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CRIME OF AGGRESSION AGAINST UKRAINE: LEGALITY AND LEGITIMACY OF DOMESTIC PROSECUTIONS IN THIRD STATES

Abstract: *The crime of aggression is an international crime that for various legal, political and practical reasons can be difficult to successfully and legitimately prosecute at the domestic level against nationals of aggressor or third states. This article considers the legality and legitimacy of domestic prosecutions initiated by third states regarding the crime of aggression against Ukraine and the role that the newly established International Centre for the Prosecution of the Crime of Aggression could have in increasing the legitimacy not only of domestic prosecutions by third states, but of the future Special Tribunal as well.*

Keywords: crime of aggression; domestic prosecution; special tribunal; universal jurisdiction

INTRODUCTION

Lithuania was among the first national jurisdictions to start criminal investigations of the crime of aggression according to its national laws.[1] On 3 July 2023 the International Centre for the Prosecution of the Crime of Aggression (ICPA) against Ukraine started functioning within Eurojust, providing coordination and support for prosecutors from joint investigation team (JIT) countries (Lithuania, Latvia, Estonia, Poland and Romania) that have started criminal investigations into the crime of aggression against Ukraine.

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[1] Ukraine, Lithuania, Latvia, Estonia, Poland and Romania have opened criminal investigations into the crime of aggression being committed against Ukraine.

The Preamble of the Rome Statute of the International Criminal (ICC) Court[2] recalls that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. But the Kampala Resolution on the crime of aggression adopted by the Assembly of States Parties to the ICC states that the amendments concerning the definition of the crime of aggression and specific rules for the jurisdiction of the ICC shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.[3] Therefore, concerning the crime of aggression, it is far from clear when domestic jurisdiction exists under domestic or international law,[4] and there are lingering questions over the desirability and possibility of prosecuting crimes of aggression at the domestic level.[5] As a leadership crime involving inter-state conduct, the crime of aggression has traditionally been viewed as more suitable for international rather than domestic prosecution,[6] and it is doubtful that under customary international law aggression is subject to universal jurisdiction.[7]

The objectives of this article are a) to provide a legal framework for the crime of aggression in the criminal code of Lithuania; b) to consider the legality and legitimacy of domestic criminal investigations of the crime of aggression against Ukraine initiated by JIT members on the basis of universal jurisdiction; and c) to explain how the establishment of the ICPA could contribute to the legitimacy of domestic prosecutions into the crime of aggression against Ukraine.

1. THE CRIME OF AGGRESSION IN THE CRIMINAL CODE OF LITHUANIA

At least 20 states, including Lithuania, have implemented aggression as a crime under customary international law, largely mirroring the definitions of crimes against peace in the 1945 London Charter and the 1946 Tokyo Charter.[8] Art. 110 of the

[2] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 3.

[3] *See also* ICC, *Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression*, 4–14 December 2017, ICC-ASP/16/24, appendix 3, understanding 5, available at: ICC-ASP-16-24-ENG.pdf (icc-cpi.int) (accessed 30 August 2024).

[4] P. Wrange, *The Crime of Aggression, Domestic Prosecutions and Complementarity*, in: C. Kress, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 732.

[5] C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, p. 375.

[6] *Ibidem*, p. 51.

[7] R.S. Clark, *Complementarity and the Crime of Aggression*, in: C. McDougall (ed.), *The Crime of Aggression under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge: 2021, p. 383.

[8] A. Reisinger Coracini, (*Extended) Synopsis: The Crime of Aggression under Domestic Criminal Law*, in: C. Kress, S. Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge: 2017, p. 1044.

Criminal Code of Lithuania – "Aggression" – states that any person who causes aggression against another state or is in command thereof shall be punished with a custodial sentence of 10 to 20 years or a custodial life sentence. The Criminal Code of the Republic of Lithuania also makes it possible to prosecute a person based on the principle of universal jurisdiction, and even to try such persons *in absentia*.[9]

Comparing the definition of the crime of aggression in the Criminal Code of Lithuania to the definition in the Rome Statute,[10] there is no reference to an act of aggression of a state that by its character, gravity and scale would constitute a manifest violation of the UN Charter. As Astrid Reisinger Coracini indicates, the definition does not list the modes of liability, and it is not clear from the definition whether the state element is understood as an integral part of the collective act underlying the crime of aggression under international law, or whether the domestic code merely limits individual criminal responsibility to participating in state acts.[11]

The Lithuanian courts did provide a certain explanation in the cases concerning international crimes being committed during the events of 13 January 1991, when the civilian population of Lithuania confronted the military forces of the Soviet Union. In 2022 a Supreme Court decision[12] explained that for the issue of individual criminal responsibility for the crime of aggression to be considered, an act of aggression must be committed; furthermore, to conclude that an act of aggression has been committed, it is necessary to state that one state used force against another state. It was also added that for the crime of aggression only persons who could effectively control the political and military actions of a state or who were in command of them could be prosecuted.

The explanation provided by the Supreme Court leads to the conclusion that individual criminal responsibility for the crime of aggression is limited to participating in a state's acts of aggression. And even though the definition of the crime of aggression in the Criminal Code of Lithuania does not directly refer to the UN General Assembly Resolution on the Definition of Aggression, an act of aggression *de jure* will have to be established before proceeding to the issue of individual criminal responsibility for the crime of aggression. As there is no gravity test in Art. 110 of the Criminal Code of Lithuania, theoretically every act of aggression by one state

[9] Lietuvos Respublikos baudžiamasis kodeksas [Criminal Code of the Republic of Lithuania], 26 September 2000, No. VIII-1968, Art. 7 and 110, available at: https://tinyurl.com/4naynsfd (accessed 30 August 2024).

[10] Art. 8*bis*(1) of the Rome Statute: "For the purpose of this Statute, 'crime of aggression' means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."

[11] Reisinger Coracini, *supra* note 8, p. 1061.

[12] Supreme Court decision of 30 June 2022, No. 2K-7-39-1073/2022.

against another could qualify as a crime of aggression for the purpose of individual criminal responsibility in the domestic jurisdiction of Lithuania.

2. LEGALITY AND LEGITIMACY OF DOMESTIC PROSECUTIONS OVER THE CRIME OF AGGRESSION

As mentioned above, the preamble of the Rome Statute declares that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. Therefore, the legality of Ukraine's domestic prosecution of the crime of aggression committed against it can hardly be questioned, as it is being implemented by the appropriate national authorities and under the formal requirements set by national laws. However, the notion of "legitimacy" has underpinned many appraisals of institutions, processes and outcomes of international criminal justice.[13] According to Vasiliev, legitimacy in international criminal justice can be considered from two approaches: legitimacy as a normative category[14] or as a sociological acceptance by an audience. In the international criminal law literature, this duality is illustrated by the use of the term "*perceived* legitimacy".[15] Whilst evaluating the legitimacy of domestic prosecutions of the crime of aggression, performance legitimacy[16] must also be considered, entailing that the whole process of adjudication should be sufficiently fair and just.

Domestic jurisdictions raise no legitimacy concerns when enforcing international criminal law at the national level, prosecuting war crimes, crimes against humanity or genocide on different bases of jurisdiction prescribed by law and according to definitions of international crimes, as well as procedural standards that comply with international law. In the case of the crime of aggression, however, domestic judicial institutions have to establish an act of aggression being committed by a state; this raises concerns in the context of perceived legitimacy, because doubts arise as to whether (1) the domestic institutions of the victim state or of third states can

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13 S. Vasiliev, *Between International Criminal Justice and Injustice: Theorising Legitimacy*, in: N. Hayashi, C.M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, Cambridge: 2017, p. 66.

14 Normative legitimacy is understood as objectively fulfilling normative standards and criteria. *See also* A. Langvatn, T. Squatrito, *Conceptualizing and Measuring the Legitimacy of International Criminal Tribunals*, in: N. Hayashi, C.M. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals*, Cambridge University Press, Cambridge: 2017, p. 43.

15 Vasiliev, *supra* note 13, pp. 77–78.

16 According to Langvatn and Squatrito, process legitimacy is part of the multidimensional conception of legitimacy that is best for assessing the legitimacy of international criminal tribunals (Langvatn, Squatrito, *supra* note 14, p. 51). According to Vasiliev, performance legitimacy may include institutional and judicial independence, impartiality, procedural fairness, quality of judicial decision-making and legal reasoning (Vasiliev, *supra* note 13, p. 86).

be considered to have the necessary mandate to decide on inter-state conduct in non-compliance with international law and (2) these domestic institutions could actually demonstrate institutional and judicial independence, impartiality and objective legal reasoning whilst doing so.

According to Veroff, the crime of aggression could give rise to three types of domestic prosecutions. Firstly, a state could prosecute its own nationals, such as the principals of a former regime. Secondly, a state with no real connection to an act of aggression could prosecute under extraordinary bases of jurisdiction, such as universal jurisdiction. Finally, an aggressed state could prosecute the nationals of an aggressor state.[17]

The common aspect to be considered for all types of domestic prosecutions of the crime of aggression is whether national judicial institutions can be considered to have the necessary mandate and competence to qualify and state that an act of aggression has been committed by one state against another before proceeding to the issue of individual criminal responsibility. Considering that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes,[18] if national institutions are unable to state that an act of aggression has been committed for the purpose of individual criminal responsibility of concrete persons, then states would be unable to implement their primary responsibility for fighting impunity and ensuring accountability for international crimes in national courts.

The least problematic case would be if the state exercises domestic jurisdiction over its own nationals and decides that the act of aggression has been committed by its own state against another state. But this legal possibility of domestic prosecution could turn into a real political and legal challenge if domestic institutions start criminal investigations based on universal jurisdiction into the crime of aggression committed by nationals of third states or an aggressor state. Even though the principle of *par in parem non habet imperium*[19] does not disqualify domestic prosecution of crimes of aggression per se,[20] it does mean that domestic courts hearing aggression cases not involving their own nationals will essentially be sitting in judgment over the acts of a co-equal sovereign[21] and deciding on the legality of the use of force by one state against another.

The legitimacy of such a domestic prosecution of nationals of a third state or an aggressor state could be strengthened if an act of aggression has been acknowledged

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17 *See* J. Veroff, *Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward*, 125 The Yale Law Journal 730 (2015–2016).

18 Rome Statute, preamble.

19 Meaning that an equal has no power over an equal.

20 Wrange, *supra* note 4, p. 714.

21 B. van Schaak, *Par in Parem Imperiun Non Habet*, 10 Journal of International Criminal Justice 133 (2012), p. 149.

and condemned by the international community. As the objective of this article is to consider the legality and legitimacy of domestic criminal investigations begun by third states into the crime of aggression against Ukraine, one should not forget that on 2 March 2022 the UN General Assembly adopted a resolution entitled "Aggression against Ukraine", which denounced in the strongest terms Russia's aggression against Ukraine as being in violation of Art. 2(4) of the UN Charter – prohibition of the use of force – with 141 votes in favour, 5 votes against and 35 abstentions. This means that in this case, domestic prosecutorial or judicial institutions will not have to decide on the legality of the use of force and will be able to refer to this resolution, stating that an act of aggression in manifest violation of the UN Charter has been committed.

In cases when victim states try to prosecute the leaders of an aggressor state, it would be difficult for them to escape "the taint of victor's justice",[22] and such prosecutions could hardly be perceived as ensuring maximum legitimacy and impartiality. Therefore, even though the legality of Ukrainian domestic prosecution of the crime of aggression committed by Russian political and military leadership is undisputed, Ukraine as the victim state has well-grounded expectations for the establishment of a fully-fledged international criminal tribunal, which on behalf of the international community would judge on the crime of aggression being committed against Ukraine and would leave no room for this judgement to be challenged later for lacking legitimacy and impartiality.

Furthermore, personal immunities being applicable under international law before the courts of third states would prevent domestic jurisdictions of third states and Ukraine ensuring that the political and military leadership of Russia are held accountable as long as these individuals remain in power. Taking this into account and referring to the multidimensional concept of the legitimacy of criminal tribunals,[23] the selection of cases and decisions, as well as the deterrent effects, must be sufficiently just and morally justifiable in terms of the results. Understanding that – according to international law as it stands today – personal immunities for political and military leaders of an aggressor state should be applied, serious doubts arise as to whether domestic jurisdictions would be able to meet expectations for the legitimacy of the results of criminal investigations, because even arrest warrants for the crime of aggression committed by Russian political and military leadership could not be issued.

But despite these aspects of legitimacy, serious doubts also arise about the legality of third states prosecuting the crime of aggression based on universal jurisdiction,

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22 McDougall, *supra* note 5, p. 391.

23 *See* Langvatn, Squatrito, *supra* note 14, pp. 14–65.

because the more burning question – as it was named by McDougall[24] – is whether universal jurisdiction applies to the crime of aggression.

Under the principle of universal jurisdiction, each and every state has jurisdiction to try particularly serious offences under international law. The basis for this is that the crimes involved are regarded as particularly offensive to the international community as a whole.[25] Universal jurisdiction according to O'Keefe amounts to an assertation of jurisdiction in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct.[26] It enables a state to prosecute certain crimes without regard to where the crime was committed, the nationality of the alleged perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction. Broomhall explains the existence of universal jurisdiction in international law, emphasising its pragmatic rationale – because other bases of jurisdiction are insufficient to ensure accountability, "as these acts are often committed by those who act from or flee to a foreign jurisdiction, or by those who act under the protection of the State" – and its normative rationale, because certain crimes are of universal concern, "deserving condemnation in themselves, and deemed to affect the moral and even peace and security interests of the entire international community."[27]

Even though the possibility of universal jurisdiction in international criminal law can ensure accountability for international crimes,[28] Van Schaak, relying on the *par in parem non habet imperium* principle considers that current law does not provide strong support for the exercise of domestic jurisdiction over the crime of aggression, *a fortiori* pursuant to universal jurisdiction.[29] On the other hand, Wrange believes that this principle does not disqualify domestic prosecutions for crimes of aggression as such,[30] but that the most controversial grounds for jurisdiction would undoubtedly be universal jurisdiction by "bystander states".[31] The fact that a particular activity may be seen as an international crime does not of itself

[24] McDougall, *supra* note 5, p. 381.

[25] M. Shaw, *International Law*, Cambridge University Press, New York: 2008, p. 668.

[26] R. O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2(3) Journal of International Criminal Justice 735 (2004), p. 745.

[27] B. Broomhall, *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law*, Oxford University Press, Oxford: 2003, pp. 107–108.

[28] According to Prof. Ryngaert, accountability for gross human rights violations – including the exercise of universal jurisdiction – is a European value, but at the same time the scope of universal jurisdiction and content remains unclear. For example, it is unclear whether universal jurisdiction falls under customary international law (*Workshop "Universal Jurisdiction and International Crimes: Constraint and Best Practices"*, European Parliament, Strasbourg: 2018, available at: https://tinyurl.com/379pczy3 (accessed 30 August 2024).

[29] van Schaak, *supra* note 21, p. 144.

[30] Wrange, *supra* note 5, p. 714.

[31] *Ibidem*, p. 717.

establish universal jurisdiction, and state practice does not appear to have moved beyond war crimes, crimes against peace and crimes against humanity in terms of permitting the exercise of such jurisdiction.[32]

I believe that a bystander state such as Lithuania exercising universal jurisdiction over the crime of aggression touches upon the rules of international law, which are not uniform or universally accepted. For this reason, even though a domestic investigation could be considered a legal option for ending impunity for the crime of aggression in the case of Ukraine, the question remains whether such a legal option could be considered to be founded on the universally accepted international law norms, and would therefore be seen by other states as worth supporting and as a legitimate legal effort ensuring accountability for the international crime where international interest is so eminent because of the *jus cogens* principle of the non-use of force being breached. Differences between national definitions of the crime of aggression and the definition provided in the Rome Statute create less legality and legitimacy risks than grounding domestic prosecution of the crime of aggression in universal jurisdiction. For example, in Lithuania, in relation to the lack of leadership element in the definition of the crime of aggression as well as in Ukraine,[33] national courts interpreted elements of the crime of aggression in compliance with the definition of the crime in the Rome Statute.

Bearing in mind that the investigation into the crime of aggression committed by the political and military leadership of Russia, a permanent member of the UN Security Council, against Ukraine will be an historical investigation on par with the Nuremberg trial, any legality, legitimacy, impartiality or quality deficit should be avoided from the very beginning, because the future political and legal legitimacy of the Special Tribunal will not only derive from the procedure under which the tribunal comes into being, but will also depend on the decisions being taken in domestic jurisdictions before proceedings are taken over by the Special Tribunal.

As Veroff points out, domestic prosecutions into the crime of aggression could encounter justiciability, evidentiary, immunity and other legal roadblocks – for example, the prosecution might need to access information that is classified or a state secret, or otherwise controlled by the putative aggressor state, or that states may also have divergent approaches to the burden of proof.[34] Common evidence standards and procedural rules for the collection, verification and evaluation of

[32] Shaw, *supra* note 25, p. 671.

[33] The Supreme Court of Ukraine stated that the acts defined in Art. 437 of the Criminal Code can be committed by individuals who, due to their official authority or actual social position, are able to exercise effective control over or manage political or military actions and/or significantly influence political, military, economic, financial, informational and other processes in their own state or abroad and/or manage specific areas of political or military actions (Supreme Court decision of 28 February 2024, No. 415/2182/20, para. 45).

[34] Veroff, *supra* note 17.

evidence could enhance the legitimacy of domestic prosecutions and ensure that coherent and just procedures will lead to evidentiary results that will strengthen, not weaken the legitimacy of the trial for the crime of aggression against Ukraine in the future Special Tribunal. For these reasons, the establishment of the ICPA could be considered an important development, not only towards establishing the Special Tribunal, but also towards increasing the legitimacy, impartiality and quality of domestic criminal investigations into the crime of aggression against Ukraine.

3. THE IMPORTANCE OF ICPA FOR THE LEGITIMACY OF DOMESTIC PROSECUTIONS INTO THE CRIME OF AGGRESSION

Lithuania, as other JIT countries, carries out investigations into the crime of aggression against Ukraine according to its national laws and procedures. The main objective of establishing the ICPA is to facilitate case-building for future trials for this crime, that is, to ensure that evidence of the crime being collected in different domestic jurisdictions of JIT countries is preserved and prepared for future trial.[35] The main purposes of the ICPA are to provide a structure to support and enhance the investigations into the crime of aggression against Ukraine by securing evidence and to facilitate the coordination of investigations for the crime of aggression among JIT members, the ICC and other states, even those which are not members of the JIT.

The procedural legitimacy and quality of the criminal investigations into the crime of aggression that have been started in domestic jurisdictions by third states and Ukraine will play its role in ensuring that the future Special Tribunal is seen by the international community as worthy of support. First, the definition of the crime of aggression will have to be agreed upon by the JIT members because, as the example of Lithuania indicates, domestic definitions do not necessarily incorporate all the elements of the definition in the Rome Statute. As there are arguments for considering the definition in the Rome Statute as reflecting international customary law, an agreement to rely on this definition could increase the legitimacy and impartiality of the domestic criminal investigations into the crime of aggression against Ukraine. Furthermore, together with its coordinating roles, the ICPA should take on the responsibility of ensuring that coherent procedural rules are applied for evidence collection, verification and evaluation in order to avoid the risk that different domestic jurisdictions will use different rules and that certain evidence could later be challenged as having been collected or verified under different procedures and standards.

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[35] *See International Centre for the Prosecution of the Crime of Aggression against Ukraine*, EuroJust, available at: https://tinyurl.com/5heknt8w (accessed 30 August 2024).

Since domestic prosecution of the crime of aggression against Ukraine have been started by countries, including Lithuania, that have previously been occupied and annexed by the Soviet Union, broad cross-regional support by other states and international (regional) organisations for domestic prosecutorial efforts of third countries on the basis of universal jurisdiction could minimise the risk of such proceedings being seen as partial, aimed at establishing historical justice and therefore lacking legitimacy from the very outset as being motivated more by self-interest and not the interest of the international community as a whole. Broad support could help internationalise the domestic proceedings of JIT members and enable non-JIT members to contribute to the quality of investigations by sharing confidential information to support the criminal prosecution of the Russian military and political leadership, because otherwise national criminal jurisdictions will face evidentiary problems without the possibility of analysing top-secret documents of the aggressor state.

Taking all these aspects into account, the conclusion can be drawn that various political and practical reasons may result in limited support in the international law doctrine for the right of states to initiate domestic criminal investigations into the crime of aggression based on universal jurisdiction, and that the legitimacy of such domestic prosecutorial efforts could be challenged at the international level. However, if the definition of the crime of aggression being agreed by the ICPA countries complies with that in the Rome Statute, coherent evidentiary standards and standard procedures for the collection and verification of evidence in different domestic jurisdictions are set and broad international support for domestic prosecutorial efforts by third states is ensured, then the legitimacy and quality of such investigations could be greatly enhanced.

CONCLUSIONS

Lithuania has started criminal investigations into the crime of aggression against Ukraine on the basis of universal jurisdiction, as this possibility is provided for in the Criminal Code of Lithuania. Under international law as it stands today and international law doctrine, it is difficult to confirm the possibility of bystander states exercising universal jurisdiction over the crime of aggression being committed by nationals of a third state against another state.

Even though there is no international consensus that universal jurisdiction of third states applies to the crime of aggression, there is no doubt that the national prosecution authorities and domestic courts of third states could manage to perform impartial and objective investigations of the crime of aggression being committed against Ukraine. Nonetheless, the aggression against Ukraine has been committed

by a permanent member of the UN Security Council – Russia – meaning that investigation by JIT members and Ukraine will be under exceptional scrutiny from the international community from the very beginning. This scrutiny proves the importance of establishing a coordinated prosecutorial effort within Eurojust: the ICPA. The definition of the crime of aggression, as well as the standards of evidence, must be decided in an impartial and credible manner from the very beginning; procedures to ensure the quality of the criminal procedures must be respected, so as to leave no possibility of challenging the truth being stated in the form of judgments from the future Special Tribunal.

By fighting back against Russia's aggression for more than 10 years and the full-scale aggression continuing for more than two years, Ukraine is already making history. First after the Nuremberg coordinated prosecution into the crime of aggression against Ukraine in the form of the ICPA has a chance to make the history also if this investigation settles down in the most legitimate and that is a fully-fledged international criminal tribunal established following the recommendation of the UN General Assembly and based on a multilateral treaty signed between the UN Secretary General and Ukraine.