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The international criminal court and the un criminal court in resolving war crimes: Legal realities and future prospects

Міжнародний кримінальний суд та кримінальний суд ООН при вирішенні воєнних злочинів: правові реалії та перспективи майбутнього

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Abstract

In the conditions of the Russian Federation's military aggression against Ukraine, a large number of war crimes committed by Russia on the territory of Ukraine, it is important to study international courts in the field of criminal justice and understand the legal realities and prospects for solving war crimes at the international level. The purpose of the work is a scientific analysis of the legal realities of the resolution of war crimes by the International Criminal Court and the UN Criminal Court, as well as forecasting the future prospects of the activities of these judicial institutions. The methodological basis of this study is such methods as historical method, logical-legal, statistical, dialectical, comparative methods, and modeling methods. As a result of the conducted research, the current state of the activities of international judicial authorities regarding the consideration of war crimes cases was analyzed. Thus, it was noted that today there are problems regarding the resolution of war crimes by the International Criminal Court, taking into account Ukraine's non-ratification of

Анотація

В умовах військової агресії російської федерації щодо України, великої кількості воєнних злочинів, що вчиняються росією на території України, важливо дослідити міжнародні судові інстанції у сфері кримінальної юстиції та зрозуміти правові реалії та перспективи вирішення воєнних злочинів у міжнародній площині. Метою роботи є науковий аналіз правових реалій вирішення воєнних злочинів Міжнародним кримінальним судом та кримінальним судом ООН, а також прогнозування майбутніх перспектив діяльності зазначених судових інституцій. Методологічним підґрунтям даного дослідження слугують такі методи, як: історичний метод, логіко-юридичний, статистичний, діалектичний, порівняльний методи та метод моделювання. В результаті проведеного дослідження проаналізовано сучасний стан діяльності міжнародних судових інстанцій щодо розгляду справ про воєнні злочини. Так, відзначено, що на сьогодні існують проблеми щодо вирішення воєнних

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the Rome Statute and the legal personality of this court to resolve this category of cases. The types of crimes for which prosecution is possible, as well as the peculiarities of their investigation and documentation, are also analyzed in detail.

Keywords: crime, war crimes, international criminal court, Rome Statute, lawsuit.

Introduction

The functioning of the bodies of international criminal justice is under the close attention of the international community. Especially in the conditions of armed aggression of one state against another, the issue of justice for the commission of war crimes. The study of the circumstances of the formation of international criminal justice bodies, the peculiarities of their activities and legal regulation, institutional models contributes to a better understanding and objective characterization of the system of international criminal law bodies and the grounds for the formation of international criminal procedural law.

The study of the resolution of territorial issues by the courts, as well as the investigation of war crimes, arouses increased interest on the part of lawyers, scientists and international experts and is one of the most acute and difficult in international law, because the territory is not only space, but also an attribute of the state, the material basis of the life of the people that inhabits it. As conflicts and wars have erupted throughout the history of human civilization, tools have been developed in international law to ensure the prompt, complete and impartial investigation of criminal offenses against peace, human security, international legal order and the foundations of national security, including war crimes, crimes against humanity, manifestations of separatism, collaborationism and treason.

And despite the ongoing war and the persistent calls of the international community to bring those guilty of war crimes to justice, there are still several problems surrounding the legal realities of the functioning of international courts and the extension of their jurisdictions to the territory of, for example, Ukraine, questions regarding the qualification of crimes, their investigation, as well as prosecution procedures.

злочинів Міжнародним кримінальним судом, зважаючи на нератифікацію Україною Римського статуту та правосуб'єктність даного суду щодо вирішення такої категорії справ. Також детально проаналізовано види злочинів, за вчинення яких можливе притягнення до відповідальності, та особливості їх розслідування і документування.

Ключові слова: злочин, військові злочини, міжнародний кримінальний суд, Римський статут, позов.

For example, in Ukraine, there are problems with the implementation of the provisions of international humanitarian law and criminal law into the national legislation of Ukraine: there are no provisions for "crimes against humanity", and "war crimes" are regulated only in one article. Recent amendments to the Criminal Procedure Code of Ukraine regarding cooperation with the International Criminal Court provided that such cooperation will apply to persons who, at the time of the commission of the crime, were subordinate to and/or acted to carry out armed aggression against Ukraine, and/or based on decisions (orders, orders, etc.) officials, military command or state authorities of the Russian Federation or another country that carried out aggression or facilitated its implementation against Ukraine (Law No. 4651-VI, 2012). In addition, as practice shows, the majority of criminal proceedings for crimes related to the open military aggression of the Russian Federation against Ukraine are qualified under Article 438 of the Criminal Code (Law No. 2341-III, 2001). However, there are misunderstandings in the issue of distinguishing the category of crimes provided for in Article 438 of the Criminal Code, which are crimes against humanity or war crimes following international law, with other criminal offenses.

In view of the above and the relevance of the research topic for Ukraine, it is important to analyze the legal realities of solving war crimes and future prospects for the activities of the International Criminal Court.

In this article, the authors analyzed the legal status of the International Criminal Court and the UN Criminal Court, which are international judicial bodies of criminal jurisdiction aimed at ensuring the right and ordering and adopting these guilty in international war crimes for justice. However, the activities and competence

of these bodies have peculiarities, which leads to difficulties in the investigation and actual enforcement of decisions, which may adversely affect the results of consideration of cases against the Russian Federation for their war with Ukraine with Ukraine.

The authors of the article paid special attention to the analysis of the legal status of the UN Criminal Court, which should resolve legal disputes and provide advisory conclusions on legal issues specified by the UN authorized bodies and specialized institutions (cases between states, border disputes, diplomatic protection issues, and legislation and use of the Armed Forces. At the same time, the activities of the International Criminal Court are limited to specific types of crimes (serious crimes against humanity on an international scale: genocide, war crimes, crimes against humanity and aggression), which are sometimes difficult to qualify.

The authors of the article conclude on the need to use all the means of international law to bring Russia as a state and all those involved in solving and conducting a criminal war against Ukraine of Russian citizens and foreign mercenaries to criminal responsibility. Such tools, in particular, should be tribunals for investigation of war crimes.

Theoretical Framework or Literature Review

In their work, Atamanova and Kobets (2022) analyzed the prospects for the execution of court decisions regarding the recovery of damages from the Russian Federation. The authors analyzed the possibilities of Ukrainians to recover damages from the Russian Federation on the example of the execution of a national court decision against the Russian Federation abroad, and possible options for the execution of the decision, taking into account international legal customs and existing practice.

The issue of the international legal status of the International Criminal Court is analyzed in the work of Bazov (2018). The researcher analyzed the peculiarities of the legal personality of the International Criminal Court and noted that this court is endowed with a dual legal nature, which consists of the synergy of the elements of a traditional international organization and an independent international judicial institution.

In his article, Bilous analyzed the peculiarities of the International Criminal Court and drew attention to what Ukraine can count on (2022). The lawyer noted that the International Criminal

Court can convict the highest officials and officials of the Russian Federation. It is also noted that this is a court that judges the most serious crimes of an international nature and can try Russians for crimes against humanity.

Khrypun (2022) analyzed war crimes committed by the Russian Federation against Ukraine. From a practical point of view, the lawyer examined the qualification of war crimes and noted the lack of systematicity in solving the issues of qualification of war crimes committed in the current year during the period of international armed conflict, in the conditions of martial law, may lead to the formation of opposite positions of the courts in evaluating the actions of the defendants of the specified category. Also, the author notes that the jurisdiction of the International Criminal Court extends exclusively to crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. That is, bringing the aggressor state to justice, including in the form of compensation for damages, is possible solely based on the results of an investigative investigation into the facts of violations of Russian laws and customs of war in the course of unleashed military aggression against Ukraine.

The theory and practice of resolving territorial disputes by the UN International Court of Justice were analyzed by V.P. Kononenko. (2018) The author analyzed many cases considered by the International Court of Justice of the United Nations and drew attention to the problematic issues of the activity of this body.

Krapyvyn (2022) analyzed the issue of the prospects for the establishment of the International Criminal Court and the initiative of the prosecutor of the International Criminal Court to open an office in Ukraine to investigate crimes committed during Russia's war against Ukraine.

The peculiarities of Ukraine's cooperation with the International Criminal Court were considered by Mamedov and Marchuk (2022). The article notes the need for cooperation and coordination of efforts to investigate and resolve cases of war crimes committed in Ukraine.

The object of Medvedev's research (2022) is the investigation and trial of war crimes against Ukraine. In particular, the lawyer emphasizes that if the procedures related to the investigation of crimes have been established, the issue of justice for war criminals has not yet been resolved. And therefore, while the work on

documenting crimes continues, it is necessary to determine whether justice will be carried out by Ukrainian courts, a special tribunal, courts of European jurisdiction, the International Criminal Court, or all institutions in cooperation.

The author Moshenets (2022) analyzed the specifics of applying to the International Criminal Court and expressed the hope that the International Criminal Court will be able to demonstrate its effectiveness, which will allow Ukrainians to see all Russian war criminals on the dock in The Hague, and force the terrorist state to pay reparations to Ukraine.

The multiplicity of institutional models of international criminal justice bodies is explored in the work of Popko (2021). The article analyzes the process of forming the legal foundations of international criminal justice, modern models of the organization and activity of international courts of criminal jurisdiction, and features that unite the bodies of international justice. In particular, it is noted that international criminal justice, as a relatively new phenomenon in the system of international law, is one of the directions of international cooperation, which consists of the implementation by courts established by the international community with the participation of the United Nations, based on or in fulfillment of international treaties, activities on consideration and decision on the merits of cases about international, as well as about other, assigned to their jurisdiction, crimes. Also, the author characterized the approaches to the typology of models of international judicial institutions and the analysis of institutional models of establishment, formation, organization, and activity of international criminal justice bodies.

Human rights in the conditions of armed conflicts, as well as the peculiarities of the procedure for the restoration and protection of violated rights, were considered by Senatorova (2018). Emphasis on the mechanism of judicial review of war crimes cases is made in the analytical materials prepared by Gryshko and Prokopenko (2022). Options for compensation for damages caused during the war in Ukraine were analyzed by Moffett (2022).

Kurylo (2022) analyzed the difference between the UN International Court of Justice and the International Criminal Court in her work. Problematic issues of the investigation of war crimes in Ukraine are considered in the work of Soroka and Prosvirov (2022).

The issue of prosecution for war crimes in Ukraine was analyzed by Tatarova (2022). As a conclusion, the author concluded that it is not the Russian Federation as a state that will stand trial for war crimes before the International Criminal Court, but its officials and other participants in the conflict who directly made decisions and managed military aggression, while the state may be held accountable in other jurisdictions, such as the UN International Court of Justice in The Hague. But his competence includes making a decision on the obligations of satisfaction, restitution and compensation to Ukraine from the aggressor state.

Peculiarities of the consideration of cases by the International Criminal Court are disclosed in the article by Tkachenko (2022). Also, the issue of prospects for solving war crimes by the UN International Court of Justice is considered in the article by Petryk (2022).

Considering the above analysis of the literature, the issue of the legal realities of the International Criminal Court and the UN Criminal Court in solving war crimes is relevant and arouses interest among scientists and lawyers. Despite this, the problems of the legal realities of the activities of international criminal courts and the prospects for their development remain insufficiently researched and require a more detailed analysis.

Methodology

During the study of the legal realities of the International Criminal Court and the UN Criminal Court in solving war crimes, the historical method was used. In general, the historical method represents the procedures by which historians interpret and investigate what happened in the past using primary and secondary sources. The use of the specified method made it possible to understand the chronology of the emergence and functioning of the International Criminal Court and the UN Criminal Court, the peculiarities of the resolution of war crimes by the specified judicial authorities in different periods, as well as to investigate the cycle of consideration of war crimes.

The use of the logical-legal method made it possible to understand the content of the legal norms regulating the activities of the International Criminal Court and the UN Criminal Court. Taking into account that the logical-legal method consists in studying the content of legal norms and clarifying the regularities of the operation of the law by

applying the rules of legal logic, research using the specified method made it possible to thoroughly research the legislation regulating the activities of international courts, analyze judicial practice, and also pay attention to the legislative technique, the correctness of the presentation of the content of the norms in the articles of a specific normative act and their enforcement. Moreover, the use of the logical-legal method became a tool for defining the concept of "war crime", "war crime", "genocide", "crimes of aggression", "crimes against humanity", etc.

The application of the statistical method contributed to the determination of quantitative indicators regarding the resolution of war crimes. Thus, the application of the method of legal statistics makes it possible to reveal the real results of the implementation of the functions of judicial bodies provided for by the Rome Statute and the UN Charter, trends in increasing efficiency and problematic aspects of the activities of the International Criminal Court and the UN Criminal Court.

Using the dialectical method, international criminal courts were examined in their relationship and development. The dialectical method is a method of knowing reality in its contradictions, integrity and development. The study of the legal realities of solving war crimes through the prism of the development of judicial bodies, challenges and risks for their effective functioning contributed not only to complex scientific work, but also made it possible to understand the perspectives of the functioning of international judicial bodies and their ability to transform in order to solve urgent problems regarding the resolution of cases of prosecution responsibility for committing war crimes.

The comparative research method made it possible to compare the activities of the International Criminal Court and the UN Criminal Court in solving war crimes. Because the comparative method in scientific knowledge is used to compare more than two researched objects to identify common and different things

in them and is the basis for many applied studies, since it allows to create of groups of objects based on distinctive features of objects, the use of this method during the study of legal realities and prospects for international judicial bodies when solving war crimes allowed to compare the features of each such body, to compare the consideration of cases of war crimes committed in different countries, the conditions and progress of their documentation and investigation, as well as to understand the prospects for several war crimes cases for Ukraine.

The application of the modeling method consists in studying the internal and external relations of the object, processes, and phenomena that are not subject to direct study, determining their essential features by creating a model (an imaginary system that reflects the object of research, the study of which will make it possible to form new information about an object, phenomenon or process). This method may have been used during the study of the foundations of the organization and activities of international criminal courts to formulate proposals for improving the legal regulation of their activities. Thus, the method of legal modeling is intended for the formation of innovative legal constructions and the formulation of specific proposals based on them regarding the introduction of changes to the current international legislation and the preparation of prospective normative acts in the field of legal regulation of the activities of international courts.

Results and Discussion

General principles of the International Criminal Court and the UN Criminal Court

Prosecution for war crimes requires a proper legal assessment. Thus, the crimes of one country on the territory of another are considered by the UN International Court of Justice and the International Criminal Court. These bodies are located in The Hague (Netherlands), but their competence is often confused. Let's consider these bodies in more detail (Table 1).

Table 1.

The Competence of the UN International Court of Justice and the International Criminal Court

International Criminal Court	UN International Court of Justice
The International Criminal Court investigates and prosecutes individuals accused of committing serious crimes against humanity on an international scale, namely: genocide, war crimes, crimes against humanity, and crimes of aggression. The Court's activities are governed by the Rome Statute. Ukraine is not a signatory of this Statute (United Nations, 1998).	The UN International Court of Justice was established in 1945, and according to the UN charter, the main purpose of the court is to resolve disputes between countries following the norms of international law (United Nations, 1945). The Court's jurisdiction over an interstate dispute is determined either by agreement between the parties, by virtue of multilateral treaties, or as a result of mutual active actions, regarding the recognition of the court's jurisdiction over the dispute.

(data provided by authors)

In general, the role of the International Court of Justice is to resolve legal disputes and provide advisory opinions on legal issues referred to it by authorized UN bodies and specialized agencies, and its main function is to adjudicate disputes between sovereign states, since only states can be parties to cases that are considered in the International Court of Justice of the United Nations and no state can be brought to court if it does not agree to such a lawsuit. The International Court of Justice examines controversial cases between states, border disputes, issues of diplomatic protection, demarcation of maritime space, humanitarian law, and the use of armed force.

At that time, the competence of the International Criminal Court is limited to specific types of crimes, and the consideration of cases at the International Criminal Court itself consists of six stages (preliminary investigation – a collection of evidence; investigation – identification of suspects, issuance of arrest warrants; preliminary consideration of the case; trial; appeal) (VOGUE website, 2022).

So, as can be seen from the above analysis of the competences of international courts of criminal jurisdiction, the International Criminal Court and

the UN Criminal Court aim to ensure punishment for the commission of crimes of an international scale, but the types of crimes and procedures are different.

International jurisdictions of criminal justice in resolving war crimes

The opinion was formed that the main international organization – the United Nations – is responsible for the security and peaceful life in the world, and the permanent body, the International Criminal Court, is responsible for the criminal punishment of war criminals at the level of personal responsibility (Bilous, 2022).

As already mentioned, the International Criminal Court is a permanent independent judicial body created by states by signing a multilateral treaty – the Rome Statute. But during the development of the Rome Statute, the concern of many states was the maintenance and preservation of their national jurisdiction. In this way, complementarity – the principle of mutual complementarity – was chosen (Table 2). This principle is based on the idea that the exercise of criminal jurisdiction is a very important state function and the manifestation of state power.

Table 2.

The Principle of the Complementarity in the International Criminal Court

Complementarity	
Positive	Negative
The investigation, prosecution and punishment of international criminals rests with states	The International Criminal Court hears cases when a state is unable or unwilling to investigate, prosecute and punish international criminals
Rules for admissibility of a case for consideration by the International Criminal Court:	
- The state is "unwilling or unable":	
- Does not take any actions to investigate crimes;	
- Does not want to prosecute;	
- Unable to prosecute due to obstacles of a legal (in Ukraine, for example, the Criminal Code does not have an article for crimes against humanity) or practical nature,	
- The case is not serious enough to warrant further action by the court (Bilous, 2022).	

(data provided by Bilous, 2022)

Currently, according to the latest data of the General Prosecutor's Office, more than 32,000 war crimes have been registered, and this raises questions about the ability of our national system to cope with such a huge number of crimes and to effectively conduct investigations (Bilous, 2022).

So, let's consider the previous practice of resolving war crimes by the International Criminal Court. Decision on the situation in Kenya in 2011 (Case ICC-01/09-02/11-274, 2011). There were 2 pending cases related to the situation in Kenya, but Kenya wanted to deal with these two cases independently. The Kenyan government approached the court from the point of view that the International Criminal Court recognizes the jurisdiction of Kenya and pressed precisely on the principle of complementarity, that the primary task of investigating and prosecuting lies with Kenya as a state that "must deal with itself". Kenya based its arguments on promises to conduct an investigation in the next 3-4 months, but there was no concrete evidence from the Kenyan government that the suspects were being investigated. The decision of the International Criminal Court (including the Appeals Chamber) was based on the fact that the Kenyan government must have something more specific than just an intention to investigate now or in the future (Bilous, 2022).

This confirms that Ukraine should work on the effectiveness of war crimes investigations. It is equally important to establish cooperation, because the International Criminal Court depends on cooperation and can cooperate with civil society, and international organizations (UN, Interpol, EU, International Committee of the Red Cross).

An equally important body that investigates war crimes is the UN criminal court. However, in the conditions of international legal customs regarding the immunity of states that have caused damage by acts of aggression, genocide, and military actions, there are certain difficulties in bringing the guilty parties to justice in the lawsuits of private persons of another state regarding its compensation.

The decision of the UN International Court of Justice in the case *Jurisdictional Immunities of the State, Germany v. Italy: Greece Intervening* (2012). The need to apply judicial immunity to Germany by Italian national courts when considering cases based on claims of victims during the Second World War has been recognized.

However, Italy and Greece have already shown a willingness to waive immunity to the aggressor state in disputes concerning damages. After the decision of the International Court of Justice of the United Nations, Italy refused to comply with it. In 2014, the Constitutional Court of Italy noted that in this case, the usual international rule of immunity of foreign states entails an absolute sacrifice of the right to judicial protection, since it denies the jurisdiction of domestic courts to resolve claims for damages brought by victims of crimes against humanity and gross violations of human rights. Moreover, in the constitutional system, no overriding public interest can be defined that can justify the sacrifice of the right to judicial protection of fundamental rights that have been violated as a result of serious crimes. The immunity of a foreign state from the jurisdiction of an Italian judge, granted by Articles 2 and 24 of the Constitution, protects the sovereign function of the state, but does not protect behavior that is not a typical exercise of government powers and is qualified as illegal, as it violates human rights (Atamanova & Kobets, 2022).

So, as the analyzed practice shows, state immunity can actually become a way of protection and the result of impunity, and victims are deprived of the opportunity to receive fair compensation for the damage caused to them. And that is why it is important to draw the attention of society (other states) to the fact that the presence of immunity should not mean impunity of the state for committing war crimes.

Prospects for the activity of international courts

The following should be noted regarding the prospects for the activities of international judicial bodies.

A number of experts, in particular the chief prosecutor of the International Criminal Court in The Hague, Karim Khan, oppose the creation of specialized tribunals to investigate certain war crimes (in particular, the investigation of Russia's crimes in Ukraine), given that the International Criminal Court can itself effectively consider war crimes. At the same time, the European Commission intends to create a special court with the support of the UN to avoid problems with immunity for Putin (Voice of America website, 2022).

Also, there are some legal challenges to properly prosecuting war criminals.

For example, Ukraine signed the Rome Statute in 2001 but has not yet ratified this international treaty. One of the reasons is the decision of the

Constitutional Court of Ukraine that the Rome Statute does not correspond to the provisions of Article 124 of the Constitution of Ukraine, which states that justice in Ukraine is administered exclusively by the courts of Ukraine. Currently, changes to the Constitution allow Ukraine to ratify the Rome Statute, and the Statute has not yet been ratified.

An equally problematic issue is the lack of a complete list of war crimes contained in international law in the Criminal Code of Ukraine and its non-compliance with the Geneva Conventions and Article 8 of the Rome Statute. The fact that there are not enough qualified personnel to document the commission of such crimes for the recording and investigation of war crimes also plays an important role.

In addition, certain problems arise when considering international immunities.

The President, Prime Minister, and Minister of Foreign Affairs of the Russian Federation enjoy personal immunity, which states that while they are in office, they cannot be prosecuted within national jurisdictions. Functional immunity is also provided, in which it is noted that these persons are not responsible for their political decisions after the termination of their powers. But in international law, there is another concept that functional immunity does not cover international criminals.

However, among the prospects for solving war crimes by international judicial bodies, to solve the problem of bringing war criminals to justice in Ukraine, it is important to ratify the Rome Statute, make changes to the procedural legislation, and improve the qualifications of all participants in the process regarding international humanitarian law, which in turn requires constant training and professional development (Website of the Ukrainian Helsinki Union for Human Rights, 2022).

Conclusions

1. The International Criminal Court and the UN Criminal Court are international judicial bodies of criminal jurisdiction aimed at ensuring law and order and bringing those guilty of international war crimes to justice. However, the activities and competence of these bodies have peculiarities, which leads to difficulties in the investigation and actual implementation of decisions.
2. The UN Criminal Court aims to resolve legal disputes and provide advisory opinions on

legal issues referred to it by authorized UN bodies and specialized institutions (cases between states, border disputes, issues of diplomatic protection, demarcation of maritime space, humanitarian law, and use of armed force. At the same time, the activities of the International Criminal Court are limited to specific types of crimes (serious crimes against humanity on an international scale: genocide, war crimes, crimes against humanity, and crimes of aggression).

3. The promising directions of the future development of international judicial authorities are the creation of progressive tribunals for the investigation of war crimes, the ratification of the Rome Statute by Ukraine, the introduction of amendments to the national procedural legislation regarding the effective documentation and investigation of war crimes, as well as improving the qualifications of all participants in the process regarding international humanitarian law.

Regarding further scientific research, we consider it necessary to pay attention to the analysis of judicial practice regarding the resolution of war crimes in international courts.

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