

## 27

## Russia

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## 27.1 The Crime of Aggression in Russian Criminal Law

27.1.1 *The Legal Framework*

Russia criminalises the crime of aggression in its Criminal Code. This crime can be found in chapter 34 of section XII of the Criminal Code, both of which are titled ‘Crimes against Peace and Security of Mankind’. With the adoption of the Criminal Code on 24 May 1996, a self-standing chapter on crimes against peace and security of mankind was introduced for the first time in the nation’s history. It aims at implementing certain treaty obligations as well as crimes under international customary law. With regard to the latter, it is inspired and drafted alongside the 1991 ILC Draft Code of Crimes,<sup>1</sup> which had been adopted shortly before the work on the new Russian Criminal Code started.<sup>2</sup>

Article 15(4) of the Russian Constitution provides that ‘the generally recognized principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system’. On this basis, an argument can be made in favour of the direct enforcement of international criminal law before Russian courts. However, a subsequent law and a decision of the Russian Supreme Court have interpreted the provision very narrowly.<sup>3</sup> Accordingly, international treaties defining crimes are not considered as self-executing and require domestic implementation, and the direct application of (‘unwritten’) international customary law is generally rejected. This is an unfortunate development as it counters the explicit constitutional provision and de-links the national implementing

<sup>1</sup> ILC, ‘Draft Code of Crimes against the Peace and Security of Mankind’, Yb ILC (1991), vol. II, 79 (including commentary on draft articles 15 and 16).

<sup>2</sup> Уголовное право России. Части общая и Особенная. Учебник /под.ред. А.И.Рарога, 3-е изд., перераб. и доп. (Москва: Проспект, 2014), 761–63 (А. И. Rarog (ed.), *Criminal law of Russia, General and Special Parts. Textbook*, 3rd edn (Moscow: Prospekt, 2014, 761–63)).

<sup>3</sup> See Federal Law, ‘On International Treaties of the Russian Federation’ (1995), and the Ruling of the Supreme Court of the Russian Federation, ‘On Application of the Generally Recognized Principles and Norms of International Law and the International Treaties of Russia by Courts of General Jurisdiction’, *Bulleten’ Verkhovnogo Suda Rossiiskoy Federatsii*, 12 (2003) (hereinafter *Bulletin of the Supreme Court of the Russian Federation*).

legislation from its international source. This has consequences for a dynamic interpretation of the crimes, in particular with a few relating to the application of the ‘international’ general part, as well as the application of universal jurisdiction to crimes under international law. Since the Russian Criminal Code does not expressly foresee it, the application of universal jurisdiction for crimes under international law, including the crime of aggression, is therefore not possible under the current interpretation of the Russian Constitution.<sup>4</sup>

The definition of the crime is contained in article 353 of the Criminal Code (‘Planning, preparation, initiation of or waging an aggressive war’). Paragraph 1 establishes responsibility for ‘planning, preparation, or unleashing an aggressive war’. Paragraph 2 establishes responsibility for ‘waging an aggressive war’, which entails aggravated responsibility. These are the two distinct constituent elements of crime.

#### **Article 353. Planning, Preparation, Unleashing, or Waging an Aggressive War**

1. Planning, preparation, or unleashing an aggressive war: shall be punished by deprivation of freedom for a term of seven to fifteen years.
2. Waging an aggressive war: shall be punished by deprivation of freedom for a term of ten to twenty years.

This definition repeats article 6(a) of the 1945 London Charter.<sup>5</sup> It is noteworthy that the term ‘aggressive war’, together with the various stages of committing the crime, are also characteristic for a number of the newly independent states in the post-Soviet territory.<sup>6</sup> Article 353 of the Criminal Code also resembles article 8 *bis*(1) of the 2010 Resolution on the Crime of Aggression, where the description of individual conduct is provided. So, the definition in the Criminal Code partly correlates with the 2010 Resolution on the Crime of Aggression.

<sup>4</sup> See also the prevailing opinion in Russian academic literature: А.Г.Кибальник, И.Г.Соломоненко, О. Н. Шибков. *Принципы и нормы международного права как источники уголовного права* (Ставрополь: Ставропольсервисшкола, 2000), 10 (A. G. Kibalnik, I. G. Solomonenko and O. N. Shibkov *Principles and Norms of International Law as the Sources of Criminal Law* (Stavropol: Stavropolservisshkola, 2010), 10); В.П. Коняхин *Международный договор как источник российского уголовного права в XXI веке. Материалы Международной научной конференции, проходившей на юридическом факультете МГУ 31 мая – 1 июня 2001 года* (Москва: Проспект, 2002), 154 (V. P. Konyakhin, ‘International Treaty as a Source of the Russian Criminal’, in *Criminal Law in the XXI Century, Proceedings of International Scientific Conference at the Law Faculty of Moscow State University, 31 May–1 June 2001* (Moscow: Prospekt, 2002), 152–59, at 154).

<sup>5</sup> ‘Charter of the International Military Tribunal’ in Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 UNTS, 284, Annex, article 6(a): ‘Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.’

<sup>6</sup> Сазипин С., ‘Развитие определения преступления агрессии в международном и национальном уголовном праве’, *Альманах международного права*, 2 (2010), 294–316 (S. Sayapin, ‘The Development of the Definition of the Crime of Aggression in International and National Criminal Law’, *Almanach International Law*, 2 (2010), 294–316, at 302 and hereinafter).

According to the 2010 Resolution on the Crime of Aggression (article 8 *bis*(1) of the Rome Statute), the “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position to exercise effectively control over an act of aggression or to direct the political or military action of a State to an act of aggression ...<sup>7</sup> Furthermore, article 8 *bis* of the Rome Statute contains the threshold requirement that the act of aggression ‘by its character, gravity and scale, must constitute a manifest violation of the Charter of the United Nations’. There are no such requirements in the Russian Criminal Code.

At present, there is no intended legislative initiative concerning the modification of article 353 of the Criminal Code. On 10 January 2003,<sup>8</sup> the President of the Russian Federation tasked a working group established under the auspices of the Ministry of Justice to prepare proposals adapting the Russian legislation to the Rome Statute in view of a possible ratification. It is unknown if this project has been finalised or what changes it will entail after further consideration in official organs. For the time being, the draft is unavailable to the public.

### **27.1.2 Individual and Collective Conduct**

Neither of the definitions in article 353 of the Criminal Code contain a description of an act of aggression, in contrast to article 8 *bis*(2) of the Rome Statute (which, in turn, is conditioned by the influence of 1974 GA Resolution 3314).<sup>9</sup> The provision of article 353 of the Criminal Code represents a narrower scope should an aggressive war be seen as the most serious type of aggressive act. But the overwhelming majority of scholars commenting on article 353 of the Criminal Code define the crime through the Definition annexed to 1974 GA Resolution 3314.<sup>10</sup> Other scholars merely cite the wording of article 3 of the 1974 Definition as a notion of

<sup>7</sup> Review Conference RC/Res. 6, ‘The Crime of Aggression’, 11 June 2010, in *Review Conference Official Records*, RC/11, part II, 17. The amendments to the Rome Statute were circulated by the UN Secretary General in Depositary Notification C.N.651.2010 Treaties-8, 29 November 2010, available at: <http://treaties.un.org>.

<sup>8</sup> Поручение Президента РФ № 323 от 3 июня 2003 года. Собрание законодательства Российской Федерации (СЗ РФ) (2003) №3 ст.2238 (Executive Order No. 323 of 3 June 2003. Sobranie zakonodatel'stva Rossiiskoy Federatsii (Compilation of Legislation of the Russian Federation), (2003), No. 23 item 2238).

<sup>9</sup> Article 8 *bis*(2) of the Statute formulates the act of aggression: ‘For the purpose of paragraph 1, “act of aggression” means 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. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression ...’ The actions qualifying as acts of aggression are listed hereinafter (invasion by armed forces, bombardment, blockade, etc.).

<sup>10</sup> Thus, Opalich writes: ‘to understand an objective aspect of an action, which corresponds to the notion of waging an aggressive war, it is necessary to refer to article 3 of Resolution 3314’. Опалич Е.В., Журавлева Е.Н., ‘Проблемы уголовно-правового понятия “агрессия”’ в С. П. Звягин (Отв. ред.), *Проблемы права и правоприменения. Сборник научных статей* (Кемерово: ГОУ ‘КРИРПО’, 2005), с. 15 (E. V. Opalich and E. N. Churavleva, ‘The Problems of the Criminal Law Definition “Aggression”’, in S. P. Zvyagin (ed.), *The Problems of Law and Application of the Law. The Collection of Scientific Articles* (Kemerovo: ‘KRIRPO’, 2005), c. 15.

aggression.<sup>11</sup> At the same time, some specialists believe that the elements of the offence cover large-scale and long wars in the first place.<sup>12</sup>

Article 353 of the Criminal Code criminalises the planning, preparation or unleashing of an aggressive war, and waging an aggressive war. These actions represent objective elements of the definition of the crime of an aggressive war. Some scholars believe these actions should be understood as alternative ones, while others believe that they should be combined.<sup>13</sup> This discussion goes back to the doctrinal question of whether the crime of aggression is to be categorised as a mere conduct crime or whether, in order to fulfil its definition, the perpetrator must also achieve a certain result or consequence. Against this background, Russian criminal doctrine distinguishes between crimes that are formally defined (i.e., the definitions of crimes are limited to action or inaction) and crimes that are materially defined (and also require the occurrence of a result or consequence). The definition of the crime of aggression is clearly formulated as belonging to the first group of formally defined crimes. That is why an action is considered a completed crime as soon as one of the listed modes of perpetration is performed.

Let us note that each of the specified actions consists of a large group of actions. Thus, planning is characterised by actions, such as the development of strategic, tactical and other plans, instructions, manuals, etc. related to the implementation of an armed attack<sup>14</sup> (related to mobilisation, timing with regard to the beginning and completion of war, sequence of blows, disposition of forces, creation of food reserves, etc.). The preparation (noting that it is difficult to specify when planning passes into preparation) is understood as actions related to the provision of war plans (building up armaments, staging military manoeuvres, redeployment of contingents, etc.).

There is no agreement as to which kind of action (unleashing or waging) the acts listed in article 3 of the Definition annexed to 1974 GA Resolution 3314 (and article 8 bis(2) of the Rome Statute) belong. Some authors view the acts listed in article 3(a)–(g) of the Annex to 1974 GA Resolution 3314 as waging war.<sup>15</sup> In this case, the unleashing would be understood as actions accomplished before the beginning of the war (provocative statements in relation to policy against the

<sup>11</sup> V. P. Stepin, though, also refers to the London Conventions of 1933 and the 1945 London Charter in *Комментарий к Уголовному кодексу Российской Федерации*. Отв. ред. В. М. Лебедев, 12-е изд. (Москва: Юрайт, 2012) (V. M. Lebedev (ed.), *Commentary to the Criminal Code of the Russian Federation*, 12th edn (Moscow: Yurait, 2012), 1298).

<sup>12</sup> Sayapin, *supra* note 6, at 304.

<sup>13</sup> Malkov in *Комментарий к Уголовному кодексу Российской Федерации*, отв. ред. Ю.И. Скуратов, В.М. Лебедев, 3-е издание (Москва: Норма, 1999) (Yu. I. Skuratov and V. M. Lebedev (eds.), *Commentary to the Criminal Code of the Russian Federation*, 3rd edn (Moscow: Norma, 1999)).

<sup>14</sup> Stepin, *supra* note 11, at 1298. <sup>15</sup> Malkov, *supra* note 13, at 847.

enemy provoking a conflict, organising an imaginary attack on armies of the provoked party);<sup>16</sup> the so-called excuses for war. Certain scholars point to a need to specify the notion of unleashing and highlight the absence of its legal clarity.<sup>17</sup> These scholars distinguish ‘unleashing’ from the term ‘waging’ because, in their opinion, the term ‘unleashing’ may include both provocation for an armed conflict and giving an order to begin military operations. A better grounded view, though, considers the acts listed in article 3(a)–(g) of the Annex to 1974 GA Resolution 3314 as falling under the notion of unleashing.<sup>18</sup>

The waging of an aggressive war is understood as a direct implementation of military operations in violation of rules of international law<sup>19</sup> or ‘actions with a view of continuation of the formally unleashed aggressive war’. In the opinion of Naumov (Razumov-EXCL), ‘the comparison of the notion of “waging” with the notion of “unleashing” allows for a conclusion that while unleashing of an aggressive war is the beginning of that war or the implementation of the act of aggression, the waging is the continuation of an aggressive war’.<sup>20</sup> The viewpoint that this may take place only in the territory of a foreign state is erroneous.

As to the moment of the beginning of a war (the commission of the crime is completed as from that instance), researchers in the area of criminal law have certain difficulties, in particular with regard to an alleged lack of a uniform definition of an international military conflict – a war. This, though, is not quite right. Those perceptions follow from a misunderstanding of customary international law and the role of state practice. The beginning or unleashing of a war takes place either when war is declared or when effective military action begins. Under Russian law, this is confirmed by a provision of article 18 of the Federal Defence Law,<sup>21</sup> where the state of war is declared ‘in case of an armed attack on the Russian Federation’. It is from the instance of declaration of the state of war or the effective commencement of military actions that the war begins.

Different interpretations stipulating which acts belong to each listed mode of perpetration result from an excessive reference to a textual, grammatical

<sup>16</sup> Кудрявцев В. Н. (ред.) *Международное уголовное право* (Москва: Наука, 1999), с. 99 (V. N. Kudryavtsev (ed.), *International Criminal Law* (Moscow: Science, 1999), 99).

<sup>17</sup> Opalich and Churavleva, *supra* note 10, at 19.

<sup>18</sup> *Комментарий к Уголовному кодексу Российской Федерации*, под ред. А. В. Наумова; Институт государства и права РАН, 2-е изд., перераб. и доп. (Москва: Издательская группа “Юристъ”, ИНФРА-М, 2000), с. 843 (A. V. Naumov (ed.), *Commentary to the Criminal Code of the Russian Federation* (Moscow: INFRA-M, 2000), 843; Stepanov, *supra* note 11, at 1300).

<sup>19</sup> *Постатейный комментарий к Уголовному кодексу Российской Федерации*, под ред. Н.А. Громова (Москва: Gross-Media, 2008) Ком. К ст.353. (N. A. Gromov (ed.), *The Item-by-Item Commentary to the Criminal Code of Russian Federation* (Moscow: Gross-Media, 2008), Commentary to article 353).

<sup>20</sup> Авторы: коллектив под руководством С.А.Разумова. *Комментарий к Уголовному Кодексу РФ. Комментарий к статье 353 УК РФ* (Commentary to the Criminal Code under the Leadership of S. A. Razumov, available at: [www.labex.ru/page/kom\\_uk\\_353.html](http://www.labex.ru/page/kom_uk_353.html)).

<sup>21</sup> Федеральный закон “Об обороне” № 61 ФЗ от 31 мая 1996 г. (с изменениями от 12 февраля 2015 г.) (The Federal Defence Law No. 61 FZ dated May 31, 1996 (last amended 12 February 2015)).

interpretation of the 1945 London Charter and insufficient attention to the 1946 Nuremberg Judgment and 1948 Tokyo Judgment. It is also explained by a desire to ‘push’ components of the crime of aggression into the three stages of a crime. Criminal law theory is based on three stages of committing a crime: preparation, attempt and completion. The first two steps are seen as incomplete stages of the crime.<sup>22</sup> ‘Planning’ and ‘preparation’ are assigned to the preparation stage, while ‘waging’ constitutes a completed crime. Against this background, ‘unleashing’ should be assigned to the stage of an attempted crime. Those acts, though, should be considered as separate crimes. Thus, A. N. Trainin wrote in 1956 that ‘preparation for a direct war of aggression in itself includes a large group of separate and comparatively complete actions, and it should, for this reason, be seen as [a] special constituent element of [a] crime against mankind’.<sup>23</sup>

A number of scholars point out the incompleteness of the list of acts in article 3 of the Annex to 1974 GA Resolution 3314.<sup>24</sup> That is to say, that some other acts may be included in the concept of war of aggression. At the same time, there is criticism of the definition provided in the Russian Criminal Code. Thus, it is pointed out that the Criminal Code does not account for the development of international law in this area (especially concretisation of certain notions) and that the definition of the collective act in article 353 of the Criminal Code should be brought in line with 1974 GA Resolution 3314.<sup>25</sup>

Alternatively, it is suggested that when defining the crime of aggression, the method of reference to an international treaty should be used.<sup>26</sup> But a mere reference is not quite sufficient. Thus, article 356 of the Criminal Code, ‘The use of prohibited means and methods of waging war’, contains, as a crime, ‘the use in the military conflict of means and methods prohibited by an international treaty applicable to the Russian Federation’ (Part 1); ‘the use of weapons of mass destruction prohibited by an international treaty applicable to the Russian Federation’ (Part 2). However, a reference of this kind does not clarify anything – not even the name of the international treaty is specified. We believe it is inadmissible to use blanket

<sup>22</sup> Article 29.2 of the Criminal Code.

<sup>23</sup> А.Н. Трайнин, *Защита мира и борьба с преступлениями против человечества* (Москва: Издательство Академии наук СССР, 1956), с.69 (A. N. Trainin, *The Defence of Peace and the Fight against Crimes against Humanity* (Moscow: Publishing House of the Academy of Sciences of the USSR, 1956), 69).

<sup>24</sup> Stepalin, *supra* note 11, at 1299.

<sup>25</sup> А. А. Мавлонов, А.Б. Мезяев, ‘Проблемы имплементации норм международного уголовного права в российском уголовном законодательстве’, *Государство и право*, 4 (1998), с. 104 (A. Mavlonov and A. Mesyaev, ‘The Issue of Implementation of the Norm of the International Criminal Law in the Russian Legislation’, *State and Law*, 4 (1998), 104).

<sup>26</sup> Opalich and Churavleva, *supra* note 10, at 19. Also *Российское уголовное право: учебник: в 2-х т. Т. I.: Общая часть* (под ред. Л.В. Иногамовой-Хегай, В.С. Комиссарова, А.И. Рарога), 3-е изд., перераб. и доп. (М.: Проспект, 2011), с. 69 (L. V. Inogamova-Khegai, V. S. Komissarov and A. I. Rarog (eds.), *The Russian Criminal Law: Textbook. General Part*, 3rd edn, vol. 1 (2 vols., Moscow: Prospekt, 2011), 69).

references in cases related to grave crimes. An individual should know what the prohibition in question relates to.<sup>27</sup>

This is why it would be more reasonable to amend article 353 of the Criminal Code by way of incorporation of the whole of the 2010 definition on the Crime of Aggression – all the more so since the provision of article 3 of the Definition of Aggression annexed to 1974 GA Resolution 3314 is already included in the Federal Constitutional Law of 30 January 2002, ‘On Martial Law’<sup>28</sup> (with amendments). That law contains a detailed definition of the notion of aggression that couples the general and the specific approaches: ‘For the purposes thereof and in accordance with the generally recognized principles and norms of international law, aggression against the Russian Federation shall be the use of armed force by a foreign state (group of states) against the sovereignty, political independence and territorial integrity of the Russian Federation or in any other manner inconsistent with the Charter of the United Nations.’ The list of exemplary acts of aggression ends with the following provision: ‘Acts of aggression against the Russian Federation, may be recognized as well as other acts of armed force by a foreign state (group of states) against the sovereignty, political independence and territorial integrity of the Russian Federation or in any other manner inconsistent with the Charter of the United Nations, equivalent specified herein are acts of aggression.’

### **27.1.3 Mental Element**

The crime of aggressive war may be committed only where a direct intent to unleash an aggressive war against another state exists.

### **27.1.4 Perpetrator**

High-ranking officials are the possible perpetrators of the crime. These are persons whose competence includes making decisions as to the commencement of military operations and other military issues. However, restriction of the number of such persons to only those persons who hold public service office in the Russian Federation<sup>29</sup> is hardly justified. They may include (and are very likely to include) senior officials of a foreign state.

<sup>27</sup> С.В. Глотова, ‘Российская Федерация и Международный уголовный суд’, *Вестник Российской Университета дружбы народов*, 4 (2006), с. 60 (S. V. Glotova, ‘The Russian Federation and the International Criminal Court’, *Herald of the Russian University of People’s Friendship*, 4 (2006), 60).

<sup>28</sup> Федеральный конституционный закон от 30 января 2002 г. N 1-ФКЗ “О военном положении” (Federal Constitutional Law of 30 January 2002, N 1-FKZ ‘On Martial Law’ (with changes and amendments as of 3 November and 28 December 2010), available at: <http://base.garant.ru/184121/1/#1100>).

<sup>29</sup> Malkov, *supra* note 13, at 1299.

### **27.1.5 Jurisdiction and Trial in Absentia**

In general, the Russian Criminal Code distinguishes jurisdiction over crimes committed on the territory of the Russian Federation and crimes committed outside the boundaries of the Russian Federation. Article 11 of the Russian Criminal Code establishes the territorial principle as a general ground of jurisdiction.

Article 12(1) and (2) introduces the nationality principle of jurisdiction. According to article 12(1) of the Criminal Code, ‘citizens of the Russian Federation and stateless persons permanently residing in the Russian Federation who have committed crimes abroad against interests protected by the present Code shall be subject to criminal responsibility in accordance with the present Code unless there is a decision of a court of a foreign State with regard to the particular crime’. In the event of conviction of said persons, the punishment may not exceed the upper limit of the sanction provided for by the laws of the foreign state on whose territory the crime was committed. Article 12(2) of the Criminal Code provides that ‘military servicemen stationed abroad shall bear criminal responsibility for crimes committed on the territories of foreign states according to the present Code, unless provided otherwise by an international treaty of the Russian Federation’.

Extra-territorial jurisdiction is further provided by article 12(3) of the Criminal Code on the basis of the protective principle and where provided by international treaty law. Foreign nationals and stateless persons who do not reside permanently in the Russian Federation and who have committed a crime outside the Russian Federation shall be subject to criminal responsibility according to the present Code, if (1) the crime is either directed against the interests of the Russian Federation, or citizens of the Russian Federation or stateless persons who permanently reside in the Russian Federation, or (2) also in instances provided for by an international treaty to which the Russian Federation is a party. In both instances, these persons can only be prosecuted ‘if foreign citizens and stateless persons were not convicted in a foreign state and are brought to criminal responsibility on the territory of the Russian Federation’.<sup>30</sup>

There is no general principle of universal jurisdiction with respect to international crimes. It is therefore necessary to introduce the principle of universal jurisdiction in respect of international crimes, such as aggression. Article 12(3) of the Criminal Code does not allow bringing a foreigner to justice in the Russian Federation if that person commits an international crime against the interests of another state, and not the Russian Federation. Furthermore, article 12 of the Criminal Code cannot be applied to international crimes defined merely under customary international law.<sup>31</sup>

<sup>30</sup> Ibid.

<sup>31</sup> Russia is a party to the Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277, the Convention on the Suppression and

Prosecution in accordance with article 12 of the Criminal Code does not require the presence of an alleged offender in Russian territory. Based on this and due to the possibility of a criminal prosecution *in absentia*, foreigners outside Russia may be tried *in absentia* to the extent that there is extraterritorial jurisdiction. Trials *in absentia* are foreseen in article 247(5) of the Criminal Procedure Code, including, in ‘extraordinary occasions’ of especially grave crimes, without a motion of the defendant. Those judicial proceedings are applied where the defendant is outside the Russian Federation’s territory and/or he or she intentionally does not appear before court provided that he or she was not brought to justice in a foreign state territory for the same criminal case. The general order for court proceedings *in absentia* is well regulated. After the pre-trial investigation is complete, the public prosecutor has the right to petition the court to hold legal proceedings against the defendant *in absentia*. The article does not disclose the notion of ‘extraordinary occasions’, which is open to judicial discretion. Examples are provided in a Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation,<sup>32</sup> including, among other things, grave danger to the public caused by the crime of which the defendant is accused, occasions where a search for the defendant did not yield positive results and the impossibility of extraditing the defendant. Thus, a quite sufficient basis exists to bring foreign citizens to criminal justice in Russia. This is especially important because aggression is a crime committed by one state against another.

#### **27.1.6 Public Calls to Unleash an Aggressive War**

The Criminal Code also includes article 354, ‘Public calls to unleash an aggressive war’. It consists of two crimes: ‘Public calls to unleash an aggressive war’ and ‘The same acts, committed with the use of the mass media or by a person holding a State office of the Russian Federation or a State office of a subject of the Russian Federation’. Public calls are calls to two or more persons in a verbal or written form to commence military actions against another state; for instance, calls to policy-makers of the country to make a decision to begin war against another state.

Punishment of the Crime of Apartheid (adopted 30 November 1970, entered into force 18 July 1976), 1015 UNTS 243, as well as the Geneva Conventions and Protocols to them. In particular, article 49 of Geneva Convention I requires Russia to ‘undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article’.

<sup>32</sup> Постановление Пленума Верховного суда РФ от 22.12.2009 г. № 28 “О применении норм уголовно-процессуального законодательства, регулирующих подготовку уголовного дела к судебному разбирательству” (ред. от 28.06.2012), п. 13 (Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation dated 22 December 2009. No. 28 ‘On Application of Rules of Criminal Procedure Legislation that Regulate Preparation of a Criminal Case to Court Proceeding’ (para. 13).

Commission by use of mass media or by a person holding a state office constitutes an aggravating factor.

### **27.1.7 Summary**

Russian criminal law incorporates the crime of aggression under the definition of an aggressive war. This definition generally repeats article 6 of the 1945 London Charter. Apart from the definition of the individual conduct, it appears to be inconsistent with the 2010 definition on the crime of aggression: a threshold level and a list of acts of aggression are missing. Nevertheless, Russian scholars agree that a crime of waging a war of aggression should be understood with due account taken of article 3 of the Annex to 1974 GA Resolution 3314.

Provisions on extra-territorial jurisdiction allow the Russian Federation to pursue foreigners for the crime of aggressive war, unless they have been convicted in another state. Foreigners who commit a crime under article 353 and who are beyond the limits of Russia may be convicted *in absentia* if the requirements of article 247(5) of the Criminal Procedure Code are met. This requires that the defendant charged is outside the Russian Federation and/or avoids appearing in court for proceedings in a criminal case concerning a grave offence or felony, but only in extraordinary cases, provided that he or she had not been brought to responsibility under this criminal case in a foreign state territory. The character of cases envisaged by article 247(5) of the Criminal Procedure Code in itself contemplates a small probability of applying the named provision. Consideration of cases *in absentia* even regarding crimes of minor or medium gravity<sup>33</sup> rarely occurs. In addition, immunity enjoyed by senior officials of a foreign state may constitute a serious obstacle to the prosecution of a crime of aggressive war, particularly because aggression is a leadership crime that may be committed only by high-ranking officials.

## **27.2 Practice of Investigation: The Georgia Case**

Three law enforcement organs opened investigations in the events following the Georgian invasion of South Ossetia in August 2008, one of which included charges of the crime of aggressive war.<sup>34</sup> The Russian Military Investigations Unit

<sup>33</sup> Article 247(4) of the Criminal Procedure Code RF.

<sup>34</sup> Georgia invaded South Ossetia on 8 August 2008. As a result, citizens of the republic were killed, the health of numerous civilians was impaired, 655 apartment houses were completely destroyed and burnt, 2,139 residential buildings and premises were partially destroyed, and municipal services and life-support facilities, hospitals, nurseries and educational institutions were destroyed. As a result, over 16,000 inhabitants of the Republic of South Ossetia (the majority of whom are citizens of the Russian Federation) were forced to abandon their habitual residence. Georgian military servicemen systematically fired on the territory of the Russian peace-keeping forces. As a result, ten military men were killed, the health of forty military men was impaired and the

introduced a criminal case based on charges of intentional homicide by military personnel on 8 August 2008. The Investigatory Office of the Investigative Committee for North Ossetia opened criminal case No. 14/00/0051-08 based on charges of homicide of citizens in South Ossetia in view of crimes contemplated by section 2, article 105 of the Criminal Code on 11 August 2008. The Investigative Committee of the Russian Federation initiated a criminal case under article 357 of the Criminal Code (Genocide)<sup>35</sup> on 14 August 2008. The facts related to the intentional homicide of Russian peacekeepers<sup>36</sup> and evidence of genocide.<sup>37</sup> On 23 December 2008, the Investigative Committee expressed its intention to expand the list of crimes under investigation to articles 353 ('Planning, preparation, initiation or waging of aggressive war'), 356 ('Use of prohibited means and methods of warfare'), 359 ('Mercenary activity') and 360 ('Attack on persons or institutions which enjoy international protection) of the Criminal Code. According to official statements of 8 August 2011 and 8 August 2012, the Investigative Committee had accomplished numerous investigative and procedural actions. The term of investigation was subsequently extended to 8 February 2013. The investigators carried out examination of the scenes, interviewed thousands of witnesses, victims and professionals, and carried out about 600 forensic examinations and other investigative actions. As a result, the Investigative Committee concluded that irrefutable evidence was obtained confirming the involvement of Georgian senior officials and military commanders of the Georgian law enforcement agencies in crimes against peace and human security on the territory of the Republic of South Ossetia. Based on the fact that Georgian senior officials and military chiefs of the law enforcement agencies at various levels cannot be brought to trial in the Russian Federation in accordance with international law and Georgia refuses to try them on Georgian territory, the Russian authorities are taking steps to facilitate opening preliminary examinations by the Prosecutor of the International Criminal Court. The Russian investigators recently sent additional information explaining the obstacles faced by the Office of the Prosecutor in enforcing the law encouraging the engagement of the Court.<sup>38</sup> The crime of aggressive war ('Planning, preparation, initiation or waging of aggressive war', under article 353

infrastructure of the military camp in Chhinval was completely destroyed. Five days later military actions ceased.

<sup>35</sup> Based on information that the armed forces of Georgia were purposely engaged in the killing of Russian citizens, who resided in South Ossetia and were Ossetian nationals, by way of murders and causing grave harm.

<sup>36</sup> On 18 August 2008.

<sup>37</sup> On 26 August 2008 the Head of Investigative Committee, A. Bastrykin, stated: 'It had been established that in the period of August 7 to August 12 the armed forces of Georgia, pursuing the aim of full extermination of the group of Ossetian nationals residing in the territory of South Ossetia, invaded the territory of the unrecognized Republic. They had no mercy. Not only in Tshinval, but also in many villages hundreds of houses were destroyed – the Aggressors wiped them out to eliminate any traces of Ossetians on that land.'

<sup>38</sup> According to official statements on 8 August 2012, 'On the course of a criminal investigation of the events in South Ossetia in August 2008', available at: [http://en.sledcom.ru/actual/140405/?phrase\\_id=194290](http://en.sledcom.ru/actual/140405/?phrase_id=194290).

of the Criminal Code) is one of the crimes under investigation. Official statements on the classification of offences under article 353 of the Criminal Code point to crimes against peace and security through the use of terms, such as ‘intrusion’, ‘aggression’ and ‘military intrusion by the Georgian armies’.

The Investigative Committee confirmed the involvement of Georgian senior officials and military commanders of the law enforcement agencies in various crimes against peace and human security on the territory of the Republic of South Ossetia in August 2008 (‘the President, Minister of Defence and other officials’).<sup>39</sup> However, as Bastrykin stated, referring to article 3(2) of the Criminal Procedure Code,<sup>40</sup> ‘it was hardly possible to bring senior officials of the Government of Georgia to criminal liability on the territory of the Russian Federation’ due to the lack of consent of the Georgian government. In the opinion of the Investigative Committee, ‘the most promising way for us to follow to bring leaders of Georgia to criminal responsibility is to initiate the procedure of investigating their crimes in international criminal instances’. Moreover, the head of the Investigative Committee said that the work that was intended to find direct evidence against the former Georgian President Mikhail Saakashvily was underway.<sup>41</sup> On the basis of the criminal case investigated by Russia’s Investigative Committee, the book ‘Code of tragedy: 08/08/08’ (a white book concerning Georgian crimes against Russian peacekeepers and civilians of South Ossetia and Abkhazia in August 2008) was published on 2 November 2012.<sup>42</sup>

## Bibliography

### *Books*

- Gromov, N. A. (ed.), *The Item-by-item Commentary to the Criminal Code of Russian Federation* (Moscow: Gross-Media, 2008) (*Постатейный комментарий к Уголовному кодексу Российской Федерации*, под ред. Н.А. Громова (Москва: Гросс-Медиа, 2008)).
- Inogamova-Khegai, L. V., Komissarov, V. S. and Rarog, A. I. (eds.), *The Russian Criminal Law: Textbook. General Part*, 3rd edn, vol. I (2 vols., Moscow: Prospekt, 2011) (*Российское уголовное право: учебник: в 2-х т. Т. 1.: Общая часть* / под ред. Л.В. Иногамовой-Хегай, В.С. Комиссарова, А.И. Парога. 3-е изд., перераб. и доп. (М.: Проспект, 2011)).

<sup>39</sup> 6 August 2009, Press Conference of Bastrykin, available at: [www.sledcom.ru/smi/6014/?phrase\\_id=194255](http://www.sledcom.ru/smi/6014/?phrase_id=194255).

<sup>40</sup> Article 3. Operation of the Criminal Procedural Code with Respect to Foreign Citizens and Stateless Persons: ‘2. The procedural actions stipulated by this Code with respect to persons having immunity against such actions in accordance with the generally recognized principles and norms of international law and international treaties of the Russian Federation, shall be carried out with consent of the foreign state at whose service is or was a person having immunity, or of the international organization a member of whose personnel they are or were.’

<sup>41</sup> Bastrykin, Press Conference. <sup>42</sup> See at: official site, [www.sledcom.ru](http://www.sledcom.ru).

- Kibalnik, A. G., Solomonenko, I. G. and Shibkov, O. N., *Principles and Norms of International Law as the Sources of Criminal Law* (Stavropol: Stavropolservisshkola, 2010) (А. Г.Кибальник, И.Г.Соломоненко, О. Н. Шибков, *Принципы и нормы международного права как источники уголовного права* (Ставрополь: Ставропольсервисшкола, 2000)).
- Kudryavtsev, V. N. (ed.), *International Criminal Law* (Moscow: Science, 1999) (В. Н. Кудрявцев (ред.) *Международное уголовное право* (Москва: Наука, 1999)).
- Lebedev, V. M. (ed.), *Commentary to the Criminal Code of the Russian Federation*, 12th edn (Moscow: Yurait, 2012) (*Комментарий к Уголовному кодексу Российской Федерации*, отв. ред. В.М. Лебедев, 12-е изд. (Москва: Юрайт, 2012)).
- Naumov, A. V. (ed.), *Commentary to the Criminal Code of the Russian Federation*, 2nd edn (Moscow: Publishing Group ‘Jurist’, 2000) (*Комментарий к Уголовному кодексу Российской Федерации* (Под ред. А. В. Наумова); Институт государства и права РАН, 2-е изд., перераб. и доп. (Москва: Издательская группа “Юристъ”, ИНФРА-М, 2000)).
- Rarog, A. I. (ed.), *Criminal Law of Russia, General and Special Parts. Textbook*, 3rd edn (Moscow: Prospekt, 2014) (*Уголовное право России. Части общая и Особенная*. Учебник /под.ред. А.И.Рарога, 3-е изд., перераб. и доп. (Москва: Проспект, 2014)).
- Razumov, S. A. (under the leadership of), *Commentary to the Criminal Code*, available at: [www.labex.ru/page/kom\\_uk\\_353.html](http://www.labex.ru/page/kom_uk_353.html) (Коллектив под руководством С.А.Разумова. *Комментарий к Уголовному Кодексу РФ. Комментарий к статье 353 УК РФ*).
- Skuratov, Y. I. and Lebedev, V. M. (eds.), *Commentary to the Criminal Code of the Russian Federation*, 3rd edn (Moscow: Norma, 1999) (*Комментарий к Уголовному кодексу Российской Федерации*, отв. ред. Ю.И. Скуратов, В. М. Лебедев, 3-е изд. (Москва: Норма, 1999)).
- Trainin, A. N., *The Defence of Peace and the Fight against Crimes against Humanity* (Moscow, Publishing House of the Academy of Sciences of the USSR, 1956) (А. Н.Трайнин, *Защита мира и борьба с преступлениями против человечества* (Москва: Издательство Академии наук СССР, 1956)).
- Zhalinskiy, A. E. (ed.), *Criminal Law: Textbook. General Part*, vol. I (3 vols., Moscow: Publishing House ‘Gorodets’, 2011) (*Уголовное право: учебник: в 3-х т. Т. 1.: Общая часть /под ред.А.В. Жалинского* (Москва: Издательский Дом ‘Городец’, 2011)).

### ***Chapters in Edited Books***

Konyakhin, V. P., ‘International Treaty as a Source of the Russian Criminal’, in *Criminal Law in the XXI Century, Proceedings of International Scientific Conference at the Law Faculty Moscow State University, 31 May–1 June 2001* (Moscow: Prospekt, 2002), 152–59 (В.П. Коняхин Международный договор как источник российского уголовного права в: Уголовное право в XXI веке. Материалы Международной научной конференции, проходившей на юридическом факультете МГУ 31 мая – 1 июня 2001 года (Москва: Проспект 2002), с.с.152–59).

Opalich, E. V. and Churavleva, E. N., ‘The Problems of the Criminal Law Definition “Aggression”’, in S. P. Zvyagin (ed.), *The Problems of Law and Application of the Law. The Collection of Scientific Articles* (Kemerovo: ‘KRIRPO’, 2005), 14–19 (Е. Н. Журавлева, Е. В. Опалич, ‘Проблемы уголовно-правового понятия “агрессия”’ в С. П. Звягин (Отв. ред.), *Проблемы права и правоприменения. Сборник научных статей* (Кемерово: ГОУ‘КРИРПО’, 2005), с.с.14–19).

### ***Journal Articles***

Glotova, S. V., ‘The Russian Federation and the International Criminal Court’, *Herald of the Russian University of People’s Friendship*, 4 (2006) 57–63 (С. В. Глотова, ‘Российская Федерация и Международный уголовный суд’, *Вестник Российского Университета дружбы народов*, 4 (2006), 57–63).

Mavlonov, A. and Mesyaev, A., ‘The Issue of Implementation of the Norm of the International Criminal Law in the Russian Legislation’, *State and Law*, 4 (1998), 104–6 (А. А. Мавлонов, А. Б. Мезяев, ‘Проблемы имплементации норм международного уголовного права в российском уголовном законодательстве’, *Государство и право*, 4 (1998), 104–6).

Sayarin, S., ‘The Development of the Definition of the Crime of Aggression in International and National Criminal Law’, *Almanach International Law*, 2 (2010), 294–316 (С.Саярин, ‘Развитие определения преступления агрессии в международном и национальном уголовном праве’, Альманах международного права, 2 (2010), 294–316).

### ***Other Material***

Constitution of the Russian Federation (with amendments and additions of 30 December 2008), available at: [www.constitution.garant.ru/english](http://www.constitution.garant.ru/english) (Конституция Российской Федерации. Принята всенародным голосованием 12 декабря 1993 г.).

Criminal Code of the Russian Federation Federal Law No. 64-FZ of 13 June 1996 (with amendments and additions) (Уголовный кодекс Российской Федерации №. 64-ФЗ от 13 июня 1996 (с изменениями и дополнениями)).

Criminal Procedure Code of the Russian Federation, Federal Law N 174-FZ (Уголовно-процессуальный кодекс Российской Федерации от 18.12.2001 N 174-ФЗ (ред. от 13.07.2015) (с изм. и доп., вступ. в силу с 15.09.2015)).

Compilation of Legislation of the Russian Federation (2003), No. 23, Item 2238 (Поручение Президента РФ № 323 от 3 июня 2003 года. Собрание законодательства Российской Федерации (СЗ РФ (2003) №3 ст. 2238)).

Executive Order No. 323 of 3 June 2003 (Sobranie zakonodatel'stva Rossiiskoy Federatsii).

Federal Constitutional Law of 30 January 2002, N 1-FKZ 'On Martial Law' (with amendments) (Федеральный конституционный закон от 30 января 2002 г. N 1-ФКЗ "О военном положении").

Federal Law No. 61 FZ dated 31 May 1996 (amended on 12 February 2015) (Федеральный закон от 31 мая 1996 г. N 61-ФЗ "Об обороне" (с изменениями и дополнениями)).

Federal Law No. 101-FZ 'On International Treaties of the Russian Federation' (1995) (Федеральный Закон от 15 июля 1995 г. N 101-ФЗ "О международных договорах Российской Федерации" (с изменениями и дополнениями)).

Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation dated 10 October 2003, No. 5, 'On Application of the Generally Recognized Principles and Norms of International Law and the International Treaties of Russia by Courts of General Jurisdiction' (amendment No. 4, 5 March 2013) (Постановление Пленума Верховного суда РФ от 10.10.2003 г. № 5 "О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации"(В ред. № 4 от 05.03.2013)).

Resolution of the Plenary Meeting of the Supreme Court of the Russian Federation dated 22 December 2009, No. 28, 'On Application of Rules of Criminal Procedure Legislation that Regulate Preparation of a Criminal Case to Court Proceeding' (Постановление Пленума Верховного суда РФ от 22.12.2009 г. № 28 (О применении норм уголовно-процессуального законодательства, регулирующих подготовку уголовного дела к судебному разбирательству (ред. от 28.06.2012))).