

LAWS AND CUSTOMS OF WAR: QUALIFICATIONS

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MARIANA TOMA

Candidate of Legal Sciences, Associate Professor at the Department of Criminal Law

Yuriy Fedkovych Chernivtsi National University, Ukraine

ORCID: 0000-0001-5081-78-42

Abstract. The article is devoted to the coverage of theoretical and practical problems of the qualification of actions provided for in Art. 438 of the Criminal Code of Ukraine «Violation of laws and customs of war». Modern legislation, both national and international, stands on the positions of guarantees of recognition of a person, his rights and freedoms, as the highest social value, to ensure the activities of both the state authorities of specific individual countries and the entire international community as a whole. However, it is fundamental that basic human rights, recognized by international law, continue to exist and be protected both in peacetime and in wartime.

The present makes adjustments to our lives every second and, unfortunately, they are not always positive. The terrible date in the calendar, February 24, 2022, the Russian Federation invaded the territory of sovereign Ukraine and began military operations to occupy it. Few people in the modern world would think that in the 21st century there is a place for such bloody crimes against humanity, which were known during the Second World War, but Ukraine faced them.

Analyzing the features of the crime provided for in Article 438 of the Criminal Code of Ukraine, we came to the conclusion that the relevant provision is blanket and directs us to the norms of international humanitarian law on the law of war. The norms of international law themselves are not clearly defined, which requires the bodies of the pre-trial investigation and the court that issues a guilty verdict against convicted servicemen of the armed forces of the Russian Federation to clearly define which of the acts provided for in the disposition were violated in a specific case. Accordingly, the blanket disposition of the first part of Article 438 of the Criminal Code of Ukraine is called international law. In order to bring the culprits to justice, it is necessary to clearly indicate which specific Convention was violated by the suspect, with the accused noting its full official name, it is also necessary not only to indicate the names of the conventions, but also to indicate which specific articles of them constitute a violation of the laws and customs of war, as well as the absence of a reference as to the specific norms of international humanitarian law on the law of war, as well as to specific articles (parts thereof) of these norms, is a violation of the requirements for establishing the fact of the commission of the crime itself, which in the future may indicate a violation of the rights of the suspect, the accused to know what criminal offense was committed he is suspected and accused of a crime.

Key words: violation of the laws and customs of war, war crimes, international humanitarian law, international human rights law, crime, law enforcement, sentence.

ЗАКОНИ ТА ЗВИЧАЇ ВІЙНИ: ОСОБЛИВОСТІ КВАЛІФІКАЦІЇ

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МАРІАНА ТОМА

кандидат юридичних наук, доцент кафедри кримінального права

Чернівецького національного університету імені Юрія Федьковича, Україна

ORCID: 0000-0001-5081-78-42

Анотація. Стаття присвячена висвітленню теоретичних та практичних проблем кваліфікації діянь передбачених ст. 438 Кримінального кодексу України «Порушення законів та звичаїв війни». Сучасне законодавство, як національне, так і міжнародне, стоїть на позиціях гарантій визнання людини, її прав і свобод, як найвищою соціальною цінністю, на забезпечення якої має бути спрямована діяльність як органів державної влади конкретних окремих країн, так і всієї міжнародної спільноти в цілому. Проте, принциповим є те, що основні права людини, визнані міжнародним правом, продовжують існувати й захищатись як у мирний, так і у воєнний час.

Сьогодення щосекунди вносить корективи в наше життя і вони, на жаль, не завжди позитивні. 24 лютого 2022 року РФ вторглася на територію суверенної України та розпочала воєнні дії щодо її окупації. Мало хто в сучасному світі міг би подумати, що в XXI сторіччі є місце для таких кривавих злочинів проти людяності, які були відомі за часів Другої світової війни, але Україна з ними зіштовхнулася.

Аналізуючи ознаки складу злочину, передбаченого ст.438 Кримінального кодексу України, зроблено висновок, що відповідна диспозиція є бланкетною та направляє до норм міжнародного гуманітарного права про право війни. Самі ж такі норми міжнародного права чітко не визначені, що вимагає від органів досудового слідства та суду, який ухвалює обвинувальний вирок щодо засуджених військовослужбовців збройних сил російської федерації, чітко визначати, які з діянь передбачених диспозицією було порушено у конкретному випадку. Відповідно бланкетність диспозиції частини першої статті 438 Кримінального кодексу України названо міжнародно-правовою. Для притягнення до відповідальності винних потрібно чітко вказати, яка конкретно Конвенція була порушена підозрюваним, обвинувачуваним зазначивши її повну офіційну назву, також необхідно не лише вказувати назви конвенцій, а й зазначати, які конкретно їх статті становлять собою порушення законів та звичаїв війни, також відсутність посилання як на конкретні норми міжнародного гуманітарного права про право війни, а також на конкретні статті (їх частини) цих норм є порушенням вимог, щодо встановлення факту вчинення самого злочину, що в майбутньому може свідчити про порушення прав підозрюваного, обвинуваченого знати, у вчиненні якого кримінального правопорушення його підозрюють, обвинувачують.

Ключові слова: порушення законів та звичаїв війни, воєнні злочини, міжнародне гуманітарне право, міжнародне право прав людини, злочин, правозастосування, вирок.

The provision of Article 438 of the Criminal Code of Ukraine establishes criminal liability for the violation of the laws and customs of war. However, since the beginning of the full-scale invasion of Ukraine by the Russian Federation, the practical application of this provision has become more relevant than ever, though the situation is not entirely straightforward. In practice, unresolved issues persist regarding the forms in which the acts constituting the objective side of this criminal offense may manifest, the characteristics of its subjective side, and the differentiation from other categories of criminal offenses. According to statistical data as of 20 February 2023, during the first year of the war, 75 criminal proceedings were initiated concerning charges under Article 438 of the Criminal Code of Ukraine, 19 of which have already been considered by the courts. However, over the three years of the war, statistics indicate that the number of criminal proceedings registered under national legislation for violations of the laws and customs of war is several times higher, with more than 300 proceedings referred to the courts, yet relatively few verdicts have been rendered. In this context, the coordination of efforts is crucial, encompassing the stages from investigation and procedural supervision to judicial proceedings and the issuance of court decisions.

The objective of this scholarly work is to examine the specific features of the criminal-legal qualification of offenses related to the violation of the laws and customs of war under the criminal legislation of Ukraine. To achieve this objective, the following tasks are outlined: to elucidate the concept of the «laws and customs of war» in international law; to analyze the «laws and customs of war» under the national legislation of Ukraine; and to examine open proceedings under Article 438 of the Criminal Code of Ukraine as well as the relevant court judgments.

Throughout its history, humanity has intermittently been in a state of war. In the contemporary world, a vast number of international treaties have been established at the legislative level to protect individuals both in peacetime and during armed conflicts. However, regrettably, this codification has not functioned as a protective shield for people during war and cannot fully ensure the protection of their rights against the arbitrariness of authoritarian regimes. The UN Charter of 1945 prohibited war, yet since then, more armed conflicts have begun than ended, and an increasing number of civilians have become victims.

This negative trend is vividly illustrated by the example of two conflicts from different centuries. In the 19th century, when war was considered «permissible», its customs were not yet codified, and human rights were only beginning to be discussed at the national level. For instance, during the Franco-Prussian War, only 2% of civilians perished, whereas the Vietnam War claimed the lives of 3 million civilians compared to 150,000 military personnel, meaning that 95% of casualties were civilians. The very nature of armed conflicts is also changing, which in turn complicates the legal regimes governing such conflicts. Whereas in earlier inter-state wars only International Humanitarian Law (IHL) was applied and International Human Rights Law (IHRL) was largely irrelevant—being primarily designed to protect individuals in peacetime—today there is an increasing recognition of the interconnection between IHL and IHRL.

It was only at the end of the 19th century that the formation of rules, customs, and laws of warfare began (the Hague Conventions). As a result of the bloody Second World War, which revealed to the world an unprecedented scale of hostilities and their catastrophic consequences for both combatants and civilians, rules governing the conduct of war and other armed conflicts were developed, and legislative norms prohibiting such acts and establishing liability for their commission were formulated at both the international and national levels [1].

Since the beginning of the full-scale invasion and aggression of the Russian Federation against Ukraine, the administration of justice in criminal proceedings concerning crimes provided for in Chapter XX, «Criminal Offenses against Peace, Humanity, and the International Legal Order»; Chapter I, «Crimes against the Foundations of Ukraine's National Security» (including treason and collaboration); and Chapter XIX, «Criminal Offenses against the Established Order of Military Service (Military Criminal Offenses)» of the Special Part of the Criminal Code of Ukraine, among others, has become particularly significant [2].

This raises the question: what are the laws and customs of war? In the modern world, this is referred to as International Humanitarian Law (IHL), as mentioned above. The terms «laws and customs» are older but simpler to understand. They regulate the conduct of parties during armed conflicts.

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Beginning as early as 2014 and continuing to the present day, the Russian Federation has ruthlessly invaded Ukraine in blatant violation of all international norms, disregarding the laws and customs of war. From crimes against Ukrainian civilians to the destruction of critical infrastructure, the occupiers consistently flout all established rules.

The laws and customs of war are, in fact, International Humanitarian Law (IHL), as noted above; that is, a set of rules and obligations applicable during armed conflicts and binding on all parties involved. Their primary function is to restrict the actions of warring parties, delineating what is permissible and what is strictly prohibited. These rules were codified with the singular purpose of reducing the brutality and lethality of wars, which is particularly relevant in the context of increasingly modern and deadly weaponry.

The laws and customs of war have not always existed. Humanity recognized the need to establish certain rules only after numerous bloody wars claimed hundreds of thousands of innocent lives. In 1889, the first Hague Convention was adopted; however, the First World War, which erupted fifteen years later, vividly demonstrated the complete ineffectiveness of these rules, as the parties failed to comply with any of the prescribed requirements. Unfortunately, Ukrainians themselves witnessed the ineffectiveness of international law during these conflicts.

The necessity for new, clearer rules of warfare became evident after the conclusion of the Second World War – the bloodiest and deadliest conflict in human history up to that point, claiming unprecedented numbers of civilian casualties. Consequently, in 1949, four Geneva Conventions were adopted, which became the foundation of International Humanitarian Law.

However, International Humanitarian Law does not explicitly prohibit the initiation of wars; in essence, it does not address this issue. All rights, duties, and prohibitions enumerated in the Conventions assume by

default that an armed conflict is already underway. Therefore, the mere fact of the Russian Federation's invasion of Ukraine is not prohibited under this body of law [3; 4; 5; 6; 7].

From the very first days of the invasion, the Russian military violated all applicable norms of International Humanitarian Law and national legislation, raising the question of holding those responsible criminally liable for the offenses provided for under Article 438 of the Criminal Code of Ukraine.

Accordingly, Article 438 of the Criminal Code of Ukraine establishes liability for the cruel treatment of prisoners of war or civilians, the forced displacement of civilians for labor, the plundering of national assets in occupied territories, the use of means of warfare prohibited by international law, and other violations of the laws and customs of war as provided for in international treaties whose binding force has been consented to by the Parliament of Ukraine, as well as the issuance of orders to commit such acts [8].

Thus, the prohibition established by the norm encompasses seven forms of the objective side of the crime, all of which are formulated, to a greater or lesser extent, according to the rules of a blanket (or referential) disposition: it is impossible to understand or assess what constitutes, for example, «cruel treatment» or «prohibited means of warfare», and even more so «other violations», without referring to the relevant international treaties in the field of International Humanitarian Law.

An analysis of the composition of the crime under the formulation of violations of the laws and customs of war at the national level indicates that the legislator, when specifying an indicative list of acts in which such a violation may be expressed («cruel treatment of prisoners of war or civilians», «forced displacement of civilians for labor», «plundering of national assets in occupied territories», «use of means of warfare prohibited by international law»), left the list open-ended. The legislation explicitly states that relevant unlawful acts may be expressed in «other violations of the laws and customs of war provided for in international treaties whose binding force has been consented to by the Parliament of Ukraine».

Consequently, from this formulation, it follows that the national definition of the offense of violating the laws and customs of war is characterized, as noted above, by blanketness. This blanketness is of an international-legal nature, as it pertains to violations by the perpetrator of those international treaties whose binding force has been consented to by the Parliament of Ukraine (the so-called «international norms of the law of war») [9, p. 166].

As of today, Ukraine is not a party that has signed and ratified the Rome Statute of the International Criminal Court (ICC); therefore, it should not be assumed that the unofficial codification of crimes included in the Rome Statute can be automatically and unconditionally applied when determining the presence of a criminal offense under Article 438 of the Criminal Code of Ukraine. The jurisdiction of the ICC extends to the territory of Ukraine pursuant to the Declaration of the Parliament of Ukraine to the ICC recognizing Ukraine's acceptance of the Court's jurisdiction over crimes against humanity committed by senior state officials that resulted in particularly grave consequences and the mass killing of Ukrainian citizens during peaceful protests from 21 November 2013 to 22 February 2014, as well as the Declaration of the Parliament «On the Recognition by Ukraine of the Jurisdiction of the International Criminal Court Regarding Crimes against Humanity and War Crimes Committed by Senior Officials of the Russian Federation and the Leaders of the «DPR» and «LPR» Terrorist Organizations, Which Resulted in Particularly Grave Consequences and the Mass Killing of Ukrainian Citizens».

The elements of crimes constitute normative guidance of the ICC, outlining the criteria (elements) that must be reflected in the justification of a court's conclusion regarding the established circumstances of a specific offense. The ICC proceeds from the existence and analysis of the so-called material criterion (*actus reus*), i.e., the objective element – the external manifestation of the act – which corresponds to our understanding of the features of the objective side of a committed offense. The mental criterion (*mens rea*) can be regarded as the subjective element of the offense.

Moreover, specific categories of international crimes – namely war crimes and crimes against humanity, which are encompassed by the offense under Article 438 of the Criminal Code of Ukraine – have special elements. This includes the contextual element, which must be established and supported by evidence when determining whether the acts of an individual bear the characteristics of these crimes. The contextual element is the most complex. The context must be linked to an armed conflict, and the incriminated criminal offense must be connected contextually, causally, and logically with the committed acts, regardless of the manner in which the act manifests itself (this could include killing, rape, abduction, appropriation of property, etc.).

In the very title of Article 438 of the Criminal Code of Ukraine, the term «war» is used; however, international and national law predominantly employ the terms «armed conflict», «military aggression», «military conflict», and others. There are different approaches to the correlation of these concepts, yet most scholars agree that the distinction between them is largely conventional, and the notion of «war» is distinguished from others by the existence of a legal fact of its declaration, which has long lost its original significance.

Therefore, to establish the elements of the offense, it is necessary to identify all constituent components, namely: the environment – the set of conditions in which the crime is committed, encompassing both physical and legal (juridical) characteristics.

Characteristics of an armed conflict include the use of armed forces, the degree of organization, intensity, and the possibility of identifying the parties to the conflict. These characteristics are significant not only for the correct legal qualification and the differentiation of war crimes from other offenses with similar features, but also for determining the applicability and scope of International Humanitarian Law norms. An armed conflict is considered international when the armed forces of one state clash with those of another; however, military actions of one state against another are recognized as an international armed conflict even if the latter state does not resist. Article 1 of the Law of Ukraine «On the Legal Regime of Martial Law» [10] provides the definition of martial law.

Thus, the established fact of an international armed conflict, to which the norms of International Humanitarian Law apply, as an element of the environment in which the crime under Article 438 of the Criminal Code of Ukraine is committed, is legally established and holds evidentiary value both during the armed conflict and after its conclusion with respect to its consequences and related circumstances.

The methods employed, as a mandatory feature of the objective side of the offense, also have significance for holding perpetrators accountable under Article 438 of the Criminal Code of Ukraine. These methods are derived from the formulations of international law norms relevant to this sphere of legal regulation.

Cruel treatment of prisoners of war or civilians. Article 438 of the Criminal Code of Ukraine does not specify the concrete methods (forms of cruel treatment) contextually; however, since it concerns violations of the laws and customs of war, reference should be made to the concepts formulated in international law [6; 7].

Forced displacement of civilians for labor. As a general rule, civilians are protected under International Humanitarian Law, with the content and scope of protection, as well as the acts and effects covered, defined in specific norms.

Plundering of national assets in occupied territories. From a doctrinal perspective, the norm employs the broader concept of «national assets», which includes, among other things, cultural assets.

Use of means of warfare prohibited by international law. The use of prohibited means of warfare, including banned weapons, constitutes a violation of the laws and customs of war in any case, regardless of the manner in which it is applied. All types of prohibited weapons can be divided into two groups: weapons of mass destruction and conventional weapons that cause excessive suffering and superfluous injury [11, p. 88].

Other violations of the laws and customs of war provided for in international treaties whose binding force has been consented to by the Parliament of Ukraine. In defining other violations of the laws and customs of war – specifically, those that differ from the acts listed in the preceding paragraphs of Article 438 of the Criminal Code of Ukraine – reference should be made to the provisions of international treaties whose binding force has been consented to by the Parliament of Ukraine, as well as to the universally recognized principles and norms of international law regarding armed conflicts (as indicated in Protocol I) [12].

Issuance of an order to commit such acts. To establish this particular method of committing a crime, it is important to determine the structure of command in order to clarify the procedure for issuing orders and to reconstruct the chain from the decision-making to the transmission of the order to the executor. Establishing and holding accountable only the direct executor of the order may be insufficient. The entire chain of actions must be established, from the person who issued the order to the person who executed it. The nature of the command's actions must be determined not only with respect to issuing the order; it also has evidentiary significance in terms of planning, aiding and abetting, incitement, and direct participation in the commission of the crime. The participation of a person in committing a crime is assessed taking into account the following: the order, the order plus an independent decision, and the independent decision itself.

The connection of a person's actions with the conditions of the armed conflict. It should be noted that not all personal or individual acts of behavior during an armed conflict fall under the norms of law relating to

armed conflicts; only those acts that are directly connected to such a conflict do. Therefore, the mere fact that a particular crime is committed under the conditions of an armed conflict is not sufficient to classify it as a war crime, including the offense analyzed in this study concerning violations of the laws and customs of war. In each case, the connection between the act and the military operations, as well as the circumstances that are inseparably linked in time and space, must be proven – that is, the act must exhibit a chain effect.

Thus, the blanket nature of the analyzed criminal offense, namely the «Violation of the Laws and Customs of War» as provided for under national legislation in Article 438 of the Criminal Code of Ukraine, directs attention to a significant number of international legal instruments necessary for understanding and qualifying unlawful acts that are prohibited under international law and have become the subject of national criminal liability for violations of the laws and customs of war. However, for the investigation and proof of the analyzed crime, the national mechanism is of crucial importance, considering that International Humanitarian Law does not contain specific guidelines in this regard. Given that such acts are not subject to statutes of limitation, it is essential to meticulously document each violation, collect the evidentiary base, and adhere to pre-trial investigation standards, which will ensure that those responsible can be held accountable.

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