

THE CRIME OF AGGRESSION UNDER THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Statute of the ICC, which was adopted in 1998, in contrast to international legal acts that determine the international responsibility of states and governments, provides for individual responsibility for committing the crime of aggression as one of the most serious crimes that causes concern for the entire international community. The crime of aggression is listed, but is not defined as a crime under the jurisdiction of the ICC. Amendments adopted in May-June 2010 in Kampala (Uganda) define the crime of aggression and the conditions for activating the jurisdiction of the ICC, starting in 2017, which closes the gap in the substantive law and jurisdictional regime of the ICC Statute.

The purpose of the article is to consider retrospectively the formation and development of responsibility for the crime of aggression in accordance with the Statute of the International Criminal Court (the ICC Statute). This study is based on the works of domestic and foreign scientists who at different times studied separate issues related to the definition of the crime of aggression A. Antonovych, J. A. Green, I. Kasyniuk, T. Ruys, J. Trahan, K. Henderson and others

The article highlights the modern interpretation of the term „crime of aggression” in accordance with the provisions of the Statute of the International Criminal Court. Attention is focused on the characteristic features, elements, methods of exercising the jurisdiction of the ICC regarding the crime of aggression, as well as the conditions for the entry into force of the amendments to the Statute of the ICC regarding this crime.

In the course of the investigation, it was established that studying the situation in Ukraine, the Office of the Prosecutor of the International Criminal Court, headed by Prosecutor Karim A.A. Khan, considers the existing grounds to be sufficient for the investigation starting from November 21, 2013. Thus, these appeals provide an opportunity to investigate the situation in Ukraine covering any past and present accusations of crimes committed by any person in any part of the territory of Ukraine, and that they will remain focused on the main goal: ensuring accountability for crimes that fall under the jurisdiction of the ICC

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Problem statement. The International Criminal Court (ICC) Statute, adopted in 1998, differs from international legal acts that define the international responsibility of states and governments. It provides for individual responsibility for the crime of aggression as one of the most serious crimes that cause concern for the entire international community. The crime of aggression is listed but is not defined as a crime taking under the jurisdiction of the ICC. Amendments adopted in May-June 2010 in Kampala, Uganda, define the crime of aggression and the conditions for activating the ICC's jurisdiction, starting from 2017. This closes the gap in the substantive law and jurisdiction regime of the ICC Statute.

Analysis of recent research and publications. Ukrainian and foreign researchers such as A. Antonovych, J.A. Green, I. Kasyniuk, T. Ruys, J. Trahan, K. Henderson, and others have dedicated their thesis to particular issues related to defining the crime of aggression at different times. Analysis of the works of these and other researchers provided the scientific basis for writing this article.

Article objective. To investigate the retrospective of the formation and development of responsibility for the crime of aggression under the International Criminal Court Statute (ICC Statute).

Results of the research. Attempts to prohibit and criminalize the illegal conduct of war (the use of force) have been known since the

Hague Conferences of Peaceful Settlement of International Disputes between States in 1899–1907; the preamble to the Charter of the United Nations and its articles also contain provisions on preventing wars; the Geneva Protocol (1924) on the peaceful settlement of international disputes, the Declaration (1927) on aggressive wars – all of these documents became the basis for the development of significant international legal acts that define war as an international crime.

With the entry into force of the UN Charter on October 24, 1945, a system of collective security was initiated. Thus, Article 2(4) of the UN Charter prohibits 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. At the same time, the Charter allows the use of force only for the purpose of legitimate individual or collective self-defence or with the permission of the Security Council. In accordance with Article 39 of the UN Charter, the Security Council determines the existence of any threat to the peace, breach of the peace or act of aggression. However, this provision does not define the concept of aggression, nor does it provide for individual criminal responsibility in cases of committing the crime of aggression. The judicial processes conducted in Nuremberg (1945–1946) and Tokyo (1946–1948) by the victorious states of World War II identified a range of international crimes for which international responsibility arises are: crimes against peace, war crimes, and crimes against the humanity. It should be noted that the Nuremberg Tribunal recognized as a crime against peace the planning, preparation, initiation, or waging of an aggressive war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing, but it does not specify what is meant by aggression. Therefore, in 1974, the United Nations General Assembly adopted Resolution 3314 (XXIX) defining the act of aggression, which pertained to the actions of a state rather than an individual who may be responsible for such an act. Thus, the definition of aggression in this resolution reflects the concept of the illegal use of force contained in Article 2(4) of the UN Charter and lists specific examples of acts of aggression, such as the invasion or attack by the armed forces of a state on the territory of another state (including military occupation), the bombardment the territory of another state by the armed forces of a state etc. Only in 2010 the main provisions of this resolution found their reflection in the amendments to the Statute of the International Criminal Court.

The crime of aggression is one of the four crimes over which the International Criminal Court has jurisdiction under the Rome Statute. Article 5(1) of the ICC Statute states that the Court's jurisdiction is limited to the most serious crimes of concern to the international community as a whole, namely genocide, crimes against the humanity, war crimes, and the crime of aggression.

However, it should be noted that at the time of the adoption of the ICC Statute in 1998, representatives of the participating states were unable to agree on a definition and mechanism for the Court to exercise jurisdiction over the crime of aggression. There were several positions on defining the crime of aggression, such as limiting it to «aggressive wars» or using the broader concept of «act of aggression» contained in the definition of the United Nations General Assembly in 1974. But more complicated issue was determining the need for the ICC to prosecute for the crime of aggression if the Security Council had determined the existence of an act of aggression by one state against another. As a result of lengthy negotiations, delegates reached a compromise, and the crime of aggression was included in the list of crimes taking under the jurisdiction of the Court. However, the definition and conditions for exercising jurisdiction, including the role of the Security Council, were postponed to the Review Conference. Therefore, Article 5(2) of the ICC Statute stipulates that jurisdiction will only be exercised after the adoption of a provision that defines the concept of this crime and establishes the conditions under which such jurisdiction will be exercised.

With the Resolution ICC-ASP/1/Res.1 at the 3rd plenary session on September 9, 2002, the Assembly of States Parties of the International Criminal Court (ICC), in accordance with Article 5(2) of the Rome Statute and paragraph 7 of the Resolution F (1998) adopted by the Diplomatic Conference under the auspices of the United Nations on the establishment of the ICC, created a special working group on the crime of aggression. Any United Nations member state or member of its specialized agencies or the International Atomic Energy Agency may be included in this group on the principle of equality. The main goal of establishing this special group is to develop and adopt an acceptable provision on the crime of aggression and to include it in the ICC Statute (Resolution ICC, 2022).

In May-June 2010, the first Review Conference of the ICC was held in Kampala, Uganda, since the entry into force of the ICC Statute in July 2002. The Conference was attended by ICC member states, as well as those interested in defining and activating the jurisdiction of the crime of aggression. After lengthy

discussions, an agreement was reached, resulting in the adoption of the Kampala Amendments, which exclude the crime of aggression.

On June 11, 2010, at its 13th plenary session, the International Criminal Court (ICC) consensus adopted the Resolution RC/Res.6 on the “Crime of Aggression,” which amended the ICC Statute. Specifically, a new added provision, Article 8 bis, defines the crime of aggression and amends its elements, while attempting to establish jurisdiction over the crime of aggression after the amendments take effect. The activation of jurisdiction (the actual exercise of jurisdiction) over the crime of aggression will take place in accordance with the provisions set out in Articles 15 bis and ter of the ICC Statute. For the first time since the Nuremberg and Tokyo trials, the ICC’s jurisdiction over the crime of aggression represents international criminal responsibility for this most serious crime.

During the development of the definition of the crime of aggression, the conference adopted the United Nations General Assembly Resolution (XXIX) from December 14, 1974, as its legal ground. Therefore, after the adoption of this resolution and the amendment of the ICC Statute with Article 8 bis, the “crime of aggression” means the planning, preparation, initiation, or execution by a person who has the ability to effectively control or direct the political or military action of a state, of an act of aggression that, by its character, gravity, and scale, constitutes a manifest violation of the United Nations Charter. The characteristic features of the crime of aggression are:

- any actions specified in Article 8(2)(b) are recognized as acts of aggression;
- there is no requirement to prove that the perpetrator made a legal assessment of whether the use of force was incompatible with the Charter of the United Nations;
- the term “manifest” is an objective qualification and includes three components: severity, scale, and consequences;
- there are no requirements to prove that the perpetrator made a legal assessment of the “manifest” nature of the violation of the Charter of the United Nations.

The elements of the crime of aggression include:

- the perpetrator planned, prepared, initiated, or executed an act of aggression;
- the perpetrator must be a political or military leader, meaning a person or group of persons who have the effective control or direction of a State’s political or military actions, and who committed an act of aggression;
- an act of aggression was committed – the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or by any other means in violation of the Charter of the United Nations;
- the perpetrator was aware of the factual circumstances that rendered the use of force incompatible with the Charter of the United Nations;
- the act of aggression, by its nature, severity, and scale, constituted a manifest violation of the Charter of the United Nations;
- the perpetrator was aware of the factual circumstances indicating such a manifest violation of the Charter of the United Nations (Resolution RC, 2010).

It is necessary to note positively that the criminalization of aggression has resulted in two facts:

- 1) real limitations defined for jus ad bellum in the sphere of military force application against other states for the first time since World War II;
- 2) clear criteria and standards by which socially dangerous actions are recognized as aggression crimes.

Amendments to the Rome Statute take effect for a state one year after ratification or acceptance by that state. However, the entry into force of amendments regarding the crime of aggression is not sufficient for the ICC to exercise jurisdiction. Two additional conditions must be met for this (ICC – factsheet). These conditions are:

- 1) the amendments must be ratified or accepted by at least 30 State Parties to the Rome Statute, after which it must pass one year before the Court can exercise its jurisdiction; and,
- 2) the Assembly of State Parties (ASP) must adopt a decision after January, 1 2017 by consensus or at least by a two-thirds majority to allow the Court to commence the exercise of its jurisdiction.

On December 3, 2022, 44 State Parties to the ICC have deposited their instruments of ratification regarding the amendments on the crime of aggression (Amendments, 2010).

Both of these conditions have now been met, so the Court can now exercise its jurisdiction over the crime of aggression.

There are disagreements among states regarding the scope of jurisdiction, specifically whether the jurisdiction extends to all ICC member states after ratification by thirty State Parties or only to those that have recognized the ICC's jurisdiction over the crime.

The ways of exercising ICC jurisdiction regarding the crime of aggression. Articles 15 bis and ter outline the process for activating the Court's jurisdiction. Despite other types of crimes taking under the ICC's jurisdiction, the crime of aggression has a unique jurisdictional regime. All three existing mechanisms for activating jurisdiction apply to the crime of aggression. According to Articles 15(1, 6) bis, the Prosecutor may conduct a preliminary investigation for the crime of aggression after using any of these mechanisms:

1) State referral: a state party to the ICC refers the situation to the Court, which can exercise jurisdiction after the amendments have come into force for at least one state party, victim, or aggressor. The Prosecutor determines whether there are reasonable grounds to proceed with an investigation, and if so, informs the UN Secretary General about the situation;

2) Proprio motu investigation: the Prosecutor initiates an investigation;

3) Security Council referral: the UN Security Council refers the situation to the Court. The Security Council has the competency to independently determine whether a crime of aggression has been committed. If the situation is referred by the UN Security Council (Article 15 ter) to the ICC, the Prosecutor has the authority to investigate any of the four core crimes, including the crime of aggression, committed on any territory by a national of any state. In this situation, the Court may exercise jurisdiction over acts of aggression related to ICC member states, regardless of their individual status of ratification or "opt-out," as well as over non-member states. Therefore, a state that is not a party to the ICC Statute, but has been the subject of a UN Security Council decision on an act of aggression, such as the Russian Federation, the Prosecutor may initiate an investigation for the crime of aggression (Resolution RC, 2010).

Aggressor state consent as a condition for exercising jurisdiction. Obtaining consent from the state suspected of committing a crime of aggression is necessary only if the investigation is conducted using the mechanism of referral by a state or proprio motu. However, when a situation is referred to the UN Security Council in accordance with its competency under Chapter VII of the UN Charter, such consent is not required.

At its 16th session held from December 4 to 14, 2017 at the UN headquarters in New York, the Assembly of States Parties to the Rome Statute adopted by consensus a resolution on activating the ICC's jurisdiction over the crime of aggression. In this resolution, the Assembly recognized the historic significance of the decision to activate the Court's jurisdiction as of July 17, 2018, and added three military crimes to the Court's jurisdiction:

1) the use of microbial, biological or toxic weapons;

2) the use of weapons that cause injuries that cannot be detected by X-rays;

3) the use of laser weapons.

Later in November 2018, amendments were made to the Court's Regulations regarding a number of procedural issues that arise from the activation of the Court's jurisdiction for the crime of aggression. The adopted amendments provide for a clear execution of judicial functions by the Pre-Trial Division under Article 15 bis (8) of the Rome Statute, namely the appointment of a presiding judge (Regulations of the Court, 2018).

Studying the situation regarding Ukraine, it should be noted that the preliminary examination of the situation began on April 24, 2014, based on the first special declaration submitted by the Government of Ukraine recognizing the Court's jurisdiction. Later, in 2015, Ukraine submitted a second extended declaration with the aim of covering ongoing and probable crimes committed on its territory since February 20, 2014.

After examining the available information, the Court concluded that potential cases likely to arise from the investigation of the situation in Ukraine would be admissible. At the time of the preliminary examination, there were sufficient grounds to believe that war crimes and crimes against humanity had been committed within the Court's jurisdiction in the context of the situation in Ukraine.

Previous examinations included three broad clusters of victimization: (i) crimes committed in the context of military operations; (ii) crimes committed during detentions; and (iii) crimes committed in Crimea. The prosecutor's office also found that these crimes, committed by different parties to the conflict, were serious enough to warrant investigation (F. Bensouda, 2020).

In December 2020, following a thorough and independent process, ICC Prosecutor Fatou Bensouda announced the results of a preliminary examination of the situation in Ukraine, stating that the necessary legislative criteria for beginning an investigation had been met.

Since the start of the active phase of the Russian-Ukrainian conflict, 38 State Parties, including the Republic of Albania, the Commonwealth of Australia, the Republic of Austria, the Kingdom of Belgium, the Republic of Finland, the French Republic, Georgia, the Grand Duchy of Luxembourg, the Republic of Malta, New Zealand, Romania, the Slovak Republic, and others, have submitted the situation regarding Ukraine to the ICC's Office of the Prosecutor in March-April 2022, in order to expedite the investigation pursuant to Article 14 of the Rome Statute (Rome Statute, 2022).

The support of ICC member states and the international community is crucial for the initiation and conduct of investigations into crimes taking under the jurisdiction of the Court, especially in the situation of Ukraine, which is not a state party to the Rome Statute, but has only recognized the Court's jurisdiction regarding possible crimes committed on its territory from November 2013 (Statement of Ukraine, 2014).

Based on received referrals on March 2, 2022, the Prosecutor of the ICC, Karim A.A. Khan, announced the opening of an investigation into the situation in Ukraine based on the Office's preliminary findings and his personal prior examination of the situation. The Prosecutor emphasized that during the preliminary examination of the situation in Ukraine, his office had already found sufficient grounds to believe that crimes falling under the jurisdiction of the ICC had been committed, and identified potential acceptable cases. He noted that these referrals allowed for the investigation of the situation in Ukraine from November 21, 2013, thereby covering any past and present allegations of crimes committed by any person on any part of the territory of Ukraine. He further stated that they would remain focused on the main objective of ensuring accountability for crimes falling under the jurisdiction of the ICC (Karim A.A. Khan, 2022; Regulations of the Court, 2022).

Conclusion. Aggression is the most serious and dangerous form of illegal use of force. According to the United Nations Charter, in order to determine whether an act of aggression has been committed, all circumstances of each particular case must be taken into account, including the severity of the relevant acts and their consequences. The so-called threshold requirements are also set out in Article 8 bis (1) of the ICC Statute, according to which an act of aggression, by its character, severity, and scale, constitutes a manifest violation of the UN Charter. Therefore, the use of force by an aggressor state must be unequivocally illegal.

References:

1. Resolution ICC-ASP/1/Res.1 Continuity of work in respect of the crime of aggression on 9 September 2002 URL: https://legal.un.org/icc/asp/1stsession/report/english/part_iv_res_1_e.pdf (accessed: 21.10.2022)
2. Resolution RC/Res.6 on 11 June 2010 URL: https://www.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/RC-Res.6-ENG.pdf P. 21 (accessed: 21.10.2022).
3. ICC – factsheet. The Crime of Aggression within the Rome Statute of the International Criminal Court https://www.coalitionfortheicc.org/sites/default/files/cicc_documents/CICC-%20Factsheet%20Crime%20of%20Aggression%20Final-%20changes%2027Nov2019.pdf
4. Amendments on the crime of aggression to the Rome Statute of the International Criminal Court Kampala, 11 June 2010. <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10-b.en.pdf> (accessed: 03.12.2022).
5. Resolution RC/Res.6 on 11 June 2010 URL: https://www.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/RC-Res.6-ENG.pdf P. 19 (accessed: 21.10.2022).
6. Regulations of the Court, 2018 URL: https://www.icc-cpi.int/sites/default/files/RegulationsCourt_2018Eng.pdf (accessed: 10.11.2022).
7. Zaiava prokurora Fatu Bensouda pro pidsumky poperednoho rozsliduvannia sytuatsii v Ukraini. URL: <https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-ukraine>
8. State Party Referral under article 14 of the Rome Statute. URL: <https://www.icc-cpi.int/sites/default/files/2022-04/State-Party-Referral.pdf> (accessed: 11.11.2022).
9. Zaiava Ukrainy pro vyznannia yurysdyktsii Mizhnarodnoho kryminalnoho sudu vid 09 kvitnia 2014 r. URL: <https://www.icc-cpi.int/sites/default/files/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf> (accessed: 11.11.2022).
10. Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation URL: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> (accessed: 11.11.2022).
11. Notice pursuant to regulation 45 of the Regulations of the Court. https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2022_01687.PDF (accessed: 03.12.2022).

ЗЛОЧИН АГРЕСІЇ ЗА СТАТУТОМ МІЖНАРОДНОГО КРИМІНАЛЬНОГО СУДУ

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Статут ІСС, що був прийнятий у 1998 р. на відміну від міжнародно правових актів, що визначають міжнародну відповідальність держав і урядів, передбачає індивідуальну відповідальність за вчинення злочину агресії як одного з найбільш тяжкого злочину, що викликає занепокоєння всього міжнародного співтовариства. Злочин агресії наявний у переліку, але не має визначення як злочин, що підпадає під юрисдикцію ІСС. Поправки прийняті у травні-червні 2010 р. у Кампалі (Уганда), визначають злочин агресії та умови активації юрисдикції ІСС, починаючи з 2017 р., що закриває прогалину в матеріальному праві та режимі юрисдикції Статуту ІСС.

Метою статті є розгляд ретроспективи становлення і розвитку відповідальності за злочин агресії відповідно до Статуту Міжнародного кримінального суду (Статуту ІСС). Дане дослідження ґрунтується на роботах вітчизняних та зарубіжних науковців, котрі в різні часи вивчали окремі питання пов'язані із визначенням злочину агресії А. Антонович, Дж. А. Грін, І. Касинюк, Т. Руйс, Дж. Трахан, К. Хендерсон та інші.

У статті виокремлена сучасна інтерпретація терміну «злочин агресії» відповідно до положень Статуту Міжнародного кримінального суду. Акцентовано увагу на характерних ознаках, елементах, способах здійснення юрисдикції ІСС щодо злочину агресії, а також умовах набрання чинності поправок до Статуту ІСС щодо даного злочину.

В ході проведення дослідження констатовано, що вивчаючи ситуацію в Україні офіс Прокурора ІСС, на чолі з прокурором Карім А.А. Ханом, вважає достатніми наявні підстави, для розслідування починаючи з 21 листопада 2013 р. Таким чином, дані звернення дають можливість розслідувати ситуацію в Україні охоплюючи будь-які минулі та теперішні звинувачення у скоєні злочинів будь-якою особою на будь-якій частині території України, а також, що вони залишатимуться зосередженими на головній меті: забезпеченні відповідальності за злочини, котрі підпадають під юрисдикцію МКС.

Ключові слова: злочин агресії, Міжнародний кримінальний суд, Статут Міжнародного кримінального суду.