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Some issues of judicial practice in proceedings on violations of the laws and customs of war

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Abstract

In the second year of the full-scale armed aggression of the Russian Federation against Ukraine, the question of bringing the perpetrators to criminal responsibility for committing war crimes is urgent. At the same time, the criminal law qualification of actions within the scope of the provisions of Article 438 of the Criminal Code of Ukraine stays debatable. The purpose of this study was to investigate the content of some verdicts in proceedings on violations of the laws and customs of war, which were passed after February 24, 2022 in Ukraine, to identify the problems of law enforcement and the performance of procedural requirements regarding their content, since they acquired not only social significance and resonance, but also international ones, and the requirements for their quality can be defined as increased. The study used various methods of scientific research, the most effective and active among which were as follows: systemic-structural, comparative, analysis, and terminological. According to the results of processing the verdicts of the courts of first instance in the proceedings under Article 438 of the Criminal Code of Ukraine, some issues were identified regarding the procedural order of special court proceedings. A causal connection between the violation of the laws and customs of war and the particular situation of a military conflict was established. The circumstances subject to proof for the commission of the specified criminal offence were substantiated and investigated, and the need to specify particular circumstances was argued. Emphasis was placed on the need to consider the particular war situation, the difference and the nature of the connection between these violations and the crime of aggression when proving a violation of the laws and customs of war, with the assumption of the possibility

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of their influence on political, legal, and other processes, even after its end. The practical significance of this study lies in the need to reflect the results of the application of legal norms related to the implementation of *in absentia* proceedings in verdicts, primarily regarding the procedure for informing the suspect, the accused about criminal proceedings, ensuring the right to defence and the effectiveness of its implementation

Keywords:

proving; trial; armed conflict; sentence; *in absentia*; civilian; serviceperson

Introduction

The full-scale invasion of the Russian Federation (RF) into the territory of Ukraine presented the state with new tasks – ensuring the proper legal response to those social relations that arose during the Russian-Ukrainian war. For the second year, crimes are committed under martial law. In the spring of 2022, the problem of practical qualifications for violating the laws and customs of war arose.

Violation of the laws and customs of war in the context of the Criminal Code of Ukraine (the CCU) is, firstly, the cruel treatment of prisoners of war or the civilian population, the deportation of the civilian population for forced labour. Secondly, the looting of national values in the occupied territory. Thirdly, the use of means of warfare prohibited by international law, other violations of the laws and customs of war prescribed by international treaties, the binding consent of which was given by the Verkhovna Rada of Ukraine. Fourthly, issuing an order to commit such actions (Article 438)¹.

Thus, as of March 22, 2023, during the period of armed aggression of the Russian Federation, the Prosecutor General's Office documented 75,552 crimes of aggression and war crimes, while of this number, 73,249 crimes were registered under Article 438 of the CCU² as a violation of the laws and customs of war (More than 71,000..., 2023). According to statistical data, as of February 20, 2023, the courts received 75 criminal proceedings regarding charges under Article 438 of the CCU, 19 of them were sentenced (Adherence to the standards..., 2023).

The purpose of this study was to analyse the court verdicts under Article 438 of the CCU³ (violation of the laws and customs of war) issued after February 24, 2022, in Ukraine, to identify the problems of law enforcement and performance of procedural requirements regarding the content of said verdicts.

Monitoring, analysis, and generalization of judicial practice is important for various spheres of law enforcement, scientific-theoretical, scientific-practical research. This allows investigating the trends in court decisions, interpretation of legislation by the court, features of the application of various legal norms.

In the situation of international armed conflict in Ukraine, court decisions, and above all verdicts in cases of violations of the laws and customs of war, are a separate, special component of judicial practice. Apart from the specificity of the content, they are also perceived by society as the result of the state's response to the commission of such crimes.

In the conditions of a military conflict, it is fair and expected to request a speedy trial and punishment of persons who have committed violations of the laws and customs of war. At the same time, it is crucial to balance between an adequate response to such a request and compliance with the law, specifically regarding requirements for court decisions.

The issue of generalization and formation of judicial practice was covered thanks to the monographs of Ukrainian scientists. O. Baranov (2016) investigated the general principles of solving issues of the application of the criminal law, considering judicial practice. I. Golovko (2019) and V. Sheludko (2017) investigated judicial practice in the criminal process of Ukraine in terms of its generalization to study its use in theoretical and legal frameworks.

V. Mykhailenko (2017) conducted a basic study on the application of transitional justice in Ukraine, considering international law on responsibility for war crimes. V. Pylypenko (2020) investigated problematic issues in the qualification of war crimes as one of the most serious, socially dangerous illegal acts that violate the fundamental norms of international law, as well as legal mechanisms for holding the individuals who committed war crimes responsible. I. Hloviuk & H. Teteriatnyk (2020) investigated the contextual circumstances in war crimes proceedings (the subject of *sui generis* proof) and their praxeological significance in the investigation. M. Bondarenko (2022) from the experience of judicial practice considered the issue of criminal-legal qualification of actions when applying the provisions of Article 438 of the CCU⁴, namely the coverage of contextual and special elements in the composition of war crimes.

The authors note that the scientific originality of this study is that the synergy of national and international

¹Criminal Code of Ukraine No. 2341-III. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?find=1&text=438#w1_1.

²Ibidem, 2001.

³Ibidem, 2001.

⁴Ibidem, 2001.

law in the court verdicts of Ukraine is the main factor in the development of law, as well as the improvement of the mechanism of bringing criminals to justice for committing war crimes at various levels.

Literature Review

At the same time, there are many questions, specifically, related to the signs of objects violating the laws and customs of war, in the conditions of Russian aggression against Ukraine. A. Vozniuk & I. Zhuk (2022) consider the direct objects, subjects, and categories of victims of crimes for violating the laws and customs of war, namely using the general provisions “jus in bello”. D. Potapova & A. Vasylenko (2022) tried to analyse the subjects of a war crime and the procedure for bringing them to criminal responsibility for committing a war crime. I. Kolotukha (2023) investigated the specifics of the criminal responsibility of commanders during the war. Analysing the judicial practice of bringing to criminal responsibility and sentencing General Yamashita for the crimes of his subordinates during the Second World War and the Muchic case during the war in Yugoslavia, Kolotukha draws his conclusions and proposals (which, in turn, the authors of the present paper support) regarding gaps in national legislation that must be corrected using international legal practices.

Fundamental scientific research on the problematic aspects of criminal responsibility for violations of the laws and customs of war was conducted by Ukrainian scientists, including V. Bazov (2008) and V. Myronova (2008). S. Kuchevska (2009) studied the problems of harmonizing the legislation of Ukraine on criminal responsibility and the Statute of the International Criminal Court in the part of provisions on war crimes. O. Batiuk & S. Dmytriv (2021) carried out a scientific investigation and proposed a single concept for the investigation of war crimes committed in the context of an armed conflict and the criminal prosecution of guilty persons. O. Atamanov (2021) investigated the stages of acquiring the status of a suspect by a person who lives and/or stays in the occupied territories of Ukraine or outside its borders, respectively, whose location has not been established.

M. Khavroniuk (2022) emphasizes that starting in 2014, at the legislative level, it was necessary to finally abandon the humiliating imitation of the Soviet and Russian legislative practices. This primarily concerned the rewriting of Articles 353, 354, 355-358 of the Criminal Code of the RF into current Articles 436, 437-442 of the CCU. O. Kuzmenko & V. Chorna (2022), considering the

legislation of Ukraine regarding responsibility for crimes against humanity and war crimes, outline the legislation of other countries on this issue, specifically: Moldova, Denmark, Spain, USA, Croatia, France, Germany, Poland, Georgia, Austria.

A critical issue is still the introduction of amendments to some legislative acts of Ukraine regarding the implementation of norms of international criminal and humanitarian law, two draft laws dated 20.05.2021 and 15.04.2022 have been registered. These changes would help judicial practice in applying the law. Synergy of criminologists and internationalists is key when analysing and researching this issue.

Applying the rules traditional for the criminal law of Ukraine on overcoming the so-called competition of criminal law norms, such competition should not take place if the committed act is fully covered by Article 438 of the CCU¹. This specifically refers to the rule of overcoming the competition of general and special norms (par. 3 Item 12)², according to which priority is given to a special norm (Khavroniuk, 2022).

According to M. Khavroniuk (2022), the norms on “general criminal” and war crimes should not take priority over the norms of Article 438 of the CCU³ based on their “speciality”, such as seizure of a car by the occupying power from a person belonging to the civilian population, if such seizure is a serious violation of international humanitarian law, cannot be qualified under Article 289 of the CCU⁴ on the grounds that this provision more specifically characterizes the subject of the crime; rape etc. Therewith, the principle non bis in idem (Article 61 of the Constitution of Ukraine⁵) does not allow the same act to be classified under two articles of the CCU at once. Sanctions with qualification are irrelevant – their disproportionality can only be indicative of the legislators’ negligence (Khavroniuk, 2022).

Materials and Methods

In this paper, the authors used various methods of scientific search, the most effective and active among which were system-structural method, comparative method, methods of analysis, terminological method.

The use of methods of analysis, discourse, and synthesis helped formulate several important conclusions. Other methods of scientific research were also used, which helped complete the study with orderly conclusions, among which the comparative method, methods of deduction and induction, etc. can be mentioned. The selective method was used by the authors for the search criteria in the Unified State Register of Court Decisions (USRCD).

¹Criminal Code of Ukraine No. 2341-III. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?find=1&text=438#w1_1.

²Resolution of the Plenum of the Supreme Court No. 7 “On the Practice of Courts Applying Criminal Legislation on Repetition, Aggregation and Relapse of Crimes and their Legal Consequences” (2010, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0007700-10#Text>.

³Criminal Code of Ukraine No. 2341-III. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?find=1&text=438#w1_1.

⁴Ibidem, 2001.

⁵Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80?lang=en#Text>.

Investigating the empirics according to the issues of this paper, the problematic questions of the qualification of a war crime under Article 438 of the CCU¹, the authors used a synergistic approach. The statistical method was used to collect and process the material of the empirical knowledge base of the issues under study.

In the study, the subject of attention was verdicts in proceedings on violations of the laws and customs of war (Article 438 of the CCU²), issued by courts after February 24, 2022, and available in the USSR. 17 verdicts were analysed, all verdicts of conviction, issued by the court of first instance.

Using the methods of deduction and induction, the authors established the composition of the crime, for which responsibility is established in the national criminal law, in the mentioned Article 438³, specifically, considering international criminal law regarding the features of this crime. At the same time, the method of generalization and the structural-logical method helped the researchers determine the architecture of this study, the logic and sequence of its individual parts, as well as to formulate conclusions.

Results

The investigation and prosecution of individuals who have committed violations of the laws and customs of war is not only a national issue, but also an example of impartial and objective activity for the entire world, which demonstrates attention to the events in Ukraine, condemns the armed aggression of the RF, the commission of war crimes, namely, violations of the laws and customs of war. Given the fact that most violations of the laws and customs of war are investigated, will be investigated and considered by the courts in Ukraine, Ukraine must demonstrate the ability to apply the mechanisms of criminal proceedings provided for by law in compliance with its principles, which are the embodiment of modern democratic principles and standards.

In absentia procedure

The *in absentia* procedure was used in 8 proceedings. Verdicts based on the results of a special court proceeding were additionally examined in terms of the performance of the requirements of the Criminal Procedural Code of Ukraine (CPCU) prior to this proceeding. Such attention is conditioned upon the prospect of increasing proceedings *in absentia*, since a significant number of persons who have committed criminal offences have not been detained, their location is unknown, their extradition is currently impossible, etc. However, the specified circumstances cannot be the reason for refusing to conduct a pre-trial investigation and trial.

The study of verdicts in proceedings on violations of laws and customs showed that not in every case the information regarding the *in absentia* procedure was properly reflected, namely:

1. The lack of detailing in the verdict of information on the implementation of all possible measures by the prosecution to respect the rights of suspects, the accused to legal protection and their access to justice (Part 5 of Article 374 of the CPCU)⁴. For example, it is not indicated how summonses were carried out, informing the accused about criminal proceedings (Verdict No. 760/4174/22)⁵, (Verdict No. 729/592/22)⁶; there is no specification of the actions regarding informing the suspect, the accused, but only a general remark that “the court recognizes that the prosecution has taken all possible legal measures to respect the rights of PERSON_33 and PERSON_32 both as suspects and as accused individuals to defence and access to justice” (Verdict No. 369/9950/22)⁷.

2. There is no instruction regarding the performance of the requirement of Part 2 of Article 349 of the CPCU⁸ that in the course of special court proceedings all available evidence is examined (Verdict No. 760/4174/22)⁹, (Verdict No. 729/592/22)¹⁰, (Verdict No. 369/9950/22)¹¹, (Verdict No. 729/574/22)¹², (Verdict No. 748/1773/22)¹³ (Verdict No. 748/1824/22)¹⁴.

¹Criminal Code of Ukraine No. 2341-III. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14?find=1&text=438#w1_1.

²Ibidem, 2001.

³Ibidem, 2001.

⁴Criminal Procedure Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>.

⁵Verdict of the Solomyansky District Court of Kyiv No. 760/4174/22, Proceedings No. 1-kp/760/1984/22. (2022, September). Retrieved from <https://reyestr.court.gov.ua/Review/106808179>.

⁶Verdict of the Bobrovytskyi District Court of the Chernihiv Region No. 729/592/22, Proceedings No. 1-kp/729/85/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107503138>.

⁷Verdict of the Kyiv-Svyatoshynsky District Court of the Kyiv Region Case No. 369/9950/22, Proceedings No. 1-kp/369/2032/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107577110>.

⁸Criminal Procedure Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>.

⁹Verdict of the Solomyansky District Court of Kyiv No. 760/4174/22, Proceedings No. 1-kp/760/1984/22. (2022, September). Retrieved from <https://reyestr.court.gov.ua/Review/106808179>.

¹⁰Verdict of the Bobrovytskyi District Court of the Chernihiv Region No. 729/592/22, Proceedings No. 1-kp/729/85/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107503138>.

¹¹Verdict of the Kyiv-Svyatoshynsky District Court of the Kyiv Region Case No. 369/9950/22, Proceedings No. 1-kp/369/2032/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107577110>.

¹²Verdict of the Bobrovytskyi District Court of the Chernihiv Region No. 729/592/22, Proceedings No. 1-kp/729/85/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107503138>.

¹³Verdict of the Chernihiv District Court of Chernihiv Proceedings No. 1-kp/748/47/23, Cases No. 748/1773/22. (2023, January). Retrieved from <https://reyestr.court.gov.ua/Review/108357178>.

¹⁴Ibidem, 2023.

3. Lack of display of information about the position and activities of the defender in the amount that gives an idea of the content and effectiveness of the defence.

For instance, the verdict states that the defender is a participant in the proceedings (Verdict No. 760/4174/22)¹; the content of the activity and the position of the defence have not been covered: “Defenders of the accused carried out militant actions aimed at protecting the accused: took part in the interrogation of the victims and the examination of evidence, spoke in debates (Verdict No. 748/1773/22)², “The defence counsel of the accused carried out militant actions to defend the accused: took part in the questioning of witnesses and the examination of evidence, drew the attention of the court to the role of the accused in the committed criminal offence, spoke in debates and denied the measure of punishment proposed by the prosecutor (Verdict No. 748/2272/22)³, “The defence counsel of the accused carried out militant actions, aimed at the defence of the accused: took part in the interrogation of the victim, witnesses and examination of written evidence, spoke in debates” (Verdict No. 748/1824/22)⁴, etc. (Verdict No. 369/9950/22)⁵; (Verdict No. 729/592/22)⁶ (Verdict No. 729/574/22)⁷.

4. Absence or formal indication of the legal positions of the ECHR (Verdict No. 369/9950/22)⁸; (Verdict No. 729/592/22)⁹.

Sentencing analysis of the verdict. Apart from the above, the sentencing analysis of the verdicts was investigated, which relates to the description of the circumstances of the event, the qualification of the act and its connection with the situation of armed conflict.

In general, the description of the chronology of the international armed conflict since 2014 (Verdict

No. 751/2961/22)¹⁰, (Verdict No. 729/574/22)¹¹. is common. For instance, “Sergeant PERSON_3, a serviceman of the armed forces of the Russian Federation, who served as a mortar commander of the 3rd mortar unit, was involved in military aggression, the conduct of hostilities on the territory of Ukraine and the commission of other related criminal acts by the leadership of the armed forces of the Russian Federation of the platoon of the mortar battery of the 2nd mechanized brigade of the military unit NUMBER_1 of the Russian Federation, which is located at the address: Russian Federation, the Republic of Tyva, the city of Kyzil”. In addition, an instruction on the involvement of a serviceman of the armed forces of the Russian Federation in criminal activity as an accomplice to the crime, who is accused in this proceeding and agreed to follow the orders of the military leadership and take part in the armed conflict (Verdict No. 748/2272/22)¹²; (Verdict No. 748/1824/22)¹³; (Verdict No. 751/2961/22)¹⁴.

Preferably, such formulations are followed by a description of the person’s actions, which qualify as a violation of the laws and customs of war. For instance, “PERSON_6 from among the military command has been entrusted with the responsibilities of directly conducting hostilities, namely carrying out, using armoured vehicles and other weapons, fire damage to military targets and civilian infrastructure objects, which are known not to be for military purposes, on the territory of Ukraine. The latter, realizing the grave consequences of his actions, including the death and injury of civilians, agreed to carry them out. <...> on 28.03.2022 around 09:00 PERSON_6, acting deliberately, following a prior conspiracy by a group of persons with other servicemen of the Armed Forces of the Russian Federation, with the

¹Verdict of the Solomyansky District Court of Kyiv No. 760/4174/22, Proceedings No. 1-kp/760/1984/22. (2022, September). Retrieved from: <https://reyestr.court.gov.ua/Review/106808179>.

²Verdict of the Chernihiv District Court of Chernihiv Proceedings No. 1-kp/748/47/23, Cases No. 748/1773/22. (2023, January). Retrieved from <https://reyestr.court.gov.ua/Review/108357178>.

³Verdict of the Chernihiv District Court of the Chernihiv Region Case No. 748/2272/22, Proceedings No. 1-kp/748/61/23. (2023, January). Retrieved from <https://reyestr.court.gov.ua/Review/108302451>.

⁴Verdict of the Chernihiv District Court of the Chernihiv Region Case No. 748/1824/22, Proceedings No. 1-kp/748/49/23. (2023, February). Retrieved from <https://reyestr.court.gov.ua/Review/109074116>.

⁵Verdict of the Kyiv-Svyatoshynsky District Court of the Kyiv Region Case No. 369/9950/22, Proceedings No. 1-kp/369/2032/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107577110>.

⁶Verdict of the Bobrovytskyi District Court of the Chernihiv Region Case No. 729/592/22, Proceedings No. 1-kp/729/85/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107503138>.

⁷Verdict of the Bobrovytskyi District Court of the Chernihiv Region Case No. 729/574/22, Proceedings No. 1-kp/729/81/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107481395>.

⁸Verdict of the Kyiv-Svyatoshynsky district court of the Kyiv region Case No. 369/9950/22, Proceedings No. 1-kp/369/2032/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107577110>.

⁹Verdict of the Bobrovytskyi District Court of the Chernihiv Region Case No. 729/592/22, Proceedings No. 1-kp/729/85/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107503138>.

¹⁰Verdict of the Novozavodsk District Court of the city of Chernihiv Case No. 751/2961/22, Proceedings No. 1-kp/751/196/22. (2022, August). Retrieved from <https://reyestr.court.gov.ua/Review/105986768>.

¹¹Verdict of the Bobrovytskyi District Court of the Chernihiv Region Case No. 729/574/22, Proceedings No. 1-kp/729/81/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107481395>.

¹²Verdict of the Chernihiv District Court of the Chernihiv Region (2023, January). Case No. 748/2272/22, Proceedings No. 1-kp/748/61/23. Retrieved from <https://reyestr.court.gov.ua/Review/108302451>.

¹³Verdict of the Chernihiv District Court of the Chernihiv Region. Case No. 748/1824/22, Proceedings No. 1-kp/748/49/23. (2023, February). Retrieved from <https://reyestr.court.gov.ua/Review/109074116>.

¹⁴Verdict of the Novozavodsk District Court of the city of Chernihiv Case No. 751/2961/22, Proceedings No. 1-kp/751/196/22. (2022, August). Retrieved from <https://reyestr.court.gov.ua/Review/105986768>.

aim of robbing the civilian population, arrived at the private household of a civilian victim PERSON_4, located at ADDRESS_2, which is not a military object, and in which her husband – PERSON_7 and her neighbour – PERSON_8 were, pointing the machine gun at the latter, PERSON_6 ordered to go to the wall and kneel, and raise his hands behind his head. Threatening to shoot, PERSON_6, together with other servicemembers of the Russian Armed Forces, took from PERSON_4 two mobile phones, a system unit from a personal computer, UAH 100,000. and USD 3,000, causing material damage to the victim in the total amount of UAH 197,871.70” (Verdict No. 729/574/22)¹.

A comparable approach, which includes a general description of the chronology of the international armed conflict in Ukraine since 2014, a finding of involvement in criminal activity (essentially a crime of aggression) of a serviceman of the regular army of the Russian Federation, an indication of the content of his duties, which, among other things, include fire damage specifically of objects of civil infrastructure, the following description of the violation of the laws and customs of war, which lies in the robbery of the civilian population, is also applied in Verdict No. 751/2961/22².

Therewith, during the interrogation of the accused, the circumstances of the robbery, capture, and treatment of the perpetrator were clarified. The evidence confirming his duties to carry out fire damage to civilian infrastructure objects, the purpose of which is to attack the civilian population and attacks of an indiscriminate nature are not mentioned (Verdict No. 751/2961/22)³.

As a generalization, it can be noted that the sentencing analysis of most of the verdicts under study contains the entire order of evidence, which makes it clear whether a person is guilty or innocent of violating the laws and customs of war. In addition, for the case, its purpose and the arguments of the parties must be indicated to perform the requirements of the CPCU, which are mandatory. Furthermore, there is a verbatim (in different verdicts) reproduction of the text about the chronology of the international armed conflict in Ukraine since 2014, its causes with a description of the crime of aggression prohibited by the UN Charter; a description of the circumstances regarding the preparation and planning, unleashing and waging of an aggressive war (Article 437 of the CCU, without such qualification). There is also a statement of the involvement of the leadership of the armed forces of the Russian Federation in military aggression, the conduct of hostilities, and the commission of other related crimes by servicepeople of the regular army of the Russian Federation

on the territory of Ukraine, who are accused in the proceedings (apparently, to determine the connection between the actions of a person and the armed conflict). The verdict is also accompanied by a statement that the defendants intended to carry out attacks on the civilian population and infrastructure, specifically, during their stay on the territory of the RF before the attack (Verdict No. 751/2961/22)⁴ (without justification and reference to evidence).

Discussion

Unequal perception of both the very concept of proceedings *in absentia* and the national model, which differs from similar ones in some foreign countries, where its application to minor offences prevails, still exists today.

The *in absentia* procedure has repeatedly been the subject of scientific research and has undergone legislative changes to develop its optimal mechanism that would meet the needs of society and the state (Kysil & Borysiuk, 2018; Shkliar *et al.*, 2020). Among other researchers, D. Shishman (2018) proposed to improve the national legislation considering the practices of applying the *in absentia* procedure in the criminal procedure of such countries as the Netherlands, Italy, Azerbaijan, and Uzbekistan and considering the impossibility of control in the occupied territories. The issue of procedural actions in the absence of a suspect and the term of a special pre-trial investigation was decided by V. Drozd (2020), who proposed to regulate in the CPCU a separately created chapter “Special criminal proceedings”. V. Yurchyshyn (2019) investigated the emergence of the institution of special pre-trial investigation for the perspective of its legal development, and O. Sachko (2019), respectively, the application of special procedures and regimes of criminal proceedings. Of interest to scientists is the study by A.O. Tymofiev (2021) regarding the institution of a special pre-trial investigation after changes and amendments to the CPCU with a forecast of their possible impact on their further functioning and ways to eliminate them.

Based on the criminal procedural legislation of both Ukraine and foreign countries, international legal acts, the practice of the European Court of Human Rights (ECHR), the analysis of the current state of development of criminal procedural law, the legal regulation of the procedure *in absentia* – pre-trial investigation in the absence of the suspect is analysed (Mykhailenko, 2019; Vereshchak, 2021).

Up to the analysed period, judicial practice formed a relatively established approach to proving and researching the grounds and conditions under which

¹Verdict of the Bobrovytskiy District Court of the Chernihiv Region Case No. 729/574/22, Proceedings No. 1-kp/729/81/22. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107481395>.

²Verdict of the Novozavodsk District Court of the City of Chernihiv Case No. 751/2961/22, Proceedings No. 1-kp/751/196/22. (2022, August). Retrieved from <https://reyestr.court.gov.ua/Review/105986768>.

³Ibidem, 2022.

⁴Ibidem, 2022.

proceedings *in absentia* can be applied, the procedure for its implementation. Special attention is paid to the legal positions of the ECHR, which, although it states that such a procedure does not contradict the European Convention on Human Rights (the Convention), however, defines increased requirements for proof during its application and pays special attention to the person's awareness of criminal proceedings against them and ensuring the right to defence.

In a generalized form, the main circumstances that are usually carefully investigated by investigating judges and courts when deciding on the application of the *in absentia* procedure are as follows: acquisition of the status of a suspect, awareness of the suspect, the accused about the criminal proceedings, the activity of the authorized subjects regarding the notification of the suspect, the accused about the criminal proceedings, establishing the location of an individual, ensuring the right to defence.

Pre-trial investigation and judicial review of proceedings on violations of the laws and customs of war is a complex, multi-faceted activity that requires an in-depth, systematic understanding of international and national law from the law enforcer, compliance with increased requirements for proof and quality of court decisions. Therefore, it is necessary to pay attention to some issues that arise in judicial practice, which were discussed above.

The description of the crime of aggression in the verdicts can be considered as a general context of the situation, a statement of the existence of an armed conflict, and the application of International Humanitarian Law (IHL). However, other circumstances are also required to prove a violation of the laws and customs of war.

The crime of aggression is prohibited by international law, in contrast to the rules of warfare (laws and customs of war), illegal aggression is not defined by virtue of its prohibition. The laws and customs of war apply to military actions, acts of using force as a method and consequence of aggression, and not to the fact of aggression as such. The crime of aggression is a means, a method of action of the attacker to achieve military and political goals, it is an illegal act, it has no legal basis. While certain actions during an armed conflict, if they follow IHL, have a legal basis, which is IHL.

These differences must be considered during the proving procedure, determining, among other things, the relationship of actions that have signs of violation of the laws and customs of war to the general context of war and its particular situation. Actions that violate the laws and customs of war refer to the act of war itself (or related to it), its conduct, and the interaction of the parties, while the crime of aggression refers to the very act of attacking another state.

The connection to the general context appears obvious, but this is not always sufficient to prove a violation of the laws and customs of war. Thus, if an individual

takes part in a war on the side of the aggressor, then they support and enact the policy of the aggressor state, i.e., these actions will be illegal, but not necessarily a violation of the laws and customs of war. Likewise, a criminal offence committed by a representative of an aggressor country during an armed conflict is not necessarily a war crime, specifically a violation of the laws and customs of war.

To prove a violation of the laws and customs of war, it is important to compare a particular action with the prohibition of IHL and consider the particular circumstances in which the violation was committed. That is, here war is not only a situation, but also an inciting, facilitating and favourable circumstance for the commission of a crime.

Considering the fact that judicial practice in criminal proceedings on violations of the laws and customs of war is not yet widespread and is actively being formed, it is necessary to pay special attention to its quality and the quality of pre-trial investigation, to avoid errors and shortcomings, a simplified approach to the city of court decisions, to improve the quality evidence activity.

Demanding quality of evidence, performance of the tasks of criminal proceedings, compliance with its principles is a guarantee that the person who committed a violation of the laws and customs of war will bear the full burden of responsibility, and in the event of an appeal against the verdict, there will be no grounds for revising the measure of punishment or making decisions that will help avoid or mitigate a just punishment due to errors and shortcomings in the work of the investigation and the court.

Conclusions

Circumstances that were determined based on the results of processing the verdicts in proceedings on violations of the laws and customs of war, as affecting their quality, relate to the validity and logic of the verdicts (statements about the essential circumstances of the case without reference to evidence, the ambiguity of the connection between certain facts and circumstances); completeness and accuracy of the verdicts (lack of detailing of the content of the violation, definition of IHL norms, formal indication of the position of the parties (primarily defence); compliance with legislation (non-compliance with some requirements regarding proceedings *in absentia*, lack of references to the practice of the ECHR).

The effective practical application of criminal procedural legislation stays relevant and requires some clarifications and amendments to solve the issues of improving the pre-trial investigation of numerous violations of the laws and customs of war committed in the conditions of military occupation of the territory and ensuring a quick pre-trial investigation in compliance with the principles of criminal proceedings and international standards, respectively.

The verdicts must consistently and coherently reflect the entire order of evidence that proves the guilt or innocence of an individual in committing a violation of the laws and customs of war, the essence of the case and the arguments of the parties are indicated in detail, the performance of the requirements of the CPCU, which are mandatory, specifically this applies to proceedings *in absentia*.

The quality of evidentiary procedure, the application of suitable sanctions, ensuring the effectiveness of the procedure, the clarity and accessibility of the verdict in proceedings on violations of the laws and customs of war are evidence of the justice, impartiality, and neutrality of the court, which ensures trust in national justice both on the territory of Ukraine and beyond.

Since the investigated category of cases does not have a statute of limitations, the recording of crimes, its evidence base, the legality of the investigative actions, compliance with established standards in pre-trial investigation and trial of these cases are important. The above

will help emphasize that Ukraine is a legal state with a European vector of development.

The mechanism for the implementation of criminal responsibility for representatives of the aggressor country who invaded Ukraine and commit aggression, genocide, violations of the laws and customs of war, and other crimes is still relevant. It is worth remembering that the mechanisms of implementation of criminal responsibility can be and will be not only national, but also international.

Issues related to the correlation of standards of proof in the criminal procedure of Ukraine and the International Criminal Court, features of the qualification of war crimes are considered promising for further scientific research.

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None.

Conflict of Interest

None.

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Деякі питання судової практики в провадженнях про порушення законів і звичаїв війни

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Анотація

На другому році повномасштабної збройної агресії Російської Федерації проти України актуальним є питання щодо притягнення винних до кримінальної відповідальності за вчинення воєнних злочинів. Водночас дискусійним питанням залишається кримінально-правова кваліфікація дій у межах застосування положень ст. 438 Кримінального кодексу України. Метою статті є дослідження змісту деяких вироків у провадженнях про порушення законів і звичаїв війни, що були постановлені після 24 лютого 2022 року в Україні, виявлення проблем правозастосування та виконання процесуальних вимог щодо їх змісту, оскільки вони набули не лише суспільного значення та резонансу, а й міжнародного, а вимоги до їхньої якості можна визначити як підвищені. У статті застосовано різноманітні методи наукового пошуку, найбільш результативними й активними серед яких стали: системно-структурний, порівняльний, аналізу та термінологічний. За результатами опрацювання вироків судів першої інстанції в провадженнях за ст. 438 Кримінального кодексу України було визначено низку проблем щодо процесуального порядку здійснення спеціального судового провадження. Встановлено причинний зв'язок між порушенням законів і звичаїв війни з конкретною ситуацією воєнного конфлікту. Обґрунтовано та досліджено обставини, що підлягають доказуванню за вчинення зазначеного кримінального правопорушення, аргументовано потребу в конкретизації окремих обставин. Акцентовано на необхідності врахування конкретної воєнної ситуації, відмінності та характеру зв'язку між цими порушеннями й злочином агресії під час доведення порушення законів і звичаїв війни з припущенням щодо можливості їхнього впливу на політичні, юридичні та інші процеси, навіть після його закінчення. Практична значущість статті полягає в необхідності відображення у вироків результатів застосування правових норм, що стосуються здійснення провадження *in absentia*, передусім щодо порядку інформування підозрюваного, обвинуваченого про кримінальне провадження, забезпечення права на захист й ефективність його здійснення.

Ключові слова:

доведення; судовий процес; збройний конфлікт; вирок; *in absentia*; цивільна особа; військовослужбовець