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THE WAY TO JUSTICE RESTORATION IN COUNTERACTION TO THE CRIME OF AGGRESSION

Abstract. The article is devoted to the search for the way to justice restoration in counteraction to the crime of aggression. In this context, international approaches to the definition of the crime of aggression in Ukraine, the crime of aggression in the Ukrainian legislation on criminal responsibility and the prosecution of crimes of aggression under national jurisdiction through case law study were investigated. This approach made it possible to consider the crime of aggression through the prism of international legal acts adopted by the League of Nations, the UN, the activities of international courts and tribunals, which contributed to the condemnation of the crime of aggression. The Rome Statute of the International Criminal Court became an important international legal act in condemning the crime of aggression. It was paid attention to the long-term Russian aggression against Ukraine with the correlation among the activities of international organizations, the international definition of the crime of aggression, the current national legislation and the activities of criminal justice bodies in Ukraine. At the same time, the methods of analysis and synthesis, deduction and induction, formal-legal, comparative-legal, historical-legal and other methods were applied, which in their combination made it possible to carry out a comprehensive study. The scientific novelty of the work consists in substantiating the possibility of bringing to criminal responsibility for certain manifestations of the crime of aggression not only in international institutions, but also in Ukraine. In addition, an important result of the study was the conclusion regarding the possibility of criminal liability within the jurisdiction of Ukraine not only of political leaders, but also of persons who played a special role in planning, preparing, unleashing or waging an aggressive war. At the same time, it is a prerogative to condemn political leaders within the limits of international jurisdiction. Study of Ukrainian judicial practice regarding registered criminal offenses under Art. 437 of the Criminal Code of Ukraine indicates that its development continues. In 2015–2017, five verdicts were found for six criminals who were not political leaders. In the future, certain limits of the application of Art. 437 of the Criminal Code of Ukraine. Coordination of the efforts of international and national criminal justice bodies regarding the prosecution of Russian political leaders for committing the crime of aggression also remains a promising direction.

Keywords: crime of aggression; war crimes; aggressive war; restoration of justice; justice; counteraction to criminal offences.

Introduction

The study of the crime of aggression and ways to restore justice in Ukraine became relevant only after the large-scale Russian aggression against Ukraine, which began on February 24, 2022. At the same time, aggressive Russian informational, economic and military policy was aimed at the occupation of the Autonomous Republic of Crimea, parts of the Donetsk and Luhansk regions was launched as minimum since 2014. However, it gained full strength with the beginning of a large-scale invasion threatening the destruction of Ukrainian state and people, which became one of the most dangerous challenges in ensuring peace in Europe and the world after the Second World War. The Russian aggression carried out is a threat not only against Ukraine, but also to other states and their alliances – the EU and NATO,

which share a common border with the aggressor state and provide assistance to Ukraine. This once again demonstrates the civilization gap between the aggressor and the countries that oppose such aggression directly or indirectly. Precisely because of the need to counter the crime of aggression against Ukraine, it is necessary to pay attention to the international legal and national definition of this crime, ways to restore justice in Ukraine, Europe and the world, since unpunished evil has the ability to return with new force.

1. International approaches in defining of crime of aggression in Ukraine

The conceptual development of the crime of aggression has come a long way to defining this phenomenon. After the First and Second World Wars,

several more localized wars, conflicts and crises, the international community came to the conclusion that it is necessary to respond and prosecute the guilty leaders for such aggression. The examples of international courts, the Nuremberg and Tokyo Tribunals, peace conferences, the establishment of the International Criminal Tribunal for Rwanda, and Kosovo Specialist Chambers have led to the concept of inevitable legal responsibility for international and war crimes, crimes against humanity, crime of aggression and genocide.

It is necessary to agree with Oleksandr Bazov that the concept of the crime of aggression began to take shape in the Middle Ages when solving the philosophical problem of “fair and unfair war” (Hugo Grotius, Francisco de Vitoria). The developments of the international community after the First World War within the framework of the League of Nations (the Covenant of the League of Nations, the League of Nations Declaration Concerning Wars of Aggression, etc.) (Bazov, 2018, s. 124). In the interwar period, an interesting international act that defined the crime of aggression was the London Convention, July 3, 1933 (Convention for the Definition of Aggression), signed by Romania, Estonian Republic, Latvian Republic, Polish Republic, Turkish Republic, Persia, USSR, Afghanistan and Finland. This act, which in some ways corresponds to modern international legal acts, used next definition: “the aggressor in an international conflict shall, subject to the agreements in force between the parties to the dispute, be considered to be the State which is the first to commit any of the following actions: 1) *Declaration of war upon another State*; 2) *Invasion by its armed forces, with or without a declaration of war, of the territory of another State*; 3) *Attack by its land, naval or air forces, with or without a declaration of war, on the territory, vessels or aircraft of another State*; 4) *Naval blockade of the coasts or ports of another State*; 5) *Provision of support to armed bands formed in its territory which have invaded the territory of another State, or refusal, notwithstanding the request of the invaded State, to take, in its own territory, all the measures in its power to deprive those bands of all assistance or protection*” (Art. 2) (Convention, 1933, July 3).

The European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (the Genocide Network) insists that attempts to criminalize the crime of aggression after First World War failed, but after Second World War this concept became topical with the establishment of the Nuremberg Tribunal (*The crime of aggression*, 2023, October, p. 7).

At the same time, these concepts worked in the context of victory and a “victor’s justice”. This approach and the weakness of international institutions make it impossible to administer justice in the ongoing

conflict and war, lack of access to the scenes where such crimes were committed, as well as to the persons who provoked and implemented such aggression. Today, a similar situation exists in Ukraine, as Russian aggression remains unstoppable, and the war of aggression continues to destroy Ukrainian identity, along with citizens, entire cities, towns, villages, its infrastructures, culture, history and language.

When defining the crime of aggression, Ukrainian legislation is primarily guided by the UN Charter. Thus, Article 1 of the UN Charter, which formulates the purposes and principles: “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace...” (*United Nations Charter [UN Charter]*, 1945, October 24). At the same time, Part 4 of Article 2 of the UN Charter provides that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. The fact that “the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security” (Article 39) blocks the realization of the purposes of the UN Charter (*UN Charter*, 1945, October 24). The fact that the aggressor in the attack on Ukraine was a member state of the UN Security Council made it impossible for the UN to neutralize Russian aggression.

The signs of the crime of aggression continued to be defined in other international legal acts. According to Resolution 3314 (XXIX) of the UN General Assembly, December 14, 1974, the following concept of aggression is provided: “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition” (Article 1 of the Resolution Annex). This resolution provides a list of actions that qualify as aggression regardless of a declaration of war:

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

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

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

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

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

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

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein” (*Definition of Aggression*, 1974, December 14) (Article 3 of the Resolution Annex). Moreover, the list of such acts is not exhaustive (Article 4 of the Resolution Annex). It is important that the Rome Statute of the International Criminal Court reproduces this definition of aggression (Article 8bis). The European network of contact points in relation to persons responsible for genocide, crimes against humanity and war crimes (the Genocide Network) insists that “as per the definition of Article 8bis, individual criminal responsibility for the crime of aggression may only be incurred by members of State leadership, subject to a threshold requirement as to the type of UN Charter violation” (*The crime of aggression*, 2023, October, p. 10). In our opinion, this approach to the definition of the crime of aggression is key, as it allows us to distinguish the crime of aggression from other international and war crimes, crimes against humanity, and genocide.

Since 2014, and especially since 2022, Russian aggression has gained maximum strength, acquiring all the features mentioned in international acts, combining these actions with war crimes and other serious crimes. Elizabeth Pollmann also points out that Russia’s military attack on Ukraine meets all the necessary requirements under Article 8bis of the Rome Statute of the International Criminal Court (Pollman, 2023, p. 717).

Ukraine has made numerous attempts to implement the Rome Statute of the International Criminal Court both before and after the large-scale invasion, February 24, 2022, but has only managed to recognize its jurisdiction.

In particular, after the Russian invasion of Donetsk, Luhansk regions and the Autonomous Republic of Crimea, on February 25, 2014, Ukraine adopted a statement to the International Criminal Court on the recognition by Ukraine of the jurisdiction of the International Criminal Court over crimes against humanity committed by senior state officials,

which led to particularly grave consequences and mass murder of Ukrainian citizens during peaceful protests between November 21, 2013 and February 22, 2014 (No 790-VII). On February 4, 2015, the Verkhovna Rada adopted a resolution (No 145-VIII) in the form of a statement “On Ukraine’s recognition of the jurisdiction of the International Criminal Court over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the terrorist organizations “DPR” and “LPR”, which led to particularly grave consequences and mass murder of Ukrainian citizens”. Subsequently, the International Criminal Court published the Office of the Prosecutor Annual Reports on the events on Independence Square, in Crimea and Eastern Ukraine (*International Criminal Court Report*, 2016, 2017, 2018, 2019). On December 14, 2020, the International Criminal Court published the Report of the Office of the Prosecutor on the Preliminary Examination Activities 2020, in which the Office concluded its preliminary analysis of subject-matter jurisdiction and found “reasonable basis to believe that crimes under the Statute has been committed both in the context of the situations in Crimea and Eastern Ukraine” (*Report on Preliminary*, 2020, December 14). The situation regarding criminal prosecution for aggression changed with the beginning of Russia’s unprovoked large-scale invasion against Ukraine on February 24, 2022. When the Russian army launched an aggressive attack from the territory of Russia and Belarus from the north, east and south, the international community became aware of the war’s goals of destroying Ukraine and Ukrainians. The Russian troops’ advance to the borders of the EU and NATO countries still do not seem to be the end of the war, which is accompanied by regular threats to the UK, Estonia, Latvia, Lithuania, Poland, the US, Finland and other countries.

Since the beginning of the large-scale invasion, 41 states have appealed to the International Criminal Court, whose jurisdiction Ukraine has recognized, for an investigation, which has immediately started in Ukraine (*Statement of ICC Prosecutor*, 2022, March 11; *Iryna Venediktova ta Prokuror*, 2022, Kviten 13). In general, the International Criminal Court has taken an active position in the prosecution of war criminals, documenting of war crimes and crimes against humanity evidence, and has also issued arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova for the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (*Situation in Ukraine*, 2023, March 17). At the same time, it seems that the International Criminal Court ignores the problem of prosecuting political leaders for the crime of aggression, obviously pointing to the

procedural features of the Rome Statute. Because of this declaration of Nuremberg Palace of Justice calls: 1) upon the international community to ensure the prosecution of crimes of aggression; 2) upon the international community to support the establishment of a tribunal to prosecute crimes of aggression as defined under international law committed on the territory of Ukraine; 3) upon States Parties to the Rome Statute of the International Criminal Court to amend the jurisdictional provisions governing the crime of aggression to align them with those applicable to the other crimes within the jurisdiction of the International Criminal Court (*Nuremberg Declaration*, 2023, May 8).

At the same time, the necessity of coordination between national and international justice systems is important today (it is possible that separate international courts / tribunals will be established to address the situation in Ukraine. For example, on April 28, 2022, the Parliamentary Assembly of the Council of Europe called for the creation of an ad hoc International Criminal Tribunal to prosecute those responsible for the crime of aggression against Ukraine – *PACE calls for the setting up*, 2022, April 28). Therefore, it was no coincidence that President of Ukraine Volodymyr Zelenskyy made a statement on April 3, 2022, regarding the “foundation of a special justice mechanism in Ukraine to investigate and prosecute every crime of the occupiers” (*Volodymyr Zelenskyy initiates*, 2022, April 3).

President Zelenskyy’s statement to establish a special justice mechanism in Ukraine is linked to the obvious need to create special investigative teams at both the interstate and inter-country levels. This approach is combined with the creation of the Joint Investigation Team (JIT), that was formed by Lithuania, Poland and Ukraine, March 25, 2022. Later Estonia, Latvia, Slovakia, Romania and also the Office of the Prosecutor at the International Criminal Court (ICC) and Europol with the support of Eurojust joined to JIT (*Joint investigation team*, 2023, March 24; *Eurojust and the war*, n.d.). This period Ukrainian law enforcement system has found itself in a rather difficult situation of necessity: 1) recording a huge amount of evidence; 2) carrying out procedural actions according to pre-war criminal procedural mechanisms; 3) lack of sufficient personnel to perform such tasks (due to the fulfillment of the duty of state defense, violation of the oath, lack of sufficient qualifications, etc.); 4) conducting criminal prosecution in situations of absence or death of perpetrators or witnesses of crimes; 5) lack of access of investigative teams to the crime scenes due to hostilities or mining of such places.

It should be noted that the intensity of the crimes, the international and public outcry leads to the search for signs of genocide. For example, on April 14, 2022,

the Verkhovna Rada of Ukraine adopted a statement “On the Commitment of Genocide in Ukraine by the Russian Federation” (No 2188-IX), which was the result of the discovery by law enforcement agencies of the Bucha Massacre after the de-occupation of the territorial communities of the Kyiv region, the facts of violence against civilians in Mariupol and other cities, statements by Russian Federation officials on the denazification and destruction of the Ukrainian people, religion, children deportation, bans on the use of the Ukrainian language and the destruction of culture.

2. Crime of aggression in Ukrainian criminal legislation

The Criminal Code of Ukraine uses the term “aggression” / “aggressor” 52 times in its General and Special Parts, defining certain criminal offenses or their consequences. In the General Part, “aggression” was mentioned as a situation that excludes the criminal unlawfulness of an act – “fulfillment of the duty to protect the Motherland, independence and territorial integrity of Ukraine” with an indication of “an act... aimed at repelling and deterring the armed aggression of the Russian Federation or the aggression of another country, if it caused harm to the life or health of the person carrying out such aggression...” (the article was included in the Criminal Code of Ukraine on March 15, 2022). In most cases, “aggression” / “aggressor” is mentioned in the Special Part of the Criminal Code under the following sections:

1) Criminal offenses against the foundations of national security:

a) *public denial of armed aggression against Ukraine* (“Collaborative activity”, Article 111¹ of the Criminal Code of Ukraine) (the article was included in the Criminal Code of Ukraine on March 03, 2022);

b) *assistance to the aggressor state* (Article 111² of the Criminal Code of Ukraine) (the article was included in the Criminal Code of Ukraine on April 14, 2022);

c) *dissemination of information about the placement or movement of weapons or the Armed Forces of Ukraine to a state that is perpetrating aggression against Ukraine* (Part 3 of Article 1142 of the Criminal Code of Ukraine) (the article was included in the Criminal Code of Ukraine on March 24, 2022).

2) Criminal offenses against public order and morality:

a) *desecration of the graves of the victims of persons who participated in deterring the armed aggression of the Russian Federation or another state recognized as the aggressor* (Part 2 of Article 297 of the Criminal Code of Ukraine).

3) Criminal offenses in the field of protection of state secrets, inviolability of state borders, provision of conscription and mobilization:

a) *illegal crossing of the state border of Ukraine* (Article 332² of the Criminal Code of Ukraine) (the article was included in the Criminal Code of Ukraine on October 18, 2018).

4) Military criminal offenses:

a) *insulting the honor and dishonor of a serviceman* (Article 435¹ of the Criminal Code of Ukraine) the article was included in the Criminal Code of Ukraine on March 03, 2022).

5) Criminal offenses against peace, human security and international legal order:

a) *public calls for aggressive war* (“Propaganda of war”, Article 436 of the Criminal Code of Ukraine);

b) *justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants* (Article 436² of the Criminal Code of Ukraine) (the article was included in the Criminal Code of Ukraine on March 03, 2022);

c) *planning, preparation, resolution and waging of an aggressive war* (Article 437 of the Criminal Code of Ukraine).

6) Final and transitional provisions of the Criminal Code of Ukraine:

a) *civilians can not be punished for using firearms against persons who carry out armed aggression against Ukraine* (paragraph 22) (the article was included in the Criminal Code of Ukraine on March 03, 2022).

It should be noted that the most articles of the Criminal Code of Ukraine that use the term “aggression” / “aggressor” were included in it with the beginning of Russian large-scale invasion against Ukraine (i.e., after February 24, 2022). This once again demonstrates the lack of a prepared legislative response to possible aggression by Russia or other countries. This seems rather strange, since February 2014, Ukraine has already been attacked by the Russian army, which that time had already occupied parts of Donetsk and Luhansk regions and annexed the Autonomous Republic of Crimea.

The accelerated amendments to the Criminal Procedure Code of Ukraine were similar. Thus, section IX¹ – “Special type of pre-trial investigation, trial under martial law” was significantly revised and revised (starting from March 03, 2022) and a new section IX² – “Peculiarities of cooperation with the International Criminal Court” was included (the section was included in the Criminal Procedure Code of Ukraine on May 03, 2022). Similarly, the inclusion of the last section on the peculiarities of cooperation with the International Criminal Court is also an important, but belated decision. It should be recalled that Ukraine has been actively cooperating with the International Criminal Court since 2014.

The Criminal Code of Ukraine does not include a direct definition of the crime of aggression (following

the example of the Rome Statute of the International Criminal Court). However, given the scale, systematic and organized nature of the crimes committed during the Russian invasion to Ukraine since 2014 and especially since 2022, the closest crime that reflects the core of the crime of aggression is “Planning, preparation, waging and conducting of an aggressive war” (Article 437 of the Criminal Code of Ukraine). Next definition of this crime is included to Criminal Code of Ukraine:

1. *Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years.*

2. *Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.*

Nikola Hajdin paid attention that “Germany, Poland, Ukraine, and others that do not explicitly include the element of leadership in their penal code”. But in the same time, he sure, that “the crime of aggression is “reserved” for prosecuting leaders who formulate or execute state policy and despite some states “reluctance to include the leadership element in their domestic legislations explicitly, any future prosecutions have to take the leadership requirement into consideration in line with customary international law” (Hajdin, 2022, March 17).

In our opinion, the very existence of “Planning, preparation, waging and conducting of an aggressive war” in the Criminal Code of Ukraine (Article 437) is intended to demonstrate the link to persons who organize the commission of an act of aggression, and not to perpetrators of individual acts during the war or on the battlefield. Otherwise, perpetrators who committed military crimes, war crimes and other crimes can be punished for crime of aggression in the same time. Article 437 of the Criminal Code of Ukraine does not provide criminal liability of the leaders of the aggressor state. Patrycja Grzebyk suggests taking advantage of this circumstance. For example, she points out that in Eastern Europe “only Croatia (though to a limited extent), Czechia, Estonia, Lithuania, North Macedonia and Slovenia have introduced a leadership clause into their legislation as a result of the ratification of the Rome Statute. Legislation in the remaining states does not preclude prosecution of a broader range of persons in comparison to ICC standards, that is, persons not necessarily classified as leaders who control over or direct the political or military action of a state” (Grzebyk, 2023, s. 456). This approach is quite interesting and may expand the circle of perpetrators (other than leaders). However, in this case, it is necessary to keep in mind the limits in establishing the perpetrators of “Planning, preparing, waging and conducting an aggressive war” (Article 437).

Otherwise, there is no point in establishing criminal liability for other international and war crimes in the way proposed by Ukrainian criminal legislation.

According to the General Prosecutor's Office, since the beginning of the large-scale Russian aggression against Ukraine, *such crimes (under Article 437 of the Criminal Code of Ukraine) have been registered (since February 24, 2022) – 94 (Zlochyny, vchyneni pid chas, n.d.)*. However, similar statistics have been demonstrated by the General Prosecutor's Office since 2014 in terms of the *number of registered crimes under Article 437 of the Criminal Code of Ukraine*:

2014 – 1 (reports of suspicion – 0, indictments – 0);
 2015 – 38 (reports of suspicion – 23, indictments – 10);
 2016 – 11 (reports of suspicion – 8, indictments – 0);
 2017 – 21 (reports of suspicion – 17, indictments – 10);
 2018 – 4 (reports of suspicion – 3, indictments – 2);
 2019 – 6 (reports of suspicion – 2, indictments – 2);
 2020 – 4 (reports of suspicion – 3, indictments – 2);
 2021 – 8 (reports of suspicion – 5, indictments – 3);
 2022 – 67 (reports of suspicion – 6, indictments – 0);
 2023 – 25 (reports of suspicion – 7, indictment – 1) (Statystyka, n.d.).

According to the Unified State Register of Judgments 2015–2017, only 5 verdicts were passed under Art. 437 of the Criminal Code of Ukraine regarding planning, preparing, waging and conducting an aggressive war (*Yedynyi derzhavnyi reiestr, n.d.*).

Article 437 of the Criminal Code of Ukraine cannot be considered to correspond to the crime of aggression as defined in UN General Assembly resolution 3314 (XXIX) of December 14, 1974, or the Rome Statute of the International Criminal Court. However, it is the establishment of criminal liability for planning, preparing, waging and conducting an aggressive war that leads law enforcement to believe that these are different acts than, for example, war propaganda (Article 436 of the CC of Ukraine) or violation of the laws and customs of war / war crimes (Article 438 of the Criminal Code of Ukraine). Similarly, the commission of planning, preparing, waging and conducting an aggressive war as a crime should be punished persons who initiated, planned, incited, or ensured the outbreak of an aggressive war, etc. It is clear that combatants (Article 43 of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June, 8, 1977) as representatives of the armed forces of the aggressor state are not inherently capable of committing such acts, unlike the political leadership of the aggressor state and other persons whose actions are directly aimed at committing an act of aggression.

3. Prosecution of the crime of aggression in the national jurisdiction: case law study

The research of the verdicts under Article 437 of the Criminal Code of Ukraine demonstrates different approaches to understanding the crime of aggression between national and international jurisdiction. According to 5 verdicts (2015–2017), 6 persons were brought to criminal responsibility under the following articles:

Part 2 of Article 437 of the Criminal Code of Ukraine (waging an aggressive war or aggressive military actions) – 6 persons;

Part 1 of Article 258³ of the Criminal Code of Ukraine (participation in a terrorist organization) – 6 persons;

Part 1 of Article 263 of the Criminal Code of Ukraine (carrying, storage, acquisition, transfer or sale of firearms, ammunition, explosives or explosive devices without a permit provided by law) – 6 persons;

Part 2 of Article 332¹ of the Criminal Code of Ukraine (violation of the procedure for entering and leaving the temporarily occupied territory of Ukraine with the intent to harm the interests of the state) – 1 person.

3.1. First verdict

On September 25, 2015, the Dzerzhynskiy City Court of Donetsk region convicted a person for committing the following acts. This person arrived from Russia to Donetsk (Ukraine), where he joined the terrorist organization “Donetsk People's Republic”, which is controlled by officials of the Russian Armed Forces. The verdict states that while participating in the said terrorist organization, this person performed the duties of the “head of the missile and artillery armament service” of the terrorist organization's structural unit. He accounted, stored and issued weapons and ammunition used by members of the terrorist organization to wage aggressive war and commit crimes against the military of the Armed Forces of Ukraine. Later, this person received a task from an unidentified member of the terrorist organization “Donetsk People's Republic” “commander of a military unit” to deliver firearms and ammunition by road from Donetsk to Yasne village of Dokuchaevsk city council of Donetsk region, where he was detained together with an accomplice (*Dzerzhynskiy miskiy sud, 2015, Veresen 25*).

3.2. Second verdict

Another verdict issued by the Dzerzhynskiy City Court of Donetsk region found that the accused participated in the “KOT” unit of the Donetsk People's Republic terrorist organization, acting with the aim of conducting aggressive military operations against the Armed Forces of Ukraine, performed the duties of “deputy commander of the counterintelligence unit of

the “MGB DPR” for the organization of the activities of the said unit, namely, personally carried out organizational activities for transportation to Donetsk and distributed firearms among unidentified pre-trial investigation members of the said unit (*Dzerzhynskiy miskiyi sud*, 2016, Lypen 04).

3.3. Third verdict

According to the verdict issued by the Krasnoarmiyskyi City District Court of Donetsk Region, the accused person joined the “DPR” military unit, was a member of the military engineering unit of the “DPR” terrorist organization as a platoon commander and was engaged in the construction and strengthening of checkpoints, equipping firing positions and other engineering structures in Sloviansk. Later, in the “OPLOT” battalion, he was engaged in the construction and strengthening of checkpoints, equipping firing positions and other engineering structures, and was on duty with weapons at checkpoints of the “DPR” terrorist organization located in Donetsk. The accused person engaged in armed resistance, unlawful opposition and obstruction of the performance of official duties by law enforcement officers, military personnel and other representatives of the Anti-Terrorist Operation forces of the Ukrainian government (*Krasnoarmiyskyi miskraionnyi sud*, 2017, Sichen 27).

3.4. Fourth verdict

According to the verdict issued by the Dzerzhynskiy City Court of Donetsk region, the accused person, acting as a scout of a separate reconnaissance company of the “DPR” terrorist organization, was on combat duty and monitored the servicemen of the Armed Forces of Ukraine involved in the Anti-Terrorist Operation, and collected information on the number of personnel, equipment, weapons and other data for organizing their fire damage (*Dzerzhynskiy miskiyi sud*, 2017, Liutyi 08).

3.5. Fifth verdict

According to the last verdict issued by the Krasnoarmeyskyi City District Court of Donetsk Region, it was established that the accused person collected and transmitted information about the location of the Armed Forces of Ukraine, i.e., adjusted the fire of the militants, thus directly participated as a co-perpetrator in the conduct of an aggressive war against Ukraine (*Krasnoarmiyskyi miskraionnyi sud*, 2017, Veresen 22).

3.6. Case law study in the context of the crime of aggression. Summary

Such practice of the Ukrainian courts is quite specific, as it is limited to the actions of ordinary

individuals (not leaders), who can be named as a combatants. At the moment, the application of Article 437 of the Criminal Code of Ukraine in the described situations demonstrates the search for the correct interpretation of this rule. In our opinion, it cannot be argued that the accused persons under Art. 437 of the Criminal Code of Ukraine, by the described actions, committed or were capable of committing a crime of aggression in accordance with international rules and principles.

It should be noted that the approaches of law enforcement agencies and courts of Ukraine have changed significantly since Russian large-scale invasion, February 24, 2022. This is confirmed by the approaches of the General Prosecutor’s Office of Ukraine, which reported on the existence of a “main case on aggression of the Russian Federation”, which includes 683 suspects-representatives of the military and political leadership of the Russian Federation i.e. ministers, members of parliament, military command, officials, heads of law enforcement agencies and propagandists (*Spysok pidozriuvanykh*, n.d.). However, this list looks rather curious, as it includes, for example, only two ministers (Ministers of Defense and Interior), and does not include the main suspect in the aggression, the President of the aggressor state, who launched the invasion of Ukraine in 2014 and 2022. An interesting approach was the inclusion of “instigators of war and propagandists of the Kremlin” in this list. This approach demonstrates that among the propagandists of war (the Criminal Code of Ukraine provides for a separate Article 436 “Propaganda of War”) there are warmongers who directly caused the war and created the conditions for its outbreak in 2014 and 2022. It should be noted that in the main case on the aggression of the Russian Federation, nobody has the status of an accused person, and no one criminal proceedings have been brought to court. At the same time, it is important that the materials collected in this main case can be used in international criminal courts to convict those guilty of committing the crime of aggression against Ukraine.

Conclusions

The beginning of Russia’s large-scale invasion of Ukraine changed the situation not only politically, socially, but also legally. Starting in 2014, it was generally accepted within the national jurisdiction that the terrorist organizations “DPR” and “LPR” were operating in the Donetsk and Luhansk regions of Ukraine with the support of the Russian Federation. At the same time, the Autonomous Republic of Crimea was annexed by the Russian Federation. In 2022, the President of Russia announced the launch of a “special military operation” in Ukraine to “denazify” and “dematerialize” the state, which led to the

destruction of Ukrainian identity, infrastructure, and deaths of thousands of civilian and military victims. Moreover, the Russian president issued an ultimatum to demilitarize NATO states that were formerly part of the Warsaw Pact. Since then, it has become clear that all the actions of the aggressor state since 2014 are causally related to the consequence and the main purpose of destroying the Ukrainian people and the Ukrainian state, as well as violating the unity of the EU and NATO. That is why restoration of Ukrainian international borders is necessary for the preservation of the EU and NATO. The prosecution of those responsible for the crime of aggression is important in shaping the future development prospects on the continent.

The research of the prosecution of the crime of aggression of Ukrainian jurisdiction provided an opportunity to look through the prism of the following issues: 1) International approaches in defining of crime of aggression in Ukraine; 2) The crime of aggression in Ukrainian criminal legislation; 3) The case law study of prosecution of the crime of aggression in Ukrainian jurisdiction.

The specifics of the international and national definitions of the crime of aggression indicate different approaches. A particular difference is the wording of the persons who can be punished for the crime of aggression. While international legal acts demonstrate that the political leaders of the aggressor state should be held accountable for the crime of aggression, Ukrainian and some other legislation does not limit the circle of guilty persons. Therefore, in our opinion, the proposal to bring to criminal responsibility within the Ukrainian jurisdiction not only political leaders, but also persons who played a special role in

the planning, preparing, waging or conducting of an aggressive war should be used.

A study of the Ukrainian judicial practice on the registered crimes on the Article 437 of the Criminal Code of Ukraine shows that it continues to develop. In the period of 2015–2017, Ukrainian courts sentenced 6 perpetrators in 5 verdicts. It should be noted that these individuals cannot be considered political leaders who started or participated in the aggressive war. However, in the future, certain limits of the application of this article should be found in judicial practice. Today, a large number of criminal proceedings are investigated by the law enforcement agencies of Ukraine. Also it is necessary to pay attention to “the main case on aggression of the Russian Federation”, which includes 683 suspects-representatives of the military and political leadership of the Russian Federation. At the same time, the main political figure of the Russian Federation is left out of the consideration of the crime of aggression or other crimes. Instead, the International Criminal Court demonstrated an active position in attempts of justice restoration and issued an arrest warrant against Vladimir Putin for the war crime of unlawful deportation of population (children), but not for the crime of aggression. It would be obviously a promising direction to coordinate the efforts of international and national criminal justice authorities to accuse Russian political leaders of committing the crime of aggression.

Acknowledgements

None.

Conflict of interest

None.

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URL: <https://gp.gov.ua/>

The article was received by the editors 03.05.2024

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НАПРЯМИ ВІДНОВЛЕННЯ СПРАВЕДЛИВОСТІ ЧЕРЕЗ ПРОТИДІЮ ЗЛОЧИНУ АГРЕСІЇ

Анотація. Статтю присвячено пошуку напрямів відновлення правосуддя через протидію злочину агресії. У цьому контексті досліджено міжнародні підходи до визначення злочину агресії в Україні, злочину агресії в українському законодавстві про кримінальну відповідальність і переслідування за злочини агресії за національною юрисдикцією через судову практику (case law study). Такий підхід уможливив розгляд злочину агресії крізь призму міжнародно-правових актів, ухвалених Лігою Націй, ООН, діяльності міжнародних судів і трибуналів, що сприяли засудженню злочину агресії. Важливим міжнародно-правовим актом у засудженні злочину агресії став Римський статут Міжнародного кримінального суду. Зважаючи на тривалу російську агресію проти України, актуалізовано питання співвідношення діяльності міжнародних організацій, міжнародного визначення злочину агресії з чинним національним законодавством та діяльністю органів кримінальної юстиції в Україні. При цьому застосовано методи аналізу та синтезу, дедукції та індукції, формально-юридичний, порівняльно-правовий, історико-правовий та інші методи, що дозволили у своєму поєднанні здійснити комплексне дослідження. Наукова новизна доробку полягає в обґрунтуванні можливості притягнення до кримінальної відповідальності за окремі прояви злочину агресії не тільки в міжнародних інституціях, а й в Україні. Крім того, важливим результатом дослідження став висновок щодо можливості кримінальної відповідальності в межах юрисдикції України не лише політичних лідерів, а й осіб, які відігравали особливу роль у плануванні, підготовці, розв'язуванні чи веденні агресивної війни. Водночас прерогативою є засудження політичних лідерів у межах міжнародної юрисдикції. Дослідження української судової практики щодо зареєстрованих кримінальних правопорушень за ст. 437 Кримінального кодексу України свідчить про те, що розвиток її триває. У 2015–2017 рр. було відшукано п'ять обвинувальних вироків щодо шести злочинців, які не є політичними лідерами. У майбутньому в судовій практиці мають бути знайдені певні межі застосування ст. 437 Кримінального кодексу України. Перспективним напрямом також лишається координація зусиль міжнародних і національних органів кримінальної юстиції щодо обвинувачення російських політичних лідерів у вчиненні злочину агресії.

Ключові слова: злочин агресії; воєнні злочини; агресивна війна; відновлення справедливості; правосуддя; протидія кримінальним правопорушенням.