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INTERNATIONAL CRIMINAL COURT: THE HISTORY OF THE ESTABLISHMENT AND LEGAL STATUS

It is stated that mass destruction and death of civilians around the world, including such countries, as Afghanistan, Serbia, Syria, Kenya, Uganda, South Sudan, Ukraine, other countries indicate the need for a peaceful resolution of ethnic conflicts both within each country and in the international arena. Therefore, the international community has long been faced with the challenge of developing coordinated measures to create a mechanism for regulating international relations in order to prevent aggressive wars and create a comprehensive system of international security.

In this regard, it is highlighted that the creation of International Criminal Court (ICC) was determined by the objective conditions for the development of international law and international relations, the need to search for coordinated actions of states in solving the most important international problems. The establishment and activities of the ICC indicate that the system of international organizations has been replenished with a new organization for maintaining international law and order, therefore the activities of the ICC are one of the striking examples of cooperation between states in the fight against crime.

In this regard the study of the historical development of the ICC and the Rome Statute is relevant in theoretical and practical terms, accordingly, the primary purpose of the article was to identify legal and institutional basics of the establishment of the ICC and its legal status.

The article states that the ICC became the first permanent body of international criminal justice, the statute of which reflected the experience of previous international criminal tribunals, in particular the Nuremberg Tribunal, the Tribunal for the former Yugoslavia, and the Rwanda Tribunal. The emphasis was placed on the number of new provisions that have become unique for the ICC, for example, on complementarity with national criminal justice systems, on the protection of victims and witnesses of international crimes, etc. It is primarily about procedural norms, while the addition of new norms of substantive law regarding the components of international crimes that fall under the jurisdiction of theICC turned out to be a much more difficult task. It took 12 years to add the crime of aggression to the Rome Statute. In the future, it is possible to supplement the Statute with other international crimes, such as ecocide, but to achieve this goal, long-term and focused work of both states and intergovernmental and non-governmental organizations will be required.

The article concludes that despite the fact that due to some circumstances the activities of the ICC cannot be considered ideal, legal standards in the field of criminal justice need improvement, yet the creation and operation of the ICC means a certain progress in legal regulation and coordination of cooperation in the fight against crime.

Key words: *Rome Statute, international criminal law, international law, international law and order, International criminal court, international crimes.*

Problem statement. Mass destruction and death of civilians around the world, including such countries, as Afghanistan, Serbia, Syria, Kenya, Uganda, South Sudan, Ukraine [1], other countries indicate the need for a peaceful resolution of ethnic conflicts both within each country and in the international arena. Solving the global problems of our time is possible only in peace. Therefore, the international community has long been faced with the challenge of developing coordinated measures to create a mechanism for regulating international relations in order to prevent aggressive wars and create a comprehensive system of international security.

It worth mentioning that a very notable feature of the current stage of development

of the international community is the increasingly noticeable influence of various organizations in the international arena. In this regard, it should be noted that the International Criminal Court (hereinafter – ICC) is an international organization, the creation of which was determined by the objective conditions for the development of international law and international relations, the need to search for coordinated actions of states in solving the most important international problems.

It should be noted that the peculiarity of international crimes is that they are characterized by scale and long duration over time. One of the main objectives of the Court is that all persons subject to international crime control treaties must not escape responsibility. With jurisdiction over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression, the ICC is a court of last resort for serious offences that national governments are unable or unwilling to investigate and prosecute. It worth mentioning that as of today the Office of the Prosecutor had opened 17 investigations regarding situations in 16 countries. These investigations led to charges in 31 cases involving 51 defendants [2].

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Analysis of the latest researches and publications. Over the years, a number of scientists have contributed to the research and development of this topic. One of the world's pioneers and leading authorities on international criminal law Cherif Bassiouni had extensively written books, research articles that covered the history, nature, and sources of international criminal law, the function of the international criminal court; rules of procedure and evidence applicable to international criminal proceedings; and the future of international criminal law. Badar M.E. examined the mental element in the Rome Statute of the ICC from a comparative criminal law perspective. Schabas W. prepared the Commentary on the Rome Statute, providing an article-by-article analysis, an overview of the drafting history of the provision and an analysis of the text. Buromenskiy M. has dedicated publications to the issues of the interplay between ECtHR and international criminal courts, Gnatovskyy M. has explored controversial issues on interrelations between international law of human rights and international humanitarian law. Gutnyk V. set forth problems of international criminal courts and protection of civilians; etc.

Main part of the research paper. At the outset it worth mentioning that international conferences on the law of war were convened in Brussels in 1874, in The Hague in 1899 and 1907, and in Geneva in 1929, 1945 and 1974. At none of these conferences were proposals even made for the creation of an international criminal court. In 1919, the Paris Preliminary Peace Conference created the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, in the Report of which a list of thirty-two specific war crimes was presented [3, p. 114 – 115]. However, Article 14 of the Treaty of Versailles, establishing the Permanent Court of International Justice, did not provide for the latter to have any criminal jurisdiction [4], thus the idea of an international criminal court was never realized.

Simultaneously, Article 227 of the Treaty of Versailles providing for bringing the German Emperor Wilhelm II Hohenzollern to criminal responsibility said: "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan…" [5]. In its decisions, the potential tribunal had to be guided not only by law, but also by considerations of international politics and morality. It should be the duty of the tribunal to determine the penalty for violations within its jurisdiction. In this regard, the Allied Powers appealed to the government of the Netherlands, where the former German emperor was hiding, with a request for his extradition, but the Netherlands rejected this request and the idea of the tribunal was never implemented [6].

Regarding the trial of persons guilty of violating the laws and customs of war, it should be noted that Articles 228-230 of the Treaty of Versailles provided

for the trial before the military tribunals of the Allied Powers of such persons and the extradition by the German government of those suspected of such crimes, as well as the provision of all relevant documents and information [5]. At the same time, given the political situation, the Allies eventually agreed that the relevant cases should be heard by a national court in Germany. This predictably undermined the very idea of international justice and demonstrated that the trial of a defeated state's own military personnel under international supervision was not a viable idea.

At the same time, it cannot be assumed that the Versailles Peace Treaty was completely fruitless in terms of the idea of international justice as such. In particular, according to Part I of the Treaty, the League of Nations was founded. The Council of the League, in turn, founded the Committee of Lawyers, which developed the Statute of the Permanent Chamber of International Justice. Article 34 of this Charter provided that only states can be parties to cases considered by the Chamber [7]. It is obvious that such a restriction hindered the consideration of criminal cases. However, the creation of the first permanent international court had demonstrated the viability of the idea of international justice as such.

A step forward can be considered the conclusion in 1928 of the General Treaty for Renunciation of War as an Instrument of National Policy (also known as the Kellogg–Briand Pact or Pact of Paris) [8]. According to this Treaty, the parties condemned war as a way of settling international disputes and renounced it as an instrument of national policy in relations with each other. "It marked the single most important break with the traditional understanding of war as a universally accepted continuation of politics by other means… As such, it provided the legal basis for the convictions of leading members of Nazi Germany and a blueprint for the prohibition to use force in Article 2(4) of the Charter of the United Nations" [9, p. 2-3].

During the Second World War, the Allied Powers repeatedly stated that after the end of hostilities there should be retribution for violations of the laws and customs of war committed by German, Italian, Japanese and allied war criminals. In particular, in June 1945, when the war in Europe came to an end, the Allies prepared a draft of the United Nations Charter [10]. The UN International Court of Justice became the only international court that was established in accordance with the Charter. As with the Permanent Chamber of International Justice, the jurisdiction of this court concerned only states.

At the same time, as early as January 1945, the USSR, the USA, Great Britain and France began negotiations on the creation of a special international tribunal for the trial of Nazi criminals. The culmination of these negotiations was the London Agreement of August 8, 1945, to which the Statute of the International Military Tribunal was added [11]. Of particular interest is the procedure for establishing the jurisdiction of this Tribunal. Thus, according to Article 6 of the Charter, the Tribunal established under the agreement had jurisdiction to try and punish the main war criminals of the European Axis countries. The following came under the jurisdiction of the Tribunal:

"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;

b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated "[11].

It should be noted that the London Agreement and the Statute of the International Military Tribunal (Nuremberg) created an international criminal court, but this court had limited jurisdiction and was created for a specific purpose. It took the end of the Cold War for the idea of international justice to continue. The events that took place after the collapse of the USSR once again brought to the fore the need for an international criminal court. In particular, the events in the countries of the former Yugoslavia and in Rwanda forced the UN Security Council to create international judicial bodies to prosecute persons guilty of serious violations of international humanitarian law.

Thus, at the proposal of the Secretary General, the UN Security Council adopted

a resolution on the creation of the International Tribunal for the former Yugoslavia [12]. Article 1 of the Tribunal's Statute provides that it has jurisdiction to prosecute those responsible for serious violations of international humanitarian law, including the 1949 Geneva Conventions, genocide and crimes against humanity. Unlike the Statute of the International Court of Justice of the United Nations, the new tribunal was given jurisdiction over natural persons.

Almost simultaneously with this, another significant event in the history of international criminal law took place: in 1992, the UN International Law Commission presented a draft code of crimes against the peace and security of mankind [13]. Later on, the UN General Assembly adopted a resolution inviting states to provide the Secretary General with comments on the draft report of the Commission on International Criminal Jurisdiction, and also asked the Commission to develop a draft statute of the International Criminal Court as a matter of priority [14]. In accordance with the given mandate, the General Assembly presented the draft statute of the International Criminal Tribunal [15]. This draft included genocide, serious violations of the Geneva Conventions and Additional Protocols to the Conventions, violations of the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, apartheid, crimes set forth in Article 2 of the 1973 Convention on the Prevention and Punishment of Crimes Against Persons Enjoying International Protection, including Diplomatic Agents, Taking Hostages, Crimes Against the Safety of Maritime Navigation (Piracy). It was planned that a potential international criminal court would have jurisdiction over cases referred to it by the UN Security Council, as well as in cases where the injured state or the state in which the accused is located agrees to accept jurisdiction.

The draft of the International Law Commission passed through UN institutions, receiving comments from various states, and ended with the report of the Preparatory Committee for the establishment of the International Criminal Court. This document was submitted to the Conference of Plenipotentiaries on the establishment of the International Criminal Court, which met in Rome in June 1998 [16]. After a long debate, the plenipotentiaries drafted the Convention on the Establishment of the International Criminal Court [17]. There is not much left herein from the original project. In fact, the plenipotentiaries chose a different approach to the formation of a permanent body of international criminal jurisdiction than that proposed by the UN International Law Commission.

Overall, in its final version, the Rome Statute contains 128 articles [18], according to which a permanent institution was established, which has the power to exercise jurisdiction over persons who have committed the most serious crimes of concern to the entire international community. Its jurisdiction is complementary to national criminal justice systems. Article 2 stipulated that the ICC's relationship with the UN should be based on an agreement between the Assembly of States Parties to the Charter and the UN.

The statute contains jurisdictional provisions and lists the crimes that fall under its jurisdiction. Thus, for the Court to exercise jurisdiction, the alleged crime must be transferred to the Prosecutor of the Court either by a state party to the Rome Statute or by the UN Security Council. The Court has jurisdiction only if the criminal conduct took place on the territory of a State Party, or if the accused is a citizen of a State Party (with the exception of situations referred to the Court for consideration by the UN Security Council).

The statute enumerates the general principles of criminal law applied in proceedings before it, in particular *nullum crimen sine lege*, *nulla poena sine lege* (Articles 22-23), the prohibition of retroactive effect of criminal law (Article 24), grounds for exemption from criminal liability (Article 31), etc.

Also, the Statute of the ICC included important provisions that were first applied in the Treaty of London and the Statute of the International Military Tribunal of 1945. It is about the prohibition of reference to the official position of the accused as a basis for exemption from criminal responsibility or punishment, and also that the fact that the accused acted in accordance with the orders of the superior does not exempt him from criminal responsibility. These provisions have become customary in international law, in particular, they were enshrined in Articles 87 and 88 of Additional Protocol I [19].

Similar provisions are contained in Article 27 of the Statute regarding the inadmissibility of reference to official position and regarding the responsibility of commanders and chiefs. At the same time, the creators of the Statute were careful about the idea of limiting the responsibility of the executor if he acted on the orders of the superior. In particular, Article 33 says: "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether

military or civilian, shall not relieve that person of criminal responsibility unless:

1. (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

2. (b) The person did not know that the order was unlawful; and

3. (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful" [18, art. 33].

Its rules of procedure and evidence are important for any judicial body. According to Article 51, such regulations shall enter into force only after their approval by a two-thirds majority of the members of the Assembly of States Parties. The fifth part of the Statute deals with investigation and prosecution. In particular, it establishes the powers of the Prosecutor of the ICC to collect evidence and support the prosecution, as well as establish the insufficiency of evidence and notify the Pre-Trial Chamber, as well as the state, which initiated a case, or the UN Security Council, if the latter was the initiator of the court proceedings.

The Statute contains a number of provisions on the protection of individuals. In particular, Article 55 defines the protection of persons during the investigation of an alleged criminal offense, and Article 66 establishes the principle of presumption of innocence. Article 63 provides for mandatory face-to-face hearings and the prohibition of holding hearings and making decisions in absentia. This sixth part of the Statute defines the rights of victims and witnesses, as well as the evidentiary procedures applied by the Court.

The seventh part of the Statute defines the types and procedure for imposing punishments by the ICC, in particular, imprisonment for a certain period not exceeding 30 years, or life imprisonment, if it is justified by the extreme gravity of the crime.

The eighth part of the Statute deals with the appeal. In particular, Article 81 empowers the Prosecutor to challenge both acquittals and convictions based on errors of fact, law or procedure. The same right is granted to the convicted person or the prosecutor on behalf of the convicted person, and adds the possibility of filing an appeal on any other grounds that could affect the fairness and impartiality of the proceedings. Article 82 refers to the appeal of a number of other types of decisions that may be made during the case.

Part 9 of the Statute deals with international cooperation and judicial assistance. Presumably, it is in this area that the greatest number of difficulties and disputes can arise. Thus, Article 89 establishes the obligation of the participating states to comply with requests for the arrest and surrender of suspects to the ICC. Since this requirement applies not only to international law, but also to the procedural law of the participating state, numerous problems may arise in this area.

The tenth part of the Statute deals with the issue of enforcement of sentences. These provisions are largely similar to provisions of the Statute of the Tribunal regarding the former Yugoslavia. In particular, in accordance with Article 103, states can declare their readiness to accept convicted persons to serve their sentences under the conditions established by the ICC. For this, states must meet a number of conditions, including those regarding the observance of human rights in places of deprivation of liberty. In addition, the state must enter into a special agreement with the International Criminal Court to accept the convicts.

Part 11 of the Statute establishes the Assembly of States Parties and defines the functions of this organization. They are mainly administrative in nature, as are the provisions of Part 12 relating to funding. At the same time, it is worth noting that the Assembly of States Parties is the body responsible for external issues related to the activities of the Court, and, in accordance with Article 121 of the Statute, this body is authorized to consider amendments to the Statute, and only member states have the right to vote when considering amendments.

Part 13 of the Statute contains the usual final provisions of international treaties regarding ratification, entry into force, etc. Attention should be paid only to Article 120, according to which states cannot make reservations when acceding to the Rome Statute. This provision had led to problems with the signing and ratification of the Statute by a number of leading states, including permanent members of the UN Security Council [20, p. 385].

It should be noted that the rejection of the current version of the Rome Statute of many crimes that were proposed by the UN International Law Commission by the authors does not automatically exclude the possibility of such crimes to be included in the Statute in the future. In fact, the Statute has already been supplemented once by Article 8bis – the crime of aggression. For example, there are often proposals to add a crime of terrorism to the Statute, especially intensified during the "war

on terrorism," which the United States and its allies declared after September 11, 2001 [21, p. 26].

At the same time, the inclusion of another crime, namely the crime of ecocide, in the Rome Statute as the fifth main component of the crime looks more promising. The corresponding project was developed by an international working group of experts and is the subject of constant advocacy by international non-governmental organizations and governments of individual countries [22]. However, we support O.O. Surilova's opinion that "making the necessary changes to the Rome Statute of the International Criminal Court requires a strong scientific and theoretical justification and will not happen quickly" [23, p. 390]. Overall, it took 12 years from the date of adoption of the initial version of the Rome Statute to supplement it with the crime of aggression [24].

Further additions to the Rome Statute are possible, just as it is possible to modify the Court itself in a way that will allow it to consider a wider range of international crimes. Recognizing the need for reform, the ICC states parties commissioned an independent review of the Rome Statute system in December 2019. In their final report, the experts made hundreds of recommendations for improvement, targeting all branches of the institution and the ICC states parties themselves [25].

Conclusion. The International Criminal Court became the first permanent body of international criminal justice, the Statute of which reflected the experience of previous international criminal tribunals, in particular the Nuremberg Tribunal, the Tribunal for the former Yugoslavia, and the Rwanda Tribunal. At the same time, it contains a number of new provisions that have become unique for the ICC, for example, on complementarity with national criminal justice systems, on the protection of victims and witnesses of international crimes, etc. It is primarily about procedural norms, while the addition of new norms of substantive law regarding the components of international crimes that fall under the jurisdiction of the ICC turned out to be a much more difficult task. It took 12 years to add the crime of aggression to the Rome Statute. In the future, it is possible to supplement the Statute with other international crimes, such as ecocide, but to achieve this goal, long-term and focused work of both states and intergovernmental and non-governmental organizations will be required.

According to experts' opinion, "with more than 20 years of experience, the ICC has become an established, if still controversial, part of the international legal system. Despite its shortcomings the Court has proven a worthy successor to the international tribunals which preceded it and has demonstrated the viability of a permanent criminal justice system" [26, p. 21]. As practice has shown, the activities of the International Criminal Court cannot be recognized ideal, since the time for consideration of cases in court stretches for many years, and a clear mechanism for serving sentences has not been developed. It is necessary to further improve legal standards in the field of criminal justice, develop and adopt new international legal acts on the prevention of crime and the treatment of offenders. However, overall, the creation and operation of the ICC means a certain progress in legal regulation and coordination of cooperation in the fight against crime.

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Стрельцова Є.Д. Міжнародний кримінальний суд: історія становлення та правовий статус

У статті зазначено, що масове знищення та загибель мирного населення в усьому світі, в тому числі в таких країнах, як Афганістан, Сербія, Сирія, Кенія, Уганда, Південний Судан, Україна, інші країни вказують на необхідність мирного вирішення етнічних конфліктів як всередині кожної країни, та на міжнародній арені. Тому перед міжнародним співтовариством

давно стоїть завдання вироблення скоординованих заходів щодо створення механізму регулювання міжнародних відносин з метою запобігання агресивним війнам і створення цілісної системи міжнародної безпеки.

У зв'язку з цим наголошується, що створення Міжнародного кримінального суду (МКС) було зумовлено об'єктивними умовами розвитку міжнародного права та міжнародних відносин, необхідністю пошуку узгоджених дій держав у вирішенні найважливіших міжнародних проблем. Створення та діяльність МКС свідчить про те, що система міжнародних організацій поповнилася новою організацією з підтримання міжнародного правопорядку, тому діяльність МКС є одним із яскравих прикладів співпраці держав у боротьбі зі злочинністю.

У зв'язку з цим дослідження історичного розвитку МКС та Римського статуту є актуальним у теоретичному та практичному плані, відповідно першочерговою метою статті було виявлення правових та інституційних засад створення МКС та його правового статусу.

Зазначено, що МКС став першим постійно діючим органом міжнародного кримінального правосуддя, статут якого відобразив досвід попередніх міжнародних кримінальних трибуналів, зокрема Нюрнберзького трибуналу, Трибуналу по колишній Югославії та Трибуналу по Руанді. Наголошено на низці нових положень, які стали унікальними для МКС, наприклад, про взаємодоповнюваність з національними системами кримінального правосуддя, про захист жертв і свідків міжнародних злочинів тощо. Йдеться насамперед про процесуальні норми, тоді як значно складнішим завданням виявилося доповнення новими нормами матеріального права щодо складів міжнародних злочинів, які підпадають під юрисдикцію МКС. Знадобилося 12 років, щоб додати до Римського статуту злочин агресії. У майбутньому можливе доповнення Статуту іншими міжнародними злочинами, наприклад, екоцидом, але для досягнення цієї мети буде потрібна тривала та цілеспрямована робота як держав, так і міжурядових та неурядових організацій.

У статті робиться висновок про те, що незважаючи на те, що через певні обставини діяльність МКС не можна вважати ідеальною, правові стандарти у сфері кримінального судочинства потребують вдосконалення, все ж створення та функціонування МКС означає певний прогрес у правовому регулюванні та координації. співробітництва у боротьбі зі злочинністю.

Ключові слова: *Римський статут, міжнародне кримінальне право, міжнародне право, міжнародний правопорядок, Міжнародний кримінальний суд, міжнародні злочини.*