

МІЖНАРОДНЕ ПРАВО

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**PROSECUTION OF WAR CRIMES IN UKRAINE:
LEGAL FRAMEWORK AND INTERNATIONAL COOPERATION**

Since February 19, 2014, an ongoing Russia's aggression against Ukraine has unfolded, marked by the Russian Federation's subsequent temporary occupation of parts of Ukrainian territory. This warfare, initially addressed by the UN General Assembly's Resolution 68/262 in March 2014, reiterated the international community's stance on Crimea's status and Ukraine's territorial integrity. Despite these declarations, Russia's escalation of aggression in February 2022, characterized by missile strikes and severe violations of Ukraine's borders, has intensified the warfare. The imposition of martial law in Ukraine on February 24, 2022, under Presidential Decree No. 64/2022, has been a significant response to the invasion.

On March 2, 2024, the UN General Assembly overwhelmingly adopted Resolution ES-11/1 condemning Russia's invasion and demanding an immediate withdrawal, underscoring the warfare's gravity and the breach of international law. Despite the acknowledgment of Russia's aggression by international bodies, such as the Parliamentary Assembly of the Council of Europe and the International Court of Justice, the war has persisted with daily violations of international humanitarian law by Russian forces.

This article explores the application and interpretation of Article 438 of the Criminal Code of Ukraine, which addresses the violation of laws and customs of war. It examines judicial practices in Ukraine concerning this article and identifies issues requiring further legislative refinement or international agreements. A thorough review of Article 438 reveals seven key forms of war crime it encompasses, including cruel treatment of civilians, pillage, and use of prohibited warfare methods. The article analyses Ukrainian judicial decisions related to these crimes, with a focus on recent court cases illustrating the prosecution of war crimes under Article 438.

Results indicate a significant number of war crimes investigations, including 82,763 cases of aggression and war crimes, with thousands of civilian casualties reported. Notable cases from Kherson, Odesa, and Chernihiv regions highlight severe violations by Russian forces, including torture and extrajudicial killings. The article concludes by emphasizing the importance of adhering to international humanitarian law and the role of international cooperation in prosecuting war crimes. It advocates for continued support from global entities in maintaining legal standards and ensuring accountability, crucial for the future global order and post-war justice.

Key words: *War crimes, Russian aggression, Ukraine, International humanitarian law, Article 438 Criminal Code of Ukraine, High treason, International cooperation in criminal cases.*



Дейнеко Д. О. Розслідування воєнних злочинів в Україні: правова основа та міжнародне співробітництво

З 19 лютого 2014 року триває збройна агресія Російської Федерації проти України, що супроводжується тимчасовою окупацією частини української території. Цей акт агресії вперше був згаданий у Резолюції Генеральної Асамблеї ООН №68/262 у березні 2014 року, де міжнародна спільнота підтвердила статус Криму як частини України та наголосила на підтримці територіальної цілісності держави. Незважаючи на численні заяви МО, ескалація російської агресії в лютому 2022 року, що проявилася у масованих ракетних ударах і грубих порушеннях територіальної цілісності України, суттєво посилила стан збройної агресії. Відповіддю на вторгнення РФ стало запровадження воєнного стану в Україні 24 лютого 2022 року згідно Указу Президента України №64/2022.

2 березня 2024 року Генеральна Асамблея ООН переважною більшістю ухвалила Резолюцію ES-11/1, яка засуджує вторгнення Росії та вимагає негайного виведення її військ, наголошуючи на фундаментальних порушеннях міжнародного права. Попри визнання агресії Росії міжнародними органами, такими як Парламентська асамблея Ради Європи та Міжнародний суд ООН, війна триває з щоденними порушеннями норм міжнародного гуманітарного права з боку російських збройних сил та комбатантів не з числа військових. У статті досліджується застосування та тлумачення статті 438 Кримінального кодексу України, що регламентує відповідальність за порушення законів і звичаїв війни. Розглядаються судові практика та проблемні питання, які потребують подальшого законодавчого вдосконалення або/та укладення міжнародних угод. Ґрунтовний аналіз статті 438 виявляє сім основних форм воєнних злочинів, включаючи жорстоке поводження з цивільним населенням, мародерство та використання заборонених методів ведення війни. У статті проаналізовано судові рішення України, що стосуються цих злочинів, зокрема нещодавні провадження, які ілюструють практику переслідування воєнних злочинців відповідно до статті 438 ККУ.

Результати дослідження показали таке. Існує значна кількість проваджень щодо воєнних злочинів, зокрема 82 763 випадки агресії та порушень законів і звичаїв війни, а також тисячі загиблих серед цивільного населення. Показові справи з Херсонської, Одеської та Чернігівської областей свідчать про тяжкі злочини з боку російських комбатантів, включаючи тортури та позасудові страти. У підсумку автор наголошує на важливості дотримання норм міжнародного гуманітарного права та ролі міжнародного співробітництва в розслідуванні воєнних злочинів. Підкреслюється необхідність подальшої підтримки з боку світової спільноти для забезпечення верховенства права та відновлення справедливості в поствоєнний період.

Ключові слова: воєнні злочини, російська агресія, Україна, міжнародне гуманітарне право, стаття 438 Кримінального кодексу України, державна зрада, міжнародне співробітництво у кримінальних справах.

Introduction. From February 19, 2014 until now, an international aggression has been going on, caused by the armed aggression of the Russian Federation against Ukraine. As a result of it a part of Ukraine was temporarily occupied by the Russian armed forces. In the General Assembly Resolution 68/262 dated 27 March 2014 with a recorded vote of 100 in favour to 11 against, with 58 abstentions, the Assembly adopted a resolution titled “Territorial integrity of Ukraine”, calling on States, international organizations and specialized agencies not to recognize any change in the status of Crimea or the Black Sea port city of Sevastopol, and to refrain from actions or dealings that might be interpreted as such [1].



Exactly 8 years later, in February 2022, after the public announcement of armed aggression against Ukraine, the Russian Federation mercilessly launched missile strikes on civilian infrastructure objects in Ukraine, and the Russian armed forces, killing on their way both the military and the civilian population of Ukraine, violated the integrity of the state border of Ukraine and began acts murders, looting of national values in the occupied territory and forcing the population to collaborate under the pressure of force or murder. Martial law was introduced in Ukraine on February 24, 2022 by the Decree of the President of Ukraine No. 64/2022 and with extensions for 90 days remains in effect until this day [2].

On 2 March, 2024 the UN General Assembly adopted – by an overwhelming majority of 141 against 5 – the Resolution ES-11/1 rejecting the Russian Federation's brutal invasion of Ukraine and demanding that Russia immediately withdraw its forces and abide by international law [3]. The fact of a large-scale armed invasion of the territory of Ukraine on February 24, 2022 was not hidden by the Russian authorities, and it was also established by the decisions of international organizations, in particular in paragraphs 1 and 3 of Conclusion 300 (2022) of the Parliamentary Assembly of the Council of Europe "Consequences of the aggression of the Russian Federation against Ukraine", paragraph 17, 18 of the Order of the International Court of the United Nations dated 16.03.2022 on the request to take temporary measures in the case "Accusations of genocide in accordance with the Convention on the Prevention and Punishment of the Crime of Genocide" However, there was not a day that Russia did not violate international humanitarian law.

Due to massive resistance of the population of Ukraine, Russia failed to reach its strategic objectives of occupying entire Ukraine, destroying Ukraine's statehood and erasing Ukrainian identity. At the time of writing this part of the article, the armed forces of Ukraine, volunteers and foreign partners of Ukraine have been heroically fighting for the right to life for 883 days against the gang armed formations that are still illegally present on the territory of Ukraine.

Purpose and methodology. This article is aimed at foreign readers, researchers and seeks to investigate the following issues:

- 1) qualification for crimes provided for in Article 438 of the Criminal Code of Ukraine (Violation of the laws and customs of war);
- 2) analyse the judicial practice of Ukrainian courts in the application of Article 438 of the Criminal Code of Ukraine (Violation of the laws and customs of war);
- 3) identify problematic issues and needs for additional regulation of Ukrainian legislation or joining a certain agreement.

An extensive review and critical analysis of Article 438 of the Criminal Code of Ukraine was undertaken, along with an examination of relevant Ukrainian judicial decisions and international laws concerning war crimes. This involved a detailed interpretation of legal texts, examination of case law precedents, and consideration of authoritative legal commentaries. Historical records, government documents, and archival materials pertinent to the war and judicial proceedings were accessed and analyzed.

Results. Ukrainian law enforcement agencies launched an investigation into 82,763 war crimes and crimes of aggression committed since 24 February. They include the killing of 10,136 (including 470 children) and the wounding of 13,756 civilians (including 949 children). These figures do not take into account the temporarily occupied areas [4]. Since the occupation, most war crimes related to looting and damage to property, indiscriminate shelling of civilian objects, deprivation of liberty of civilians, murders and infliction of bodily harm have been committed in the territory of Kherson region. According to the Kherson Regional Prosecutor's Office, in 2023, 12,948 criminal proceedings were registered under Art. 438 of the Criminal Code of Ukraine "Violation of laws and customs of war" committed on the territory of the Kherson region. 21 indictments were sent to the court, three of them entered into force [5].

Examining how investigations of crimes of violation of the customs of war are conducted, how these actions are qualified in the legislation of Ukraine and how they are consistent with international treaties, namely the Geneva Conventions of August 12, 1949.



According to the general definition, war crimes are serious violations of international humanitarian law (violations of the laws and customs of war), for the commission of which criminal liability of individuals is provided at the national and international levels. References to serious violations of prohibitions are contained in both treaty and customary international humanitarian law.

The laws and customs of war are applied from the moment of the occurrence of an armed conflict or the partial or total occupation of a state, even if this occupation does not encounter any armed resistance (Articles 2(1), 2(2), 3(1)) common to the Geneva Conventions on the Protection of War Victims dated August 12, 1949, which were ratified by Ukraine with reservations by the Decree of the Ukrainian SSR PVR dated July 3, 1954 and with subsequent withdrawal of reservations by Law of Ukraine No. 3413-IV dated February 8, 2006).

The ICC, referring to general article 2 of the Geneva Conventions of 1949 and the relevant judicial practice of the ICTY, considers "an armed conflict to be international in nature if it occurs between two or more states; it extends to the partial or total occupation of the territory of another state, regardless of whether this occupation meets with armed resistance or not."

The ICC adheres to the "overall control" test developed by the ICTY [6], according to which a conflict is international when a foreign state "plays a role in organizing, coordinating or planning the military operations of a military group, in addition to financing, training and equipping or providing operational support to that groups". This allowed the ICC to conclude that "an international armed conflict exists in the case of armed actions between states through their respective armed forces or through other actors acting on behalf of the state."

Article 438 of the Criminal Code of Ukraine provides for liability for violation of rules of the warfare [7]. According to Art. 438 of the Criminal Code of Ukraine both combatants and non-combatants can be held accountable. However, the prosecution of non-combatants is most likely the exception to the rule, as most crimes such as violations of the laws and customs of war are committed by combatants.

There are seven forms of qualification of the crime «Violation of rules of the warfare» provided for in Art. 438 of the Criminal Code of Ukraine:

1. Cruel treatment of prisoners of war or civilians;
2. Cruel treatment of civilians;
3. Deportation of civilian population to engage them in forced labour;
4. Pillage of national treasures on occupied territories;
5. Use of methods of the warfare prohibited by international instruments;
6. Any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine (Parliament of Ukraine);
7. Issuing an order to commit any such actions.

The features of the crime described above in combination with premeditated murder are punishable by imprisonment for a term of ten to fifteen years or life imprisonment. Looking ahead, we should note that the highest measure of punishment is quite often applied in the judgments of the Ukrainian courts of first instance.

On August 21, 2024, the Verkhovna Rada of Ukraine ratified the Rome Statute of the International Criminal Court. Ukraine became the 125th State Party to the Statute. The corresponding draft law No. 0285 was supported by 281 members of parliament [8]. In the meantime, some scholars considered not appropriate the use of the Rome statute provisions as an additional regulatory basis for qualification under Art. 438 of the Criminal Code. This may contradict the very provision of Part 1 of Art. 438 of the Criminal Code, which provides for the violation of those laws and customs of war, which are provided for by treaties, the consent of which was given to the Parliament to be binding [9].

Identification of problematic issues.

It is worth noting that the opinion about the impossibility of applying Article 438 of the Criminal Code of Ukraine to the actions of the Russian armed forces in the period from February 2014 to February 2022 is erroneous, due to the fact that martial law was not declared on the entire



territory of Ukraine through all of this period. The fact itself of aggression against the state by armed formations of another state or an international organization is decisive for the application of this rule [10]. According to the decree of the President of Ukraine "On the introduction of martial law in Ukraine" dated February 24, 2022 No. 64/2022, martial law has been introduced in Ukraine, which is currently ongoing.

According to Part 1 of Art. 4 of the Geneva Convention on the Protection of the Civilian Population in Time of War dated August 12, 1949, the persons protected by this Convention are those 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 an occupying state of which they are not citizens.

In accordance with Part 1, Part 2, Part 3 of Art. 6 of the said Convention I, it must be applied from the very beginning of any conflict or occupation specified in Article 2 of this Convention. In the territory of the parties to the conflict, the application of the Convention ceases after the general cessation of hostilities. In the occupied territory, the application of this Convention ceases one year after the general cessation of hostilities.

According to Part 1 of Art. 27 of Convention I, persons under protection have the right under any circumstances to personal respect, respect for their honor. They should always be treated humanely and protected, in particular, from any act of violence, intimidation, insults and curiosity of the crowd.

In addition, according to Art. 29 of the Convention and the party to the conflict under whose power are the persons under protection is responsible for the behavior of its representatives with these persons, and this does not remove the personal responsibility of such representatives.

According to Art. 31-32 of Convention I is prohibited, in particular: no coercion of a physical or moral order may be applied to persons under protection, in particular for the purpose of obtaining any information from them or from third parties; the application of any measures that may cause physical suffering or lead to the destruction of protected persons under their authority. This prohibition extends not only to murder, torture, corporal punishment, mutilation, and medical or scientific experiments not caused by the need to treat a protected person, but also to any other brutal treatment by both civilian and military authorities.

Another important aspect – Article 438 of the Criminal Code does not contain a direct reference to the war crime of torture. However, this crime is covered by "violation of the laws and customs of war provided for by international treaties, the consent of which has been given by the Verkhovna Rada of Ukraine."

Additionally, Article 438 of the Criminal Code of Ukraine cannot be applied to criminal offenses committed by military personnel against the population of their country (violence, illegal destruction of property or its seizure under the pretext of military necessity). Such actions qualify under Art. 433 of the Criminal Code of Ukraine.

Therefore, in the absence of such a contextual aspect, not every rape, murder or other crime should be qualified under Art. 438 of the Criminal Code of Ukraine. In such a situation, prosecution of a person for general criminal offenses (Articles 115 (intentional murder), 152 (rape) of the Criminal Code of Ukraine) is not excluded, provided that there is no relevant context, namely, a connection with the conduct of military operations, in the absence of signs of terrorism population, impact on the population, use of weapons, violence as a form of overcoming resistance.

Among the available court cases, we chose for analysis 3 recent judgements (all decisions rendered in 2024) with various signs of violation of the laws and customs of war:

1) In the verdict of the court of first instance of the Kherson region dated 29 April 2024 in proceedings No. 1-kp/650/69/24 [11] regarding the facts of repeated rape over several weeks by a staff officer of the Russian Federal Security Service against her will of a citizen of Ukraine in the village of Velyka Oleksandrivka of the Kherson region, which was occupied by the armed forces of the Russian Federation until de-occupation in October 2023. These actions took place regardless of the victim's female cycle, each time under the pressure of using weapons. The court qualified his actions under the first part of Article 438 of the Criminal Code of Ukraine (violation of the laws



and customs of war) as another violation of the laws and customs of war provided for by international treaties, the binding consent of which was given by the Verkhovna Rada of Ukraine, which consisted of rape, the use of physical and moral coercion, including intimidation through threats of physical massacre of the civilian population, i.e. in violation of the second part of Article 27 of the Convention on the Protection of the Civilian Population in Time of War, signed in Geneva on August 12, 1949, the second part of Article 75, the first part of Article 76 Additional Protocol to the Geneva Conventions of August 12, 1949.

2) On June 18, 2024, the Court of First Instance of the Odesa Oblast, in proceedings No. 1-kp/496/341/24, considered the composition of the crime committed by the commander of the Vyatich special forces unit of the Federal Service of the National Guard of the Russian Federation. This criminal gave orders for illegal detention (illegal imprisonment), use of physical violence and torture against civilians (*e.g. he put a plastic bag on the victim's head and deprived him of air in order to obtain the information he needed about the armed forces of Ukraine.*), which is a serious violation of Art. 147 of the Convention on the Protection of the Civilian Population in Time of War dated August 12, 1949, ratified by the Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR "On the Ratification of the Geneva Conventions of August 12, 1949 on the Protection of War Victims" dated July 3, 1954 (hereinafter the Convention) and part 2 of Art. 51, Part 2 of Art. 75 of the Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977, regarding the prohibition of attacks on civilians. The court found the person guilty of the criminal offense provided for in Part 1 of Article 438 of the Criminal Code of Ukraine and sentenced him to 9 years of imprisonment [12].

3) On June 13, 2024, the court of first instance of the city of Chernihiv considered the composition of the crime committed by a Russian citizen by a serviceman of the 55th separate motorized rifle brigade in proceedings No. 1-kp/750/94/24. Temporarily occupying one of the villages of the Chernihiv region, the servicemen of the Russian Federation, acting in a conspiracy, deprived them of their freedom, tied up their bodies, and publicly tortured both Ukrainian servicemen and the civilian population, among whom were minors. Some of the civilian victims were shot after being tortured naked and blindfolded, proving particularly cruel. This citizen of Russia was found guilty of committing a criminal offense provided for in Part 2 of Art. 28, part 2 of Art. 438 of the Criminal Code of Ukraine and I was sentenced to life imprisonment [13].

Collaborators and persons who voluntarily assisted the armed forces of occupants in committing crimes are also being searched for and sentenced, inter alia:

1) *High treason.* If a citizen of Ukraine wilfully joins the enemy under martial law and provides assistance in subversive activities against Ukraine such activities may be qualified under Article 111 (para.2) of the Criminal Code of Ukraine as High treason, which shall be punishable by imprisonment for a term of fifteen years to life imprisonment with or without forfeiture of property.

2) *Collaborative activity with the enemy.* Voluntary occupation by a citizen of Ukraine of a position related to the performance of organizational and administrative work in illegal authorities shall be punishable by imprisonment for a term of five to ten years. (para.5 Art 111-1 of the Criminal Code of Ukraine);

3) *Aid to an aggressor state.* If a citizen of Ukraine, a foreigner or a stateless person (with the exception of citizens of the aggressor state) commits actions to help the occupying administration of the aggressor state, such actions can be qualified as Aiding the aggressor state and are punishable by imprisonment for a term of ten to twelve years. (para.1 Art 111-2 of the Criminal Code of Ukraine).

Ukraine is a truly law-based legal state even during martial law. Despite the high state of moral stress and the awareness of thousands of executions of civilians by Russian soldiers, the courts are governed by the law. According to Part 3 of Art. 373 of the Criminal Procedural Code of Ukraine, a guilty verdict cannot be based on assumptions and is adopted only on the condition that a person's guilt in committing a criminal offense is proven during the trial.

The questions that governments around the globe should ask, and that their populations should insist on hearing the answers to, are about what vision they have for the future of the world



order, what they are doing to secure it, and what cost they are willing to bear to try to achieve it [14]. The cooperation between Ukraine and international organizations plays a crucial role in prosecuting war criminals and maintaining law and order. This cooperation is essential for ensuring accountability, deterring future violations, and upholding the rule of law in post-warfare time.

Conclusions

1) The provision of Article 438 of the Criminal Code of Ukraine (violation of the laws and customs of war) provides for criminal liability also for giving an order to commit such actions. That is, the article applies both to persons who are direct executors and to those who give orders to commit crimes.

2) When determining the qualifications, it is reasonable to proceed precisely from the state of armed aggression of the Russian Federation, that is, a crime committed by a foreigner on the territory of Ukraine against a citizen of Ukraine during their use of armed force or the threat of using force as part of the armed forces of the Russian Federation. For example, if a citizen of the same Russia during peacetime took possession of property that did not belong to him using violence, then the qualification could well be under Article 187 of the Criminal Code (robbery). However, the full-scale armed aggression of the Russian Federation against Ukraine has been going on for the second year, to put it mildly, bloody and covered in blood. The commission of such a crime during the attempted occupation of the Russian Federation part of the territory of Ukraine is absolutely legally qualified under Art. 438 of the Criminal Code of Ukraine.

3) If the violation of the customs of war was combined with the intentional killing of a person by the occupier, the maximum punishment is life imprisonment according to para 2 of Article 438 of the CCU.

4) Article 438 of the Criminal Code of Ukraine doesn't apply to crimes by military personnel against their own country's population, such as violence or property destruction under the guise of military necessity. These acts are covered under Article 433 of the Criminal Code of Ukraine.

5) The very structure of war crimes, as understood by the ICC, differs from the structure of Ukrainian legislation. The ICC does not operate with the concepts of subjective (subject and subjective side) and objective (object and objective side) features of the crime. Instead, a framework is used that includes: a material element, a mental element and a contextual element (contextual circumstances).

6) Most of cases regarding violation of laws and customs of war where the guilty party is soldier of the Armed Forces of the Russian Federation are considered in the order of special criminal proceedings in the absence of the accused (*in absentia*).

7) Referral of judges to norms of international humanitarian law deserves special attention. In the analyzed decisions on the qualification of violations of the laws and customs of war, the courts do not simply quote the norms of, for example, the Convention on the Protection of the Civilian Population in Time of War, but rather indicate. It should be added that when considering currently significant cases related to the torture and killing of civilians, the courts use the practice of the European Court of Human Rights, and most importantly, criminal proceedings are conducted on the basis of adversarial proceedings, which provides for the prosecution and the defense to defend their legal positions independently (*Article 22 of the Code of Criminal Procedure Code of Ukraine*); An indictment cannot be based on assumptions and is adopted only if the person's guilt in committing a criminal offense is proven during the trial (*Article 373 of the Criminal Procedure Code of Ukraine*).

8) Collaborators and those who assist occupying forces are being prosecuted for high treason, which includes joining the enemy and aiding against Ukraine during martial law, punishable by 15 years to life imprisonment (Article 111(2)). Collaboration involves taking positions in illegal authorities, leading to 5 to 10 years of imprisonment (Article 111-1(5)). Aiding an aggressor state by helping the occupying administration can result in 10 to 12 years of imprisonment (Article 111-2(1)).

9) By collaborating with IOs like the International Criminal Court and the United Nations, Ukraine can leverage global expertise, resources, and legal frameworks to address crimes that



transcend national borders. The integration of international legal mechanisms with domestic efforts not only strengthens the judicial process but also affirms the commitment to justice and human rights on a global scale.

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