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The Development of International Criminal Justice: Expectations and Reality

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The article deals with the efficiency of international criminal justice. It is proved that the development of the system of international criminal justice took place rather in waves, and the permanent International Criminal Court can hardly be called an effective judicial institution. All international criminal courts encountered the same problems and were effective if there was adequate cooperation between the states. Attention is drawn to the existing armed conflict in Ukraine and the prospects of prosecution of persons who committed international crimes.
Keywords: international criminal justice, International Criminal Court, aggression, Ukraine.

Tarptautinės baudžiamosios justicijos raida: lūkesčiai ir realybė

Straipsnyje nagrinėjamas tarptautinės baudžiamosios justicijos efektyvumas. Įrodyta, kad tarptautinės baudžiamosios justicijos sistemos raida vyko bangomis, o nuolatinį Tarptautinį baudžiamąjį teismą vargu ar galima vadinti veiksminga teismine institucija. Visi tarptautiniai baudžiamieji teismai susidūrė su tomis pačiomis problemomis ir buvo veiksmingi, jei valstybės tinkamai bendradarbiaudavo. Atkreipiamas dėmesys į Ukrainoje vykstantį ginkluotą konfliktą ir tarptautinius nusikaltimus padariusių asmenų patraukimo baudžiamojon atsakomybėn perspektyvas.
Pagrindiniai žodžiai: tarptautinė baudžiamoji justicija, Tarptautinis baudžiamasis teismas, agresija, Ukraina.

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Introduction

Russia's direct armed aggression against Ukraine in 2022 with new force raises the question of the ability of the international community, with the assistance of international criminal courts, to bring to justice persons who commit international crimes on the territory of Ukraine. After all, both the security of individual states and international security as a whole directly depends on how quickly and qualitatively the international community will be able to respond to the committing of international crimes, including the response by bringing to criminal responsibility those who give orders to commit them.

International criminal courts (*ad hoc* or permanent), under the condition of their efficiency, will be able to perform not only the function of prosecution for the commission of international crimes but also the prevention of international crimes in the future. Therefore, if this system is effective, it will be possible to prevent the commission of international crimes and ultimately reduce the number and scale of armed conflicts and their victims. The issue of international criminal justice is especially relevant in the context of the commission of international crimes during the armed aggression of the Russian Federation against Ukraine.

This article is devoted to analyzing the efficiency of international criminal justice with special attention to the prospects of bringing to justice persons who have committed international crimes in Ukraine. Despite the importance of the study of the efficiency of international criminal justice, the existing scientific research is limited only by the separate aspects of this question. The originality of the work is connected with special attention to the existing armed conflict in Ukraine and the prospects of prosecution of persons who committed international crimes during the mentioned armed conflict.

In this article the following tasks were solved:

– to find out the development of international criminal justice;
– to characterize effectiveness of the International Criminal Court;
– to analyze the prospects of prosecution of persons who committed international crimes during the armed conflict in Ukraine.

The study was conducted through the critical analysis of the international law doctrine, the practice of international and hybrid criminal courts. Particular attention is paid to the prospects of prosecution of persons who committed international crimes during the armed conflict in Ukraine.

Dialectical, comparative legal, historical, system-structural and formal logical methods were used in this research.

The subjects of the research were international law norms and the practice of the international and hybrid criminal courts. International criminal justice is the subject of the study.

1. The first attempts to establish international criminal courts

International criminal justice in the modern sense arose in the 20th century and continues its development nowadays, changing from *ad hoc* tribunals to the permanent International Criminal Court.

International criminal justice was first implemented after the Second World War, although certain attempts in this direction have been made since the Middle Ages. In international legal doctrine, the trial of Peter Von Hagenbach in Breisach in 1474 is considered as the first prototype of modern international criminal courts. Although this court was quite distant from its understanding as an international criminal tribunal, the issues surrounding this trial, orders of superiors, sex crimes, cooperation in the collection of evidence and the court's jurisdiction, are still relevant today (Gordon, 2013, p. 13; Grayson, 1995, p. 245; Cryer *et al*, 2010, p. 109; Maogoto, 2009, p. 4).

International criminal courts perform a very important mission. According to the intention of their creators, they should become bodies where justice is done for persons who particularly defiantly violate the international legal order, committing the most serious crimes of concern to the international community. Criminal prosecution is carried out against any person, regardless of possible immunities and status in society. Moreover, international criminal courts were established so that high-ranking officials do not escape responsibility for crimes committed by hiding behind their special status.

On the other hand, the development of the system of international criminal justice strengthens the system of protection of human rights and in its essence is one of the key directions of the turn of international law from the concept of state-centrism to anthropocentrism. In the case of particularly serious violations of human rights (international crimes), states cannot hide behind their sovereignty and exclusive jurisdiction over the criminal prosecution of all crimes committed on their territory.

The first international treaty that provided the establishment of a special international criminal tribunal was the Treaty of Versailles of 1919, according to which the Allied Powers "publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties" (Treaty of Versailles, 1919, art. 227). However, since Holland refused to extradite him, the tribunal was never established. Responding to the request of the Allied Powers, the Dutch Minister of Foreign Affairs referred to the fact that Holland had not become a party to the Treaty of Versailles and, because it supported neutrality in the war, was not obliged to join the twenty-six other states that had secured an indictment against the Kaiser (Kelley, 1940, p. 12).

Therefore, although the international treaty was concluded, which provided for the establishment of a special international criminal tribunal for crimes committed during the First World War, the idea of this tribunal was not implemented. Quite important problems arose from this attempt to establish the international criminal tribunal: 1) international criminal justice cannot take place without appropriate international cooperation, especially with those states where persons who have allegedly committed international crimes are located; 2) since high-ranking officials are on trial before international criminal tribunals, the question arises: will not such prosecution be a political massacre? There is also the question of the inadmissibility of the establishment of a tribunal by the victorious states only for the trial of the vanquished.

2. Nuremberg and Tokyo military tribunals

The idea of international criminal justice was able to materialize only after the Second World War. Unfortunately, the international community only recalled international criminal justice after there had been more than fifty million deaths in the Second World War when the question arose of what to do with the defeated states. Therefore, the Nuremberg and Tokyo military tribunals became the first international criminal tribunals.

Obviously, the reasons for establishing these tribunals were different. On the one hand, a trial would have publicly condemned such crimes and deterred them in the future, and the victorious states did not want to resort to simple physical destruction without a public trial. On the other hand, it was clear that these tribunals would be limited to judging defeated states and would not pose any threat to the Allies.

How were these tribunals created? Initially, the Allies issued a declaration in Moscow in 1943 promising punishment for Axis war criminals, but noted that it "without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint declaration of the governments of the Allies." However, after a discussion among the Allies, the US and the USSR were convinced by Churchill that a trial of such individuals will be preferable to their execution (Chase, 1995, p. 180).

As a result, representatives of Great Britain, France, the USA and the USSR met in London to draw up the charter of the International Tribunal. The negotiation process in London regarding the statute of the Nuremberg Military Tribunal was quite tense, in particular, when the representatives of the USA and the USSR faced a number of important issues which were related to the fact that the parties represented the common and civil law systems, which differ in their principles (Cryer *et al*., 2019, p. 117). However, on August 8, 1945, the four Allies signed the London Agreement, which established the Tribunal.

The trial against the 24 defendants was held for more than ten months in open sessions. In the end, the three accused were acquitted; the rest of the remaining defendants: twelve were sentenced to the death penalty, seven – to periods of imprisonment from ten years to life imprisonment, one accused committed suicide before the start of the trial, and one was recognized as terminally ill (Nuremberg Trials, 2018).

The International Military Tribunal for the Far East (hereinafter referred to as the Tokyo Tribunal), which was proclaimed by General Douglas MacArthur, was quite similar to the Nuremberg Tribunal in terms of design, jurisdiction and principles of work. MacArthur's actions were authorized by the powers granted to him by the Allied Powers (the USSR, the United States, China, Great Britain, Australia, Canada, France, the Netherlands, New Zealand, India, and the Philippines) as the Supreme Commander to implement the Potsdam Declaration, principle 10 of which promised "strict justice for all war criminals" (Proclamation Defining Terms for Japanese Surrender, 1945). The Declaration was accepted by Japan in its Instrument of Surrender (Cryer *et al*., 2014, p. 120).

The Tokyo Tribunal consisted of 11 judges, nine from the states that signed the Treaty on the surrender of Japan (Australia, Canada, China, France, New Zealand, the Netherlands, Great Britain, the USA and the USSR), one each from India and the Philippines. The US was entitled to appoint a chief prosecutor, while the other mentioned above countries were only allowed to appoint associate prosecutors. Defense teams were Japanese and American lawyers. The trial lasted almost two and a half years, and most of the verdicts were handed down in November 1948. All the defendants who were before the Tribunal at the time of sentencing were found guilty and sentenced: seven defendants to the death penalty, one to twenty years imprisonment, one to seven years imprisonment, and the rest to life imprisonment (Cryer *et al*., 2005, p. 44).

It is worth emphasizing that according to Art. 1 of the Nuremberg Charter and Art. 1 of the Tokyo Charter, these Tribunals were established for the fair and speedy trial and punishment of the main war criminals of European countries and the Far East. However, there is no doubt that both the Nuremberg and Tokyo tribunals were courts of "victors over the vanquished." Crimes committed by the states that won the war were not under the jurisdiction of the Nuremberg and Tokyo tribunals. In particular, accusing the leaders of the Third Reich of committing war crimes, the heads of states who committed acts of aggression against Poland and the Baltic states, ordered the bombing of Dresden and were also neutral about the Soviet Army's barbaric treatment of the civilian population in East Prussia were not under the jurisdiction of the Nuremberg Tribunal (Blakesley, 1994, p. 80). The same was true of the Tokyo Tribunal, whose jurisdiction did not cover crimes committed by allies. In particular, the judges feared that the defendants and their defence counsels would accuse the victorious powers of committing the same type of crimes they were accused (Mutua, 2000, p. 81). All attempts by the defence counsels of the accused to demonstrate a serious violation of the norms of international law by the victors in the war (for example, the provision by Ribbentrop's lawyer at the Nuremberg Tribunal of the text of the secret supplementary Protocol to the Molotov-Ribbentrop Pact) were blocked in every possible way (Tomuschat, 2006, p. 833).

Despite the mentioned one-sidedness of these tribunals, they became the first precedent for bringing criminal responsibility for international crimes under the norms of International Law. The Nuremberg

Military Tribunal is still considered the 'loudest' trial in the history of mankind, and the principles of this Tribunal found their further development in the principles and norms of international criminal and international humanitarian law (Bickley, 2000, p. 230; MacPherson, 1998, p. 9).

Summarizing the activities of the Nuremberg and Tokyo Tribunals, it was positive that, thanks to these Tribunals, international criminal justice took place for the first time in practice, and international crimes committed during the Second World War were convicted by the international community. However, the admissibility of establishing the Nuremberg and Tokyo tribunals only by the states that won the war, and exclusively for the trial of the defeated, raises the question of the one-sidedness of these tribunals, because those who committed crimes on the part of the allies were not prosecuted. It goes without saying that the normative establishment of the elements of crimes after they have been committed clearly contradicts the principle of *nullum crimen sine lege*. Therefore, despite the obviously positive features of the creation and activity of the Nuremberg and Tokyo tribunals, the mentioned tribunals still cause a lot of debate.

3. Yugoslavia and Rwanda tribunals

The next stage of the genesis of international criminal justice, like the previous ones, is connected with armed conflicts, in particular, with the armed conflicts in the former Yugoslavia and Rwanda in the 1990s and the creation by the UN Security Council of the International Criminal Tribunal for the former Yugoslavia (hereinafter, 'the ICTY') and the International Criminal Court Tribunal for Rwanda (hereinafter, 'the ICTR').

The ICTY was established by UN Security Council Resolution No. 827 (1993) on 25 May 1993 (Resolution 827: United Nations Security Council, 1993), and the ICTR by UN Security Council Resolution No. 955 (1994) on 8 November 1994 (Resolution 955: United Nations Security Council, 1994).

In Resolution 827 (1993) on 25 May 1993, which established the ICTY, the UN Security Council expressed its concern at the numerous reports of large-scale and flagrant violations of international humanitarian law in the territory of the former Yugoslavia and, in particular, in Bosnia and Herzegovina and aimed to put an end to such crimes and to take effective measures to bring to justice the persons responsible for the mentioned crimes. That is, the *de facto* purpose of the creation of the ICTY was the need to restore the international legal order by bringing to justice persons who committed international crimes on the territory of the former Yugoslavia.

Currently, there are still questions about the legality of the creation of the ICTY, and later the ICTR. After all, according to the UN Charter, the Security Council does not have the authority to create any auxiliary bodies, including judicial ones. Undoubtedly, the Security Council has the primary responsibility for maintaining international peace and security (Art.24(1) of the UN Charter). But did the Security Council legally create the mentioned tribunals? Why was the ICTY created more than two years after the start of active hostilities?

Since the outbreak of hostilities in the former Yugoslavia, the Security Council was addressing issues of the current situation, with the UN Security Council's rhetoric changing as the conflict escalated (Gutnyk, 2020, p. 162). In particular, in the Resolution on 25 September 1991, the Security Council called on "all parties to abide strictly by the ceasefire agreements of 17 and 22 September 1991"; asked the UN Secretary General to advise the government of Yugoslavia on achieving peace, and also established an embargo on the supply of weapons and military equipment (Resolution 713: United Nations Security Council, 1991), and already 10 months later – on 13 July 1992 – it called on all parties to observe the norms of international humanitarian law, in particular the Geneva Conventions of 1949,

and drew attention to the fact that persons who commit or give orders to commit serious violations of the mentioned Conventions will bear individual responsibility for such violations (Resolution 764: United Nations Security Council, 1992). After that, the Security Council, in the Resolution 771 of 13 August 1992, called on states and international humanitarian organizations to summarize information on violations of international humanitarian law and to submit it to the Security Council, and to the UN Secretary General to prepare a report in which there will be a summary of the information and a proposal for additional measures that may be necessary to respond to such information (Resolution 771: United Nations Security Council, 1992). Taking into account the continuation of the armed conflict, the presence of facts of large-scale violation of the international humanitarian law, especially in Bosnia and Herzegovina, in particular, reports of mass killings and the continued practice of 'ethnic cleansing', the Security Council on 6 October 1992 instructed the UN Secretary General to create an impartial Commission of Experts for verification and analysis information on the facts of serious violations of the Geneva Conventions and other violations of international humanitarian law committed on the territory of the former Yugoslavia (Resolution 780: United Nations Security Council, 1992).

The Commission of Experts was created on 26 October 1992. For almost two years, the Commission studied the Yugoslav armed conflict and on 24 May 1994, it submitted the Final Report, in which, taking into account that, as of the time of drafting the Report, the legally relevant facts have not yet been fully established and generally agreed upon, the Commission proposed to transfer consideration of the question of the qualification of the armed conflict in the former Yugoslavia to the International Tribunal (Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992): Annex to the Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, 1994, §43). Moreover, the mentioned Commission is considered one of the initiators of the creation of the ICTY (Aksar, 2004, p. 17).

Thus, the ICTY became a tribunal that tried war crimes, crimes against humanity and crimes of genocide that occurred during the conflicts in the former Yugoslavia in the 1990s. The tribunal became the first court to begin prosecutions and sentencing for the most serious crimes since Nuremberg and Tokyo Tribunals. There were 161 persons on the bench of the ICTY, among which 91 persons were convicted, 18 were acquitted, 13 were transferred to national jurisdictions, 37 accused were dismissed or died, 2 persons are currently being prosecuted by the International Residual Mechanism for Criminal tribunals (IRMCT) (ICTY: Key Figures of the Cases, 2021). For more than two decades of functioning, the ICTY has made a significant contribution to the development of international criminal and humanitarian law.

Summarizing the establishment of the ICTY, it again encountered the same problems that were inherent to previous *ad hoc* tribunals: the legality of its establishment and the violation of the fundamental principles of criminal law when establishing the jurisdiction of this Tribunal, in particular, the principle of non-retroactivity and of the *nullum crimen sine lege* principle. However, under those circumstances, was there another way out to prevent new international crimes or at least reduce their scale and ensure the inevitability of punishment for persons who committed international crimes? It seems not.

Concerning the ICTR, it is often referred to as the twin brother of the Yugoslavia Tribunal (Bingham, 2006, p. 687; Josipovic, 2006, p. 146). To analyze the situation in Rwanda, the UN Security Council in Resolution 935 (1994) of 1 July 1994 established the Independent Commission of Experts, which in its Preliminary Report came to the conclusion that "on the basis of ample evidence, that individuals from both sides to the armed conflict in Rwanda during the period 6 April 1994 to 15 July 1994 have perpetrated serious breaches of international humanitarian law, in particular of obligations set forth in article 3 common to the four Geneva Conventions of 12 August 1949 and in Protocol II additional to the

Geneva Conventions and relating to the protection of victims of non-international armed conflicts, of 8 June 1977" ((Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994): Annex to Letter dated 1 October 1994 from the Secretary-General to the President of the Security Council, 1994, § 146). The Commission recommended to the UN Security Council "take all measures to ensure that individuals shall be accorded a fair trial on the facts and law according to international standards of law and justice" and "amend the Statute of the International Criminal Tribunal for the former Yugoslavia to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on 6 April 1994" (Preliminary report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994): Annex to Letter dated 1 October 1994 from the Secretary-General to the President of the Security Council, 1994, § 152). However, the Rwandan government sent a letter on 28 September 1994 requesting the establishment of an *ad hoc* international criminal tribunal. Taking into account, among other things, the mentioned suggestion of the Government of Rwanda, the UN Security Council in the Resolution 955(1994) of 8 November 1994 established the ICTR (Resolution 955: United Nations Security Council, 1994).

The consideration of the need to create the ICTR was quite similar to the ICTY. The UN Security Council, in Resolution 955(1994) of November 8, 1994, was concerned about reports indicating that "genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda, determining that this situation continues to constitute a threat to international peace and security, determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them"; in the mentioned Resolution, the Security Council emphasizes that "the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed" (Resolution 955: United Nations Security Council, 1994).

The ICTR became the international tribunal to prosecute those responsible for committing genocide. There were 93 people under prosecution, among them: 62 – convicted, 14 – acquitted, 10 – transferred to national jurisdictions, 3 – fugitives referred to IRMCT, 2 – deceased prior to judgment, 2 – indictments were withdrawn before trial (The ICTR in Brief, 2022).

However, the ICTY and the ICTR were created as *ad hoc* tribunals, and after ten years of their work, the question began to arise: how long can they function? Therefore, the Security Council, in Resolution 1503 (2003) of 28 August 2003 and Resolution 1534 (2004) of 26 March 2004, called on the tribunals to take all possible steps "to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010" (Resolution 1503: United Nations Security Council, 2003; Resolution 1534: United Nations Security Council, 2004). On the other hand, there was the question of what to do with those persons who were wanted, or if it will be necessary to conduct a revision? In addition, it was clear that the formal termination dates of the ICTY and the ICTR could be determined in advance, and the dates of completion of all pending proceedings were difficult to predict. Therefore, on December 22, 2010, the Security Council, by Resolution 1966, decided to establish a special judicial institution – the International Residual Mechanism for Criminal Tribunals (IRMCT) with two branches, which, in accordance with this Resolution, began to operate on 1 July 2012 (the ICTR branch) and 1 July 2013 (the ICTY branch) (Resolution 1966: United Nations Security Council, 2010). During the first years of the existence of the IRMCT, it functioned in parallel with the ICTR and the ICTY. After the termination of the ICTR (31 December 2015) and the ICTY (31 December 2017), the IRMCT continued to operate as a separate institution, with the authority to

cover jurisdiction the ICTY and the ICTR previously had (Resolution 1966: United Nations Security Council, 2010). In essence, the IRMCT became another international tribunal that took over the jurisdiction of the ICTY and ICTR.

4. The permanent International Criminal Court and hybrid courts

4.1. The permanent International Criminal Court

The current stage of the development of international criminal justice is associated with the permanent International Criminal Court (hereinafter, 'the ICC'). Unlike the ICTY and the ICTR, the ICC is a permanent body empowered to exercise jurisdiction over persons responsible for the most serious crimes of concern to the international community. The ICC functions on the basis of a multilateral treaty – the Rome Statute, which was adopted on 17 July 1998, and entered into force on 1 July 2002.

The motives for the establishment of the ICC are outlined in the preamble of the Rome Statute of the ICC. In particular, already in the first paragraph of the preamble, it is noted that "all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time." Further, the preamble states that "during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"; and "such grave crimes threaten the peace, security and well-being of the world"; "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." That is, starting from the preamble, it becomes obvious the connection between the establishment of the ICC and the awareness of the need to prevent the commission of new international crimes, and if these crimes are committed, to punish the guilty persons.

As already noted, the ICTY, ICTR and IRMCT were established by the resolutions of the UN Security Council, and the ICC was established on the basis of an international treaty as a permanent international judicial body. Therefore, at first glance, in contrast to *ad hoc* international criminal courts, the creation of the ICC should not raise doubts about its legitimacy. However, although the ICC was established on the basis of an international treaty that entered into force after its ratification by 60 states, the question is raised: is it legitimate that 60 states have established the international judicial body that will cover the jurisdiction to states that are not parties to the treaty? And the ICC can extend its jurisdiction to the states not party to the Rome Statute; the practice of extending jurisdiction to such states also exist, in particular, when the situations in Darfur (Sudan) and Libya were referred by the UN Security Council to the ICC. And in general, the referral of situations to the ICC by the UN Security Council raises enough questions. For example, only two members (France and Great Britain) out of the five permanent members of the UN Security Council ratified the Rome Statute. Therefore, the question arises: how is it legitimate for states that themselves do not recognize the jurisdiction of the ICC to make a decision to referral the situation of alleged international crimes committed on the territory of other states to the ICC? In general, the work of the UN Security Council raises many questions and should be noted the minimal effectiveness of the statutory activity of the UN Security Council in the last two decades.

Returning to covering the jurisdiction of the ICC to states that are not parties to the Rome Statute, it can be argued that the ICC cannot compel such states to cooperate, and this greatly complicates the implementation of international criminal justice. Without solving this issue, it is impossible to achieve the key goal of international criminal courts – the inevitability of punishment for committed international crimes and prevention of commission in the future.

4.2. Hybrid courts

In addition to international criminal courts, the international community has established several hybrid criminal courts whose jurisdiction covers prosecuting persons who have committed international crimes. These courts have mixed (both international and domestic) composition.

Such judicial institutions include: the Special Panels for Serious Crimes (East Timor) (it was established by the United Nations Transitional Administration in East Timor on 6 June 2000) (Regulation No. 2000/15 on the Establishment of Panels with exclusive jurisdiction over serious criminal offences, 2000); the Extraordinary Chambers in the Courts of Cambodia (it was established by the Agreement between the Royal Government of Cambodia and the United Nations of 06 June 2003) (Agreement between the Royal Government of Cambodia and the United Nations, 2003); the Special Court and the Residual Special Court for Sierra Leone (the Special Court was established by the Agreement between the United Nations and the Government of Sierra Leone on 16 January 2002) (Agreement between the United Nations and the Government of Sierra Leone, 2002); the Residual Special Court was established by the Agreement between the United Nations and the Government of Sierra Leone on 11 August 2010 (Agreement between the United Nations and the Government of Sierra Leone, 2010)); the Special Tribunal for Lebanon (it was established by the United Nations Security Council Resolution 1757 of 30 May 2007) (Resolution 1757: United Nations Security Council, 2007), the Kosovo Specialist Chambers and Specialist Prosecutor's Office (it was established by the International Agreement between the Republic of Kosovo and the European Union on 23 April 2014 (International Agreement between the Republic of Kosovo and the European Union, 2014) and the Amendment of the Constitution of Republic of Kosovo: "Article 162: The Specialist Chambers and the Specialist Prosecutor's Office" on 03 August 2015 (Amendment of the Constitution of Republic of Kosovo: "Article 162: The Specialist Chambers and the Specialist Prosecutor's Office", 2015).

5. Russian invasion of Ukraine: the challenge to international criminal justice

5.1. International crimes in Ukraine: the prospects of international criminal justice

The armed aggression of the Russian Federation against Ukraine forces the search for international legal means of protection, including by bringing to criminal responsibility persons who have committed international crimes (genocide, crimes against humanity, war crimes and the crime of aggression).

The use of a mechanism of international criminal justice will make it possible to bring to justice the guilty persons, and therefore ensure the principle of inevitability of punishment. In addition to this, the effectiveness of the relevant international criminal courts will be able to prevent the commission of such crimes in the future, fulfilling the function of general prevention.

The international community has repeatedly encountered crimes similar to those committed in Ukraine and developed separate mechanisms for the creation and functioning of international criminal courts, which was discussed above.

The analysis of the mentioned international/hybrid criminal tribunals allows us to conclude that the following models of the establishment of criminal courts were used to bring criminal responsibility for international crimes:

1) International agreement between the victorious states: a) the Nuremberg Tribunal (established on the basis of an international agreement between the USA, Great Britain, France and the USSR); b) the Tokyo Tribunal (created on the basis of the proclamation of General Douglas MacArthur – the Supreme Commander of the Allied Powers, who was authorized to do so by the victorious states)

2) International agreement between the state and the international organization: a) between the state and the UN – the Extraordinary Chambers in the Courts of Cambodia, the Special Court and the Residual Special Court for Sierra Leone; b) between the state and the EU – Kosovo Specialist Chambers and Specialist Prosecutor's Office;
3) Resolution of the UN Security Council: the ICTY, the ICTR, the IRMCT, the Special Tribunal for Lebanon;
4) Multilateral international agreement – the ICC.

Returning to the issue of criminal prosecution using the tools of international and/or hybrid criminal justice for international crimes committed in Ukraine during the Russian-Ukrainian armed conflict, it is worth emphasizing that Ukraine is actively working on this path.

However, Ukraine is not a state party to the Rome Statute, but the country has accepted *ad hoc* the jurisdiction of the ICC (2014 and 2015). In additional, situation in Ukraine (international crimes committed in Ukraine) was referred to the ICC by 43 states parties (Referral submitted by the Republic of Lithuania, 2022; Referral letter submitted in coordination with 38 States Parties, 2022; Referral submitted by the Republic of North Macedonia, 2022; Referral submitted by Japan, 2022; Referral submitted by Montenegro, 2022; Referral submitted by Chile, 2022). ICC investigations opened on 2 March 2022 with focus: alleged crimes committed in the context of situation in Ukraine since 21 November 2013 (with special focus on international crimes committed during the direct Russian invasion of Ukraine in 2022) (Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 2022).

The material jurisdiction *(ratione materiae)* of the ICC is limited and covers the crime of genocide, war crimes, crimes against humanity and the crime of aggression. In the same time, the ICC Prosecutor in his Statement on the Situation in Ukraine (25 February 2022) noted, that "my Office has also received multiple queries on the amendments to the Rome Statute with respect to the crime of aggression, which came into force in 2018, and the application of those amendments to the present situation. Given that neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, the Court cannot exercise jurisdiction over this alleged crime in this situation" (Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine, 2022). In fact, this means that the ICC cannot bring to justice persons who committed the crime of aggression during the armed intervention of the Russian Federation in Ukraine.

The question arises: can the international community bring to justice persons who have committed the crime of aggression (aggression of the Russian Federation against Ukraine) outside the ICC? It seems that the best way out of this issue is the establishment of an appropriate International criminal tribunal *ad hoc* with an emphasis on the crime of aggression. The possibility of establishing such a tribunal is now being actively discussed (Declaration on a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine, 2022; Ukraine's foreign minister calls for creation of a special tribunal to investigate Russia's "crime of aggression," 2022; Zelensky: Special tribunal on Russian aggression must be established ASAP, 2022).

5.2. Potential difficulties in the proceedings of the International Criminal Court / hybrid trial with regard to the situation in Ukraine

Despite the existing mechanisms of prosecution for international crimes committed in Ukraine, the question arises: how effective can such mechanisms be? What are the main obstacles to international criminal justice?

One of the major problems of international criminal justice lies in slow proceedings, which can be explained by the necessity of international criminal justice to deal with extraordinary crimes, implying much more complicated proceedings, even in comparison with the most complex domestic criminal cases (Galbraith, 2009, p. 82; Nada, 2014, p. 411; Stephane, 2004, p. 527). As noted Robert Heinsch, "While in a national murder case, for example, there is usually only a handful of suspects and victims, this is different in war crimes, crimes against humanity and genocide cases. These cases deal with a much bigger scale of perpetrators and victims. There can be hundreds or thousands of suspect and even ten thousands or more victims" (Heinsch, 2009, p. 482). The crimes as usually commit on large stretches of territory which are not easy for investigators to access (especially during armed conflict). The pace of international criminal justice directly depends on how close the cooperation is between the ICC and states (where committed international crimes or located a suspect persons).

Obviously, international criminal justice cannot be so expeditious as domestic criminal proceedings. However, on the other hand, when the justice cannot be rendered through the efficiency of domestic courts, the length of time needed to justice in the international criminal proceedings is not a serious problem (Gutnyk, 2015, p. 144).

As a result of 20 years of ICC activity, final judgments were issued against about ten accused for international crimes: Lubanga Dylio: sentenced to 15 years' imprisonment (Prosecutor v. Thomas Lubanga Dyilo, 2012), Germain Katanga: sentenced to 12 years' imprisonment (Prosecutor v. Germain Katanga, 2014), Bosco Ntaganda – 30 years' imprisonment (Prosecutor v. Bosco Ntaganda, 2019), Al Faqi Al Mahdi: sentenced to 7 years imprisonment (Prosecutor v. Ahmad Al Faqi Al Mahdi, 2021). Acquitted: Mathieu Ngudjolo Chui (Prosecutor v. Mathieu Ngudjolo, 2012), Bemba Gombo (sentenced to 18 years' imprisonment by the ICC Trial Chamber (Prosecutor v. Jean-Pierre Bemba Gombo, 2016) and acquitted on 8 June 2018 by the Appeals Chamber (Prosecutor v. Jean-Pierre Bemba Gombo, 2018), Blé Goudé (Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 2021), Gbagbo (Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, 2021). Few defendants are sentenced for offences against the administration of justice. Indeed, such a number of final judgments clearly does not indicate the effectiveness of the International Criminal Court.

Other problems are related to the future requests for the arrest and surrender of persons found on the territory of Russia to be complied. According to art. 61(1) of the Constitution of the Russian Federation, "a citizen of the Russian Federation may not be deported from Russia or extradited to another State." Hence, it seems that suspected persons will not be extradited by Russia.

Conclusion

1. The emergence and development of international criminal justice is related to armed conflicts; international criminal courts were established only when states were aware of the importance of such courts in punishing guilty persons and preventing new international crimes. Only considerable human casualties during both world wars, armed conflicts in the former Yugoslavia and Rwanda became the locomotive for the development of international criminal justice. It seems that the development of international criminal justice should take place by programming the development of international law with the elimination of all existing problems in its implementation.
2. Evaluating the development of the international criminal justice system, one can only see that it took place in a rather wavelike manner, and the permanent ICC can hardly be called an effective judicial institution, although it is sometimes the only possibility of bringing to criminal responsibility for international crimes committed. All international criminal courts met the same problems

and were effective in the case of proper cooperation between states. The obvious weakness of the international justice system regarding international crimes should be recognized if the state in which such crimes are committed or in which the suspects are located refuses to cooperate with international criminal courts. Undoubtedly, the efficiency of the international criminal courts will also affect national legal systems.

3. Armed aggression of the Russian Federation against Ukraine forces to rethink the system of international criminal justice. Today, this system is undergoing an efficiency test. Implementation of the principle of inevitability of punishment for committed international crimes depends on its performance, as well as the prevention of similar crimes in the future. Evaluating the prospects of criminal prosecution for committed crimes, the biggest obstacles may be the lack of cooperation with the Russian Federation regarding the extradition of suspects, as well as the excessive duration of proceedings, which can extend to several decades.

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The Development of International Criminal Justice: Expectations and Reality

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S u m m a r y

The article deals with the efficiency of international criminal justice in a historical retrospective. The development of international criminal justice is related to armed conflicts. Only considerable human casualties during both world wars, armed conflicts in the former Yugoslavia and Rwanda became the locomotive force for the development of international criminal justice.

It is emphasized that the development of the international criminal justice system was rather in a wavelike manner, and the ICC cannot be called an effective judicial institution, although it is sometimes the only possibility of bringing to criminal responsibility for the international crimes that have been committed.

International criminal justice is rethinking itself and undergoing an efficiency test nowadays due to the armed aggression of the Russian Federation against Ukraine and the international crimes committed in Ukraine. ICC investigations opened on 2 March 2022 with a special focus on international crimes (alleged war crimes, crimes again humanity, genocide) committed during the direct Russian invasion of Ukraine in 2022. The establishment of the international criminal tribunal *ad hoc* with jurisdiction over the crime of aggression could be a solution to the question of how the international community could bring to justice persons who have committed the crime of aggression against Ukraine. When evaluating the prospects of criminal prosecution for committed crimes, the biggest obstacles may be the lack of cooperation with the Russian Federation regarding the extradition of suspects, as well as the excessive duration of proceedings which can extend to several decades.

Tarptautinės baudžiamosios justicijos raida: lūkesčiai ir realybė

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S a n t r a u k a

Straipsnyje nagrinėjamas tarptautinės baudžiamosios justicijos efektyvumas istorinėje retrospektyvoje. Tarptautinės baudžiamosios justicijos raida yra susijusi su ginkluotais konfliktais. Tik nemažos žmonių aukos per abu pasaulinius karus, ginkluoti konfliktai buvusioje Jugoslavijoje ir Ruandoje tapo tarptautinės baudžiamosios justicijos plėtros paskata.

Pabrėžiama, kad tarptautinės baudžiamosios justicijos sistemos raida buvo gana banguota, o Tarptautinio baudžiamojo tribunolo (TBT) negalima vadinti veiksminga teismine institucija, nors kartais tai yra vienintelė galimybė patraukti baudžiamojon atsakomybėn už padarytus tarptautinius nusikaltimus.

Dėl Rusijos Federacijos ginkluotos agresijos prieš Ukrainą ir Ukrainoje padarytų tarptautinių nusikaltimų tarptautinė baudžiamoji justicija permąsto savo vaidmenį ir atlieka savo veiklos efektyvumo testą. TBT tyrimai pradėti 2022 m. kovo 2 d., ypatingas dėmesys skiriamas tarptautiniams nusikaltimams (tariamiems karo nusikaltimams, nusikaltimams žmoniškumui, genocidui), padarytiems per tiesioginę Rusijos invaziją į Ukrainą 2022 metais. Tarptautinio baudžiamojo tribunolo *ad hoc*, turinčio jurisdikciją agresijos nusikaltimui, įsteigimas galėtų būti sprendimas, kaip tarptautinė bendruomenė galėtų patraukti atsakomybėn asmenis, padariusius agresijos nusikaltimą prieš Ukrainą. Vertinant baudžiamojo persekiojimo už padarytus nusikaltimus perspektyvas, didžiausia kliūtimi gali tapti tai, kad nėra bendradarbiavimo su Rusijos Federacija dėl įtariamųjų ekstradicijos, taip pat pernelyg ilga proceso trukmė, kuri gali siekti kelis dešimtmečius.

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Vitalii Gutnyk yra Lvovo nacionalinio Ivano Franko universiteto, Ukraina, Tarptautinės teisės katedros profesorius teisės mokslų daktaras. Jo moksliniai interesai – tarptautinių baudžiamųjų teismų praktika, tarptautinė humanitarinė teisė ir tarptautinė žmogaus teisių teisė.