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In the last two centuries, the world and humanity have changed more than ever. The rapid development of technology, but also socio-humanistic and political thought has led to a completely different perception of the world by people. The desire to spread influence, aided by technological development, has pushed the great powers into the bloodiest armed conflicts the world has ever seen. After the end of the First and Second World Wars, it proved necessary not only to sanction the leaders of the idea of aggressive war, but also to sanction the insult to the independence of countries through armed attack. In this regard, the international community has approached a more detailed definition of the concept of aggression and crimes against peace (crime of aggression) and the establishment of appropriate mechanisms with the aim of preventing armed conflicts, stopping them and promoting peaceful settlement of international disputes. It is this idea that is the subject of the text that follows. The author wants to make his modest contribution to legal science in terms of analysis of the concept of aggression in international law (primarily in international public law), but also the definition and elements of (international) crime – crime against peace (aggression) in international criminal law. In addition to explaining and clarifying the content of the concept of aggression, the author will analyze this international crime contained in international documents, present the jurisdiction of the International Criminal Court in relation to aggression, and explain the position and role of the United Nations in preventing armed conflict and peace. Finally, a critical analysis of all the above, the author will present the advantages and disadvantages of mechanisms for preventing armed conflict and punishing perpetrators of international crimes against peace through the prism of the amendment to the Rome Statute of the ICC.

Keywords: *aggression, crime against peace, Rome Statute, International Criminal Court, Security Council, armed conflict, international criminal law, international public law*

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1. INTRODUCTION

The problem and the notion of aggression in international relations has always been topical and significant. Its importance is reflected in the fact that it represents a key question that needs to be answered in order to further build the international legal system, but also to build healthy relations between the subjects of international law, and above all the state. We see this even today when there are progressive forces working to destabilize world peace and insulting the fundamental goods of all mankind. The basis for understanding the concept of aggression is the distinction between cases of permissible and impermissible use of force. However, the problem arises when we realize that it is not possible to arrive at a single criterion (or group of criteria) with the help of whom (or which) we could make a distinction between the two previously mentioned concepts. Which criteria are taken into account at a given time depends on the degree of social development and objective social circumstances at the time. Before the formation of the first international organizations in the true sense of the word, i.e. during the unorganized international community, we can say that two basic criteria were taken: (1) moral and (2) political. The third criterion came to life only in the 20th century. Namely, the legal basis for the use of force as a criterion came to life only after the end of the First World War and it is the basis for further development of understanding and defining the concept of aggression. This certainly does not mean that moral and political criteria are excluded, but it means that the use of armed force is subject to legal frameworks, then its restriction and prohibition.

Human history is full of wars, sufferings and killings, which have taken on more or less proportions depending on the socio-economic development of human civilization at a given time. More optimistic authors often state that people tried to overcome mutual killings, bloodshed, destruction and devastation (Račić 2013, 80). Unfortunately, we cannot agree with the views of such authors. War, as primarily a social phenomenon, is conditioned by many factors, which can be divided into several groups: (1) moral, (2) political, (3) economic and (4) technological. Despite the international community's aspirations to suppress the use of force as a means of resolving both international disputes and internal conflicts, the reality is that for man, the use of force

remains an integral part of his essence, as evidenced not only by past events but also by what we see happening today before our very eyes.

The issue of aggression arose only after the international community, taught by the experiences of the devastating Great War, decided to limit and even completely ban the use of force. This resulted in the definition of the concept of aggression in international law. The development of society and social science and consciousness has led to the legal shaping of relations between states (Janković 1970, 41). These relations resulted in the emergence of the international community. The legal rules governing armed conflict (international law of armed conflicts, international humanitarian law) depend on international political trends, on the one hand, and domestic law and social relations, on the other. The unification of these two terms led to, conditionally speaking, the adoption of the first corpus of rules restricting war. The issue at hand concerned customary international law and the initial international treaties that prohibited the arbitrary use of force, thereby preventing any one entity from using force as they saw fit. Despite the good intentions of international actors, these rules and documents did not yield optimal results. However, with the institutionalization of international relations, there has been a stronger commitment from states to adhere to international law. The establishment of an institutional mechanism for the peaceful settlement of international disputes within the League of Nations remained an attempt. Many European and world powers have continued their imperialist tendencies despite the appeals of the "international community". Having witnessed the atrocities of World War II, we became determined to create not only a more effective peacekeeping mechanism but also an organization that could monopolize the use of physical coercion on an international scale, in the event that a member state violates its constituent and other documents. This led to the establishment of the United Nations (hereinafter: UN).

The new UN Charter institutionalizes and formalizes the system of collective security. And not only that – the UN Charter goes beyond both the Covenant of the League of Nations and the Briand-Kellogg Pact, which limited the non-border or forbade aggressive warfare.[1]

[1] Here we could also mention the Stimson doctrine. Namely, it is an American foreign policy statement made by Secretary of State Henry Stimson in 1932, during the first years of the Great Depression. The doctrine was named after Stimson, who served under President Herbert Hoover. The Stimson Doctrine stated that the US government would not recognize any territorial changes resulting from the use of force by one country against another. Specifically, it stated that the US would not recognize any

The use of force was only limited, but not completely prohibited, by the Covenant of the League of Nations, while the codification of the prohibition of the use of force in international law was only carried out by the Briand-Kellogg Pact, to which a relatively small number of states acceded (and which did not contain a mechanism of coercion or implementation).[2] The UN Charter completely prohibits the use of force as an instrument for resolving international disputes, and even prohibits the threat of using force against sovereignty, territorial integrity and political independence, which is contrary to the UN Charter and the fundamental principles on which this international organization is based. Unfortunately, this legal regulation and the prohibition of war did not exclude this phenomenon from human reality. Wars continued to be fought (either for a reason or without it). It is such a social phenomenon that evolves with society itself and is to a greater extent related to society. However, after long and incessant legal and political struggles, the international community has managed to codify the legal rules governing the conduct of the warring parties. A complete ban on the use of armed force should be questioned when human society is mature enough to do so. It was believed that this moment came at the end of the 20th century when negotiations began to establish a permanent international criminal tribunal that would criminalize aggressive work as a crime against peace. Unfortunately, even after the establishment of the International Criminal Court (hereinafter: ICC), aggression was not found in its Rome Statute as an international crime. Only later amendments to the Rome Statute and accompanying documents incriminate this international crime.

In the past, the use of force between states, as a way of resolving international disputes, has been a regular and even normal occurrence. Not only were wars allowed, but it was considered that the state, as a sovereign entity, had the right to war (*ius ad bellum*), i.e. the right to wage war (*ius belli gerendi*) (Krivokapić 2018, 502). In the modern

territorial changes made by Japan after the 1931 invasion of Manchuria in northeastern China. This Doctrine was seen as a response to Japanese aggression in China, and was intended to discourage further territorial expansion by Japan and other powers through the use of force. It was also seen as a statement of support for China, which was then a weak and vulnerable country. The Stimson Doctrine was largely symbolic and had no real impact on Japanese actions in China. However, it set a precedent for US foreign policy and helped shape the principles of international law regarding the use of force and territorial sovereignty. It is also important to note that this Doctrine was guided by the principle of *ex iniuria ius non oritur* (Ryan 1950).

[2] Out of 35 signatory states, it entered into force in only 25 of them.

world, states no longer have the right to wage war, and starting a war is considered a crime against international law.[3]

Previously, there was a belief that the incrimination of war aggression would never occur, as it was thought that anything was permissible in war and that the international community would never establish a set of rules governing armed conflict. This understanding was based on the notion that war and law were mutually exclusive opposites. According to this view, war was seen as a violent force that required the use of maximum physical force and resources to defeat the enemy, including his capacity to resist. Such use of force was considered to be the king of the outpouring of the state of sovereignty, which does not suffer any restrictions in its manifestation. In contrast, law represents a stable order, security, submission to the authority of written and unwritten rules. From this, many authors have concluded that waging war cannot be subject to any rules. Such understandings, according to Prof. Juraj Andrassy, are absolutely unacceptable. Namely, there is no reason why the acts of war of states should not be subject to certain legal rules and restrictions, just like the actions of states during peacetime (Andrassy 1971, 520). The rules that regulate, but also limit war to human civilization are not unknown. Even thousands of years ago, during armed conflicts, people negotiated its limits and established rules of warfare so that both suffered as little damage as possible. Of course, history is, unfortunately, full of examples contrary to the previously stated fact. The devastation that took place during armed conflicts that covered a significant part of the world's territory (and ultimately the whole world) prompted people not only to establish strict rules of conduct during war and other armed conflicts, but to emphasize the idea of a total ban on war.[4]

2. THE CONCEPT AND DEFINITION OF AGGRESSION BEFORE THE UN CHARTER

In 1919, the Treaty of Versailles provided for the responsibility of Germany and its allies for the losses and damage caused by the devastation of war, which the victorious countries suffered as a result of the war imposed by the aggression of the central powers (Art. 231).

[3] Regardless, war can actually occur – either by aggression or self-defense.

[4] Of course, this ban applies to war of aggression, but not to self-defense.

This peace agreement also established a special tribunal to try former German Emperor Wilhelm II, but not for the crime of aggression, but for "violation of international morality and the sanctity of international treaties" (Art. 227). It was considered impossible for him to be tried for the crime of aggression, according to the fact that no international legal document provides for it as a criminal offense, as well as the fact that no one before him has been tried for such a thing. If the Paris Peace Conference incriminated aggression as an international crime against peace, and then tried Wilhelm II, it would mean retroactive application of international law, which according to the ruling theory of criminal law was considered absolutely inadmissible. Also, the trial of Wilheln II was never held due to his exile to the Netherlands, and the refusal of the Dutch authorities to extradite him to the appropriate entity.

Another attempt to define aggression at the international level was made in the 1920 League of Nations Covenant. namely, the Covenant obliged the member states of the League of Nations not to resort to war in order to resolve disputes, but to take measures to respect the territorial integrity and existing political independence of all member states of the League of Nations from external aggression (Art. 10). If the states involved in the dispute fail to resolve it using all possible means at their disposal (direct negotiations, mediation of third countries, commissions of inquiry, conciliation, arbitration, etc.), they can resort to armed conflict without violating the Convenant. However, in that case, the League of Nations has rights and duties under the Covenant to work to maintain and establish peace (Andrassy, 1858, pp. 269–286). The League of Nations should not act only as soon as war breaks out, but before hostilities begin. The organs of the League of Nations should take all necessary measures to prevent war, that is, to prevent open conflict. If war does break out, the League of Nations may take certain measures of an economic and military nature to sanction the attacker. First, economic measures consist in severing all trade and financial ties with the State that has violated the Covenant and in prohibiting trade and financial relations with the citizens of that State. Second, measures of a military nature are not explicitly stated in the Covenant itself, but it is the responsibility of the Council of the League of Nations to establish what military measures are necessary to end the conflict (Andrassy 1831, pp. 158–160 and 171–175; Degan 1948, 239).

The Briand-Kellogg Pact of 1928 represents a significant step in defining the prohibition of warfare. All signatory states to the Covenant

solemnly declared that they condemned the use of war as a means of resolving international disputes and renounced it as an instrument of national policy in mutual relations. What is considered a great weakness of this Pact is that the notion of war does not include conflicts that the state has resorted to in self-defense to protect its sovereignty, territorial integrity, political independence and vital interests, as well as conflicts that the conflicting parties have not described as war. It is important to note that this Pact is still in force (valid for 25 countries). The Briand-Kellogg Pact has been widely criticized for failing to fulfill its purpose – to prevent armed conflict after its signing (Krivokapić 2018, 502; Tesla 2016, 55–56; Neff 2005, 295–296).

In 1933, the Conference on Disarmament was held, at which the USSR proposed a declaration containing a definition of aggression. According to the proposal of the Soviet representatives, the aggressor was considered to be the state that first did one of the following actions: (1) declare war on another state, (2) invade the territory of another state with its armed forces without declaring war, (3) bomb the territory of another state naval or air force, (4) enters the territory of another state with its land, naval or air force without the approval of the government of that state, or acts contrary to such authorization, especially in relation to stay in a certain area and (5) blockade coasts or ports of another state. This proposal also contained a provision according to which the internal situation in a country, its political and economic organization, cannot serve as a justification for aggression. As a reason for the existence of this provision, we see the growing fear of the spread of communism in the world, and we believe that the representatives of the Soviet Union pointed out with this very intention that the definition of aggression should include this requirement. Based on the proposal of the USSR delegation, the Security Committee of the Conference prepared a Draft Act on the Definition of Aggression, but this document was not adopted (Avramov, Kreća 2003, 631; Minc et al. 1951, 385–395; Tesla 2016, 56–57; Vučinić 2006, 66).

At the beginning of the Second World War, it was realized that it was necessary to give the appropriate content to the term aggression and to define it in more detail. In 1942, a major conference of the Western Allies on the Punishment of War Crimes was held in London. It was pointed out at the Conference that those responsible for crimes committed during the war should be prosecuted and punished through the system of organized justice, and waging an aggressive

war was declared an act for which that is, individual responsibilities (Bassiouni 2008, 212). With the conclusion of the London Agreement in 1945, four great allied powers established the International Military Tribunal, whose task will be to try the perpetrators of the most serious crimes against the rights and customs of war, as well as crimes against humanity. The Nuremberg Tribunal, which is an integral part of the London Agreement, criminalizes aggression as a *crime against peace*, which is defined as *planning, preparing, starting and waging a war of aggression or a war in violation of international treaties, agreements or guarantees, or participation in a joint plan or conspiracy to commit any of the foregoing* (Tomić 2001, 37–45; Heller 2011, 179–203). The Statute provides individual responsibility for aggression restrictions only on leaders, organizers, instigators and accomplices who participated in the compilation or execution of a joint plan or conspiracy to commit this crime. The first verdict of the Tribunal states that starting an offensive war is not just an international crime, but that it is a supreme international crime that differs from other war crimes only in that it contains all the accumulated evil (Ikanović 2015, 194; Vuković 1988, 98). War criminals who did not hold the highest positions in the state power of the Third Reich were tried on the basis of the Law of the Control Council for Germany no. 10. The provisions of the mentioned law define the *crime against peace* (aggression) somewhat differently. Namely, according to Law no. 10 aggression is defined as *initiating an invasion of other states and starting an war of aggression in violation of international laws and treaties, including, but not limited to: planning, preparing, initiating or waging an war of aggression or war violating international treaties, agreements or guarantees, or participating in in a joint plan or conspiracy to commit any of the said acts* (Tomić, 2001, pp. 45–49; Jovašević, 2015, pp. 107–123). A similar definition of aggression is contained in the Statute of the International Military Tribunal for the Far East in Tokyo. The only difference was in supplementing the definition by adding the words "declared or undeclared" in front of the words "waging an war of aggression".[5] The reason for that is the fact that Japan could complain that it was not officially in the war against certain countries, because technically, in most cases, the declaration of war did not take place (Simović, Blagojević, Simović 2013, 238; Kittichaisaree 2001, 207).

[5] The crime of aggression belonged to the so-called Class A.

3. CONCEPTUALIZATION OF AGGRESSION AFTER THE ADOPTION OF THE CHARTER OF THE UNITED NATIONS AND RESOLUTION 3314

In 1945, an international organization was formed with the task of promoting world peace, resolving international disputes peacefully and cooperating between states. The conclusions of the London Conference have been translated into a total ban on war as a means of resolving international disputes contained in the UN Charter. The charter prohibits the use of force, as well as the threat that force will be used against the territorial integrity or political independence of a UN member state (Art. 2/4). In addition, the UN Security Council is empowered to determine whether there is a threat to peace, a breach of peace or aggression, as well as to take measures in accordance with Chapter VII of the Charter to establish international peace and security. However, it should be noted that the Charter does not diminish the right of states to individual or collective self-defense in the event of an armed attack on a UN member state (Krivokapić 2015, 505). In that case, the Security Council shall be empowered to act in accordance with the Charter.

The UN Charter does not mention the term "war" in its content, but "the threat that force will be used or the use of force", while the term "war" is used only in the preamble. One part of the legal doctrine considers that this good solution is the use of force to denote the essence of war, while on the other hand it prevents conflicts that are not marked as war from being excluded from the provisions of the Charter, as was the case with some international documents before the Second World War (specifically the Briand-Kellogg Pact and the Covenant of the League of Nations) (Bassiouni 2008, 214–215).

The Charter explicitly stipulates that UN member states refrain from using force or threatening to use force against the territorial integrity and political independence of any member state. In addition, the Charter emphasizes that member states must refrain from acting contrary to the UN Charter. In legal theory, opinions are divided over the provisions of Art. 2 of the UN Charter. Namely, one part of the theory believes that Art. 2 does not prohibit any use of force by states in international relations, but that it prohibits the use of force in a manner contrary to the purpose of the UN. Proponents of this view also argue that Art. 2 of the Charter prohibits only the use or threat of use

of force against the territorial integrity and political independence of UN members, and believes that the use of force can be allowed only if it is in accordance with the UN and the Charter, and that it is not directed against the territorial integrity and political independence of the Member States (Ikanović 2015, 195; Seršić 2007, 271–290).[6]

The UN Charter establishes several of the following control mechanisms and principles for respecting the prohibition of the use of force: (1) States are obliged to refrain from the use or threat of force and to settle all disputes amicably (Art. 2–3), (2) The UN Security Council is empowered to identify threats to peace, violations of peace or acts of aggression and to determine what measures are needed to restore international peace and security (Art. 39) and (3) States have a duty to respect and enforce Security Council decisions (Art. 25). The theory points out that the solution contained in the Charter is extremely controversial because the Security Council, as the principal body of the UN, is empowered to assess what can be considered an act of aggression in accordance with the Charter. The creators of this solution justify their proposal by emphasizing that there is no generally accepted and accepted definition of aggression.

It is important to note that the prohibition on the use of force is not absolute. Namely, the Charter allows three exceptions to the prohibition of the use of force. These exceptions are: (1) measures taken by the Security Council, (2) individual and collective self-defense, and (3) measures against states that sided with the enemy during World War II. The first exception to the ban on the use of force is the measures available to the Security Council to preserve world peace. The right to individual self-defense is previously known and recognized in international law to those states that have faced an aggressor attack from another state, while the right to collective self-defense is a new rule that takes into account the existence of many military and political alliances. aggression. The right to collective self-defense means the use of force by the entire military alliance if aggression is committed against one of the member states. Thus, member states of a military alliance can take collective self-defense measures against an attacker (Milovanović 2011, 34). The third exception is contained in the provisions of Art. 107 of the Charter, and it is a measure of a temporary

[6] Potential examples of the such use of force include self-defense of one's borders and territory, as well as military actions carried out in the fight against international terrorism on the territory of a foreign sovereign state.

nature, according to the fact that the Charter was adopted before the end of the Second World War.

As a serious problem arose in determining which act constituted aggression and which did not, the UN authorities decided to establish a generally accepted definition of aggression. Namely, it is given in the Resolution of the UN General Assembly no. 3314 of 14 December 1974 (hereinafter: the Resolution). By its nature, this Resolution, as a document of the UN General Assembly, has great political and moral force, but it is not a legally binding document. Regardless of that, it is considered that the content of the Resolution, ie the solutions formulated in it, has grown into a universal customary international law, which would mean that they are obligatory for all subjects of international law (Krivokapić 2012, 35–81).

The definition of aggression contained in the Resolution refers only to this act, but not to other crimes against peace as defined by the statutes of the international military tribunals in Nuremberg and Tokyo. An important feature of this definition is that it was not adopted in order to prosecute and punish individuals and responsible persons. It was established to assist the Security Council, in accordance with Art. 39 of the Charter, to determine whether there has been a threat to peace, breaches of peace or aggression and to make recommendations and decide what action to take in accordance with Art. 41 and 42 of the UN Charter, in order to maintain and establish international peace and security. Therefore, the aim of this Resolution is not to anticipate the criminal offense for which those responsible will be prosecuted before a criminal court, but to make it easier for the political-operational body of the UN – the Security Council to make and execute important decisions. Another important feature of the Resolution is that it contains a general definition of aggression, then lists cases (examples) of aggression, so, using an exemplary method, the authors of the Resolution leave an open list for the Security Council to follow the examples and cases from the Resolution. represents an act of aggression or not (Krivokapić, 2018, p. 506). In accordance with the Resolution, 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 (Art. 1).

The resolution also considers the following acts as an act of aggression, in accordance with Art. 3, as follows: (1) the invasion or at-

tack 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, (2) 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, (3) the blockade of the ports or coasts of a State by the armed forces of another State, (4) an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State, (5) 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, (6) the action of a State in allowing its temtory, 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 and (7) t he 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 (Jovašević 2013, 212). The acts previously enumerated are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter (Art. 4). What is interesting here, and what should undoubtedly be mentioned, is that the Resolution does not contain clear criteria on the basis of which the Security Council should assess whether aggression has occurred or not. The fact is that few people will openly threaten to use force or even use force (although we know of exceptions here, which will be discussed later). For this reason, the authors believe, it is acceptable for part of the international community to advocate that there is aggression for the existence of a crime if there is aggressive intent (*animus aggressionis*) as a special kind of intent (*dolus specialis*). That intention should consist of the intention to conquer, annex the territory of the attacked state or subjugate it, etc (Stojanović 2012, 113). The definition in the Resolution especially emphasizes that no considerations of any nature (political, economic, military or others) can serve as a justification for aggression. The resolution explicitly states that the war of aggression is a crime against peace, and that aggression entails international responsibility (Art. 5). It is also important to note that the Resolution speaks of international responsibility (which opens space for various

forms of international responsibility, which further implies the use of a wide range of international sanctions), and not of individual (criminal) responsibility (Krivokapić 2017, 70–92).

The Resolution stipulates that the first use of force by the state, and contrary to the UN Charter, is *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity (Art. 2). In other words, if one party was the first to use force, this is sufficient evidence to establish an act of aggression, unless the Security Council, having regard to all the circumstances of the case, concludes otherwise.

4. ADOPTION OF THE ROME STATUTE OF THE ICC AND FURTHER DEVELOPMENT OF THE (CRIMES OF) AGGRESSION

After Nuremberg and Tokyo, the question of establishing a permanent international criminal court arose. Unfortunately, the bloc division of the world certainly did not contribute to this idea. However, after the events in the former Yugoslavia during the 1990s, but also the events in Rwanda, the issue was raised again.[7] It is for this reason that a large diplomatic conference was convened in Rome to discuss the possibility of establishing a (Permanent) International Criminal Court. The conference discussed a number of issues: court organization, funding, substantive and procedural law... Although the conference lasted just over a month, state representatives could not agree on all issues. Unlike genocide, war crimes and crimes against humanity, they failed to define the concept of aggression and define it more closely as an international crime under the jurisdiction of the ICC. However, they agreed that the Preparatory Committee would continue its work after the adoption of the ICC Statute and that it would resolve all disputed issues, including the crime of aggression. After the end of the diplomatic conference, the Preparatory Committee held a series of meetings

[7] With the adoption of the statute of the *ad hoc* tribunal for the former Yugoslavia and Rwanda, the crime of aggression is not envisaged as a crime under international law.

and until 2002 offered several variants of the definition of aggression with the recommendation that the special working group continue to work on this issue. In this regard, the Assembly of Member States of the Rome Statute has established a Special Working Group whose task is to prepare a revision of the Rome Statute. The ad hoc working group was open to all states (whether members of the Rome Statute or not) and met twice a year to discuss all contentious issues. The work of the Special Working Group was completed in 2009, when all preparations for the adoption of amendments to the Rome Statute were completed (Bassiouni 2008, 244–245; 262–265).

Seven years after the adoption of the Rome Statute, the formal conditions contained in Art. 123 of the Statute for holding a revision conference have been met. Accordingly, the UN Secretary-General Ban Ki-moon convened a conference of member states of the Rome Statute and those countries that have not yet ratified the Statute to attend as observers. Other states that did not accede to the Rome Statute and representatives of international, interstate and non-governmental organizations were invited in the same capacity (Milovanović 2011, 45–46; Simović, Blagojević, Simović 2013, 241).

The review conference was held in Kampala, the capital of the African state of Uganda, in 2010 and lasted for 12 days (from 31st May to 11th June). The main goal of the conference was to define aggression, determine its elements and adopt an appropriate amendment to the Rome Statute of the ICC. In order to facilitate and more efficient work, working groups were formed to deal with certain issues. The definition of aggression was dealt with by the Working Group for the Crime of Aggression. Due to many disagreements, the members of the Working Group had to make concessions to each other. The most significant was reflected in the separation of the state act of aggression and individual criminal responsibility for the crime of aggression. On the last working day of the conference, the report of this Working Group was adopted and a Resolution was adopted adopting amendments supplementing the Rome Statute and its accompanying documents (amendments to the Elements of Crime were also adopted). The new amendments to the Statute include the crime of aggression as a separate international crime and prescribe the conditions under which the ICC may exercise its jurisdiction over this international crime (Babić 2021, 180–181).

Resolution RC/Res.6 adopted in Kampala has three appendices: (1) Annex I (containing amendments to the Rome Statute), (2) Annex II (containing amendments to the Elements of Crime) and (3) Annex III (regulating the question of the jurisdiction of the rationae temporis and the jurisdiction of the national judiciary in relation to the crime of aggression, and the explanation of the procedure concerning the referral of the case by the UN Security Council).

In accordance with the new Art. 8 *bis* of the Rome Statute, the *crime of aggression* is *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*. Thus, the adopted definition of the crime of aggression comes down to the use of armed force by one state against another that violates its sovereignty, territorial integrity or political independence, or any other attack on a sovereign member of the UN that is contrary to the UN Charter. According to this definition of a crime, the acts of committing the crime of aggression are alternatively determined and consist of: (1) planning, (2) preparation, (3) initiation and (3) execution. All these actions must be aimed at the final execution of the aggression. This amendment to the Rome Statute also presents examples (cases) of aggression, which largely coincide with Resolution 3314. However, it is important to note that, despite the large number of elements taken from Resolution 3314, the definition of aggression under Art. 8 *bis* of the Rome Statute does not provide for the threat of use of force (or any other unarmed threat), but only the use of force. Art. 8 *bis* criminalizes only direct use of force, while other forms of indirect aggression (e.g. economic blockades, unfounded political sanctions, incitement to aggression or any other form of unarmed attack) on a particular state remain outside this definition (Jovašević, Ikanović 2015, 182–185; Munivrana Vajda 2012, 830–833).

The perpetrators of this international crime can only be persons who hold leading positions in one state and who, using their political or military position, make political or military decisions or exercise *de facto* control over their implementation. The crime of aggression is, therefore, always closely connected with the holders of state or military power.[8] It is important to note that this does not always have to

[8] The crime of aggression is often called *leadership crime*.

be about people in the highest positions (e.g. head of state or government), but that this crime is usually committed by those who have *de facto* power over political, military and security structures. Thus, a head of state who has a purely protocol function (British monarch, Japanese emperor or Austrian or German president) cannot be the perpetrators of this international crime because they do not influence decision-making. There is no criminal responsibility for the crime of aggression because such a head of state is not in a position to really decide on significant political or military operations, nor to order them (Degan, Pavišić, Beširević 2011, 204). In order for a person to be held accountable, there must be an exemplary link between an individual's early execution (planning, preparation, initiation or execution) and acts of aggression undertaken by the state (Škulić 2005, 290; Zimmermann, Freiburg 2015, 590–593).

This international crime can be committed only with intent, which includes awareness of the fact that the use of force is not in accordance with the UN Charter, but not the legal assessment that characterizes this use as non-compliance with the UN Charter. In addition, although the perpetrator may not be aware of the legal elements (although it is absurd to talk about ignorance of legal and other elements of international crimes, especially by those in a position to commit crimes of "world" proportions, because these are crimes whose ignorance is almost impossible) which determine the objective condition of incrimination he needs to be aware of the factual situation that led to the objective condition of incrimination being met (Klamberg 2017, 124–125; Degan, Pavišić, Beširević 2011, 205).

It was expected that the biggest problem would be both the establishment of competencies and the role of the UN Security Council in conducting investigations into cases of crimes of aggression. The permanent members of the UN Security Council advocated a solution according to which only the Security Council could request the ICC to launch an investigation into this international crime. Many other states were of the opinion that the ICC Pre-Trial Chamber should be given the opportunity to decide whether to initiate an investigation if this crime has been reported to the court by the Prosecutor's Office or a UN member state. In order for this attempt to criminalize aggression not to fail, a compromise solution was reached, which satisfied all parties. Namely, according to this compromise solution, the investigation of this international crime can be initiated at the

request of: (1) the UN Security Council and (2) the member states of the Rome Statute or the prosecutor *proprio motu* (on its own initiative, as well as in case within the competence of the ICC) (Klamberg 2017, 205–206).

It is important to note that the conditions for initiating and conducting an investigation differ and depend on whose initiative the proceedings are initiated. In the first case, the UN Security Council may, acting on the basis of Chapter VII of the UN Charter and in accordance with Art. 13 of the Rome Statute, report to the ICC that aggression has been committed, on the basis of which the prosecutor initiates an investigation. The application may concern States Parties to the Rome Statute (including those that have deposited a declaration that they do not accept ICC jurisdiction for the crime of aggression) and those that have not (as in the case of other international crimes under ICC jurisdiction). Given that the decision to carry out the aggression was made by a body other than the UN Security Council, not the ICC, the new Art. 15 *ter* of the Rome Statute emphasizes that the decision of another body (e.g. the UN Security Council) some states assessed as aggression, cannot adversely influence the decision of the ICC itself on the nature of this action, which the ICC decides on the basis of the Rome Statute.[9]

In addition, it is necessary to clarify a few things. First, in order for a prosecutor to initiate *proprio motu* proceedings (provided he finds that there is a reasonable basis for continuing the investigation into the crime of aggression), he/she must first determine whether the UN Security Council has already ruled that a specific state act constitutes aggression under Art. 39 UN Charter. Thereafter, the Prosecutor shall inform the UN Secretary-General of the situation before the Court, including all relevant information and documents (Art. 15 *bis*). Second, if the Security Council does not reach a decision within six months of the ICC Prosecutor providing information, the Prosecutor may continue the investigation only with the approval of the ICC Pre-Trial Chamber, subject to the following restrictions: (1) The ICC

[9] The question of legal certainty can justifiably be raised here. Regardless of the fact that in most cases the situation is, conditionally speaking, clear, i.e. that, for example, an open armed attack on one country is clearly aggression, or if a country has committed one of the actions provided by Resolution 3314, we need to ask whether the ICC freely appreciating all the objective circumstances of the case to convict those responsible for such an act, or will be under pressure from the UN (Security Council) and other factors of world politics.

may not exercise its jurisdiction in relation to States which are not members of the Rome Statute, regardless of whether the act was committed by its nationals or in their territory (although certain Member States of the Rome Statute adopted an amendment to the Rome Statute in 2015, which deleting Art. 124), thereby preventing proceedings against States not bound by the Rome Statute (e.g. China, Saudi Arabia, Turkey, Pakistan), (2) the ICC cannot exercise its jurisdiction over this international a crime against a member state of the Rome Statute that has deposited a declaration that it will not accept ICC jurisdiction over the crime of aggression (e.g. Canada, Brazil, Island). Third, the investigation can only continue if the UN Security Council has not, in accordance with Art. 16 of the Rome Statute, requested the ICC to postpone the investigation or criminal proceedings for a period of 12 months through a special resolution under Chapter VII of the UN Charter. Thus, it is possible to initiate criminal proceedings before the ICC without a decision of the UN Security Council that the aggression was carried out, but the question is whether this is feasible in practice. The UN Security Council, which is a permanent member of five world powers, three of which are not members of the Rome Statute, is a UN operational and political body with a wide range of competencies (namely, maintaining international peace and security can be interpreted quite broadly, and this can include major political and even economic issues) may assess that a certain act of a state and in a particular case is not aggression in accordance with the provisions of the UN Charter. Unfortunately, this can happen due to certain political motives, which may have a negative impact on decision-making in the ICC (Ambose 2014, 190–196).[10]

5. FACTUAL SITUATION IN THE WORLD (ONE EXAMPLE OF THE AGGRESSION IN REALITY)

The famous professor Mihajlo Vuković wrote that all sciences have their expression in the practical life of men, and that the measure of their success is again the practical life of man. Legal science

[10] The ICC has been established as a permanent and universal judicial body for conducting criminal proceedings and adjudicating perpetrators of the most serious international crimes, and in its work so far it has proved to be such. We express our belief that it will be so in the future.

would not have any effect if it did not have its expression in the practical life of man through the creation of legal rules for the regulation of social relations in one community, and ultimately, the world. The issue of international crimes, ie crimes against international law, has never been more topical (starting from the 1990s onwards). Today there are about 50 wars, armed conflicts that are not characterized as war and smaller, border conflicts, on all continents. Certainly, special attention of the international community should be paid to the recently started conflict between the Russian Federation and Ukraine, which will be an issue that we will order, from a scientific point of view, to analyze.

In 2014, political tensions in Ukraine culminated in armed riots by pro-Russian separatists in the Crimea and Donbas. Shortly afterwards, the Supreme Council of Crimea (provincial parliament) declares itself independent following a controversial referendum on Crimea's status. Crimea was an "independent" state for less than a week, when it was annexed by the Russian Federation. Since 2014, the conflict in Donbas between pro-Russian separatists and the Ukrainian armed forces and security forces has continued to this day. Meanwhile, there have been a multitude of cyber attacks, naval and political incidents between Ukraine and Russia, leading to rising tensions in that part of Europe and the world (Đipalo 2015, 76–81; Miloglav, Tomaš 2017, 161–163).

On February 24, 2022, the Russian armed forces launched a *special military operation* and enter Ukraine's sovereign state territory. The first question to be asked here is what is a "special military operation". According to NATO military doctrine, a special (military) operation is a military activity carried out by specially designated, organized, selected, trained and equipped forces using unconventional techniques and modes of operation.[11] Thus, a special (military) operation has the following elements: (1) it is a military activity, (2) it is carried out by special, specially trained and equipped forces, and (3) it is carried out using unconventional techniques and modes of operation. Observing these elements, we can conclude that the Russian operation in Ukraine is a military activity (which is logical), but this military activity is not conducted by special forces using unconventional techniques

[11] AAP-06 Edition 2021, NATO Glossary of Therms and Definitions (English and French), NATO Standardization Office, 2021, p. 120.

and methods, but by all types, branches and services of the Russian armed forces using all types of conventional weapons and conventional means of combat. Special operations may include reconnaissance, unconventional warfare, and counter-terrorism actions, and are typically conducted by small groups of highly-trained personnel, emphasizing sufficiency, stealth, speed, and tactical coordination, commonly known as *special forces*.

If we adhere to the generally accepted definition of aggression from Resolution 3314 and the Rome Statute, and all of the above, we can draw the following conclusion: (1) carried out on the territory of another UN member state, (2) by ground forces, air (bombing) and blockade of ports and coasts, (3) members of the Ukrainian armed forces and civilians were targeted and (4) this act violated the UN Charter. So, by definition, this is a textbook act of aggression, which today is a crime under international law.

A special issue is the issue of guilt, ie international criminal responsibility. Regardless of the fact that aggression is incriminated as an international crime, neither Ukraine nor Russia are members of the Rome Statute. Does this mean that no one who may have committed this crime will be held accountable? The answer to this question is no. Namely, the crime of aggression, ie the content of aggression and its legal definition, has become an integral part and reflection of customary international law.[12] In this regard, there is a part of legal theory, but also of practice, which believes that the jurisdiction of the ICC in relation to the perpetrators of this international crime can be established. But that again depends on the strength of multilateral diplomacy, because the ICC is in some way tied to the Security Council and the UN General Assembly with regard to the crime of aggression. Unfortunately, multilateral diplomacy is in crisis and the most important international organization whose main task is to preserve peace and security in the world has failed. What will be the consequences of imposing sanctions? Will they stop the war? Is there a legal basis for their introduction? Who will be liable for the damage? Does the UN follow the same fate as the League of Nations? These are all issues that can be discussed, but not in this paper.

[12] What the International Court of Justice found in the case of Nicaragua v. USA (ICJ Reports 1986, para. 195).

6. THE PROHIBITION OF THE AGGRESSION (AND THREAT OF USE AND USE OF FORCE) AS A PEREMPTORY NORM OF INTERNATIONAL LAW AND R2P DCTRINE

Ius cogens rules are a special category of rules of international (customary) law that are accepted as such by the international community as a whole and from which there is no possibility of derogation. These norms are not norms of what we consider to be classical customary law, although they arise in a relatively similar way, i.e. *ius cogens* rules arise when relevant state practice and *opinio iuris* demonstrate that a certain rule is considered imperative (Thirlway 2010, 119; Kolb 1998, 103). In the context of the prohibition of aggressive war, the use of force or the threat to use force, as a *ius cogens* norm, there are different opinions. Thus, for example, Helmersen (2014, 167–193) believes that a distinction should be made between the use of force permitted by the UN Security Council and aggression, i.e. the use of force (which is not sanctioned by the UN Security Council) against other countries. According to this author, aggression as a jus cogens norm exists only in relation to the use of force that is not authorized by the UN Security Council. This author argues this by the fact that the term "aggression" is often identified with the term "use of force". Thus, in the case of *Nicaragua v. USA* (1986, para. 191), the International Court of Justice established the existence of a difference between "aggression" and "other forms of use of force". In addition, in the *Barcelona Traction* (*Belgium v. Spain*) case, the International Court of Justice states that the prohibition of aggression in international law is an *erga omnes* rule, which, according to Helmersen, implies that "aggression" is a term with a different content than the term "use of force". This is supported by the opinion of ICJ judge Bruno Simma in the case *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*). In a separate opinion in this case, Judge Simma pointed out that "aggression" and "other forms of use of force" differ "in intensity" (2005, paras. 2–3). Thus, the (crime of) aggression is defined as the use of force contrary to the provisions of the UN Charter, namely the use of force against the sovereignty, territorial integrity and political independence of another state. No, it is still very difficult to distinguish

whether the jus cogens norm prohibits all use of force (as implied by the decision of the International Court of Justice in *Nicaragua v. USA*), or whether it only applies to aggression. However, as stated by Corten, the practice guided by the decision of the International Court of Justice in the case *Nicaragua v. USA* should be followed, where it was established that any use of force or threat to use force is a jus cogens norm of international law (2010, 251).

Another interesting question that we should discuss here concerns the global political obligation, or rather the doctrine adopted more than twenty years ago within the UN, which was supported by all UN member states at the World Summit in 2005. It is about the *Responsibility to Protect* doctrine, which mandates the obligation of all UN member states to prevent genocide, war crimes, ethnic cleansing and crimes against humanity. *Responsibility to Protect* (hereinafter: R2P) foresees the responsibility of all states (which derives from their sovereignty) to protect all half-states from mass crimes and mass violations of human rights. This doctrine is based on respect for the norms and principles of international law, especially the fundamental principles of law related to sovereignty, peace and security, as well as human rights and armed conflicts. The R2P doctrine rests on three pillars: (1) The protection responsibilities of the state (which is reflected in the obligation of each individual state to protect its population from mass crimes, such as genocide, war crimes, ethnic cleansing or crimes against humanity), (2) International assistance and capacity-building (according to which states oblige each other to provide assistance), (3) Timely and decisive collective response (this pillar foresees the collective action of all UN member states when a specific state fails to protect its population, i.e. does not fulfill its responsibility according to the R2P doctrine) (Welsh 2019, 53–72). The R2P doctrine practically changes the previous concept of humanitarian intervention as a possible deviation from the prohibition of use of force or the threat that force will be used against another state (or other states) in case of serious violations of international humanitarian law and human rights. Although the doctrine of R2P is a very interesting concept, unfortunately we cannot devote more attention to it in this paper due to reasons of economy, and we leave it as the subject of another discussion.

7. CONCLUSION

Throughout its development, humanity has sought to suppress or at least limit the phenomenon known as armed conflict or war. In his work *De iure belli ad pacis*, Hugo Grotius stated that many of the wars (whether public or private) of which he was a contemporary contained so many terrible things, events and deeds that it seemed impossible for such a thing to come from People. Also, Grotius pointed out that people tend to take up arms and start a war because of things so incredible, that the average person would not even assume that they could be the causes of war. In particular, Grotius wrote that human vanity or hunger to conquer one man often precedes war destruction. This last statement is important for us. Some people who are in certain political and military positions, and who have the de facto power to issue orders and direct state moves, are disturbing international peace, which is today incriminated as an international crime – the crime of aggression.

Although they describe the same phenomenon, the most important definitions of aggression differ significantly. Which is understandable, taking into account the historical moments in which the definition was adopted, from which body it was adopted and which social forces participated in their compilation. The definition from the Statute of the International Military Tribunal in Nuremberg was adopted just before the end of the Second World War, and the authors of that definition were the four victorious powers – the USA, the UK, the USSR and France. The nature of crimes against peace referred to the planning, preparation, initiation or conduct of a war of aggression in violation of international treaties, agreements or guarantees, or participation in a joint plan or conspiracy to commit crimes against peace. This definition of this international crime was used only before the Nuremberg tribunal, which ceased to exist by fulfilling its purpose (punishing war criminals after the Second World War).

Later, the idea of condemning the war of aggression and disturbing international peace and security was revived, and the UN, as the umbrella organization of states whose main task is to preserve international peace and security, adopted a special resolution giving a more complete definition of aggression. The resolution is passed in order to help, that is, to guide the Security Council in exercising its competencies. Later, the issue of establishing a permanent international judicial

body that will try persons for the most serious international crimes was raised on several occasions. This led to a diplomatic conference in Rome in 1998 and the formation of the International Criminal Court.

The adopted definition of aggression and the establishment of ICC competencies by the amendments to the Rome Statute of Kampala are the result of a compromise between different interests (unfortunately, diplomacy and world politics are reduced to protecting one's own interests as much as possible). The definition of aggression contained in Art. 8 *bis* is somewhat more restrictive than the definition in Resolution 3314, which is a minor shortcoming. Namely, Resolution 3314 states that aggression is the use of the armed forces of one state against the sovereignty, territorial integrity or political independence of another state, or in any way that is not in accordance with the UN Charter, performing some of the alternative actions. On the other hand, the definition from the amendment to the Rome Statute states that the crime of aggression is committed by someone who plans, prepares, initiates or executes, and is in a position to exercise effective control and order political or military action of the state (acts of aggression), which by its character, seriousness and strengthis, is a clear violation of the UN Charter, and the act of aggression itself is defined as the use of the armed forces of one state against the sovereignty, territorial integrity and political independence of another state, or in any other way incompatible with the UN Charter. execution. The mentioned restrictiveness is of less significant nature, but what can be significantly objected to is the procedure for establishing the competences of the ICC and initiating and conducting an investigation by the competent authorities. The shortcoming is reflected in the possibility of the UN Security Council influencing the formation of an appropriate objective picture of a particular act, on the one hand, while on the other hand it can significantly complicate or prolong the investigation, as already explained.

Of course, we must not forget that the amendments to the Rome Statute and the Elements of Crime are the result of long negotiations and compromises between different centers of power, on the one hand, and aggression on the other, especially in a world full of various (armed and unarmed) interventions. However, solutions like this are much better than entering the homeless from which there is no way out. How good the adopted solutions are, time will tell. Not taking into account all the dilemmas and doubts regarding this issue, we

can rightly consider that in 2010 one big step was made in Kampala, significant both for international criminal law (and the international legal order) and for humanity as a whole. The survival of the world, especially in today's context, largely depends on the survival of peace, as well as the elimination of armed unrest and insurgency, terrorism and extremism of all kinds that can lead to the destruction of world peace. Peace, therefore, are not only an aspiration, but also an urgent need, and its coming and survival is necessary.

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AGRESIJA (ZLOČIN PROTIV MIRA) U MEĐUNARODNOM JAVNOM I KRIVIČNOM PRAVU

Rezime

U posljednja dva stoljeća svijet i čovječanstvo su se promijenili više no ikada. Nagli razvoj tehnologija, ali i društvno-humanističke i političke misli doveo je do potpuno drugačije percepcije svijeta od strane ljudi. Želja za širenjem utjecaja, potpomognuta tehnološkim razvojem, velike su sile gurnule u najkrvavije oružane sukobe koje je svijet ikada vidio. Po svršetku Prvog, ali i Drugog svjetskog rata, pokazalo se kao nužno ne samo sankcionirati kolovođe ideje o agresivnom ratu, nego i sankcionirati vrijeđanje neovisnosti zemalja putem oružanog napada. S tim u vezi, međunarodna zajednica je pristupila podrobnijem definiranju pojma agresije, te zločina protiv mira (zločin agresije) i utemeljavanje odgovarajućeh mehanizama sa namjerom preveniranja oružanih sukoba, njihova zaustavljavanja i promoviranja mirnog rješavanja međunarodnog sporova. Upravo je ova ideja predmet teksta koji slijedi. Autor rada želi da svoj skromni doprinos pravnoj znanosti u pogledu analize pojma agresije u međunarodnom pravu (primarno u međunarodnom javnom pravu), ali i određenju i elementima (međunarodnog) kaznenog djela – zločin protiv mira (agresija) u međunarodnom kaznenom pravu. Pored razlaganja i pojašnjenja sadržine samog pojma agresije, autor rada će pristupiti analizi ovog međunarodnog zločina sadržanog u međunarodnim dokumentima, predstaviti nadležnost Međunarodnog kaznenog suda u odnosu na agresiju, te

objasniti položaj i ulogu Ujedinjenih naroda u preveniranju oružanih sukoba i očuvanju mira. Naposlijetku, kritičkom analizom svega navedenog autor će predstaviti prednosti i nedostatke mehanizama za spječavanje oružanih sukoba i kažnjavanje počinitelja međunarodnih zločina protiv mira kroz prizmu novele Rimskog statusa MKS-a.

Ključne riječi: *agresija, zločin protiv mira, Rimski statut, Međunarodni kazneni sud, Vijeće sigurnosti, međunarodno humanitarno pravo, oružani sukob, međunarodno kazneno pravo*