I have tried to analyse the issue related to definition of Crime of Aggression specially related to the non-state actors. I will examine the need to include the non-state actors in order to deal with contemporary form of new war in a current situation.

Historical background

Officially, after the first world, the prosecution of individual responsibility on the war of aggression started to begin. The Treaty of Versailles under article 228 to 230 provided for the prosecution of German Combatants charged with “violation of laws and customs of war,” though this treaty did not establish the right and obligation on state parties. However Also article 227 of the treaty did not use the word “aggression” or “crime against peace” but it provided that provided that “the Allied and Associated Powers publicly arraign ‘William II of Hohenzollern’, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.”⁵ Therefore this treaty became the antecedent of the Charter of the International Military Tribunal at Nuremberg. Another development that took place in early 1990 i.e., Kellogg- Briand Pact of 1928 which prohibited the war of aggression but this pact had various limitation and interpretation by the state parties and most important it has nodded no binding force.⁶

Another development that took place in the year 20th October 1943 when the United

4 *id*

5 SERGEY SAYAPIN, “THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW: HISTORICAL DEVELOPMENT, COMPARATIVE ANALYSIS AND PRESENT STATE”, *ASSER PRESS*, (2014).

6 HISTORICAL REVIEW OF DEVELOPMENT RELATING TO AGGRESSION, UNITED NATIONS PUBLICATION, E.03 Vol. 10 (2003).

Nations War Crimes Commission was established in the Diplomatic conference held in London in order to draft the statute of a future international criminal court and most debated issue was whether aggressive war amounted to criminal act or not. Though most of the state parties was in against saying state could not be subject to criminal liability therefore aggressive war could not be considered as crime on an individual level. It was stated in the report that "*Acts committed by individuals merely for the purpose of preparing for and launching aggressive war, are, ledge late, not 'war crimes.'*"⁷

Though in the London Conference the Commission resolved the matter after the Unites states of America, United Kingdom, France and Soviet Union had decided to include the 'Crime against peace' as subject-matter of jurisdiction of International Military Tribunal at Nuremberg in order to prosecute the Nazi Leaders. Therefore, war of aggression which was not considered as crime in the time of the Treaty of Versailles is now been considered as international crime specially after first and second world war. Although the objective of UN War Crime Commission and London conference was to punish past crime committed by Nazis though unsure whether this was consistent with the principle of international law whereas the objective of Rome conference in 1998 intended to govern only the conduct of future acts.⁸

The International Law Commission drafted the 'international commission on State Responsibility' i.e., 'Draft Code of Crimes against the Peace and Security of Mankind' and gave rise to state responsibility regarding the crime against peace, and security of mankind. Though the general definition provided by the ILC were parallel to the definition provided under the Chapter VI of the IMT charter. It also relied on the formula given at the London Conference and differentiate the distinction between the state responsibility and individual responsibility. The drafting of Article 16 of the "Code of Offence against peace and security of mankind" provided that "*An individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression*"⁹. It means that the definition provided by the ILC is intended to include only those individuals for prosecution of crime of aggression who actively participate in the crime i.e., state leader or organizer of the crime. Though from 1954 to 1996, ILC submitted three draft of code which was not accepted the UN.¹⁰

7 *id.*

8

9 Draft Code of Crimes against the Peace and Security of Mankind 1996, Yearbook of the International Law Commission, Art. 16. vol. II, (1996).

10 *id.*

After the Nuremberg Charter member state argued before the General Assembly through the resolution 378B (V) of 17th November 1950 regarding the necessity to make an instrument to decide and confirm the act of aggression.¹¹ As a result general Assembly asked the ILC established total three special Committees from 1952 to 1965, till the resolution 2330(XXII) of 18th December 1967 adopted by the general assembly, which emphasize the need to expedite the drafting of definition of aggression according to the present circumstances.

The General Assembly constituting of 35 members was successful in drafting the definition of aggression. Therefore after 20 years from the constitution of special committee in 1952, finally the general assembly resolution 3314(XXIV) of 14 December 1974 was adopted which provided the definition of aggression.

The Article I of the resolution 3314(XXIX) OF 1974 provides the definition as stated “*Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.*”¹²

There definition provided under the resolution 3314(XXIX) of 1974 had made a distinction between the ‘acts of aggression’ and ‘war of aggression’, where the ‘acts of aggression’ gives rise to state responsibility and ‘war of aggression’ stands for individual criminal responsibility. The distinction made it clear that not every act of aggression would constitute a crime against peace but every war of aggression does constitute crime against peace, nevertheless the definition is intended to made state responsible for the acts of aggression and not individual criminal responsibility.¹³

After the establishment of ICC on July 1978 under the Rome statutes in diplomatic conference, the issue of definition of aggression was continued which led to the establishment of Preparatory Commission. In order to reach to the negotiation there were ten sessions which take place from 1999 to 2002 but they could not reach to the unanimous conclusion. The Rome statutes came into force on 1 July 2002, the Assembly and members states decided to establish “special Working Group on the Crime of Aggression.”

11 Elizabeth Wilmshurst, Definition of Aggression General Assembly Resolution 3314 (XXIX), *United Nations Audiovisual Library of International Law*, (14 Dec. 1974). <https://legal.un.org/avl/ha/da/da.html>

12 *id.*

13 Elixabeth Wilnshurst, “Definition on Aggression General Assembly Resolution 3314 (XXIX)”, *Audiovisual Library of International Law*,(14th December 1974).

The Review Conference in accordance with Article 123¹⁴ considered the need to amend the Article 8 of the Rome Statutes in order to define the aggression and conditions for the jurisdiction of the court to be in force. The Review conference recommended to extend the criminalization of the use of certain weapons as a war crime to non-international conflicts such as use of poison, poisonous weapons and asphyxiating, poisonous of other gases and all analogous liquids as well as bullets.¹⁵ Though it excluded the jurisdiction of ICC to the nationals of non-state parties and even if they are state parties but did not ratify the amendment made under Article 8 of the Rome statutes.

Definition of Crime of Aggression

In the 2010 Review conference held in Kampala, the definition of crime of aggression was adopted and included under the *Article 8 bis* of the Rome statute. There is three core element of definition, firstly perpetrator must be political or military leader i.e. a “person in a position effectively to exercise control over or to direct the political or military action of a State”, Secondly it must be proved that perpetrator was involved in “planning, preparation, initiation or execution of such a state act of aggression” and thirdly state act must amount to an act of aggression in accordance with the definition contained in General Assembly Resolution 3314(XXIX) and must be in manifest violation of UN Charter. Therefore, it can be said that court will only have the jurisdiction when state uses serious form of illegal force against the territorial integrity of another state.¹⁶

In 2002, a Special Working Group was established at the first session of Assembly of State Parties (ASP) with the duty to address the several problems relation to crime of aggression which would be discussed in the future meetings. The proposal by Special Working Group were finalized in 2009 and eventually the definition was adopted in the Kampala Review Conference in 2010.

*Article 8 bis*¹⁷ (Crime of aggression)

14 Article 123 of Rome Statutes provides that “ Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.”

15 *Report on the First Review Conference on the Rome Statute Kampala (Uganda)*, Coalition for the International Criminal Court, (Kampala 31st May-11th June 2010).

16 Kress, C. and von Holtendorff, L.v., “The Kampala Compromise on the Crime of Aggression”, *Journal of International Criminal Justice* 1179–1217(2010) .

17 Inserted by resolution RC/Res.6 adopted by 13th plenary Meeting on 11 June 2010. <https://treaties.un.org/>

“1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “act of aggression” means the use of armed 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

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

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

Crime of Aggression: Exclude criminal activities of Non-state Actors

The International community had created an international forum to prosecute a 'mastermind' of heinous crime, who is responsible for killing of numerous sailor and other severe damages. International forum is required to prosecute these masterminds for heinous crime away from the politically charged states and potentially unfair tribunal but what the mastermind is not affiliated with state such as the definition of crime of aggression is does not intend to take 'non-state actors' ten in that situation ICC would have the jurisdiction over these masterminds even though sometimes they do more harm than the state. Therefore, the court inability to prosecute these actors negates the very purpose of the having an International forum as it cannot stop the harm caused by non-state actors.

The non-state actors without any fear uses force against the territorial integrity of another state as they are excluded from the jurisdiction of ICC. These non-sate actors involve a terrorist, low level state officials etc. Though terrorist comes jurisdiction of ICC as crime against humanity provided the acts of terrorist must results in civilian casualties but if the acts of terrorist does not always result in civilian casualties the in that case International Court would not have jurisdiction over the particular act. Therefore, it is necessary that attack of terrorist should also be included under the elements of crime of aggression. Similarly, the international court do not have jurisdiction over war crimes in which sporadic acts of violence do not constitute armed conflict. Therefore, it would not be wrong to say that the definition on 'crime of aggression' is outdated as it does not take into consideration the new contemporary form of crimes such as cybercrime or other crimes which involve non-state actors who sometimes can be potential threat to the territorial integrity of other state. The international community must close these loopholes existing in the system otherwise these non-sate actors will continue to evade prosecution based on the technicalities.¹⁸

There is need to shift from the ideology that only sate can act in an aggressive manner, today because of globalization communication, coordination and technology are no longer a state monopoly, the state and non-sate actors have equal access of these powerful

18 Julie Veroff, "Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and way Forward", *The Yale Law Journal*, Vol. 125, 2016.

tool tools.¹⁹ Attacks like 9/11²⁰ or US Cole²¹ and attacks by group like Taliban and Al-Qaeda are some of the examples where even though they are not affiliated to state could be a potential threat to the particular crime. Only under the crime of aggression which ICC do not have jurisdiction over the non-state actors unlike other crime like crime against humanity, war crime, genocide where ICC has jurisdiction not only over the state but also the non-state actors. Therefore, it is necessary that definition should also include the new contemporary forms of crime.

The expansion of Globalization has a huge impact on the relations between state. Nowadays, even a non-state affiliated actor can easily coordinate; communicate with other states which previously used to come exclusively under the domain of state. Technology has become so advanced that millions of dollars can be transferred electronically from one state to another in few seconds which helps Taliban or other terrorist group to buy modern technology or suicide bomb materials which can destroy the other state to a great extent. The Globalization makes non state actors more powerful than earlier era. Therefore, the definition of crime of aggression should be evolved with such evolution of globalized world.

The Leadership Requirement -Rationed Personae

The ICC has limited jurisdiction under the Rome Statutes to prosecute an individual for crime of aggression. Its jurisdiction is limited to the extent that perpetrator is a decision maker or policy maker of the crime of aggression. Therefore, ICC have jurisdiction over certain category of individuals for the crime of aggression also referred as *Rationed Personae*. it can be inferred from that not every individual involved in crime of aggression could be punished, as the responsibility of government is not same as that of the soldiers on the ground.

Though there have been some changes in the tribunal's view regarding the responsibility for crime of aggression post World War II as it holds in number of judgments that responsibility of state for crime of aggression is limited to only political, economic and

19 *ibid*.

20 Peter L. Bergen, *September 11 Attack*, Encyclopedia Britannica, (2001). "On September 11, 2001 Islamic Terrorist group al Qaeda attacked on the United States, in which 2750 people were killed, and 6000 people got injured." <https://www.britannica.com/event/September-11-attacks>

21 *US Cole Bombing Fast Facts*, CNN Editorial Research, Feb 20, 2020. "On 12th October 2000, al-Qaeda attacked against the United States Navy Guided Missile Destroyer USS Cole (DDG-67), which results in killing of 17 American sailor and 39 sailors were also got injured." <https://edition.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/index.html>

industry leaders. For example, in the *High Command Case*²² individual can be punished for crime of aggression only at the policy-making level. The *Fabre Case*²³ added that industrial leader could be a potential defendant for the crime of aggression. Therefore, only the high-ranking military officials, civil servant of highest order and civilians holding influential positions in the public affairs or the economy could be hold accountable for crime of aggression because they can be a potential policy-maker or better able to influence their sub-ordinates.

It has been suggested that it is unnecessary to limit the modes of liability only to state actors who have power to direct or control state action. Therefore, it is equally important to modes of liability should be extended to those who are in leadership position. One of the good examples is '*Protocol on the statute of African court of Justice*' defines crime of aggression as "the planning, preparation, initiation or execution, *by a person* in a position effectively to exercise control over or to direct the political or military action of a state or organization."²⁴

In order to make an individual liable under the Leadership clause, he should not only hold the particular office but also should be in the ability to exercise the power accompanying the high-level position. These ability to exercise includes leadership, policy-making, decision-making, influencing high level officers, responsibility, authority and discretion etc.²⁵ The Draft code of crime against peace and security of mankind 1946 clearly specify that individual who is leader or organizer of crime are liable to be accountable for crime of aggression, whereas the Preparatory Commission in 2002 had further proposed that individual who has effective control over or to direct the political or military action of a state, come under the ICC jurisdiction. Therefore, by limiting the rationed Personae have taken a step back from Post World war II tribunals as the leadership clause can be invoked only when individual effective control or affiliated to state but it does hold non-civilian servant such as private economic actors or third state-officials accountable for their action under crime of aggression.²⁶ It do not include the cyber war or terrorist under its domain and also ignored the modern forms of aggression. The leader of non-state armed group such

22 The United States of America v Wilhelm von Leeb , 12 TWC 462 (27th October 1998).

23 The United States of America v Carl Krauch, United Nation War crime Commission by His Majesty Stationary Office (Nuremberg 1948).

24 MacKenna Graziano and Lan Mei, "The Crime of Aggression Under the Rome Statute and Implications for Corporate Accountability", *Harvard International Law Journal*, (April 11, 2017).

25

26 *Report of Part II Proposals for provisions on crime of Aggressions*, by Preparatory Commission for the International Criminal Court, PCNICC/2002/2/Add.1 (New York 1-12 July 2002)

as Taliban or Osama Bin Laden could not be hold accountable for under this crime until and unless aggression is supported by the state itself or committed on behalf of state.²⁷

Limitation of prosecuting illegal use of force as other Crime

The definition of crime of aggression is only intended to state actors from its jurisdiction and the reason behind it that there is other international crime which deals with both non-state actors as well as state actors.²⁸ Some commentator have argued that in the crime of aggression individual can exclude its criminal liability is he is able to prove the exculpatory circumstances such as humanitarian intervention but it's not possible in other international crime such as crime against humanity, war crimes, genocide etc. even if there are exculpatory circumstances the individual cannot exclude its liability. Therefore, many argued that "perpetrators of aggression... who are also likely to commit one of the other core crimes... can be tried more effectively under these other offences."

For prosecuting under crime of aggression there must be illegal use of force which other international crime such as war crime, crime against humanity, genocide also includes. Therefore, other international crime often overlaps with crime of aggression. If an individual (not affiliated to state) commit uses any illegal force against another state then its acts would fall under these international crime and crime of aggression could not be invoked in that cases. However, there are certain limitation of these international crime which fails to include all the instances of aggression by non-state group within its jurisdiction.

Crime of Aggression is special crime as put total ban on the illegal use of force whether or not it involves civilians or military targets whereas other international crime does not criminalize the very use of force itself (unlike crime of aggression) but rather criminalize the attacks provided it must satisfy the certain conditions. Genocide criminalize the acts only when attack is directed against the protected group, crime against humanity requires to attack against civilians, war crime requires to be attacked non-combatants or any other protected group and terrorism requires to provoke state of terror in population. Therefore, from this it can easily be concluded that other international crime only criminalizes the certain acts unlike crime of aggression which criminalize the very use of force itself. This makes it important to include even the non-state actors within its

27 *id.*

28 Leila sadat Wexler, *Committee Report on Jurisdiction, Definition of Crimes, and Complementarity*, Denv. J. Int'l L. & Pol'y, (1996-97).

definition.²⁹ Another reason why it is important to include individuals within the definition of crime of aggression is that this crime criminalizes not only the acts of aggression but also the preparatory to aggression also called as crime of *Jus ad Bellum*. The definition clearly says if state involves in “*planning, preparation, initiation or execution of an act of aggression*”³⁰ against any other state, will be liable for their act. Though other international crime i.e., crime of *Jus in Bello* such as war crime and crime against humanity does not criminalize the very preparation of act unless and until those preparatory acts are identified or attack has actually taken place. In the crime of aggression criminals can be prosecuted without having proved their direct responsibility or command responsibility or complexity-based responsibility which is sometimes very difficult to prove.³¹ Though other international crime does not recognize the preparatory acts of criminals unless perpetrator identified as direct responsibility, command responsibility etc. In case of crime of aggression individual could be prosecuted if he is involved in any in planning or preparation of armed attack and his involvement in the armed attack need not to be proved. This is not case in war crime and crime against humanity where perpetrator involvement must be proved i.e., he controlled or directed the armed attack.³²

New war and Crime of Aggression:

Weisbord member of special working group had also pointed out that the definition of crime of aggression is limited to state-centric approach, it only made accountable to state leader who are in a position to effectively exercise their power and therefore do not even made accountable the quasi-state actors such as low-level officers even when they played the active role in the crime of aggression. Therefore, the definition should be stretched beyond the lateral language and should be interpreted in the sense to include quasi-state actors as well as non-state actors. Weisbord has said that “*the best way to include non-state groups in the definition would be by accompanying the word ‘State’ with ‘or Group’ or ‘/ Group’*”.³³

29 *id*

30 International Military Tribunal (Nuremberg) Judgment of 1 October 1946

31 *Situation of Democratic Republic of Congo in the case of Prosecutor v. Thomas Lubanga Dyilo*, Decision on the participation of victims in the appeals against Trial Chamber I’s conviction and sentencing decisions, ICC-01/04-01/06-2951 (ICC, 13 December 2012). Court held that “It is hard to prove that the link between an individual in a position of military or political leadership and the criminal acts committed by foot soldier has been established beyond reasonable doubt.”

32 Laurie O’Connor, *Humanitarian Intervention and the Crime of Aggression: The Precarious Position of the ‘Knights of Humanity’*, (University of Otago, Dunedin, New Zealand. 15th October 2010).

33 Noah Weisbord, *Prosecuting Aggression*, Harvard International Law Journal, Vol. 49, Number 1, Winter (2008).

He further pointed out that neither general assembly resolution 3314(XXIX) nor Article 8bis (2) of the Rome statutes had prescribed the way in which the provisions of statute should be applied by the ICC other than provided except for article 1 and 3 which describe the crime of aggression. therefore, he suggested that definition on crime of aggression should read armed group independently of state by interpreting the definition with the need of current situation. Weisbord by interpreting the United Nation General Resolution 1974 suggested that “*the states covered do not necessarily need to be universally recognised. In fact, it was left to the UNSC to decide whether an entity should be considered a state or not for the purposes of Resolution 3314.*”³⁴

The UNGA brought the resolution 3314(XXIX) at the time of cold war in 1974 when many independent states as well as Soviet Union held the view that wars on national liberation were an exception to Article 2(4) of the UN Charter. Therefore, it can be inferred that the resolution includes the idea that even groups are able to fight by using armed force for their self- determination. Therefore, the resolution either recognized states, states lacking recognition for political reasons and other state-like entities on which United Nation Security Council (UNSC) decide on individual cases.

Another suggestion given by the Weisbord were to interpret the word ‘state’ in the sense to include state like entities. Thought it does not mean that all non-state group should come under the purview of state, it only means to broad the definition of ‘state’ which provides under Montevideo Convention on Rights of the Duties of States of 1933 by including the state-like entities within the definition i.e. “*new political-military organizations that do not control territory but that attack states could be included within the ambit of the definition.*”³⁵ Therefore it is necessary to widen the definition of ‘state’ with the changing time. Similarly, the resolution 3314(XXIX) should also broaden they’re in way to include non-state groups within its definition who have state-like character sticks. Anderson pointed out even though including the non-state groups within the definition who have state-like entities does not solve the problem of including terrorist organization within the ICC jurisdiction because it “lack the characteristics necessary for classification as a state.”³⁶ Despite this there are many new forms of contemporary wars which would be still excluded from definition such as cyber war, terrorism etc.

34 *id.*

35 *id.*

36 Michael Anderson, “*Reconceptualizing Aggression*”, 60 *Duke Law Journal* (2010) 411-451 Available at: <http://scholarship.law.duke.edu/dlj/vol60/iss2/3>

Cyber Warfare and Crime of Aggression: The Need for Individual Accountability

Cyber warfare is an emerging threat in international arena and it generally involved non-state actors because there is no boundary or territorial limitation in order to connect with other state. Though cyber warfare on not fit into the current definition of crime of aggression because it does not require any use of force. The Assembly of state parties' (ASP) on-going efforts to define aggression should also into matters related to cyber war. Also, the International Criminal Court should incorporate these contemporary forms of aggression within its jurisdiction by broadening the definition on crime of aggression.

Generally, in most of the cyber war non-state actors are involve for example the cyber-attack in Gorgia were carried out by Individuals who had no affiliation with state.³⁷ There are many websites which guide individuals, steps by steps instruction to hack a computer of Gorgia. Technology had made easier to communicate all around the world, as a result combatant does not need to be physically present in particular meeting or to conduct any attack, they can communicate even on internet such as skype, Facebook etc and similarly it poses more chances of cyberwar. Homogeneity of software increases the chances of hacking for example the software design of bug hunter is same all over world which encourages the global market to find the security flaw.

Kaldor Theory of New War

Mary Kaldor emphasizes the need to look for the new war theory which focused on to include non-state group within the definition of crime of aggression. She said that earlier only sued to in the position to use weapons against another state but nowadays even a non-state actor without the affiliation of state can access to weapon and use against another state.³⁸ Therefore the definition on crime of aggression of outdated. According to Kaldor "*state actors are becoming of less importance for the use of force, as the capacity of states to make use of force unilaterally against other states has been greatly weakened which mainly caused by the growing destructiveness of military technology and the increasing interconnectedness of states, especially in the military field*".³⁹

Kaldor pointed out the three situations which shows how new war is different

37 Russian Invasion of Gorgia Russian Cyberwar, Georgia Report,(10 November 2008). http://georgiaupdate.gov.ge/doc/10006922/CYBERWAR-%20fd_2_.pdf

38 Mary Kaldor, In Defence of New Wars, *International Journal of Security and Development*, (2013).

39 Dodeye Uduak Williams, Relevance of Mary Kalodor's 'new war Thesis in 21st century, *Journal of Law of conflict Resolution*, (27th May 2014).

from inter-state war- firstly she clarifies that new wars are based on “identity politics i.e., the claim to power on the basis of a particular identity”. The main reason behind this is globalization as it resulted in breakdown of modern state structure which eventually resulted in formation of political groupings all around the world on the basis of exclusive identity.⁴⁰ As a result these groups started feeling insecure or threaten by the other groups who do not belong to the same identity. This leads to crime of genocide and expulsion which not only limited within state but globalization makes easier to fast communicate the ideas, technologies, money, arms etc. and this may involve not only the state actors but also the non-state groups.

Secondly, the ‘modes of warfare’ is nowadays changing such as countries like New York, London, Madrid, Israel and Iraq are using a variant strategy of new war. the new war involves “population expulsion through various means, such as mass killing and forcible resettlement, as well as a range of political, psychological, and economic techniques of intimidation”. John Robb⁴¹ pointed out the traditional method of war are supplemented by other methods of intimidation such as “system disruption” is new method of warfare. The system disruption involves a sabotage the critical system like electricity, telecommunications, gas, water or transport etc, apart from system disruption cyber war and terrorism are other instances of new war which generally involves aggressive state, small groups and individuals.⁴²

Thirdly, war provide a legitimate cause for personal gain such as actors extract funds from black-marketing or illegal trade of arms, drugs or valuable commodities, sometime externals also supported or gave assistance to the war specially to non-actors such as terrorists. The globalization helps these actors to generate funds which is essential to war in order to buy arms and ammunitions.⁴³ Therefore it would not be wrong to say that new war has blurred the distinction between war and peace and it has also become difficult to distinguish between the political and economic, public and private, military and civil.

Therefore, Kaldor condemns the practice of state-centred approach by the international courts and its failure to prevent the new wars due to “misperception, the persistence of inherited ways of thinking about organized violence, and the inability to understand the character and logic of the new warfare”.

40 *Ibid.*

41 JOHN ROBB, “BRAVE NEW WAR: THE ATATE OF TERRORISM AND END OF GLOBALISATION”, WILEY SONS AND INC, (2007) PP 224.

42 *supra*-39.

43 *id*

Conclusion

In conclusion, It could be pointed out that the definition of crime of aggression has become outdated and conservative, thereby suggesting a need to look at new war theory as prescribed by Kaldor. Efforts should be made in order to move further from the state-centric approach and put an end the exemption for non-state actors. Because of Kaldor's theory of new war it can be said that the categorization of aggression is outdated and not capable of dealing with the new nodes of warfare. The definition has become an obstacle to deal with contemporary forms of aggression, which is not only detrimental to the objective of statute but has also resulted in gross violation to Human Rights. Therefore the amendment needs to be made so as to bring the contemporary form of war within the jurisdiction of ICC.

Firstly, the leader clause of crime of aggression should be interpreted in the broad sense so as to include individuals of cybercrime. For passing the leadership clause leader must have effective control over the state assets nowadays individual can easily hack the state's computer and are in position to launched a missile or can issues a bogus order of invasion on behalf of state. In that way though illegal they exercise effective control over the state assets and passes the effective control standards, therefore it is necessary interpretation of "leadership clause" should be widened in order to include non-state actors within the jurisdiction of ICC. Secondly, the definition should read in a manner so as include non-state actors such as "the 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State or a *Nonstate Group*, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Similarly, an act of aggression should be defined as "the use of armed force by a State or a Nonstate Group against the sovereignty, territorial integrity or political independence of another state or in any other manner inconsistent with the UN charter." Thirdly, the phrase provided under the leadership clause of Rome statutes required "effective or direct control" which needs to be amended and should use "shape or influence" i.e., person responsible at the policy level should be hold accountable for the crime of aggression. It is important in order to individual for crime of aggression irrespective of their rank and position but has power to shape and influence the policy of his state.

Therefore, there are still so many areas which needs to be amended or clarify by the drafters so that the conflict between Security council and ICC could be reduced. Also, the current definition should incorporate the cyber war fare, terrorism, warlords and other

form of contemporary wars within the definition of crime of aggression in order to meet the current needs of the situation. Similarly, the statutes should be incorporated in the sense to achieve justice.

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