

HEARING OF WAR CRIMES AS NEW INTERNAL CHALLENGES FOR UKRAINIAN JUDGES

Daria BARBASH,

*post graduate student (Ph.D in Law),
National Aerospace University – "Kharkiv Aviation
Institute" NAU "KhAI", Kharkiv, Ukraine
<https://orcid.org/0000-0001-7814-9620>
e-mail: d.barbash@khai.edu*

The article analyses the moral challenges faced by Ukrainian judges when hearing war crimes committed by the Russian military on the territory of Ukraine during the armed aggression of the Russian Federation against Ukraine. The exclusivity of this practice among Ukrainian judges makes it highly relevant, and the author analyses and presents a number of key features of the hearing of war crime cases by Ukrainian judges.

Key words: war crimes, evidence, criminal procedure.

Numerous military conflicts have been an integral part of human history, and the ideas of peace and war prevention have been promoted since the time immemorial. The most famous initiatives to prevent war and preserve peace in modern history were the Hague Conferences of 1899 and 1907, which adopted documents aimed at reducing the threat of war and improving the International Law. However, these attempts did not prevent the First and Second World Wars, which changed the political and social layout of Europe forever. Thus, after the Second World War, there was a need to create an organisation that could guarantee peace and security in the world, and in 1945, the United Nations (UN) was established to proclaim its basic principles - the preservation of peace, the resolution of international conflicts through diplomacy and the settlement of disputes. [1]

Later, a special judicial body was established to sue people who are responsible for the most serious crimes relating to the international law and heard by the International Criminal Court operating under the Rome Statute. Thus, according to Article 5 of the Rome Statute, the court has jurisdiction over the following crimes: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression. [2]

Since 2014, hostilities involving the Russian military have taken place on the territory of Ukraine, which since the 24th of February 2022 have taken the form of open armed aggression by the Russian Federation against Ukraine. National and international organisations have documented numerous crimes committed by the Russian military that fall under the jurisdiction of the International Criminal Court. However, according to Article 1 of the Rome Statute, this court is complementary to national courts and will be used only in cases where national courts are unwilling or unable to exercise jurisdiction over the crimes committed.

Thus, taking into account the principle of complementarity, the primary responsibility for consideration of criminal cases against the Russian military personnel who committed crimes on the territory of Ukraine lies with national courts. In addition, it should be noted that as of today, Ukraine has recognised the

jurisdiction of the International Criminal Court only ad hoc, in accordance with Article 12(3) of the Rome Statute, which makes it impossible for the International Criminal Court to consider the crime of aggression of the Russian Federation against Ukraine. In order to fill the vacuum in international criminal justice, the European Parliament adopted a resolution on the 19th of January 2023 calling on the EU, in close cooperation with Ukraine and the international community, to seek the establishment of a special international tribunal to prosecute the political and military leadership of Russia and its allies. [3]

It is not yet clear enough what the tribunal will look like and when it will be established, but the participation of Ukrainian judges in the consideration of cases of war crimes committed by the Russian military on the territory of Ukraine is obvious. It should be noted that for sixteen months of the full-scale invasion of Ukraine by the Russian Federation, Ukrainian courts have already delivered the first verdicts in such criminal proceedings, so it is necessary to explore the main challenges that Ukrainian judges are facing and will face in the course of implementing their professional duties in hearing such atypical cases.

Firstly, it is a high level of impartiality and independence of Ukrainian judges who consider war crime cases as a guarantee of avoiding political or other influence on the judge with end to safeguard the fairness of the trial. In this context, judges should be impartial and free of any political influence and should act only on the basis of the facts and evidence presented during the trial.

Secondly, it is the ethical and moral aspects that are of primary importance, when bringing the verdict of guilty or non-guilty and sentencing to the punishment for war crimes. National judges must be careful and objective when considering such cases, not allowing their personal beliefs and interests to influence their decision-making. In order to make morally sound decisions in war crime cases, judges must have sufficient knowledge of international humanitarian law and international human rights standards, as war crimes are a special type of crime under international law and, therefore, they require special competence.

Thirdly, it is essential to ensure a fair trial for the accused, including the presumption of innocence and the right to defence, regardless of how serious the charges are. These principles are in line with the current Ukrainian legislation, namely Article 7 of the Criminal Procedure Code of Ukraine [4], and their observance is an important moral task that the judiciary face in the context of the military conflict. This will help the national judicial system to gain trust and legitimacy in the eyes of the international community, and therefore, adherence to the principles of criminal justice is fundamental and crucial.

Fourthly, it is the balance between ensuring the procedural rights of the accused and justice in the form of punishment for war criminals, which should be ensured. For example, the aspiration to ensure justice and punishment for war criminals may require speedy trials and severe punishments, which in turn may violate the right to defence and the right to a fair trial. Failure to ensure the right to a fair trial may result in the accused being exonerated due to technical violations of the procedure.

On the other hand, failure to ensure full justice may lead to the sense of impunity among perpetrators of war crimes, which, in turn, may lead to a decrease in public confidence in the judicial system. Thus, it is imperative that Ukrainian

judges maintain a balance while ensuring that war criminals do not go unpunished for their actions.

For the fifth, understanding that decisions on guilt and punishment can have a major impact on relations between Ukraine and the international community as a whole. For example, trials can create tensions between countries, especially when they relate to war crimes committed in the context of a conflict between countries. These decisions can also affect the image of countries in the international community and their relations with other countries. In such circumstances, it is imperative to conduct fair trials, which can have a positive impact on relations between countries and the international community as a whole, help strengthen the legal culture and reduce the number of war crimes in the future.

Thus, the trial of war crimes poses entirely new challenges for Ukrainian judges and requires both the usual implementation of the basic principles of criminal justice and the upholding of the principles of international humanitarian law. It is also crucial to ensure a high level of impartiality and independence of judges, as well as a balance between ensuring the procedural rights of the accused and justice in the form of punishment for war criminals. Of particular importance to the judicial process are the ethical and moral aspects of making decisions on guilt and punishment for war crimes, combined with understanding of the social and international implications of the trial and sentencing.

References:

1. The Charter of the United Nations [Internet]. The United Nations site. Available from: <https://www.un.org/en/about-us/un-charter/chapter-1>
2. Rome statute of the International Criminal Court [Internet]. International Criminal Court site. Available from: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>
3. European Parliament resolution of 19 January 2023 on the humanitarian consequences of the blockade in Nagorno-Karabakh (2023/2504(RSP) [Internet]. European Parliament site. Available from: https://www.europarl.europa.eu/doceo/document/TA-9-2023-01-19_EN.html#sdocta4
4. The Criminal Procedure Code of Ukraine. [Internet]. Verkhovna rada of Ukraine site. Available from: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> [in Ukr.].