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THE LONG-AWAITED BREAKTHROUGH LEGISLATION – CHANGES IN UKRAINIAN CRIMINAL LAW DUE TO THE RATIFICATION OF THE ROME STATUTE

Abstract: *Despite the fact that the Russian aggression against Ukraine has been ongoing since 2014, Ukrainian legislation establishing criminal responsibility for international crimes had not been fully in line with international standards for a long time. After many years of negotiations and overcoming many obstacles, the Law of Ukraine "On amendments to the Criminal and the Criminal Procedure Codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments" of 9 October 2024 entered into force on 24 October 2024. This signifies that the Ukrainian material criminal law has introduced internationally recognised categories and elements of international crimes. In this article we analyse whether it is true that international standards regarding the elements of international crimes have been fully introduced, and to what extent the new legislation fulfils the goals of international criminal law – in particular, whether it sufficiently implements the standards established in the Rome Statute. This analysis indicates several elements that still could be improved in the area of Ukrainian material criminal law when it comes to the definitions of international crimes.*

Keywords: International Criminal Court, international criminal law, crimes against humanity, criminal law of Ukraine, command responsibility

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INTRODUCTION

Despite the fact that the Russian aggression against Ukraine has been ongoing since 2014, Ukrainian legislation on responsibility for international crimes had not been fully in line with international standards for a long time. Firstly, the part of the Criminal Code of Ukraine (CCU) which penalises crimes against peace, security and international order (Chapter XX) did not contain a detailed (or complete in the light of international standards) list of types of international crimes corresponding to the catalogue of crimes in the Rome Statute, thus hindering the correct qualification and prosecution of such crimes.[1] As a consequence, the legislation on international crimes was not coherent and not in compliance with international law. It was not merely an academic problem, but a practical one that led to the impossibility of prosecuting the perpetrators of the most serious violations of international law. In particular, the problem concerned the fact that there was no category or definition of crimes against humanity in the CCU; it was not possible to prosecute perpetrators for crimes against humanity – neither on the basis of national law nor (hypothetically) of international law.[2] The criminal offences committed after the Russian aggression could only be legally classified as war crimes or the crime of genocide. Moreover, other existing provisions lacked specificity in their approach to the precise elements of international crimes: the provision penalising violations of the laws and customs of war (Art. 438 CCU) was a blanket norm, as it only directly listed a few specific violations of international humanitarian law, whereas for the remaining crimes it simply referred to those violations prescribed in the treaties ratified by Ukraine.[3] In consequence, only the violations of the laws and customs of war enumerated in international instruments

[1] *See* A. Kosylo, A. Dmytriv, *Implementation and Interpretation of the Definitions of International Crimes in the National Jurisdiction of Ukraine*, 43 Polish Yearbook of International Law 353 (2024); I. Marchuk, *Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor's Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine*, Torkel Opsahl Academic EPublisher, The Hague: 2018, p. 393; I. Anosova, K. Aksamitowska, V. Sancin, *Positive Complementarity in Action: International Criminal Justice and the Ongoing Armed Conflict in Ukraine*, 24 International Criminal Law Review 657 (2024); K. Aksamitowska, *The Domestic Legal Framework for the Prosecution of Core International Crimes in Iraq and the Ukraine: A Comparative Perspective*, in: P. Grzebyk (ed.), *International Crimes in National Regulations of Selected States*, Wydawnictwo Instytutu Wymiaru Sprawiedliwości, Warszawa: 2023, pp. 229–244. On the participation of civil society in this procedure, *see* K. Aksamitowska, *The Counter-Hegemonic Turn to "Entrepreneurial Justice" in International Criminal Investigations and Prosecutions Relating to the Crimes Committed in Syria and Eastern Ukraine*, in: F. Jeßberger, L. Steinl, K. Mehta (eds.), *International Criminal Law: A Counter-Hegemonic Project?*, TMC Asser Press, Hague: 2022, p. 142.

[2] Кримінальний кодекс України [Criminal Code of Ukraine], No. 2341-III of 5 April 2001, available at: https://zakon.rada.gov.ua/laws/show/2341-14?lang=en#Text (accessed 30 June 2025).

[3] *The Domestic Implementation of International Humanitarian Law in Ukraine (updated)*, Global Rights Compliance, Kyiv: 2021, available at: https://www.asser.nl/media/794633/2021-the-domestic-implementation-of-ihl-in-ukraine-updated.pdf (accessed 30 June 2025).

duly ratified by Ukraine could be prosecuted on the basis of Ukrainian criminal law. Thus, some legal scholars claimed that other war crimes, e.g. those established in customary international law or some of those listed in the Rome Statute, fell outside the ambit of Ukrainian national law.[4]

Secondly, the implementation of international criminal law could not be considered to be in accordance with the standards of international law, as the Rome Statute had not been ratified by Ukraine. Although Ukraine signed the Rome Statute on 20 January 2000, the ratification was not executed for years, until 21 August 2024; on 1 January 2025, it entered into force for Ukraine.[5] There were many obstacles to overcome to make ratification possible. First, in 2001 the Constitutional Court ruled that the International Criminal Court (ICC)'s principle of complementarity conflicted with the Ukrainian Constitution (its Art. 124).[6] The Constitutional Court found that a potential ICC investigation into crimes committed on the territory of Ukraine would be contrary to the constitutional provision which conferred exclusive competence in matters of the judiciary to the Ukrainian national courts.[7] To address this problem, amendments pertaining to Art. 124 of the Constitution were introduced, in order to allow for the jurisdiction of the ICC to be applicable to Ukraine in the event of the Rome Statute being ratified. They entered into force in 2019, three years after the official publication of the law.[8] However, even in this situation, the government did not immediately move towards ratification of the ICC Statute, which finally took place on 21 August 2024.[9]

In this text we analyse the new provisions of the CCU, resulting from the Law of Ukraine "On amendments to the Criminal and the Criminal Procedure Codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments" of 9 October 2024 (Law No. 4012-IX or the

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[4] I. Marchuk, A. Wanigasuriya, *Venturing East: The Involvement of the International Criminal Court in Post-Soviet Countries and Its Impact on Domestic Processes*, 44(3) Fordham International Law Journal 735 (2021), p. 747.

[5] Закон України «Про ратифікацію Римського статуту Міжнародного кримінального суду та поправок до нього» [The Law of Ukraine on the ratification of the Rome Statute of the International Criminal Court and its amendments], No. 3909-IX of 21 August 2024, available at: https://zakon.rada.gov.ua/laws/show/3909-20#n2 (accessed 30 June 2025).

[6] Висновок Конституційного Суду України [Opinion of the Constitutional Court of Ukraine], 11 July 2001, N 1-35/2001, available at: https://zakon.rada.gov.ua/laws/show/v003v710-01#Text (accessed 30 June 2025).

[7] M. Kersten, *After All This Time. Why has Ukraine Not Ratified the Rome Statute of the International Criminal Court?* 2022, Justice in Conflict, 14 March 2022, available at: https://justiceinconflict.org/2022/03/14/after-all-this-time-why-has-ukraine-not-ratified-the-rome-statute-of-the-international-criminal-court/; G. Radu, *Is Ukraine Finally Breaking Its 24-year International Criminal Court Commitment Phobia?*, Asser Institute Blog, available at: https://rb.gy/8788mr (both accessed 30 June 2025).

[8] Marchuk, *supra* note 1, p. 379.

[9] Marchuk, Wanigasuriya, *supra* note 4, pp. 745–746.

Law of 9 October 2024),[10] and whether it is a valid assumption that this act fully introduced international standards regarding the elements of international crimes and to what extent the new legislation fulfils the goals of international criminal law, in particular whether it implements in a sufficient way the standards established in the Rome Statute.

The first part of the article presents the attempts to criminalise all four types of international crimes in the CCU and the reasons why they were unsuccessful. In the second part the new legislation is analysed, allowing for a comprehensive analysis of its alignment with international standards and the consequences of the new wording of the regulations. This analysis indicates several elements that could still be improved in the area of Ukrainian material criminal law when it comes to the definitions of international crimes.

1. ON THE ROCKY PATH TO NEW LEGISLATION ON INTERNATIONAL CRIMES

The war began in 2014 and Ukrainian law was not fully adapted to allow for effective prosecution and adjudication of international crimes following the Russian Federation's aggression in 2014; moreover, it failed to comply with international law. In consequence, the powers of Ukrainian law enforcement authorities in terms of legally qualifying conduct remained unchanged.[11] At the same time, it did not mean that international law is not applied at all – in their jurisprudence, national courts have applied the case law of the European Court of Human Rights (ECtHR) and have referred to the Geneva Conventions in cases concerning war crimes.[12] In particular, while defining the status of Russian aggression, courts have referred to it as an international armed conflict. In doing so, the courts have invoked, inter alia, the Charter of the United Nations, UN resolutions and the Declaration of the United Nations General Assembly on the inadmissibility of intervention and

[10] Закон України «Про внесення змін до Кримінального та Кримінального процесуального кодексів України у зв'язку з ратифікацією Римського статуту Міжнародного кримінального суду та поправок до нього» [The Law of Ukraine on amendments to the Criminal and the Criminal procedure codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments], No. 4012-IX of 9 October 2024, available at: https://zakon.rada.gov.ua/laws/show/4012-20#n6 (accessed 30 June 2025).

[11] *Human Rights Defenders Recommend the Ukrainian Authorities to Finilize the Draft Law No. 7290*, Zmina, 22 April 2022, available at: https://tinyurl.com/3r56capz; *MATRA-Ukraine: The Halfway Mark*, TMC Asser Institute & Global Rights Compliance, 22 September 2022, available at: https://www.asser.nl/matra-ukraine/news-and-events/matra-ukraine-the-halfway-mark/ (both accessed 30 June 2025).

[12] *See also* A. Korynevych, O. Senatorova, M. Shepitko, *Prosecution of the Crime of Aggression in International and Ukrainian Jurisdiction: Challenges and Prospects*, 43 Polish Yearbook of International Law 367 (2024), pp. 377–378.

interference in the internal affairs of states.[13] Court decisions have concluded that the conflict between the Russian Federation and Ukraine is an ongoing international armed conflict. References have been made to the four 1949 Geneva Conventions. Moreover, Ukrainian courts have referred to the Rome Statute in their decisions, although Ukraine had not ratified it at the time when decisions were issued. The relevant provisions of the Rome Statute have been used to determine which acts should be classified as war crimes or in order to interpret such acts. The case law of international criminal courts, i.e. the International Criminal Tribunal for former Yugoslavia, has also been cited by Ukrainian courts for the interpretation of international crimes.[14]

The lacuna in the penalisation of international crimes was clearly visible, and in 2021 the Ukrainian Parliament adopted Bill No. 2689, defining the categories of war crimes and crimes against humanity, defining them in accordance with the international humanitarian law and the Rome Statute and providing for a new structure of command responsibility.[15] In particular, Art. 442-1 of the Bill penalises crimes against humanity.[16] The draft law accommodated major developments of international law, in particular, taking into account the wording and scope of

[13] Charter of the United Nations (signed on 26 June 1945); Declaration No. 36/103 of the United Nations General Assembly of 9 December 1981, on the inadmissibility of intervention and interference in the internal affairs of states; UNGA resolutions: of 21 December 1965, *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, A/RES/20/2131; of 24 October 1970, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, A/RES/2625(XXV); of 16 December 1970, *Declaration on the Strengthening of International Security*, A/RES/25/2734; of 14 December 1974, *Definition of Aggression*, A/RES/3314(XXIX).

[14] Вирок Чернігівського районного суду Чернігівської області [Decision of Chernihiv District Court of Chernihiv Region] of 10 January 2023, Case No. 748/2272/22, available at: https://reyestr.court.gov.ua/Review/108302451; Вирок Деснянського районного суду м. Чернігова [Decision of the Desnyan District Court of Chernihiv] of 11 April 2023 No. 750/6470/22, available at: https://reyestr.court.gov.ua/Review/110135338; Вирок Іванківського районного суду Київської області [Decision of the Ivankiv District Court of the Kyiv Region] of 28 June 2023, No. 366/869/23, available at: https://reyestr.court.gov.ua/Review/111894270; Вирок Саксаганського районного суду м. Кривого Рогу [Decision of the Saksagan District Court of Kryvyi Rih] of 10 October 2023, No. 522/3868/23, available at: https://reyestr.court.gov.ua/Review/111894270 (all accessed 30 June 2025).

[15] *Parliament of Ukraine Adopts Bill to Implement International Criminal and Humanitarian Law*, Parliamentarians for Global Action, 20 May 2021, available at: https://www.pgaction.org/news/ukraine-bill-2689.html (accessed 30 June 2025).

[16] Comparative Table to the Draft Law of Ukraine "On amendments to certain legislative acts on the enforcement of international criminal and humanitarian law" (on amendments to the Criminal and Criminal Procedure Codes of Ukraine concerning the implementation of the norms of international criminal and humanitarian law), Bill No. 2689, available at: https://www.pgaction.org/pdf/2021/en-bill-2689-10-03-2021.pdf (accessed 30 June 2025).

international crimes in the Rome Statute.[17] However, the Bill was not signed by the president and did not enter into force.[18]

Later, a new draft law was presented: Bill No. 7290 (on 15 April 2022, the Verkhovna Rada of Ukraine registered the Draft Law "On amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine").[19] However, it was met with severe criticism.[20] It was claimed that the planned changes "artificially reduced opportunities to prosecute Russian military commanders and civilian superiors liable for war crimes", by not taking into account the existing international standards of command responsibility and not penalising the inaction of a commander for their subordinates' infringement of international norms. Moreover, the draft proposed to punish military commanders with deprivation of liberty for a period ranging from 7 to 10 years, although subordinates could be imprisoned for longer, while under international law the punishment for the inaction of commanders and superiors should be no less than that of their subordinates.

Moreover, experts and human rights specialists pointed out that unlike Bill No. 2689, Bill No. 7290 did not contain a provision on universal jurisdiction, according to which Ukraine could prosecute international crimes regardless of the place of their commission and the citizenship of the perpetrator.[21] The Bill did not indicate the leadership character of the crime of aggression, although the international standard provides that only military and political leaders of the state can be held responsible for the crime of aggression. As a result, it signifies that each Russian prisoner of war could be prosecuted for having committed the crime of

[17] Marchuk, Wanigasuriya, *supra* note 4, pp. 747–749.

[18] M. O'Brien, *Options for a Peace Settlement for Ukraine: Option Paper XVI – War Crimes, Crimes against Humanity and Genocide*, Opinio Juris, 30 October 2022, available at: http://opiniojuris.org/2022/10/30/options-for-a-peace-settlement-for-ukraine-option-paper-xvi-war-crimes-crimes-against-humanity-and-genocide/; K. Ambos, *Ukrainian Prosecution of ICC Statute Crimes: Fair, Independent and Impartial?*, EJIL: Talk!, 10 June 2022, available at: https://www.ejiltalk.org/ukrainian-prosecution-of-icc-statute-crimes-fair-independent-and-impartial/ (both accessed 30 June 2025).

[19] Проект Закону про внесення змін до Кримінального кодексу України та Кримінального процесуального кодексу України [The Draft Law On making changes to the Criminal Code of Ukraine and Code of Criminal Procedure of Ukraine] of 14 April 2022, available at: https://itd.rada.gov.ua/billInfo/Bills/pubFile/1271913 (accessed 30 June 2025).

[20] *See Euromaidan SOS: a New Government Bill No. 7290 Artificially Reduces Opportunities to Prosecute Russian Military Commanders and Civilian Superiors Liable for War Crimes*, Center for Civil Liberties, 20 April 2022, available at: https://ccl.org.ua/en/claims/euromaidan-sos-a-new-government-bill-№-7290-artificially-reduces-opportunities-to-prosecute-russian-military-commanders-and-civilian-superiors-liable-for-war-crimes/; *Principle of Complementarity: International Justice in Ukraine*, Ukrainian Legal Advisory Group, Kyiv: 2020, p. 21, available at: https://ulag.org.ua/wp-content/uploads/2024/09/PRINCIPLE-OF-COMPLEMENTARITY-1.pdf (both accessed 30 June 2025).

[21] *See also Principle of Complementarity...*, *supra* note 20, p. 4; C. De Vos, *Destruction and Devastation: One Year of Russia's Assault on Ukraine's Health Care System*, Physicians for Human Rights, 21 February 2023, available at: https://phr.org/our-work/resources/russias-assault-on-ukraines-health-care-system/ (accessed 30 June 2025).

aggression. Moreover, it was criticised that, contrary to draft Bill No. 2689, draft Bill No. 7290 did not contain a rule indicating the need to consider international law while applying Ukrainian legislation to international crimes.

While the fate of the new legislation was at stake, the question was being explored whether prosecution for crimes against humanity would be possible on the basis of international or customary law.[22] When it comes to customary law, Art. 58 of the Ukrainian Constitution of 1996 states that "[n]o-one shall bear responsibility for acts that, at the time they were committed, were not deemed by law to be an offence." There is no clear basis, however, to argue that the penalisation of all types of crimes against humanity could be derived from customary international law (*jus cogens*) norms.[23]

When it comes to using international treaties as material criminal law norms on which prosecution could be based, hypothetically, there is a possibility to prosecute some of the behaviours falling within the scope of crimes against humanity. Some types of offences that could be classified as crimes against humanity are covered by international treaties. In this scope, since according to Art. 9 of the Constitution of Ukraine "[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine", international treaties theoretically could become legal acts on which prosecution could be based. On 14 August 2015, Ukraine became a state party to the Convention for the Protection of All Persons from Enforced Disappearance,[24] whose Art. 5 stipulates the following: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law." On 10 November 1975, Ukraine (the Ukrainian Soviet Socialist Republic at that time) also ratified the International Convention on the Suppression and Punishment of the Crime of Apartheid, which declares that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination are crimes that violate the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constitute a serious threat to international peace and security.[25] Ukraine (the Ukrainian Soviet Socialist Repub-

[22] M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, Wolters Kluwer, Hague: 1999, p. 210.

[23] This is unlike in the case of the Polish Constitution, which in Art. 42(2) provides that "[o]nly a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally responsible. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law", giving a foundation for arguing that prosecution on the basis of *jus cogens* is possible.

[24] Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force on 23 December 2010), 2716 UNTS 3.

[25] International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted on 30 November 1973, entered into force on 18 July 1976), 1015 UNTS 243.

lic) also ratified the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, on 19 June 1969.[26]

However, prosecuting crimes on the basis of international law poses serious questions about the principle of *nullum crimen sine lege certa/scripta* and has no precedence in the practice of Ukrainian courts.[27] One may also examine the possibility of applying the norm resulting from Art. 7 of the Rome Statute, since Ukraine ratified that treaty. It previously expressed its support for the definition, by recognising the jurisdiction of the ICC over crimes against humanity committed on its territory since 21 November 2013. Also, now that the new national legislation is in place, the question remains whether it is admissible to search for elements of crimes in international treaties (especially in the case of war crimes) – also in order to clarify specific notions of international law.

Once the Law of 9 October 2024 entered into force, establishing the definition of crimes against humanity, it must be determined whether it is possible to retroactively apply Art. 442-1 CCU to actions that took place before 24 October 2024 (when it entered into force). It should be done in accordance with the Ukrainian Constitution and the interpretation adopted in the case law of the Ukrainian Constitutional Court. In its previous jurisprudence, the Constitutional Court already assessed the possibility of retroactively applying criminal law. In particular, the Constitutional Court expressed two positions. Firstly, the provisions of Art. 58 of the Constitution of Ukraine, taking into account the requirements of Art. 92(1)(22) of the Constitution of Ukraine, should be understood in such a way that the laws of Ukraine alone determine which acts are crimes and establish criminal liability for their commission. Such laws have retroactive effect in cases where they mitigate or cancel the criminal liability of a person. Secondly, the provisions of Art. 6(2) CCU should be understood in such a way that only laws which cancel or mitigate the criminal liability of a person have retroactive effect in time.[28]

On the other hand, it seems that the provisions of Art. 58 of the Constitution of Ukraine could be examined differently from the point of view of criminal liability for international crimes, which include crimes against humanity. The possibility

[26] Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (adopted on 26 November 1968, entry into force on 11 November 1970), 754 UNTS 73. *See also Ukraine*, Equipo Nizkor, https://www.derechos.org/intlaw/ukr.html (accessed 30 June 2025).

[27] The principle of *nullum crimen sine lege* is enshrined in Ukrainian law in Art. 58 of the Constitution of Ukraine and in Arts. 1–4 CCU.

[28] Рішення Конституційного Суду України [Decision of the Constitutional Court of Ukraine (case on the retroactive effect of the criminal law in time)] of 11 April 2000, N 6-rp/2000 у справі за конституційним поданням 46 народних депутатів України щодо офіційного тлумачення положень статті 58 Конституції України, статей 6, 81 Кримінального кодексу України (справа про зворотну дію кримінального закону в часі), справа N 1-3/2000, available at: https://zakon.rada.gov.ua/laws/show/v006p710-00#Text (accessed 30 June 2025).

of prosecuting earlier conduct on the basis of this provision with retroactive effect may be assessed in the light of Art. 7(2) of the European Convention on Human Rights (ECHR), for example, according to which the principle of *nullum crimen sine lege* shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations.[29] In particular, the possibility of prosecuting international crimes on the basis of a new law was confirmed by the ECtHR in *Streletz, Kessler and Krenz v. Germany*.[30] In turn, in *Kononov v. Latvia*,[31] the Court stated that it was possible to foresee that the impugned acts constituted war crimes, and to anticipate that perpetrators of such acts would be subsequently prosecuted. Even in cases where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused person guilty, fix the punishment on the basis of domestic criminal law. There can be no doubt that even in the absence of an international treaty prohibiting crimes against humanity, at least since the Nuremberg judgment, any person should anticipate the criminalisation of crimes which are internationally recognised as such.[32]

2. ADOPTION OF THE NEW LAW AND ITS CONSEQUENCES

On 24 October 2024, the Law of Ukraine "On amendments to the Criminal and the Criminal Procedure Codes of Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and its amendments" of 9 October 2024 entered into force. This law was not adopted on the basis of any of the above-mentioned Bills, but as a consequence of proceedings over Bill No. 11484, which was a draft presented by the President of Ukraine.[33]

[29] The Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force on 3 September 195), 213 UNTS 221.

[30] ECtHR, *Streletz, Kessler and Krenz v. Germany* (App. Nos 34044/96, 35532/97 and 44801/98), 22 March 2001. *See also* the literature on the concept of the objective foreseeability of international law norms of a criminal character: S. Paiusco, *Nullum Crimen Sine Lege, the European Convention on Human Rights and the Foreseeability of the Law*, Nomos, Hamburg: 2020, pp. 111–118; A. Rychlewska, *The Nullum Crimen Sine Lege Principle in the European Convention of Human Rights: The Actual Scope of Guarantees*, 34 Polish Yearbook of International Law 163 (2016); M. Pieszczek, *Zasada lex retro non agit w kontekście zbrodni wojennych – rozważania na tle orzeczeń ETPCz w sprawie Kononov v. Łotwa* [The Principle of *Lex Retro Non Agit* in the Context of War Crimes: A Few Comments on the Case of *Kononov v. Latvia*], 6 Europejski Przegląd Sądowy 14 (2011); C. Peristeridou, *The Principle of Legality in European Criminal Law*, Intersentia, Cambridge: 2015, pp. 99–100.

[31] ECtHR, *Kononov v. Latvia* (App. No. 36376/04), 17 May 2010.

[32] *See also* O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observer's Notes, Article by Article*, CH Beck, München: 2008, p. 167 and the state practice and jurisprudence cited therein.

[33] Проект Закону про внесення змін до Кримінального та Кримінального процесуального кодексів України у зв'язку з ратифікацією Римського статуту Міжнародного кримінального суду та поправок до нього [Draft Law on amendments to the Criminal and Criminal Procedure Codes of

The Law of 9 October 2024 introduced significant changes to Ukrainian legislation regarding responsibility for international crimes,[34] including:

- a new category of international crime, "crimes against humanity", with its definition and responsibility for it;
- specification of the concept of universal jurisdiction;
- criminal responsibility for civilian superiors and military commanders in cases where their subordinates commit international crimes;
- harmonisation of legislative terminology with that used in the Rome Statute.

It must be noted that these were not the only changes introduced into the CCU since 22 February 2022. Several changes were also introduced by Act No. 2124-IX of 15 March 2022 "On the introduction of amendments to the Criminal Code of Ukraine and other statutory acts of Ukraine concerning the determination of circumstances that exclude the punishability of an offence and ensuring combat immunity during martial law", which became effective on 21 March 2022.[35] This Act includes the list of circumstances that exclude punishability of an offence if it is executed in the course of performing one's duty to defend the homeland and the independence and territorial integrity of Ukraine.[36] Another amendment to the general part of the Code was introduced by Act No. 2472-IX of 28 July 2022 "On amendments to the Criminal Code, the Criminal Procedure Code of Ukraine and other legislative acts of Ukraine on the regulation of the procedure of exchange of persons as prisoners of war."[37] Pursuant to the new provisions, new grounds were introduced for releasing a convict from serving their sentence under a decision of an authorised authority in order to exchange the convict as a prisoner of war. Also,

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Ukraine in connection with the ratification of the Rome Statute of the International Criminal Court and amendments thereto], No. 11484 of 15 August 2024, available at: https://itd.rada.gov.ua/billInfo/Bills/CardByRn?regNum=11484&conv=9 (accessed 30 June 2025).

[34] *See* Kosylo, Dmytriv, *supra* note 1, pp. 353–365.

[35] Закон України «Про внесення змін до Кримінального кодексу України та інших законодавчих актів України щодо визначення обставин, що виключають кримінальну протиправність діяння та забезпечують бойовий імунітет в умовах дії воєнного стану» [Law of Ukraine on amendments to the Criminal Code of Ukraine and other legislative acts of Ukraine regarding the determination of circumstances excluding the criminal illegality of an act and ensuring combat immunity in the conditions of martial law], No. 2124-IX of 15 March 2022, available at: https://zakon.rada.gov.ua/laws/show/2124-20#Text (accessed 30 June 2025).

[36] These changes were described in detail – *see* M. Mozgawa, M. Shupyana, *Changes in the Ukrainian Criminal Code Related to the Ongoing War with the Russian Federation*, 33(3) Studia Iuridica Lublinensia 111 (2024).

[37] Закон України «Про внесення змін до Кримінального, Кримінального процесуального кодексів України та інших законодавчих актів України щодо врегулювання процедури обміну осіб як військовополонених» [Law of Ukraine on amendments to the Criminal and Criminal Procedural Codes of Ukraine and other legislative acts of Ukraine on regulating the procedure for the exchange of persons as prisoners of war], No. 2472-IX of 28 July 2022, available at: https://zakon.rada.gov.ua/laws/show/2472-20#Text (accessed 30 June 2025).

according to Act No. 2108-IX of 3 March 2022 "On making changes to some legislative acts of Ukraine regarding the establishment of criminal liability for collaborative activity",[38] Chapter I of the special part of the CCU was supplemented with the new Art. 111^1, which provides for liability for collaborating with the enemy. Moreover, Act No. 2110-IX supplemented Chapter XX of the special part of the CCU with Art. 436^2, which introduces criminal liability for justifying, considering as lawful and denying the fact of the Russian Federation's armed aggression against Ukraine.[39]

Although these new provisions do not relate directly to international crimes as formulated in the Rome Statute, they may exert influence on the exercise of the new provisions regarding international crimes as penalised in Chapter XX CCU. They may become mitigating or aggravating circumstances, or new types of crimes connected to forbidden means and methods of warfare.

3. CRIMES AGAINST HUMANITY

According to the recent amendments to the CCU, the legislation now includes the definition and legal responsibility for crimes against humanity. The newly adopted Art. 442-1 CCU provides a definition of this type of crime that closely aligns with the wording of the Rome Statute. Specifically, it is defined as intentional actions committed as part of a widespread or systematic attack directed against a civilian population. Such acts include (1) persecuting any identifiable group or collectivity, i.e. restricting human rights based on political, racial, national, ethnic, cultural, religious, sexual or other grounds of discrimination recognised as impermissible under international law; (2) deporting a population, i.e. the forced displacement (eviction), without the grounds provided for by international law, of a relevant group of persons from a territory in which they were lawfully present to the territory of another state; (3) forcibly transferring a population, i.e. the forced displacement (eviction), without the grounds provided for by international law, of a relevant group of persons from a territory in which they were lawfully present to another territory within the borders of the same state; (4) perpetrating rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form

[38] Закон України «Про внесення змін до деяких законодавчих актів України щодо встановлення кримінальної відповідальності за колабораційну діяльність» [Law of Ukraine on amendments to certain legislative acts of Ukraine regarding the establishment of criminal liability for collaborative activities], No. 2108-IX of 3 March 2022, available at: https://zakon.rada.gov.ua/laws/show/2108-20#Text (accessed 30 June 2025).

[39] Закон України «Про внесення змін до деяких законодавчих актів України щодо посилення кримінальної відповідальності за виготовлення та поширення забороненої інформаційної продукції» [Law of Ukraine on amendments to certain legislative acts of Ukraine regarding strengthening criminal liability for the production and distribution of prohibited information products], No. 2110-IX of 3 March 2022, available at: https://zakon.rada.gov.ua/laws/show/2110-ix#Text (accessed 30 June 2025).

of sexual violence; (5) enslaving persons or trafficking in humans; (6) carrying out enforced disappearance; or (7) illegally depriving persons of liberty or engaging in torture and other inhumane acts which cause extreme suffering, serious physical or mental harm or severe bodily injury.

The commission of such acts is punishable by imprisonment for a period ranging from 7 to 15 years. If these crimes escalate to the level of apartheid, mass extermination or murder, the penalty increases to 10 to 15 years of imprisonment or even life imprisonment. Additionally, specific definitions have been provided to clarify key terms:

- an "attack directed against a civilian population" refers to a course of conduct involving the multiple commission (two or more instances) of any of the acts referred to in this article against a civilian population, pursuant to or in furtherance of a state or organisational policy to commit such an attack;
- "enforced disappearance" entails the arrest detention, abduction or any other form of deprivation of liberty of a person followed by a refusal to acknowledge the fact of such arrest, detention, abduction or deprivation of liberty in any other form or with the concealment of information about the fate or whereabouts of such a person;
- the "crime of apartheid" is defined according to the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;
- "extermination" involves the taking of the life of one or more persons by deliberately inflicting conditions of life intended to destroy part of the population, including by depriving them of access to water, food or medicine;
- "torture" refers to the intentional infliction of severe pain or suffering upon an individual, whether physical or psychological.

It is clear from the wording of this provision that the framework of the Rome Statute was adopted in order to structure the elements of this type of crime. The significance of the "widespread and systematic character" of an attack was appropriately noted. The new Law of 9 October 2024 emphasises the scope or gravity of this act, as does the ICC Statute. It also introduces the most internationally recognised element of this definition, that the act in question must be directed against a "civilian population".[40] There are, however, several details that differ from the wording of the Rome Statute. Firstly, in the chapeau of this article the phrase "with knowledge of the attack" is missing, constituting a *mens rea* element of crime. It can be claimed, however, that the general part of the Criminal Code makes this requirement so clear that it was not necessary to repeat this element in the text of

[40] *See e.g.* Triffterer, *supra* note 32, pp. 180–181; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford: 2010, pp. 152–153.

the article. Knowledge about all the elements of a crime is a required standard of intent in Ukrainian criminal law.

Also, the type of crime has been split into two parts: the more severely punished "intentional acts committed as part of a widespread or systematic attack directed against any civilian population constituting apartheid, extermination or murder" – which are punishable by imprisonment for a term of 10 to 15 years or life imprisonment – and the other, less severely punished acts constituting offences, which are punishable by imprisonment for a term of 7 to 15 years. It seems that this differentiation is not justified in the light of the Rome Statute, which gives the powers to assess the real severity of the crime and due penalty to the adjudicating judges, who on the basis of Art. 78 of the Rome Statute, should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person when determining the sentence (taking into consideration that committing several acts of murder could be assessed as less severe than one hundred thousand instances of rape, deportation or torture). For all the crimes under the jurisdiction of the ICC, the judges may pronounce sentences such as imprisonment for a specified number of years, which may not exceed a maximum of 30 years or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.[41] It does not signify that states should copy these solutions (especially that the ICC adjudicates only in the gravest cases of violations of international criminal law), but they certainly should take into consideration the special gravity of such crimes when compared to other criminal offences.

The third detail that differs in the CCU refers to a change of concepts: in the Criminal Code the forbidden conduct is "persecution against any identifiable group or collectivity, meaning restrictions on human rights based on political, racial, national, ethnic, cultural, religious, sexual or other grounds marks of discrimination recognised as impermissible under international law." However, under Art. 7 of the Rome Statute, a crime against humanity is, inter alia, an act of "persecution of any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". According to paragraph 3, "for the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above";

[41] The extreme gravity of crimes against humanity (and genocide) was underlined in the case of the *ad hoc* tribunals, as in the case of *Prosecutor v. Kambanda*, case no. ICTR 9-23-S, judgment and sentence, para. 14; *see* Triffterer, *supra* note 32, p. 1436.

the wording of this definition is not without meaning, as it was achieved through a process of long negotiations.[42] Therefore, in accordance with the standard of protection as it has been set in international law, persecution on "gender grounds" is forbidden.

4. UNIVERSAL JURISDICTION

Before the amendments introduced by the Law of 9 October 2024, the principle of universal jurisdiction in Ukrainian criminal law existed in a somewhat limited and unclear form. Art. 8(1) CCU provides that foreign nationals or stateless persons not residing permanently in Ukraine who have committed criminal offences outside Ukraine shall be criminally liable in Ukraine under this Code in such cases as provided for by international treaties, or if they have committed any of the grave or special grave offences against the rights and freedoms of Ukrainian citizens or Ukraine as prescribed by the Code.[43] This provision introduces the jurisdiction of Ukrainian courts on the basis of both the principle of universal jurisdiction ("as provided for by the international treaties") and the principle of passive jurisdiction (where Ukrainian citizens are victims or Ukrainian interests are violated). However, it was impossible to claim that prosecution on the basis of the principle of universal jurisdiction was operational in Ukraine, as the principle of *nullum crimen sine lege* forbids the prosecution of offences that are not defined in national law (as in the case of crimes against humanity).

This provision was not changed, but paragraph 2 was added and the previous paragraph 2 became paragraph 3 of this provision (see the table below). The present Art. 8(2) reads as follows:

> Foreign nationals or stateless persons who do not permanently reside in Ukraine and who have committed any of the crimes provided for in Articles 437–439, 442, and 442[1] of this Code outside Ukraine shall be subject to criminal responsibility in Ukraine under this Code, regardless of the conditions specified in Part 1 of this Article, if such

[42] Triffterer, *supra* note 32, p. 273. On the procedure of negotiations of the text of Art. 7(3) of the Rome Statute, *see* V. Oosterveld, *The Defnition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 Harvard Human Rights Journal 55 (2005), pp. 58–66.

[43] *See e.g.* M. Pashkovsky, *Окремі аспекти регламентації інституту юрисдикції в міжнародному праві* [Certain Aspects of the Regulation of the Institution of Jurisdiction in International Law], in: V.M. Dryomin (ed.), *Правове життя сучасної України : матер. Міжнар. наук. конф. проф.-викл. складу (Одеса, 20–21 квітня 2012 р.)* [Legal Life of Modern Ukraine: Proceedings of the International Scientific Conference of the Teaching Staff (Odessa, April 20–21, 2012)], Fenix, Odessa: 2012, pp. 336–338; M. Pashkovsky, *Universal Criminal Jurisdiction in Ukraine*, Institute For War & Peace Reporting, 20 September 2022, available at: https://iwpr.net/global-voices/universal-criminal-jurisdiction-ukraine (accessed 30 June 2025).

> persons are present in the territory of Ukraine and cannot be extradited (surrendered) to a foreign state or an international judicial body for prosecution, or if their extradition (surrender) has been refused.

This new provision provides a detailed basis for the universal jurisdiction principle in cases of crimes of aggression (Art. 437), war crimes (Art. 438), use of weapons of mass destruction (Art. 439), genocide (Art. 442) and crimes against humanity (Art. 442[1]). The necessary conditions for Ukrainian courts to apply universal jurisdiction are (1) the existence of an international agreement under which Ukraine has undertaken to prosecute a specific crime – an example of such an agreement is the Statute of the ICC; (2) it has not been decided to extradite the foreigner – however, prosecution is possible when a foreign state has requested extradition and the application has been denied or when no such application has been filed; and (3) the perpetrator is on the territory of Ukraine.

Universal jurisdiction means the competence of national courts to try perpetrators of crimes committed outside the territory of that state and having no connection with that state, whether because of the nationality of the perpetrator or the injured party or a violation of the specific interests of that state.[44] It is an obligation to engage its own law enforcement apparatus in preventing impunity for perpetrators of specific treaty crimes.[45] It is generally accepted that some crimes are so harmful to the entire international community – and therefore to all states involved in its functioning – that bringing the perpetrators to justice, regardless of the location of the crime, should be the duty of every state.[46] Universal jurisdiction offers enormous potential for expanding the effectiveness and reach of international criminal law and allows states to take an active part in preventing impunity for the most serious crimes. Active involvement of the state apparatus in prosecuting such crimes means not consenting to impunity or to violations of the principle of coexistence established by the international community. It was rightly observed that the introduction of precise foundations for universal jurisdiction would be an important

[44] *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation: Chapter 14. Overcoming Obstacles to Implementing Universal Jurisdiction*, Amnesty International, 31 August 2001, p. 11, available at: https://www.amnesty.org/en/documents/ior53/017/2001/en/ (accessed 30 June 2025).

[45] A. O'Sullivan, *Universal Jurisdiction in International Criminal Law: The Debate and the Battle for Hegemony*, Routledge, New York: 2017, p. 94; A. Poels, *Universal Jurisdiction in Absentia*, 23(1) Netherlands Quarterly of Human Rights 65 (2005); R. Rabinovitch, *Universal Jurisdiction in absentia*, 28(2) Fordham International Law Journal 500 (2005); M. El Zeidy, *Universal Jurisdiction in absentia: Is It a Legal Valid Option*, (37) International Lawyer 835 (2003), pp. 852–854.

[46] M. Robinson, *Forward to the Princeton Principles of Universal Jurisdiction*, Equipo Nizkor, July 2001, available at: https://www.derechos.org/nizkor/icc/princeton.html (accessed 30 June 2025); L. Reydams, *Universal Jurisdiction: International and National Perspectives*, Oxford University Press, Oxford: 2003, p. 223.

sign of Ukraine's readiness to assist other states in the prosecution of international crimes committed outside its territory.[47]

In this case, two problems appear. Firstly, the Code makes a reference to provisions of national law: universal jurisdiction should be applied in cases of "crimes provided for in Articles 437–439, 442, and 442[1] of this Code." At the same time, the obligation to exercise universal jurisdiction is based on international treaties. There is no doubt that the obligation to prosecute must in this case result from an international treaty and not solely from domestic provisions. Secondly, the provision introduces conditional universal jurisdiction, in that the perpetrator must be on the territory of Ukraine. The provision makes it clear that the principle of universal jurisdiction can be used only "if such persons are present on the territory of Ukraine and cannot be extradited (surrendered) to a foreign state or an international judicial body for prosecution, or if their extradition (surrender) has been refused."

This solution of the Ukrainian legislature seems to be unduly limited. The aim of universal jurisdiction is to prevent impunity for perpetrators of the most serious crimes, and from this perspective it should be assumed that the obligation to prosecute, on the basis of universal jurisdiction, perpetrators who are *not* on the territory of the given state not only results from international obligations, but also has a significant preventive and condemnatory effect.[48] Many states consider the introduction of a mechanism according to which it is possible to request the extradition of a suspect for international crimes who is not on the territory of the country in question to be one of the key achievements in preventing impunity – this was done in Germany, Belgium and Lithuania, for example.[49] Ukraine has placed itself in the group of states that demand the presence of the perpetrator in order to initiate criminal prosecution. It should be stressed that changes in many states' national legislation are rather moving in the opposite direction, where unconditional universal jurisdiction is being considered in order to also prosecute crimes committed in Ukraine by Russian perpetrators (e.g. Poland[50]).

[47] *See Euromaidan SOS...*, *supra* note 20.

[48] *See* Poels, *supra* note 45. *See also* T. Ostropolski, *Zasada. jurysdykcji uniwersalnej w prawie międzynarodowym* [The principle of universal jurisdiction in international law], EuroPrawo, Warszawa: 2008, pp. 45–47.

[49] *Universal Jurisdiction Annual Review 2024*, Trial International, Geneva: available at: https://trialinternational.org/wp-content/uploads/2024/04/UJAR-2024_digital.pdf (accessed 30 June 2025).

[50] *See* the draft bill of the Ministry of Justice of Poland – *Projekty aktów prawnych* [Draft Legal Acts], gov.pl, 17 April 2024, available at: https://www.gov.pl/web/sprawiedliwosc/projekty-aktow-prawnych (accessed 30 June 2025).

5. COMMAND RESPONSIBILITY

Art. 31.1 CCU establishes the criminal liability of military commanders, persons effectively acting as military commanders and other superiors for crimes committed by their subordinates if they fail to exercise proper control. Under the aforementioned article, a military commander or a person effectively acting as a military commander is criminally liable for the crimes specified in Arts. 437–439, 442, and 442-1 of the CCU if they were committed by a subordinate under their effective command and control. Liability arises if the commander knew, should have known or could have known about the crime or the subordinate's intention to commit it but failed to take necessary measures to prevent, repress or report it to the competent authority. In addition, other superiors who are not military commanders but hold authority and control over subordinates are also criminally liable for the aforementioned crimes if they were related to activities under their effective responsibility and control. Liability applies if the superior knew, should have known or consciously disregarded clear indications that the subordinate was committing or intended to commit such a crime but failed to take appropriate measures. As for the responsibility, part 3 of Art. 31.1 provides that military commanders, persons effectively acting as military commanders and other superiors are held criminally liable under this article and the corresponding article of the CCU that defines the responsibility for the crimes committed by their subordinate.

Also, specific definitions are provided to clarify key terms:

- a "military commander" is a person lawfully authorised to exercise command and control over subordinates engaged in hostilities as part of a state's armed forces;
- a "person effectively acting as a military commander" is a person who, due to hostilities, exercises effective authority and control over subordinates engaged in hostilities but who is not a member of the state's armed forces;
- a "superior" is any person who holds a position or is in a situation that grants them authority and control over subordinates but does not fall under the definitions of a military commander or a person effectively acting as one.

In this provision, the Code fully introduces the provisions of Art. 28 of the Rome Statute, establishing a standard of command responsibility in accordance with the internationally accepted one. It penalises such forms of a commander's inaction as the lack of control over international crimes committed by the subordinates. In accordance with the international standard expressed in Art. 28 of the Rome Statute, a commander or a superior shall be criminally responsible not only for the results of commands given to subordinates, but also for crimes committed by subordinates under their effective authority and control as a result of their

failure to properly exercise control over their subordinates (so persons who either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes, crimes concerned activities that were within the effective responsibility and control of the superior); and the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities. Moreover, the Law of 9 October 2024 foresees punishing superiors and military commanders with the deprivation of liberty for no less than the punishment handed down to their subordinates.

6. THE CRIME OF AGGRESSION

On the basis of the new Law of 9 October 2024, the names of crimes have also been changed to align with the terminology used in the Rome Statute. Presently, Art. 437 is entitled "Crime of aggression." In the previous version, the provision relating to the "crime of aggression" was entitled "Planning, preparation, initiation, and conduct of an aggressive war" (Art. 437).[51] Presently, the crime of aggression is understood as planning, preparation or initiation of an aggressive war or military conflict, as well as participation in a conspiracy aimed at committing such acts ("leaders' crime" – part 1), and the conduct of an aggressive war or aggressive military actions (the crime of conducting war – part 2).

Stricter penalties have been introduced for the crime of aggression. The minimum and maximum penalties in part 1 of Art. 437 have been increased to 10 to 15 years of imprisonment (previously 7 to 12 years), and in part 2 of Art. 437 the punishment has been changed to imprisonment for 12 to 15 years or life imprisonment (previously 10 to 15 years).

In consequence it is visible that the criticism towards Bill No. 7290 for incorrectly implementing the international standard is still valid. The new Law of 9 October 2024 does not indicate the leadership character of the crime of aggression, although the international standard provides that only military and political leaders of the state can be held responsible for the crime of aggression.[52] At the same time, in the Rome Statute this crime can only be committed by a person with certain authority, which is why it is referred to as a "leadership crime". As a result, on the basis of this

[51] *See e.g.* S. Denisov, K. Kardash, *Визначення поняття агресивна війна у кримінальному праві України* [Definition of the Concept of Aggressive War in the Criminal Law of Ukraine], 3 Bulletin of Luhansk State University of Internal Affairs named after EO Didorenko 96 (2012); Y. Kamardina, S. Kovaliov, *Сутність понять" агресивна війна" і" воєнний конфлікт": співвідношення та міжнародно-правовий аспект* [The Essence of the Concepts "Aggressive War" and "Military Conflict": Relationship and International Legal Aspect], 15 Bulletin of Mariupol State University, Series: Law 82 (2018).

[52] Kosylo, Dmytriv, *supra* note 1, p. 356.

provision, each Russian prisoner of war could potentially be prosecuted for having committed the crime of aggression – and sentenced for a much more severe penalty, as the conduct of an aggressive war is also punishable with life imprisonment. Also, the definition of the crime of aggression is not precise and, above all, lacks an explanation of the notion of "an aggressive war".

It cannot be said that the new Ukrainian legislation aligns its definitions with international law. Thus, the definition from Art. 8*bis* of the Rome Statute – as well as other sources of international law – should be used to clarify the notion of "an aggressive war". Article 8*bis* of the Rome Statute refers to the concept of an "act of aggression", as formulated in United Nations General Assembly Resolution 3314 of 1974,[53] which defines aggression as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" and lists "acts of aggression" (committed regardless of a declaration of war), although the list is open-ended (Art. 4 of the Resolution states that the acts enumerated above are not exhaustive). The regulation of Art. 8*bis* also indicates that acts of aggression must reach a certain threshold, namely they must violate the Charter of the United Nations by their nature, gravity or scale.[54] In consequence, the Ukrainian courts have to refer in their decisions to the concept of the crime of aggression as defined in international law. However, the practice of Ukrainian courts proves that the leadership element has been applied *de facto* so far: according to the Prosecutor General's Office, by 30 August 2024, 94 such crimes had been registered since the beginning of the large-scale Russian aggression against Ukraine (since 24 February 2022). At present, a "magistral" criminal case under Art. 437 CCU has been opened, involving 687 suspects: ministers (defence and interior), members of parliament, military commanders, senior officials, heads of law enforcement agencies and instigators of war (although this list of suspects does not include the leaders of the Troika, due to their personal immunities).[55]

Also, the wording of Art. 437 CCU does not clarify the legal situation or consequences of other hostile acts that would reach a certain level of severity, aimed at the sovereignty and integrity of a state. In view of the growth of various formations, groups and gangs representing state-related actors, the national provisions could have been extended so that members of armed groups, organisations or gangs acting on behalf of state-related groups could be subject to criminal liability for acts of

[53] UNGA resolution of 14 December 1974, *Definition of Aggression*, Doc. A/RES/3314.

[54] R. Heinsch, *The Crime of Aggression after Kampala: Success or Burden for the Future?*, 2(2) Goettingen Journal of International Law 713 (2010), p. 724; P. Grzebyk, *Crime of Aggression against Ukraine: The Role of Regional Customary Law*, 21(3) Journal of International Criminal Justice 435 (2023).

[55] *See* the analysis provided in Korynevych, Senatorova, Shepitko, *supra* note 12, p. 377, based on the Prosecutor General's Office. For a list of suspects in the main case of "24th February", *see Spysok Pidozryuvanykh Mahistral'noyi Spravy "24 Lyutoho"* [List of Susupects in the "24th February" Master Case], Prosecutor General's Office, available at: https://gp.gov.ua/detectable (accessed 30 June 2025).

aggression (broadly including any terrorist or mercenary organisations, regardless of whether they operate within a legal organisation or outside any state structures, but having within the group itself a strictly defined hierarchy or division of competences),[56] in the way that it penalises acts of aggression committed by cyber warfare.[57]

7. WAR CRIMES

When it comes to war crimes and the changes introduced by the new Law of 9 October 2024, only the names of provisions were changed. Previously, "war crimes" were referred to as "violations of the laws and customs of war" (Art. 438 CCU). At the same time, the definitions of these crimes remain unchanged. In turn, "war crimes" include "cruel treatment of prisoners of war or civilians, forced labour deportation of civilians, plundering of national treasures in occupied territory, use of warfare methods prohibited by international law and other violations of the laws and customs of war as provided for in international treaties ratified by the Verkhovna Rada of Ukraine, as well as issuing orders for such actions" (part 1). The same acts, if they result in death, fall under part 2. It is important to note that in the previous version, the war crimes described in part 2 were related to "acts combined with intentional killing", whereas the new version uses a broader formulation: "acts that resulted in the death of a person." This version does not require criminal intent, but also covers negligence and omission, changing (extending) the *mens rea* element of this crime.

The Code, however, does not precisely define what is "provided for in international treaties". The article, as in the previous form, still has a blanket character.[58] The wording of the Ukrainian law is based on the monistic system of law, which takes into consideration that ratified international agreements constitute part of the domestic legal order and shall be applied directly, unless their application depends on the enactment of a statute (as Art. 9 of the Constitution of Ukraine states: "International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine"). Therefore, when the Code penalises the use of "means and methods forbidden by international treaties", relevant norms of international law should be applied to define which means and

[56] *See* P. Grzebyk, K. Kowalczewska, K. Kremens, H. Kuczyńska. K. Wierczyńska, *Efektywne ściganie zbrodni międzynarodowych w Polsce: konieczne zmiany w polskim systemie prawnym i w podejściu do międzynarodowego prawa karnego* [Effective prosecution of international crimes in Poland: Necessary changes in the Polish legal system and in the approach to international crimes], Helsinki Foundation for Human Rights, Warsaw: 2024, available at: https://hfhr.pl/publikacje/sciganie-zbrodni-miedzynarodowych (accessed 30 June 2025).

[57] D. Scheffer, *The Missing Pieces in Article 8 bis (Aggression) of the Rome Statute*, 58 Harvard International Law Journal 83 (2017), p. 84.

[58] Kosylo, Dmytriv, *supra* note 1, p. 359; Anosova, Aksamitowska, Sancin, *supra* note 1, p. 663; *Principle of Complementarity...*, *supra* note 20.

methods are forbidden. Currently, the prosecutors or the courts are forced to independently recreate Ukraine's obligations in the scope of international law, deciding in every case what is the scope of international obligations resulting from international treaties.[59]

8. THE CRIME OF GENOCIDE

The definition of the crime of genocide has been slightly modified. In the previous version, it referred to "inflicting severe bodily harm", whereas the new version uses the term "causing serious harm to members of a group." According to the note to this Article, "serious harm" should be understood as "causing severe bodily harm or moderate bodily harm, committing rape or other forms of sexual violence, causing severe physical pain or physical or moral suffering."

The elements of the type of crime of "incitement to genocide" have also been changed. The previous version described it as "public incitement to genocide, as well as the production of materials with incitements to genocide for distribution or the distribution of such materials." The new version refers to "direct and public incitement to commit acts provided for in part 1 of this article, proclaimed with the aim of fully or partially destroying a national, ethnic, racial, or religious group as such, as well as the production of materials containing incitements to commit such acts for the distribution of such materials."

However, the penalties for the crime of genocide have not been changed. In both versions, the penalty is imprisonment for a term of 10 to 15 years or life imprisonment. The statute of limitations for prosecuting "public incitement to genocide" has also been revised. Previously, the limitation period for this act was determined by the general rule and was 5 years. Under the new changes, no statute of limitations applies to this crime, as is the case with other international crimes covered by Arts. 437–439, 442 and 442[1] CCU (part 5 of Art. 49 CCU).

However, the Ukrainian legislature did not use this opportunity of enacting the new law to widen the definitions and scope of the crime of genocide. Both the 1949 Convention[60] and the Rome Statute protect only certain groups and certain actions. As a result, actions taken against groups other than those listed in the characteristics of the crime of genocide are not penalised as genocide (they may be qualified as different crimes, most often crimes against humanity). The definition currently

[59] *See e.g.* D. Kolodiazhna, *How Ukraine Passes Judgment on Violations of the Laws and Customs of War?*, Zmina, 24 April 2024, available at: https://zmina.info/en/articles-en/how-ukraine-passes-judgment-on-violations-of-the-laws-and-customs-of-war/ (accessed 30 June 2025). *See also Principle of Complementarity...*, *supra* note 20.

[60] Convention on the Prevention and Punishment of the Crime of Genocide (adopted on 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

used in international criminal law assumes only a limited dimension of genocide: only aspects of physically exterminating a given group are covered; not all actions aimed at exterminating a given group were included. According to Rafał Lemkin, these usually constitute subsequent elements/stages of a large-scale, coordinated plan aimed at destroying the basic principles of the life of national groups, leading to the annihilation and destruction of that group. Lemkin wrote about a set of such actions, including all of them in the characteristics of the crime of genocide: genocide in the political, social, cultural, economic, biological, physical, religious and moral spheres.[61] At the same time, some scholars have claimed that the annihilation of Ukrainians who identify themselves as members of the independent Ukrainian nation should be defined as a crime of genocide.[62] In the view of the old definition, it is difficult (but not impossible) to establish genocidal intent in the real goal behind the systematic military attacks, the destruction of objects of Ukrainian cultural heritage, the russification carried out through bans on Ukrainian books and language in the Ukrainian territories occupied by Russia and the systematic, discriminatory nature of the mass atrocities committed by Russian armed forces in Ukraine. It is disappointing that the legislature did not expand the definition of genocide beyond that established in international law so many years ago, and did not take the opportunity to define cultural, social, political and economic annihilation of a protected group as a crime of genocide. It could have been done without infringing the standard of international law – the standard adopted by states in national legislation can always be higher – thus setting a direction for the development of state practice. At the same time, the compliance with the standard of the ECHR must be assured. From the case law of the Court it results that domestic provisions may contain a definition of an international crime broader than that existing under international law, but that broader definition cannot be applied retroactively by domestic courts.[63]

[61] R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Division of International Law, Washington: 1944, p. 82; K. Wierczyńska, *Pojęcie ludobójstwa w kontekście orzecznictwa międzynarodowych trybunałów karnych ad hoc* [The Concept of Genocide in the Context of the Jurisprudence of International ad hoc Criminal Tribunals], Wydawnictwo Naukowe Scholar, Warsaw: 2010, p. 13.

[62] *E.g.* D. Azarov, D. Koval, G. Nuridzhanian, V. Venher, *Understanding Russia's Actions in Ukraine as the Crime of Genocide*, 21(2) Journal of International Criminal Justice 233 (2023).

[63] *See e.g.* ECtHR, *Vasiliauskas v. Lithuania* (App. No. 35343/05), 20 October 2015, paras. 181 and 184, concerning the Lithuanian expanded definition of genocide to include "political groups"; *see also* ECtHR, *Drėlingas v. Lithuania* (App. No. 28859/16), 12 March 2019, para. 107.

CONCLUSIONS

The new legislation on international crimes that entered into force on 24 October 2024 can generally be assessed as coherent and complying with international law. In consequence, Ukrainian authorities can now prosecute crimes against humanity, crimes committed by superiors and commanders and other international crimes in the new form, if they were committed after this date –based on national law and in accordance with the principle of *nullum crimen sine lege certa/scripta*. Moreover, the new legal status of the Rome Statute allows its provisions to be used on the basis of Art. 9 of the Constitution of Ukraine, which states that "[i]nternational treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine."

However, the new legislation has also faced criticism. Much of the criticism that was expressed at earlier stages of adopting changes to the CCU is still valid. In the final version there is still the problem of the non-leadership character of the crime of aggression. Although the international standard provides that only military and political leaders of the state could be held responsible for the crime of aggression, the Ukrainian version leads to the conclusion that each Russian prisoner of war could be prosecuted for having committed the crime of aggression. Also, the blanket character of penalisation of war crimes has not been changed, and the national norms must always be interpreted and read together with the relevant norms of international law that define which means and methods of warfare are forbidden. In every case it is necessary to establish the scope of international obligations resulting from international treaties. To align with international standards, a more precise definition of war crimes should be necessary, one that focusses on "grave breaches" or "serious violations" of international law, as outlined in the Rome Statute.[64]

Moreover, some other solutions adopted by the Ukrainian legislature seem to be unduly limited. Firstly, the character of universal jurisdiction is limited to prosecuting perpetrators who are on the territory of Ukraine and have not been extradited. However, this solution should be evaluated as insufficient, as the aim of universal jurisdiction is to prevent impunity for perpetrators of the most serious crimes. From this perspective, it should be assumed that there is an obligation to also prosecute on the basis of the universal principle those perpetrators who are not on the territory of the given state. The principle of universal jurisdiction should be exercised not only on the condition that the perpetrator is present on the territory of Ukraine, but also against perpetrators who are not, giving grounds for extradition requests in order to bring them before the national courts. Secondly, a wider scope

[64] Kosylo, Dmytriv, *supra* note 1, p. 364.

of the definition of genocide could have been introduced, in line with Lemkin's understanding of the real harmfulness of this international crime.

In sum, the new legislation is a required step towards introducing international standards for elements of international crimes, truly fulfilling the goals of international criminal law, but cannot be considered to be the final step; there is still room for improvement. When it comes to achieving justice for all crimes committed on the territory of Ukraine, it is of utmost importance that in the times of war and afterwards, the definitions and scopes of international crimes and the methods of implementing international criminal law are operational and sufficient. It is worth noting that a new draft law is currently being discussed, which would establish a new legal act on international crimes, similar to the law existing in Germany or the Netherlands.[65] The solutions presented therein raise many doubts.[66]

Table 1. Authors' own analysis

Title	Date
Art. 8. The operation of the law on criminal liability with regard to offences committed by foreign nationals or stateless persons outside Ukraine 1. Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code. 2. Foreign nationals or stateless persons who do not reside permanently in Ukraine shall also be liable in Ukraine under this Code if they have committed any criminal offence outside Ukraine provided for by Articles 368, 368-3, 368-4, 369, and 369-2 hereof in complicity with officials who are citizens of Ukraine or if they offered, promised, provided improper advantages to such officials, or accepted a proposal, a promise of improper advantages or received such advantage from them.	Art. 8. The operation of the law on criminal liability with regard to offences committed by foreign nationals or stateless persons outside Ukraine 1. Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offences outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by the international treaties, or if they have committed any of the grave or special grave offences against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code. 2. Foreign nationals or stateless persons who do not permanently reside in Ukraine and who have committed any of the crimes provided for in Articles 437–439, 442, and 4421 of this Code outside Ukraine shall be subject to criminal responsibility in Ukraine under this Code, regardless of the conditions specified in Part 1 of this Article, if such persons are present in the territory of Ukraine and cannot be extradited (surrendered) to a foreign state or an international judicial body for prosecution, or if their extradition (surrender) has been refused. 3. Foreign nationals or stateless persons who do not reside permanently in Ukraine shall also be liable in Ukraine under this Code if they have committed any criminal offence outside Ukraine provided for by Articles 368, 368-3, 368-4, 369, and 369-2 hereof in complicity with officials who are citizens of Ukraine or if they offered, promised, provided improper advantages to such officials, or accepted a proposal, a promise of improper advantages or received such advantage from them.

[65] Проект Закону про кримінальну відповідальність за міжнародні злочини [Draft Law on criminal responsibility for international crimes], No. 11538 of 2 September 2024, available at: https://itd.rada.gov.ua/billInfo/Bills/Card/44789 (accessed 30 June 2025).

[66] *See Human Rights Defenders...*, *supra* note 11.

Title	Date
Art. 437. Planning, preparation and waging of an aggressive war 1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes shall be punishable by imprisonment for a term of seven to twelve years. 2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of ten to fifteen years.	Art. 437. Crime of aggression 1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes, shall be punishable by imprisonment for term of ten to fifteen years. 2. Conducting an aggressive war or aggressive military operations shall be punishable by imprisonment for a term of twelve to fifteen years or life imprisonment.
Art. 438. Violation of rules of the warfare 1. Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years. 2. The same actions, where they are accompanied with premeditated murder shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.	Art. 438. War crimes 1. Cruel treatment of prisoners of war or civilians, deportation of civilian population to engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine, and also issuing an order to commit any such actions shall be punishable by imprisonment for a term of eight to twelve years. 2. The same actions, where they are accompanied with premeditated murder, shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment.
Art. 442. Genocide 1. Genocide, that is a wilfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grievous bodily injuries on them, creation of life conditions aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment. 2. Public incitement to genocide, and also production of any materials inciting to genocide for the purpose of distribution, or distribution of such materials shall be punishable by arrest for a term of up to six months, or imprisonment for a term of up to five years.	Art. 442. Genocide 1. Genocide, meaning acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such, by means of: 1) killing members of the group; 2) causing serious harm to members of the group; 3) creating living conditions for the group aimed at its total or partial physical destruction; 4) implementing measures intended to prevent births within the group; 5) forcibly transferring children from one group to another, shall be punishable by imprisonment for a term of ten to fifteen years or life imprisonment. 2. Direct and public incitement to commit acts specified in the first part of this article, proclaimed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such, as well as the production of materials containing calls for such acts for the purpose of dissemination or the dissemination of such materials shall be punishable by imprisonment for a term of three to seven years. Note: For the purposes of this article, serious harm shall mean causing grievous bodily harm or moderate bodily harm, committing rape or other forms of sexual violence, inflicting severe physical pain, or causing physical or moral suffering.