

War Crimes under the Rome Statute of the International Criminal Court: Questions of Theory and Practice

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Abstract

The study aims to describe the priorities of the International Criminal Court in the field of investigation of war crimes at the present stage, as well as to conduct a comprehensive international legal analysis of the Rome Statute and the practice of the International Criminal Court in its jurisdiction. The study used such special legal scientific methods as historical-legal, comparative legal and formal legal. The study analyses the legal issues of liability for war crimes from a theoretical and practical standpoint. It was determined that it is extremely important for Ukraine to establish closer cooperation with the International Criminal Court in order to bring to justice war criminals. To improve the functioning of the International Criminal Court, its members must create a safe environment for victims of crime, as well as assist it in executing arrest warrants and contributing to the compensation system for victims of crime.

Keywords: International Justice, International Criminal Law, The Principle of Complementarity, Human Rights.

Introduction

Numerous conflicts around the world are leading to a dynamic increase in the number of war crimes committed, which cause terrible human rights violations. Often these crimes are not punished by national courts. Therewith, the participation of the world community in the fight against impunity and ensuring the criminal responsibility of individuals for criminal violations of human rights would be impossible without an appropriate institutional mechanism.

That is why, since 2002, an international criminal justice body has been established, namely the International Criminal Court, which is a permanent international tribunal set up to prosecute crimes against humanity, genocide, and

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war crimes, the legal basis of which is the Rome Statute, which was adopted at an international conference in Rome on July 17, 1998.

The signing in 1998 and the entry into force of the Rome Statute of the International Criminal Court in 2002 marked the final approval of international criminal law as a branch of modern international law and became a new impetus for its development (Dancy, 2017). As M. Sirant (2018) notes, “the Rome Statute of the International Criminal Court aims to strengthen the rule of law in international relations by requiring those who have violated their obligations to the international community to stand before an independent international tribunal and be held accountable for their actions”. Therewith, the International Criminal Court can make a significant contribution to the promotion of international justice and peace and have a major impact on crime prevention, as its prosecution poses a threat to high-ranking perpetrators of serious crimes (Cheah & Vormbaum, 2018; Tsivatyi, 2020). On the other hand, the international criminal justice system, although focused on the International Criminal Court, also depends on effective domestic action, including the cooperation of states with the International Criminal Court (Deguzman, 2018; Lewis, 2019; Halajová, 2020).

It is important to note that the activities of the International Criminal Court in the administration of justice, as well as the prosecution of persons accused of war crimes, ranks second in scope in the practice of this judicial body after its relevant activities in relation to persons accused of crimes against humanity (Lyamin, 2018; Batiuk and Dmutriv, 2021). In this context, to analyse war crimes investigations, the International Criminal Court also needs to investigate a number of situations in Sudan, the Democratic Republic of the Congo, Uganda, and the Central African Republic, Libya, Mali and Georgia, where the prosecutor’s office of the International Criminal Court is also investigating the situation to date.

As noted in the scientific literature, the idea of establishing the International Criminal Court embodies the centuries-old desire of humankind for a just world order, impossible without the punishment of serious crimes that encroach on the foundations of human civilisation (Depiazza, 2017; Makarenko, 2018). To date, the issue of war crimes under the Rome Statute of the International Criminal Court has been understudied by Ukrainian scholars, although some aspects of this issue were considered by M. Buromensky (2003), who first addressed the issue of international criminal jurisdiction. For example, M. Hnatovsky thoroughly studied the issues related to the relations between Ukraine and the International Criminal Court. Ya. Yavorsky (2017) studied the genesis of the prosecutor’s office in the International Criminal Court. Therewith, Yu. Anosova (2016) analysed the issue of jurisdiction of the International

Criminal Court over crimes committed during the armed conflicts in Georgia and Ukraine, focusing on the specific features of the jurisdiction of the International Criminal Court in specific cases, in particular in the context of armed conflicts in Europe in recent years. The issue of the role of the Rome Statute of the International Criminal Court in the development of the concept of a fair trial was investigated by O. Lutsenko (2015). M. Sirant considered the activities of the International Criminal Court in the context of countering aggression. The issue of counteracting aggression was also studied by M. Antonovych, who noted that “despite the fact that since January 1, 2017 the International Criminal Court has jurisdiction over the crime of aggression, much remains to be done to put this jurisdiction into practice. And since the aggressor states are unlikely to ratify the Rome Statute or declare recognition of the jurisdiction of the International Criminal Court on the crime of aggression, the main responsibility remains with the UN Security Council, which has the power to appeal to the International Criminal Court to open such cases (Antonovych, 2017).

The study aims to describe the priorities of the International Criminal Court in the field of investigation of war crimes at the present stage, as well as to conduct a comprehensive international legal analysis of the Rome Statute and the practice of the International Criminal Court in its jurisdiction to prosecute perpetrators of human rights and crimes.

Materials and Methods

Materials and methods of research were chosen with the consideration of the goals and objectives set in the study. In addition, the study used a set of regulatory principles, techniques, and methods by which knowledge of the specific features of the regulation of war crimes under the Rome Statute of the International Criminal Court was achieved. The use of the methods and materials listed below allowed a comprehensive analysis of the theory and practice of war crimes under the Rome Statute of the International Criminal Court. Thus, to conduct a comprehensive study of the theory and practice of war crimes under the Rome Statute of the International Criminal Court, the study used several general scientific methods such as analysis and synthesis, deduction, induction, prediction, modelling, analogy, and dialectics. The study is based on a systematic approach, which is to investigate the complex system of war crimes under the Rome Statute of the International Criminal Court. For example, using the method of deduction based on other Ukrainian and foreign studies, the original conclusions were made. The method of induction also helped make certain assumptions about war crimes under the Rome Statute of the International Criminal Court.

Problem situations were formulated using the method of system analysis; the goals of the study were defined, as well as the criteria for achieving the goals. Based on the study, the method of dialectics helped in deriving new results on war crimes under the Rome Statute of the International Criminal Court.

One of the methodological techniques used in the research process was an integrated approach, which largely overcame the shortcomings of analytical legal science, as it allowed to organically combine legal tools, legal tools, and basic legal ideas, principles of international law. In addition, such special legal scientific methods as historical legal, comparative legal, and formal legal were used in the study. In particular, the historical legal method was used to study the history of the International Criminal Court, as well as during the study of the establishment and development of cooperation between Ukraine and the International Criminal Court.

Within the comparative legal method, the study compared the provisions of the Rome Statute with other provisions of international law, as well as with the provisions of national law. In addition, the comparative legal method was used to compare investigations of cases and situations by the International Criminal Court regarding war crimes in Sudan, Democratic Republic of Congo, Uganda, Central African Republic, Libya, Mali, and Georgia.

The formal legal method is used for generalisation, classification, and systematisation of research results, as well as for the correct presentation of these results. To comprehensively study the issue, the regulatory framework included the Rome Statute of the International Criminal Court, as well as other universal international legal acts, regulations of Ukraine, etc. In turn, the theoretical framework of the study included fundamental monographs, scientific articles by Ukrainian and foreign authors on the problems of war crimes under the Rome Statute of the International Criminal Court. Thus, the scientific novelty of the study is a comprehensive analysis of the theory and practice of war crimes under the Rome Statute of the International Criminal Court, as well as consideration of current trends in the investigation of cases and situations by the Prosecutor of the International Criminal Court in countries such as Sudan, Democratic Republic of Congo, Uganda, Central African Republic, Libya, Mali, Georgia, as well as a study of Ukraine's cooperation with the International Criminal Court.

Results

The International Criminal Court was established in 1998 to prosecute perpetrators of war crimes, crimes against humanity, and genocide.

Notably, war crimes constitute serious violations of the Geneva Conventions of August 12, 1949, which define the rules of war and establish

international standards for the protection of civilians and the treatment of participants in hostilities in international and internal armed conflicts, as well as serious violations of laws and customs used in armed conflicts (Lutsenko, 2020; Riabinin, 2020). In turn, war crimes are committed in armed conflicts. Some war crimes are related to internal armed conflicts, such as civil war, and others to international armed conflicts; however, most war crimes can be committed in both situations.

On the one hand, war crimes in international armed conflicts comprise such actions as premeditated murder; torture or inhuman treatment, including biological experiments; intentionally causing great suffering or serious injury to body or health; large-scale destruction and misappropriation of property, not justified by military necessity and committed illegally and senselessly; forcing a prisoner of war or other protected person to serve in the forces of the enemy; intentional deprivation of a prisoner of war or other protected person of the right to a fair and regular trial; unlawful deportation or transfer or unlawful detention; hostage-taking. On the other hand, war crimes in internal armed conflicts include actions such as violence against life and person, including murder; mutilation, ill-treatment, and torture; outrage upon personal dignity, in particular, humiliating and degrading treatment; hostage-taking; conscription and enrolment of children under the age of fifteen.

In addition to violations of the Geneva Conventions, war crimes can be other violations of the laws or customs of war. The Rome Statute lists a wide range of such acts. Examples include deliberate attacks on civilians; deliberate targeting of civilian objects; deliberate targeting of personnel, facilities, vehicles involved in humanitarian aid or peacekeeping missions; killing or wounding a combatant who, having laid down arms or having no further means of defence, surrenders. Under international law, such acts may be war crimes, even if they are not committed in the context of a systematic or large-scale attack on the civilian population, but if they are rare or irregular. However, the powers of the International Criminal Court are more limited. According to the Rome Statute: “The Court has jurisdiction over war crimes, in particular when they are committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Rome Statute of the International Criminal Court). Thus, the direct objects of criminal encroachment on persons accused of war crimes under the jurisdiction of the International Criminal Court are mainly the following fundamental human rights: the right to life and health, to personal liberty, to inviolability, to honour and dignity, property, etc.

In the Tadić (2019) case, it was recognised that a war crime must comprise the following: 1) there must be a “serious violation” of international law,

and the violation must have serious consequences for the victim; 2) the violated rule must be considered a customary right or be part of the relevant agreement; 3) the violation must entail, in accordance with customary or generally accepted legislation, the individual criminal responsibility of the person who violates the law; in other words, conduct that is a serious violation of international law must be criminalised. Furthermore, in accordance with the principle of complementarity in the Rome Statute, the International Criminal Court cannot continue a case if national authorities are already conducting or have initiated national proceedings in the same cases (Wexler, 1999). That is, the Rome Statute makes provision that the International Criminal Court is the court of the last instance and will intervene where national courts have not heard international crimes.

The principle of complementarity has at least four functions: it protects sovereignty, reaffirms the fundamental role of states in the exercise of criminal jurisdiction over international crimes; promotes effective investigation and prosecution by encouraging States to make genuine efforts to bring perpetrators to justice in accordance with their duty to investigate and prosecute crimes; facilitates a certain division of labour between different levels of jurisdiction, i.e., by resolving conflicts of jurisdiction and limiting cases coming to the ICC; stimulates cooperation and exchange of practice between international and domestic justice actors (Stahn, 2016).

However, the International Criminal Court cannot automatically administer justice for any crime. This requires one of the following mechanisms to exercise this right: 1) the prosecutor of a State Party shall refer a situation to the International Criminal Court; 2) the UN Security Council shall refer the situation to the International Criminal Court; 3) the Prosecutor of the International Criminal Court shall initiate an investigation into a particular State Party on his or her own initiative (*proprio motu*). In the latter case, the actions of the prosecutor must be confirmed by a chamber comprising three independent and impartial judges. In addition, each arrest warrant and every formal accusation issued by a prosecutor must be approved by a committee of three judges, who make decisions solely in accordance with certain legal principles and evidence provided by the prosecutor.

Thus, to date, cases and situations in Sudan, Democratic Republic of the Congo, Uganda and the Central African Republic, Libya, Mali, and Georgia have been and are being considered by the International Criminal Court. It is important to consider these areas in more detail to analyse war crimes investigations by the International Criminal Court.

1. Situation in Darfur (Sudan), referred by UN Security Council Resolution 1593 (2005). In 2003, the conflict attracted the attention of the international community when two rebel groups began fighting the government.

The government was accused of bias and oppression of the non-Arab population. The reaction of the non-Arab population in the form of repulse led to ethnic cleansing by the government. As a result, hundreds of thousands of people died in the conflict. The situation in Darfur deteriorated and was then referred by the Security Council to the International Criminal Court in March 2005.

Notably, Sudan is not a member state to the Rome Statute. However, since the UN Security Council referred the situation in Darfur to the International Criminal Court by Resolution 1593 of March 31, 2005, the International Criminal Court may exercise its jurisdiction over crimes listed in the Rome Statute committed in Darfur or committed by Sudanese nationals from July 1, 2002. Therewith, the situation in Darfur was the first to be addressed by the UN Security Council to the ICC, and it was the first investigation of the International Criminal Court in a state that is not a party to the Rome Statute. In addition, former Sudanese President Omar al-Bashir is the first president wanted by the International Criminal Court and the first person to be charged by the International Criminal Court with genocide and war crimes. However, neither of the two arrest warrants has been executed against him and he is still not in the custody of the Court.

2. Situation in the Democratic Republic of the Congo, referred by the member state. The International Criminal Court's investigations in the Democratic Republic of the Congo have focused on alleged war crimes and crimes against humanity, committed mainly in eastern Congo in the Ituri region and the provinces of North and South Kivu since July 1, 2002.

The investigation led to a number of cases in which charges were brought for such war crimes: the recruitment and conscription of children under the age of fifteen years and their use for active participation in hostilities; murder and attempted murder; premeditated murder; attack on civilians; rape; sexual slavery of civilians; looting; displacement of civilians; attack on protected objects; destruction of property; rape; sexual slavery; mutilation; cruel treatment; torture; destruction of property; theft and outrage upon personal dignity.

This was the first investigation by the prosecutor's office, resulting in two cases, *The Prosecutor v. Thomas Lubanga Dyilo* and *The Prosecutor v. Germain Katanga and Mr. Ngudjolo Chui's acquittal* (International Criminal Court, 2015), which is still pending trial.

3. The situation in Uganda, referred by the member state. Investigations by the International Criminal Court in Uganda have focused on alleged war crimes and crimes against humanity committed in the context of armed conflict, mainly between the Lord's Resistance Army and national authorities, mainly in Northern Uganda since July 1, 2002.

An investigation launched in July 2004, and alleged war crimes in this situation include murder; ill-treatment of civilians; deliberate coordination of an attack on the civilian population; looting; incitement to rape; forced conscription of children.

This situation forced the judges of the International Criminal Court to issue an arrest warrant in 2005 against the leaders of the Lord's Resistance Army. All the suspects remained at large for ten years, until one of the members, Dominic Ongwen (The Prosecutor v. Dominic Ongwen), surrendered in January 2015. Other members of the Lord's Resistance Army, Joseph Kony and Vincent Otti, remain at large.

4. The situation in the Central African Republic, referred by the member state. The Central African Republic ratified the Rome Statute on October 3, 2001 and referred the situation on its territory from July 1, 2002 to the International Criminal Court. Thus, the International Criminal Court may exercise its jurisdiction over crimes listed in the Rome Statute committed in the territory of the Central African Republic or by its citizens from July 1, 2002.

The International Criminal Court's investigation in the Central African Republic has focused on alleged war crimes and crimes against humanity committed in the context of the conflict in the Central African Republic since July 1, 2002, which peaked in 2002 and 2003. Accordingly, the investigation has opened one main case – the Prosecutor v. Jean-Pierre Bemba Gombo, which includes charges for the following war crimes: murder, rape, and theft.

5. Situation in Libya, referred by UN Security Council Resolution 1970 (2011). Notably, Libya is not a member state to the Rome Statute. However, on February 26, 2011, the UN Security Council referred the situation in Libya to the International Criminal Court on February 15, 2011 by Resolution 1970. Thus, the International Criminal Court may exercise its jurisdiction over crimes listed in the Rome Statute committed in Libya or by its citizens from February 15, 2011.

The Pre-Trial Chamber of the International Criminal Court has found reasonable grounds to believe that a non-international armed conflict between government forces and various organised armed groups, or among various such armed groups, has been ongoing in Libya since at least early March 2011. To date, an investigation launched in March 2011 has opened three cases, initially against five suspects, which include the following war crimes: murder, torture, ill-treatment, and outrage upon personal dignity. The arrest warrant for Muammar Muhammad Abu Minyar al-Gaddafi was revoked on November 22, 2011 due to his death. The trial of Abdullah Al-Senussi in the International Criminal Court ended on July 24, 2014, when the Appeals Chamber upheld the decision of the Pre-Trial Chamber to declare the case inadmissible.

6. The situation in Mali, referred by the member state. Mali ratified the Rome Statute on August 16, 2000 and referred the situation on its territory to the International Criminal Court. Investigations in Mali focused on alleged war crimes committed since January 2012, mainly in the three northern regions of Gao, Kidal, and Timbuktu, and incidents also occurred in the south in Bamako and Sevar.

The report stated that the uprising in the north included deliberate damage to the shrines of Muslim saints in Timbuktu, attacks on military bases in Gao, Kidal, and Timbuktu, the alleged execution of 70 to 153 detainees in Aguelhok, and robberies and rapes. Cases of torture and enforced disappearances in the context of a military coup were reported separately. The prosecutor argued that there were reasonable grounds to believe that war crimes, including murder, had been committed in Mali; mutilation, ill-treatment, and torture; deliberate targeting of protected objects; sentencing and execution without prior court decision; looting and rape.

7. Situation in Georgia. On January 27, 2016, the Pre-Trial Chamber of the International Criminal Court granted the prosecutor's request to open an investigation in Georgia into crimes against humanity and war crimes under the Court's jurisdiction in the context of the international armed conflict between July 1 and October 10, 2008.

The ICC's investigations focus on alleged crimes committed in the context of the international armed conflict between July 1 and October 10, 2008 in South Ossetia, including war crimes: attacks on civilians, premeditated murder, deliberate attacks on peacekeepers, destruction of property. During the preliminary examination, the prosecutor's office gathered information about alleged crimes attributed to three parties involved in the armed conflict – the Georgian armed forces, the South Ossetian forces, and the Russian armed forces.

In approving the prosecutor's request to open an investigation, the Chamber noted that the statements of 6,335 victims on the matter, which it received on December 4, 2015, were overwhelmingly in favour of opening an investigation. On August 14, 2008, the Prosecutor of the International Criminal Court announced a preliminary examination of the situation in Georgia. Based on the information available, the prosecutor concluded that there were reasonable grounds to believe that the crimes falling within the Court's jurisdiction had been committed in Georgia in the context of the August 2008 armed conflict. Pursuant to Article 15 (3) of the Rome Statute, the prosecutor applied to the Pre-Trial Chamber for permission to open an investigation into the situation on October 13, 2015.

8. The situation in the Islamic Republic of Afghanistan. On November 20, 2017, the Prosecutor of the International Criminal Court requested the Pre-Trial

Chamber to initiate an investigation into alleged war crimes and crimes against humanity committed in the armed conflict in Afghanistan. In particular, the request concerned crimes committed in Afghanistan since May 1, 2003 by all parties to the conflict, including the Taliban and its affiliates, Afghan government forces and international forces, including the US military. On March 5, 2020, the Appeals Chamber of the International Criminal Court unanimously decided to authorise the Prosecutor to open an investigation into the alleged crimes under the Court's jurisdiction regarding the situation in the Islamic Republic of Afghanistan.

The preliminary examination focuses on the crimes listed in the Rome Statute, committed in the context of an armed conflict between pro-government and anti-government forces, including crimes against humanity and war crimes, including murder; abuse; outrage upon personal dignity; sentencing and execution without proper judicial authority; deliberate attacks on civilians, civilian targets, and humanitarian missions; treacherous murder or wounding of enemy combatants. Thus, having analysed the practice of the International Criminal Court on war crimes, it should be noted that the International Criminal Court has considered and is considering a substantial number of cases and situations related to war crimes. However, in some cases, it had problems, especially regarding the enforcement mechanism, which needed to be reformed for the International Criminal Court to function effectively.

Discussion

An inherent feature of war crimes is that there must be a connection to a situation of armed conflict, as opposed to, for example, crimes against humanity, which can occur both in peacetime and in armed conflict. These crimes involve violations of international humanitarian law, such as intentional or unintentional attacks on civilians, torture, or ill-treatment, etc.

However, to improve the functioning of the International Criminal Court, its members must play a crucial role in supporting the International Criminal Court in ensuring international justice. They must create a safe environment for victims of crime who wish to testify before the International Criminal Court and protect them from further violence (Sirant, 2018). States should also assist the International Criminal Court in executing arrest warrants and contributing to the compensation system for victims of crime. Notably, not all states are in a hurry to sign the Rome Statute and recognise the status of the International Criminal Court, which undermines the system of international criminal law (Halajová, 2020).

Ukraine signed the Rome Statute on January 20, 2000, but the Constitutional Court later ruled that ratification would be unconstitutional due to the principle of complementarity. Accordingly, the Constitutional Court

concluded that the jurisdiction that complements the Ukrainian national system is not provided for in the Constitution (Lutsenko,2015). However, after the Euromaidan revolution and the start of the war in eastern Ukraine, Ukraine declared that it was accepting the jurisdiction of the International Criminal Court. In particular, on April 17, 2014, the Government of Ukraine lodged an application under Article 12 (3) of the Statute for recognition of the Court's jurisdiction over the alleged crimes committed in its territory from November 21, 2013 to February 22, 2014. On April 25, 2014, the Prosecutor of the International Criminal Court opened a preliminary study of the situation in Ukraine regarding the so-called "Maidan events" (ICC-OTP, 2014). On September 29, based on Ukraine's second application, the prosecutor announced the continuation of a preliminary study of the situation in Ukraine, including alleged crimes that took place after February 20, 2014 in Crimea and eastern Ukraine (ICC-OTP, 2015).

However, the Rome Statute has not yet been ratified, and those guilty of crimes under the Rome Statute, including war crimes, have not yet been brought to justice (Depiazza, 2017; Sirant, 2018).

At the same time, the ratification of the Rome Statute should clearly be comprehensive and accompanied by appropriate changes to the criminal, criminal procedural, and criminal executive legislation, which were developed during this time by scholars, representatives of public organisations, and legislative initiatives (Stahn, 2016; Volynets, 2019).

Conclusions

The Rome Statute of the International Criminal Court constitutes one of the sources of international humanitarian law in the field of individual criminal responsibility, which has been ratified by 123 states. Therewith, the International Criminal Court is one of the main international judicial bodies. Nevertheless, the question arises as to the effectiveness of the mechanism for enforcing the decisions of the International Criminal Court, which is not effective. In addition, there are still states that have not ratified the Rome Statute. The evasion of ratification of the Rome Statute is due to the desire of states not to fall under the jurisdiction of the International Criminal Court. This poses a problem in the administration of justice at all levels.

Therewith, the International Criminal Court is a unique universal body of international criminal justice with great potential, which can become an effective mechanism in the system of prevention of criminal violations of human rights and responsibility for their violations.

It is extremely important for Ukraine to establish closer cooperation with the International Criminal Court to bring to justice those who have committed war

crimes. In addition, it would be appropriate to ratify the Rome Statute, which will expand Ukraine's rights in the International Criminal Court.

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