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Theoretical and legal analysis of certain aspects of forensic characterisation of violations of the laws and customs of war

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Abstract
The relevance of the study is determined by the need to improve theoretical and practical approaches to the investigation of war crimes, ensuring their effective detection and documentation in the process of proof. The purpose of the study was a comprehensive investigation of the structural elements of the criminalistic characteristics of war crimes provided for in both Article 8 of the Rome Statute of the International Criminal Court and Article 438 of the Criminal Code of Ukraine, considering the practice of national and international courts, and the development of proposals for optimal ways of Investigation. The methodological basis of the research was formal legal, comparative legal, dogmatic, systematic methods, empirical study of investigative and judicial practice. The practical basis of the study was the materials of criminal proceedings on the fact of committing war crimes committed on the territory of Ukraine, and the case law of international (special) tribunals. As a result of the research, the content and structure of the criminalistic characteristics of war crimes were clarified, its significance for establishing the circumstances to be proved was determined, and key problems that affect the process of proof in an armed conflict were identified. Attention was paid to the contextual signs of violations of the laws and customs of war, which were integrated into the criminalistic characteristics of war crimes, as system-forming elements that determine the specifics of investigations, considering the method of commission, the mechanism of the event, the identity of the criminal and the victim, socially dangerous consequences, and their relationship with what was committed. For the first time, forensic signs of war crimes were systematised, considering international legal qualifications and specific conditions of investigation. The practical significance of the results obtained lies in the possibility of their use in the practical activities of the pre-trial investigation bodies, the prosecutor's office and the court to increase the effectiveness in the investigation process and prove the guilt of persons involved in violations of the laws and customs of war

Keywords:
war crime; specifics of investigation; contextual circumstances; international law; emergency circumstances; martial law; proof process

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Introduction

War as a socio-political phenomenon requires proper legal support not only in terms of mobilisation processes, but also in the procedure for documenting related crimes. In the methodological sense, it is the object of research not only in military science, but also in a wide range of other disciplines – from history and political sciences to law, sociology, and psychology. This necessitates the application of an interdisciplinary approach to the study of its nature, consequences, and mechanisms, which indicates an interdisciplinary object of research, within which the impact of war on the individual, society, international security, and law and order is indicated.

In the context of armed conflict, many social processes become extreme, which directly affects the mechanisms of committing crimes, the specifics of their detection, disclosure, and investigation. In this context, a prerequisite for the proof process is the establishment of contextual and legal circumstances that indicate the individual responsibility of participants in an armed conflict within the framework of international humanitarian and criminal law. Thus, considering the violation of the laws and customs of war as a systemic phenomenon in the structure of international crimes, it should be emphasised that the key (basic) crime in this context is the act of armed aggression itself, since it creates the prerequisites for the commission of other related violations of international humanitarian law.

This aspect reveals such a terminological group as *jus in bello* and *jus ad bellum*. Analysing these concepts, R. Kolb (1997) noted that despite the widespread perception of their centuries-old history, they entered the international legal terminology relatively recently. The reason for this, according to S. Sefriani (2024) and Y. Ka Lok (2022), is that until the beginning of the 20th century, the concept of just war prevailed in the doctrine of international law – *bellum justum*. Within the latter, war was recognised as a permissible and fair act if it was of a defensive nature, was aimed at restoring violated rights, restoring lost status or property, collecting debt or committing retribution. In such circumstances, the subject of legal analysis was the very fact of the beginning of an armed conflict, while its specific consequences acquired a derivative character (Liang, 2021). In other words, universal law *in bello* and *ad bellum* did not exist. Accordingly, the rights and obligations of the belligerents depended solely on the actual situation, the stated motives and the material validity of the reasons, which were determined by a fair basis for its resolution and conduct.

Subsequently, as noted by L. Peperkamp (2020) and F. Grimal & M.J. Pollard (2024), evolution of the doctrine *bellum justum* gave in to the idea that states (monarchs) have a discretionary right to wage war and use it as a tool for implementing national policy. In this context, the attention of researchers has shifted from the problems of the legality of the outbreak of war to issues related to the rights and obligations that arise in the process of its conduct – *durante bello*. According to R. Kolb (1997), in fact, this is the beginning of the formulation of the principle *jus in bello* in the contemporary sense.

It is believed that one of the first to introduce this term into international scientific use was an Austrian international lawyer, a representative of the so-called "Vienna School of International Law" L.J. Kunz. In the monograph "Law of War and the Law of Neutrality", he gave a clear definition of the concept *jus in bello* noting that the term should be applied to all parties to an armed conflict, irrespective of whether their actions are lawful in terms of *jus ad bellum* emphasising the importance of distinguishing between the right to wage war and the rules of conduct (Kunz, 1939).

Already in 1937, one of the fundamental scientists in the field of public international law of the mentioned century, A. Ferdross, applied the term *jus in bello* in an absolutely identical sense as Kunz, correlating it with the concept of "military law" or "law of war" (Kolb, 1997). However, as the researchers note, during this period, the above definition was not used in international practice. Its practical application took place after the Second World War, as a result of which a clear terminological distinction was made between *jus in bello* and *jus ad bellum* as key elements of international humanitarian law that ensure the legality of war, the humanity of its conduct, and the protection of persons who do not take part in hostilities.

This leads to the need for an in-depth analysis of war crimes committed on the territory of Ukraine not only through the prism of doctrine *jus in bello*, but also in the plane of topical issues of a procedural and forensic nature that arise in the course of their investigation. It is these aspects that will form the purpose of this study, which is determined by the theoretical and legal analysis of certain aspects of the forensic characterisation of violations of the laws and customs of war.

Materials and Methods

The normative basis of the study was a set of provisions of international and national legislation regulating certain aspects of the activities of law enforcement agencies in the detection, disclosure, investigation, and prevention of war crimes. In particular, certain provisions of the Rome Statute of the International Criminal Court [1], the Law of Ukraine on criminal liability[2], criminal procedure legislation[3], international humanitarian

[1] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[2] Criminal Code of Ukraine. (2001, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2001-05#Text.
[3] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.

law[1,2,3], legislation of Ukraine on civil protection of the population[4], etc., were used. The theoretical basis of the research was the analysis of scientific and methodological sources that analyse certain forensic aspects of the investigation of war crimes, in particular, those committed on the territory of Ukraine.

The practical basis of the study was the analysis of investigative and judicial practice on the investigation of war crimes on the territory of Ukraine[5], and the study of the case-law of international criminal tribunals, in particular, the international tribunal for the former Yugoslavia (Press Releases of the International..., 1996). The norms of customary international humanitarian law were also analysed within the framework of forensic characterisation (International Committee of the Red Cross, 2006).

The methodological basis of the research was formed considering a combination of general scientific and special methods of cognition, the use of which provided a proper substantiation for the research tasks and obtaining scientifically based results based on their solution. In particular, the formal legal method was used to analyse and systematise the provisions of laws and regulations related to the subject of research. The comparative legal method was used to identify differences and common features in the approaches of national and international law to the object of research. The dogmatic method allowed revealing the content of legal concepts and categories related to the subject of research. The method of analysis of scientific sources was used to generalise scientific and methodological approaches to determining the features of forensic characteristics of war crimes. The empirical analysis of judicial practice was carried out to investigate the decisions of national courts of Ukraine and international courts on the specifics of the investigation of war crimes. The generalisation method was used to form conclusions and provide suggestions.

Results and Discussion

Forensic characterisation of violations of the laws and customs of war is a structured system of information and/or data that reflects the natural connections between individual elements of illegal activity and its consequences. It serves as a guide for authorised participants in criminal proceedings in the process of establishing circumstances that are subject to proof, putting forward and verifying investigative versions, and choosing the most optimal ways of investigation.

In a practical sense, it performs the function of determining the priority areas of Investigation, forming reasonable hypotheses about the commission of a crime, the offender, the victim, traces and mechanisms of trace formation, and other criminalistically significant information that is important in the process of proof. According to Yu. Chaplynska (2019), the application of systematised knowledge that makes up the content of forensic characteristics becomes particularly relevant at the initial stage of pre-trial investigation, which is characterised by a lack of primary information about illegal activities. As an integral part of the forensic methodology, it applies a comprehensive approach to the analysis and description of typical features of this activity, aimed at solving the problems of criminal proceedings. Despite this, depending on the specific type of criminal offence, some of its elements may acquire decisive significance, while others may play a secondary role or have no relevance at all. On this matter, A. Kuntiy (2019) emphasised that although Article 91 of the Criminal Procedure Code of Ukraine[6] determined the general circumstances to be established in the process of proof, its provisions did not consider the specifics of certain categories (groups) of criminal offences, their specifics and individual characteristics. Actually, this also applies to violations of the laws and customs of war, where the so-called contextual and legal elements are crucial in the proof process. It is they who establish the fact that there is or is not an event of a socially dangerous act that falls under international jurisdiction in accordance with the provisions of the Rome Statute of the International Criminal Court[7].

Given the above, it is advisable to consider the criminalistic characteristics of war crimes as a systematic description of typical signs and specific features of violations of the laws and customs of war, aimed at ensuring a complete, comprehensive, and objective investigation. In this context, it is reasonable to distinguish between two groups of elements. The first one covers the general signs inherent in a wide range of socially dangerous acts. These were the main focus of K. Shevchyshena (2024). Studying the general aspects of the investigation of war crimes, their characteristic features include the circumstances that characterise the event of a criminal offence and justify its criminal legal assessment, the

[1] Geneva Convention relative to the Protection of Civilian Persons in Time of War. (1945, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154.
[2] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_151#Text.
[3] Geneva Convention relative to the Treatment of Prisoners of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_153#Text.
[4] Civil Protection Code of Ukraine. (2012, October). Retrieved from https://zakon.rada.gov.ua/laws/show/5403-17#Text.
[5] Verdict of the Oktyabrsky (Shevchenkivsky) District Court of Poltava in Case No. 554/3925/22. (2022, June). Retrieved from https://reyestr.court.gov.ua/Review/104701812.
[6] Criminal Procedure Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Te.xt.
[7] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

identity of the applicant, the victim, witnesses and eyewitnesses of its commission, the identity of the criminal, their purpose and motives, socially dangerous consequences that determine the type and amount of damage caused and affect the measure of punishment.

As the researcher emphasised, it is important for the effective investigation of war crimes to find the way in which the crime is prepared, committed and concealed, and information about the identity of the criminal and victim, which is empirically confirmed in the results of the conducted sociological study by K. Shevchyshena (2024). In this context, the researcher emphasised that the process of investigating war crimes largely depends on typical investigative situations that determine the activities of pre-trial investigation bodies. These include the place and method of committing a war crime, the identity of the victim, the object of criminal encroachment, the nature of the trace picture, and the presence or absence of information about the suspect.

This opinion can be either agreed with or questioned. Undoubtedly, the elements identified are essential for ensuring the proper investigation of war crimes. However, they are of a general type and are not limited to investigating only violations of the laws and customs of war. In addition, although the significance of individual components of the forensic characteristic is confirmed by empirical data from the results of interviews with investigators, however, these results cannot be considered final, since their assessment may be influenced by cognitive biases.

As noted by D. Lazareva (2025), the specifics of the investigation of war crimes are determined by the specifics of their qualification, which covers a wide range of illegal acts defined by the norms of international law. These acts can be qualified as war crimes only if there are appropriate contextual circumstances that are causally related to the subject of proof. They determine the key elements of the forensic characteristic and influence the features of the proof process.

On this occasion, O. Agarkova (2024) noted that in the process of investigating war crimes, facts and circumstances must be established that allow identifying individual signs of a particular socially dangerous activity. Depending on the form of the objective side, such circumstances include the beginning, duration, and prevalence of an armed conflict, its type, and the spatial and temporal relationship between the act itself and the armed conflict. This is conditioned by the fact that war crimes can only be committed in conditions of armed conflict. Consequently, violations of the laws and customs of war occur in the context of this conflict, regardless of whether a state of emergency has been officially introduced.

In other words, the territorial boundaries of an offence usually cover a war zone or other areas directly related to the conduct of an armed conflict. That is why, from a territorial standpoint, war crimes are committed in conditions of armed conflict. In turn, armed conflict as a key legal context of a war crime manifests itself in the form of active military operations, which, according to I. Kostiuk & A. Sakovsky (2024), determine the specifics of the combat situation. It may include the location of armed formations, strategic and tactical changes, the impact of military operations on the civilian population, and other contextual circumstances that shape the conditions of the offence.

Establishing the location of violations of the laws and customs of war is of key importance not only for proper qualification, but also for determining territorial jurisdiction. According to O. Agarkova (2024), as part of the pre-trial Investigation, special attention should be paid to the circumstances that characterise the spatial and temporal parameters of the committed act. For example, in the context of the use of weapons prohibited by international humanitarian law, such elements include the place of launch, departure and arrival of ammunition, the trajectory of its movement (flight), the method and type of weapons used, the type of targets, and other relevant data that allows objectively recreating the picture of the crime.

One example is the events that took place on 14 January 2023 in the city of Dnipro, when more than 40 civilians were killed as a result of a missile strike on a multi-storey residential building. According to the established data, the strike was carried out by a high-precision missile of the X-22 type, which, according to its tactical and technical characteristics, is designed to hit large, pre-identified targets (Anniversary of the missile..., 2024). Simultaneously, no military facilities were found in the immediate vicinity of the strike site, which gives grounds to conclude that the principle of differentiation (selectivity) of the object of attack was deliberately violated.

Given the absence of military necessity and the purposeful nature of a strike on an object that is not a military target, such actions should be regarded as a purposeful attack on the civilian population, which, according to Article 8 of the Rome Statute, falls under the qualification of a war crime[1]. The legal assessment of such acts requires the pre-trial investigation bodies to provide a comprehensive and objective analysis of the circumstances that allow them to provide answers to key questions related to the tactical and technical characteristics of the weapons used, the nature of the affected object, its spatial distance from potential military targets, the possibility of its identification, the evidence of its civilian purpose, and the presence or absence of measures for preliminary clarification and verification of targets.

That is why one of the key elements of the event of a criminal offence under Article 438 of the Criminal

[1] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

Code of Ukraine[1], is a method of its commission, which covers the nature of the offender's actions, the means of destruction used, the sequence of implementation of criminal intent, and circumstances indicating a deliberate or careless attitude to possible consequences. In the context of violations of the laws and customs of war, the method of commission is crucial not only for establishing the actual circumstances of the wrongful act, but also for its international legal qualification.

For example, according to Article 8 of the Rome Statute[2], an intentional attack on civilian objects, i.e., objects that are not military targets, qualifies as a war crime. In turn, the provisions of Article 51 of Additional Protocol I to the Geneva Convention of 1949[3] regarding the protection of victims of international armed conflicts prohibit indiscriminate attacks, in particular, those that may cause excessive civilian casualties or damage to civilian infrastructure in comparison with the expected military advantage. This means that the use of weapons in the absence of a military purpose and failure to comply with the principles of proportionality, selectivity, differentiation, and military necessity in this regard indicates a violation of international humanitarian law, and, accordingly, can serve as a basis for qualifying such acts as war crimes.

When analysing the method of committing violations of the laws and customs of war, it is necessary to consider the specific context conditioned by the specifics of illegal acts (Shulzhenko, 2022). Therefore, when interpreting the disposition of Article 438 of the Criminal Code of Ukraine, it is justified to refer to the norms of international humanitarian law, which establish general principles, rules, and customs of the use of force during an armed conflict. In this context, O. Taran (2022) noted that an important criterion for the criminal law assessment of a particular case of violation of the laws and customs of war is the content of regulations defining the permissible limits of conducting an armed conflict.

The researcher emphasises that the structure of circumstances to be established during the investigation of war crimes, as an element of forensic characteristics, should also include a specific legal environment formed under the influence of international law. In her opinion, this allows authorised participants in criminal proceedings to understand the content of both contractual and customary norms of international law in the process of establishing the legality of resolving an armed conflict *jus ad bellum* – the "right to war", and the procedure and rules for conducting it *jus in bellum* – "the right of war". In fact, these aspects are also focused on by other researchers who suggest that using the phrase "violation of the laws and customs of war", the contracting parties to the London[4], and later the Rome Statutes[5], deliberately expanded the boundaries of the criminal and legal characterisation of war crimes, going beyond the scope of international humanitarian law (Rubanenko, 2024).

That is, in the national context of Article 438 of the Criminal Code of Ukraine[6], it is necessary to interpret in a systematic way not only international humanitarian law, but also other international legal acts that regulate relations during an armed conflict and determine responsibility for their violation. This means that the national approach to the qualification of war crimes is covered by a wide range of socially dangerous acts, including not only serious violations of international humanitarian law, but also other acts prohibited by ratified international treaties (Hlovyuk & Teteryatnyk, 2022; Antonyuk, 2023).

In other words, the scope of legal regulation of responsibility for the commission of war crimes is not limited exclusively to the norms of international humanitarian law. This activity is covered by a wide contractual system of laws and regulations of international importance that define the legal limits of conducting armed conflicts, establish requirements for the protection of the civilian population, the wounded and sick, prisoners of war, persons no longer participating in combat operations, medical and spiritual personnel, civilian objects, cultural values, the environment, critical infrastructure, etc.

Therefore, the legal qualification of war crimes should be carried out not only based on Article438 of the Criminal Code of Ukraine[7], but also consider international treaties that establish the signs and composition of such offences, depending on the specific case of illegal activity and the method of its commission. This refers to the norms of the Rome Statute[8], where Article 8 specifies the types of war crimes and formulates the methods of their commission, and the provisions of the Geneva Conventions of 1949 and their Additional Protocols. These acts, in conjunction with other international treaties, regulate responsibility for war crimes and contribute to the development of an integral legal framework in the system of international criminal law.

In this context, the norm of Article 438 of the Criminal Code of Ukraine[9], reflects the national legal

[1] Criminal Code of Ukraine. (2001, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2001-05#Text.
[2] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[3] Protocol Additional to the Geneva Conventions of (1949, August), Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199.
[4] Charter of the International Military Tribunal. (1945, August). Retrieved from https://avalon.law.yale.edu/imt/imtconst.asp.
[5] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[6] Criminal Code of Ukraine. (2001, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2001-05#Text.
[7] Ibidem, 2001.
[8] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[9] Criminal Code of Ukraine. (2001, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2001-05#Text.

understanding of war crimes as socially dangerous acts for which criminal liability is provided. This demonstrates the normative integration of Ukraine into the system of international criminal law and simultaneously shows solidarity with the international community in matters of inadmissibility of violations of the laws and customs of war, and on the other hand – the commitment of the national legal system to the principle of inevitability of punishment for international crimes.

That is, depending on the nature of the committed act and its consequences, the legal qualification of a particular crime should be carried out using the provisions of Article 438 of the Criminal Code of Ukraine, and relevant norms of international criminal and humanitarian law. This approach ensures that the national criminal justice system is consistent with the civilised world and its standards regarding individual responsibility and the inevitability of punishment for international crimes.

For example, in the case of mass deportation or forced displacement of the civilian population from the occupied territories, legal qualification is possible under the combination of Article 438 of the Criminal Code of Ukraine and subparagraph (viii) of paragraph 2(b) of Article 8 of the Rome Statute[1]. This circumstance confirms the expediency of applying an integrative approach to the legal qualification of socially dangerous acts of international importance. This also applies to illegal attacks on persons protected by international humanitarian law, in particular, prisoners of war, wounded, sick, medical workers, or personnel of humanitarian missions. In such cases, legal qualification is carried out while considering the provisions of Article 438 of the Criminal Code of Ukraine and the norms of international law that directly incriminate the relevant violations.

In this context, Article 3, which is common to all four Conventions of 1949, should be applied, which establishes basic guarantees for the humane treatment of persons who do not participate in the fighting of a non-international armed conflict[2]. Regarding international armed conflicts, it is worth paying attention to the special provisions consolidated in Article 12 (protection of the wounded and sick)[3] and/or Article 13 (treatment of prisoners of war)[4], which determine the legal status and guarantees of persons involved in armed conflict. Additionally, these actions can be qualified as war crimes in accordance with the subparagraph (II) paragraphs 2(a) and subparagraph (I) and subparagraph (2)(b) of Article 8 of the Rome Statute[5].

Special attention should be paid to the analysis of war crimes committed by giving a deliberately criminal order (ordering), which clearly contradicts the provisions of international humanitarian law. Despite the absence in Article 438 of the Criminal Code of Ukraine[6] of specific qualifying characteristics that would indicate an increased degree of public danger of the act in question, from a criminalistic standpoint, the fact of giving a knowingly illegal order that grossly and obviously violates the laws and customs of war should be considered a significant contextual circumstance. This circumstance is an important element of the mechanism for the development and implementation of criminal intent, is important for clarifying the structure of criminal activity, identifying the perpetrators, and describing the roles of each of the participants, for the implementation of proper legal qualification of their actions, and determining the degree of responsibility of each of them.

That is, in the forensic sense, the methods of committing war crimes cover a wide range of techniques, tools, methods, and organisational mechanisms used to prepare, directly commit, and conceal socially dangerous acts. In this context, it is advisable to consider giving a deliberately illegal (criminal) order as one of the forms of organising illegal activities, which determines its structural model, affects the mechanism for implementing criminal intent and is essential for effective detection, documentation, investigation, and prevention of relevant criminal offences. According to the authors of the war crimes investigation standards, developed with the participation of specialists from the General Prosecutor's Office in 2023, it is not enough to bring a person to justice for an international crime only to prove the fact of its commission – it is necessary to establish that a particular person acted in a certain way, and that these actions contributed to the commission of the crime (General Prosecutor's office, 2023).

Non-compliance of the order with the requirements of international humanitarian law is an essential legal fact that is considered when establishing the form of guilt, the legal qualification of the act, determining the subject of a criminal offence and the level of its responsibility. This circumstance also contributes to the differentiation of the roles of accomplices and indicates the organised nature of illegal activities, which is crucial for building a reasonable evidence base.

These provisions are consistent with the norms of International Criminal Law, in particular, Article 28

[1] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[2] Geneva Convention Relative to the Protection of Civilian Persons in Time of War. (1945, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154.
[3] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field . (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_151#Text.
[4] Geneva Convention Relative to the Treatment of Prisoners of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_153#Text.
[5] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[6] Criminal Code of Ukraine. (2001, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2001-05#Text.

of the Rome Statute[1], which provides for the responsibility of commanders and other military chiefs for war crimes in cases where they, firstly, knew or should have known that subordinates were committing or intending to commit war crimes. And, secondly, they did not take all necessary and reasonably possible measures to prevent, stop, warn and ignore them in order to bring those responsible to justice.

Similar standards are contained in Article 87 of the Additional Protocol (I of 1977) to the Geneva Conventions of 1949[2], where commanders are required to take all possible measures to prevent violations of international humanitarian law by subordinate military personnel. If the commander knew or should have been aware of possible or actual violations of the laws and customs of war, but did not take appropriate measures to prevent or stop them, he is liable under international law.

The existence of such a duty is also indicated by Rule 153 of the Code of Customary International Humanitarian Law, developed by the International Committee of the Red Cross (2006). In general terms, it reflects a well-established custom that requires the principle of command responsibility to be respected even in cases where the relevant international treaties have not been ratified by a particular party. That is why the principle of team responsibility is universal and is subject to application within the international legal system, regardless of the contractual status of a particular party. In essence, it formalises the doctrine of individual criminal responsibility on the principle of command, which provides for the legal obligation of military leadership to take effective measures to ensure compliance with international humanitarian law on the part of subordinate personnel.

Thus, giving a criminal order can significantly affect the legal characteristics of a war crime, modify the method of its commission and acquire key importance for detecting, disclosing, investigating and preventing socially dangerous acts that encroach on prohibited norms of warfare. Actions related to the issuance of an order that clearly violates the laws and customs of war can be considered as an aggravating circumstance that determines the structure and content of the method of committing a war crime. This indicates the organisational nature of the participants in a military offence and is essential for the legal qualification of the crime, considering the principle of individual criminal liability.

Other researchers also focused on this, noting that the presence of such a contextual circumstance indicates not only the structure of a war crime, but also its organised form of commission (Taran, 2022; Yankovy, 2023). According to researchers, this is conditioned by the hierarchical nature of the military order, which contains both subjective and substantive elements that must comply with the norms of international humanitarian law. In other words, any military order must comply with the requirements of international law, and therefore not contradict them. This is due to the presumption that both the command staff of the armed forces and subordinate military personnel of armed formations are aware of the norms and customs of warfare. Violation of these rules creates grounds for bringing a person to justice in connection with the loss of the legal status of a combatant. In this case, the person is not only deprived of the protection provided for by international humanitarian law, but is also subject to criminal prosecution for committing war crimes, including in the form of giving an obviously criminal order and its subsequent execution.

Given the above, an integral element of the criminalistic characteristics of war crimes is the identity of the offender (criminal, guilty party), and the establishment of a link between the actions of the perpetrator and the contextual conditions of an armed conflict. Other researchers pointed to this fact, emphasising that not every individual act of violence committed during an armed conflict falls within the scope of international criminal law response (Tolkach, 2023; Yefimenko, 2024). This is possible only if it is established that the act had a direct connection with the armed conflict and was committed within its framework or context. Consequently, the very fact of violation of the laws and customs of war is not sufficient for the legal qualification of an act as a war crime without proving the connection between the actions of a particular person and the armed conflict itself, and without establishing the status of the subject of a war crime and the presence of its subjective side, in particular, the person's awareness of the context of the armed conflict and their intention to act contrary to the norms of international humanitarian law.

This conclusion is justified by international case law. In particular, according to the legal position formulated by the International Criminal Tribunal for the former Yugoslavia (ICTY) on the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia, in order to qualify a war crime, it is necessary to find out that the existence of an armed conflict significantly affected the ability of a particular person to commit illegal actions or make a decision on the commission of a war crime, the method of implementing criminal intent, and the purpose and motives by which the person sought to achieve the tasks set (Taran, 2022).

The subjective perception of the nature of the conflict of the perpetrator (in particular, their understanding of the political or legal nature of the war) is not crucial for legal assessment. It is enough only that illegal

[1] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[2] Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts. Protocol I. (1977, October). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199.

behaviour occurs in the context of an armed conflict and is part of the implementation of a military-political strategy. In other words, the performer's awareness of all components of the military plan or the organisational structure of the military-political leadership is not mandatory. It is sufficient to confirm that what is done is the result of conscious actions in the context of the overall implementation of the relevant strategy or policy of the state in the framework of an armed conflict.

In fact, the International Tribunal for the former Yugoslavia also focused on this. Thus in the case of "Kunarac *et al*." (Prosecutor V., ICTY, IT-96-23/1), the court concluded that a person can be held accountable for a war crime or a crime against humanity, even without having an idea of the overall plan or structure of the high military command (Press Releases of the International..., 1996). In other words, a person accused of international crimes is not required to have full awareness of a political or military strategy, and the fact of deliberately committing actions as part of a large-scale aggression is sufficient. As noted by O. Agarkova (2024), in addition to the form of guilt, the criminal procedure law obliges in each specific case to establish the motives and purpose of a criminal offence, which are considered by the court when determining the public danger of both the act itself and the person who committed it, and when determining the amount of punishment.

Despite the presence of common methodological guidelines in the law enforcement of Article 438 of the Criminal Code of Ukraine[1], the analysis of individual decisions of the domestic courts attests to certain shortcomings in the wording of the charge and the description of the actual circumstances of the commission of the offence. For example, in the verdict of the (Oktyabrsky) Shevchenkivsky District Court of Poltava dated June 9, 2022 in case No. 554/3925/22[2] (criminal proceedings No. 1-kp/554/387/2022), on the grounds of crimes under Part 2 of Article 111, part 2 of Article 260 and Article 438 of the Criminal Code of Ukraine, it was established that the accused, being in the conditions of an international armed conflict, acting intentionally, committed illegal possession of vehicles on the territory of one of the state-owned enterprises of the Sumy Oblast, which caused material damage in the amount of UAH 232,048. In the reasoning part of the relevant court decision, the description of the incriminated act does not contain an indication of its purpose and motives, it does not specify which norm of international humanitarian law was violated, and there is no clear and convincing link between the illegal act and the context of the armed conflict. In other words, questions remain as to whether the act falls within the qualification of a war crime within the meaning of international criminal and humanitarian law, or whether the act should be considered in the context of general responsibility that occurred within the framework of an armed conflict.

In such circumstances, there is a risk of erroneous legal qualification, which can lead to ignoring the specifics of a war crime, which implies not only objective and subjective signs, but also the need to establish a link between the act, the context of an armed conflict and its international legal consequences. This significantly affects the direction of intent of the subject of the crime, determines the choice of ways to implement criminal intentions, and also determines the goals, motivational factors and other relevant elements of the actual circumstances of the criminal offence.

O. Agarkova (2024) noted that within the framework of criminal proceedings, factual data should be established that confirm the existence of an armed conflict, its relationship with an illegal act and socially dangerous consequences, which allows identifying victims of a criminal offence, and identifying objects of encroachment that are protected by international humanitarian law. Describing the potential range of subjects of war crimes, the researcher referred to direct participants in the armed conflict, persons who were involved in the planning, organisation, or implementation of military operations, representatives of the administrative and command staff who control the provision of law and order, including in the occupied territories (Agarkova, 2024).

A somewhat detailed differentiation of the subjects of war crimes was given by K. Shevchyshena (2024), dividing the latter into representatives of the military-political leadership, the highest command staff, other military personnel involved in the armed conflict, members of illegal armed groups and private military companies involved in the armed conflict, and persons cooperating with one of the parties to the conflict for political, ideological, material, personal, and other reasons.

In fact, the above classification is consistent with the research data, where the subjects of war crimes can be differentiated into four main groups. Firstly, combatants from among the armed forces of a state party to an armed conflict. Secondly, persons acting on behalf of or in the interests of one of the parties to the conflict, including mercenaries, volunteers, and members of armed groups. Thirdly, commanders, military chiefs, and representatives of the military-political leadership who can both personally commit illegal actions and bear legal responsibility for giving orders, which directly contradicts the provisions of international humanitarian law. Fourthly, civil or service organisations that take an active part in the implementation of military tasks, or perform the assigned powers within the structure or functions of the belligerent party

[1] Criminal Code of Ukraine. (2001, May). Retrieved from https://zakon.rada.gov.ua/laws/show/2001-05#Text.
[2] Verdict of the Oktyabrsky (Shevchenkivsky) District Court of Poltava in Case No. 554/3925/22. (2022, June). Retrieved from https://reyestr.court.gov.ua/Review/104701812.

(representatives of security agencies, intelligence, law enforcement agencies, the penitentiary system, medical institutions, employees of defence or infrastructure enterprises, etc.).

The functioning of these categories of subjects of war crimes is based on a well-established system of subordination relations, which is formed on the principle of unity of command. This fundamental approach provides for a clear division of management functions and responsibility for their proper implementation. Accordingly, military commanders (chiefs) have the power to make decisions, give orders and ensure their implementation within a certain competence, where the structural hierarchy is implemented both through vertical subordination (for example, by rank) and through functional affiliation (for example, by official position).

Subordination relations in the military structure are determined not only by the specifics of internal military service, but also serve as the foundation for establishing individual and command responsibility. It follows from this that commanders and other military chiefs are subjects of war crimes not only if they are directly involved in illegal acts, but also as persons who have given clearly criminal orders or failed to take appropriate measures to prevent or suppress gross (serious) violations of international law. This means that the legal assessment of a person's behaviour as a potential war criminal is inextricably linked with their official position, the nature of functional powers (official duties), and the volume of subordinate personnel.

In this context, the key circumstances to be proved in criminal proceedings on violation of the laws and customs of war should include the injured person (victim), and the scope and nature of socially dangerous consequences caused by the actions of the guilty person in committing a war crime. This involves determining the nature and extent of the physical, moral and/or material (financial) damage caused, which is important for establishing the degree of public danger of the unlawful act, its classification, and for justifying the initiation of a pre-trial investigation.

This was also emphasised by O. Agarkova (2024), referring to the circumstances to be proved the social status of the injured person. This refers to whether the person is a serviceman, a prisoner of war, a civilian, a person endowed with appropriate immunity or protected in accordance with international treaties. Type and legal status of property that has been damaged or reduced as a result of an armed attack, including whether this property belongs to objects that are protected (protected) by international treaty law. Causal relationship between the actions of the perpetrator and the consequences that caused physical, moral (psychological), property or material (financial) damage.

According to K. Shevchyshena (2024), the differentiation of victims of war crimes should be carried out according to three main criteria, which answer the question of whether the victims belong to the civilian population, military personnel, and representatives of humanitarian organisations or peacekeeping missions. However, this classification does not fully meet the needs of practice, since it does not cover all possible participants in war crimes.

The standards of investigation of war crimes developed by specialists in international humanitarian law under the auspices of the Office of the Prosecutor General of Ukraine (Basic investigative standards..., 2016) also do not give clear answers to the questions raised. According to the results of the analysis, they superficially identify three main groups of protected persons who may fall under the category of victims of violations of the laws and customs of war. These subjects include prisoners of war, civilians, and other participants who are protected by international humanitarian law.

A similar opinion is shared by other researchers, dividing the victims into medical and spiritual personnel, persons from the armed forces who laid down their weapons, as well as those who in the status: "hors de combat" – left the fighting due to illness, injury, detention, or for any other reason. This refers to former combatants who no longer participate in an armed conflict as a result of voluntary cessation of hostilities as a result of captivity, injury, illness, or other circumstances that objectively make it impossible for them to continue participating in hostilities (Batyuk & Dmytriv, 2021; Hryga & Burnos, 2024).

In addition, the researchers emphasise that the commission of war crimes can have legal consequences even in the absence of these subjects. As an example, researcherscite situations where military operations cause significant or long-term damage to the environment, attacks are carried out on critical infrastructure, or national cultural treasures are looted, etc. Consequently, the victim, according to researchers, is considered as an optional sign of the objective side of the composition of a criminal offence under Article 438 of the Criminal Code of Ukraine, which seems debatable.

In this context, it should be noted that ignoring the fact of the presence of an injured party contradicts the generally recognised principles of criminal law, according to which damage (physical, property or non-material) is always a mandatory element of an act that acquires criminal significance. In addition, in the context of international humanitarian law, it is the presence of an injured party (both individually defined and collectively) that allows providing a legal assessment of the relevant acts. The absence of the victim as an object of encroachment calls into question the public danger in the understanding of the criminal law doctrine, which requires additional theoretical and legal rethinking. For a holistic distinction of victims in criminal proceedings on the facts of violation of the laws and customs of war, it is advisable to focus on the classification of war crimes (Table 1).

Table 1. Classification of victims in war crimes proceedings based on the forensic aspects of their commission

Based on the type of armed conflict		Based on the location of the offence		Based on the criterion of the legal status of a person in an armed conflict				Based on the illegal orientation and method of commission			Based on the character and scale of consequences			
victims of an international armed conflict	victims of a non-international armed conflict	victims in the occupied territory, including where active military operations are being conducted or not being conducted	victims in the controlled territory, including de-occupied territory	a civilian who has reached the age of majority	a child and/or a person who has not reached the age of majority	a serviceman, including a person involved in an armed conflict and a person who, for objective reasons, is in the status of "hors de combat"	persons with special status and special protection in accordance with international law	victims of attacks on life, health, honour, dignity, inviolability, and personal security	victims of encroachments on property rights	victims of violations of international protection of entities and objects that are under special protection	victims of the death of a person	victims of bodily injury or mutilation	victims of loss or damage to cultural values, national heritage	victims of humanitarian crises (catastrophes)

Source: developed by the authors

In this context, the analysis of socially dangerous consequences of the offences under study is of particular importance. This refers to extraordinary circumstances caused by dangerous events that disrupt the usual mode of life of the population and the functioning of the country. This thesis was confirmed by the classification of emergency situations in the current legislation of Ukraine. Thus, according to Article 5 of the Law on Civil Protection, all emergencies are divided according to the nature of origin, the scale of spread, the level of human losses, and the amount of material damage[1]. Depending on the source of origin of a particular event, emergencies are differentiated into natural, anthropogenic, social, and military ones.

Unlike others, military emergencies arise as a result of armed conflict. As a rule, they cause significant destruction, unpredictable human casualties, disruption of the living conditions of the population, and serious changes in the social, political, economic, and security environment of the country. Researchers also identified combined emergencies that simultaneously combine several types of threats that interact with each other on the principle of a "cascade effect", when the negative consequences of one event provoke the emergence of others. This means that military actions can be a catalyst for the occurrence of anthropogenic disasters, in particular, by damaging critical infrastructure facilities, industrial enterprises, etc. Therefore, war crimes in a broad sense pose a threat to national security. In other words, the consequences of war crimes often cause systemic disturbances in social, economic, political, environmental, and humanitarian stability, which takes society and the state beyond the normal functioning. As a result, circumstances arise that form special conditions for the life of the population and the functioning of the country, which are usually classified as emergency.

Thus, the main criterion for the introduction of a special legal regime of martial law is the occurrence of emergency circumstances of a military nature that violate the normal (normal, regular) living conditions of the population and the functioning of the country as a result of armed conflict and its associated consequences. In most cases, this leads to large-scale destruction, significant human casualties, destruction of elements of biodiversity, environmental threats, and a number of other destabilising factors that pose a threat to the national security of the country.

That is, emergency circumstances of a military nature form the appropriate conditions that make it necessary to introduce a special legal regime – martial law. Emergency conditions are a direct consequence of these circumstances and the basis for the introduction of a special legal regime to localise military threats, stabilise the situation, ensure national security, law and order, and restore the rule of law and the normal functioning of government bodies in conditions of armed conflict.

As noted by D. Lazareva (2025), extraordinary circumstances caused by military operations create specific conditions for the procedural activities of investigative bodies, which affects the methodology of their investigation. In this context, war crimes have a dual legal nature, covering both domestic and international legal contexts. From the standpoint of national jurisdiction, their consequences are expressed by significant human casualties, significant material damage, and violation of normal living conditions of the population both at the level of individual administrative and territorial units and the state as a whole.

In terms of international law, war crimes go beyond the territories of the warring parties, since they constitute a violation of the norms of international humanitarian law and acquire the status of internationally wrongful acts affecting security and stability on a global scale. This leads to a response from the international community and the activation of mechanisms for international criminal prosecution. That is why the effectiveness of the investigation of war crimes requires coordinated interaction between national and international

[1] Civil Protection Code of Ukraine. (2012, October). Retrieved from https://zakon.rada.gov.ua/laws/show/5403-17#Text.

legal institutions, which contributes to the strengthening of the global system of security, law and order, and justice in this area of legal relations. The commission of war crimes causes a significant international response, leading to the development and implementation of the legal policy of the international community aimed at minimising their negative impact on international security and stability.

Conclusions

Criminalistic characterisation of war crimes is a structured system of information that allows authorised participants in criminal proceedings to find out the circumstances of what was committed and effectively collect sufficient evidence to substantiate the guilt of the accused in court for gross violations of the laws and customs of war. This concept should be considered as a structured description of typical features of the type of war crimes, aimed at the effective activities of pre-trial investigation bodies to identify, disclose, investigate, and prevent socially dangerous acts that encroach on the established norms and rules of warfare.

It is appropriate to distinguish two main groups of elements of criminalistic characteristics of war crimes based on their international legal nature and the actual context of commission. The first one consists of general signs that are inherent in a wide range of socially dangerous acts. These include the place, time, method, and instrument of the crime, the nature and severity of the consequences, motives, typical traces (circumstances), and other common elements that allow recreating the model of a criminal event and contribute to its investigation.

The second one covers contextual and legal features that reflect the international legal nature of war crimes. Such circumstances include armed conflict as a mandatory element of the act under study, the legal status of subjects of offence and victims in accordance with the provisions of international humanitarian law, the nature of the object of criminal encroachment, signs of violation of international law, and other factors that determine the specifics of legal qualification under international criminal law and affect the process of proving violations of the laws and customs of war.

That is why it is noteworthy to establish a connection between actions and the contextual features of what was done. This involves finding out the ability of a particular person to commit a war crime, making an appropriate decision, the method of implementing criminal intent, and the goal that they sought to achieve by committing an illegal act and the motives that were the grounds for achieving criminal goals. Therefore, within the framework of criminal proceedings on violation of the laws and customs of war, factual data should be collected that confirm the existence of an armed conflict, the existence of a causal link between it and a specific crime, and allow identifying the culprit, victims, and objects of encroachment that are protected by international humanitarian law. The establishment of these circumstances significantly affects the process of proof itself, where the cognitive significance of each procedural action depends on the specific event of violation of the laws and customs of war.

In further research, it becomes necessary to carry out a detailed analysis of issues related to determining the evidentiary value of questioning in criminal proceedings on violation of the laws and customs of war, investigating the organisational and tactical aspects of its preparation, outlining the main tactical techniques for conducting, and determining methods for properly recording its results.

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Conflict of Interest

None.

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Теоретико-правовий аналіз окремих аспектів криміналістичної характеристики порушень законів і звичаїв війни

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Анотація
Актуальність дослідження зумовлена необхідністю вдосконалення теоретичних і практичних підходів до розслідування воєнних злочинів, забезпеченням ефективного їх виявляння та документування в процесі доказування. Метою дослідження було комплексне вивчення структурних елементів криміналістичної характеристики воєнних злочинів, передбачених як ст. 8 Римського статуту Міжнародного кримінального суду, так і ст. 438 Кримінального кодексу України, з огляду на практику національних і міжнародних судових інстанцій, а також розроблення пропозицій щодо оптимальних шляхів розслідування. Методологічну основу дослідження становили формально-юридичний, порівняльно-правовий, догматичний, системний методи, емпіричне вивчення слідчої та судової практики. Практичною основою дослідження є матеріали кримінальних проваджень за фактом вчинення воєнних злочинів, на території України, а також прецедентна практика міжнародних (спеціальних) трибуналів. За результатами проведеного дослідження уточнено зміст і структуру криміналістичної характеристики воєнних злочинів, окреслено її значення для встановлення обставин, що підлягають доказуванню, а також ключові проблеми, які впливають на процес доказування в умовах збройного конфлікту. Увагу зосереджено на контекстуальних ознаках порушень законів і звичаїв війни, які були інтегровані в криміналістичну характеристику воєнних злочинів як системоутворювальні елементи, що визначають специфіку розслідувань залежно від способу вчинення, механізму події, особи злочинця та потерпілого, суспільно небезпечних наслідків та їх взаємозв'язку з учиненим. Уперше систематизовано криміналістичні ознаки воєнних злочинів на підставі міжнародно-правової кваліфікації та специфічних умов розслідування. Практичне значення одержаних результатів полягає в можливості їх використання в практичній діяльності органів досудового розслідування, прокуратури та суду задля підвищення результативності в процесі розслідування та доведення вини осіб, причетних до порушень законів і звичаїв війни

Ключові слова:
воєнний злочин; особливості розслідування; контекстуальні обставини; міжнародне право; надзвичайні обставини; воєнний стан; процес доказування