



aggression

**LEGAL ANALYTICS**

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crime of aggression under Article 437 of  
the Criminal Code of Ukraine**

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# Persons who may be held liable for the crime of aggression under Article 437 of the Criminal Code of Ukraine

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## LEGAL ANALYTICS

Small research publications by Truth Hounds that provide a brief overview of a selected issue and present the main findings, suggestions or recommendations.

## **TRUTH HOUNDS**

Ukrainian civil society organization specializing in documenting and investigating international crimes and serious human rights violations in Ukraine and other conflict-affected regions of Eastern Europe, the Caucasus, and Central Asia.

1. Article 437 of the Criminal Code of Ukraine (**CCU**) provides for liability for planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes. Article 437 additionally states that waging an aggressive war is also punishable. This definition is similar to the definition of aggression in Article 8 bis of the Rome Statute, where the list of methods of committing the crime is as follows: planning, preparation, initiation and execution. At the same time, the wording used in the Rome Statute and Article 437 of the CCU is synonymous: "initiation" can be equated with "waging", and "execution" with "waging". Thus, at least in terms of the methods of committing the crime of aggression, the comments to Article 8 bis of the Rome Statute are relevant for the interpretation of Article 437 of the CCU.
2. Despite the use of the term "*war of aggression*" in the statutes of post-war international military tribunals and UN General Assembly Resolution 3314, which provided the first legal definition of the concept of "aggression", the drafters of the Rome Statute nevertheless chose to use the term "*act of aggression*" in the text of Article 8 bis.<sup>1</sup> It is interesting that despite the gradual historical distancing from the term "war" in international humanitarian law and related fields, the Ukrainian legislator still opted for the expression "aggressive war" when drafting Article 437 of the CCU.
3. It is also important to focus on the (non-cumulative) nature of the criminalised acts constituting an act of aggression (or "aggressive war") under the CCU. As the commentary to the Rome Statute notes, the forms of conduct described in Article 8 bis, namely planning, preparation, initiation or execution of an act of aggression, should not be interpreted as synonymous or even identical acts. Instead, they should be understood as containing different, albeit seemingly similar, forms of committing the crime of aggression, and are also alternative. In other words, for an act to be recognised as a crime of aggression under the Rome Statute of the International Criminal Court (**ICC**), it is sufficient for it to take one of these alternative forms of behaviour, not all four.<sup>2</sup> A similar logic can be applied to the text of Article 437 of the CCU, which also emphasises the non-cumulative nature of the application of the listed acts – mainly due to the use of the conjunction "or" between them.
4. Thus, **planning** is the first step in the preparation of an act of aggression. It is manifested in the first discussions of the idea of starting a war, the conceptual work of the highest political and military leaders of the state, as well as possibly

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<sup>1</sup> Triffterer O., Ambos K., (2016). *The Rome Statute of the ICC: A Commentary*. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 3rd edition, Article 8 bis, para. 17

<sup>2</sup> *Ibid*, para. 22

high-ranking lawyers, diplomats, and ideologues of the future campaign of aggression.<sup>3</sup> One example of planning could be participation in a meeting where the idea of starting an armed conflict, that is not provoked by the armed aggression of another state, is discussed.<sup>4</sup> However, according to the prevailing opinion, the mere presence at such a meeting or even expressing support for an act of aggression, should not be considered as a direct commission of the crime of aggression. Nevertheless, such behaviour may be considered aiding and abetting an act of aggression.<sup>5</sup>

5. At the same time, the third edition of the Kampala Elements of Crimes notes that in order to prosecute such a primary form of the crime of aggression as planning, it is necessary for the act of aggression to ultimately take place directly. Otherwise, in the absence of an act of aggression, a broad interpretation of the element of "planning" would lead to a dangerous expansion of its application to cases of *the threat of the use of force*, which, although prohibited under Article 2(4) of the UN Charter, is nevertheless a distinct act that is not covered by the crime of aggression.<sup>6</sup>
6. A key feature of the "planning" stage within the meaning of Article 8 bis of the Rome Statute, which is confirmed by international legal custom, is participation in the development of specific, rather than abstract and general, military or other plans and operations. Given this, the mere fact of participation in the development of political or other plans of a state that may lead to acts of aggression is not sufficient to consider a person to be complicit in the "planning" of such an act. As the commentary confirms, the concept of "planning" means the exclusive ability of the perpetrator to direct the aggression by planning "*a design or scheme*" for its implementation.<sup>7</sup>
7. **Preparation** is the taking of practical steps to implement the initial plan to commit aggression.<sup>8</sup> They can relate to direct military preparations, as well as economic and diplomatic preparations. In the diplomatic and economic spheres, planning may involve freeing up assets for carrying out the subsequent act of

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<sup>3</sup> Sayapin S., (2014). *The Crime of Aggression in International Criminal Law Historical Development, Comparative Analysis and Present State*. Asser Press / Springer, p. 228

<sup>4</sup> Aronsson-Storrier M., (2017). *Commentary to the article 8 bis of the Rome Statute*. Lexitus, [URL](#).

<sup>5</sup> *Ibid*

<sup>6</sup> Triffterer O., Ambos K., (2016). *The Rome Statute of the ICC: A Commentary*. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 3rd edition, Article 8 bis, para. 23-24

<sup>7</sup> *Ibid*, para. 26

<sup>8</sup> Sayapin S., (2014). *The Crime of Aggression in International Criminal Law Historical Development, Comparative Analysis and Present State*. Asser Press / Springer, p. 229

aggression or diplomatic manoeuvres to conceal plans for aggression.<sup>9</sup> The range of persons involved in the preparation of an act of aggression is wider by its definition than those involved in the planning. However, this does not mean that all those involved in the preparation are aware of the goals of their activities or share the intent to commit a crime of aggression.<sup>10</sup> Accordingly, the possibility of establishing the commission of a crime of aggression by a particular person in the form of preparation should be studied separately in each case.

8. Thus, while the "planning" phase involves the development of *specific* and targeted rather than general *plans*, the "preparation" phase involves taking *specific measures* to implement this plan. Here it is important to make a note of the state's military build-up, both through a general increase in arms production and the increased presence of military personnel and equipment on the border with another state. As empathised in the case of *Nicaragua v. the United States of America* of the International Court of Justice, international law, except for treaty law, does not outline any restrictions that would be imposed on a sovereign state regarding its armament. Thus, the participation of a person in controlling the overall build-up of the state's military potential does not entail criminal liability for "preparing" for an act of aggression.<sup>11</sup>
9. **Initiation** is the final decision to commit an act of aggression. This decision, in most commentaries on the Rome Statute, is attributed to the head of state, head of government, minister of defence, commander-in-chief, etc.<sup>12</sup> The commentaries also note that the "initiation" of an act of aggression covers decisions taken at the strategic level – whether to take the first step and launch an aggression – but does not necessarily focus solely on the operational and tactical levels. For example, the act of "initiating" an act of aggression would be the act itself, for example, of the president giving the final and definitive order to commit aggression.<sup>13</sup>

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<sup>9</sup> Aronsson-Storrier M., (2017). *Commentary to the article 8 bis of the Rome Statute*. Lexitus, [URL](#).

<sup>10</sup> Sayapin S., (2014). *The Crime of Aggression in International Criminal Law Historical Development, Comparative Analysis and Present State*. Asser Press / Springer, p. 230

<sup>11</sup> Triffterer O., Ambos K., (2016). *The Rome Statute of the ICC: A Commentary*. C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 3rd edition, Article 8 bis, para. 30

<sup>12</sup> Aronsson-Storrier M., (2017). *Commentary to the article 8 bis of the Rome Statute*. Lexitus, [URL](#).

<sup>13</sup> Clamberg M., (2017). *Commentary on the Law of the International Criminal Court*. Torkel Opsahl Academic EPublisher

Brussels 2017, Article 8 bis, para. 153

10. At the same time, it can be adopted by members of parliament<sup>14</sup> or the state security council. In the case of the parliament, unanimity (or lack thereof) in the adoption of the relevant decision may play a role in establishing the presence of a subjective side of the crime of aggression in the act of a particular parliamentarian. For example, the presence of those who did not support the decision to commit an act of aggression or did not participate in the relevant voting may indicate that parliamentarians had a choice and, accordingly, otherwise confirms the conscious decision to support an act of aggression and to participate in its planning and preparation.
11. **Execution** of an act of aggression consists of the direct initiation of an armed conflict. This is the final stage of the crime of aggression. Persons involved in the direct execution of an act of aggression, such as low-ranking military personnel, are not subjects of the crime of aggression unless they participated in its planning and preparation.<sup>15</sup> The execution of an act of aggression can be expressed, among other things, in the decision to annex a certain territory, establish an occupation administration, continue an armed conflict, etc.<sup>16</sup>
12. Article 8 bis of the Rome Statute, after listing the methods of committing the crime of aggression, contains an additional clarification that is not found in Article 437 of the CCU, namely, the indication that planning, preparation, initiation and execution of aggression is possible only by a person in a position effectively to exercise control over or to direct the political or military action of the state. Despite the absence of such an explanation in the CCU, it is absolutely necessary for Ukrainian prosecutors and courts to take it into account because *de facto* such an addition only states an obvious truth: in order to commit the crime of aggression, one must be endowed with powers that allow them to push the state toward the violation of international law in the form of an act of aggression.
13. Since 2014, Ukrainian courts that have heard cases related to the crime of aggression have not developed a consistent practice regarding who should be considered a subject of the crime under Article 437. On the one hand, the courts did not follow a unified practice and developed their own interpretations of the

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<sup>14</sup> Sayapin S., (2014). *The Crime of Aggression in International Criminal Law Historical Development, Comparative Analysis and Present State*. Asser Press / Springer, p. 231

<sup>15</sup> Sayapin S., (2014). *The Crime of Aggression in International Criminal Law Historical Development, Comparative Analysis and Present State*. Asser Press / Springer, p. 233

<sup>16</sup> McDougall C., (2013). *The Crime of Aggression under the Rome Statute of the International Criminal Court*. Cambridge University Press, p. 188

application of Article<sup>17</sup>. On the other hand, the general narrative was that the perpetrator could be any member of the Russian Armed Forces or the paramilitary formations of the so-called DPR and LPR. This created a body of practice with a flawed understanding of the nature of the crime of aggression.

14. However, it is worth noting that some courts still upheld an approach that reflected the nature of the crime as a "leadership" offence. For example, the Pryazovskyi District Court of Zaporizhzhia Region in its verdict in case No. 325/266/16-к dated May 29, 2017, acquitted the person of the charge under Art. 437 of the CCU, as it did not see in his actions managerial actions or leadership of the armed forces<sup>18</sup>:

*"the conduct of aggressive war or aggressive hostilities is recognised as managerial actions to implement aggressive plans, in particular, the overall command of all forces involved in a war or military conflict, the command of armed forces or military operations, etc. These actions are taken after the aggressive war or armed conflict has already been resolved and may include amending the plan of war or military conflict, creating new plans for conducting the war or military operations. The prosecution did not provide the court with any evidence that the perpetrator performed managerial actions to implement aggressive plans, general management of all forces involved in the war or military conflict, command of the armed forces, conducted military operations, made changes to the plan of war or military conflict, created new plans for conducting the war or military operations that had been started."*

15. The recent ruling of the Grand Chamber of the Supreme Court of February 28, 2024, in case No. 415/2182/20 is revolutionary for Ukrainian courts. According to the court's position in the decision:

*"The acts defined in Article 437 of the CCU may be committed by persons who, by virtue of their official authority or social standing, 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."*<sup>19</sup>

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<sup>17</sup> Maliar H., (2016). *Analysis of domestic legislation and judicial practice on criminal liability for preparation, unleashing and conduct of aggressive war*. Centre for Civil Liberties, [URL](#).

<sup>18</sup> *Ibid*

<sup>19</sup> Decision of the Grand Chamber of the Supreme Court, No. 415/2182/20, 28 February 2024, para. 45, [URL](#).

As can be seen, the Grand Chamber clearly defined the "leadership" nature of the crime and rejected the possibility of convicting low-ranking soldiers who had no influence on the decision to commit aggression.

16. In international practice, there are two main approaches that shape the understanding of the level of involvement of a person required to make a decision on aggression. The text of Article 8 bis of the Rome Statute contains the phrase "*to control or to direct*", while the practice of the Nuremberg and Tokyo tribunals, as well as the so-called subsequent Nuremberg Tribunals, tends to use the formula "*shape or influence*" on the political or military actions of a state.
17. These two formulas differ significantly. The first is much more restrictive, as it essentially excludes the possibility of considering persons outside the state apparatus as the subject of the crime of aggression (such as officials who do not hold the highest positions in the state – such as ministers, the president, etc. – military commanders other than the commander-in-chief, or even entrepreneurs, scientists, influential journalists, etc.). However, there is also the opinion that even the Rome Statute's requirement of control and direction allows key businessmen of the state or other persons with a significant level of influence to be considered accomplices to the crime.<sup>20</sup>
18. The second ("Nuremberg") formula is more extensive and provides for the possibility of expanding the circle of potential accused for the crime of aggression to include the persons listed above. In any case, both the option of considering such persons as accomplices and the use of the Nuremberg model of "shaping and influencing" imply that potential accused persons must be involved (even if not in the highest positions) in the creation of a plan to commit or adjust an act of aggression.
19. From the existing international judicial practice of the Nuremberg and Tokyo tribunals, we know that the following persons were successfully accused of the crime of aggression: military leaders (the top leadership of the army and navy, ministers of defence), the president, prime minister, ministers of economy, interior and foreign affairs, a Nazi ideologue and later minister of the occupied territories, a foreign politician who was a key figure in the occupation of the state he represented, a deputy plenipotentiary representative for the implementation of the state economic programme, the secretary of state and

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<sup>20</sup> Nerlich V., (2017). *The Crime of Aggression and Modes of Liability – Is There Room Only for Principals?* Harvard International Law Journal, p. 46 , [URL](#).

head of the political department of the ministry of foreign affairs, and an economic adviser to the head of state.<sup>21</sup>

20. The charges against German financiers and industrialists, as well as the head of the news department of the Ministry of Propaganda, were not approved. However, in both cases, the possibility of holding them accountable was not categorically rejected.<sup>22</sup>
21. Analysing the approach of the Grand Chamber of the Supreme Court in the above decision, it can be concluded that two models are combined into one. The court emphasises the possibility of prosecuting a person who was involved in the commission of a crime both because of his or her official position and because of his or her significant social influence. This creates an opportunity for bringing to justice representatives of business or other elites with an influential position.
22. Truth Hounds, in turn, support the position of the Supreme Court in terms of the general definition of the potential circle of those responsible and were pleased to contribute to it by advising judges in order to establish a position in national practice based on the principles of international law.

## Conclusions

23. Given the above, if the Ukrainian courts apply the approaches crystallised by the Supreme Court or the Nuremberg formula, charges of an act of aggression may be brought:
  - a) the senior political leadership of the Russian Federation (the president, prime minister, members of the Security Council, senior officials of the Ministry of Economy, Ministry of Foreign Affairs, Central Bank and similar institutions in terms of their functions and influence);
  - b) persons representing the security agencies (the Minister of Defence and the Minister of Internal Affairs, the heads of ministries, ministerial advisers, other persons close to them who could have participated in the planning and preparation of the act of aggression against Ukraine, representatives of the General Staff, the leadership of intelligence services, the leadership of the Rosgvardia, etc);
  - c) representatives of the Russian parliament (those who voted in favour of granting the President of the Russian Federation the right to use troops abroad);

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<sup>21</sup> International Military Tribunal (Nuremberg), 1 October 1946, pp. 101-154, [URL](#); International Military Tribunal for the Far East, 4 November 1948, pp. 558-588, [URL](#).

<sup>22</sup> International Military Tribunal (Nuremberg), 1 October 1946, pp. 101-154, [URL](#).

- d) business representatives (those persons who were actively involved in decision-making on the planning and preparation of the act of aggression and were able to influence these plans);
- e) representatives of the Russian state media engaged in state propaganda of aggression.