

women's movement at the international level reflected in the chronology of conferences, in the texts of declarations and conventions of the United Nations (UN), resolutions of regional international organizations, and other international documents of the last decades, among which, first of all, the UN Convention on the Elimination of All Forms of Discrimination against Women should be singled out. It is also worth emphasizing that our study of foreign experience in the prevention of crime in the family sphere proved that in Europe, due to the active actions of international human rights organizations, the concept of observing human rights has significantly expanded, in particular, the understanding of the responsibility of the state for the commission of a criminal offense by a person - an offender - has changed. The article examines the experience of crime prevention in the family sphere in the USA, Sweden, Germany, Israel, Greece, France, Great Britain. Further integration of Ukraine into the EU and the Euro-Atlantic security space will open up to our state many tools for preventing crime in the family. However, already now in Ukraine, based on foreign experience, it is possible to implement campaigns to raise awareness about domestic violence, provide legal support, provide a safe environment and eliminate harm from violence, conduct diploma programs on gender violence. Therefore, understanding the global experience of crime prevention in the family sphere will make it possible to speed up the successful solution of this problem through joint efforts of state and non-state institutions of the public.

Key words: *crime prevention, family sphere, offender, violence.*

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CRIMINAL LIABILITY FOR VIOLATION OF THE LAWS AND CUSTOMS OF WAR

Валентин Людвік. КРИМІНАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА ПОРУШЕННЯ ЗАКОНІВ ТА ЗВИЧАЇВ ВІЙНИ. У науковій статті досліджені проблемні питання статті 438 (Порушення законів та звичаїв війни) Кримінального кодексу України. Розкриті форми вчинення цього злочину, а саме: жорстоке поводження з військовополоненими або цивільним населенням, вигнання цивільного населення для примусових робіт, розграбування національних цінностей на окупованій території, застосування засобів ведення війни, заборонених міжнародним правом, інші порушення законів та звичаїв війни, що передбачені міжнародними договорами, згода на обов'язковість яких надана Верховною Радою України, віддання наказу про вчинення таких дій.

Ключові слова: *війна, закони війни, звичаї війни, цивільне населення, військовополонені, національні цінності.*

Relevance of the study. According to the official statistics of the Office of the Prosecutor General "On registered criminal offences and the results of their pre-trial investigation", 12 criminal offences were registered under Article 438 of the Criminal Code in 2019, 223 criminal offences in 2020, 172 criminal offences in

2021, 60387 criminal offences in 2022, and 22168 criminal offences in January-April 2023 [1]. That is, we see that since the full-scale invasion of Russia, the number of recorded criminal offences under Article 438 of the Criminal Code has increased hundreds of times.

Practitioners of pre-trial investigation and court have to interpret Article 438 of the Criminal Code, taking into account that this provision is of a blanket nature and to clarify its content it is necessary to refer to international legal acts ratified by Ukraine.

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Recent publications review. Problematic issues of criminal liability for violations of the laws and customs of war are usually studied within the framework of war crimes. War crimes have been studied in the works of scholars in the field of international and criminal law, in particular: V. Glushkov, V. Emelianov, V. Navrotskyi, A. Naumov, V. Panov, A. Piontkovskiy, A. Traynin, P. Fries, M. Khavroniuk and others. In the modern science of criminal law, the only dissertation study by V. Mironova "Criminal liability for violation of the laws and customs of war" (2008, DSUIA), as well as the monograph by the same author "Problems of criminal liability for violation of the laws and customs of war" [2], were devoted to the issues of criminal liability for violation of the laws and customs of war. After the aggression of the Russian Federation against Ukraine, Ukrainian scholars turned their attention to certain issues of criminal liability for violation of the laws and customs of war, in particular, A. Vozniuk, M. Pashkovsky, M. Khavroniuk, V. Myslyvyi, O. Shapovalov, K. Popov and others.

The article's objective is to analyze and elaborate on the provisions of Article 438 (Violation of the Laws and Customs of War) of the Criminal Code of Ukraine.

Discussion. Art. 438 of the Criminal Code of Ukraine "Violation of the laws and customs of war" contains 2 parts.

The generic **object of** this crime is public relations in the field of protection of peace, human security and international law and order. The immediate main object is social relations in the field of compliance with international law during warfare. In addition to the immediate main object, the analysed crime also includes an immediate additional object, which includes social relations in the field of protection of life and health, property, freedom, honor and dignity of a person, etc.

The subject of the crime committed in the form of "looting of national property in the occupied territory" is national property. The concept of national values is not defined at the legislative level. As a rule, national values are understood as objects, phenomena and their properties that satisfy the needs of an individual, society and the state for safe existence and progressive development [2, p. 18]. In the context of the analysed crime, national values as the object of the crime should be understood as property in respect of which the state of Ukraine has established a special legal regime and which satisfies the needs of an individual, society and the state for safe existence and progressive development.

In committing certain forms of this crime, the legislator has specified special victims, namely prisoners of war and civilians. Prisoners of war should be understood as persons captured by the enemy and belonging to one of the categories defined in Article 4 of the Geneva Convention relative to the Treatment of Prisoners of War [3].

The civilian population includes those persons who, at any time and under any circumstances, find themselves, in the event of a conflict or occupation, under the authority of a party to the conflict or of an occupying power of which they are not nationals (Article 4 of the Convention relative to the Protection of Civilian Persons in Time of War) [5]. At the same time, they did not and do not participate in the armed struggle.

The objective side of the crime may be committed in one of the following forms:

- 1) Ill-treatment of prisoners of war or civilians;
- 2) Expulsion of civilians for forced labour;
- 3) Looting of national property in the occupied territory;
- 4) Use of means of warfare prohibited by international law;
- 5) Other violations of the laws and customs of war, as provided for by international treaties ratified by the Verkhovna Rada of Ukraine;
- 6) Issuing an order to perform such actions.

In the Ukrainian language, the term "cruel" is interpreted as showing severity, harshness, mercilessness, ferocity; heartless, ruthless [6, p. 544]. The term "ill-treatment" is not defined in national legislation or in international documents ratified by the Verkhovna Rada of Ukraine. In our opinion, ill-treatment should be understood as such actions of perpetrators aimed at causing physical or mental suffering to prisoners of war or civilians. Such actions, in particular, include:

- Violence against life and person, including all forms of murder, mutilation, ill-treatment and torture;
- hostage-taking;
- outrages on human dignity, including insulting and humiliating treatment;
- conviction and punishment without a prior judgement rendered by a duly constituted

court that provides judicial guarantees recognized by civilized nations as necessary [4, 5], etc.

The expulsion of civilians for forced labour should be understood as the coercion of civilians to perform unpaid work or work that is not paid fairly, i.e. clearly not commensurate with the effort expended.

According to Art. 40 of the Convention relative to the Protection of Civilian Persons in Time of War, protected persons may be engaged in forced labour only to the same extent as nationals of the State party to the conflict on whose territory they are located [5].

Citizens of the adversary state can be involved only in such types of forced labour, the performance of which is necessary to provide food, shelter, clothing, transport and human health and which are not directly related to military operations [5].

The looting of national property in the occupied territory should be understood as the illegal seizure of property (by any means) in respect of which the state of Ukraine has established a special legal regime in the territory temporarily under the authority of the army of another state with its subsequent removal from the occupied territory for the purpose of turning it over to another state or other persons. Occupied territory should be understood as the territory that is actually under the authority of the enemy army (Article 42 of the IV Convention relative to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land) [7].

In cases where national property is destroyed or significantly damaged, the actions of the perpetrators should be qualified as other violations of the laws and customs of war. Thus, for example, Article 53 of the Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 prohibits: "any destruction by the Occupying Power of movable or immovable property, whether individually or collectively owned by private persons or by the State or by other public institutions or social or cooperative organizations, except as necessary for the conduct of military operations" [5].

Another form of the objective aspect of the crime in question is the use of means of warfare prohibited by international law. In particular, the following are prohibited:

- means of warfare that cannot be directed at specific military objectives; or whose effects cannot be limited [8];
- the use of asphyxiating, poisonous and other similar gases and bacteriological agents in warfare [9];
- specific types of conventional weapons that may be considered to cause excessive damage or have indiscriminate effects [10];
- to use weapons, projectiles, substances capable of causing excessive damage or excessive suffering, means of warfare that are intended to cause or may be expected to cause widespread, long-term and serious damage to the natural environment [11];
- to use laser weapons specially designed for use in hostilities solely or in particular to cause permanent blindness to the visual organs of a person who does not use optical devices, i.e. unprotected visual organs or visual organs that have vision correction devices [12];
- use mines, booby traps or other devices specifically designed to detonate when a munition is detected by publicly available mine detectors as a result of their magnetic or other non-contact effects during normal use in detection operations [13];
- use self-deactivating mines equipped with a non-retrieval element that is designed in such a way that the non-retrieval element is able to function after the mine has lost its ability to function [14];
- explosive bullets and bullets that easily turn around or flatten in the human body (bullets with a hard shell that does not completely cover the core or has incisions) [13];
- projectiles weighing less than 400 grams, explosive or equipped with an explosive or incendiary substance [14];
- torpedoes without a self-destruct device [14];
- automatic underwater contact mines, which are attached to minesweepers when they are no longer safe if they are dislodged from their anchors [14];
- incendiary weapons against the civilian population and civilian objects, as well as for the destruction of forests and other types of vegetation, except as specified in the Basic Requirements of Protocol III "On Prohibitions or Restrictions on the Use of Incendiary Weapons" to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects" [14], etc.

In our opinion, when prohibited methods of warfare are used, the actions of the

perpetrators should be qualified as other violations of the laws and customs of war.

Another form of committing the analysed crime is other violations of the laws and customs of war, which are provided for by international treaties ratified by the Verkhovna Rada of Ukraine. Other violations of the laws and customs of war include such violations of international treaties that are not covered by other forms of this crime enshrined in the disposition of Article 438 of the Criminal Code of Ukraine. Other violations include, in particular: looting; treacherously kill or wound persons belonging to the enemy nation or army; to kill or wound an enemy who, having laid down his arms or no longer having any means of defense, has unconditionally surrendered; declare that there will be no mercy; improperly use the parliamentarian's flag, national flag or military insignia and uniforms of the enemy, as well as distinctive signs under the Geneva Convention; to declare the rights and claims of citizens of the opposing party cancelled, suspended or inadmissible for consideration in court.

The belligerent is also prohibited from forcing citizens of the opposing party to participate in hostilities directed against their own state, even if they were in the service of such belligerent before the outbreak of war.

Indiscriminate attacks (except in cases of use of prohibited means of warfare during such attacks), (Article 51 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977) [8]. Indiscriminate attacks include:

- a) attacks not directed at specific military objectives;
- b) attacks that use methods or means of warfare that cannot be directed at specific military objectives;
- c) attacks which employ methods or means of warfare whose effects cannot be limited as required under this Protocol; and which, in each such case, strike military objectives and civilians or civilian objects without distinction;
- d) an attack by bombardment, by any method or means, which treats as a single military objective a number of clearly connected and distinguishable military objectives located in a town, village or other area where civilians or civilian objects are concentrated;
- e) an attack which may be expected to cause incidental loss of civilian life, injury to civilians and damage to civilian objects, or both, which would be excessive in relation to the specific and immediate military advantage to be obtained [8].

A general list of international treaties of Ukraine in the field of international humanitarian law that enshrine the laws and customs of war was provided by Mykola Khavroniuk in his article "Criminal liability for violation of the laws and customs of war: twenty questions and answers" [15].

The final form of committing this crime is giving an order to perform the actions described above. An order should be understood as a requirement of a superior to his/her subordinates to perform or not to perform certain actions. Thus, in wartime, the issuance of an order should be understood as a military official (by any means) communicating to subordinate personnel a requirement to perform or not to perform certain actions. Such orders include, in particular, the order not to leave anyone alive [8], the order to shoot prisoners, not to provide assistance to the wounded, to shoot civilians, etc.

An obligatory element of the objective side of this crime is the time of its commission, namely during the war. War should be understood as all cases of declared war and cases of any other armed conflict between states, even if one of them does not recognize the state of war (Article 2 of the Convention relative to the Protection of Civilian Persons in Time of War) [5].

In the verdict of the International Military Tribunal over the main war criminals of European countries, the Nuremberg Tribunal defined war as "the implementation of politics by means of violence" [16, p. 35].

The above-mentioned "Instruction on the Procedure for the Implementation of International Humanitarian Law in the Armed Forces of Ukraine", approved by the Order of the Ministry of Defense of Ukraine of 23.03.2017 No. 164, states: "The norms of international humanitarian law come into force with the beginning of an armed conflict or an operation to maintain peace and security. The scope of obligations of a party to an international armed conflict (war) is determined by both customary law and treaty-based international humanitarian law ratified by each party.

During a non-international armed conflict, the scope of IHL obligations for the parties to the conflict (the state and anti-government forces) is determined by common Article 3 of the Geneva Conventions of 1949 and the Second Additional Protocol of 1977, other conventions

ratified by the state, as well as customary international humanitarian law.

During international armed conflicts, the application of the rules ceases with the general cessation of hostilities, and in the occupied territory – with the end of the occupation, except for the application to persons whose release, repatriation or placement will be carried out after these periods. These persons shall be protected by the relevant provisions of the Geneva Convention and Additional Protocol I until their release, repatriation or placement" [14].

By its construction, the offence under Article 438 of the Criminal Code of Ukraine is formal, i.e. it is considered completed from the moment of committing at least one of the forms of the objective side specified in the disposition of the article.

Subject of the crime. According to Article 18 of the Criminal Code of Ukraine, the subject of a criminal offence is a natural, sane person who has committed a criminal offence at the age from which criminal liability may arise under the Criminal Code [17]. The analysis of Article 22 of the Criminal Code of Ukraine allows us to assert that criminal liability for committing a crime under Article 438 of the Criminal Code of Ukraine begins at the age of 16. When committing this offence in the form of "giving an order...", the subject of the offence will be an official who gives orders.

Subjective side of the crime. This crime can be committed only intentionally and only in the form of direct intent, namely, the perpetrator is aware of the socially dangerous nature of his/her act, is aware that he/she is ill-treating prisoners of war or civilians, expels civilians for forced labour, loots national property in the occupied territory, uses means of warfare prohibited by international law, commits other violations of the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine or orders the above actions and wishes to do so.

Qualifying features. The second part of Art. 438 of the Criminal Code of Ukraine contains an aggravating circumstance, namely the acts provided for in Part 1 of Art. 438 of the CCU, if they are combined with intentional murder. The concept of murder is defined in Part 1 of Article 115 of the Criminal Code of Ukraine, according to which murder is the intentional unlawful infliction of death on another person [17]. At the same time, there is no need to additionally qualify the perpetrator's actions under Article 115 of the CC of Ukraine.

Conclusions. On 20 May 2021, the Verkhovna Rada of Ukraine adopted the law "On Amendments to Certain Legislative Acts of Ukraine on the Implementation of International Criminal and Humanitarian Law", which is still pending the President's signature [18]. According to this law, the Criminal Code of Ukraine is to be supplemented with a number of articles that provide for criminal liability for violations of the laws and customs of war, in particular:

Article 438. War crimes against a person.

Article 438¹. War crimes against property.

Article 438². War crimes involving the use of prohibited methods of warfare.

Article 438³. War crimes involving the use of prohibited means of warfare.

Article 438⁴. War crimes against humanitarian operations and the use of symbols.

Article 438⁵. War crimes against cultural property protected by international humanitarian law.

In our opinion, the signing of this law by the President will greatly facilitate the prosecution of those responsible for violating the laws and customs of war.

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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ABSTRACT

The article examines the problematic issues of Article 438 (Violation of the Laws and Customs of War) of the Criminal Code of Ukraine. The author reveals the forms of this crime, namely: cruel treatment of prisoners of war or civilians, expulsion of civilians for forced labour, looting of national property in the occupied territory, use of means of warfare prohibited by international law, other violations of the laws and customs of war provided for by international treaties ratified by the Verkhovna Rada of Ukraine, and ordering such actions.

Keywords: *war, laws of war, customs of war, civilians, prisoners of war, national values.*