

TWO LINES OF CRIMINAL-LEGAL PROTECTION OF THE TERRITORIAL INTEGRITY OF UKRAINE: PROBLEM OF COLLISION

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A Special part of the Criminal Code of Ukraine contains two interrelated articles that protect such an important social value as the territorial integrity of Ukraine. The first of them is an Article 110 «Encroachment on the territorial integrity and inviolability of Ukraine», located in Section I «Criminal offenses against the basis of the national security of Ukraine». It protects the physical directly parameters of the territory of Ukraine within the existing borders of Ukraine from negative change (reduction). The second is article 437 «Planning, preparation and waging of an aggressive war» («crime of aggression»). It is located in Section XX «Criminal offenses against peace, security of mankind and international legal order» and protects the peace between states and peoples, but indirectly (in some cases) the object of its protection may also be the integrity of the territory of Ukraine. Such dualism characterizes the criminal law of most states of the world.

There are two areas of social relations and, accordingly, two levels of their legal regulation at the heart of such a two-linearity of the protection of the territorial integrity of Ukraine: national area and intergovernmental (international) area. Protected value under art. 437 of the Criminal Code of Ukraine is peaceful relations between the states. The normative basis of these relations is the interstate agreements ratified by Ukraine. The main one is the UN Charter, which proclaims: «All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political

independence of any state, or in any other manner inconsistent with the Purposes of the United Nations» [1]. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations states: «Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations... The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal...» [2]. The Helsinki Final Act states «The participating States will respect the territorial integrity of each of the participating States. Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force...» [4].

International agreements provide a framework for the protection of the integrity and inviolability of any state (incl. Ukraine). That is, the territorial integrity of Ukraine is an optional (facultative) value protected by Art. 437 CC. It is facultative because this article punishes the planning, preparation and waging of an aggressive war or a military conflict against any state. Military aggression and military conflict against Ukraine are only a separate case of the «crime of aggression». Moreover, military aggression and military conflict with Ukraine are not necessarily directed against the integrity of its territory. The Article 110 of the Criminal Code of Ukraine protects the integrity of the territory of Ukraine from any subjects. Instead, the Article 437 of the Criminal Code protects the integrity of the territory of Ukraine only from the encroachments of foreign states or their associations and only from such attacks that have the character of aggression.

Subject of aggressive actions under Art. 437 of the Criminal Code is only a person who has a certain connection with representatives of the state power and takes aggressive actions to fulfill the state plan of aggression (war or military conflict). In international law, the keys characteristics of the subject are the ability to exercise control or guidance, participation in activities that are of utmost importance for the planning, preparation and waging of an aggressive war or a military conflict [9, p. 662]. To determine if a certain person is under such control, it is necessary to apply the one of two criterions: a) criterion of «general control» – in relation to groups of individuals organized for military principle (it is not just the supply of weapons, equipment or financing, and the coordination of military operations by the state, contributing to general planning, even without issuing an instruction for committing specific acts), b) criterion of «effective control» – in relation to individuals and groups not organized on a military basis (giving specific orders, instructions). These criterions in the judgment of the Appeals Chamber of the Tribunal for the Former Yugoslavia (it elaborates on the issue of assigning the individual to the state), as well as in the earlier judgments

of the International Criminal Court are described [5; 6; 7; 9, p. 500]. This approach was embodied in the formulation of the «crime of aggression» of the adopted amendments to the Rome Statute of the International Criminal Court (Art. 8-bis): «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» [8]. Therefore, those who are under the control of an aggressor are also local residents who joined the actions of the aggressor, as well as mercenaries who work under his general or effective leadership.

The Article 437 of the Criminal Code of Ukraine refers, firstly, to the actions of a certain state, and secondly, to the such actions that can be qualified as an aggressive war or an international military conflict. The aggressive war is characterized by the scale of action, the combination of the use of armed forces with other means of struggle (diplomatic, economic, political, informational, ideological means), the formulation and implementation of certain political tasks [10, p. 983]. In order to distinguish an aggressive war from other wars, an additional aggressive element is needed – aggressive goals (annexation, conquest, etc.) [9, p. 658-659]. Aggressiveness must also be sufficient in intensity [11, p. 271]. An international military conflict is characterized by the use of armed forces to resolve certain controversial issues between States [10, p. 983]. Aggressive war and war conflict are forms of aggression, the essence of which is expressed in the definition of aggression. In the UN General Assembly Resolution № 3314, under aggression meant the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition [3]. Consequently, aggression necessarily interstate nature.

From this follows an important conclusion that there are encroachments on the integrity of the territory of Ukraine, which haven't got all the necessary signs of aggression. They aren't covered by Art. 437 of the Criminal Code and qualify under Art. 110 CC. There are, for example, encroachments committed by individuals in the implementation of a specific plan of a foreign state (s), acting «under the control» (leadership) of a foreign state (s), but herewith the state activity is not an aggressive war or an international military conflict. Only under Art. 110 of the Criminal Code are also prosecuted acts that are not intergovernmental (international), but an internal military conflict.

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