

ПРАВОВІ ЗАСАДИ НАЦІОНАЛЬНОЇ БЕЗПЕКИ УКРАЇНИ



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VIOLETIONS OF THE LAWS OR CUSTOMS OF WAR UNDER MILITARY LAW: COMPARATIVE ANALYSIS OF INTERNATIONAL AND INTERNAL LEGISLATION OF UKRAINE

This paper addresses the question of the criminalization of war crimes, which are compared at the international and internal legislative level under military law. Considering current threats to the

international legal order and security system, justice and defence sector actors, military lawyers and research fellows in military law are faced with the problems of the concept of responsibility for the most serious crimes in the world. The adoption of the Rome Statute of the International Criminal Court in 1998 raises the question of the internal legislation validity. The states Parties to International Criminal Court should revise the established conceptual approaches of responsibility for war crimes. The comparative analysis was made of the core and international military law.

Keywords: sovereignty; national security; human collective security; violation; laws or customs of war; responsibility; war crime; reintegration; armed conflict; human rights.

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Порушення законів і звичаїв війни за військовим правом: порівняльний аналіз міжнародного та українського законодавства

Розглядається питання криміналізації воєнних злочинів, закріплення відповідальності за які відбувається у військовому праві на міжнародному та державному рівнях. Через поточні загрози міжнародному правопорядку та системі безпеки перед системою правосуддя та правоохоронними органами, військовими юристами та науковцями галузі військового права постають проблеми відповідальності за найтяжчі злочини у світі. Прийняття Римського статуту Міжнародного кримінального суду в 1998 р. порушує питання актуальності внутрішнього законодавства його держав. Усі вони повинні переглянути встановлені концептуальні підходи до відповідальності за воєнні та інші міжнародні злочини.

Україна не завершила ратифікацію Римського статуту міжнародного кримінального суду. Однак вона визнала його юрисдикцію шляхом подання декларації у порядку п. 3 ст. 12 Римського статуту. Це означає, що сьогодні держава активно співпрацює з Міжнародним кримінальним судом у питаннях притягнення до відповідальності за міжнародні злочини (воєнні та злочини проти людяності). Така співпраця є частиною цілісної концепції перехідного правосуддя, що має стати шляхом до відновлення суверенітету і безпеки України, реінтеграції тимчасово окупованих територій частин Донецької та Луганської областей, Автономної Республіки Крим. У цих умовах потребує вирішення питання гармонізації внутрішнього законодавства України з положеннями міжнародного права щодо врегулювання збройного конфлікту. Порівняльний аналіз було здійснено між внутрішньодержавним та міжнародним військовим правом.

Ключові слова: суверенітет; національна безпека; колективна безпека; порушення; закони та звичаї війни; відповідальність; воєнний злочин; реінтеграція; збройний конфлікт; права людини.

Problem statement. War crimes are classified as international. Basheer al-Zoughbi (2020) was quite right in asserting that international crimes as are the most serious crimes of the world [1]. By Ross McGarry (2015) such crimes breach international law and legal order, human rights principles, peace and security of humanity [2]. We think it makes perfect sense after the two world wars [3], when the fight against international crimes united almost all countries of the world [4].

The responsibility of war crimes is defined in Art. 438 of the Criminal Code of Ukraine (further mentioned “CCU”) as “A violation of the laws or customs

of war”. A similar name was used in Art. 3 [5, p. 100-102] of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (International Tribunal for the Former Yugoslavia) [6]. A comparison of these category names with the regulation of a similar issue at the international level in the Rome Statute of the International Criminal Court (The Statute of the International Criminal Court, ICC RS) indicates that the norms of the national legislation of Ukraine are outdated and inconsistent (art. 8 “War crimes” ICC RS) [7]). The article does not indicate a sign of the “serious breach” in order to determine their crimes, which makes law enforcement issues and the application of laws much more complex. Also, worth noting is the fact that there is no specific catalog of war crimes in Art. 438 of the CCU. Accordingly, the result of such regulatory defects is the results of criminal proceedings under the relevant article. We have only 3 sentences under Art. 438 of the CCU for the eighth year of the armed conflict. The first of these sentences is heavily criticized not only by lawyers, scientists, but also the public. In such conditions, the theoretical and legal analysis of the elements of war crimes becomes especially relevant.

The article seeks, within the general confines aforementioned, to find an answer to several problems. **The Purpose** of the article is to analyze the elements of war crimes (*corpus delicti*), which is a type of international crime that was criminalized in Ukraine before the adoption of ICC RS. Based on the results of the comparative analysis of international norms and norms of internal military law of Ukraine, it is planned to: 1) identify the differences in the elements of war crimes in international military law and military law of Ukraine; 2) to develop proposals to improve the regulation of responsibility of war crimes at the level of internal state regulation.

The methods that were used in this article are general scientific and special legal ones. The main method that has been used is the method of comparison. This method was used to compare the elements of war crimes according to the internal law of Ukraine and at the international level, to identify areas for improvement in the regulation of war crimes in Ukraine.

I. The elements of crime (*corpus delicti*) and the characterization of conduct as unlawful.

The *corpus delicti* is a set of structural elements of crimes. These elements are used to distinguish a crime from other acts, making possible to characterize the conduct as unlawful, and prosecute and punish the perpetrator.

The first systematic attempt to define a broad range of war crimes was the Instructions for the Government of Armies of the United States in the Field—also known as the “Lieber Code” after its main author, Francis Lieber—which was issued by U.S. President Abraham Lincoln during the American Civil War and distributed among Union military personnel in 1863 [8]. Recognition of the possibility of prosecution for war crimes (as a violation of the laws or customs of war) was defined in Art. 228 of the Treaty of Versailles [9], which was come into effect on 10 January 1920. And the League of Nations was formally established on the same day. This

League after the First World War was the first attempt of human collective security [10, p. 545–546]. Today, war crimes are criminalized both at the international level in the ICC RS [7] and in the internal military law of Ukraine. At the same time, both systems of norms are interconnected by the need to implement international standards and cooperation on the basis of security and defence sector institutions, the judiciary, the public and other stakeholders.

In particular, the International Criminal Court (ICC) was established in 1998 as a permanent institution with universal jurisdiction, complementarity and gravity as the principles of operation. Strategy of ICC: investigating and prosecuting those most responsible for the most serious crimes [11]. This court, based on certain criteria, selects cases, determining whether a situation meets the legal criteria established by the ICC RS to warrant investigation by the Office of the Prosecutor (“Office” or “OTP”). The Office establishes the legal framework for a preliminary examination activities, conducts a preliminary examination of all communications and situations that come to its attention. After that war crimes, which were committed in different countries, are prosecuted by ICC [12, p. 3–4]. In the context of this article, this means that in terms of levels of counteracting war crimes, we can argue about two separate systems: the national (internal) and international dimension.

At the same time, these levels are interconnected by the principle of implementation of international criminal law into the national legal order. Also, they are interconnected by the parallel work of national authorities and the ICC to achieve common goals, including bringing those responsible for international crimes to individual responsibility. We can say that the issue of responsibility for international crimes has entered a new stage of its development and formation, when the ICC RS had been established in 1998 [7]. Today it is a fundamental act in the system of modern sources of the International Criminal Law and International Military Law.

Jian Zhou (2019) makes a comprehensive analysis of the basic principles and theories of military law, restructuring the theoretic framework of military law. He puts forwards the new concepts of “core military law” and “international military law” for the first time in the world [10, p. 109, 545]. These systems were a long-awaited result of joint activities of representatives of different countries after the two world wars. Humanity had realized the need to establish a supranational mechanism to organize investigations, qualifying acts and prosecuting crimes, which breach the interests not only of some certain states, but also of the international law and global community [13, p. 88].

II. The corpus delicti of a war crime in the military law of Ukraine.

Let’s start with the question of how international crimes are criminalized in the legislation of Ukraine. And at once it is necessary to state a number of problem questions which require solution.

In the CCU [14] responsibility for international crimes is enshrined in Chapter XX “Crimes against peace, security of human and international order”. In particular, in Art. 437, 438, 439 and 442. However, not all international crimes are included in

the indicative Chapter. The CCU is based on the principle of distinction between objects of crime. Contrary to this rule, the issue of international crimes is resolved outside of Chapter XX. In our opinion, it is necessary to unite all crimes against peace, security of human and international order within the framework of Chapter XX of the CCU.

However, this is not the only flaw in the regulation of international crimes in Ukraine's military and criminal law. Crimes against humanity are currently absent from the CCU. Thus, for Ukraine such question today is extremely important both for the theory and for the practice. The Reports of the Office of the Prosecutor ICC include the relevant category of crimes as probably committed in Ukraine [15, p. 154].

Among the shortcomings of Art. 438 of the CCU, which regulates the issue of violations of the laws or customs of war, we have already pointed to the outdated name, the absence of the sign of the "serious breach". In addition to these shortcomings, the practice of prosecuting war crimes in Ukraine is complicated by the lack of detail in the article, the gaps in liability for violations of customary IHL, punishment not in accordance with international standards. Scientists have criticized the CCU: "such situation is unacceptable, in difficult circumstances where Ukraine found itself. Therefore, the problems require a comprehensive balanced approach" [16, c. 166].

Summarizing the above, we can say, today law enforcement and the judicial system of Ukraine are working to bring the perpetrators to justice for war crimes in difficult conditions with imperfect legislation [17, p. 381]. Therefore, the question of the elements of crimes (*corpus delicti*) of a war crime is extremely relevant for scientific research and conclusions.

The construction, which characterizes the *corpus delicti* of an international crime in the law of Ukraine [14], provides for its establishment a set of the following elements: object, subject, objective and subjective aspects of the crime.

The **object** of the crime determines the range of legal relations that are governed by international law [18, p. 169]. Ukrainian scientists distinguish general, species and direct object of crime. The general object of a war crime is the world legal order (a set of all legal rights and interests defined by the system of international law as a whole and protected by international law). General object – the interests of peace and security of humanity. Species object – the interests of compliance with the rules of armed conflict as defined in the principles of International Law and International Humanitarian Law (IHL). Direct object (target) – the rule of an armed conflict.

The peculiarity of a war crime is its predominant **multi-object nature**: the crime causes damage to several direct objects at the same time. This type of crime poses the *principal and direct threat* to the social relations regulated by the norms of international law, which are formed by the use of means and methods of conducting military operations in order to humanize armed conflicts. The widest range of rights and interests can act as additional objects: life, health, sexual freedom and inviolability, dignity of the person, physical freedom, property, etc.

In some cases, the instruments used for the crime acquire legal significance: the territory of the state, objects of civil domestic, cultural, religious, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected etc. (depending on the specific type of method of warfare chosen by the subject of the crime).

Often the figure of the victim acquires legal significance: combatant, prisoner of war, civilian population of the occupied territory, etc. But the **subject** of a war crime is common. At the same time for a number of corpus delicti of war crimes, their subject must have certain rights or responsibilities, which indicates the possibility of their commission only by an authorized subject (soldiers, military personnel, commander).

The **subjective aspect** of a war crime involves the intent to commit a crime (direct or indirect).

A separate element of a war crime is the **objective aspect**. This component defines the so-called “external side” of a criminal act – a set of features that characterize the form of the act (action or inaction), consequences, causal relationship between them, also – the manner, place, time and circumstances of the act. For a war crime, the characterization of the objective side is always carried out through the connection of action (inaction) with an armed conflict. It may take the form of attack, unlawful deportation or transfer or unlawful confinement, torture or inhuman treatment, including biological experiments (for Part 1 of Article 438), murder (for Part 2 of Art. 438 of the CCU), etc. Since Art. 438 of the CCU does not have a specific list of actions, to determine the elements of a war crime should analyze the “Geneva law”, “Hague law” and other international treaties that are part of Ukrainian law and regulate the means and methods of an armed conflict. Only grave breaches of IHL and customs of war are considered to be a crime.

Analysis of the case law of the European Court of Human Rights in cases *Jorgic v. Germany* and *Kononov v. Latvia* provides starting points for preventing appeals to the Constitutional Court of Ukraine (from Art. 58 of the Constitution of Ukraine violations) and to the ECtHR (due to violation of Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms [19]). For example in the second case the applicant alleged, in particular, that his conviction for “war crimes” as a result of his participation in a punitive military expedition in the Second World War had violated Article 7 of the Convention (the principle “*nullum crimen sine lege*”). He submitted, in particular, that the acts of which he was accused did not, at the time of their commission, constitute an offence under either domestic or international law. But the ECtHR explains: the accused had to be aware of the possible punishment of his act and could foresee the consequences in the form of criminal prosecution for violating IHL [20]. Giulia Pinzauti submitted that a critical assessment of the *Kononov* case provides a fitting opportunity to revisit the general legal problem of resort by the Court to bodies of law other than the European Convention. The case is also a landmark decision for the ECtHR’s application of

humanitarian law, a body of law to which the Court does not make express reference in its previous case law. On the basis of the Court's reasoning in *Kononov* and the more general analysis of its inherent power to apply provisions of other branches of international law, it is possible to make a strong argument that the European Court should incidentally apply humanitarian law and international criminal law, and it should do so accurately [21, p. 1045].

III. Elements of crimes under international military law.

There are different approaches to distinguish between classification types of international crimes in international military law. In this research article, we use an institutional approach. In particular, we will investigate as international those crimes in respect of which the ICC has jurisdiction (genocide, crimes against humanity, war crimes, aggression).

The ICC has developed an algorithm for qualifying international crimes according to the rules contained in Rules of Procedure and Evidence of International Criminal court [22], on the basis of the Elements of Crimes [23]. The analysis of the specified and other modern sources for regulation of responsibility for war crimes shows that the structure of structure of the international crime contains material, mental and contextual elements.

The material elements (*actus reus*) of each *corpus delicti* of a war crime, are defined in Article 8 of the Rome Statute. They are explained and disclosed in a document entitled Elements of Crimes. This document was adopted by the member states of the Rome Statute. It is a mandatory source for application by the ICC. It means that material elements of war crimes must be interpreted using the Elements of Crime. Material elements of war crimes can be divided into two components: 1) the act criminalized by the Rome Statute (described in the first paragraph of the relevant composition of a war crime in the Elements of Crimes); 2) the object affected by such an act / acts. These can be, for example: assault, deportation, imprisonment, seizure, etc. The objects of encroachment are described in the second paragraph of the relevant composition of a war crime in the Elements of Crimes. Such facilities include IHL-protected buildings, structures, civilians, nature, prisoners of war or combatants who have laid down their arms and surrendered unconditionally, and so on [24, c. 16–17].

The mental element (*mens rea*) is based on the commission of material elements with intent. Article 30 of the ICC RS stipulates that a war crime must be committed “intentionally and knowingly”. War crimes cannot be committed through negligence. This phenomenon is exceptional for international criminal law in general. There are subjective attributes of the perpetrator (mental disorder, intoxication, and juvenile status) and a mental disposition (mistake) that exclude intent. By Johan D. Van der Vyver “The constitutive elements of fault (intent and knowledge) only apply unless otherwise provided by the ICC RS. Therefore, it becomes important to identify the specific crimes within the subject matter jurisdiction of the ICC where a conviction will be dependent on a more stringent, or may be based on a lesser, form of fault. It is also important to distinguish between crimes where intent to engage in the criminal

conduct is all that has to be proved as far as mens rea is concerned (conduct oriented or general intent crimes) and those crimes where accountability is also dependent on an intent to bring about a certain consequence of the criminal conduct (consequence oriented or special intent crimes)” [25, p. 59–60].

Material (actus reus) and mental (mens rea) elements are called like constitutive elements. They to some extent correlate with ordinary crimes in the military law of Ukraine. In turn, the contextual element is an important function of differentiation in the qualification of the act as an international crime [15, c. 152]. There is a two-dimensional formula of war crimes comprised of the contextual elements as well as the constitutive elements (actus reus and mens rea) of underlying crimes [26, p. 83].

Contextual elements make it possible to distinguish international crimes from ordinary ones and at the same time to distinguish them from each other [27, p. 227–229]. It means that the contextual element serves two purposes: 1) identification of crimes as international; 2) identification of an international crime of a specific type [15, c. 152].

For each of the types of international crimes, the contextual element is provided in the relevant Articles 6–8 and 8 bis of the ICC RS. For genocide the contextual element is the intent to destroy, in whole or in part of the four protected groups (a national, ethnical, racial or religious group). For crimes against humanity – it acts when committed as part of a widespread or systematic attack directed against any civilian population. For war crimes, it is an armed conflict (when proving the causal link between an act and such a conflict) [15, c. 152]. The decisions of international tribunals ad hoc “contextual element” of a war crime defines the actual existence of an armed conflict and the “obvious connection” of the committed crime with this conflict.

Conclusion. A comparative analysis of the regulation of liability for war crimes in the legislation of Ukraine and in the ICC RS provides grounds for highlighting significant differences in the elements of war crimes (corpus delicti). When applying the criminal legislation of Ukraine, acts and other circumstances of committing a crime are analyzed from 4 elements: subject, object, subjective aspect and objective aspects. The ICC is guided by other rules of qualification, establishing the material, mental and contextual elements of the crimes.

We must complete the ratification of the ICC RS. At the same time, the implementation of international humanitarian law’s norms into the legislation of Ukraine should be continued. Improving the regulation of liability for war crimes at the level of internal state regulation in Ukraine should be based on the norms of the ICC RS and the practice of tribunals. It fully covers the following areas: 1) change the name of Art. 438 on “War crimes”; 2) to develop and consolidate a catalog of war crimes in the Criminal Code of Ukraine; 3) establish appropriate international standards of punishment. In addition to these promising changes, it is already advisable to provide methodological support for the activities of law enforcement agencies and the judiciary.

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Нарушение законов и обычаев войны по военному праву: сравнительный анализ международного и украинского законодательства

Рассматривается вопрос криминализации военных преступлений, ответственность за которые предусмотрена военным правом на международном и государственном уровнях. Вследствие текущих угроз международному правопорядку и безопасности система правосудия и правоохранительные органы, военные юристы и ученые области военного права сталкиваются с проблемами концепции ответственности за наиболее тяжкие преступления в мире. Принятие Римского статута Международного уголовного суда в 1998 г. ставит вопрос актуальности внутреннего законодательства его государств. Все они должны пересмотреть установленные концептуальные подходы к ответственности за военные и другие международные преступления.

Украина не завершила ратификацию Римского статута международного уголовного суда, однако признала его юрисдикцию путем направления декларации в порядке п. 3 ст. 12 Римского статута. Это означает, что на сегодня государство активно сотрудничает с Международным уголовным судом в вопросах привлечения к ответственности за международные преступления (военные и преступления против человечности). Такое сотрудничество является частью целостной концепции переходного правосудия, которая должна стать путем к восстановлению суве-

ренитета и безопасности Украины, реинтеграции временно оккупированных территорий частей Донецкой и Луганской областей, Автономной Республики Крым. В этих условиях требует решения вопрос гармонизации внутреннего законодательства Украины с положениями международного права по урегулированию вооруженного конфликта. Сравнительный анализ был проведен между внутригосударственным и международным военным правом.

Ключевые слова: суверенитет; национальная безопасность; коллективная безопасность; нарушения; законы и обычаи войны; ответственность; военное преступление; реинтеграция; вооруженный конфликт; права человека.

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