УДК 344.2 : 341.48
DOI https://doi.org/10.24144/2788-6018.2023.06.120

LEGAL TUG-OF-WAR: INSTITUTIONAL CHALLENGES OF THE DOMESTIC PROSECUTION OF WAR CRIMES IN UKRAINE

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Nazarko A. Legal Tug-of-War: The Institutional Challenges of the Domestic Prosecution of War Crimes in Ukraine.[1]

This article navigates the complexities of domestic prosecution of war crimes in Ukraine following Russia's invasion in February 2022. The unprecedented scale of atrocities has presented significant challenges to domestic prosecutors and judges in addressing the multifaceted legal landscape. The research aims to provide a nuanced understanding of various actors' roles, responsibilities, and investigations within Ukraine's national legal and judicial system.

The article offers a comprehensive overview of the infrastructure of domestic criminal prosecution, emphasising the pivotal role played by the national legal and judicial system. It explores the accountability, methods, and investigations associated with war crimes and outlines the general challenges that Ukraine's domestic judicial prosecution system faces.

The research unravels the intricacies of Ukraine's domestic criminal justice system and illustrates its multifaceted responsibilities and functions. By highlighting the critical role of the national legal and judicial system, the article identifies challenges that underscore the complexity of prosecuting war crimes domestically.

The analysis reveals crucial aspects of prosecuting war crimes in Ukraine. Hurdles in navigating the legal terrain, collecting and preserving evidence, securing credible witnesses, and overcoming jurisdictional barriers underscore the need for bolstering investigative capacities and fostering international cooperation. The identified challenges highlight the imperative for enhanced training and capacity-building initiatives within the legal and judicial sectors. The overarching challenge lies in promoting a systemic shift in the legal culture, emphasising accountability for international crimes. Addressing these challenges requires a multi-faceted approach involving legal reforms, capacity-building, international collaboration, and a cultural shift towards recognising the significance of prosecuting international crimes. Ukraine can effectively pursue justice for such egregious crimes through a comprehensive strategy.

Keywords: Ukrainian criminal law, justice, domestic accountability, war crimes, international crimes, Ukraine.

Назарко А.А. Правові колізії: інституційні виклики національного судового переслідування воєнних злочинів в Україні.

У цій статті розглядаються складнощі переслідування воєнних злочинів в Україні після вторгнення Росії в лютому 2022 року. Безпрецедентний масштаб звірств поставив перед національними прокурорами та суддями значні виклики у вирішенні багатогранних правових питань. Дослідження має на меті надати детальне розуміння ролей, обов'язків та розслідувань різних суб'єктів у національній правовій та судовій системі України.

Стаття пропонує комплексний огляд інфраструктури кримінального переслідування в Україні, підкреслюючи ключову роль, яку відіграє національна правова та судова система. У ній досліджуються питання відповідальності, методів та розслідувань воєнних злочинів, а також окреслюються загальні виклики, з якими стикається національна система кримінального переслідування в Україні.

Автор розкриває хитросплетіння української системи кримінального правосуддя та ілюструє її багатогранні обов'язки та функції. Висвітлюючи критично важливу роль національної правової та судової системи, стаття визначає виклики, які підкреслюють складність переслідування воєнних злочинів на національному рівні.

[1] This article relates to research that has received funding through the MSCA4Ukraine project (Project ID 1233453). The project is funded by the European Union. Views and opinions expressed are, however, those of the author only and do not necessarily reflect those of the European Union. Neither the European Union nor the MSCA4Ukraine Consortium as a whole nor the Alexander von Humboldt Foundation can be held responsible for them.

Аналіз розкриває ключові аспекти переслідування воєнних злочинів в Україні. Перешкоди в орієнтуванні в правовому полі, зборі та збереженні доказів, забезпеченні надійних свідків і подоланні юрисдикційних бар'єрів підкреслюють необхідність посилення слідчих можливостей і сприяння міжнародному співробітництву. Виявлені виклики підкреслюють необхідність посилення тренінгів та ініціатив з розбудови потенціалу в правовому та судовому секторах. Основний виклик полягає у сприянні системним змінам у правовій культурі з акцентом на відповідальності за міжнародні злочини. Вирішення цих проблем вимагає багатогранного підходу, що включає правові реформи, розбудову потенціалу, міжнародну співпрацю та культурні зміни у визнанні важливості переслідування міжнародних злочинів. Україна може ефективно здійснювати правосуддя за такі кричущі злочини за допомогою комплексної стратегії.

Ключові слова: українське кримінальне право, правосуддя, воєнні злочини, міжнародні злочини, Україна.

1. Introduction

Russia's unprovoked attack on Ukraine on 24 February 2022 has been accompanied by widespread atrocity crimes, primarily attributed to Russian forces and pro-Russian separatist groups under Russian influence. The Office of the Prosecutor General of Ukraine has documented over 113,000 instances of alleged crimes, including war crimes and the crime of aggression, since the onset of Russia's invasion [2]. These offences encompass various violations of the laws and customs of war, as outlined in Article 438 of the Criminal Code of Ukraine (CCU) [3]. While Ukrainian authorities have previously dealt with these criminal law provisions in addressing atrocities related to the Crimea occupation and the Donbas conflict, the unprecedented scale of atrocities following Russia's invasion in February 2022 has posed a significant challenge for domestic prosecutors and judges.

The pursuit of justice for war crimes within domestic legal frameworks is a nuanced and intricate undertaking, particularly evident in the Ukrainian context [15]. This article seeks to provide an overview of the infrastructure of domestic criminal prosecution and the roles of its various actors to elucidate the responsibilities, methods, and investigations carried out by each. It delves into the nuanced understanding of who is accountable, how, and what is being investigated, emphasising the pivotal role played by the national legal and judicial system. The paper outlines the general challenges faced by the domestic judicial prosecution system of war crimes in Ukraine.

This article aims to unravel the intricacies of Ukraine's domestic criminal justice system, illustrating its key components' multifaceted responsibilities and functions. Focusing on the national legal and judicial system accentuates its critical role in pursuing justice. The identified challenges collectively underscore the complexity of the task at hand, requiring a comprehensive and collaborative strategy to fortify Ukraine's endeavours in addressing war crimes.

2. Overview of the Ukrainian war crimes prosecution framework

Ukraine's system of prosecution (pre-trial and trial investigation) for war crimes consists of national authorities in the criminal justice system (pre-trial investigation bodies, prosecutors, courts of general jurisdiction) and other authorities (e.g. the Ministry of Foreign Affairs in terms of work on a special tribunal for the crime of aggression). In addition, non-state actors such as NGOs, lawyers, human rights defenders, and journalists actively help to record international crimes and provide information about them. There is also an international dimension to this system, as we are talking about crimes against the peace and security of mankind, which affect not only Ukrainians but the entire global security architecture. Therefore, the International Criminal Court (ICC), foreign jurisdictions within the framework of universal jurisdiction, and other mechanisms are also involved in the prosecution of war crimes committed in the Russian-Ukrainian armed conflict.

Currently, the Ukrainian national system of prosecution in various forms deals with all types of crimes known under international criminal law, namely: (a) war crimes (in the Ukrainian dimension, called 'violations of the laws and customs of war'); (b) the crime of aggression (planning, preparation, initiation or execution of aggression expressed in specific acts listed in UNGA resolution 3314 (XXIX) [4]; (c) crimes against humanity; (d) the crime of genocide. The peculiarity of Ukrainian national legislation is that the CCU does not provide for such a crime as crimes against humanity, so prosecuting this crime takes place in cooperation with Ukraine's international partners.

3. Highlights of the prosecution of war crimes in Ukraine

War crimes are investigated by Ukrainian national legislation under Article 438 of the CCU 'Violation of the laws and customs of war' [3]. All war crimes are investigated by law enforcement agencies (the Security Service of Ukraine (SBU), the National Police of Ukraine (NPU), the State Bureau of Investigation (SBI) and prosecutors (the Office of the Prosecutor General). These law enforcement agencies have specialised units where investigators work full-time on international crimes. The Office of the Prosecutor General also has a Department for Combating Crimes Committed in the Context of Armed Conflict and specialised

units in nine regional prosecutor's offices with over 200 employees [5]. The prosecutor's office coordinates the pre-trial investigation bodies as the body that provides procedural guidance to the pre-trial investigation. This allows for avoiding duplication of efforts, strengthening and delimiting the competencies of different investigative bodies so that they do not do the same work. In addition, the exchange of information has been established so that investigators and prosecutors clearly understand which bodies have what information and which databases and registers are maintained to save time searching for it.

At the same time, the issue of jurisdiction over criminal offences against peace, human security and international law and order (Section XX of the CCU), which is exclusively assigned to the SBU (part 2 of Article 216 of the Criminal Procedure Code of Ukraine (CPC), is controversial [16]. In practice, pre-trial investigations of international crimes are carried out not only by SBU investigators but also by the NPU and the SBI. There is a fear that evidence collected in 'violation of the rules of jurisdiction' will be declared inadmissible in court by the case law. At the same time, there are at least two reservations against this fear.

Firstly, according to the legal position of the Supreme Court, when deciding on the admissibility of evidence, the court must, within the arguments of the parties, check whether the way the examination was ordered led to a violation of certain human rights and freedoms under the Convention and the Constitution of Ukraine. If the evidence is declared inadmissible, the court must substantiate its conclusions about a significant violation of the requirements of the criminal procedure law, indicating which and whose rights and freedoms were violated and how it was expressed [6]. In other words, it is impossible to automatically declare evidence inadmissible due to breaking the jurisdiction rules. The court must consider whether they led to a violation of human rights and freedoms. Secondly, the CPC of Ukraine allows the Prosecutor General, the head of the regional prosecutor's office, their first deputies and deputies to entrust the pre-trial investigation of any criminal offence to another pre-trial investigation body by a reasoned resolution. The reason for this is the ineffectiveness of the pre-trial investigation or the existence of objective circumstances that make it impossible for the relevant pre-trial investigation body to function or conduct a pre-trial investigation under martial law (part 5 of Article 36 of the CPC of Ukraine). Thus, given the number of registered war crimes and martial law conditions, it is easy to assume that the SBU does not have the objective ability to effectively investigate such a large-scale criminal offence, so the involvement of investigators from other pre-trial investigation bodies is justified.

Insufficient coordination between investigators and prosecutors of different units creates several other problems, such as the loss of criminal proceedings due to numerous chains of transfer between units of different levels and different bodies, which negatively affects the effectiveness of criminal prosecution—or repeated investigative and detective actions by units of different levels, which is a duplication of efforts, a waste of working time, and, in some cases, harmful to the victim. For example, in such a sensitive category of cases as conflict-related sexual violence (CRSV), there are international standards that indicate the need to interrogate a victim only once, as each repetition of their story causes psychological pain and moral suffering and creates repeated and secondary victimisation. In practice, there are cases when the same victim is interrogated more than five times, causing psychological harm [7].

Prosecution under Article 438 of the CCU (as well as other international crimes, except for crimes against humanity, which are not provided for by the current legislation) is conducted by courts of general jurisdiction - local courts. Most judges have received some training in the basics of international humanitarian and international criminal law, particularly by the National School of Judges of Ukraine. In some courts, by decision of the meeting of judges of the respective court, specialisation of judges in hearing this category of cases has been introduced by the procedure set out in part 2 of Article 18 of the Law of Ukraine 'On the Judicial System and Status of Judges' [8].

There is a professional debate about the ability of Ukrainian judges to prosecute international crimes in a quality manner. Some researchers believe that Ukrainian justice can handle the prosecution of war crimes [9]. Other researchers question the impartiality of the trial, given that Ukraine is a party to the armed conflict and any Ukrainian is a victim of war; the qualifications of Ukrainian judges; the availability of sufficient time to consider cases, given the overload of judges because they are almost half-staffed, etc.

In turn, Ukrainian judges note that Ukrainian justice should play a significant role in restoring justice and bringing war criminals to justice, as Ukrainian judges will be able to consider such cases most effectively, quickly and efficiently [12]. A Ukrainian judge will be able to understand all the case details, weigh all the circumstances, and assess the events that took place on Ukrainian soil. Of course, international judicial bodies employ top-level specialists, but the slow pace of case consideration gives rise to doubts about the effectiveness and timeliness of trials. International tribunals consider cases for years and even decades. The long duration of the proceedings can be a severe obstacle to the practical consideration

of issues and conviction of criminals whose guilt must be proved within a reasonable time under the standard of proof 'beyond reasonable doubt'. In particular, researchers put forward arguments about guarantees of court independence, ensuring the qualification of their actions and organising a trial that meets reasonable time limits for the administration of justice [13].

In addition, there are proposals to establish the High Court of Ukraine for War Crimes (similar to the High Anti-Corruption Court), which will include international judges as advisers and may not be located in Ukraine for security reasons. In addition, Ukrainian judges also recognise that it is advisable to introduce court specialisation by creating separate specialised chambers in the system of general courts or a separate specialised court and provide severe arguments in favour of this position. At the same time, the experience of judicial reform and unrealised intentions, especially regarding the High Specialised Court for Intellectual Property, shows that establishing a specialised court may take years. Concerning this situation, the phrase 'justice delayed is justice denied' comes to mind.

At the same time, given the principle of complementarity in international law and taking into account Ukraine's acceptance of jurisdiction, proceedings against the military and political leadership are already being considered by the ICC. To this end, communication with the relevant authorities and institutions is ongoing daily, from information exchange to the involvement of ICC investigators in investigative and procedural actions in certain strategic proceedings, as agreed by both parties. The first significant result of cooperation with the ICC was the issuance of arrest warrants on 17 March 2023 for President Vladimir Putin and the Russian Presidential Commissioner for Children's Rights, Maria Lvova-Belova, in connection with the illegal deportation and transfer of Ukrainian children from the occupied territories to Russia [14]. The ICC determined that they had grossly violated international humanitarian law and qualified their actions under Articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute of the ICC. In addition, Putin must be held accountable for failing to exercise proper control over civilian and military subordinates who 'abducted' Ukrainian minors during the armed conflict (Article 28(b) of the Rome Statute) [17].

4. General challenges facing the system of prosecution of war crimes

In addition to the coordination challenges mentioned earlier, the Ukrainian national justice system grapples with various institutional obstacles, including:

(a) The absence of a sustainable, long-term vision for developing the military justice system raises concerns about potential reductions in allocated resources over the next 5-10 years or more needed to prosecute international crimes.

(b) A lack of political and legal consensus regarding the existing system's specialisation among law enforcement agencies, prosecutors, and courts. There's a possibility that proposals to establish a separate pre-trial investigation body or even a court may be implemented over time, irrespective of the practicality of such a move.

(c) Mounting pressure on the national system for prosecuting war crimes.

(d) Weakness in formulating a comprehensive program for protecting victims and witnesses involved in criminal proceedings.

(e) Deprioritisation of the investigation of international crimes, exacerbated by the prevalence of in absentia investigations. This approach may be perceived by society as lacking results altogether, fostering a demand for political reforms that shift the pursuit of justice for war crime victims to the international arena rather than the national one.

(f) Unmotivated personnel changes at the level of the Prosecutor General or heads of pre-trial investigation bodies, as well as among leaders and staff in specialised units.

The culmination of the points mentioned above underscores the profound challenges facing Ukraine's prosecution system for international crimes. Striking a delicate balance between international obligations and domestic legal frameworks stands out as a formidable task, requiring a nuanced and harmonised approach.

5. Conclusion

The analysis of the general challenges facing the system of prosecution for war crimes in Ukraine sheds light on several crucial aspects. The identified hurdles underscore the intricate nature of navigating the legal terrain associated with these offences. The complexities of collecting and preserving evidence for international crimes pose significant impediments. Eventually, the challenges in securing credible witnesses, ensuring the admissibility of evidence, and overcoming jurisdictional barriers underscore the necessity for bolstering investigative capacities and fostering international cooperation. Moreover, the identified challenges highlight the imperative for enhanced training and capacity-building initiatives within the legal and judicial sectors. Strengthening the expertise of legal professionals, judges, and law enforcement agencies in handling international crimes is paramount to ensuring effective prosecution.

In summary, the overarching challenge lies in fostering a systemic shift in the legal culture, emphasising accountability for international crimes. Raising awareness among legal practitioners, policymakers, and the general public about prosecuting these crimes is crucial for cultivating

an environment conducive to justice. Addressing these challenges requires a multi-faceted approach involving legal reforms, capacity-building, international collaboration, and a cultural shift towards recognising the significance of prosecuting international crimes. Through a comprehensive strategy, Ukraine can effectively meet the demands of pursuing justice for such egregious crimes.

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