

The aggravating and the particularly aggravating circumstances of «intentional grievous bodily harm» corpus delicti, unknown to Ukrainian legislation, are considered. So 19 of 34 circumstances are entirely unknown to the corpus delicti legal construction and 15 of them are foreseen in p.2 art.115 of the Criminal Code of Ukraine (intentional murder).

The offers are suggested as for criminal legislation norms improvement, that Criminal Code contains, about the responsibility for intentional grievous bodily harm, including the aggravating circumstances of the p.2 art. 121 of the Criminal Code of Ukraine (intentional grievous bodily harm) review in order to include some aggravating circumstances of the p.2 art. 115 of the Criminal Code of Ukraine (intentional murder) as the particularly aggravating circumstances of the pointed crime, taking into account the practice of the CIS countries above.

Key words: body injuries, physical violence, mental violence, aggravating and the particularly aggravating circumstances, intentional grievous bodily harm, foreign countries legislation .

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WAR CRIMES UNDER THE INTERNATIONAL CRIMINAL COURT STATUTE

The article considers important aspects of determination of «war crimes» and «elements of war crimes» in the international treaties and international practice. The authors reveal the efficacy of the international precedent in ensuring compliance, implementation, application and use of decisions of ICTY, ICTR, and ICC in today's realities. The elements describing the subject-matter of jurisdiction for war crimes under art. 8 (2) (a) ICC Statute are analyzed. It was defined that a war crime is any act of violence qualified as crime, committed during, and in connection with a war under specially favorable conditions, created by the war and facilitating its commission, the act being directed against the other belligerent state, its interests, or its citizens, against a neutral state, its interests, its citizens as well as against stateless civilians, unless it is justified under the law of warfare.

Key words: war crimes, elements of war crimes, international humanitarian law, Geneva Conventions of 1949, international criminal law, international armed conflict, violation of laws of war.

Formulation of the problem.

A war crime is defined as an act that constitutes a serious violation of the law of war that gives rise to individual criminal responsibility.

Examples of war crimes include intentional killing civilians or prisoners, torture, destroying civilian property, taking hostages, perfidy, rape, using child soldiers, pillaging, declaring that no quarter will be given, and using weapons that cause superfluous injury or unnecessary suffering.

The concept of war crimes began to emerge during the end of the 19th century and the beginning of the 20th century when the body of customary international law applicable to warfare between sovereign states was codified. Such codification occurred at the national level, such as with the publication of the Lieber Code in the United States, and at the international level with the adoption of the treaties during the Hague Conventions of 1899 and 1907. Moreover, trials in national courts during this period further helped clarify the law. Following the end of World War II, major developments in the law occurred. Numerous trials of Axis war criminals established the Nuremberg principles, such as notion that war crimes constituted crimes defined by international law. Additionally, the Geneva Conventions in 1949 defined new war crimes and established that states could exercise universal jurisdiction over such crimes.

In the late 20th century and early 21st century, following the creation of several international courts, additional categories of war crimes applicable to armed conflicts other than those between states, such as civil wars, were defined [1, p. 63–64].

State of Research. The issues of determination and development of the international norms concerning the war crimes and their elements in different aspects were researched by a lot of lawyers and scientists since the appearance of the main international criminal tribunals and courts (such as Nuremberg Tribunal, Tokyo Tribunal, ICTY, ICTR and ICC). A great contribution to the development of the problem was made by such scholars as I. P. Blishchenko, R. Abi-Saab, L. Moir, E. La Haye, T. David, F. Bugnion, I.M. Angel, K. S. Zhabigailo.

In post-Soviet jurisprudence in some legal issues concerning war crimes such researchers as A.B. Amelin, A.I. Poltorac, L.I. Savinski, M.G. Smirnov, V.N. Rusinova, V. Gamurari, O.N. Tolochko are involved.

In the Ukrainian legal science with some aspects of the problems of international conflicts and war crimes such experts as A.S. Matsko, M.M. Gnatovsky, O.V. Kasinyuk, V.N. Repetsky, N.V. Dremina, V.P. Basov are engaged.

The **main objective** of the study is to reveal trends and optimal mechanism for the development, as well as to formulate scientific and practical proposals on the definition and qualification of war crimes and their implementation in the national jurisdictions on the basis of an integrated, comprehensive analysis of the doctrinal foundations, legal

regulation of international humanitarian law provisions and international criminal law norms applicable to determination of armed conflicts.

Statement of key provisions. Violation of the laws of war entailed individual responsibility in many ancient civilizations such as China, India or Asia, where, for example, according to the code of Bushido a soldier shall be guilty of manslaughter if he kills prisoners of war with his own hands. In 1268 in Naples, Conrandin von Hohenstafen was tried and sentenced to death for having initiated an unjust war. In 1474, the trial of Peter von Hagenbach is one example of a quasi-international tribunal, which convicted him of murder, rape, perjury and other crimes against the laws of man and of God committed in the village of Breisach.

In 1625, Grotius, shadowing the concept of international crime or offenses against mankind, wrote: «the fact must be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishment not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons what so ever». Similar views were expressed by, for example, F. de Vitoria in 1532, c. Wolf in 1764 and J. Moser in 1882 [2, p. 105–106].

The Versailles Treaty include specific provisions dealing with individual criminal responsibility for violations of the laws of war. After the conclusion of the First World War, Allied leaders developed a concept to try enemy leaders criminally for the international law violations they committed during the war. Articles 227-230 of the stipulated Versailles Treaty the arrest and trial of German officials accused as war criminals. These occurred in 1921. The legacy of the Leipzig trial is that it was the first attempt to develop a comprehensive approach and system for prosecuting international law violations in war time [3].

After the Second World War the Nuremberg and Tokyo Tribunals were created. This Tokyo tribunal convened in May of 1946 to try the leaders of the Empire of Japan for three types of crimes: «Class A» (crimes against peace), «Class B» (war crimes), and «Class C» (crimes against humanity), committed during World War II. What is known today as the concept of war crime developed further under the umbrella of the Nuremberg Trials based on the definition found in the London Charter (1945).

In addition to war crimes, the London Charter also set out definitions for crimes against peace (used today in the discussion surrounding the crime of aggression) and crimes against humanity, often occurring in concert with war crimes during situations of armed conflict [3].

War crimes committed in internal armed conflict were not recognized in war crimes provisions until the Statute of the International Criminal Tribunal for Rwanda, as a result of the 1994 genocide that occurred there. This post-dates the mandate of the Statute for the International Criminal Tribunal for the Former Yugoslavia, though in the 1995 *Tadic* case, the Court embraced a broad view of the two categories of war crimes and found that international criminal responsibility included acts committed during internal armed conflict [1]. In 1998 a very important body, the International Criminal Court was created.

Every State is forbidden to wage war or armed conflict in a manner that violates international humanitarian law. The duty of States is not limited to refraining from violations.

They must also ensure that individuals under their control adhere to the provisions of international humanitarian law. Here, criminal law can function to deter individuals from violating international humanitarian law and punish those violations that do occur. Many states have adopted codes of military justice and claimed the right to try and punish members of enemy forces, after hostilities ceased, for violations of the laws of war. As a rule, the crimes were defined in domestic law. The Geneva Conventions were the first treaties to require criminalization of certain violations under domestic law (grave breaches).

Determining which violations of international humanitarian law create individual criminal liability is one of the principal challenges facing the law of war crimes. No definitive international codification exists so far. Art. 8 (2) of the ICC Statute, for example, lists many important crimes, but is not exhaustive, and other crimes can exist under customary international law [4].

A classical definition of war crimes was given by Manfred Lachs in 1945: a war crime is any act of violence qualified as crime, committed during and in connection with a war under specially favorable conditions, created by the war and facilitating its commission, the act being directed against the other belligerent state, its interests, or its citizens, against a neutral state, its interests, its citizens as well as against stateless civilians, unless it is justified under the law of warfare.

The punishment of individuals for war crimes is as old as the rules regulating warfare. Sanction for violating the laws and customs of war have been an integral part of the laws of warfare and an essential trigger to assure some compliance with this body of law by soldiers. The principle of individual criminal responsibility slowly found its way into international instruments codifying the laws and customs of war. In the twentieth century, an essential ingredient of the regime of war crimes was added with

the creation of international tribunals able to prosecute war criminals for what had become international crimes [2, p. 104].

The Statute of the International Criminal Court [5] defines war crimes as, *inter alia*, «serious violations of the laws and customs applicable in international armed conflict» and «serious violations of the laws and customs applicable in an armed conflict not of an international character». The Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda and of the Special Court for Sierra Leone and UNTAET Regulation No. 2000/15 for East Timor also provide jurisdiction over «serious» violations of international humanitarian law [7].

War crimes may be perpetrated by military personnel against enemy servicemen or civilians, or by civilians against either members of the enemy armed forces or enemy civilians (for instance, in occupied territory). Conversely, crimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes. Such offenses may nonetheless fall within the ambit of the military law of the relevant belligerent.

Not all crimes committed during an armed conflict constitute war crimes. It is widely held in case law and legal literature that, in order to qualify as a war crime, criminal conduct must be 'closely related to the hostilities'. This relationship between armed conflict and conduct, termed 'nexus' (or 'link'), serves to distinguish between war crimes, on the one side, and 'ordinary' criminal conduct (offenses falling under the law applicable in the relevant territory) committed during – but unrelated to – an armed conflict, on the other. This applies in particular to offenses committed by civilians, although courts have also required the link or nexus with an armed conflict in the case of crimes perpetrated by members of the military.

It should also be noted that the question of identifying a nexus between a criminal offence and an armed conflict is relatively easy in the case of international armed conflict: there, normally two or more belligerents face each other, and the civilians who belong to the enemy belligerent and do not take an active part in hostilities are «protected persons» (together with the wounded and the sick, the shipwrecked and the prisoners of war); they therefore may not be the subject of an attack. In addition, any offense committed by a combatant against a 'protected person' in breach of international humanitarian law is the actus reus of a war crime, for the offense amounts to a 'serious' violation of a rule of IHL.

In contrast, things are less clear in internal armed conflict. Here, in addition to the fact that governments face rebels having the same nationality

as government officials, civilians sometimes are engaged in fighting, and attack other civilians – despite the fact that they have the same nationality – on the assumption that the latter ‘belong to’ the opposed faction (that is, owe allegiance to the military and political structure of the opposed faction).

Furthermore, technically speaking, in a civil war civilians are not ‘protected persons’ pursuant to the Geneva Conventions and Protocols. These problems affecting internal armed conflicts should be kept in mind when considering the various issues that accompany the question of pinpointing the nature and scope of the ‘nexus’ [8].

Violations of the laws and customs of war are considered serious if (a) they endanger protected persons or objects or they breach important values; and (b) they are committed willfully—in the sense of intentionally or in reckless disregard of their outcome as endangering protected persons or objects or their breach of important values [9].

War crimes include the following serious violations of international humanitarian law:

1. Grave breaches of the Geneva Conventions:

In the case of an international armed conflict, any of the following acts committed against persons or property protected under the provisions of the relevant Geneva Convention: willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; willfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial; unlawful deportation or transfer; unlawful confinement; taking of hostages.

Four elements describing the subject-matter jurisdiction for war crimes under art. 8 (2) (a) ICC Statute are drafted in the same way for all crimes under this section.

1. Such person or persons/ property were/was protected under one or more of the Geneva Conventions of 1949.

2. The perpetrator was aware of the factual circumstances that established that protected status.

3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of actual circumstances that established the existence of an international armed conflict [10, p. 17].

In other interpretation these elements are:

(1) Armed conflict: there must have been an armed conflict when and where the alleged crimes were committed.

(2) Protected persons: the victim must be protected under IHL.

(3) Nexus: there must be a sufficient nexus between the accused's acts and the armed conflict.

(4) Existing IHL: the violation must be a breach of customary or treaty IHL binding on the accused.

(5) Gravity: the violation must be serious and involve grave consequences for the victim. (6) Individual criminal responsibility: the violation must entail individual criminal responsibility of persons breaching the rule.

(7) Awareness: It is also necessary to prove that the accused was aware that an armed conflict existed [11].

The current view of 'grave breaches' as something special and different was given judicial impetus by a majority of the judges of the ICTY Appeals Chamber in *Tadić* (Decision on Interlocutory Appeal on Jurisdiction), with Judge *Abi-Saab* dissenting. In that decision, the majority of the ICTY Appeals Chamber reasoned that the notion of 'grave breaches' is limited to international armed conflicts and does not apply to internal armed conflicts. Their conclusion was based solely on the fact that the Geneva Conventions provided for universal jurisdiction for purposes of 'grave breaches' [9].

The term «international armed conflict» is defined under common art. 2 of the Geneva Conventions in the following terms:

– ... all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

– ... all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance [12, p. 15].

The ICTY found in the *Tadić* case that an international armed conflict exists whenever there is a resort to armed forces between States [13].

2. Other serious violations of the laws and customs applicable in international armed conflict:

- Intentionally directing attacks against the civilian population;
- Intentionally directing attacks against civilian objects;
- Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission;

- Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

- Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

- Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;

- Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

- The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

- Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

- Killing or wounding treacherously individuals belonging to the hostile nation or army;

- Declaring that no quarter will be given;

- Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

- Pillaging a town or place, even when taken by assault;

- Employing poison or poisoned weapons; asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

- Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

- Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict;

- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, a enforced sterilization, or any other form of sexual violence;
- Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies;
- Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities. These violations of customary international law are listed as grave breaches in Additional Protocol I and as war crimes in the Statute of the International Criminal Court.

Serious violation of international humanitarian law are covered by the general subject matters in national penal codes, which particularly include offenses against: life, body and health, personal liberty, personal property, offenses constituting a public danger and offenses committed in execution of official duties [10, p. 704].

To summarize, a tentative appraisal of the provisions on war crimes of the ICC Statute cannot but be checked: in many respects the Statute marks a great advance in International criminal law, in others it proves faulty instead; in particular, it is marred by being too obsequious to state sovereignty.

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Доди К., Марко С. И. Военные преступления в Статуте Международного уголовного суда

Рассмотрен важный аспект проблематики, который проистекает из содержания понятий «военные преступления» и «элементы военных преступлений», в международных договорах и международной практике.

Выяснена действенность международного прецедента в обеспечении, соблюдении, исполнении, применении и использовании решений МТБЮ, МУТР и МУС в современных реалиях. Проанализированы элементы, описывающие предметную юрисдикцию в отношении военных преступлений по ст. 8 (2) (а) Статута МУС. Определено, что под военным преступлением понимается предусмотренное актом международного уголовного права виновно совершенное общественно опасное деяние, посягающее на установленные основополагающими принципами международного права и международным гуманитарным правом правила ведения вооруженных конфликтов международного и немеждународного характера.

Ключевые слова: *военные преступления, элементы военных преступлений, международное гуманитарное право, Женевские конвенции 1949 г., международный вооруженный конфликт, международное уголовное право, нарушение законов войны.*

Доді К., Марко С. І. Воєнні злочини в Статуті Міжнародного кримінального суду

Розглянуто важливий аспект проблематики, що вкладається у зміст понять «воєнні злочини» та «елементи воєнних злочинів», у міжнародних договорах та міжнародній практиці. З'ясовано дієвість міжнародного прецеденту у забезпеченні, дотриманні, виконанні, застосуванні та використанні рішень МКТЮ, МКТР і МКС у сучасних реаліях.

Проаналізовано елементи, що описують предметну юрисдикцію стосовно воєнних злочинів за ст. 8 (2) (а) Статуту МКС. Встановлено, що під воєнними злочинами треба розуміти серйозне порушення звичаєвих і договірних норм міжнародного гуманітарного права, яке застосовують під час збройних конфліктів, іншими словами – серйозне порушення законів та звичаїв війни. Акцентовано, що такі злочини можуть вчинятися під час як міжнародних збройних конфліктів, так і збройних конфліктів неміжнародного характеру.

До воєнних злочинів, за ст. 8 Статуту Міжнародного кримінального суду, належать: а) серйозне порушення Женевських конвенцій від 12 серпня 1949 р.; б) інші серйозні порушення законів та звичаїв, які вчиняються під час міжнародних збройних конфліктів у межах, встановлених міжнародним правом; в) серйозне порушення ст. 3, загальної для чотирьох Женевських конвенцій 12 серпня 1949 р., яка застосовується до збройних конфліктів неміжнародного характеру; г) інші серйозні порушення законів і звичаїв, що стаються під час збройних конфліктів неміжнародного характеру в межах, визначених міжнародним правом.

Ключові слова: воєнні злочини, елементи воєнних злочинів, міжнародне гуманітарне право, Женевські конвенції 1949 р., міжнародний збройний конфлікт, міжнародне кримінальне право, порушення законів війни.

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