The background of the entire page is a photograph of a destroyed tank, likely from the Russo-Ukrainian war. The tank is heavily damaged, with its turret and hull visible. The image is overlaid with a solid green color, which serves as a background for the white text.

LEGAL OBSTACLES TO PROSECUTION FOR WAR CRIMES IN UKRAINE

This publication is designed to inform Ukrainian and international stakeholders about the progress on improvement of Ukrainian legislation on prosecution for war crimes.

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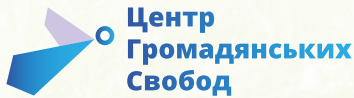
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The views and opinions expressed in this publication do not necessarily reflect the views of all members of the CivilMPlus platform and the German Ministry of Foreign Affairs.



The armed aggression of the Russian Federation in Donbass has led to the commission of a significant number of crimes in the armed conflict. In December 2020, the Prosecutor of the International Criminal Court, Fatou Bensouda, stated¹ that: “there is a reasonable basis at this time to believe that a broad range of conduct constituting war crimes and crimes against humanity within the jurisdiction of the Court have been committed in the context of the situation in Ukraine.” Previous reports from the Office of the Prosecutor have stated that war crimes such as intentional assault on civilians, civilian and protected objects, premeditated murder, torture and inhuman or degrading treatment, rape and other forms of sexual violence have been committed over the years. After obtaining the permission of the judges of the Pre-Trial Chamber, the Prosecutor of the International Criminal Court may initiate a full-fledged investigation. At the same time, according to its policy, the court will focus on the “big fish” — political leaders and top military leaders. This, in turn, means that **bringing thousands of perpetrators of these crimes to justice remains Ukraine’s responsibility.**

¹ <https://bit.ly/3mkloQR>

In 2014, this duty fell to the unprepared law enforcement and judicial system². The situation was complicated by imperfect Ukrainian national legislation, which did not comply with international humanitarian and international criminal law. Now, eight years later, it is possible to draw conclusions about the extent to which the state has paid due attention to this duty and made the appropriate institutional and legislative changes to ensure the implementation of the principle of inevitability of criminal liability in practice. This issue should be the subject of a comprehensive study, so this publication will analyze only some aspects.

In a number of resolutions of the Parliamentary Assembly of the Council of Europe, reports of the UN High Commissioner for Human Rights and human rights organizations the Ukrainian authorities have been called upon to bring the Criminal Code of Ukraine into line with the provisions of international humanitarian and international criminal law. The fact is that the Code does not provide for liability for crimes against humanity, and war crimes are written in the form of an abstract blanket rule, which makes it almost impossible to apply in practice. In view of this, some crimes that have the characteristics of war crimes or crimes against humanity have been classified as general criminal offenses, for example, as crimes against the person or crimes against public safety. At the same time, such a qualification does not reflect the nature of international crimes and entails a number of legal consequences, such as shorter sentences, the need to take into account statutes of limitations, the possibility of applying amnesty, and so on. This state of affairs opened the way to impunity and leveled the rights of victims of these crimes.

To solve this problem, human rights organizations initiated the development of a draft law amending the Criminal Code of Ukraine. In the Parliament of the previous convocation, the government draft law # 9438 “On Amendments to Certain Legislative Acts to Ensure Harmonization of Criminal Law with the Provisions of International Law” passed only the first reading, and literally a month before the end of its term. In the Parliament of the ninth convocation, a similar draft law # 2689 “On Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of Norms of International Criminal and Humanitarian Law”³ was registered by the chairman of the profile parliamentary committee.

² <https://bit.ly/3uBLmmu>

³ <https://bit.ly/3oAmGd4>



But **the majority of deputies of the previous and present convocations did not show much interest in solving the legislative problems of prosecuting war criminals, which caused a wave of public appeals⁴ and street actions⁵ of human rights defenders and victims of war crimes.**

After a long public campaign of human rights organizations, the Parliament adopted the document as a whole in May 2021 and sent it to the President of Ukraine for signature. More than three months have passed, but the draft law as of early September 2021 is still “to be signed by the President.” In fact, Volodymyr Zelensky has already exceeded the legal deadline by six times, when the fate of this document was to be decided by the Constitution. The President’s Office has no official communication on this issue, so the reasons for the long delay are unknown. This state of affairs directly contradicts Volodymyr Zelensky’s public statements⁶ that Ukraine intends to continue to bring Russia accountable for systemic violations that continue in the territories of Ukraine controlled or occupied by Russia. But in practice this can be done only if the state bodies have the appropriate legal instruments, which are enshrined in draft law # 2689.

If the initiative to amend the Criminal Code of Ukraine met with the indifference of the Ukrainian authorities, the ratification of the Rome Statute of the International Criminal Court was opposed. Despite the fact that according to Article 8 of the Association Agreement between the European Union and Ukraine this is an international legal obligation of Ukraine, the position is publicly communicated that the Russian Federation would use this international mechanism to file fake criminal cases, which would force Ukraine to constantly disprove certain materials. In June 2016, human rights organizations managed to amend Article 124 of the Constitution of Ukraine, which removed the legal and technical obstacles to ratification identified by the Constitutional Court of Ukraine. But the final provisions of the draft amendments to the Constitution in the area of justice provided for a three-year delay⁷ for the entry into force of the provisions of this Article.

4 <https://bit.ly/3mgvQZy>

5 <https://bit.ly/3iw4Ofs>

6 <https://bit.ly/3l7vsx6>

7 <https://bit.ly/3mp94ig>

This postponement ended on June 30, 2019, but despite assurances⁸ of the resumption of the ratification process from the Deputy Head of the President's Office at the very beginning of the term of President Volodymyr Zelensky, the case did not move forward.

The situation regarding the legal regulation of special (in absentia) court proceedings remains quite controversial. Previously, according to the Code of Criminal Procedure, the only reason to initiate a special pre-trial investigation or trial, to apply a precautionary measure in matters of extradition in the absence of the accused, was to declare the suspect wanted interstate and / or internationally. As Ukraine has withdrawn from the Agreement on the Exchange of Information in the Field of Combating Crime concluded between the governments of the CIS member states, this is currently being implemented through an appeal to the international criminal police organization Interpol. The jurisprudence connects such an "announcement" not with the moment of the search warrant, but with the publication by the Interpol General Secretariat of the relevant circular — a Red Notice on the international search for a person.

However, in accordance with Article 3 of the Statute⁹, which prohibits any interference or activity of a political or military nature, Interpol does not declare internationally wanted participants in war crimes committed in Donbass and Crimea. In these eight years, Interpol has never declared internationally wanted any suspects in war crimes filed by Ukraine. As a result, these criminal proceedings could not be brought to court, and therefore **the trials of many of the defendants in the Russian Federation and the Ukrainian territories occupied by it were blocked.**

On April 27, 2021, the Parliament adopted the draft law "On Amendments to the Code of Criminal Procedure to improve certain provisions in connection with the conduct of a special pre-trial investigation". The Prosecutor General of Ukraine Iryna Venediktova¹⁰, people whose relatives were killed during the Revolution of Dignity and the Bar Advisory Group¹¹ called who represents the interests in the

8 <https://bit.ly/3Fh4cEf>

9 <https://bit.ly/3Fh4hYz>

10 <https://bit.ly/3D8HyfB>

11 <https://bit.ly/3AaTdbI>

courts appealed for the adoption of this bill. According to the authors of the draft law, its purpose is to ensure the inevitability of punishment for persons who have committed a criminal offense and in order to avoid criminal liability have left or are in other countries or in the temporarily occupied territories of Ukraine.

This law defines another basis for conducting a special pre-trial investigation or special court proceedings. Namely: “if the suspect unreasonably evades appearing at the summons of the investigator, prosecutor, investigating judge or court (provided he/she is duly notified of such summons) and is in the territory of the aggressor state or in the temporarily occupied territories of Ukraine.”

Without questioning the need for changes in legislation to remove obstacles to the start of war crimes trials, experts say there are a number of risks to the innovation. For the first time, the legislative level stipulates that the scope of procedural rights of persons staying in the territory of the Russian Federation and the temporarily occupied territories is significantly narrowed in comparison with persons residing or staying in other countries of the world. The possible risks of abuse by the pre-trial investigation authorities are also a matter of concern. It is not clear what is meant by “sufficient grounds to believe” that the suspect, accused has left and / or is in the temporarily occupied territory of Ukraine, the territory of the state recognized by the Verkhovna Rada of Ukraine as an aggressor state.

A number of issues also remain open. Will refuting the evidence of a person’s stay at the time of the court ruling lead to its revocation? Can the methods established by law be considered as proper notification of the suspect, and accordingly ensure his / her right to defense, the opportunity to know about the prosecution and to defend his / her position in court? Is it guaranteed that a person, as soon as he / she learns of a criminal proceeding, has the opportunity to obtain from the court hearing their case that he / she may return to it without the obligation to be imprisoned on the basis of a conviction in absentia?

These questions will be answered in the future by the European Court of Human Rights, which has already developed case law¹² on the application of this type of proceedings in the context of ensuring Article 6 of the European Convention on Human Rights.

¹² <https://bit.ly/3A9yBAH>

It is important to understand that the signing and entry into force of the amendments to the legislation described above is only the first step in bringing to justice for war crimes. Many prosecutors and police investigators lack general training, let alone special training in the investigation of armed conflict cases. The situation is not the best in the justice system, whose staff do not have adequate knowledge of international humanitarian and international criminal law. In this context, **a series of exercises should be organized for the special training and retraining of judges, investigators, prosecutors and lawyers in the provisions of international humanitarian and international criminal law, as well as the practical aspects of its application to the investigation and administration of justice in armed conflict.** It is also important to give law enforcement officers the opportunity to receive operational advice from experts in international humanitarian and international criminal law during the investigation of criminal proceedings.

In addition, changes to the legislation will not have the desired effect without increasing the institutional capacity of state bodies. The problems of staff shortage and overload of criminal proceedings of investigative bodies and investigative units of the police, lack of coordination between law enforcement agencies in general and within the bodies, understaffing of courts of Donetsk and Luhansk regions, unsatisfactory working and logistical conditions, as well as guarantees of safety, housing and other practical needs.

It is worth mentioning the unjustified removal of the Deputy Prosecutor General of Ukraine Gunduz Mammadov from overseeing the Department of Supervision in Criminal Proceedings for Crimes Committed in the Conditions of Armed Conflict. On June 29, 2021, an order¹³ appeared on the website of the Prosecutor General Office transferring the curatorship of this department to another deputy, Maksym Yakubovsky. The very next day after the public criticism of such a decision, Iryna Venediktova decided to subordinate this department to herself. The Prosecutor General of Ukraine cited the SSU's decision to deprive Gunduz Mammadov of access to state secrets as the reason. But by order¹⁴ of July 8, 2021, she removed her Deputy from overseeing the last departments subordinate to him — the Department of Child Protection and Combating Violence and the Training Center of the Office of the Prosecutor General.

¹³ <https://bit.ly/3BbOl7A>

¹⁴ <https://bit.ly/3A9GoPd>

This decision of the Prosecutor General of Ukraine is extremely incomprehensible and illogical. The department created by Gunduz Mammadov in less than the first year of work has developed a strategy for investigating war crimes, created mirror departments in regional prosecutor offices, began documenting and preparing evidence for transfer to the International Criminal Court, established permanent cooperation with the public, and prepared several joint court appeals to International Criminal Court with non-governmental organizations. The activities of the department were almost the only area of work of the Office of the Prosecutor General, to which there were no significant questions from human rights defenders, journalists or international partners.

In view of this, human rights organizations appealed¹⁵ to the President of Ukraine regarding the inadmissibility of removing Gunduz Mammadov from control of the department and held a “briefing on chairs” directly under the Prosecutor General Office, demanding¹⁶ that she change this decision.

In response, Iryna Venediktova met¹⁷ with human rights activists, established¹⁸ the International Council of Experts on Crimes Committed in Armed Conflict, and signed¹⁹ a decree with the heads of the National Police and Security Service of Ukraine on the establishment of specialized units to investigate crimes committed in armed conflict. According to this resolution, such structural units, following the example of the Prosecutor General Office, will be created within the central offices of the SSU and the National Police of Ukraine, as well as their regional and territorial bodies in Donetsk and Luhansk regions.

Gunduz Mammadov himself appealed to the court to protect²⁰ his violated rights and decided²¹ to resign from the post of Deputy Prosecutor General. In his interview, Volodymyr Zelensky called²² it a personal decision of Iryna Venediktova.

¹⁵ <https://bit.ly/3FfyPdg>

¹⁶ <https://bit.ly/3DfZQvD>

¹⁷ <https://bit.ly/3l7Zh0r>

¹⁸ <https://bit.ly/3a8hl4p>

¹⁹ <https://bit.ly/2ZWpuCo>

²⁰ <https://bit.ly/3uCzxfM>

²¹ <https://bit.ly/2YimUKZ>

²² <https://bit.ly/3a4zakN>

Ukraine is slowly implementing institutional and legislative changes aimed at ensuring the implementation of the principle of inevitability of criminal liability for war crimes committed in the framework of the armed conflict in Donbas. Such an unjustified delay has long-term negative consequences, because if the legal system does not work, the people's demand for justice can easily turn into a demand for revenge.

This publication is developed in the framework of the activity of CivilM+ platform.

CivilM+ is an independent international civil society platform, which mission is to active integration of civil initiatives to restore the Donetsk and Luhansk oblasts as peaceful, integrated and developed regions as part of a democratic Ukraine and a united European space, with the active participation of the region's population and those who have left the region due to the conflict.

The CivilM+ platform offers its participants the opportunity to collaborate as part of joint initiatives and projects, to develop and express joint positions, provide mutual support and solidarity, systematise knowledge, raise levels of qualification and improve coordination.

Platform CivilM+ was launched in December 2017 thanks to the joint effort of the civil society representatives from Ukraine, Russia, Germany and France.

More about the platform and it's members on the web-site civilmplus.org

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Federal Foreign Office



