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THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW: LEGAL PROVISIONS AND GOVERNING PRINCIPLES.

Florea Irina

LLM in Criminal Law, Department of Criminal Law,
Faculty of Law, Moldova State University
ORCID ID: 0009-0009-4568-303X

Thesis Coordinator:
Dorina Gurev,
Ph.D. in Law, associate professor

A universal peace represents one of the most desired dreams of humanity. However, the course of history has proved on every occasion that - its establishment is only done by imposing it by force. What would seem to be a universally recognized value and the exclusive prerogative of each nation, peace, is shown to be a less important priority, as long as the less vocal interests of states end up manipulating the international course of development. We believe in an increasing interdependence of states in the contemporary world, where all international relations are based on the constant exchange of techniques, information, trends, practices, cultures and values, and as a result, geopolitics and economicy, thus regulate the general direction of the global arrangement.

Traditionally, highly developed states have always tried to dominate the international order by applying a series of coercive or manipulative measures, aiming to obtain a form of superiority, in relation to those that are just in the course of development. However, in the need of some states to assert both regionally and globally, a series of historical, geographical, economic or political frustrations arise, and thus - lead the state to militarization and aggression.

The concept of aggression is closely related to the phenomenon of war, since the war itself is triggered by an act or series of acts of military aggression directed against a territory, population or infrastructural points. In essence, by aggression we understand those "unfriendly" actions carried out by a state towards another, aimed at harming its sovereignty, world peace and regional security. The international community identifies as a crime of aggression, those actions carried out by the political, administrative and military leadership of a state, aimed at destabilizing the regional balance, thereby creating tensions, disputes and effectively - armed conflicts of international character.

Michael Waltzer consideres there is a whole theory of aggression:

"aggression is, both morally and physically, coercive". According to the author, "comparing the international order with the civil one is crucial for the theory of aggression; aggression theory restates the old doctrine of just war: it explains when fighting is a crime and when it is permissible, it may even be morally desirable. Aggression is a singular and undifferentiated crime because, in all its forms, it challenges rights worth dying for. If states really have rights more or less as individuals do, then it is possible to imagine a society among them more or less like the society of individuals. When the analogy is explicit, as it often is among lawyers, the world of states takes the form of a political society whose character is entirely accessible through such notions as crime and punishment, self-defense and law enforcement. [1].

Centuries ago, the term "the first to resort to force" offered the state a certain status in the international community. However, this status diminished in time and reduced the level of importance. If back then, such a state imposed itself as a potential geopolitical power through its military capacity, nowadays, a state that manipulates with its military power, pursues clear actions of attempting international crimes.

International criminal law classifies any act of aggression as a crime against international peace. Whereas its commission automatically attracts international liability, no judgement will take into account any political, ideological, economic or military justifications. Countries admit that force can only be used in the exercise of the right to individual/collective self-defense or on the basis of a decision of the Security Council as an international action to coerce the aggressor, a fact that allows not only the restoration of sovereign rights but also the restoration of the violated international order.

An innovation in the matter of aggression was brought by the London Convention for the Definition of Aggression. Signed in 1933, the Convention [2] presented for the first time what type of actions constitute aggression. Thus, art. 2, states that: "Consequently, the state that will be the first to commit one of the following actions will be recognized as the aggressor in an international conflict, subject to the agreements in force between the parties to the conflict:

- declaration of war on another state;
- the invasion with its armed forces, even without a declaration of war, of the territory of another state;
- attacking with its land, naval or air forces, even without a declaration of war, the territory, ships or aircraft of another state;
- naval blockade of the coasts or ports of a state;

- support given to armed gangs which, formed on its territory, will have invaded the territory of another state or the refusal, with all the request of the invaded state, to take on its own territory any measures in its power to deprive said gangs of any aid or protection. "

The Second World War, a classic example of aggression, exploitation and revenge, demonstrated a brutal violation of all the norms of international law: systematic criminal acts against the belligerents, the civilian population, the infrastructure, and of course - the ecological system. The issue of establishing an international tribunal to punish war criminals arose during the war and saw light with the signing of the UN Charter – a covenant that establsihed the minimum basis for regional security and global peace. Until then, in 1942, the Inter-Allied Commission for the Investigation of War Crimes was formed, with the aim not only of conducting international investigations, but also of promoting the mechanisms of bringing persons to justice that are clearly guilty of starting and conducting the war.

In 1942, the governments of the countries under Nazi siege, signed the **Saint James Palace Declaration** - a first international act, which foreshadowed the repression of war crimes or other manifestations of violence against the civilian population. The signing of this document allowed the drafting of other documents of significant value, promoting for the end of the war and the punishment of war criminals: **Declaration on Atrocities**, 1943; **The Yalta Agreement**, 1945; **The Potsdam Agreement**, 1945; **Agreement on the pursuit and punishment of major war criminals of the European Axis Powers, whose crimes are without geographic location**, 1945, the last one, serving as the basis for the creation of the International Military Tribunal at Nuremberg.

In the same course of events, the **Proclamation** of January 19, 1946 of the Supreme Commander of the Allied Powers was signed, by which was established the International Military Tribunal in Tokyo for the pursuit and punishment of war criminals from the Far East.

Art. 6 of the Statute of the Nuremberg Tribunal [3] listed the following crimes that are subject to international liability:

- crimes against peace (*in particular,* preparing, starting or waging a war of aggression, or waging a war by violating treaties, guarantees or international agreements, or participating in the performance of any of these acts);
- war crimes (*in particular*, violation of the laws and customs of war, assassinations, admission of ill-treatment and deportations for forced labor of the population from the occupied territories, murder or ill-

treatment of prisoners of war or persons at sea, execution of hostages , the looting of public or private property, the destruction of cities and villages or their unjustified devastation by military necessity, as well as causing unnecessary suffering);

- crimes against humanity (*in particular*, murder, extermination, enslavement, deportation of the civilian population, persecution for political, racial or religious reasons).

Starting with art. 4, par. 2 of the UN Charter, the principle of non-aggression was addressed in **the Declaration on the principles of international law of friendly and cooperative relations between states, in accordance with the UN Charter**, approved by the UN General Assembly Resolution no. 2625 of 1970. [4] This principle was also addressed in the **Declaration on the definition of aggression**, adopted by the UN General Assembly Resolution no. 3314/1974, **the Final Act of the OSCE** [5] of 1975 and **the Declaration on increasing the effectiveness of the principle of renouncing the threat of force or its application in international relations** , adopted by the UN General Assembly in 1987. [6] However, when facing aggression, the only empowered body by the UN Charter to ascertain the existence of such an act is the Security Council. The International Criminal Court cannot be referred to these facts until after the Security Council has given its verdict in this regard.

The work on the definition of aggression was resumed closer to 1970s, by the Special Commission established for the question of the definition of aggression, with the aim of developing a clear definition of the actions that represent armed aggression in the international framework. Although the Commission has issued reports on this situation before, however, the report presented in 1971 pointed out more convincingly on the substantial elements of the definition of aggression.

The Report ruled out the necessity of identifying a clear explanation of the aggression and, then, through an exhaustive list – of all the acts of aggression that occur in the objective reality. Para. 26 of the subsequent report, states that "there is no objection to the idea that the definition must be limited only to the use of armed forces; forms of aggression other than the use of armed forces must be defined on a broader scale". The same paragraph also refers to whether is it necessary or not to address the right to self-defense, as well as the status of the indirect use of armed forces. Several representatives stated that the definition should cover only direct armed aggression, which is considered to be the only form of aggression that justifies the exercise of the right to self-defense under art. 51 of the Charter.

The concept of aggression encompasses several types of situations, of which the highest level of danger is the armed attack and the full-scale war. But even if the Charter makes no reference to direct or indirect aggression, the definition of aggression does not preclude a distinction between direct and indirect aggression.

We note from the Report, that the term aggression means, first of all, "**an objectively observable and serious physical act**". The Report emphasizes the declaration of war that can emerge prior to a military attack, and if, through this kind of manifest, aggression takes place. Another example would be the use of weapons of mass destruction and extermination, which are unanimously recognized, but not unanimously applied. Nuclear weapons and tools also relate to this aspect.

In the process of definition, the Commission believed that a definition would be incomplete without addressing the form of intent. According to the Commission's opinion, **aggressive intent** consist of a combination of pretexts, goals, national political and/or legal acts, which favor and lead to that kind of circumstances out of which an act of aggression can occur. Although this constitutes a side of the definition far too complex to address, the Commission considers that an act of aggression is always enacted by a bad intention - reasons that result exclusively from the internal policies of the state*. Animus aggressionis*, as provided by the Report, is also part of the definition, which includes the preparation and attempts to carry out an act of aggression, but also the simulation without a certain clarity of an act of aggression.

Although it is complicated to agree unanimously over a definition, this Report strengthened more comprehensively the perception of states over acts of aggression. The Commission played an important role in aligning states to the minimal standards of the concept of aggression, and in certain cases - it strengthened relations between some countries. On all the grounds, the Commission has pointed out that it is the duty of the UN Security Council to prevent, investigate and reconcile any dispute resulting from acts of aggression. The Special Commission established for the matter of the definition of aggression within the UN concluded not only on a general definition, but also on a subtle (but not exhaustive) definition of aggression.

After several years of work, in April 1974, the Commission's final report, as well as the draft resolution, was submitted to the UN General Assembly, which in December of the same year was approved under the provisions of Resolution 3314 (XXIX). According to art. 3 of Resolution no. 3314 from 1974, "any of the acts below, whether or not there was a declaration of war, meets the

conditions of an act of aggression:

a. the invasion or attack of the territory of a State by the armed forces of another State, or any military occupation, even temporary, resulting from such invasion or attack, or any annexation, by force, of the territory or part thereof of the territory of another state;
b. the bombardment, by the armed forces of a State, of 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. the attack carried out by the armed forces of a state against the land, naval or air armed forces or against the civil maritime and air fleets of another state;
e. the use of the armed forces of a state, which are stationed on the territory of another state with the agreement of the host state, contrary to the conditions provided for in the agreement, or any prolongation of their presence on that territory after the date of termination of the agreement;
f. the admission by a state that its territory, which it made available to another state, is used by the latter to commit an act of aggression against a third state;
g. the sending by or on behalf of a state of gangs or armed groups, irregular forces or mercenaries who commit acts of armed force against another state of such gravity that they amount to the acts enumerated above, or the fact of substantially engage in such action."

In 1998, during the UN Diplomatic Conference, 122 participating states adopted the Rome Statute of the International Criminal Court, a treaty that not only established a new permanent international court, but also laid the foundations for international liability for various international crimes. [7] Thus, according to the Statute of the International Criminal Court "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 way incompatible with the Charter of the United Nations, identifying as acts of aggression the same actions listed by UN General Assembly Resolution no. 3314/1974. In 2009, the Statute of the Court was amended with a new article – 8*bis*, which came out with new provisions. Thus, according to art. 8 *bis*, of the 2010 Amendment to the Rome Statute, the following circumstances together qualify as an act of aggression:

- the perpetrator planned, prepared, initiated or executed an act of aggression.
- the perpetrator was a person in a position to effectively exercise control over or direct the political or military action of the State that committed the act of aggression.
- the act of aggression – the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state or in any other way inconsistent with the Charter of the United Nations – has been committed.
- the perpetrator was aware of the factual circumstances which established that such use of armed force was in contradiction with the Charter of the United Nations.
- the act of aggression, by its character, gravity and scale, constituted a manifest violation of the United Nations Charter.
- the perpetrator was aware of the factual circumstances that established such a manifest violation of the United Nations Charter.

If we allign the provisions all toghether, we conclude that "no consideration of any nature, political, economic, military or of any other kind, can justify aggression. A war of aggression constitutes a crime against international peace, and enacts international liability. Neither a territorial acquisition, nor a special advantage resulting from an aggression is lawful, and shall not be recognized as such. [8]

If we take a look over the governing principles regarding this matter, we see that norms of international criminal law are drawn up with **maximum generality**. Since art. 38, para. (1) of the Statute of the International Court of Justice [9] recognizes (i) international covenants, whether general or special, (ii) international customs, as evidence of general practice, (iii) general principles of law recognized by civilized nations, and (iv) judicial decisions and the doctrine of the most qualified specialists in public law of different nations, as auxiliary means of determining the rules of law, the prohibition of resorting to force or the threat of force gains general, unanimous and global recognition.

The principle of non-aggression, as stated in the UN Charter, represents one of the 10 *jus cogens principles*, being very close to **the principle of sovereign equality**. Since no state has the right to interfere in the internal affairs of another state in any way, or to commit any act of aggression against another sovereign state, every member of the international community has the obligation to obey these principles of imperative order. States shall refrain from resorting to force in any crisis on their own and unilateral initiative (with the

exception of situations in which the Security Council authorizes such a maneuver), to declare war, to threaten with the use of force the international community, to start preparing for any operation or to carry out one.

According to art. 51 of the Charter, the principle of non-aggression does not prohibit to any state that has been subjected to any act of aggression to prepare for the fight already started against it or to any co-member of a collective alliance to oppose resistance. We consider it appropriate to reiterate that aggression is primarily "an objectively observable and serious physical act", which, regardless of the form of manifestation - causes exceptionally serious consequences.

The crime of aggression, and in general, the aggressive conduct of the state has a **mandatory legal foundation**, which finds condemnatory provisions in a number of international acts of high value. Starting with the provisions of the UN Charter, that establishes the state's obligation to refrain from illegal conduct, the same covenant is also the one that establishes the foundations of the international system of conciliation, security and peacekeeping.

The provisions of international criminal law **protect fundamental values** and, thus, benefit from **universal recognition.** In the light of this principle, states can count on mutual respect, security and reconciliation in their engagement with other countries. We may also refer to the well-being of mankind, as stated by the preamble of the UN Charter, peace, security, future safe from wars, diplomatic, political and economic cooperation, secure borders and legitimate internationally recognized territories.

Individual responsibility is another principle of international criminal law, by which liability is enacted only to the natural persons found responsible for committing an international crime. Given the unilateral character, mainly of political or administrative nature of the crime of aggression, the state itself cannot be found guilty, convicted or subjected to the execution of certain punishments, as a result of committing an act of aggression. International criminal liability can accrue to a person who "planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of a crime referred to in the articles of this Statute, is individually responsible for the crime." [9]

Non bis in idem is also a principle assuming that the person is held criminally liable only once, either by a national court or by an international one. It should be noted that in case of conflict of jurisdictions, the person cannot be found guilty twice or more for the same crime. For cases in which the jurisdiction of an international court was exercised, it follows that the person

executes his sentence, most often - this taking place in the convict's country of origin. T**he legality of liability or *nullum crimen sine poena lege*** guarantees the person a fair trial, in which all proescutorial institutions proceed under legal grounds. We may recall **the imprescriptibility of liability**, which means, that, compared to any other crime recognized around the world, the crime of aggression has an undefied period of prescription.

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