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Subject of the crime of aggression under international and Ukrainian criminal law

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Abstract. The international community supports the idea of prosecuting those responsible for the crime of aggression. However, the participants in the ongoing war in Ukraine are not signatories to the Rome Statute of the International Criminal Court, and therefore, discussions continue on the possibility of prosecuting those involved in Russian aggression in the newly created special hybrid tribunal. The purpose of this study was to investigate, through legal analysis of international legislation and criminal legislation of Ukraine, the legal regulation of responsibility for the preparation, planning, unleashing, and waging of aggressive war. In the course of the study, the following scientific methods were used: formal-logical, logical-semantic, hermeneutical, statistical, comparative-legal. The study examines the norms of international criminal law and national legislation of Ukraine, which establish criminal liability for the crime of aggression and court sentences issued in Ukraine in this category of cases. The signs of the subject of the crime of aggression are analysed, and the question of which persons are subject to criminal liability for such acts is resolved. It was established that international criminal law and Ukrainian criminal law define the characteristics of persons who can be criminally responsible for unleashing and waging a war of aggression differently, as well as their planning and preparation. It was proved that the absence in the Criminal Code of Ukraine of a clear and literal indication of who can be considered the subject of the crime of aggression does not indicate that it can be any sane person of sixteen years of age. It was proved that this crime can only be committed by persons who are responsible for certain functions in the structure of the armed forces of the country or state power while making decisions in the field of military planning and management, directing, and exercising control over the military or political actions of the state that committed the act of aggression. Therefore, it was generalised that the qualification under Article 437 of the Criminal Code of Ukraine of actions of "ordinary" participants in military operations is erroneous. The results of the study can be used by investigators, prosecutors, judges in the criminal law qualification of the actions of accused or defendants; research and teaching staff and applicants for higher education in the study of criminal law disciplines; and for further scientific research

Keywords: international criminal law; criminal law of Ukraine; preparation of war; aggressive war; subject of crime

Introduction

Since 2014, Russia has been waging an aggressive hybrid war against Ukraine. A full-scale military invasion of RF on the sovereign territory of Ukraine in February 2022 set new challenges for the international community and Ukrainian society. One of the key challenges posed by this war is bringing to justice those who committed this crime of aggression. From a theoretical and practical standpoint, it is extremely important to decide who should be recognised as the subjects of this crime of aggression. After all, in Ukraine, judicial practice is not uniform in solving this problem. The courts issued a number of guilty verdicts, which convicted for the crime of aggression persons who were ordinary participants in military operations and did not take part in either planning or preparing or in unleashing or waging war. The relevance of this issue is also evidenced by the fact that due to the need to formulate fundamental approaches to the interpretation and application of the Ukrainian criminal law norm on the crime of aggression, one of the court cases was transferred to the Grand Chamber of the Supreme Court.

Having examined the issues of qualifying Russia's war of conquest against Ukraine under international law, C. Binder (2023) demonstrated that the Russian attack on Ukraine is a clear violation of international law due to the breach of fundamental norms of general international law, international criminal law, and international humanitarian law. K. Arai (2023) analysed the consequences of the Russian-Ukrainian war through the lens of the application of international humanitarian law in aggressive wars and concluded that despite the Russian Federation's justification of its use of force and its criticism of Ukraine's self-defence actions as "acts of terrorism", the use of armed force by one state against the territorial integrity, sovereignty, and political independence of another state constitutes a crime of aggression.

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M. Kolesnik (2023) investigated the possible impact of the tribunal for the crime of aggression against Ukraine on changes in the United Nations while making a number of relevant comments. In particular, the fact that although the United Nations General Assembly recognised the military operation launched by the Russian Federation in February 2022 against Ukraine as an act of aggression. However, in April 2023, the Russian Federation began its presidency of the UN Security Council. Thus, on the one hand, the international community supports the idea of prosecuting those responsible for this crime of aggression; at the same time, the aggressor itself has become the head of an international institution whose main task is to ensure international peace. According to M. Kolesnik, this development calls into question not only the effectiveness of the UN's activities but also the concept of state responsibility. Analysing the crime of aggression as the most dangerous international crime, O. Voloshchuk (2023) notes that passive behaviour towards the aggressor state by subjects of international law (both altogether and each in particular) gives the offending state an incentive to increase its own "appetites" for the seizure of territories of other states and further stimulates the desire to establish its own hegemony in the international sphere.

A. Khan *et al.* (2021) conducted a review of individual criminal liability for the crime of aggression and concluded that the feature of "leadership" as a characteristic of the perpetrator of this crime is not clearly defined. The issues of responsibility of private individuals for complicity in an aggressive war were examined by N. Hajdin (2022), who argued that it is not limited to the scope of the leadership clause. A similar position is also maintained by P. Grsebyk (2023), who investigated the role of regional customary law in countering the crime of aggression against Ukraine. F. Mégret and C. Redaelli (2022) analysed the crime of aggression through the prism of violating the rights of the population of the state that is waging an aggressive war. V. Navrotsky (2023), examining the relationship between Ukrainian and international criminal law, came to the conclusion that in countering war, these branches of law should be partners, not competitors.

Therewith, a special comparative legal study on the features that characterise the subject of the crime of aggression in international criminal law and criminal law of Ukraine has not been conducted. Thus, the purpose of this study was a legal analysis of international criminal law and Ukrainian criminal law in terms of regulating responsibility for the crime of aggression and establishing the signs of the subject of this crime.

Materials and methods

In the course of the study, a number of methods were used, namely: formal-logical, dialectical, logical-semantic, hermeneutical, statistical, comparative-legal. The objective examination is possible only by considering various aspects of a single phenomenon and carefully analysing and generalising different approaches to its understanding. Therefore, pluralism was one of the main principles in the process of investigating the problems of criminal liability for the crime of aggression. A systematic analysis of various approaches to defining the concept and characteristics of the subject of this crime allowed establishing the optimal way to understand responsibility for such acts.

The study also used a number of formal logical methods. Understanding the texts of primary sources with the disclosure of their meanings that are not expressed explicitly, and by predicting the content of the whole through understanding its parts and vice versa – awareness of the content of parts of the text by understanding the whole was achieved through the use of the hermeneutics method. Using the statistical method for the analysis of quantitative material collected by the Attorney General's Office, the State Judicial Administration, and the Unified State register of court decisions (n.d.) allowed comprehensively analysing and establishing certain regularities of judicial consideration of the examined category of criminal cases. The comparative legal method was used to compare legal norms regulating responsibility for the crime of aggression in international and Ukrainian criminal law.

The international and Ukrainian national normative legal acts that provide for criminal liability for the preparation, planning, unleashing, waging a war of aggression, Ukrainian judicial practice of applying this norm, and scientific publications on this subject were examined. In particular, the following primary sources were analysed: the Charter of the United Nations (1945); unleashing of the General Assembly of the United Nations 3314 (XXIX) (1974); the Rome Statute of the International Criminal Court (1998); the Criminal Code of Ukraine (2001); the sentences of the Nuremberg and Tokyo tribunals. The study examines the judicial practice of Ukraine in cases of planning, preparing, unleashing and waging a war of aggression, in particular, analyses more than twenty sentences handed down by the courts of Ukraine over ten years in the period from 2013 to 2023.

The study also used an information resource developed by Professor M. Karchevsky, which allows systematising quantitative data related to combating crime using the format of reproducible research using the data science methodology (Interactive guide "Combating crime in Ukraine..., n.d.). With the help of this interactive reference book, a visualisation was created that demonstrates the number of registered criminal offences under Article 437 of the Criminal Code of Ukraine (2001) (hereinafter referred to as the CC of Ukraine); the number of persons convicted and acquitted under this article. When creating this visualisation programmatically, the data, which cover the work on combating crime in Ukraine was used. This official information was posted on the above-mentioned resource, which systematised data from reports of the Office of the Prosecutor General of Ukraine and the State Judicial Administration for 2013-2023. The use of the above-mentioned source base and research methods allowed reaching reasonable and objective conclusions.

Results and discussion

Resolution of the General Assembly of the United Nations 3314 (XXIX) (1974) defines aggression as "the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state". Article 3 of the same Resolution sets out the most common variants of acts of aggression, in particular, occupation, naval blockades, attacks by armed forces and bombing, and assistance to illegal armed groups operating on the territory of other states. Article 8 bis of the Rome Statute of the International Criminal Court (1988) recognises the initiation, preparation, planning, or commission of an act of aggression as a "crime of aggression", its nature, scale, and severity, is a violation

of the Charter of the United Nations (1945), provided that such actions are committed by persons who are actually able to control or direct the military, political actions of the state.

Article 437 of the CC of Ukraine (2001) provides for liability for preparation, planning, unleashing of a military conflict or aggressive war; for participation in a conspiracy aimed at achieving such goals; and for conducting aggressive military operations or aggressive war. However, there is a difference between these norms of international criminal law and the national criminal law of Ukraine: the criminal law of Ukraine does not contain a clear provision on which persons can be the subject of the crime of aggression. Therefore, in the science of criminal law and in the practice of applying the criminal law of Ukraine, there is no single well-established approach to understanding the features that a person subject to criminal liability for a crime of aggression should be endowed with.

In doctrinal research, there are two diametrically opposite standpoints on the problems of the crime of aggression, which are due to different approaches to interpreting the above-mentioned norms of international and national criminal law. The first of these positions is based on the norms of international criminal law (in particular, on the norms of the Rome Statute of the International Criminal Court) and consists in the fact that the subject of the crime of aggression under Article 8 bis of the Rome Statute (1998) is a person who is able to control or direct the military or political actions of a state. N. Hussain *et al.* (2023) note that this leadership clause is a necessary tool to enforce international criminal law and deter future acts of aggression. Criminal acts of high-ranking officials are characterised by characteristics that substantially distinguish them from other criminal-illegal encroachments, in particular: crimes committed by such persons are inextricably linked with and affect the actions of the state; powers of office, and the status of these persons allow them to influence a substantial number of persons under their jurisdiction, and this, in turn, leads to the absence of persons willing to give evidence or persons interested in prosecuting or bringing charges against such high-ranking officials; such persons are endowed with a wide range of political, economic, and human resources to ensure the commission of criminal acts.

In the statutes of international tribunals and in international customary law, there is no list of examples of such official powers or any instructions on the methodology for establishing or determining certain powers, the presence of which would be recognised as sufficient grounds for qualifying the actions of a particular person as a subject of the crime of aggression. It is necessary to assess and analyse all factual circumstances in their totality to establish the circle of persons who can actually control and direct the military or political actions of a particular state, in particular, such as the ability to form the general course of development of the state; determine the national ideology; influence the rule-making process, the creation of national law and its further implementation; approve the composition and leadership of the armed forces of the state; organise tax support for the functioning of the state and its apparatus; make decisions on entering into interstate and international contractual relations (Dubber, 2007).

In this aspect, the sentences of the Nuremberg and Tokyo tribunals are interesting. From their content, it can be seen that only political or military leaders were recognised as subjects of crimes. Thus, during the Nuremberg trial of the main war criminals, high-ranking officials of the government, the military apparatus and the Nazi Party of Germany were prosecuted and convicted of participating in an aggressive war. Thus, the range of subjects of the crime of aggression was limited to a relatively small group of military and political leaders. Therewith, their ability to exercise effective leadership and control, rather than the position outlined by the legal framework, was the decisive factor. The subject of a crime does not necessarily have to make certain decisions in the context of war and peace but must be involved in activities that have exceptional weight for unleashing, preparing, planning, and waging a war of aggression (Werle, 2011).

Thus, as of 2024, according to international criminal law, personal responsibility for the preparation and conduct of a war of aggression is assigned to those who exercise military and political leadership, and more than one person can hold such a "leadership" position. This definition of the subject moves the crime of aggression to the plane of actions exclusively of those officials who have a wide range of powers and actual means to organise and commit international crimes. There is also an opinion in scientific circles that the criteria for such "leadership" have yet to be determined by the International Criminal Court (Khan *et al.*, 2021).

In the theory of international law, it is also suggested that aggression is not only a crime of one state against another. The criminal nature of aggression also lies in its destructive consequences for the population of both states at war. The conduct of war is increasingly interpreted as a violation of the rights of the state's own population, which commits the crime of aggression, including combatants and non-combatants. In this way, internal human rights topics related to the state's responsibility to persons under its jurisdiction are actualised (Mégret & Redaelli, 2022).

Another view is to challenge the requirement described above, which is called the "leadership clause", and to challenge the view that individuals are not criminally liable because they do not have the necessary authority over public policy (Hajdin, 2022). Researchers defending this standpoint, note that the possibility of bringing to justice for the crime of aggression is not limited to the scope of the leadership provision, which is formulated in the Rome Statute (1998) and is broader since it allows bringing to justice all those who knowingly participate, for example, in the conduct of a war of conquest or in the administration of the occupied territories to prepare them for annexation (Grsebyk, 2023). This standpoint is also based on the national criminal law of Ukraine (in particular, article 437 of the CC of Ukraine), according to which any person who actively participates in the conduct of a war of aggression should be held criminally liable for the crime of aggression. After all, Article 437 of the CC of Ukraine (2001) does not contain any requirements for the subject of the crime that it establishes.

Criminal liability of managers, organisers, and participants of the military aggression of the Russian Federation against Ukraine to the international jurisdictional bodies in accordance with the provisions of international criminal law should not exclude their criminal prosecution under the Ukrainian criminal law. In this regard, international and Ukrainian criminal law should not compete with each other but should act as partners (Navrotskyi, 2023). Therewith, the ambiguity and vagueness of criminal law norms and the abuse of judicial and law enforcement agencies in

the application of criminal law means, can have a negative consequence of devaluation, depreciation of these norms of criminal law (Hazdayka-Vasylyshyn *et al.*, 2021).

The analysis of the practice of applying the analysed criminal law norm in Ukraine shows the following. From the beginning of the Russian military aggression against Ukraine in 2014, Ukrainian courts issued a number of sentences on the crime of aggression, namely "Planning, preparing, unleashing, and waging a war of aggression". Statistical data on the number of criminal offences that were considered, the number of persons who were served with a notice of suspicion, and persons convicted under Article 437 of the CC of Ukraine (2001) during the period from 2013 to 2023 are shown in Figure 1. Unified state register of court decisions (Unified state register…, n.d.) in the public domain for the above period contains 20 sentences issued in proceedings under Article 437 of the CC of Ukraine (2001); four of them are acquittals (in terms of charges for the crime of aggression).

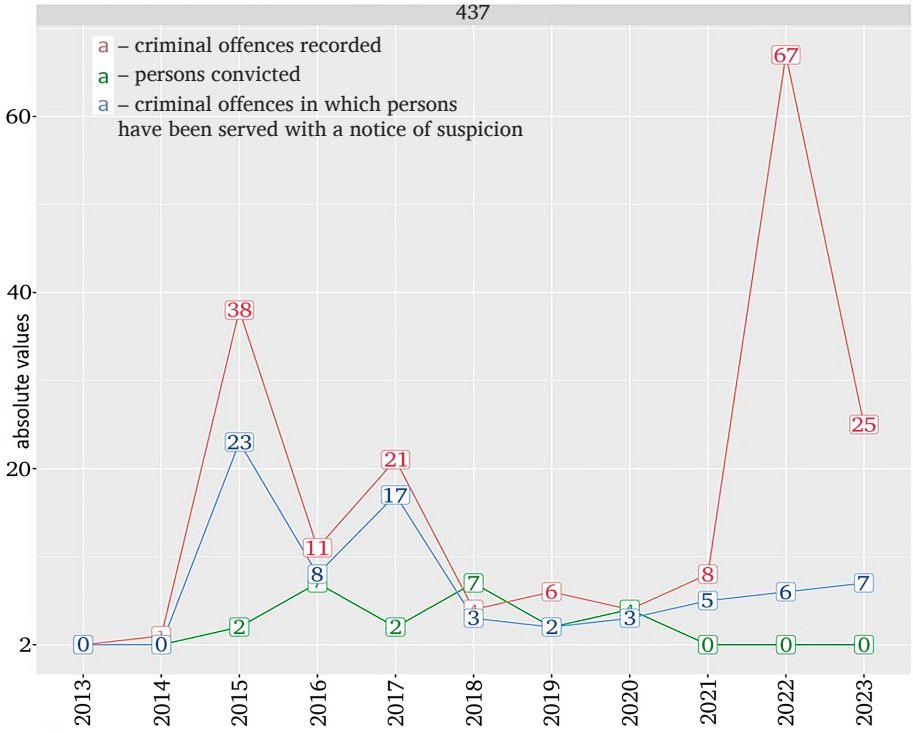

Figure 1. Number of registered criminal offences under Article 437 of the Criminal Code of Ukraine
Source: Interactive guide "Combating crime in Ukraine: Infographics" (2013-2023) (n.d.)

In one of these court proceedings, the Criminal Court of Cassation as part of the Supreme Court issued a ruling on 03.02.2022, by transferring the case to The Grand Chamber of the Supreme Court (Decision of the Criminal Court..., 2022). This transfer was conditioned by the Criminal Court of Cassation by the fact that it is necessary to formulate fundamental approaches to the application and interpretation of Article 437 of the CC of Ukraine (2001) (in particular, in terms of determining the necessary characteristics of the subject of this criminal offence). In the first instance, the verdict against two Ukrainian citizens was handed down by the Lysychansk City Court of the Luhansk region. The citizens were accused of committing several offences under various articles of the Criminal Code of Ukraine, including Part 2 of Article 437 of the CC of Ukraine (2001). The quintessence of the arguments of the defenders in this production is reduced to the fact that according to the definition of the concept of both aggressive war and the crime of aggression, in accordance with international law, convicts cannot be considered subjects of this crime, therefore, they should not be held criminally liable under Article 437 of the Criminal Code of Ukraine (2001).

The process of forming the position of the Grand Chamber of the Supreme Court on determining the necessary features of the subject of a crime under Article 437 of the CC of Ukraine (2001), lasted more than two years. The decision of the Grand Chamber of the Supreme Court of in case No. 415/2182/20 (2022) indicates that the acts defined in Article 437 of the CC of Ukraine (2001) can only be committed by the persons, official powers or actual social status of which allows effectively controlling or managing military and political actions, or have a substantial influence on the armed areas, government and politicians, media, economy, and other spheres of public and political life both in your their state and outside of it, or lead certain areas of military or political actions (Decision of the Criminal Court…, 2022).

Thus, from a legal standpoint, the problem of the subject of those offences that are provided for in various parts of Article 437 of the Criminal Code of Ukraine is manifested in the fact that, at first glance, a literal understanding of the text of this article can lead to the conclusion that their subject is general. Ultimately, there is not a single sign of a special subject of a crime under Article 437 of the CC of Ukraine (2001) that is explicitly provided for. There is no mention of the subject. In contrast to international law, the Ukrainian criminal law does not specify that the subject of such crimes can only be those persons who are factually able to exercise control over the military and political actions

of the state or direct such actions. However, criminal law norms should be interpreted in a comprehensive, systematic way, in particular, it is worth paying attention to those forms of socially dangerous acts, the responsibility for which is enshrined in Article 437 of the CC of Ukraine (2001).

Thus, under the planning of a war or military conflict, it is customary to understand the joint conceptual activities of political and military figures of the highest rank, who form the strategic goals of military campaigns; senior military officials who determine the military means and methods to achieve these goals, and lawyers and ideologues, representatives of diplomatic services which provide maximum international and national campaign legitimacy and the commitment of public opinion to it.

Preparation of a war or military conflict is recognised as an activity that practically coincides with the planning stage, but still, the preparation has its own characteristics; in particular, it manifests itself in practical actions performed to fulfil agreed goals, creating conditions for and organising a military aggressive campaign. In addition, preparation for war can manifest itself in the acquisition, transportation, and installation of weapons and other equipment, which can be used to achieve military goals, in the implementation of measures to transfer the economy to the military type, in the elimination of obstacles, that can interfere with the military manoeuvres or waging war, in the construction of defensive lines and structures. It can also involve developing and adopting necessary legislative acts, increasing the production of military goods, conducting full or partial mobilisation, evacuating the population from strategic objects and localities, and initiating, preparing, and conducting negotiations with possible military allies (Vasyurenko, 2014).

Issuing an order providing for encroachment on the sovereign territory of another state, on its political independence, or other attributes of the state can be interpreted as the unleashing of a military conflict or war. It can also be a declaration of war, although the norms of international law provide for separate responsibility for it, so most of the wars that are currently going on in the world remain undeclared. Unleashing a war is also possible by provoking it, creating a fictional, fake excuse, or staging a conflict situation to force the enemy to use weapons.

Conducting a war or military operations consists in performing managerial actions for the purpose of the implementation of aggressive plans, in particular: general leadership of all forces that are involved in a military conflict or war; implementation of leadership of military by forces or management of the individual operations conducted by them. Such actions may include making changes to the plan of a military conflict or war, creating new versions of the plan of an already initiated military conflict or war. Thus, the conduct of aggressive military operations or war is not just participation in such actions but the management of the armed forces and the control of military operations on the territory of another state to implement a plan of aggressive war or military conflict, which may be accompanied by the occupation of territories, the taking of hostages and prisoners of war, and making adjustments to the plan of war or military conflict, to the plans of military and other operations, the management of the occupied territories, etc. (Yurikov, 2022).

Notably, organised war and its preparation, planning, or unleashing, for the most part, are conducted by representatives of the highest military and political leadership of the aggressor state. That is why, despite the absence of a direct indication of the characteristics of the subject of this crime in Article 437 of the CC of Ukraine (2001), it is quite reasonable to conclude that the subject of this offence is still special. After all, judging by the nature and content of those socially dangerous acts that are prohibited by Article 437 of the CC of Ukraine (2001), this crime can only be committed by high-ranking persons who perform functions in the system of the armed forces of the state or in the system of state power, resolving issues of military administration, exercising leadership and control over the military and political actions of the aggressor state.

Therefore, despite the fact that the article of the Ukrainian criminal law, which establishes criminal liability for the crime of aggression, does not contain an indication of special crime subject, all forms of committing this crime are not characterised by the commission of such encroachments by ordinary citizens. Only military and political leadership has the potential and the appropriate means and resources to participate in planning, collusion, organisation, unleashing, or waging a military conflict or aggressive war (Oliynyk, 2022).

Therefore, qualification under parts one or two of Article 437 of the CC of Ukraine (2001) of the actions of all "ordinary" participants involved in military operations is erroneous. It is necessary to establish and prove that the person has committed at least one of the actions described above, which are alternative forms of socially dangerous encroachment to accuse a particular person of committing a crime of aggression. Therewith, it is worth emphasising that "conducting military operations" is not the same as "participating in military operations".

Guided by similar arguments, the Ukrainian courts issued four acquittals, mentioned above. In particular, on 21.09.2017, the Druzhkivka City Court of Donetsk region issued an acquittal in terms of the lack of proof of the accused's Commission of a criminal offence under Part 2 of Article 437 CC of Ukraine (2001). The panel of judges concluded that "the conduct of aggressive war or aggressive military operations is recognised as managerial actions for the implementation of aggressive plans, in particular, the general leadership of all forces involved in a war or military conflict, the leadership of armed forces, or conducting military operations, etc. These actions are committed after an aggressive war or military conflict has already been resolved, and may include making changes to the plan of wars or military conflict, creating new plans for conducting the war or military operations that have begun". The evidence that the defendant conducted managerial actions to implement military plans or general leadership of all forces involved in the war, leadership of the armed forces, conducting military operations, making changes to the existing war plan, the creation of new military plans, were not provided by the prosecution to the court (Decision of Druzhkivka City Court..., 2017).

However, in judicial practice, there are also errors in the qualification of actions of persons accused of conducting military operations. As an example of such erroneous and inconsistent judicial practice, the guilty verdict issued the day after the above acquittal can be cited. Thus, the verdict of the Krasnoarmiisk city-district court established that in June 2015, a citizen of the Russian Federation, being in a correctional colony on the territory of the Russian Federation, for the purpose of personal enrichment, out of mercenary motives, voluntarily agreed to the proposal of persons

not identified at that time by the pre-trial investigation regarding participation in the terrorist organisation "Donetsk People's Republic" (hereinafter – the DPR) and conducting aggressive military operations on the territory of Ukraine. The accused crossed the state border of Ukraine on foot and signed a contract with representatives of "DPR", voluntarily joined the terrorists, which were controlled by representatives of the Russian Federation, which waged an aggressive war against Ukraine. After joining the specified terrorist organisation, he received the call sign "Rumyn" and was appointed to the post of intelligence officer of the 2nd platoon of the intelligence company of the 5th Donetsk separate motorised rifle brigade "OPLOT" of the terrorist organisation "DPR". The verdict also states that the defendant committed aggressive military operations and terrorist acts, attacks on organisations, enterprises, institutions, and citizens in the Donetsk and Luhansk regions of Ukraine, identified the location of military equipment and fortifications, personnel of the Armed Forces of Ukraine, corrected the fire on them by the artillery of the terrorist organisation. That is, he took an active part in military operations, but did not exercise general leadership of all the forces involved in the conflict, did not direct the armed forces, the conduct of military operations. Despite this, his actions were (in the opinion of the study, wrongly) qualified by the court as "waging a war of aggression by prior agreement of a group of persons" (Decision of the Krasnoarmiisk City-District…, 2017).

I. Basysta (2022), exploring the options of possible jurisdictional ways to resolve the issue of responsibility for the crime of aggression, states that international experts identify four possible options for the prosecution of the military aggression crimes committed in Ukraine: (1) International Criminal Court; (2) international tribunal *ad hoc* 3) a national court exercising territorial jurisdiction (in Russia, Belarus, or Ukraine); 4) a national court exercising universal jurisdiction (Dannenbaum, 2022). Considering that this crime cannot be investigated by the International Criminal Court due to a number of restrictions, the process of establishing a special tribunal *ad-hoc* was launched, certain steps have been taken to create it. Although the discussion in the international scientific society regarding the creation of such a special tribunal is characterised by different standpoints: both approving and having certain reservations (Lebid, 2022). Scientific circles discuss the question of founding a special international tribunal for investigating the crime of aggression by Russia against Ukraine, focusing on the main challenges that arise in the process of creating such a tribunal (Voytsikhovskyi & Bakumov, 2023; McDougall, 2023).

Therewith, national justice must provide an appropriate criminal law assessment and the response of the state to each fact of committing a criminal offence, while international jurisdictional bodies conduct their activities on the basis of complementarity (they begin to act only in cases where a certain state does not want or cannot conduct a criminal assessment and legitimate prosecution of the relevant crimes). This provision is based on the basic rule that, within the limits of its sovereignty, criminal liability must be exercised by the state in the sovereign territory of which the crime was committed, while being guided by the national criminal law. This is one of the constructive foundations of state sovereignty. (Navrotskyi, 2023). Therefore, if any sane individual who has reached the age of 16 has committed at least one of the actions provided for in Article 437 of the CC of Ukraine (2001), then it is subject to criminal liability and such an action in accordance with the current criminal law of Ukraine.

Conclusions

At a time when the current international criminal law refers to the subjects of the crime of aggression, only persons who are able to actually control the military and (or) political actions of the state and (or) direct them, the scientific sphere actively discusses the criteria for such "leadership", and the possibility of bringing to criminal responsibility those persons who do not occupy such a "leadership" position, but simultaneously take an active part in the conduct of aggressive warfare.

Ukrainian criminal law does not contain such direct restrictions on the subjects of the crime "planning, preparing, unleashing, and waging a war of aggression". According to the current Criminal Code of Ukraine, the subject of this crime is general. According to the generally recognised rule, criminal liability is implemented by the state on the territory of which the criminal offence is committed under national criminal law. Therefore, hypothetical criminal liability of managers, organisers, or participants of the Russian military invasion of Ukraine in accordance with the provisions of international criminal law, possible in the distant future, should not exclude the possibility of their immediate criminal liability in Ukraine under the current Ukrainian criminal law.

The analysis of the judicial practice of Ukraine showed that there is no unity in the interpretation and application of the criminal law norm, which provides for responsibility for planning, preparing, unleashing, and waging a war of aggression. In particular, active participation in military operations is often interpreted by the courts as waging a war of aggression; simultaneously, there are acquittals in which similar actions (participation in war) are not recognised as forming a crime under Article 437 of the Criminal Code of Ukraine.

As a result of the conducted study, it is worth summarising that qualifying the actions of a specific subject under Article 437 of the Criminal Code of Ukraine, it is necessary to establish that they committed at least one of those alternative socially dangerous acts provided for by it. Special attention, in this case, should be drawn to the fact that the conduct of aggressive war or aggressive military actions is not just participation in such actions but the implementation of managerial actions for the implementation of the military plan, in particular, the implementation of the general leadership of all forces involved in the war, the implementation of the leadership of the armed forces, or the conduct of military operations.

A promising area of research on the subject is the examination of opportunities for draft law development on amendments to Article 437 of the Criminal Code of Ukraine, which would improve its text in such a way as to exclude different understandings and interpretations of its content.

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Conflict of interest

None.

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Суб'єкт злочину агресії за міжнародним та українським кримінальним правом

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Анотація. Світове співтовариство підтримує ідею судового переслідування осіб, винних у злочині агресії, проте, учасники триваючої війни в Україні не є сторонами Римського статуту Міжнародного кримінального суду, у зв'язку з чим тривають дискусії щодо можливості переслідування осіб, причетних до російської агресії, у новоствореному спеціальному гібридному трибуналі. Метою цієї статті було вивчення, шляхом правового аналізу міжнародного законодавства та кримінального законодавства України щодо правової регламентації відповідальності за підготовку, планування, розв'язування та ведення агресивної війни. В ході дослідження використано такі наукові методи: формально-логічний, логіко-семантичний, герменевтичний, статистичний, порівняльно-правовий. Було досліджено норми міжнародного кримінального права та національного законодавства України, якими встановлена кримінальна відповідальність за злочин агресії, а також судові вироки, винесені в Україні за даною категорією справ. Було проаналізовано ознаки суб'єкта злочину агресії та вирішено питання про те, які саме особи підлягають кримінальній відповідальності за такого роду діяння. Встановлено, що міжнародне кримінальне право та український кримінальний закон по-різному визначають ознаки осіб, які можуть нести кримінальну відповідальність за розв'язування та ведення агресивної війни та її планування і підготовку. Було доведено, що відсутність у Кримінальному кодексі України чіткої та буквальної вказівки на те, кого можна вважати суб'єктом злочину агресії, не свідчить про те, що ним може виступати будь-яка фізична осудна особа шістнадцятирічного віку. Доведено, що цей злочин можуть вчинити лише особи, які відповідають за певні функції в структурі збройних сил країни або державної влади, при цьому приймають рішення в сфері воєнного планування та управління, керують та здійснюють контроль за воєнними або політичними діями тієї держави, яка здійснила акт агресії. Тому було узагальнено, що кваліфікація за статтею 437 Кримінального кодексу України дій "рядових" учасників, які беруть участь у воєнних діях, – помилкова. Результати дослідження можуть бути використані слідчими, прокурорами, суддями при кримінально-правовій кваліфікації дій обвинувачених чи підсудних осіб; науково-педагогічними працівниками та здобувачами вищої освіти при вивченні кримінально-правових дисциплін; а також для подальших наукових розвідок

Ключові слова: міжнародне кримінальне право; кримінальне право України; підготовка війни; агресивна війна; суб'єкт злочину