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HUMANITARNA INTERVENCIJA U KONTEKSTU ZLOČINA AGRESIJE IZ ČLANA 8bis RIMSKOG STATUTA**

SAŽETAK: Iako ne predstavlja novi koncept u međunarodnom pravu, humanitarna intervencija i dalje izaziva mnoge kontroverze kada su u pitanju njena sadržina i sama primenjivost. Kako je reč o institutu najuže vezanom uz situacije upotrebe sile u međunarodnim odnosima, potencijalna primena instituta humanitarne intervencije se nalazi i u sferi međunarodnog krivičnog prava, naročito u pogledu krivičnog dela zločin agresije iz člana 8bis Rimskog statuta, kojim se inkriminiše upotreba sile mimo okvira postavljenih Poveljom Ujedinjenih nacija. Rad pokušava da pruži odgovor na pitanje da li humanitarna intervencija, ukoliko bi bila prihvaćena kao međunarodno običajno pravilo, može i na koji način da utiče na primenu odredaba Rimskog statuta. Pored analize značaja humanitarne intervencije kada je reč o utvrđivanju ostvarenosti elemenata bića krivičnog dela zločin agresije, rad će ukazati na domete ovog instituta kada su u pitanju osnovi za isključenje krivične odgovornosti prema Rimskom statutu, upućujući na moguće strategije odbrane u postupcima do kojih bi moglo doći pred Međunarodnim krivičnim sudom.

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UVOD

Rimski statut je usvojen dana 17. jula 1998. godine,[1] dok je stupio na snagu 1. jula 2002. godine,[2] odnosno, prvog dana meseca koji sledi po proteku šezdesetog dana od dana deponovanja šezdesetog instrumenta ratifikacije.[3] Na ovaj način osnovan je Međunarodni krivični sud nadležan za zločin genocida, zločine protiv čovečnosti, ratne zločine i, naposletku, zločin agresije.[4]

Zločin agresije smatra se jednim od najkontroverznijih krivičnih dela u međunarodnom krivičnom pravu.[5] Poput ratnih zločina, zločin agresije je po svojoj prirodi blisko povezan sa upotrebom oružane sile, koja je zabranjena čl. 2. st. 4. Povelje Ujedinjenih nacija (u daljem tekstu: Povelja UN).[6] Međutim, za razliku od ratnih zločina kojima se inkriminišu ponašanja protivna pravilima međunarodnog humanitarnog prava, a koja se odnose na postupanja učesnika u oružanom sukobu u pravcu minimalizovanja patnji,[7] zločinom agresije se teži krivičnopravnom ograničavanju prava na rat i osnaživanju prava kojim se rat zabranjuje.[8] Zločin agresije je po prvi put formalno inkriminisan usvajanjem Amandmana na Rimski statut[9] na Revizijskoj konferenciji u Kampali dana 25. maja 2010. godine.[10]

Iako su težnje u međunarodnoj zajednici još od Prvog svetskog rata bile usmerene ka sprečavanju budućih oružanih sukoba, istorija nas uči da je takav

[1] United Nations General Assembly, *Rome Statute of the International Criminal Court*, Rome, 1998.

[2] Cryer, R., Friman, H., Robinson, D., Wilmshurst, E. (2010). *An Introduction to International Criminal Law and Procedure*. New York: Cambridge University Press, 149.

[3] *Rome Statute*, *Op. cit.,* čl. 126. st. 1.

[4] *Rome Statute*, *Op. cit.,* čl. 5.

[5] Paulus, A. (2010). Second Thoughts on the Crime of Aggression. *European Journal of International Law,* 20 (4), 1117–1128, 1117; Kreß, C. (2010). Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus. *European Journal of International Law,* 20 (4), 1129–1146, 1129.

[6] United Nations, *Charter of the United Nations*. San Francisco, 1945.

[7] Stahn, C. (2019). *A Critical Introduction to Internatonal Criminal Law*. Cambridge: Cambridge University Press, 73.

[8] *Ibid.,* 95.

[9] Review Conference, *Resolution RC/Res.6*, Kampala, 2010.

[10] Ambos, K. (2010). The Crime of Aggression After Kampala. *German Yearbook of International Law,* 53, 463–509, 464.

cilj teško ostvariv. Još od doba antike, civilizacija je poznavala ratove.[11] Svaki učesnik rata je verovao da je cilj koji želi da ostvari onaj nužni i plemenit, dok se sa suprotne strane uvek nalaze kriminalci, koji nastoje da unište njegovu državu i narod.[12] Ovakav rezon nije odsutan ni kada govorimo o slučajevima tzv. humanitarne intervencije, kao koncepta koji se nastoji uvesti u sferu međunarodnog javnog prava, kojim se teži opravdati upotreba oružane sile u slučajevima kada su jedna ili nekoliko država našle da je to opravdano.

Uz već podrobno razvijen korpus prava koje se primenjuje u ratu – *jus in bello*, razvija se i tzv. pravo na rat – *jus ad bellum* i, karakteristično za poznije decenije dvadesetog veka, pravo protiv rata – *jus contra bellum*.[13] Kroz istoriju države su se pozivale na različite povode zbog kojih su započinjale oružane sukobe (*casus belli*). Međutim, do danas nije postignut konsenzus o razlozima zbog kojih bi se upotreba sile u međunarodnim odnosima smatrala dopuštenom, ukoliko država koja koristi silu nije neposredno i sama napadnuta.[14] U tom cilju, poslednjih decenija se sve više radi na definisanju pravnog instituta koji bi dopustio upotrebu sile pod precizno određenim uslovima, a koji se najčešće označava kao humanitarna intervencija[15] čiji je cilj legalizacija upotrebe sile bez prethodne odluke Saveta bezbednosti. Njenim dopuštanjem došlo bi do proširivanja kruga izuzetaka od pravila o zabrani upotrebe sile u međunarodnim odnosima, a time i do slučajeva kada je do upotrebe sile došlo, ali se ista ne smatra protivpravnom i kao takva ne može se smatrati ni aktom agresije u smislu odredaba Rimskog statuta.

Takav pojam humanitarne intervencije koji pojedini autori predstavljaju kao novonastalo običajno pravilo bi imao značajan uticaj u sferi međunarodnog krivičnog prava. Njime bi se neposredno zadiralo u pitanje dopuštenosti upotrebe sile između država, a samim tim bi bilo od uticaja i na determinaciju postojanja akata agresije, kao bitnog elementa bića krivičnog dela zločin agresije. Shodno navedenom, ovaj rad će nastojati da humanitarnu intervenciju stavi u kontekst zločina agresije i Rimskog statuta u celosti, kako bi se izveo zaključak o njenom uticaju na eventualne odluke Međunarodnog krivičnog suda.

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[11] V.: Holbert Turney-High, H., Roland, A. (1971). *Primitive war: its practices and concepts*. Columbia: University of South Carolina Press.

[12] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 4.

[13] Kemp, G. (2010). *Individual criminal liability for the international crime of aggression*. Oxford: Intersentia, 47–48.

[14] Ruys, T. (2010). *"Armed attack" and Article 51 of the UN Charter: customary law and practice*. New York: Cambridge University Press, 54.

[15] Goodman, R. (2006). Humanitarian Intervention and Pretexts for War. *The American Journal of International Law* 100 (1), 107–141, 111.

ZLOČIN AGRESIJE U SMISLU ČLANA 8bis RIMSKOG STATUTA

Član 8bis Rimskog statuta se sastoji iz uvodnog dela (*chapeau*) koji predviđa opšte elemente[16] zločina agresije i sadržan je u prvom stavu ovog člana, te posebnog dela kojim se bliže određuje značenje pojma akta agresije i navode pojedinačne radnje izvršenja krivičnog dela. Tako ovaj član definiše zločin agresije kao

> „...planiranje, pripremanje, započinjanje ili izvršenje, od strane lica koje se nalazi u položaju da može efikasno da vrši kontrolu ili da usmerava političku ili vojnu akciju države, akta agresije koji, po svom karakteru, težini i obimu, predstavlja očigledno kršenje Povelje UN".[17]

St. 2. istog člana određuje *akt agresije* kao

> „...upotrebu oružane sile od strane jedne države uperene protiv suvereniteta, teritorijalnog integriteta ili političke nezavisnosti druge države, ili njena upotreba na bilo koji drugi način koji nije u skladu sa Poveljom UN".[18]

Kao i kada je reč o drugim krivičnim delima iz nadležnosti Međunarodnog krivičnog suda, neophodno je ostvarivanje svakog od navedenih elemenata bića krivičnog dela i to kroz ostvarivanje barem jedne od predviđenih radnji izvršenja na jedan od alternativno postavljenih načina izvršenja od strane lica koje zadovoljava postavljene standarde. U nastavku ćemo pružiti pregled pojedinačnih elemenata člana 8bis, zadržavajući pažnju na opštim elementima, kao zajedničkim za sve pojedinačne akte agresije.

„Zločin agresije"

Centralni element člana 8bis je pojam „zločin agresije", koji se u ovom obliku po prvi put javlja u međunarodnom pravu. Najveći značaj novousvojenog naziva je u kreiranju distinkcije između zločina agresije, kao individualnog čina, koji podleže gonjenju pred Međunarodnim krivičnim sudom i „akata agresije", kao radnji izvršenih od strane države.[19] Na ovaj način, član 8bis

[16] Ristivojević, B. (2010). „Opšti elemenat" zločina protiv čovečnosti. *Zbornik radova Pravnog fakulteta u Novom Sadu,* 44 (2), 229–251, 230.

[17] *Rome Statute* (2010). *Op. cit.,* čl. 8bis st. 1; prevod preuzet iz Stojanović, Z. (2012). *Međunarodno krivično pravo*. Beograd: Pravna knjiga, 114.

[18] *Rome Statute* (2010). *Op. cit.,* čl. 8bis st. 2.; V.: Stojanović, Z. (2012). *Op. cit.,* 114.

[19] Zimmermann A., Freiburg E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 586–587.

odražava dualističku prirodu zločina agresije čiji su zaštitni objekti kolektivni interesi, mir, bezbednost i dobrobit sveta[20] i koji u sebi objedinjuje kolektivni element (akt agresije od strane države kao entiteta) i individualni element (sam zločin agresije kao radnju pojedinca).[21]

„Planiranje, pripremanje, započinjanje i izvršenje"

Fraza „planiranje, pripremanje, započinjanje i izvršenje" je gotovo istovetna odredbi sadržanoj u Statutu međunarodnog vojnog tribunala u Nirnbergu,[22] kao i Statutu međunarodnog vojnog tribunala za Daleki istok.[23] Osnovna razlika se ogleda u upotrebi termina „izvršenje", budući da pomenuti statuti namesto njega koriste izraz „vođenje agresorskog rata".[24]

Kada je reč o „planiranju", na prvi pogled se čini da ovaj oblik implicira mogućnost gonjenja čak i zbog *pripremanja planova za buduće izvršenje akta agresije*, pod uslovom da takav akt agresije zadovoljava preostale elemente sadržane u članu 8bis stav 1 Statuta, čak i u slučaju da do agresije i ne dođe.[25] Međutim, ukoliko uzmemo u obzir sadržinu Elemenata zločina, očigledno je da akt agresije ipak mora biti izvršen.[26] Stav da odredbom člana 8bis nije predviđeno kažnjavanje u slučaju kada akt agresije nije izvršen, u svemu je u skladu sa međunarodnim običajnim pravilima, imajući u vidu da se postojeći precedenti bave isključivo aktima agresije koji su izvršeni,[27] odnosno zahtevaju da

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[20] Bassiouni, M. C. (2014). *Introduction to International Criminal Law*. Leiden: Martinus Nijhoff, 227.

[21] Ambos, K. (2014). *Treatise on International Criminal Law: Volume II The Crimes and Sentencing*. Oxford: Oxford University Press, 186.

[22] European Advisory Commission, *The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, London, 1945, čl. 6. st. 2. t. a).

[23] Supreme Commander for the Allied Powers, *International Military Tribunal for the Far East Charter*, Tokyo, 1946, čl. 5. t. a.; Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart; International Criminal Court, *Elements of Crimes*, New York, Kampala, 2011, ISBN No. 92-9227-232-2, dostupno na: https://www.refworld.org/docid/4ff5dd7d2.html, Crime of Aggression, Element no. 3.587.

[24] The Charter of the International Military Tribunal. (1945). *Op. cit.*, čl. 6. st. 2. t. a).

[25] Zimmermann, A., Freiburg, E. Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016).*Op. cit.*, 588.

[26] *Ibid*.; International Criminal Court, *Elements of Crimes*, New York, Kampala, 2011, ISBN No. 92-9227-232-2, dostupno na: https://www.refworld.org/docid/4ff5dd7d2.html, Crime of Aggression, Element no. 3.

[27] *Ibid*., 588.

sila zaista bude upotrebljena.[28] Centralno mesto u pojmu *planiranja* akta agresije zauzima (direktni) umišljaj izvršioca, tzv. *animus aggressionis*,[29] premda pojedini autori, među kojima i Kasese (Cassese) smatraju da je zločin agresije moguće izvršiti i sa eventualnim umišljajem (*recklessness*).[30] U praksi, formiranje umišljaja kod individualnih civilnih ili vojnih lidera države je prvi korak u procesu planiranja zločina agresije.[31] Onog trenutka kada vođa podeli svoje planove sa drugim licima koja se nalaze na pozicijama sa kojih mogu efikasno da kontrolišu ili da upravljaju političke ili vojne aktivnosti države i kada se uspostavi saglasnost među ovim licima, smatra se da je otpočela radnja planiranja.[32] Držaće se da je radnja planiranja zločina agresije izvršena, na primer, učešćem na sastancima na kojima se formulišu planovi napada na drugu državu.[33] Sajapin (Sayapin) ukazuje da je upravo umišljaj – *animus aggressionis*, distinktivni element koji kvalifikuje planiranje vojnih akcija, kao suvereno pravo svake države, dajući mu takav kvalitet koji ga transformiše u međunarodno krivično delo.[34]

Faza *pripremanja* sledi neposredno nakon faze *planiranja* izvršenja zločina agresije.[35] Pod pripremanjem se smatra preduzimanje praktičnih koraka ka ostvarenju prethodno dogovorenih planova.[36] Pripremne radnje se mogu podeliti u dve grupe: radnje usmerene ka stvaranju materijalnih uslova za izvršenje krivičnog dela i organizacione pripremne radnje.[37] Kako bi se određeno lice moglo smatrati krivično odgovornim za pripremanje potrebno je i da je

[28] *Discussion paper 1 The Crime of Aggression and Article 25, paragraph 3, of the Statute*, ICC-ASP/4/32, Annex II.B, 380.

[29] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 228.

[30] Cassese, A. (2003). *International Criminal Law*. Oxford: Oxford University Press, 115; Murphy, S. D. (2006). *Principles of international law*. Toronto: Thomson & West, 419.

[31] Sayapin, S. (2014). *Op. cit.*, 228.

[32] *Ibid.*, 228.

[33] McDougall, C., (2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press, 187; Klamberg, M. (2017). *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic Epublisher, 153, fusnota 151; Zimmermann, A., Freiburg, E. (2016). *Op. cit.*, 588.

[34] Sayapin, S. (2014). *Op. cit.*, 229.

[35] *Ibid*., 229.

[36] Radzinowicz, L. (1969). *Ideology and crime*. London: Columbia University Press, 52; Greenspan, M. (1959). *The Modern Law of Land Warfare*. Berkeley: University of California Press, 455.

[37] Eds. Kudryavtsev, V. N., Luneev, V., Naumov, A. V., (2012). *Ugolovnoe pravo Rossii: Osobennaya chast*. Moscow: Feniks, 237, citirano u: Sayapin, S. (2014). *Op. cit.*, 229.

pripremna radnja bila u tolikoj meri neophodna za potonje izvršenje akta agresije, da bi bez nje izvršenje bilo nemoguće ili u znatnoj meri otežano.[38]

Započinjanje vršenja akta agresije predstavlja formalni *corpus delicti* zločina agresije[39] i ogleda se u samoj upotrebi oružane sile.[40] U ovoj fazi je kod izvršioca uglavnom prisutna svest o budućim zabranjenim posledicama.[41] Može se prihvatiti stanovište da je radnja akta agresije započeta već u trenutku izdavanja naređenja o upotrebi sile protiv druge države.[42] Međutim, trenutak započinjanja vršenja radnje u najvećoj meri zavisi od konkretnog pojavnog oblika akta agresije.[43] Značaj započinjanja akta agresije se ogleda i u tome što je ono *conditio sine qua non* za postojanje zločina agresije u smislu planiranja i pripremanja krivičnog dela, o kojima je gore bilo više reči.[44] Sa druge strane, započinjanje vršenja akta agresije po svojoj prirodi ne zahteva dovršenje krivičnog dela te bi se kao takvo moglo svesti i na pokušaj, koji je pak regulisan čl. 25. stav 3*bis* Statuta,[45] te je prema Ambosu eksplicitno predviđanje započinjanja kao oblika ostvarivanja krivičnog dela suvišno.[46]

Izvršenje akta agresije obuhvata sve radnje koje slede po započinjanju akta agresije[47] i predstavlja materijalni *corpus delicti* zločina agresije, koji pretpostavlja neminovnost posledica izvršenog krivičnog dela.[48] Za nastupanje ovakvih kriminalnih posledica nužno je postojanje stvarnog oružanog napada, budući da u situaciji gde je agresivni *napor* države suzbijen u nekoj od tri faze koje prethode izvršenju, govorilo bi se isključivo o planiranju, pripremanju i započinjanju akta agresije, ali ne i o njegovom stvarnom izvršenju.[49] Faktičke karakteristike i posledice izvršenog akta agresije imaju direktan uticaj na utvrđivanje njegovog karaktera, težine i obima, kao sastavnih elemenata

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[38] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 230.

[39] *Ibid*., 230.

[40] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 590.

[41] Sayapin, S. (2014). *Op. cit.*, 230.

[42] *Ibid*., 230–231.

[43] Zimmermann, A., Freiburg, E. (2016). *Op. cit.*, 590.

[44] Ambos, K. (2014). *Treatise on International Criminal Law: Volume II The Crimes and Sentencing*. Oxford: Oxford University Press, 209.

[45] *Rome Statute* (2010), *Op. cit.*, čl. 25 st. 3bis i čl. 25 st. 3 tač. (f).

[46] Ambos, K. (2014). *Op. cit.*, 209.

[47] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 590.

[48] Sayapin, S. (2014). *Op. cit.*, 232.

[49] *Ibid*., 232.

bića krivičnog dela zločina agresije,[50] od kojih će potom zavisiti i postojanje krivične odgovornosti izvršilaca. Sama radnja akta agresije podrazumeva učešće lica koja nisu ni na koji način učestvovala u radnjama koje su prethodile izvršenju,[51] odnosno, samih vojnika koji fizički *izvršavaju* akt agresije kroz aktivno učešće u sukobu.[52]

„Od strane lica u položaju da može efikasno da vrši kontrolu ili da usmerava političku ili vojnu akciju države"

Prema svojoj prirodi, zločin agresije može biti izvršen jedino od strane najviših državnih funkcionera, tj. lica na poziciji liderstva.[53] Pravilo o odgovornosti funkcionera svoje korene nalazi još u praksi Nirnberškog tribunala, gde je u *Ministries* slučaju utvrđeno da su jedino lica na određenim položajima u državnim strukturama raspolagala odgovarajućim sredstvima da bi mogla da izvrše akt agresije.[54]

Prema pojedinim autorima, pod licima u poziciji liderstva se u najmanju ruku podrazumevaju predsednici država i vlada, kao i ministri odbrane i drugi vojni rukovodioci, poput generala visokog ranga.[55] Ovim se, međutim, ne isključuje odgovornost lica koja, iako se ne nalaze na poziciji formalnog čelnika, imaju takav stepen uticaja na državnu spoljnu politiku ili vojne aktivnosti, da bi mogli iste da usmere na izvršenje akta agresije.[56] U skladu sa samim tekstom člana 8bis, *de facto* sposobnost kontrolisanja ili usmeravanja političkih ili vojnih aktivnosti države,[57] a ne formalna titula, predstavlja odlu-

[50] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 232.

[51] McDougall, C., (2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press, 188.

[52] Barriga, S. Against the Odds: The Results of the Special Working Group on the Crime of Aggression. objavljeno u: Bellelli, R. (2010). *International Criminal Justice Law and Practice from the Rome Statute to Its Review.* Farnham: Ashgate Publishing, 627.

[53] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 590.

[54] The Ministries Case, Case No. 11, United States v. Weizsaecker et al., Opinion and Judgment and Sentence, Green Series, Vol. 14 at 308, Mil. Trib. No. 4, 13 April 1949, 321–322.

[55] Heinsch, R. (2010). The Crime of Aggression after Kampala: Success or Burden for the Future. *Goettingen Journal of International Law* 2, 713–743, 722.

[56] Sayapin, S. (2014). *Op. cit.*, 260.

[57] Klamberg, M. (2017). *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic Epublisher, 154, fusnota 155; McDougall, C.,

čujući faktor prilikom utvrđivanja ispunjenosti ovog elementa.[58] Pored toga, budući da Statut predviđa da izvršilac mora biti u poziciji da, alternativno, *vrši efikasnu kontrolu*, ili da *usmerava*, čini se da bi zločin agresije mogao biti izvršen i kroz vršenje nadzora, pod uslovom da je izvršilac imao efikasan uticaj na radnje koje su dovele do izvršenje akta agresije.[59]

„Akt agresije koji, po svom karakteru, težini i obimu, predstavlja očigledno kršenje Povelje UN"

Poslednji deo prvog stava člana 8bis bliže određuje karakteristike akta agresije. Naime, kako bi se smatrala aktom agresije za potrebe člana 8bis, upotreba sile od strane države mora biti u tolikoj meri protivpravna, razarajuća i obimna da zadovoljava kriterijume karaktera, težine i obima sadržane u kriterijumu očigledne povrede Povelje UN.[60]

Govoreći o *kršenju Povelje UN* moramo se osvrnuti na čl. 2. st. 4. Povelje, koji predviđa zabranu pretnje silom, kao i upotrebe sile.[61] Nesporno je, međutim, da Povelja predviđa dva izuzetka od ovog pravila, koji se tiču postojanja odluke Saveta bezbednosti i prava na nužnu odbranu iz čl. 51. Povelje. S obzirom da član 8bis Rimskog statuta direktno upućuje na Povelju, isti izuzeci bi se morali primeniti i kada je reč o zločinu agresije u smislu Rimskog statuta.[62]

U nameri da ograniče spektar situacija u kojima bi se moglo smatrati da izvršeni akt agresije konstituiše zločin agresije u smislu člana 8bis Statuta, u tekst ovog člana je uneta odrednica „očiglednog kršenja".[63] Reč je o objektivnoj kvalifikaciji za koju nije od značaja subjektivni doživljaj države žrtve agresije.[64] Pojedini autori smatraju da je smisao navedene odredbe u

(2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press, 181.

[58] Jessberger, F., Werle, G. (2014). *Principles of International Criminal Law*. Oxford: Oxford University Press, 542.

[59] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 591.

[60] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 261; Schüller, A. (2008). 'Gravity' Under The *Rome Statute*: Procedural Filter or Instrument of Shaping Criminal Policy?. *Humanitäres Völkerrecht Informationsschriften,* 21 (2), 73–81.

[61] Charter of the United Nations (1945). *Op. cit.*, čl. 2. st. 4.

[62] Zimmermann, A., Freiburg, E. (2016). *Op. cit.*, 593.

[63] *Rome Statute* (2010). *Op. cit.*, čl. 8bis st. 1.

[64] Klamberg, M. (2017). *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic Epublisher, 157.

isključivanju „sivih zona“ upotrebe sile, naročito kada je reč o humanitarnoj intervenciji.[65]

Kriterijum očiglednog kršenja Povelje ima dvojaku funkciju: na prvom mestu služi eliminaciji graničnih previranja koja ne bi opravdala gonjenje pred Međunarodnim krivičnim sudom, dok, sa druge strane, izostavlja iz nadležnosti Suda akte čiji je protivpravni karakter u najboljem slučaju diskutabilan.[66] Pojedini autori prihvataju stav prema kom da bi povreda Povelje UN bila *očigledna*, potrebno je da akt bude odgovarajućeg karaktera, težine i obima. [67]

Kriterijum *karaktera* se tiče prirode konkretnog akta agresije,[68] odnosno, stvarne subjektivne motivacije lica odgovornih za upotrebu sile.[69] U tom pogledu pravi se razlika između onih akata koji se imaju smatrati *agresivnim* za potrebe Rimskog statuta i akata koji bi bili obuhvaćeni izuzetkom iz čl. 51. Povelje. Međutim, prateći dinamiku međunarodnih odnosa, otpočeo je razvoj doktrine humanitarne intervencije, kao instituta koji bi predstavljao dodatni izuzetak od zabrane upotrebe sile i koji, prema mišljenju pojedinih autora, ne bi trebalo da bude obuhvaćen krivičnim delom zločin agresije.[70] Pojmovi težine i obima su usko povezani i često je nemoguće ih u potpunosti razgraničiti.[71] Ipak, težinu kršenja Povelje UN možemo shvatiti kao kvalitativni kriterijum, koji se pre svega tiče ozbiljnosti ili značaja učinjene povrede.[72]

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[65] Klamberg, M. (2017). *Op. cit.*, 155, fusnota 157; O'Connell, M. E., Niyazmatov, M. (2012). What is Aggression? Comparing the Jus ad Bellum and the ICC Statute. *Journal of International Criminal Justice,* 10, 189–207, 203–204; Cryer, R., Friman, H., Robinson, D., Wilmshurst, E. (2010). *An Introduction to International Criminal Law and Procedure*. New York: Cambridge University Press, 321.

[66] Barriga, S. Negotiating the Amendments on the crime of aggression, objavljeno u: Kreß, C., Barriga, S. (2012). *The Travaux Préparatoires of the Crime of Aggression*. New York: Cambridge University Press, 29.

[67] *Rome Statute* (2010), *Op. cit.,* čl. 8bis st. 1.

[68] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 597.

[69] Root, J. L. (2013). First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention. *University of Baltimore Journal of International Law* 2, 63–99, 88.

[70] DeNicola, C. (2008). A Shield for the 'Knights of Humanity': The ICC Should Adopt a Humanitarian Necessity Defence to the Crime of Aggression. *University of Pennsylvania Journal of International Law* 30, 641–689, 641; Leclerc-Gange, E., Byers, M. (2009). A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention. *Case Western Reserve Journal of International Law 41*, 379–390, 379.

[71] Zimmermann, A., Freiburg, E. (2016). *Op. cit.*, 597.

[72] Van Schaack, B. (2011). The Crime of Aggression and Humanitarian Intervention on Behalf of Women. *International Criminal Law Review,* 11, 477–493, 486; Root, J. L. (2013). First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention. *University of Baltimore Journal of International Law* 2, 91.

Ovaj se kriterijum odnosi na prirodu upotrebljenih sredstava ili metoda,[73] kao i prouzrokovane štete.[74] Obim kršenja Povelje UN je kvantitativni element koji se tiče nivoa ili opsega akta agresije.[75] Pitanje obima trebalo bi posmatrati u svetlu broja žrtava ili geografske ili vremenske rasprostranjenosti akta agresije.[76] Prema Zimermanu, što je rasprostranjenija i dugotrajnija upotreba sile, lakše je doći do zaključka da je kriterijum obima povrede zadovoljen.[77]

Tek ukoliko bi nadležni sud nakon sprovedenog dokaznog postupka utvrdio da je svaki od ovih standarda ponaosob zadovoljen, moglo bi se govoriti o postojanju očiglednog kršenja Povelje UN, a time i o ostvarenosti elemenata bića krivičnog dela zločin agresije.[78]

Akt agresije u smislu člana 8bis Statuta

Član 8bis Statuta predviđa da akt agresije podrazumeva

„...upotrebu oružane sile od strane jedne države uperene protiv suvereniteta, teritorijalnog integriteta ili političke nezavisnosti druge države, ili njenu upotrebu na bilo koji drugi način koji nije u skladu sa Poveljom UN“.[79]

Na ovaj način su autori teksta Statuta prihvatili stav autora Rezolucije br. 3314,[80] prema kom se kroz implementiranje dodatnih kvalifikatornih elemenata isključuju bagatelni slučajevi koji, po svojoj prirodi, ne bi trebalo da se posmatraju kao akti agresije u smislu Statuta.[81]

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[73] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 597.

[74] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 260.

[75] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *Op. cit.*, 598; Sayapin, S. (2014). *Op. cit.*, 260; Root, J. L. (2013). First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention. *University of Baltimore Journal of International Law* 2, 91, 94.

[76] Office of the Prosecutor, *Policy paper on preliminary examinations*, The Hague, 2013, para. 62.

[77] Zimmermann, A., Freiburg, E. (2016). *Op. cit.*, 598.

[78] Jessberger, F., Werle, G. (2014). *Principles of International Criminal Law*. Oxford: Oxford University Press, 549.

[79] *Rome Statute* (2010), *Op. cit.,* čl. 8bis st. 2.

[80] UN General Assembly, *Definition of Aggression*, A/RES/3314, 1974, dostupno na: https://www.refworld.org/docid/3b00f1c57c.html, čl. 1.

[81] Broms, B. (1977). The Definition of Aggression. *Recueil des Cours de l'Academie de Droit International* 154, 299–399, 346, citirano u: Dinstein, Y. (2001). *War, aggression and self-defence*. Cambridge: Cambridge University Press, 116.

Koristeći se restriktivnijim pristupom u odnosu na čl. 2. st. 4. Povelje UN,[82] Statut kao akt agresije predviđa jedino „upotrebu oružane sile",[83] isključujući upotrebu političke ili ekonomske sile.[84] Pored toga, Statut predviđa da jedino država može da izvrši akt agresije, na ovaj način nedvosmisleno isključujući mogućnost izvršenja od strane paravojnih ili terorističkih grupa.[85]

Sa ciljem popunjavanja mogućih pravnih praznina,[86] u zaključak definicije akta agresije uneta je odredba koja zabranjuje i upotrebu sile „na bilo koji drugi način koji nije u skladu sa Poveljom UN".[87] Citiranom odredbom je zadržana formulacija iz Rezolucije 3314 od koje mnoge države nisu želele da odstupe, pri čemu je unekoliko zadovoljena težnja za unošenjem odrednice „protivpravna". Istovremeno, odredba omogućuje da izuzeci pod kojima je upotreba sile dozvoljena u smislu Povelje UN, ostanu van domašaja člana 8bis Statuta.[88] Na ovaj način je precizirano da se svi slučajevi upotrebe sile bez pristanka napadnute države, bez odobrenja Saveta bezbednosti, kao i oni koji nisu učinjeni u samoodbrani, imaju smatrati protivnim Povelji UN, a tako i protivpravnim u smislu odredbe člana 8bis Statuta.[89] Time je i otklonjena bojazan da bi se definicija zločina agresije mogla nehotice primeniti na one slučajeve koji bi potpadali pod neki od izuzetaka od zabrane upotrebe sile, koji su kao takvi dopušteni.[90] Spektar slučajeva u kojima je upotreba sile ipak dopuštena se, kako ćemo videti, nastoji proširiti, što se međunarodnopravnoj javnosti najčešće čini zagovaranjem doktrine humanitarne intervencije.

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[82] Charter of the United Nations (1945). *Op. cit.*, čl. 2. st. 4.

[83] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 604.

[84] Broms, B. (1977). The Definition of Aggression. Re*cueil des Cours de l'Academie de Droit International,* 154, 299, 342, citirano u: Zimmermann A., Freiburg E. (2016). *Op. cit.*, 604.

[85] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 260.

[86] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 606.

[87] *Rome Statute* (2010), *Op. cit.,* čl. 8bis st. 2.

[88] Broms, B. (1977). *Op. cit.*, 299, 343, citirano u: Zimmermann A., Freiburg E. (2016). *Op. cit.*, 606.

[89] Kreß, C. The State Conduct Element, objavljeno u: Kreß, C., Barriga, S. (2017). *The Crime of Aggression: A Commentary*. Cambridge: Cambridge University Press, 454.

[90] Anggadi, F., French, G., Potter, J. Negotiating the Elements of the Crime of Aggression', objavljeno u: Barriga, S., Kreß, C. (2012). *The Travaux Préparatoires of the Crime of Aggression*. Cambridge: Cambridge University Press, 72.

HUMANITARNA INTERVENCIJA KAO INSTITUT MEĐUNARODNOG JAVNOG PRAVA

Kako je pomenuto u ranijem tekstu, čl. 2. st. 4. Povelje UN predviđena je zabrana pretnje i upotrebe sile u međunarodnim odnosima,[91] pri čemu se predviđaju izuzeci i to postojanje ovlašćenja Saveta bezbednosti na upotrebu sile[92] i prava na nužnu odbranu iz čl. 51. Povelje.[93] Posebnu kategoriju odstupanja od zabrane upotrebe sile u međunarodnim odnosima predstavljaju slučajevi kada je država na čijoj teritoriji sila treba da bude upotrebljena dala svoju saglasnost.[94]

Humanitarna intervencija predstavlja odstupanje od načela zabrane upotrebe sile. U najširem smislu se pod pojmom humanitarne intervencije podrazumevaju akti diplomatskog, ekonomskog ili vojnog karaktera koji imaju za cilj sprečavanje kršenja ljudskih prava.[95] U užem smislu humanitarna intervencija se definiše kao upotreba oružane sile sa ciljem prevencije ili zaustavljanja masovnih kršenja ljudskih prava na teritoriji strane države,[96] koja se čak i kod njenih zagovarača smatra poslednjim sredstvom.[97] Koncept humanitarne intervencije pretenduje da legalizuje upotrebu oružane sile protiv druge države sa ciljem prevencije nepoštovanja i kršenja ljudskih prava.[98] Primeri koji su od strane pojedinih država okarakterisani kao humanitarne intervencije, koji prethode napadu na Saveznu Republiku Jugoslaviju 1999. godine, su intervencije Indije u Bangladešu od 1971. godine, Vijetnama u Kambodži iz 1978. godine, Tanzanije u Ugandi iz 1979. godine, Sjedinjenih Američkih Država u Grenadi

[91] Charter of the United Nations (1945). *Op. cit.*, čl. 2 st. 4.

[92] Charter of the United Nations (1945). *Op. cit.*, čl. 42.

[93] Charter of the United Nations (1945). *Op. cit.*, čl. 51.

[94] Scharf, M. P. (2018). Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Interventions. *Chicago Journal of International Law,* 19 (2), 1–29, 11.

[95] Greenwood, C. (2002). The Case of Kosovo. *Finnish yearbook of international law,* 10, 141–175, 161.

[96] Reisman, M., McDougal, M. Humanitarian Intervention, objavljeno u: Lillich, B. (1973). *Humanitarian intervention and the United Nations*. Charlottesville: University Press of Virginia, 178.

[97] Dinstein, Y. (2005). *War, Aggression and Self-Defence*. Cambridge: Cambridge University Press, 82.

[98] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 601.

od 1983. godine,[99] kao i intervencija Sjedinjenih Američkih Država, Ujedinjenog Kraljevstva i Francuske u Siriji 2018. godine.[100]

Dozvoljenost humanitarne intervencije u međunarodnom javnom pravu

Pitanje dozvoljenosti humanitarne intervencije u međunarodnoj zajednici je pokrenuto u više navrata, pri čemu su stavovi mahom bili protiv njene primene.[101] Primera radi, intervencija u Bangladešu je bila široko osuđena od strane međunarodne zajednice, iako je isticano da je osnovni motiv intervencije bio humanitarnog karaktera.[102] Slična situacija je i sa intervencijom u Saveznoj Republici Jugoslaviji. Niz država je zauzeo stav da potencijalna humanitarna katastrofa ne opravdava jednostrano delovanje država članica NATO mimo odluke Saveta bezbednosti.[103] Navedeni slučajevi se oslanjaju na glavne prigovore upućene humanitarnoj intervenciji, a koji se tiču oportunističkog korišćenja humanitarnih motiva kako bi države opravdale upotrebu oružane sile protiv drugih država.[104]

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[99] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 601.

[100] Scharf, M. P., Sterio, M., Williams, P. R. (2020). *The Syrian Conflict's Impact on International Law*. Cambridge: Cambridge University Press, 59.

[101] Goodman, R. (2006). Humanitarian Intervention and Pretexts for War. *The American Journal of International Law,* 100 (1), 111.

[102] Schachter, O. (1984). The Right of States to Use Armed Force. Michigan Law Review 82 (5–6), 1620–1646, 1629; UN General Assembly, *Question considered by the Security Council at its 1606th, 1607th and 1608th meetings,* A/RES/2793(XXVI), 7 December 1971, dostupno na: http://www.worldlii.org/int/other/UNGA/1971/43.pdf.

[103] Kina i Rusija su iznele ovaj stav na 3988. sastanku Saveta bezbednosti od dana 23. marta 1999. godine, S/PV.3988; UN Security Council, *Belarus, India and Russian Federation: draft resolution*, S/1999/328, 26. March 1999; UN Security Council, *Letter dated 9 April (S/1999/451) from the representative of South Africa addressed to the President of the Security Council, transmitting a statement issued on 9 April 1999 on behalf of the Movement on Non-Aligned Countries*, S/1999/451, 21 April 1999; UN General Assembly, *Letter dated 26 March 1999 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General on behalf of the Rio Group*, A/53/884, 26 March 1999; UN General Assembly, *Letter dated 5 May 2000 from the Permanent representative of Nigeria addressed to the United Nation addressed to the President of General Assembly on behalf of the Group of 77*, UN Doc A/55/74, 12 May 2000, para. 54.

[104] Brown, B. S. (2000). Humanitarian Intervention at a Crossroads. *William and Mary Law Review,* 41 (5), 1683–1741, 1727; Kritsiotis, D. (1998). Reappraising Policy Objections to Humanitarian Intervention. *Michigan Journal of International Law,* 19 (4), 1005–1050, 1020.

Sa druge strane, niz država kao i autora, već dugi niz godina ističu argumente kojima bi opravdali institut humanitarne intervencije. U ovom nastojanju, neretko se autori oslanjaju na doktrinu „odgovornosti za zaštitu" (eng. „Responsibility to Protect") koja je proistekla iz ranijeg prava na intervenciju. U pitanju je koncept nastao kao produkt rada kanadske Međunarodne komisije za intervenciju i državnu suverenost, prezentovan u Izveštaju Komisije iz decembra 2001. godine.[105] Polazeći od teorije pravičnog rata, Izveštaj određuje standarde usled čijeg zadovoljenja se humanitarna intervencija ima smatrati dopuštenom, a koji standardi su postojanje „ispravne namere", da je upotreba sile krajnje sredstvo, da je proporcionalna opasnosti koja preti i da postoji razumna mogućnost da će upotreba sile rezultirati prestankom nanošenja patnji civilnom stanovništvu.[106] Tek ukoliko bi svi navedeni kriterijumi bili ispunjeni, moglo bi se smatrati da upotrebljena sila predstavlja dozvoljenu humanitarnu intervenciju.

Ne treba gubiti iz vida da humanitarna intervencija ne nalazi svoje pravne osnove ni u jednom međunarodnom pravnom aktu. Naprotiv, kako smo videli, upotreba sile u međunarodnim odnosima je zabranjena. Kako bi se eventualno moglo govoriti o dopuštenosti humanitarne intervencije, pojedini autori su nastojanja da je predstave kao deo međunarodnog običajnog prava, koje po svojoj pravnoj snazi parira najznačajnijim međunarodnim aktima, kakva je Povelja UN.[107]

Kako bi pravilo moglo da postane međunarodno običajno pravilo, postoje dva uslova koja moraju da budu ispunjena: postojanje rasprostranjene državne prakse i dovoljan *opinio iuris,* odnosno, uverenje u međunarodnoj zajednici o obaveznosti određene prakse.[108] Problem koji se javlja kada su u pitanju međunarodna običajna pravila se u najznačajnijoj meri tiče dugotrajnosti procesa njihovog nastanka.[109] Ne postoje ujednačeni standardi koji bi određivali nakon koliko vremena i nakon koliko praktičnih situacija se može smatrati da je određeno pravilo steklo karakter međunarodnog običaja. S obzirom na to da su odnosi u međunarodnoj zajednici sve dinamičniji, dok su najznačajniji među-

[105] International Commission on Intervention and State Sovereignty, *Report: The Responsibility To Protect*. Ottawa, December 2001.

[106] Report: The Responsibility To Protect (2001). *Op. cit.,* 4.19, 4.32.

[107] United Nations, *Statute of the International Court of Justice*, San Francisco, 1945, čl. 38. st. 1.

[108] *Statute of the International Court of Justice* (1945). *Op. cit.,* čl. 38. st. 1. tač. b); International Court of Justice, North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*), I.C.J. Reports 1969, p. 3, 20 February 1969, dostupno na: https://www.refworld.org/cases,ICJ,50645e9d2.html, 44, para. 77.

[109] Scharf, M. P. (2013). *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*. Cambridge: Cambridge University Press, 58.

narodni akti teško podložni promeni,[110] doktrina je pokušala da pruži rešenje kroz ideju „međunarodnih konstitutivnih trenutaka“[111] ili, kako ih profesor Šarf naziva, „Grocijuskih trenutaka“ (eng. „Grotian Moment“).[112]

Grocijuski trenutak

Grocijuski trenutak jeste termin skovan od strane Ričarda Falka 1958. godine.[113] Profesor Šarf ovaj termin koristi kako bi označio proces u kome nova pravila, kao i doktrine međunarodnog običajnog prava nastaju nesvakidašnje brzo, do čega obično dolazi u okolnostima korenitih promena u međunarodnoj zajednici.[114] Neophodno je napraviti razliku između ovih situacija i slučajeva koje obuhvata teorija „instant običaja“, kako je formulisana od strane profesora Čenga.[115] Dok teorija o Grocijuskim trenucima polazi od rasprostranjenog pristajanja ili odobravanja država u pogledu novonastalih pravila, teorija instant običaja se oslanja na rezolucije Generalne skupštine Ujedinjenih nacija, što se ističe kao suštinski nedostatak, budući da iste nemaju obavezujuće dejstvo i kao takve ne održavaju uvek stvarni stav država koje su glasale za njihovo usvajanje.[116]

Kao najvažniji primer Grocijuskog trenutka u literaturi se navodi osnivanje Nirnberškog tribunala.[117] Kao noviji primeri pominju se i NATO vojna intervencija nad Saveznom Republikom Jugoslavijom iz 1999. godine, okarakterisana kao primer humanitarne intervencije,[118] ali nadasve bombardovanje

[110] Roberts, A. E. (2001). Traditional and Modern Approaches to Customary International Law: A Reconciliation. *American Journal of International Law,* 95, 757–791, 767.

[111] Martinez, J. S. (2003). Towards an International Judicial System. *Stanford Law Review,* 56 (2), 429–529, 463; Sadat, L. N. (2007). Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror. *George Washington University Law Review,* 75, 1200–1248, 1206.

[112] Scharf, M. P. (2010). Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change. *Cornell International Law Journal,* 43 (3), 439–469, 440.

[113] *Ibid*., 444.

[114] *Ibid*.

[115] Cheng, B. (1965). United Nations Resolutions on Outer Space: 'Instant' International Customary Law?. *Indian Journal of International Law* 3, 23–48, 23.

[116] Scharf, M. P. (2010). *Op. cit.,* 446.

[117] Gassama, I. (2004). International Law at a Grotian Moment: The Invasion of Iraq in Context. *Emory International Law Review* 18 (1), 1–52, 33–34.

[118] Sterio, M. (2009). The Kosovar Declaration of Independence: 'Botching the Balkans' or Respecting International Law?. *Georgia Journal of International and Comparative Law,* 37, 267–304, 271–272; Sterio, M. (2011). A Grotian Moment: Changes in the Le-

Sirije 2018. godine, u vezi sa kojim je Velika Britanija pružila obrazloženje da je posredi reč bilo o humanitarnoj intervenciji, pozivajući se pritom na kriterijume principa „odgovornosti za zaštitu“[119] o kojima je u ranijem tekstu bilo više reči. Kao opravdanje za preduzetu intervenciju navodi se upotreba hemijskog oružja na teritoriji Sirije, te nužnost preveniranja takvih postupaka u cilju zaštite međunarodnog mira i bezbednosti.[120] U slučaju Sirije se navodi nekoliko razloga koji bi opravdali determinisanje humanitarne intervencije kao Grocijuskog trenutka, a koji se najpre tiču potonje reakcije međunarodne zajednice, gde su tri države koje su sprovele vazdušne napade (SAD, Velika Britanija i Francuska) zagovarale zakonitost intervencije, trideset i osam država je izrazilo odobravanje preduzetih radnji, dok je jedanaest država eksplicitno tvrdilo da je humanitarna intervencija bez prethodnog odobrenja Saveta bezbednosti protivpravna.[121] Uzimajući navedeno u obzir, pojedini autori su stava da su zadovoljeni uslovi da bi se humanitarna intervencija u slučaju Sirije mogla smatrati legalnom, kao institut međunarodnog običajnog prava, mada čak i ovi autori domet takvog stava ograničavaju na situacije gde postoji opasnost, ili je već došlo do upotrebe hemijskog oružja,[122] čija je upotreba zabranjena Konvencijom o zabrani razvoja, proizvodnje, skladištenja i upotrebe hemijskog oružja i o njegovom uništavanju.[123]

Isključivo za potrebe ovog rada, poći ćemo od stava da je humanitarna intervencija postala delom međunarodnog običajnog prava, a kako bismo mogli ispitati njen eventualni uticaj na meritorne odluke Međunarodnog krivičnog suda.

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gal Theory of Statehood. *Denver Journal of International Law & Policy* 39 (2), 209–237, 213–214.

[119] Scharf, M. P. (2018). Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Interventions. *Chicago Journal of International Law,* 19 (2), 22.

[120] U. N. SCOR, 73d Sess., 8233d mtg., Provisional Verbatim Record of the Security Council, Threats to International Peace and Security: The Situation in the Middle East, U.N. Doc. S/PV.8233, 14 April 2018.

[121] Scharf, M. P. (2018). *Op. cit.,* 24–25.

[122] Scharf, M. P., Sterio, M., Williams, P. R. (2020). *The Syrian Conflict's Impact on International Law*. Cambridge: Cambridge University Press, 89.

[123] Organisation for the Prohibition of Chemical Weapons, *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction*, Paris, 1993.

VEZA ZLOČINA AGRESIJE I HUMANITARNE INTERVENCIJE

Kako smo videli, humanitarna intervencija na prvom mestu predstavlja institut međunarodnog javnog prava. Međutim, ukoliko bi uzeli da je doista postala međunarodni običaj, njen značaj se ne bi smeo zanemariti ni u sferi međunarodnog krivičnog prava, naročito kada je reč o odredbama Rimskog statuta koje inkriminišu zločin agresije.

Akt agresije, kao bitan element bića krivičnog dela zločin agresije ogleda se u upotrebi oružane sile od strane jedne države protiv suvereniteta, teritorijalnog integriteta ili političke nezavisnosti druge države, ili njenoj upotrebi na bilo koji drugi način koji nije u skladu sa Poveljom UN,[124] što principijelno predstavlja radnje koje bi se mogle podvesti pod pojam humanitarne intervencije. Kako Statut zločin agresije na dva mesta neposredno vezuje za kršenje Povelje UN, nameće se pitanje da li bi humanitarna intervencija, ukoliko bi joj se priznao status međunarodnog običaja, mogla smatrati pravilom koje bi izuzetno dopustilo upotrebu sile, a za potrebe tumačenja i primene odredaba Rimskog statuta? Prema Zimermanu, prostim tumačenjem svrhe i ciljeva Rimskog statuta može se doći do zaključka da se odredba člana 8bis ne ograničava samo na odredbe Povelje UN, već da se odnosi i na paralelno postojeće međunarodno običajno pravo.[125] Ovde bi trebalo imati u vidu i odredbu čl. 31. st. 3. t. c) Bečke konvencije o ugovornom pravu koji predviđa mogućnost tumačenja odredbe međunarodnog ugovora u skladu sa relevantnim pravilima međunarodnog prava, što bi imalo obuhvatiti i međunarodne običaje.[126]

Pored navedenog, mogao bi se zastupati i stav da odredbe Statuta Međunarodnog suda pravde koje predviđaju međunarodne običaje kao izvor prava dovode do zaključka da su međunarodni običaji kao izvor prava obuhvaćeni samom Poveljom UN, budući da se Statut Međunarodnog suda pravde nalazi u prilogu Povelje UN i da na njega i odredbe Povelje UN neposredno upućuju.[127]

Ukoliko se prihvati da je humanitarna intervencija međunarodni običaj, Sud bi morao da, tumačeći odredbu člana 8bis st. 2. Statuta, zauzme stav da li će odredbu tumačiti na način da upotreba sile mora da bude u skladu sa odredbama Povelje UN, ili je dovoljno da je sila upotrebljena saglasno pravilima međunarodnog običajnog prava. Nadalje, ukoliko bi sud našao da je

[124] *Rome Statute* (2010), *Op. cit.,* čl. 8bis st. 2.

[125] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 594.

[126] United Nations, *Vienna Convention on the Law of Treaties*, Vienna, 1969, čl. 31. st. 3. t. c.

[127] Charter of the United Nations (1945). *Op. cit.*, čl. 92.

dovoljno da se u odnosu na upotrebljenu silu imaju primeniti međunarodna običajna pravila, sledeći zadatak suda bi bio da se upusti u razmatranje da li konkretna upotreba sile ispunjava uslove da bi se smatrala aktom agresije, ili ima mesta primeni instituta humanitarne intervencije, pri čemu bi Sud i u slučaju da Savet bezbednosti ili Međunarodni sud pravde zauzmu stav da je akt agresije izvršen ili ne, mogao da utvrdi obratno.[128]

Kada bi Sud našao da su ispunjeni kriterijumi da bi se upotrebljena sila mogla podvesti pod humanitarnu intervenciju kao izuzetak od pravila o zabrani upotrebe sile u međunarodnim odnosima, smatralo bi se da upotrebljena sila ne konstituiše akt agresije u smislu člana 8bis st. 2. Statuta, te da samim tim nije ostvaren bitan element bića krivičnog dela zločin agresije iz člana 8bis st. 1. Statuta. Konačno, u takvom slučaju okrivljeni se ne bi mogao smatrati krivično odgovornim zbog izvršenja krivičnog dela zločin agresije.

HUMANITARNA INTERVENCIJA KAO OSNOV ISKLJUČENJA KRIVIČNE ODGOVORNOSTI IZ čl. 31 RIMSKOG STATUTA

Čl. 31. st. 1. t. c) Rimskog statuta predviđa da lice neće biti krivično odgovorno ukoliko u vreme izvršenja krivičnog dela

> „...reaguje racionalno kako bi odbranilo sebe ili drugo lice, […] na način koji je proporcionalan stepenu opasnosti po to lice, drugo lice ili imovinu koje se štiti".[129]

Reč je o normi koja je tipična za većinu nacionalnih pravnih sistema, iz kog razloga je možemo okarakterisati kao međunarodni običaj.[130] Međutim, kada je reč o ovom osnovu isključenja odgovornosti, potrebno je ukazati na razliku između lične odbrane i operativne odbrane, gde se potonja nalazi u sferi međunarodnog javnog prava.[131] Poslednja rečenica citirane odredbe predviđa da činjenica

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[128] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, objavljeno u: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 763.

[129] *Rome Statute* (2010), *Op. cit.,* čl. 31. st. 1 t. c); V.: Zakon o potvrđivanju Rimskog statuta Međunarodnog krivičnog suda (*Službeni list SRJ – Međunarodni ugovori*, br. 5/2001) čl. 31. st. 1. tač. (c).

[130] ICTY, *Prosecutor v. Kordić and Čerkez*, Judgement, Trial Chamber, IT-95-14/2-T, 26 February 2001, para. 451; Raimondo, F. (2008). *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers, 137; Klamberg, M. (2017). *Op. cit.,* 324.

[131] Eser, A. Article 31 Grounds for excluding criminal responsibility, objavljeno u: eds. Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 1125–1160, 1145.

> „...da je lice u vreme izvršenja krivičnog dela učestvovalo u odbrambenoj operaciji vojnih snaga, sama po sebi ne predstavlja osnov za isključenje krivične odgovornosti“[132]

što ukazuje da se lica na poziciji liderstva (kako je zahtevano odredbom člana 8bis st. 2. Statuta), kao ni sami vojnici ne bi mogli u svakom slučaju pozivati na isključenje svoje krivične odgovornosti na osnovu ovog člana. Sa druge strane, ostaje mogućnost da njihova odgovornost bude isključena na osnovu čl. 31. st. 3. Statuta.[133]

Pomenutom odredbom čl. 31. st. 3. Statuta predviđa se da

> „Sud može da razmatra i druge osnove za isključenje krivične odgovornosti, pored ovih pomenutih u st. 1, ukoliko takve osnove predviđaju propisi koji se primenjuju u smislu čl. 21. Statuta“.[134]

Navedena norma neposredno upućuje na odredbu kojom se regulišu važeći izvori prava pred Međunarodnim krivičnim sudom, među koje spadaju i principi i načela međunarodnog prava, što obuhvata i međunarodno običajno pravo.

Humanitarna intervencija predstavlja potencijalni osnov za isključenje odgovornosti države u međunarodnom javnom pravu. Međutim, kako su radnje države po prirodi rezultat odluke i radnji fizičkih lica, to su izvesne situacije utvrđivanja i njihove individualne krivične odgovornosti. Ukoliko sud ne bi smatrao da humanitarna intervencija predstavlja izuzetak od zabrane upotrebe sile u skladu sa Poveljom UN, odnosno, da su ispunjeni svi neophodni uslovi da bi se konkretna upotreba sile smatrala aktom agresije u smislu člana 8bis st. 2. Statuta, pitanje je da li bi se humanitarna intervencija mogla smatrati osnovom za isključenje krivične odgovornosti u skladu sa čl. 31. st. 3. Statuta.

Iz obrazloženja država koje su poslednjih decenija svoju upotrebu sile pravdale institutom humanitarne intervencije proizlazi da je reč o svojevrsnoj operativnoj odbrani trećeg, koja bi potencijalno mogla biti obuhvaćena odredbom čl. 31. st. 3. Statuta. Kada bi se sud upustio u razmatranje da li humanitarna intervencija predstavlja osnov za isključenje krivične odgovornosti u smislu čl. 31. st. 3. Statuta, morao bi da utvrdi ispunjenost uslova kako bi se određena upotreba sile smatrala humanitarnom intervencijom, što

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[132] *Rome Statute* (2010). *Op. cit.,* čl. 31. st. 1. t. c).

[133] Eser, A. Article 31 Grounds for excluding criminal responsibility, objavljeno u: eds. Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 1146.

[134] *Rome Statute* (2010). *Op. cit.,* čl. 31. st. 3; V.: Zakon o potvrđivanju Rimskog statuta Međunarodnog krivičnog suda (*Službeni list SRJ – Međunarodni ugovori*, br. 5/2001) čl. 31. st. 3.

predstavlja naročit problem, s obzirom na to da ista nije precizno definisana u međunarodnim dokumentima. U svakom slučaju, bilo bi neophodno ispitati da li su radnje okrivljenog, koje su dovele do upotrebe sile od strane države, preduzete najmanje uz postojanje „ispravne namere", da je upotreba sile predstavljala krajnje sredstvo, da je bila proporcionalna opasnosti koja je pretila i da je postojala razumna mogućnost da će upotreba sile rezultirati prestankom nanošenja patnji civilnom stanovništvu.[135]

Ovde bi dakle došlo do utapanja principa međunarodnog javnog prava u međunarodno krivično pravo. Iako je nesporna njihova odvojenost, reč je o dve grane koje se neretko međusobno prepliću, prožimaju i uslovljavaju. Ako se ima u vidu da su principi i načela međunarodnog prava jedan od izvora prava pred Međunarodnim krivičnim sudom, izvesno je da će buduće kompleksne situacije zahtevati intervenciju međunarodnog javnog prava, čak i kada je reč o pitanjima kakva je individualna krivična odgovornost.

ZAKLJUČAK

U radu smo nastojali da pružimo odgovor na pitanje da li se humanitarna intervencija može smatrati osnovom koji bi isključio protivpravnost dela koje bi inače bilo u nadležnosti Međunarodnog krivičnog suda. Da bi se na ovo pitanje dao konačan odgovor, na prvom mestu je neophodno uspostavljanje međunarodnog konsenzusa o tome da li je humanitarna intervencija stekla karakter i time obaveznost međunarodnog običajnog pravila. Međutim, kako se nijedan međunarodni organ, kakvi bi bili Savet bezbednosti, Međunarodni sud pravde, ali i Međunarodni krivični sud nisu do sada upustili u takvo razmatranje uz donošenje odgovarajuće odluke, humanitarna intervencija ostaje na nivou doktrinarnog pitanja. Autori, mahom iz anglosaksonskih pravnih sistema, braneći tezu o dopuštenosti humanitarne intervencije, istoj nalaze utemeljenje u različitim teorijama, od kojih se kao najaktuelnija javlja upravo teorija o nastanku međunarodnih običaja putem Grocijuskih trenutaka.

Ne treba gubiti iz vida da su situacije koje se nastoje odrediti kao humanitarne intervencije sve češće, što ima uticaj i na međunarodnu javnost da zauzme stav o njihovoj dopuštenosti. Iako ni Savet bezbednosti, ni Međunarodni sud pravde, kao organi koji neposredno mogu da usmeravaju razvoj međunarodnog javnog prava nisu do sada izneli svoj stav o ovom pitanju, nije nemoguće da će se o istom izjasniti upravo Međunarodni krivični sud u okvirima svojih kompetencija. Stoga, potrebno je već sada uzeti u razmatranje

[135] Report: The Responsibility To Protect (2001). *Op. cit.*, para. 4.19, 4.32.

domete koje humanitarna intervencija može da ima kada je reč o postupcima pred Međunarodnim krivičnim sudom.

Polazeći od činjenice da je Rimskim statutom inkriminisan zločin agresije i to na način da se neposredno oslanja na norme kojima se reguliše upotreba sile u međunarodnim odnosima, humanitarna intervencija, kao koncept koji se neposredno tiče upotrebe sile između država, može igrati značajnu ulogu kao potencijalni izuzetak od pravila iz čl. 2. st. 4. Povelje UN. Njeno prihvatanje kao međunarodnog običajnog pravila bi povlačilo obavezu ispitivanja njene ostvarenosti u konkretnim slučajevima pred Međunarodnim krivičnim sudom, a za potrebe utvrđivanja da li je zločin agresije izvršen. Osim toga, zbog same sadržine ovog instituta, humanitarna intervencija bi mogla imati i određeni uticaj na utvrđivanje individualne krivične odgovornosti okrivljenih, kao lica koja su odlučivala o radnjama države, čija se dopuštenost dovodi u pitanje.

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HUMANITARIAN INTERVENTION IN THE CONTEXT OF THE CRIME OF AGGRESSION UNDER ARTICLE 8 bis OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT**

ABSTRACT: Even though it does not represent a new concept in international law, the notion of humanitarian intervention still causes numerous controversies when it comes to its content and applicability. Since this institute is tightly related to situations characterized by the use of force in international relations, the potential application of the institute of humanitarian intervention belongs to the domain of international criminal law, particularly in reference to the crime of aggression from Article 8 bis of the Rome Statute, which criminalizes the use of force outside of the boundaries set by the UN Charter. This article attempts to provide an answer to the question whether humanitarian intervention, if it were accepted as part of international customary law, can affect the application of the Rome Statute. In addition to the analysis of the significance of humanitarian intervention when it comes to the establishment of the elements of the crime of aggression, the article will point out the scope of this institute pertaining to the bases for the exemption from criminal responsibility according to the Rome Statute, referencing

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potential defence strategies in cases that could take place before the International Criminal Court.

Keywords: crime of aggression, Rome Statute, humanitarian intervention, Grotian Moment, criminal responsibility, International Criminal Court

INTRODUCTION

The Rome Statute was adopted on July 17, 1998,[1] but it became law on July 1, 2002,[2] i.e., on the first day of the month following the sixtieth day of the deposition of the sixtieth instrument of ratification.[3] The International Criminal Court with jurisdiction over crimes of genocide, crimes against humanity, war crimes, and finally, the crime of aggression was founded in this way.[4]

The crime of aggression is considered to be one of the most controversial crimes in international criminal law.[5] Similar to war crimes, the crime of aggression is in its essence tightly linked with the use of military force, which is prohibited by Article 2, paragraph 4, of the UN Charter.[6] However, in contrast to war crimes which comprise behaviours that violate the rules of international humanitarian law related to the actions of the participants in military conflicts with the aim of minimizing suffering,[7] the crime of aggression is designed to restrict the right to initiate war and strengthen the regulations that prohibit war.[8] The crime of aggression was formally instituted for the first time with the adoption of the Amendment to the Rome Statute[9] at the Review Conference in Kampala on May 25, 2010.[10]

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[1] United Nations General Assembly, *Rome Statute of the International Criminal Court*, Rome, 1998.

[2] Cryer, R., Friman, H., Robinson, D., Wilmshurst, E. (2010). *An Introduction to International Criminal Law and Procedure*. New York: Cambridge University Press, 149.

[3] *Rome Statute*, *Op. cit.,* Art. 126, para. 1.

[4] Rome Statute, *Op. cit.,* Art. 5.

[5] Paulus, A. (2010). Second Thoughts on the Crime of Aggression. *European Journal of International Law,* 20 (4), 1117–1128, 1117; Kreß, C. (2010). Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus. *European Journal of International Law,* 20 (4), 1129–1146, 1129.

[6] United Nations, *Charter of the United Nations*, San Francisco, 1945.

[7] Stahn, C. (2019). *A Critical Introduction to Internatonal Criminal Law*. Cambridge: Cambridge University Press, 73.

[8] *Ibid.,* 95.

[9] Review Conference, *Resolution RC/Res. 6*, Kampala, 2010.

[10] Ambos, K. (2010). The Crime of Aggression After Kampala. *German Yearbook of International Law,* 53, 463–509, 464.

Even though the international community has been inclined towards preventing future military conflicts since WWI, history teaches us that this goal is difficult to obtain. Wars have been a part of our civilization since ancient times.[11] All participants in all wars believed that the goal they wanted to reach was necessary and noble, while the opposing side was criminal and bent on destroying their country and their people.[12] This reasoning is also present in cases involving so-called humanitarian interventions, a concept that is being introduced into the sphere of international law with the aim of justifying the use of military force in cases when one or a few countries decided that doing so would be justified.

Alongside the well-developed corpus of laws that are applied in war – *jus in bello*, the, so-called,. right to war – *jus ad bellum* and, especially in the later decades of the 20th century, the right against war – *jus contra bellum* are being developed.[13] Throughout history, countries have used various pretexts to initiate military conflicts (*casus belli*). However, there is still no consensus regarding the reasons that would justify the use of force in international relations unless a country is not under attack itself.[14] Towards that goal, during the last decades, there has been an increasing amount of work on defining the legal institutes that would allow the use of military force under precisely defined circumstances, which are most frequently referred to under the notion of humanitarian intervention[15] with the aim of legalizing the use of force without the previous authorization by the Security Council. The legalization of the humanitarian intervention would expand the range of exceptions from the rule on the prohibition of the use of military force in international relations, and thereby increase the amount of cases in which the use of force would be applied without being considered illegal or regarded as an acts of aggression in view of the provisions of the Rome Statute.

This notion of humanitarian intervention, which certain authors regard as newly developed customary law, would have significant impact in the sphere of international criminal law. It would seriously raise the question of the legality of the use of force between countries, and by the same token, it would

[11] Cf.: Holbert Turney-High, H., Roland, A. (1971). *Primitive war: its practices and concepts*. Columbia: University of South Carolina Press.

[12] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 4.

[13] Kemp, G. (2010). *Individual criminal liability for the international crime of aggression*. Oxford: Intersentia, 47–48.

[14] Ruys, T. (2010). *"Armed attack" and Article 51 of the UN Charter: customary law and practice*. New York: Cambridge University Press, 54.

[15] Goodman, R. (2006). Humanitarian Intervention and Pretexts for War. *The American Journal of International Law,* 100 (1), 107–141, 111.

impact the definition of an act of aggression as an essential element of the substance of the crime of aggression. In line with these observations, this article will seek to place humanitarian intervention in the context of the crime of aggression and the Rome Statute in its entirety in order to draw a conclusion about its impact on potential decisions of the International Criminal Court.

THE CRIME OF AGGRESSION IN THE SENSE OF ARTICLE 8 bis OF THE ROME STATUTE

Article 8bis of the Rome Statute consists of the introductory part (*chapeau*) which defines the general elements[16] of the crime of aggression and it is contained and is located in the first paragraph of this Article as well as a special part that defines the notion of the crime of aggression more closely and lists specifications that constitute this crime. In that sense, this article defines the crime of aggression as

> "...the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations".[17]

Paragraph 2 of the same Article defines aggression as

> "...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."[18]

As when dealing with other crimes within the jurisdiction of the International Criminal Court, each listed element of the substance of the crime has to be realized through at least one of the defined actions of incrimination in one of the defined ways by a party that meets the defined standards. In what follows, we will provide an overview of the individual elements of Article 8 bis while bearing in mind the general elements as well as those elements that are common to all specific acts of aggression.

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[16] Ristivojević, B. (2010). „Opšti elemenat" zločina protiv čovečnosti. *Collection of Papers of the Faculty of Law in Novi Sad,* 44 (2), 229–251, 230.

[17] *Rome Statute* (2010), *Op. cit.,* Art. 8 *bis,* para. 1; Translation from Stojanović, Z. (2012). *Međunarodno krivično pravo*. Belgrade: Pravna knjiga, 114.

[18] Rome Statute (2010), *Op. cit.,* Art. 8 *bis,* para. 2; See: Stojanović, Z. (2012). *Op. cit.,* 114.

"The Crime of Aggression"

The central element of Article 8 bis is the notion of the "crime of aggression", which appears for the first time in international law in this form. The highest significance of the newly adopted name is in creating the distinction between the crime of aggression as an individual act, which is subject to prosecution before the International Criminal Court and "the acts of aggression" as actions undertaken by states.[19] In this way, Article 8 bis reflects a dual nature of the crime of aggression whose objects of protection are collective interests, peace, security, and global wellbeing[20] and which unities the collective element (act of aggression by a state as an entity) and the individual element (the crime of aggression itself as an action of an individual).[21]

"Planning, preparation, initiation and execution"

The phrase "planning, preparation, initiation and execution" is almost identical to the provision contained in the Statute of the International Military Tribunal at Nuremberg[22], as well as the Statute of the International Military Tribunal for the Far East.[23] The basic difference is reflected in the use of the term "execution" given that the mentioned statutes use the term "carrying out an aggressive war" instead of it.[24]

When it comes to the word "planning", it seems that this form implies the possibility of prosecution even in the case of making plans for a future execution of the act of aggression on condition that such an act of aggression exhibits the remaining elements contained in Article 8 bis, paragraph 1, of the

[19] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 586–587.

[20] Bassiouni, M. C. (2014). *Introduction to International Criminal Law*. Leiden: Martinus Nijhoff, 227.

[21] Ambos, K. (2014). *Treatise on International Criminal Law: Volume II The Crimes and Sentencing*. Oxford: Oxford University Press, 186.

[22] European Advisory Commission, *The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, London, 1945, Art. 6, para. 2, line a).

[23] Supreme Commander for the Allied Powers, *International Military Tribunal for the Far East Charter*, Tokyo, 1946, Art. 5, line a.; Zimmermann A., Freiburg E. (2016). *Op. cit.*, 587.

[24] The Charter of the International Military Tribunal. (1945). *Op. cit.*, Art. 6, para. 2, line a).

Statute even if the aggression does not take place.[25] However, if we take into account the content of the elements of the crime, it is apparent that the act of aggression must be carried out.[26] The stance that this provision of Act 8 bis does not prescribe punishment in case an act of aggression was never committed is entirely in accordance with international customs, bearing in mind that the existing precedents deal exclusively with acts of aggression that were carried out,[27] i.e., they require the actual use of force.[28] The central place in the notion of the *planning* of an act of aggression belongs to the (direct) premeditation of the perpetrator, the so-called *animus aggressionis*,[29] even though some authors, including Cassese, are of the view that the act of aggression can be considered even through recklessness.[30] In practice, the formation of premeditation on the part of individual civilian or military leaders of a country is the first step in the process of planning an act of aggression.[31] At the moment when a leader shares their plans with other individuals who are in positions that allow them to efficiently control or manage political or military activities of a country and when an agreement is reached among these individuals, it is considered that the action of planning has begun.[32] It is held that the action of planning an act of aggression has been carried out, for instance, by taking part in meetings in which plans to attack another country were formulated.[33] Sayapin points out that premeditation, *animus aggressionis*, is the precise

[25] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 588.

[26] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 588; International Criminal Court, *Elements of Crimes*, New York, Kampala, 2011, ISBN No. 92-9227-232-2, available at: https://www.refworld.org/docid/4ff5dd7d2.html, Crime of Aggression, Element no. 3.

[27] Zimmermann, A., Freiburg, E. (2016). *Op. cit.*, 588.

[28] *Discussion paper 1 The Crime of Aggression and Article 25, paragraph 3, of the Statute*, ICC-ASP/4/32, Annex II.B, 380.

[29] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 228.

[30] Cassese, A. (2003). *International Criminal Law*. Oxford: Oxford University Press, 115; Murphy, S. D. (2006). *Principles of international law*. Toronto: Thomson & West, 419.

[31] Sayapin, S. (2014). *Op. cit.*, 228.

[32] Sayapin, S. (2014). *Op. cit.*, 228.

[33] McDougall, C., (2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press, 187; Klamberg, M. (2017). *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic Epublisher, 153, фуснота 151; Zimmermann A., Freiburg E. (2016). *Op. cit.*, 588.

distinctive element that qualifies planning military actions, as a sovereign right of every country, as an international crime.[34]

The phase of *preparation* immediately follows the phase of *planning* a crime of aggression.[35] The notion of *preparation* entails the undertaking of practical steps towards the realization of the previously arranged plans.[36] The preparatory actions can be divided into two groups: the actions that are directed towards the creation of the material conditions for the execution of a criminal act and organizational preparatory actions.[37] In order to consider a particular person criminally responsible for preparation, the preparatory action in question must be necessary for the subsequent execution of the act of aggression to such an extent that the execution would be impossible or significantly more difficult without it. [38]

The initiation of the act of aggression represents a formula *corpus delicti* of the crime of aggression[39] and it manifests itself in the use of military force itself.[40] In this phase, the perpetrator is typically conscious of the future illegal consequences.[41] One can accept the view that the action of aggression is initiated already at the point when the order about the use of force against another country was given.[42] However, the moment of the initiation of the action depends, for the most part, on the concrete manifestation of the act of aggression.[43] The significance of the initiation of the act of aggression is reflected in the fact that it is the *conditio sine qua non* for the existence of a crime of aggression in the sense of planning and preparing a criminal act that

[34] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 229.

[35] Sayapin, S. (2014). *Op. cit.*, 229.

[36] Radzinowicz, L. (1969). *Ideology and crime*. London: Columbia University Press, 52; Greenspan, M. (1959). *The Modern Law of Land Warfare*. Berkeley: University of California Press, 455.

[37] eds. Kudryavtsev, V.N., Luneev, V., Naumov, A.V., (2012). *Ugolovnoe pravo Rossii: Osobennaya chast*. Moscow: Feniks, 237, quoted in: Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 229.

[38] Sayapin, S. (2014). *Op. cit.*, 230.

[39] *Ibid.*, 230.

[40] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 590.

[41] Sayapin, S. (2014). *Op. cit.*, 230.

[42] Sayapin, S. (2014). *Op. cit.*, 230-231.

[43] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 590.

was discussed previously in greater detail.[44] On the other hand, the initiation of the act of aggression, by its very nature, does not require the compilation of this criminal act, and in that sense, it could be reduced to an attempted crime, which is regulated in Article 25, paragraph 3 bis, of the Statute[45]. Consequently, Ambos considers the inclusion of initiation as a form of carrying out this crime superfluous.[46]

The execution of the act of aggression comprises all the actions that follow the initiation of the act of aggression[47] and it represents a material corpus delicti of a crime of aggression, which presupposes the inevitability of the consequences of a carried out crime.[48] For the manifestation of these criminal consequences, the existence of a real military attack is necessary given that in situations in which aggressive efforts of countries are suppressed in one of the three stages preceding the execution, one would speak of planning, preparation, or initiation of the act of aggression and not its execution.[49] Factual characteristics and consequences of a committed crime of aggression have a direct impact on the establishment of its character, its severity, and scope, as well as the essential components of the substance of the crime of aggression,[50] which will, in turn, affect the existence of criminal responsibility of the perpetrators. The action of the act of aggression itself presupposes the participation of persons who did not participate in the actions that preceded the execution in any way,[51]or the soldiers who carry out the act of aggression physically through participation in the conflict.[52]

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[44] Ambos, K. (2014). *Treatise on International Criminal Law: Volume II The Crimes and Sentencing*. Oxford: Oxford University Press, 209.

[45] Rome Statute (2010), *Op. cit.,* Art. 25, para. 3 bis, and Art. 25, para. 3, line. (f).

[46] Ambos, K. (2014). *Op. cit.*, 209.

[47] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 590.

[48] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 232.

[49] *Ibid*., 232.

[50] *Ibid.*, 232.

[51] McDougall, C., (2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press, 188.

[52] Barriga, S. Against the Odds: The Results of the Special Working Group on the Crime of Aggression. објављено у: Bellelli, R. (2010). *International Criminal Justice Law and Practice from the Rome Statute to Its Review.* Farnham: Ashgate Publishing, 627.

"By a person in a position effectively to exercise control over or to direct the political or military action of a State"

According to its nature, the crime of aggression can be carried out only by the highest government officials, i.e. persons in leadership positions.[53] The rule of the responsibility of government officials has its roots in the practice of the Nuremberg Tribunal where, in the *Ministries* case, it was determined that only the persons with particular ranks in the government structures were in the possession of adequate means to carry out the act of aggression.[54]

According to certain authors, the phrase "persons in leadership positions", at the very least, refers to presidents of countries and governments as well as defence ministers and other military leaders such as high ranking generals.[55] This, however, does not exclude the responsibility of individuals who, despite not occupying formal leadership positions, possess such a degree of influence on the foreign policy and military activities of a country, which they could direct towards acts of aggression.[56] In accordance with the text of Article 8 bis, the *de facto* ability to control and direct political and military activities of a country,[57] rather than a formal title, represents the decisive factor in determining the fulfilment of this element.[58] Furthermore, given that the Statute prescribes that the perpetrator must be in the position to *exercise effective control* or *direct,* it seems that the crime of aggression could be carried out even through the functions of oversight provided that the perpetrator had effective influence on the actions that lead to the act of aggression.[59]

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[53] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 590.

[54] The Ministries Case, Case No. 11, United States v. Weizsaecker et al., Opinion and Judgment and Sentence, Green Series, Vol. 14 at 308, Mil. Trib. No. 4, 13 April 1949, 321–322.

[55] Heinsch, R. (2010). The Crime of Aggression after Kampala: Success or Burden for the Future. *Goettingen Journal of International Law,* 2, 713–743, 722.

[56] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 260.

[57] Klamberg, M. (2017). *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic Epublisher, 154, reference 155; McDougall, C., (2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. Cambridge: Cambridge University Press, 181.

[58] Jessberger, F., Werle, G. (2014). *Principles of International Criminal Law*. Oxford: Oxford University Press, 542.

[59] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 591.

"An act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations"

The final part of the first paragraph of Article 8 bis offers a more precise definition of the act of aggression. Namely, in order to be considered an act of aggression for the purposes of Article 8 bis, the use of force on the part of a foreign country must be sufficiently illegal, destructive, and far reaching to satisfy the criteria of character, gravity, and scale contained in the criterion of manifest violation of the UN Charter.[60]

With regard to the violations of the UN Charter, we must devote some attention to Article 2, paragraph 4, of the Charter, which forbids threats of force as well as the abuse of force.[61] It is indisputable, however, that the Charter prescribes two exceptions to this rule, which affect the existence of the decision of the Security Council and the right to self-defence from Article 51 of the Charter. Given that Article 8 bis of the Rome Statute references the Charter directly, the same exceptions would have to be applied to the crime of aggression in the sense of the Rome Statute.[62]

In order to restrict the range of situations in which it would be possible to consider an undertaken action as an act of aggression in the sense of Article 8 bis, the phrase "manifest violation" was added to the text of this Article.[63] This is an objective qualification which is not affected by the subjective impression of the victim of aggression.[64] Certain authors believe that the purpose of the given provision lies in the exclusion of "grey area" cases, especially when it comes to humanitarian interventions.[65]

The criterion of manifest violation of the Charter has a twofold function: on the one hand, it serves the purpose of eliminating border conflicts, which

[60] Sayapin, S. (2014). *Op. cit.*, 261; Schüller, A. (2008). 'Gravity' Under The Rome Statute: Procedural Filter or Instrument of Shaping Criminal Policy?. *Humanitäres Völkerrecht Informationsschriften,* 21 (2), 73–81.

[61] Charter of the United Nations (1945). *Op. cit.*, Art. 2, para. 4.

[62] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 593.

[63] Rome Statute (2010). *Op. cit.,* Art. 8 *bis,* para. 1.

[64] Klamberg, M. (2017). *Commentary on the Law of the International Criminal Court*. Brussels: Torkel Opsahl Academic Epublisher, 155, reference 157.

[65] Klamberg, M. (2017). *Op. cit.*, 155, reference 157; O'Connell, M. E., Niyazmatov, M. (2012). What is Aggression? Comparing the Jus ad Bellum and the ICC Statute. *Journal of International Criminal Justice* 10, 189–207, 203–204; Cryer, R., Friman, H., Robinson, D., Wilmshurst, E. (2010). *An Introduction to International Criminal Law and Procedure*. New York: Cambridge University Press, 321.

would not justify prosecution before the International Criminal Court, while, on the other, it leaves out from the jurisdiction of the Court those actions whose illegal character is at best disputable.[66] Certain authors accept the view according to which a violation of the UN Charter has to be of a certain character, gravity, and scale in order to be considered *manifest*.[67]

The criterion of *character* has to do with the nature of the particular act of aggression in question,[68] i.e. the real subjective motivation of the persons responsible for the use of force.[69] In this regard, the distinction is made between those acts that can be considered aggressive for the purposes of the Rome Statute and acts that could be seen as exceptions from Article 51 of the Charter. However, following the dynamics of international relations, the development of the doctrine of humanitarian intervention as an institute could create an additional exception from the prohibition on the use of force, and which according to certain authors, should not be included into the crime of aggression.[70] The notions of gravity and scale are tightly related and it is often difficult to differentiate between them.[71] However, the severity of the violation of the UN Charter can be understood as a qualitative criterion, which is primarily connected to the seriousness and significance of the committed violation.[72] This criterion pertains to the nature of the means and methods that

[66] Barriga, S. Negotiating the Amendments on the crime of aggression, published in: Kreß, C., Barriga, S. (2012). *The Travaux Préparatoires of the Crime of Aggression*. New York: Cambridge University Press, 29.

[67] Rome Statute (2010), *Op. cit.,* Art. 8 *bis,* para. 1.

[68] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 597.

[69] Root, J. L. (2013). First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention. *University of Baltimore Journal of International Law,* 2, 63–99, 88.

[70] DeNicola, C. (2008). A Shield for the 'Knights of Humanity': The ICC Should Adopt a Humanitarian Necessity Defence to the Crime of Aggression. *University of Pennsylvania Journal of International Law* 30, 641–689, 641; Leclerc-Gange, E., Byers, M. (2009). A Question of Intent: The Crime of Aggression and Unilateral Humanitarian Intervention. *Case Western Reserve Journal of International Law 41*, 379–390, 379.

[71] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 597.

[72] Van Schaack, B. (2011). The Crime of Aggression and Humanitarian Intervention on Behalf of Women. *International Criminal Law Review* 11, 477–493, 486; Root, J. L. (2013). *Op. cit.*, 91.

were used,[73] as well as the damage that was done.[74] The scale of the violation of the UN Charter is a quantitative element, which has to do with the level or scope of the act of aggression.[75] The question of scale should be addressed in light of the number of casualties or geographical spread of the act of aggression.[76] According to Zimmermann, the more widespread and longer lasting the use of force is, the easier it is to reach the conclusion that the criterion of scale is fulfilled.[77]

Only if following the evidence hearing, the relevant court determines that each of these standards was fulfilled, it would be possible to speak about the existence of a manifest violation of the UN Charter and the manifestation of the substance of the crime of aggression.[78]

The act of aggression in the sense of Article 8 bis of the Statute

Article 8bis prescribes that an act of aggression presupposes

> "...the use of military force on the part of one country directed against the sovereignty, territorial integrity or political independence of another country or its use in any other way that is not consistent with the UN Charter."[79]

In this way, the authors of the text of the Statute accepted the stance of the authors of Resolution 3314,[80] according to which the implementation of additional qualifying elements excludes low-level cases, which, according to their nature, should not be considered as acts of aggression in the sense of the Statute.[81]

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[73] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 597.

[74] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 260.

[75] Zimmermann, A., Freiburg, E. (2016). *Op. cit.*, 598; Sayapin, S. (2014). *Op. cit.*, 260; Root, J. L. (2013). First Do No Harm: Interpreting the Crime of Aggression to Exclude Humanitarian Intervention. *University of Baltimore Journal of International Law,* 2, 91, 94.

[76] Office of the Prosecutor, *Policy paper on preliminary examinations*, The Hague, 2013, para. 62.

[77] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 598.

[78] Jessberger, F., Werle, G. (2014). *Principles of International Criminal Law*. Oxford: Oxford University Press, 549.

[79] Rome Statute (2010), *Op. cit.,* Art. 8 *bis,* para. 2..

[80] UN General Assembly, *Definition of Aggression*, A/RES/3314, 1974, available at: https://www.refworld.org/docid/3b00f1c57c.html, Art. 1.

[81] Broms, B. (1977). The Definition of Aggression. *Recueil des Cours de l'Academie de Droit International* 154, 299–399, 346, quoted in: Dinstein, Y. (2001). *War, aggression and self-defence*. Cambridge: Cambridge University Press, 116.

Relying on the more restrictive approach relative to Article 2, paragraph 4 of the UN Charter,[82] the Statute defines as aggression only the use of military force,[83] excluding the use of political and economic force.[84] Furthermore, the Statute prescribes that only a country can commit and act of aggression, which unambiguously excludes the possibility that paramilitary or terrorist groups could commit aggression.[85]

With the aim of filling potential legal blank spots,[86] a provision which forbids the use of force "in any other way that is not consistent with the UN Charter"[87] was added to the definition of the act of aggression. The cited provision retained the formulation from the Resolution 3314, which many countries did not want to give up, whereby the desire for the addition of the qualifier "illegal" was fulfilled to a certain extent. Simultaneously, the provision enables that the exceptions for which the use of force in the sense of the UN Charter is allowed remain out of the reach of Article 8 bis of the Statute.[88] In this way, it was made explicit that all cases of the use of force without the consent of the attacked country, without the permission of the Security Council as well as those that were not committed in self-defence will be considered contrary to the UN Charter and illegal in the sense of the provisions of Article 8 bis of the Statute.[89] In this way, the fear that the definition of the crime of aggression could inadvertently apply to those cases which would fall under one of the exceptions from the prohibition of the use of force, and which are, as such, allowed, was assuaged.[90] The spectrum of cases in which the use of

[82] Charter of the United Nations (1945). *Op. cit.*, Art. 2, para. 4.

[83] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 604.

[84] Broms, B. (1977). The Definition of Aggression. *Recueil des Cours de l'Academie de Droit International*, 299, 342, quoted in: Zimmermann A., Freiburg E. (2016). *Op. cit.*, 604.

[85] Sayapin, S. (2014). *The crime of aggression in international criminal law: historical development, comparative analysis and present state*. The Hague: Asser Press, 260.

[86] Zimmermann A., Freiburg E. (2016). *Op. cit.*, 606.

[87] Rome Statute (2010), *Op. cit.,* Art. 8 *bis,* para. 2.

[88] Broms, B. (1977). The Definition of Aggression. *Recueil des Cours de l'Academie de Droit International*, 299, 343, quoted in: Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 606.

[89] Kreß, C. The State Conduct Element, published in: Kreß, C., Barriga, S. (2017). *The Crime of Aggression: A Commentary*. Cambridge: Cambridge University Press, 454.

[90] Anggadi, F., French, G., Potter, J. Negotiating the Elements of the Crime of Aggression', published in: Barriga, S., Kreß, C. (2012). *The Travaux Préparatoires of the Crime of Aggression*. Cambridge: Cambridge University Press, 72.

force is still allowed is being expanded, as we will show, most often through the advocacy of the doctrine of humanitarian intervention.

HUMANITARIAN INTERVENTION AS AN INSTITUTE OF INTERNATIONAL LAW

As mentioned earlier, Article 2, paragraph 4 of the UN Charter prohibits threats and the use of force in international relations,[91] with exceptions in the form of the existence of the permission of the Security Council[92] and the right to necessary self-defence from Article 51 of the Charter.[93] The special category of exceptions from the prohibition of the use of force in international relations is dedicated to cases when a country on whose territory force is supposed to be deployed gave its permission.[94]

Humanitarian intervention represents a deviation from the principle of the prohibition of the use of force. In the broadest sense, the notion of humanitarian intervention denotes acts of diplomatic, economic or military character aimed at preventing the violations of human rights.[95] More narrowly, humanitarian intervention is defined as the use of military force with the aim of preventing or stopping gross violations of human rights on the territory of a foreign country,[96] which is considered to be a last resort option even by its proponents.[97] The concept of humanitarian intervention opens the door to the legalization of the use of force against another country with the aim of preventing disregard or violations of human rights.[98] The examples that have been described as humanitarian interventions are the attack on the Federal Republic

[91] Charter of the United Nations (1945). *Op. cit.*, Art. 2, para. 4.

[92] Charter of the United Nations (1945). *Op. cit.*, Art. 42.

[93] Charter of the United Nations (1945). *Op. cit.*, Art. 51.

[94] Scharf, M. P. (2018). Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Interventions. *Chicago Journal of International Law* 19 (2), 1-29, 11.

[95] Greenwood, C. (2002). The Case of Kosovo. *Finnish yearbook of international law,* 10, 141–175, 161.

[96] Reisman, M., McDougal, M. Humanitarian Intervention, published in: Lillich, B. (1973). *Humanitarian intervention and the United Nations*. Charlottesville: University Press of Virginia, 178.

[97] Dinstein, Y. (2005). *War, Aggression and Self-Defence*. Cambridge: Cambridge University Press, 82.

[98] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 601.

of Yugoslavia in 1999, India's intervention in Bangladesh in 1971, Vietnam's intervention in Cambodia in 1978, Tanzania's operations in Uganda in 1979, the US intervention in Grenada in 1983,[99] as well as the joint intervention by the US, the UK, and France in Syria in 2018.[100]

The legality of humanitarian intervention in international law

The question of the legality of humanitarian intervention in the international community has been raised on multiple occasions, whereby the opinions were mostly opposed to its application.[101] For example, the intervention in Bangladesh was widely condemned by the international community even though it had been emphasized that the basic motive of the intervention was humanitarian in character.[102] A similar situation arouse with respect to the intervention in the Federal Republic of Yugoslavia. A group of countries took the stance that the potential humanitarian catastrophe does not justify the unilateral actions of NATO member states in contravention of the decision by the Security Council.[103] The listed cases are related to the main objections to the notion of humanitarian intervention dealing with the opportunistic use of

[99] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 601.

[100] Scharf, M. P., Sterio, M., Williams, P. R. (2020). *The Syrian Conflict's Impact on International Law*. Cambridge: Cambridge University Press, 59.

[101] Goodman, R. (2006). Humanitarian Intervention and Pretexts for War. *The American Journal of International Law*, 111.

[102] Schachter, O. (1984). The Right of States to Use Armed Force. Michigan Law Review 82 (5–6), 1620–1646, 1629; UN General Assembly, *Question considered by the Security Council at its 1606th, 1607th and 1608th meetings,* A/RES/2793(XXVI), 7 December 1971, available at: http://www.worldlii.org/int/other/UNGA/1971/43.pdf.

[103] China and Russia took this stance on the 3988th meeting of the Security Council on March 23, 1999, S/PV.3988; UN Security Council, *Belarus, India and Russian Federation: draft resolution*, S/1999/328, 26. March 1999; UN Security Council, *Letter dated 9 April (S/1999/451) from the representative of South Africa addressed to the President of the Security Council, transmitting a statement issued on 9 April 1999 on behalf of the Movement on Non-Aligned Countries*, S/1999/451, 21 April 1999; UN General Assembly, *Letter dated 26 March 1999 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General on behalf of the Rio Group*, A/53/884, 26 March 1999; UN General Assembly, *Letter dated 5 May 2000 from the Permanent representative of Nigeria addressed to the United Nation addressed to the President of General Assembly on behalf of the Group of 77*, UN Doc A/55/74, 12 May 2000, para. 54.

humanitarian motives as justifications for the use of military force against other countries.[104]

On the other hand, a range of countries and authors have been presenting arguments in favour of the institute of humanitarian intervention for years. In these endeavours, they often invoke the doctrine of the *Responsibility to Protect*, which has emerged from the earlier right to intervene. It is a concept that came into existence as a product of the work of the Canadian International Commission on Intervention and State Sovereignty presented in the Report of the Commission in December 2001.[105] Starting from the theory of just war, the Report sets the standards whose fulfilment justifies a humanitarian intervention. These standards are: the existence of "just cause", the fact that the use of force was the last resort, the fact that the use of force is proportional to the threat, and that there is a reasonable possibility that the use of force will result in the cessation of civilian suffering[106] Only when all these criteria are fulfilled could it be considered that the use of force represents justified humanitarian intervention.

One should not lose sight of the fact that humanitarian intervention does not find its legal basis in any international legal act. On the contrary, as we saw, the use of force in international relations is prohibited. In order to allow for the possibility of discussing the legality of humanitarian intervention, certain authors seek to represent it as part of international customary law, whose strength can be compared to the most significant international documents such as the UN Charter.[107]

In order to become part of international customary law, a rule has to satisfy two conditions: the existence of a widespread practice among countries and a sufficient level of *opinio iuris,* i.e. the conviction of the legal community about the obligatoriness of a particular practice.[108] The problem that arises when it comes to the issue of international customary rules concerns the

[104] Brown, B. S. (2000). Humanitarian Intervention at a Crossroads. *William and Mary Law Review,* 41 (5), 1683–1741, 1727; Kritsiotis, D. (1998). Reappraising Policy Objections to Humanitarian Intervention. *Michigan Journal of International Law,* 19 (4), 1005–1050, 1020.

[105] International Commission on Intervention and State Sovereignty, *Report: The Responsibility To Protect*, Ottawa, December 2001.

[106] Report: The Responsibility To Protect (2001). *Op. cit.,* 4.19, 4.32.

[107] United Nations, *Statute of the International Court of Justice.* San Francisco, 1945, Art. 38, para. 1.

[108] *Statute of the International Court of Justice* (1945). *Op. cit.,* Art. 38, para. 1, line. b); International Court of Justice, North Sea Continental Shelf Cases (*Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*), I.C.J. Reports 1969, p. 3, 20 February 1969, available at: https://www.refworld.org/cases, ICJ,50645e9d2.html, 44, para. 77.

length of the period that is necessary for them to form.[109] There are no uniform standards which would define the amount of time and the number of actual situations that are necessary for a rule to obtain a character of an international custom. Given that the relations in the international community are becoming more and more dynamic while the most significant international documents are difficult to change,[110] the doctrine represented an attempt to offer a solution through the idea of "international constitutive moments"[111] or, as Professor Scharf calls them, "*Grotian Moments*".[112]

Grotian Moment

Groatian moment is a term that was coined by Richard Falk in 1958.[113] Professor Scharf uses this term to signify the process in which new rules as well as doctrines of international customary law come into existence exceptionally fast, usually as a consequence of fundamental changes in the international community.[114] It is necessary to make a difference between these situations and cases which fall within the theory of "instant customs", which was formulated by Professor Cheng.[115] While the theory of Groatian moments derives from the widespread acceptance or approval of countries pertaining to newly established rules, the theory of customs relies on the resolutions of the General Assembly of the United Nations, which is pointed out as an essential shortcoming given that these do not have obliging effects, and as such, they do not reflect a real stance of the countries that voted for their adoption.[116]

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[109] Scharf, M. P. (2013). *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*. Cambridge: Cambridge University Press, 58.

[110] Roberts, A. E. (2001). Traditional and Modern Approaches to Customary International Law: A Reconciliation. *American Journal of International Law,* 95, 757–791, 767.

[111] Martinez, J. S. (2003). Towards an International Judicial System. *Stanford Law Review* 56 (2), 429–529, 463; Sadat, L. N. (2007). Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror. *George Washington University Law Review,* 75, 1200–1248, 1206.

[112] Scharf, M. P. (2010). Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change. *Cornell International Law Journal,* 43 (3), 439–469, 440.

[113] Scharf, M. P. (2010). *Op. cit.,* 444.

[114] Scharf, M. P. (2010). *Op. cit.*, 444.

[115] Cheng, B. (1965). United Nations Resolutions on Outer Space: „Instant" International Customary Law?. *Indian Journal of International Law,* 3, 23–48, 23.

[116] Scharf, M. P. (2010). *Op. cit.,* 446.

The founding of the Nuremberg Tribunal is singled out as the most important example of a Groatian moment pointed out in literature.[117] Among the newer examples that are mentioned is the NATO intervention in the Federal Republic of Yugoslavia in 1999, characterized as an instance of a humanitarian intervention,[118] but above all else the bombing of Syria in 2018 in relation to which Great Britain offered a justification invoking the principles of the "responsibility to protect,"[119] which has been discussed in this article. The use of chemical weapons on the territory of Syria is used as the justification for the intervention, as is the necessity to prevent such actions with the aim of protecting international peace and security.[120] In the case of Syria, several reasons that would justify defining the humanitarian intervention as a Groatian moment are stated, which are primarily linked to subsequent reactions of the international community, and the three countries that carried out air strikes (US, UK, and France) advocated the legality of the intervention, 38 countries expressed their support for the actions, while eleven countries explicitly claimed that humanitarian intervention without the permission of the Security Council is illegal.[121] Taking all of this into account, certain authors took the stance that the conditions were fulfilled for the intervention in Syria to be considered legal, as an institute of international customary law, but even these authors restrict the scope of this stance to situations where there is a danger of the use of chemical weapons or such weapons have been used,[122] because the use of such weapons is prohibited by the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction.[123]

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[117] Gassama, I. (2004). International Law at a Grotian Moment: The Invasion of Iraq in Context. *Emory International Law Review,* 18 (1), 1–52, 33–34.

[118] Sterio, M. (2009). The Kosovar Declaration of Independence: 'Botching the Balkans' or Respecting International Law?. *Georgia Journal of International and Comparative Law* 37, 267–304, 271–272; Sterio, M. (2011). A Grotian Moment: Changes in the Legal Theory of Statehood. *Denver Journal of International Law & Policy,* 39 (2), 209–237, 213–214.

[119] Scharf, M. P. (2018). *Op. cit.,* 22.

[120] U. N. SCOR, 73d Sess., 8233d mtg., Provisional Verbatim Record of the Security Council, Threats to International Peace and Security: The Situation in the Middle East, U.N. Doc. S/PV.8233, 14 April 2018.

[121] Scharf, M. P. (2018). Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Relating to Humanitarian Interventions. *Chicago Journal of International Law*, 24–25.

[122] Scharf, M. P., Sterio, M., Williams, P. R. (2020). *The Syrian Conflict's Impact on International Law*. Cambridge: Cambridge University Press, 89.

[123] Organisation for the Prohibition of Chemical Weapons, *Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction.* Paris, 1993.

Exclusively for the purposes of this article, we will start from the position that humanitarian intervention has become a part of international customary law in order to examine its effects on the decisions of the International Criminal Court.

THE LINK BETWEEN THE CRIME OF AGGRESSION AND HUMANITARIAN INTERVENTION

As was presented, humanitarian intervention is primarily an institute of international law. However, if we assume that it has indeed become an international custom, its significance should not be underestimated in the sphere of criminal law, especially pertaining to the provisions of the Statute of Rome which prohibit the crime of aggression.

The act of aggression, as an important element of the substance of the crime of aggression is manifested in the form of the use of military force by one country against the sovereignty, territorial integrity or political independence of another country, or its use in any other way that violates the UN Charter,[124] which, in principle, represents the actions that could be subsumed under the notion of humanitarian intervention. Since the Statute ties the crime of aggression to the violations of the UN Charter in two places, the question arises whether humanitarian intervention could be considered a rule that would allow the exceptional use of force for the purposes of the Rome Statute if it is was granted the status of an international custom. According to Zimmerman, a simple interpretation of the purpose and goals of the Statute of Rome can lead to the conclusion that the provision of Article 8 bis is not restricted only to the provisions of the UN Charter but it can refer in parallel to existing international customary law.[125] Here, one should bear in mind the provision of Article 31, paragraph 3, line C of the Vienna Convention on the Law of Treaties in accordance with the relevant rules of international law, which would encompass international customs as well.[126]

In addition to the abovementioned, one could defend the position that the provisions of the Statute of the International Court of Justice, which recognizes international customs as a source of law, lead to the conclusion that international customs as a source of law are contained in the UN Charter

[124] Rome Statute (2010), *Op. cit.,* Art. 8 *bis,* para. 2.

[125] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, *594.*

[126] United Nations, *Vienna Convention on the Law of Treaties*, Vienna, 1969, Art. 31, para. 3, line c.

itself, given that the Statute of the International Court of Justice is found in the appendix of the UN Charter and that provisions of the Charter reference it directly.[127]

If one accepts that humanitarian intervention is an international custom, the Court would have to take a stance as to whether it would read the provision of Article 8 bis, paragraph 2 of the Statute as saying that the use of force must be in accordance with the UN Charter or that it is sufficient that the use of force be in accordance with the international customary law. Furthermore, if a court found it sufficient that the use of force should be addressed within the international customary law, the next task of a court would be to evaluate whether the application of force in question satisfied all the criteria of an act of aggression or whether there is room for the application of the institute of humanitarian intervention; whereby in cases where the Security Council or the International Court of Justice determined a crime of aggression was or was not committed, the court could reach the opposite conclusion.[128]

In cases where the Court found that the criteria for the use of force for the purpose of a humanitarian intervention as an exception to the rules about the use of force in international relations were fulfilled, the stance would be that the use of force does not constitute an act of aggression in the sense of Article 8 bis, para. 2 of Statute and, consequently, the crucial element of the substance of the crime of aggression from Article 8 bis, para. 2 of the Statute was not realized. Finally, in that case, the defendant could not be considered responsible for the crime of aggression.

HUMANITARIAN INTERVENTION AS A BASIS FOR THE EXCLUSION FROM CRIMINAL RESPONSIBILITY FROM ARTICLE 31 OF THE ROME STATUTE

Article 31, paragraph 1, line C of the Rome Statute prescribes that a person will not be criminally responsible if, at the time of the execution of the crime "they reacted rationally in order to defend themselves or others, in a way that is proportional to the degree of danger for the person in question, some other person or property that is being protected".[129] This is a norm that

[127] Charter of the United Nations (1945). *Op. cit.*, Art. 92.

[128] Zimmermann, A., Freiburg, E., Article 8bis Crime of Aggression, published in: Triffterer, O., Ambos, K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, *763.*

[129] Rome Statute (2010), *Op. cit.,* Art. 31, para. 1, line. (c); See: Law on the Ratification of the Rome Statute of the International Criminal Court (Official Gazette of the Federal Republic of Yugoslavia – International Treaties, no. 5/2001) Art. 31, para. 1, line (c).

is typical for most national legal systems, which is why we can characterize it as an international custom.[130] However, when dealing with this basis for the exclusion of criminal responsibility, it is necessary to point out the difference between personal defence and operational defence, where the latter is located in the domain of international law.[131] The last sentence of the quoted provision prescribes that the fact that "at the time of the execution of the criminal action, the person participated in a defensive operation of military forces, does not, by itself, represent the basis for the exclusion of criminal responsibility,"[132] which indicates that persons in leadership positions (as required by the provision of Article 8 bis, paragraph 2 of the Statute), like the soldiers themselves, could not rely on the exclusion from criminal responsibility from this Article in all cases. On the other hand, the possibility for the exclusion from responsibility on the basis of Article 31, paragraph 3 of the Statute remains.[133]

The abovementioned provision of Article 31, paragraph 3 of the Statute prescribes that "the Court can consider other bases for the exemption from criminal responsibility in addition to those cited in Paragraph 1 if those bases are prescribed in regulations that are applied following Article 21 of the Statute".[134] This norm points directly to the provisions that regulate the current sources of the law before the International Criminal Court, including the principles and foundations of international law comprising also international customary law.

Humanitarian intervention represents a potential basis for the exclusion from responsibility of a country in international public law. However, since the actions of a country are essentially the result of decisions and actions of natural persons, the situations in which their individual criminal responsibility is evaluated are sure to happen. If the Court took the stance that humanitarian intervention does not represent an exception from the prohibition of the use of force in accordance with the UN Charter, i.e. if all the necessary conditions to consider the use of force in a given case an act of aggression in the sense of Article 8bis, paragraph 2 of the Statute are met, the question is

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[130] ICTY, Prosecutor v. Kordić and Čerkez, Judgement, Trial Chamber, IT-95-14/2-T, 26 February 2001, пара. 451; Raimondo, F. (2008). *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*. Leiden: Martinus Nijhoff Publishers, 137; Klamberg, M. (2017). *Op. cit.,* 324.

[131] Eser, A. Article 31 Grounds for excluding criminal responsibility, објављено у: eds. Triffterer O., Ambos K. (2016). *The Rome Statute of the International Criminal Court: A Commentary*. Baden: Beck/Hart, 1125–1160, 1145.

[132] Rome Statute (2010), *Op. cit.,* Art. 31, para. 1, line (c).

[133] Eser, A. (2016). *Op. cit.,* 1146.

[134] Rome Statute (2010), *Op. cit.,* Art. 31, para. 3; See: Law on the Ratification of the Rome Statute of the International Criminal Court (*Official Gazette of the Federal Republic of Yugoslavia – International Treaties*, no. 5/2001) Art. 31, para. 3.

whether humanitarian intervention could be considered a basis for the exclusion from criminal responsibility in accordance with Article 31, paragraph 3 of the Statute.

From the explanation of the countries which have justified their use of force on the basis of the institute of humanitarian intervention, it follows that it represents a special operation of defending a third party, which could potentially be included in the provision of Article 31, paragraph 3 of the Statute. If the Court began to consider whether humanitarian intervention represents the basis for the exclusion from criminal responsibility in the sense of Article 31, paragraph 3 of the Statute, it would have to determine the fulfilledness of the conditions that are necessary for regarding the use of force as a humanitarian intervention, which represents a specific problem, given that the same is not precisely defined in international documents. In any case, it would be necessary to determine whether the actions of the accused which led to the use of force on the part of a foreign country were undertaken at least on the basis of "just cause", that the use of force represented the last resort option, that it was proportional to the threat, and that there was a reasonable possibility that the use of force would result in the cessation of the suffering endured by the civilian population.[135]

Therefore, this would be a point at which international public law would blend into international criminal law. Even though their separateness is undeniable, these are two branches that often intertwine, entangle, and influence each other. Bearing in mind that the principles and foundations of international law are one of the sources of law before the International Criminal Court, it is certain that future complex situations will demand the intervention of international public law even when dealing with questions such as individual criminal responsibility.

CONCLUSION

In this article, we attempted to answer the question whether humanitarian intervention can be considered as a basis for the exclusion from the illegality of actions that would otherwise be in the jurisdiction of the International Criminal Court. To answer this question with finality, it is first necessary to establish the international consensus regarding whether humanitarian intervention has acquired the character and the obligatoriness of an international customary rule. However, since no international organ, such as the Security Council, the International Court of Justice, and the International Criminal Court have not undertaken such consideration and reached an appropriate

[135] Report: The Responsibility To Protect (2001). *Op. cit.*, para. 4.19, 4.32.

decision, humanitarian intervention remains at the level of a doctrinal issue. Some authors, coming mostly from Anglo-Saxon legal systems, defended the thesis about the legality of humanitarian intervention by grounding it in different theories, the most recent of which is precisely the theory of the development of international customs via Grotian moments.

One should not lose sight of the fact that the situations that are being portrayed as humanitarian interventions are becoming more and more frequent, pressing the international community to take a stance about its legality. Even though neither the Security Council nor the International Court of Justice, as organs that are capable of directing the development of international public law, have not made their views on this matter public, it is not impossible that the International Criminal Court will address this issue in line with its capacities. Therefore, it is necessary to consider the scope that humanitarian intervention can have when it comes to the cases before the International Criminal Court.

Starting from the fact that the Rome Statute prohibits acts of aggression in a way that directly relies on the norms that regulate the use of force in international relations, humanitarian intervention, as a concept pertaining to the use of force between countries, can play an important role as a potential exemption from the rules in Article 2, paragraph 4 of the UN Charter. Its acceptance as part of the international customary law would give rise to the obligation of examining its manifestations in concrete cases before the International Criminal Court in order to determine whether the crime of aggression has been committed. Furthermore, because of the content of this institute, humanitarian intervention could have s certain impact on the establishment of criminal responsibility of defendants as persons that have made decisions about the actions of countries whose legality is being examined.

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