

STANCE

of Ukraine 5 AM Coalition organizations¹ on Draft Law “On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine” (No. 7290)

On May 20, 2021, the Verkhovna Rada of Ukraine passed the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of Norms of International Criminal and Humanitarian Law” (No. [2689](#)). On June 7, 2021, the law was submitted to the President of Ukraine for his signature, but there is no news about the status of this document so far.

The text of this law became a compromise solution based on the international law practice and the capacity of the national justice system of Ukraine to prosecute the most serious crimes. Representatives of law enforcement and judicial bodies of Ukraine, human rights organizations, and foreign experts in international criminal law took part in the drafting procedure. The provisions on universal jurisdiction, command responsibility, and the formulation of the crime of aggression remained debatable. The same aspects remain problematic today.

The Draft Law “On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine” (No. [7290](#)) was registered in the Verkhovna Rada of Ukraine on April 15, 2022, as opposed to the text of Law No. 2689. The explanatory note highlights the international armed conflict waged in the territory of Ukraine and the mass violations of international law committed by the Russian Federation in the current conditions.

However, the wording of Draft Law No. 7290 differs from the wording of Law No. 2689, significantly worsening the prospect of prosecuting the most serious international crimes committed amid the armed aggression against Ukraine. The exclusion of controversial issues from the text leaves unresolved the problems that arise in practice when administering justice in Ukraine.

¹ Ukraine 5 AM Coalition has been working since the beginning of a large-scale Russian invasion to protect the victims of Russian armed aggression in Ukraine and to bring to justice the top leadership of the Russian Federation and the direct perpetrators of war crimes. The Coalition members are Human Rights Centre ZMINA, Ukrainian Helsinki Human Rights Union, Ukrainian Legal Advisory Group, Regional Center for Human Rights, Media Initiative for Human Rights, Institute for Peace and Common Ground, “Almenda” Civic Education Center, CrimeaSOS, Crimean Human Rights Group, East SOS, Social Action Centre, Advocacy Advisory Panel, Kharkiv Institute for Social Research, DEJURE Foundation, Truth Hounds, Educational Human Rights House Chernihiv, Human Rights Center “Action”, Association UMDPL, Ukraine without Torture, Human Rights Platform, Association for Development of Judicial Self-Government of Ukraine, Ukrainian Healthcare Center (UHC), Expert Center for Human Rights, NGO “Postypovyi Hurt Frankivtsiv”, Association of Relatives of the Kremlin Political Prisoners, Fund for Fundamental Research Support.

1. The draft law does not contain provisions on the possibility of prosecuting persons for war crimes within the framework of command responsibility. This concept is fundamental in international criminal law which allows for the investigation into the actions of military commanders and civilian superiors within the scope of responsibility for the most serious international crimes. It is important to emphasize that this concept does not apply to general criminal offenses, but it will be impossible to speak of full and efficient justice in Ukraine on the consequences of the armed conflict if it is not introduced. Article 422-2 of the Criminal Code of Ukraine proposed by the draft law as an alternative to command responsibility does not cover the peculiarities of prosecuting military commanders and civilian superiors for the most serious international crimes. Instead, it creates a basis for their responsibility as a separate component of the crime, which does not fully include team responsibility but only applies to their inaction. That is, this article actually overlooks situations where a commander did not fulfill his authority in terms of what he knew or should have known about the crimes committed and deliberately ignored the fulfillment of his obligations. In addition, orders to commit war crimes as an aspect of command responsibility are not regulated in any way. Such an approach makes it impossible to bring such persons to justice for the most serious international crimes.

2. The proposed wording of Article 436 of the Criminal Code of Ukraine does not cover a situation of an international armed conflict but contains situations only of committing "an act of aggression" or "a non-international armed conflict." Given that not all acts of aggression can potentially lead to international armed conflict, these cases actually fall out of the Article regulation. At the same time, a rather broad category is "public appeals" which does not provide legal certainty as to which actions of a person will fall under the qualification of this article. Currently, Ukraine has a problem with the interpretation of the concept of "public appeals" which allows bringing to justice individuals for their statements made on social networks. In fact, the article only reinforces existing law enforcement practice.

3. The wording of Article 437 of the Criminal Code of Ukraine enshrines the unlimited potential composition of the subjects of the crime of aggression, as enshrined in the current wording. This approach runs counter the international law and the provisions of the Rome Statute of the International Criminal Court. The practice of international criminal tribunals, including the Nuremberg trials and post-World War II trials, defines that ordinary service members cannot be held accountable for the crime of aggression due to their limited ability to influence the state and form a policy on the commission of the act of aggression.

This position was enshrined in the Kampala Amendments to the Rome Statute of the ICC. Instead, the current practice of Ukrainian justice enshrines the possibility of bringing anyone to justice for waging an aggressive war. The same approach is supported by this draft law, probably to prevent persons, who have already been convicted under Article 437 of the Criminal Code of Ukraine, from being released from criminal liability.

4. The text of the draft law excludes provisions on the possibility of introducing the institution of universal jurisdiction in Ukraine. This applies, in particular, to the norms on the possibility of prosecuting foreigners in Ukraine who committed the most serious international crimes outside Ukraine. In this case, Ukraine limits its opportunities for cooperation with other countries in matters of international justice, in particular in using its own experience of prosecuting the most serious international crimes concerning other events. The jurisdiction of the justice system in Ukraine will become irrelevant to the most serious international crimes trials. In addition, in this case, there is a risk that such persons will be able to hide in Ukraine from being prosecuted for the most serious crimes. This was the case, in particular, after the war in the former Yugoslavia, when a significant number of refugees left for the Netherlands, until the country introduced the principle of universal jurisdiction into its national legislation.

In addition, the draft amendments to the Criminal Procedure Code of Ukraine proposed by the draft law are not essential to ensure the effective investigation into the most serious international crimes in Ukraine. The text proposes to amend the numbering of new articles of the Criminal Code of Ukraine in the provisions of the Procedural Code, in which they are indicated. Instead, such an approach does not solve the problem in the practice of law enforcement and judicial bodies of Ukraine which relate to the timing of pre-trial investigation, peculiarities of gathering evidence, conducting procedural actions that are important to ensure their effective performance. Without introducing the relevant provisions of the Criminal Procedure Code of Ukraine, amendments to the Criminal Code of Ukraine are insufficient and will not have a significant impact on Ukraine's ability to prosecute the most serious international crimes.

Therefore, the Draft Law “On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine” (No. 7290) needs to be finalized.