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Elements of the Crime of Aggression

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Introduction

1. Resolution F of the Rome Conference, in paragraph 7, instructed the Preparatory Commission to “prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and conditions under which the International Criminal Court shall exercise its jurisdiction with regard to this crime”. The Commission has concentrated its efforts to date on the “definition” and the “conditions”. It occurred to us that the question of the Elements should not pass entirely unnoticed with the impending demise of the Preparatory Commission. The question is important, not only for its own sake, but also, and perhaps more importantly, for the light that it might shed on technical aspects of the “definition” and “conditions”.

2. The following is therefore a tentative first effort to think conceptually about the Elements of the Crime of aggression. We have taken the discussion paper proposed by the Coordinator on 1 April 2002 (PCNICC/2002/WGCA/RT.1) and tried to apply to it the conceptual structure contained in articles 30 and 32 of the Rome Statute as utilized in the draft Elements of Crimes (PCNICC/2000/1/Add.2) (hereinafter “Elements” or “Elements of Crimes”). In particular, we have operated on the premise that the crime of aggression can be conceptualized, like other crimes within the jurisdiction of the Court, in terms of “mental” elements and “material” elements, terms to be found (but not fully explained) in article 30 of the Rome Statute.

3. We also follow the Coordinator’s usage, which distinguishes between an “act of aggression”, which is committed by a State, and the “crime of aggression”, which is committed by an individual.

4. Mental elements in the Statute and the Elements are intent and knowledge. Material elements, for their part, relate to “circumstances”, “conduct” and “consequences”. Since not everyone in the Working Group on Aggression was

involved in the complex negotiations that led to the finalized draft text of the Elements of Crimes (PCNICC/2000/1/Add.2), we shall try to summarize in the next few paragraphs what we believe the drafters of the Elements understood by these concepts.

5. We understand “elements” to be those basic building blocks which fit together to constitute “a crime”. A prosecutor who fails to establish any one of those elements has failed to overcome the “presumption of innocence” (Rome Statute, article 66, title) or failed to meet the “onus ... to prove the guilt of the accused” (Statute, article 66, para. 2).

6. Article 30 of the Rome Statute is titled “Mental element” and it contemplates that “unless otherwise provided”, there is no criminal responsibility in the absence of “intent and knowledge” in respect of what the article calls “material elements”. (Drafts of the Statute had consistently used the term “physical elements”; the word “material” was substituted in the Drafting Committee at a very late stage, evidently with no intention to change the meaning.)

7. A careful examination of the structure of article 30 convinced those who participated in the drafting of the Elements that the authors of the Rome Statute had in mind three types of material elements that might be present in a particular crime. (There seems to be no logical reason why every crime will necessarily have each of the three.) The three are “conduct”, “consequences” and “circumstances”.

8. “Conduct” normally refers to an act or omission and a “consequence” is the result of such conduct, but there is in everyday speech, and in legal usage, some overlap between conduct and consequence. Thus, for example, in the negotiations on the Elements some speakers would analyse a homicide as consisting of an act or omission (conduct) and a consequence (death), whereas others would see the conduct as an act or omission resulting in death and would not find it necessary to think in two “categories”. (For them the term “consequence” was apparently redundant.)

9. The term “circumstances” is a lot more difficult to understand and there is little in the preparatory work to explain what the drafters of article 30 had in mind. Yet the concept is a crucial one in any legal system. We tend to “know it when we see it”. If a person kills a living being, it cannot be murder unless the being is a human one. That the deceased is human is a circumstance element. In theft, that the property which the perpetrator took belonged to another is a circumstance element. It will be noted that in such cases, criminal responsibility does not turn on whether or not the accused did (or failed to do) something that brought the circumstance about. The issue is what he or she did in the light of that circumstance (and often knowledge about it). A circumstance is a (legally) crucial factor in the environment in which the actor operates. International criminal law is rife with circumstance elements. Did the events take place in an armed conflict? Was the victim protected by one of the Geneva Conventions? Was the victim hors de combat? Some of these questions, as we discovered in drafting the Elements, raise excruciatingly difficult issues of mistake of fact and mistake of law which, one day, may also need to be faced in respect of the crime of aggression.

10. It should be added that, in drafting the Elements, the Working Group slowly evolved a subcategory of “circumstances” which is not specifically mentioned in article 30. These are called “contextual circumstances” in the Elements. In practice,

the subcategory included only three items in the Elements: a manifest pattern of similar conduct, in the case of genocide; a widespread or systematic attack against a civilian population, in the case of crimes against humanity; and an armed conflict, in the case of war crimes.

11. Especially in the light of the words “unless otherwise provided” at the beginning of article 30 of the Rome Statute, it is necessary to ask the question what is the appropriate mental element in respect of each material element of a crime. With this in mind, the Elements of Crimes are drafted with the mental element of intent and knowledge as a “default rule”. That is to say, intent and knowledge is generally not stated each time but understood, in the absence of anything to the contrary, to apply to a particular material element. Silence means “intent and knowledge”. If, however, a greater (or lesser) mental element is required, by applying the Statute or other applicable law, the Elements state that mental element.

12. Paragraph 7 of the general introduction to the Elements embodies the propositions discussed in the preceding paragraphs. It reads as follows:

“7. The elements of crimes are generally structured in accordance with the following principles:

- As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
- When required, a particular mental element is listed after the affected conduct, consequence or circumstance;
- Contextual circumstances are listed last.

13. With this background, we can proceed to the proposed draft.

Draft Elements of the Crime of Aggression

1. An act of aggression has been committed by a State.

Notes: (a) This is a material element. As we shall see, it is one that would typically be decided by another entity (a United Nations organ), not by the ICC. The ICC has, when the appropriate organ has spoken, to take that organ’s decision as a “given”.

(b) It is not necessary to be definitive about which category of material element it fits. If the perpetrator is a head of Government and centrally involved, it may be possible to regard it as the conduct of that person or as the consequence of that conduct. In other cases, it may be more like a circumstance. In any event, it is a central element and the rest of the crime is constructed around it.

2. The perpetrator knew that the actions of the State amounted to an act of aggression.

Note: This element is probably redundant, as the default rule of article 30 would read it in. It has been included out of an abundance of caution, as in the case of the phrase “with knowledge of” in the chapeau of article 7 of the Statute.

3. [An appropriate organ of the United Nations] has determined that the State’s actions amounted to an act of aggression. It need not be shown that the perpetrator knew of this determination.

Notes: (a) The verb “determined” is taken from Article 39 of the Charter of the United Nations. The organ will presumably apply the Charter as interpreted in the General Assembly’s Definition of Aggression (resolution 3314 (XXIX), annex).

(b) This element might be variously characterized. It is a “condition” or “precondition”. It is probably also a “circumstance”. It is also “jurisdictional” in the sense that, without it, the ICC cannot proceed. We have drafted this provision assuming what we believe at this stage of the negotiations is an inescapable conclusion: it will not be possible to achieve a consensus on defining the crime unless there is a role for the appropriate organ. The room for manoeuvre is on which organ or organs and how the appropriate determination may be reached.

(c) We have used the term “appropriate organ” to reflect the multiple options expressed in paragraphs 3 and 4 of the Coordinator’s paper, rather than the single reference to the Security Council in paragraph 1. We believe that the Secretariat’s historical review of developments relating to aggression (PCNICC/2002/WGCA/L.1 and Add.1) supports the view that there may be a role for one or more of the Security Council, the General Assembly and/or the International Court of Justice. Beyond that, the present paper remains neutral on the final shape the “procedural” modalities for determining the act of aggression might take. It may even be, as suggested by at least one colleague, that denominating the appropriate modality is something that could be left for the United Nations rather than the Assembly of States Parties to decide. In the absence of any action by the United Nations organs, the ICC might need to decide the “act of aggression” issue itself.

(d) Finally, this is a special case where it is not necessary that the perpetrator have any knowledge of the action by the organ. In the light of the opening phrase of article 30, this needs to be stated expressly somewhere. Knowledge of the organ’s action is logically irrelevant as far as guilt is concerned. In an especially egregious case, the determination by the United Nations organ might precede the actions of the perpetrator, who would then have acted in defiance of such a determination, but normally the determination will occur later.

[4.

Option 1: By its characteristics and gravity, the crime of aggression amounts to a war of aggression.

Option 2: The crime of aggression has the object or result of establishing a military occupation of, or annexing the territory of another State or part thereof.

Option 3: The crime of aggression is in manifest violation of the Charter of the United Nations.]

Notes: (a) These are the options at the end of paragraph 2 of the Coordinator's paper. Each of these options would carve out from the broader category of "crime of aggression" a class of the more serious examples of the (already serious) category. (Option 1 invokes yet another variety of "aggression", a "war of aggression". The term seems to come from article 5 (2) of the annex to General Assembly resolution 3314 (XXIX), defining aggression. It is not itself defined in that resolution.) We believe all three are unnecessary, in that the class is already small enough, and have accordingly placed the paragraph in square brackets. We also think (as we believe the Coordinator's draft suggests) that, if they must be included, they are elements that should be decided by the ICC, rather than by the United Nations organ. On the hypothesis that something "more" than "mere aggression" is needed for criminal responsibility, that "more" should logically be decided by the criminal organ!

(b) We have not included any mental element in respect of this element, thus assuming that the default rule applies. A case can, however, be made for treating this also as an element in respect of which no mental element on the part of the perpetrator need be shown. Arguably it is an "objective" element, a threshold (a "jurisdictional threshold"?) as to which the actor need not have any particular attitude. (If we had to, we would also describe it as a "circumstance" element.)

- 5. The perpetrator, who need not formally be a member of the Government or the military, [was in] [occupied] an [actual] [effective] position to exercise control over or direct the political or military action of the State which [was responsible for] [committed] the act of aggression.**

Notes: (a) This is probably a conduct element, although some might characterize it as a circumstance element. The essence of it is that the perpetrator placed himself (or allowed himself to be placed) in a defined role.

(b) The "need not formally" phrase is aimed at catching the essence of the Nuremberg decisions in the *I. G. Farben* and *Krupp* industrialist cases. The tribunals held there that it *may* be possible to convict non-governmental actors for a crime against peace (although there were acquittals on the facts of those cases). The bracketed words "actual" and "effective" are aimed both at such

cases and at the position of the figurehead head of State who is formally part of the Government but in fact exercises no control.

(c) The various internal brackets reflect our groping for the right turn of phrase.

6. The perpetrator ordered or participated actively in the planning, preparation, initiation or waging of the act of aggression.

Notes: (a) This is a conduct element.

(b) “Participated actively” includes an understanding that there was a nexus between the perpetrator’s conduct and the act of aggression.

(c) The mental element default rule applies. The perpetrator must be knowingly engaged.

Final comments

14. Following the precedent of the drafting of the Elements, we have tried to state the “positive” elements that must be proved by the prosecution to establish its case and have not addressed the responses that may be made by an accused. Such issues are encompassed in the Rome Statute under the rubric “grounds for excluding criminal responsibility” (see articles 31 and 32 of the Statute). In the case of particular prosecutions, such issues may prove crucial. As noted above, the requirement that the aggression be done knowingly by the accused leads directly into potential mistakes of fact *or law* that the accused may have made (see article 32). There are also difficult questions of whether, notwithstanding the prior determination by the United Nations organ of the existence of an act of aggression, the accused may raise, as a defence, State responsibility arguments such as that the action could be justified as legitimate self-defence by the State. There might also be questions such as newly discovered evidence, the examination of which might be compelled by the need to render justice in the particular case.

15. There is also the matter of the extent to which each of the “General Principles of Criminal Law” items in Part 3 of the Rome Statute should apply. A premise of the current paper is that the framework of articles 30 and 32 should obviously apply. The same, we believe, is true of article 31 (grounds for excluding criminal responsibility), as indeed the general provisions in articles 22 to 24, 26, 27 and 29. On the other hand, given that, by its very nature, the crime of aggression is a leadership crime involving purposive activity, we do not believe that the structure of articles 25 (individual criminal responsibility), 28 (responsibility of commanders and other superiors) and 33 (superior orders and prescription of law) “fits” it. It should, accordingly, be defined so as to exclude any residual effect of those three provisions.

16. One issue addressed in article 25 of the Rome Statute in respect of all crimes (attempts) and another addressed only in respect of genocide (direct and public incitement) perhaps need to be considered, for the sake of completeness. Should there be liability for attempted aggression or for direct and public incitement to it?

17. We doubt that there can be an “attempted aggression” by a State. Accordingly, the kind of attempts that would be contemplated are those where the actor tries to contribute to the “planning, preparation, initiation or waging” of an aggression that takes place, but he or she fails in the effort to contribute. We are inclined to think that liability might be appropriate for attempts in some such cases.

18. As to direct and public incitement to aggression: Where the aggression in fact takes place, one who incites is probably guilty of one or other version of the offence in our draft article 6. The point about direct and public incitement to genocide is, however, that it is a separate offence from participation in a completed act of genocide and may, indeed, be prosecuted even though the genocide (or even an attempt at it) does not occur. Should the same principle apply in the case of aggression? There are certainly some weighty free speech arguments that might be made about penalizing an incitement to an aggression that does not occur, similar to arguments made concerning the prohibition in article 20 of the International Covenant on Civil and Political Rights of “propaganda for war”. We merely flag the issue at this stage.
