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THE CRIME OF AGGRESSION IN INTERNATIONAL LAW: PROBLEMS OF THE DEVELOPMENT OF A UNIVERSAL DEFINITION

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THE CRIME OF AGGRESSION IN INTERNATIONAL LAW: PROBLEMS OF THE DEVELOPMENT OF A UNIVERSAL DEFINITION

Oksana VOLOSCHUK¹

Abstract

This article describes the problems associated with violating the principle of non-use of force or threat of use of force in modern international relations (the principle of the prohibition of aggressive warfare). The concept, essence and signs of the crime of aggression have been analyzed. Particular attention was paid to UN General Assembly Resolution 3314 on the definition of aggression and the Rome Statute of the International Criminal Court, which reveals the concepts and essential characteristics of the crime of aggression, as well as outlines the range of acts that should be recognized as committing acts of aggression. It is determined that there are problems in bringing to justice the states and individuals for the crime of aggression, especially when the acts of aggression are committed in a new type of war - a hybrid war. The role and significance of the UN and the Hague International Criminal Court in the mechanism for combating the crime of aggression and bringing the perpetrators to justice is analyzed. The author concluded that today there is an actual problem for adoption the international crime of aggression definition on the universal conventional level. The adoption of such a definition will contribute to preventing international crime of aggression and the efficiency of international law to combat it.

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International relations, jus cogens, international crime, aggression, crime of aggression.

1. Introduction

The use of armed forces, military conflicts, and wars are those phenomenas that always have worried international society, and those aspects of international coexistence, that at the present stage of human development are the subject of attention. Only for the past and present centuries, armed conflicts took place, and in some regions, in Iraq, Chechnya, Georgia, Libya, Syria, Ukraine, and others, are underway. There is no doubt that in a globalized world of contemporary international relations acts of aggression, among other subjects, are the destabilizing factors both in political, economic and social aspects. Accordingly, the problem of maintaining international peace and security is now gaining an increasing urgency.

2. Theoretical Background

The question of the legality of engagement and conduct an aggressive war has been attracting the attention of scientists for a long time. The first researchers of this topic were Cicero, H. Grotius, C. Montesquieu E. de Vattel. Fundamental developments in this area have been made by such scientists as J. Brownlie, A. Cassese, G. Kelsen, L. Oppenheim A. Ferdross, S. Schwebel. Also, attention to this issue was given by G. Ackerman, T. Anouk D. Antsylvotti T. Bennett, M. Bergman, L. Berkowitz, B. Ferenc, B. Hartup, M. Kaldor, M. Shaw, C. Selden, A. Willis. The contribution to the development of the abovementioned problem was made by our scientists, including M. Antonovych, M. Baymuratov, M. Buromenskiy, V. Butkevych, V. Vasilenko, M. Hnatovskyy, O. Zadorozhnii, I. Lukashuk, A. Merezhko, V. Mytsyk, V. Repetsky and many others. However, despite such a large number of studies, we believe that the problems which are outlined remain one of the toughest and most controversial in the theory and practice of international law. Carrying

out new research, which would have included new trends in the development of international criminal law in particular, and international law, in general, should be welcomed and encouraged.

3. Argument of the paper

Given that, aggression is now a widespread phenomenon in international affairs, conflicts occur between states for various reasons and lead to the resolution of an aggressive war, and the war is modified during the development of human civilization, new forms of aggressive war appear, the latest methods and means of warfare apply, the definition of aggression is imperfect, because it does not take into account all these features and trends. Therefore, one of the urgent tasks of the international community is to develop a universal definition of aggression that takes into account all these latest trends (responsibility of the individual on the rules of international criminal law, responsibility of the aggressor to resolve the hybrid war, etc.). For this purpose, we need to examine the concept, essence and the nature of the crime of aggression in modern international law.

4. Arguments to support the thesis

We can find diametrically opposing views on understanding the essence and nature of aggression in the literature. Firstly, we should mention the ideas of "the fathers of international law" - F. de Vitoria and G. Grotius who in their writings analyzed and disclosed the nature of the aggression in the "international dimension" and repeatedly said that the fair and permitted war can only be war, launched in response to violation of law and that unfair, aggressive war is a serious violation of international law. Along with this doctrine developed another concept of understanding the war. In particular, the main idea of the Anglo-Saxon doctrine is a permissibility of any war because of the fact that war is a struggle between nations, consequently, wars must be seen as legitimate.

Despite the criticism of aggression, it should be noted that in the practice of international relations until the end of the First World

War (in 1918) request for war (regardless of its purpose) was seen as a natural right of each state. Moreover, Jus ad belum (right to war) guarded all systems of principles and norms of international law that existed at that time, based on its interpretation as the highest manifestation of sovereignty in international relations. Only following the results of World War II right on the war was considered a shameful phenomenon, and acts of aggression as one of the most serious international crimes against the peace and security of mankind. During this period, the international community has developed a number of documents in which the prohibition of aggressive war or the threat of its decision (Decree on Peace of 1917, declarations and protocols of the League of Nations on the prohibition of aggressive war, Briand-Kellogg Pact 1928) were legally enshrined. However, these provisions were not universal, but after the Second World War, mankind is trying to establish a universal ban on the use of force in international relations at the level of international law. The principle of prohibition aggressive war was a clear regulatory consolidation (p. 4. 2 of the UN Charter). This progressive rate is now regarded as a fundamental principle international law.

The word «aggression» comes from the Latin «aggression», which literally means «attack», «aggressive movement», «what creates an image of actions». A more profound study of this period indicates its origin from the root «aggređi» - «ad» + «gradi», where «ad» means «before» and «gradi» – «walk, move» (derived from Indo-European «Ghredh» - «go»). Thus, the original meaning of the word "aggression" – to move forward to a specific purpose, without a doubt, and fear. Although this word has long been used in several European languages, the importance attached to it could be opposite. By the beginning of XIX century, the aggressive behavior could have such meaning as friendly and hostile. Gradually aggression increasingly started to be used in a negative sense. This led to a narrowing of understanding this concept to hostile behavior relative to others.

In international law «aggression» is used in a negative sense and is defined as any illegal use of armed force by one State against (1) sovereignty, (2) the territorial integrity or (3) the political independence of another State. Actually, this definition contained in

Resolution 3314 (XXIX) of the UN "Definition of Aggression" in 1974, which is considered to be universal in international law. In determining the aggressor indication of superiority (initiative) of an act of aggression is taken as a basis. That is the concept of "aggression" from the standpoint of international law must contain a sign of initiative that means the application of any country forces first. Actions of which are carried out as self-defense, even if this state used the armed forces this shall not be considered an act of aggression. This extends to collective actions of states that apply under the UN Charter to maintain peace or security. In addition, we should also consider that aggression as a crime against the security of mankind is only used in relation to international conflicts. Therefore, internal conflicts, wars within a country from the position of international law are not considered as acts of aggression. We should also take into account how A. Reshetov notes that aggression is an international crime that has particularly dangerous nature, as characterized by the wide scope and high level of public danger, anticipating guilty intent aggressor state, and is not a result of excesses or negligence of some officials, but rather of a deliberate and planned aggressive policy [1: 85-8]. In the generally accepted doctrine, it is stated that the result of the committing of acts of aggression the responsibility regime should be different and heavier than other violations of international law. Representatives of various concepts of state responsibility agree with the position that the committing of such crimes as aggression provides guilty intent of state-infringer [2: 132-3].

The characteristic of international crime is that aggression could not take place without the participation of the state or states without their planned actions and expressed will and intent to carry out certain actions and achieve specific goals. For implementing the aggression, it is necessary to involve the armed forces of at least one state which should be located and act under the centrally organized command of the State (represented by the relevant public authorities). Consequently, committing aggression is almost impossible without the involvement of the entire state apparatus, and thus the society of the state, depending on the current mechanisms of representative government. In addition, the acts that constitute the crime of aggression shall be determined and supported by public policy that

meets the strategic objectives of foreign policy and geopolitics of the state [2: 129]. However, it seems that any consideration of political, economic, military or other nature cannot justify this crime.

Another feature of the crime of aggression in international law is that the state and the individual, which is implementing a criminal policy of the State, giving orders within their powers to commit acts of aggression, are both responsible for it. However, the State is responsible under international law and individual - under international criminal law. This dual nature of liability also applies to the characteristics of the crime of aggression in international law.

The resolution outlined the actions that must be considered as aggression, from which we can conclude about which state acts should be regarded as a violation of the principle of non-use of force or threat of its use in international relations which was enshrined in the UN Charter (p. 2(4)). The Resolution 3314 (XXIX) states that «Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein» (Article 3).

In some writings it is argued that these acts should be seen as aggravating features of aggression, in particular, such a position holds Kostenko N. I. [3: 98]. However, analysis of the Nuremberg Tribunal Charter, UN resolutions GA "Definition of Aggression", as a Draft Code of Crimes against the Peace and Security of Mankind allows you to come to the conclusion that any of these actions should be considered as an act of aggression. It seems that every act should be regarded as an independent manifestation of aggression as a crime under international law, respectively. It should also be emphasized that the above list is not exhaustive, as UN Security Council may determine that other acts can be recognized as aggression under the provisions of the UN Charter. Also, it is noteworthy that the above resolution was not dealing with individual criminal responsibility for acts of aggression because it caused a lot of questions among scientists, primarily on international affairs. The issue of individual responsibility for the crime of aggression was resolved much later after the establishment of the International Criminal Court in 1998, according to which the Charter assigned the crime of aggression to its jurisdiction.

5. Arguments to argue the thesis

In the legal literature, there are still present discussions on the legitimacy and relevance of the definition and the list of actions contained in the resolution. Thus, some scientists even suggest that in contemporary reality "Definition of Aggression" 1974 is obsolete. I. I. Boyko believes that the list of actions that are considered as aggression should be extended to more than seven. At least it should be taken into account the emergence of new "technology" damage and new types of threats (for example, interference with the operation of automated information systems). In addition, the

researcher notes that the big drawback is that UN Security Council may determine what other acts to be considered as aggression because any international body which is authorized to determine who is the aggressor cannot be fully impartial [4]. Noteworthy is the fact that in this resolution it is emphasized that no circumstances can justify the crime of aggression. Aspects of the whole severity of the crime of aggression is taken into account: "aggressive war is a crime against international peace" [5]. And, of course, all the gains that have been made on the basis of aggression, cannot be legitimate. To recognize the fact of aggression gross violation of the principles of international law, for which the aggressor State would be responsible, should be confirmed.

6. Dismantling the arguments against

One of the problems in modern international law is the issue of liability of the aggressors who deny their participation in armed conflicts. In this case, we talk about the new, so-called "hybrid" type of war. Despite the intensive implementation of this concept in the practice of international relations, the very definition of "hybrid war" in international legal instruments is absent. The same is observed within the domestic law of many countries (particularly in Ukraine, which is involved in this kind of war, the Military Doctrine of Ukraine has no provisions that would disclose the essence of this concept). The lack of universal legal definition in international law makes it impossible to bring to justice the real aggressors.

In general, in the legal literature out of the most distinctive features of the so-called hybrid war the following are highlighted:

- an armed attack occurs without formal declaration;
- concealment of participation of the aggressor in the outbreak of war and his disregard of both international law in general and international humanitarian law in particular;
- the use of irregular armed groups; non-fulfillment of international agreements;
- the use of "dirty" information technologies on propaganda and counter-propaganda and confrontation in cyberspace;

reciprocal measures of pressure of political and economic nature.

In terms of driving the hybrid wars, a wide variety of tools and techniques can be used, including political destabilization, undermining the economic security of victims, informational and ideological operations using regional and international media, creating centers of social tension based on ethnic grounds and so on. While specific or even defining feature of hybrid warfare is that the real aggressor State does not recognize himself in that capacity and by various means is trying to hide or disguise his participation in preparing and committing acts of aggression. This is a very serious threat to peace and security in the world because it can lead to impossibility even of raising the question of liability of such a state for committing the aggression under international law, and then - to elusion of liability.

In order to avoid such situations ways to counteract hybrid warfare can be suggested.

First, the term "hybrid warfare" should be defined under international law. To assign this as part of the UN Commission on the codification and progressive development of international law it is needed to create special groups for drafting the definition of "hybrid warfare" under the guidance of the special rapporteur. The adoption of such determination at the level of international law will bring to justice all involved subjects for aggression.

Second, special groups similar to the International Criminal Court should be created. Supplement No. 5 to the Rome Statute of the ICC of the hybrid warfare as one of the acts of aggression will expand the jurisdiction of the ICC.

Thirdly, it should be within the UN and NATO to cooperate more closely on addressing new aggression, including hybrid warfare and develop a common strategy to combat this negative phenomenon.

6. Conclusions

Therefore, given all the above, it can be argued that today there is an urgent need to development and adoption at the universal conventional

level the new definition of aggression, taking into account the features of new types of wars that are widely used in recent decades. This will contribute to the prevention of international crime of aggression and the efficiency to combat it.

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