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**QUALIFICATION PROBLEMS OF WAR-RELATED CRIMINAL OFFENCES  
DOCUMENTED ON THE DE-OCCUPIED TERRITORIES OF UKRAINE**

The article is devoted to the characteristics of the main qualification problems of criminal offenses related to the war in the context of the de-occupation movement. Based on the analysis and synthesis of the experience of investigators from the National Police, the Security Service of Ukraine, as well as prosecutors on the de-occupied territories of Ukraine, four basic problematic subject areas with the corresponding typical situations of the law on criminal liability application have been identified: criminal legal qualification of artillery shelling, mining, causing death to a person, and other actions of physically detained representatives of the aggressor state. For each zone and situation, the main approaches to the qualification of documented criminal offenses and other events used in law enforcement practice have been identified. A critical analysis of these approaches has been carried out, shortcomings are identified, and ways to eliminate them are proposed.

**Key words:** *war, de-occupation, shelling, mining, causing death, war crime, terrorist attack, sabotage.*

*Original article*

**INTRODUCTION.** With the natural, tendentious expansion of the de-occupied territories areas of Ukraine with the gradual access to the internationally recognized state border of Ukraine, with the intensification of the de-occupation movement, an equally natural and very acute question arises regarding the restoration of legal and law enforcement activities on these territories. The de-occupation movement is a conditional category that reflects the process of restoring Ukraine's jurisdiction over the territories that were temporarily occupied by the Russian Federation. Of course, this process is multifaceted and criminal law enforcement is only one of its components, along with military combat, engineering technical, logistical, humanitarian and many other components. However, it is the adequate application of the criminal law that largely determines the adequacy of coverage of the criminal activities of representatives of the aggressor country on the territory of Ukraine. The latter is the requirement to ensure justice in the context of both international criminal justice and the national dimension of a larger process - transitional justice. At the

same time, as the practice of the work of the investigative and operational groups of the National Police, as well as investigators of the Security Service of Ukraine, the State Bureau of Investigation of Ukraine, prosecutors shows, there are significant differences, unevenness, and, in some cases, incorrectness in law enforcement approaches.

In this context, it is not superfluous to note that the peculiarities of criminal legal qualification are manifested primarily in the extraordinary conditions of application of the law on criminal liability in respect of those socially dangerous acts that: a) were committed during the temporary occupation, were an element (instrument) or criminal background phenomenon of the temporary occupation, criminal state policy of the Russian Federation or related aberrations-excesses; b) continue to be committed as a reaction not to de-occupation and/or continuation of the aggressive war and related crimes. These are groups of criminal offenses that law enforcement forces have to deal with when they enter the de-occupied territory and deploy their jurisdictional activities. The latter is accompanied by numerous

difficulties of both organizational, security and intellectual nature, which affects the quality of law enforcement, especially in the format of investigative activities.

It should be noted that the problems of criminal legal qualification of war crimes, collaboration, aiding and abetting the aggressor state and other criminal offenses related to the war, since the end of February 2022, have not only become more frequently the focus of scientific attention, but have become a real mainstream for obvious reasons. It is impossible not to note the works of M. M. Hnatovskiy, K. Dörmann, N. A. Zelinska, V. V. Kuznetsov, S. P. Kuchevska, V. O. Myronova, O. Yu. Illarionov, Ye. O. Pysmenskyi, M. V. Piddubna, V. P. Popovych, V. M. Repetskyi, M. V. Syploki, T. Taylor, M. I. Khavroniuk, V. V. Shablysty and other researchers. The existing developments are either fundamental in nature, relate to the issues of international criminal law as such, or controversially highlight certain aspects of technical and legal nature, compliance with the grounds and principles of criminalization and penalization of relevant socially dangerous acts, interpretation of legal features of criminal offenses. At the same time, the movement of de-occupation of the territories of Ukraine, the practice of the investigative and operational groups of the National Police, the Prosecutor's Office, the Security Service of Ukraine shows that we are dealing with a complex, relatively holistic problem of criminal qualification of criminal offenses related to the war on the de-occupied territories from the standpoint of the conditional logic of wartime. More on this logic below.

**PURPOSE AND OBJECTIVES OF THE RESEARCH.** The purpose of the article is to identify and describe the main theoretical and applied problems of the criminal offenses qualification related to the war on the de-occupied territories, to formulate proposals for their solution, to ensure unity in the application of the law. The tasks of the article are: 1) selection and description of typical situations of application of the law on criminal responsibility on the de-occupied territories in the context of responding to criminal offenses related to the war; 2) description of the approaches to criminal and legal qualifications formed by practice; 3) critical analysis of these approaches and formation of proposals for their improvement.

**METHODOLOGY.** The philosophical level of the research methodology of theoretical and applied problems of criminal offenses qualification related to the war on the de-occupied territories is based on the principles and laws of dialectical determinism: universal connection, historicism,

systematicity, dialectical contradiction, balance. Their application with the addition of general scientific methods (analysis, synthesis, induction, comparison, etc.) determined the general composition of the study, the allocation of an epistemologically autonomous problem of qualification of this category of criminal offenses. Using the methods of system-legal analysis, hermeneutic method, content analysis (regarding 250 court verdicts under Articles 111, 111-1, 111-2, 114-2, 436-2, 438 of the Criminal Code of Ukraine), expert assessments (115 employees of pre-trial investigation bodies of the National Police, 40 prosecutors were interviewed, 10 heads and deputy heads of investigative departments of the Security Service of Ukraine) allowed to present a system of typical situations of application of the law on criminal liability on the de-occupied territories, to characterize the existing approaches to the criminal legal qualification of war-related crimes, to carry out their critical analysis.

**RESULTS AND DISCUSSION.** In the introduction to this article, we have repeatedly used the undogmatic category of “war-related criminal offences”. It should be noted that it is cross-cutting in terms of the structure of the Special Part of the Criminal Code and covers a number of criminal offenses (mainly crimes) committed during the temporary occupation by representatives (components) of the occupation forces against both the Armed Forces of Ukraine (combatants) and non-military (non-combatants), but protected by international humanitarian law categories of persons (civilians), as well as against the foundations of national security of Ukraine, public safety, and some other objects of criminal law protection. It is clear that the restoration of law and order on the de-occupied territories is a complex matter, covering the response to all offenses without exception, the implementation of other jurisdictional, preventive and service activities. However, we should be aware of the fact that law enforcement forces, “entering” the de-occupied territories immediately after their liberation, find themselves in a specific reality, where the primary factors that determine the priority of service activities are those related to recording, documenting, investigating both the consequences of the war, the activities of the occupation administration and occupation forces, their accomplices and collaborators, and documenting, investigating acts of ongoing, continuing aggressive war.

Our analysis of the investigative practice, expert assessments of the National Police, the Security Service of Ukraine, the Prosecutor's Office, who had experience in documenting, solving and investigating criminal offenses on the de-occupied

territories, as well as procedural guidance in them, allows us to identify a number of problematic typical situations in which an investigator finds oneself and in which decisions should be made on the criminal legal qualification of actions.

#### *1. Criminal-legal qualification of artillery fire*

*Situation 1.* Artillery shelling outside the settlement or within its boundaries, but such that did not cause any socially dangerous consequences, physical or property damage, i.e. without human casualties and destruction. The shelling that took place both before and during the de-occupation process, as well as after, on the de-occupied territory are being mentioned. Usually, in such cases, an investigative team is sent to the scene to document the event, ensure the implementation of a set of explosive safety measures, fix the trace pattern, and seize material evidence (or items that do not have the value of material evidence). But further activities regarding criminal legal qualification and entering (not entering) information into the Unified State Register of Pre-trial Investigations differ. Thus, the most common option is to refuse to initiate a pre-trial investigation on the grounds that the laws and customs of war were not violated as a result of the shelling, and therefore there are no signs of a criminal offense under Art. 438 of the Criminal Code of Ukraine. It is difficult to argue with this. And so it is.

Another approach, which is less common, but still occurs, is related to the qualification of such acts under Part 1 of Art. 438 of the Criminal Code of Ukraine. The arguments of law enforcers in favour of this position are mainly associated with: a) the established practice of qualifying shelling as war crimes; b) the inability to determine the real intent, the direction of the intent of those who carried out the shelling, and the use of the assumption of the possibility of a criminal offense under Art. 438 of the Criminal Code of Ukraine (a kind of presumption of guilt of the aggressor country). It is believed that this approach does not require a detailed critical analysis. Even a cursory glance is enough to reveal the logical and doctrinal weakness of this argumentation. It should be only noted that due to the obvious absence of immediate socially dangerous consequences in the form of material or physical damage from a particular artillery shelling, which could indicate a possible violation of the laws and customs of war, the mere assumption of otherwise is not enough to establish a criminal offense under Art. 438 of the Criminal Code of Ukraine (beyond reasonable doubt).

Instead, it should be emphasized that the refusal to initiate a pre-trial investigation into the facts of such shelling due to the lack of signs of a

criminal offense is groundless. Firstly, even if no damage was caused by the shelling, there was a threat of socially dangerous consequences. Secondly, the very fact of shelling significantly violates the state of public safety. Thirdly, the shelling is carried out not in ordinary conditions, but in the conditions and in the context of war. Here is the first place where the need to apply the logic of war is encountered (or the logic of wartime thinking), which was mentioned in the introduction. And this logic proceeds from the statement as a legal fact of the existence of an ongoing crime, that is waging an aggressive war (aggressive war as a continuing crime (Stahn, 2013)), the elements of which are provided for in Part 2 of Article 437 of the Criminal Code of Ukraine. Of course, each shelling is not a separate fact, but an episode of an ongoing crime. Documentation of such episodes within the framework of a single criminal proceeding (i.e., with the mandatory entry of information about the shelling into the USRCD, the initiation of criminal proceedings under Part 2 of Art. 437 of the Criminal Code of Ukraine and its unification with the “parent”) is an important condition for documenting the crime of aggression itself, for which, in accordance with international criminal and humanitarian law (international immunity of combatants), the responsibility lies solely with the highest military and political leadership of the aggressor state. In the future, these materials, among other things, will be the basis for prosecution in the format of international criminal justice. Instead, the absence or insufficiency of these materials due to law enforcement bias towards qualification mainly as war crimes (Репецький, Лисик, 2009; Maron, 2017) or as non-criminal acts of shelling can significantly weaken the position of the prosecution.

*Situation 2.* Artillery shelling that caused destruction or damage to infrastructure and property. The situation here depends on which objects are damaged:

a) if a military facility (buildings, engineering structures used by the Armed Forces of Ukraine, the National Guard, etc.) is damaged. A common approach in practice is to document the shelling and its consequences and at the same time to avoid assessing it as a crime. At the same time, it is guided by the provisions of customary international humanitarian law and the provisions of paragraph 11 of the Instruction on the procedure for the implementation of international humanitarian law in the Armed Forces of Ukraine<sup>1</sup>, which

<sup>1</sup> Про затвердження Інструкції про порядок виконання норм міжнародного гуманітарного

states that military objectives are considered legitimate targets for attack. Thus, the approach when investigators do not see the shelling of military targets as a crime under Article 438 of the Criminal Code of Ukraine should be considered quite correct. Exceptions, however, are those cases that involve the use of prohibited means of warfare, namely cluster, vacuum, phosphorus and similar munitions, which can be defined as inhumane weapons, the use of which is prohibited by convention (in particular, in particular, in accordance with the UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects<sup>1</sup>, the UN Convention on Prohibition of the Use of Cluster Munitions, etc.) Such cases are subject to qualification under Part 1 of Article 438 of the Criminal Code of Ukraine, and in case of death of people, including servicemen - under Part 2 of Article 438 of the Criminal Code of Ukraine.

At the same time, guided by the arguments that have already been stated above, it should be considered that even in the language of using the means permitted by international humanitarian law to attack military targets, it should be considered another manifestation of ongoing aggression, and therefore another episode of aggressive warfare (Part 2 of Article 437 of the Criminal Code of Ukraine). Especially when it comes to the death of servicemen;

b) if there is damage or destruction of property that does not belong to legitimate military purposes (so-called civilian property). In such situations, usually there are no difficulties, the qualification is carried out under Part 1 of Art. 438 of the Criminal Code of Ukraine. However, it is important to find out the affiliation of the subject of the shelling at least in the most general outlines: "Forces of Ukraine – forces of the aggressor state". For this purpose, a military examination is appointed, and at the stage of entering information into the USRCD, during the inspection of the scene, that is the involvement of a specialist in mili-

tary affairs, who will be able to determine at the initial stage the direction from which the shelling was carried out, the type of ammunition, artillery system, etc.

It should be noted here that often the establishment of these circumstances is either impossible due to the high intensity and multidirectional (from several directions) shelling, the object getting into the crossfire zone, the territory changing hands several times, under the control of different sides of the combat collision, or too complicated. A typical example is the situation with the destruction of the transport aircraft AN-225 "Mriya" in the hangar at the airport in the village of Gostomel, Buchansky district, Kyiv region. The trace picture formed at the scene does not currently give grounds for an unambiguous and accurate military expert conclusion about the factor of destruction: the nature, cause, explosive factors, their origin, the direction from which the fire was carried out, etc. In such cases, for the correct qualification of the act, the testimony of witnesses, eyewitnesses of the event, in particular among servicemen, local residents, is no less important than the expert opinion (specialist opinion);

c) destruction or damage to critical civil infrastructure (dams, transformer substations, thermal power plants, power plants, ports, etc.) is mostly qualified under Part 1 of Article 438 of the Criminal Code of Ukraine. The alternative qualification as sabotage is rejected by the investigators of the Security Service of Ukraine, guided by the same logic of war. The respondents from among the heads of investigative departments of the Security Service of Ukraine noted that sabotage is a peacetime crime; the state of war necessitates qualifying the relevant attacks on critical infrastructure as manifestations of war, in particular war crimes. A similar position is fixed in some doctrinal sources (Mireille, 2007). It seems that this position is vulnerable to criticism. First of all, because Part 2 of Art. 113 of the Criminal Code of Ukraine contains such a qualifying feature of sabotage as the commission of this crime under martial law. Therefore, in our opinion, it is necessary to distinguish between the shelling of critical civilian infrastructure with the aim of weakening the Ukrainian army (complicating the opportunities to gain a foothold on the de-occupied territory, slowing down the pace of de-occupation) and with the aim of weakening the state as a whole (its defense capability, economic potential, logistics, etc.). In the first case, it should be Part 1 of Article 438 of the Criminal Code of Ukraine, in the second – Part 2 of Article 113 of the Criminal Code of Ukraine. It should be understood that the state of war does not eliminate such an object of

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права у Збройних Силах України : Наказ МО України від 23.03.2017 № 164 // База даних (БД) України / Верховна Рада (ВР) України. URL: <https://zakon.rada.gov.ua/laws/show/z0704-17> (accessed 11 September 2022).

<sup>1</sup> Конвенція про заборону або обмеження використання конкретних видів звичайної зброї, які можуть вважатися такими, що завдають надмірних ушкоджень або мають невибірковою дію : від 10.10.1980 // БД «Законодавство України» / ВР України. URL: [https://zakon.rada.gov.ua/laws/show/995\\_266](https://zakon.rada.gov.ua/laws/show/995_266) (accessed 11 September 2022).

criminal law protection as the foundations of national security, which, moreover, becomes much more vulnerable than under normal conditions.

*Situation 3.* Artillery, rocket fire or the use of strike drones, which caused death or injury to people. Most of them are qualified under Part 2 of Article 438 of the Criminal Code of Ukraine. Similarly to the situation described above, the respondents from the National Police and Security Service investigators reject the possibility of qualifying such cases as terrorist acts (as well as in the case of destruction or damage to civilian infrastructure, for example, when a shell/rocket hits an apartment building), referring to the logic of war, according to which it should be a war crime, but not terrorism. However, again we have to make some adjustments and note that the qualification will be influenced by the content of the subjective side of the act, which can be judged by a set of derivative features, additional markers.

From our point of view, in the situation when there is a shelling (attack) on civilians in the area of active hostilities and in the adjacent territory, in most cases it should be talked about the crime under Article 438 of the Criminal Code of Ukraine. Such shelling is indeed a method of warfare and is aimed at reducing the capabilities, psychological readiness of the local population to support the units of the Armed Forces of Ukraine: depopulation of the territories and reduction of volunteer, logistical support, discrediting the importance of the presence of the Armed Forces of Ukraine in or near settlements, etc. But in cases when it comes to terrorizing the local population, which is not directly connected with the Ukrainian army, with ensuring its capabilities in a particular section of the front, in the combat zone, it should, in our opinion, be talked about terrorism. Thus, the state of war does not cancel the possibility of committing terrorist acts, does not cancel public safety as an object of criminal law protection. A terrorist attack has a different purpose (Part 1 of Article 258 of the Criminal Code of Ukraine), a different subjective content of a socially dangerous act, which from the objective side may not differ from a war crime. When the shelling, in particular rocket attacks, is primarily a political action (for example, for the purpose of intimidation), and not a factor of a purely military nature, the act should be qualified as a terrorist act, not a war crime. By the way, a similar position is held by a number of foreign lawyers who study the problems of legal assessment of rocket attacks on the territory of Israel, different from the attacks of a military nature precisely because of the subjective side (Kontorovich, 2012). Waging an aggressive war may well be accompanied (and we see it on the exam-

ple of the Russian-Ukrainian war) by terrorist practices. Thus, they are built into the metasystem of war. But at the same time they retain their functional independence (we emphasize that this thesis does not apply to simulacra such as “DPR” and “LPR”, which are not terrorist organizations, but forms of the Russian occupation administration). The same criteria should be used to distinguish between terrorist attacks and sabotage. Even if the strikes are inflicted on critical infrastructure facilities, but such that objectively are not able to significantly weaken the state, but have mainly a psychological effect (panic, atmosphere of fear, anxiety, etc.), the act should also be qualified under the relevant part of Article 258 of the Criminal Code of Ukraine.

*Situation 4.* Identification of unexploded ordnance, such as explosive ordnance in which an igniter, detonator has been inserted and which has been stacked or otherwise prepared for use and used in an armed conflict. They could be fired, dropped, launched or released and should have exploded but did not<sup>1</sup>. The approach used in the practice of law enforcement agencies on the de-occupied territories is formed only in the security plane and is limited to the seizure and/or neutralization (destruction) of unexploded ammunition. From a service-applied point of view, this approach is quite functional and justified. Formally, it can be talked at least about a crime under Part 2 of Article 437 of the Criminal Code of Ukraine, that is waging an aggressive war. And if the relevant ammunition belongs to the prohibited under international humanitarian law then about violation of the laws and customs of war (Part 1 of Article 438 of the Criminal Code of Ukraine).

#### *II. Criminal and legal qualification of mining*

*Situation 1.* Detection of anti-tank mines. It should be borne in mind that the use of this category of mines is not prohibited by international humanitarian law. They do not belong to the prohibited means of warfare (Базов, 2008). Therefore, there is no crime under Article 438 of the Criminal Code of Ukraine. This is also reflected in the practice of law enforcement: demining is not accompanied by the initiation of criminal proceedings. And this practice is justified.

*Situation 2.* Detection of anti-personnel mines, which also in the vast majority of cases remains without fixation in the necessary criminal

<sup>1</sup> Конвенція про заборону застосування, накопичення запасів, виробництва і передачі протипіхотних мін та про їхнє знищення : 18.09.1997 // БД «Законодавство України» / ВР України. URL: [https://zakon.rada.gov.ua/laws/show/995\\_379](https://zakon.rada.gov.ua/laws/show/995_379) (accessed 11 September 2022).

procedural form within criminal proceedings. However, the situation is different here. The use of anti-personnel mines is prohibited by the Ottawa Convention. Therefore, their use is a violation of the laws of war. This gives grounds to raise the question of the qualification of mining with anti-personnel mines under Part 1 of Article 438 of the Criminal Code of Ukraine, and in case of death of a person from an explosion on an anti-personnel mine - under Part 2 of Article 438 of the Criminal Code of Ukraine. But the critic may rightly point out that the Russian Federation has not ratified the above-mentioned Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 18 September 1997. It follows that Russia is not subject to this Convention. However, this does not mean that it is free from international obligations arising from international customs, *jus cogens*, general principles of law accepted by civilized nations of the world. The same applies to international humanitarian law. It is absolutely unacceptable that one party to the war adheres to these principles and conventional obligations (Ukraine), while the other (Russia) does not. And this is another aspect of the logic of war.

The Preamble of the said Convention unambiguously emphasizes that this Convention itself is an attempt to formalize the principle of international humanitarian law, according to which the right of the parties to an armed conflict to choose methods and means of warfare is not unlimited, the principle which prohibits the use in armed conflicts of weapons, projectiles and methods of warfare likely to cause superfluous injury or suffering, and the principle that civilians and combatants must be distinguished<sup>1</sup>. These are unwritten principles, customary humanitarian law, from which the aggressor country cannot dissociate itself only on the basis of non-ratification of the relevant Convention.

Reasonable in this context is the opinion of T. R. Korotkoi (2017), who emphasizes that not all states of the world are bound by the obligations under the treaty norms of international humanitarian law. Therefore, international legal custom is of great importance in international humanitarian law: in case of universality, it is binding on all states, all actors, including non-state parties to armed conflict. The international custom of international humanitarian law successfully complements even a very detailed and extensive legal regulation.

It should also be noted that the installation of the so-called tripwires using hand grenades as explosive devices in the literal sense used in the above Convention is not considered illegal from its point of view, because such a device does not meet the definition of a "mine". However, it should be borne in mind that international humanitarian law consists not only of semantic and textual conventional structures, but also of conventions at the level of customary law. We believe that the purpose of such "tripwires" and the nature of their destructive effect are identical to anti-personnel mines. In this regard, there are, in our opinion, all grounds for qualifying the laying of "tripwires" as crimes under Part 1 or 2 (in case of death) of Art. 438 of the Criminal Code of Ukraine under the criterion of violations of the customs of war. When qualifying, it is necessary to proceed from the modeling of the coverage by a single intent of a holistic act of mining a certain object: terrain, structures, buildings, premises or even a settlement (a system of mining buildings, abandoned cars, military equipment, corpses, toys and other objects) during the retreat of enemy forces. Such a system of mining actions (and not the installation of each individual mine or "tripwire") constitutes a single crime under Art. 438 of the Criminal Code of Ukraine.

### *III. Criminal and legal qualification of causing death to a person*

*Situation 1.* As a result of the exhumation, a mass grave has been found. As a rule, a unified approach is applied to the entire burial site: examining each corpse separately, information is entered into the USRCD on the fact of committing a crime under Part 2 of Art. 438 of the Criminal Code of Ukraine. From our point of view, the correct approach is not a unified, but a differentiated approach, which provides for the differentiation of cases of causing death: a) to each individual person, which could have happened at different times, in different places, be committed by different actors, despite being in the same mass grave; b) to non-combatants and combatants. For non-combatants, taking into account the immediate causes of death, under Part 2 of Art. 438 of the Criminal Code of Ukraine with the specification of a specific violated norm of international humanitarian law (a specific convention or custom), depending on whether the death occurred due to violations of the treatment of civilians in the occupied territories or indiscriminate use of weapons, or an attack on civilian objects not justified by military necessity, etc; c) to combatants according to the criterion of the immediate cause of death – in the course of hostilities (Part 2 of Article 437 of the Criminal Code of Ukraine) or as a

<sup>1</sup> *Ibid.*

result of ill-treatment of prisoners of war (tied hands, signs of torture, etc. – Part 2 of Article 438 of the Criminal Code of Ukraine). The identical approach to the qualification of causing death is applied in cases of detection of single burials, as well as corpses outside the burial sites.

*Situation 2.* Discovery of the corpse of a combatant of the aggressor country. According to our surveys, in such cases, there is no question of launching the mechanism of criminal proceedings; the corpses of the Russian occupiers are transferred to centralized storage facilities without any investigative actions. At the same time, we cannot exclude (and this is confirmed by practice) that Russian servicemen may also become victims of war crimes. The fundamental cultural and civilizational difference between Ukraine and Russia does not allow us to refuse to respond legally to these facts, which are also subject to documentation and proper legal assessment, criminal and legal qualification.

#### *IV. Criminal and legal qualification of other acts of physically detained representatives of the aggressor state*

First of all, it is mentioned the problems of correlation of the legal status of detainees with the possibility of charging them with a certain criminal offense.

*Situation 1.* Physical detention of a career serviceman of the armed forces of the Russian Federation. In accordance with the requirements of international humanitarian law, according to the procedure defined by the current legislation of Ukraine, such a person acquires the status of a prisoner of war and must be transferred to prisoner of war camps<sup>1</sup> with the relevant notification

to the International Red Cross. If such a person is reasonably suspected of committing a military or other criminal offense, criminal proceedings under the relevant article of the Criminal Code of Ukraine are initiated against him/her simultaneously with obtaining the status of a prisoner of war. This situation is relatively clear and does not cause difficulties.

*Situation 2.* Physical detention of a member of a paramilitary unit who identifies oneself with the so-called DPR and LPR. The practice of assessing the actions and legal status of such persons varies. In a number of cases, law enforcers follow the path described in the previous situation, i.e. through the registration of the status of a prisoner of war and transfer to the relevant camps. In other cases, and quite numerous, there is refusal to register the status of a prisoner of war on the basis of the established approach to the qualification of participation in the organizations of the DPR and LPR as participation in terrorist organizations (Article 258-3 of the Criminal Code of Ukraine), less often as participation in illegal armed groups (Part 4 of Article 260 of the Criminal Code of Ukraine). In particular, respondents from among investigators of the Security Service of Ukraine insisted on the expediency of applying only this position. In this regard, we would like to make a few comments.

First, the qualification of participation in combat (paramilitary) units of the so-called DPR and LPR as participation in a terrorist organization is groundless. The linguistic and textual simulacra of the “DPR” and “LPR” are not terrorist organizations by definition, by essence. This is the ‘fruit’ of counter-real fantasies of representatives of the aggressor country, the result of their game. We should not accept the imposed rules of their game and believe that the combination of letters “DPR” and “LPR” is an ontological reality. The attitude to this combination as to terrorist or illegal armed formations is inadequate, it is the result of accepting the rules of the game imposed by the aggressor and the imposed semantic-symbolic reality. Moreover, in the latitudes of the same reality, the next schizopolitical changes have recently taken place and the simulacra “DPR” and “LPR” were included in the Russian Federation and ceased to exist as independently distinguished abbreviations. In addition to the fact that by this act the constitution of the mentioned country completely lost its meaning in relation to the real component of legal reality, including in the internationally significant context (presumably bringing

<sup>1</sup> Женевська конвенція про поводження з військовополоненими : від 12.08.1949 // БД «Законодавство України» / ВР України. URL: [https://zakon.rada.gov.ua/laws/show/995\\_153](https://zakon.rada.gov.ua/laws/show/995_153) (accessed 11 September 2022); Про затвердження Інструкції про порядок виконання норм міжнародного гуманітарного права у Збройних Силах України : Наказ МО України від 23.03.2017 № 164 // БД «Законодавство України» / ВР України. URL: <https://zakon.rada.gov.ua/laws/show/z0704-17> (accessed 11 September 2022); Про затвердження Порядку тримання військовополонених : Постанова Кабінету Міністрів України від 05.04.2022 № 413 // БД «Законодавство України» / ВР України. URL: <https://zakon.rada.gov.ua/laws/show/413-2022-п> (accessed 11 September 2022); Про утворення Координаційного штабу з питань поводження з військовополоненими : Постанова Кабінету Міністрів України від 11.03.2022 № 257 // БД «Законодавство України» / ВР України. URL:

<https://zakon.rada.gov.ua/laws/show/257-2022-п> (accessed 11 September 2022).

the final collapse of the empire one step closer), according to the law enforcement logic established in Ukraine, the anti-terrorist paradigm should have been broken. However, it is hindered by the conventional legal approach to the recognition of the nullity of any legal acts of the aggressor country or occupation administration (such as the recognition of the independence of the LDPR or the possible accession of the occupied territories to the territory of the Russian Federation), which violate the sovereignty and territorial integrity of Ukraine.

Thus, we must continue to apply the norm of Art. 258-3 of the Criminal Code of Ukraine to the detained members of paramilitary, armed units of the abbreviations “DPR” and “LPR”, which, we emphasize, do not exist even in the schizoid Russian propaganda quasi-reality. That is, we continue to drag the “corpse” of a sick consciousness, leaving it in the field of our legal system. It is high time to get rid of it. And the way is very simple: to change the thinking, perception and finally to adjust to the logic of war (again we remind about this logic). This means to be consistent in the legal assessment of the temporary occupation of certain territories of Donetsk and Luhansk regions not by terrorist organizations, but by a specific state – the Russian Federation. Not terrorist organizations, but occupation administrations are created in the occupied territories in order to manage them. You can call the latter as you like, but their nature as occupation administrations remains unchanged. Therefore, participation in the armed, paramilitary and other formations, bodies of the occupation administration should be assessed either as high treason or as collaboration, if there are grounds for that. Moreover, the majority of such formations and bodies are citizens of Ukraine.

At the same time, of course, a citizen of Ukraine cannot acquire the status of a prisoner of war. Therefore, with regard to the detained members of the armed formations of the abbreviations “DPR” and “LPR”, the issue of either bringing them to criminal liability under Part 7 of Art. 111-1 of the Criminal Code of Ukraine (in case of voluntary participation of a citizen of Ukraine in illegal armed or paramilitary formations created in the temporarily occupied territory), or recognizing them as victims of forced mobilization and, accordingly, a crime under Part 1 of Art. 1 of Art. 438 of the Criminal Code of Ukraine, if the circumstances of the case will reasonably prove the fact of forced recruitment into the relevant armed forces of the occupier (the prohibition of such actions is provided by Art. 51 of the Convention relative to the Protection of Civilian Persons

in Time of War<sup>1</sup>). *The same applies to those citizens of Ukraine who joined the armed forces of the aggressor country on the territory of the Autonomous Republic of Crimea.*

*Situation 3.* Physical detention of members of illegal armed groups identified with so-called private military companies (PMCs, such as the so-called Wagner group). Such cases are not very frequent, so there is no established practice of criminal legal qualification. However, in the international context, they are very common (Бапанов, 2020). According to the respondents from among the investigators of the Security Service of Ukraine, the actions of such persons should be qualified as mercenarism (Part 4 of Article 447 of the Criminal Code of Ukraine – participation of a mercenary in an armed conflict, hostilities). That is, they do not fall into the category of prisoners of war. At the same time, this is possible only when a mercenary is either a stateless person or a foreigner for Ukraine and the Russian Federation, that is, neither a citizen of Ukraine nor a citizen of Russia. This feature of a mercenary directly follows from its definition, enshrined in the note to Article 447 of the Criminal Code of Ukraine, and is recognized by researchers as constitutive (Юпраєва, 2017). When a member of the so-called PMC is a citizen of the Russian Federation (and there is an absolute majority of such motivated by mercenary aspirations), the qualification of his\her actions under Art. 447 of the Criminal Code of Ukraine is excluded. In this situation, in our opinion, there are no sufficient legal, moral and legal grounds to extend to PMC members the guarantees for prisoners of war provided by international humanitarian law and consider them combatants in general. From the point of view of international law, these are armed gangs, groups sent by the aggressor country (sending armed gangs, groups, irregular forces or mercenaries who carry out acts of armed force against another state as an act of aggression). Their use is a crime of aggression. From the standpoint of domestic criminal legislation, the participation of Russian citizens in PMCs should be qualified under Article 260 of the Criminal Code of Ukraine. Thus, for this category of persons, as well as for collaborators – citizens of Ukraine, there are no legitimate military objectives a priori. Each fact of causing death, in particular to Ukrainian servicemen, should be qualified as premeditated murder. Committing

<sup>1</sup> Конвенція про захист цивільного населення під час війни : від 12.08.1949 // БД «Законодавство України» / ВР України. URL: [https://zakon.rada.gov.ua/laws/show/995\\_154](https://zakon.rada.gov.ua/laws/show/995_154) (accessed 11 September 2022).

other criminal offenses with signs of war crimes in their cases are general criminal offenses (against human life and health, against property, against public safety, etc.), including illegal handling of weapons, ammunition, explosives.

**CONCLUSIONS.** Summing up, it should be noted that the identified and described situations of application of the law on criminal liability in terms of criminal legal qualification of acts recorded on the de-occupied territories are not exhaustive. The variable situations of rape and sexual violence related to the war (against civilians, against prisoners of war), the little-studied facts of war crimes against the environment, as well as deportation, involvement in forced labor (in particular, persons who fell under occupation while in penal colonies, serving a sentence of imprisonment for a certain term, life imprisonment), etc., the problem of correlation and distinction between war crimes

and crimes against humanity have been overlooked. We also have not raised the controversial issues of qualification of treason, collaboration activities (adjusters of hostile fire, providing information on the whereabouts of ATO veterans, servicemen, etc.), aiding and abetting the aggressor state, justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants and others. These criminal offenses are also committed and recorded on the de-occupied territories, but do not constitute the specifics of the de-occupation movement and are subject to scientific research in a general doctrinal format. Therefore, the generalizations and proposals set out in this article should be perceived as an initial attempt to systematize the problems of criminal law arising in the context of the de-occupation movement, and as an invitation to scientific discussion.

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### **ПРОБЛЕМЫ КВАЛИФИКАЦИИ УГОЛОВНЫХ ПРАВОНАРУШЕНИЙ, СВЯЗАННЫХ С ВОЙНОЙ, ДОКУМЕНТИРУЕМЫХ НА ДЕОККУПИРОВАННЫХ ТЕРРИТОРИЯХ УКРАИНЫ**

Статья посвящена характеристике основных проблем квалификации уголовных правонарушений, связанных с войной, в контексте движения деокупации. На основании анализа и обобщения опыта работы следователей Национальной полиции, Службы безопасности Украины, а также прокуроров на деокупированных территориях Украины выделены четыре базовые проблемные предметные зоны с соответствующими типовыми

ситуаціями применення закону об уголовной ответственности: уголовно-правовая квалификация артиллерийских обстрелов, минирования, причинения смерти людям, других деяний физически задержанных представителей государства-агрессора. По каждой зоне и ситуации определены основные подходы к квалификации документируемых уголовных правонарушений и других событий, применяемых в правоохранительной практике. Осуществлен критический анализ этих подходов, выявлены недостатки, предложены пути их устранения.

**Ключевые слова:** *война, деокупация, обстрел, минирование, причинение смерти, военное преступление, теракт, диверсия.*

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**ПРОБЛЕМИ КВАЛІФІКАЦІЇ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ,  
ПОВ'ЯЗАНИХ ІЗ ВІЙНОЮ, ЩО ДОКУМЕНТУЮТЬСЯ НА ДЕОКУПОВАНИХ  
ТЕРИТОРІЯХ УКРАЇНИ**

Статтю присвячено характеристиці основних проблем кваліфікації кримінальних правопорушень, пов'язаних із війною, в контексті руху деокупації – процесу відновлення юрисдикції України на територіях, які були тимчасово окуповані російською федерацією. Метою статті є виявлення, опис основних теоретико-прикладних проблем кваліфікації кримінальних правопорушень, пов'язаних із війною, на деокупованих територіях, формування пропозицій щодо їх вирішення, забезпечення єдності в застосуванні права. Емпіричну базу дослідження склали матеріали 250 судових вироків за статтями 111, 111-1, 111-2, 114-2, 436-2, 438 КК України, результати експертних оцінок 115 працівників органів досудового слідства Національної поліції, 40 працівників прокуратури, 10 керівників та заступників керівників слідчих відділів Служби безпеки України.

Виділено, надано опис і пояснення чотирьом базовим проблемним предметним зонам із відповідними типовими ситуаціями застосування закону про кримінальну відповідальність: кримінально-правова кваліфікація артилерійських обстрілів, мінування, заподіяння смерті людині, інших діянь фізично затриманих представників держави-агресора. Для кожної зони та ситуації визначено основні підходи до кваліфікації документованих кримінальних правопорушень та інших подій, які застосовуються у правоохоронній практиці. Здійснено їх критичний аналіз, виявлено недоліки, запропоновано шляхи їх усунення. Здійснено розмежування ситуацій артилерійських обстрілів військових та цивільних об'єктів і з'ясовано їх вплив на кримінально-правову кваліфікацію. Наголошено на необхідності розгортання активної практики кваліфікації та документування фактів ведення агресивної війни за ч. 2 ст. 437 КК України.

Доведено можливість (з юридичної точки зору) вчинення терористичних актів і диверсій протягом та як елементів ведення агресивної війни. Ключовий критерій розмежування цих злочинів – суб'єктивна сторона їх юридичного складу. Практики терору і терористичних атак можуть бути використані та використовуються країною-агресором у загальному контексті агресивної війни проти України. Обґрунтовано хибність підходу до кваліфікації участі у воєнізованих, збройних формуваннях так званих ДНР, ЛНР за статтями 258-3 та/або 260 КК України. Наведено думку про те, що вступ на службу до воєнізованих, збройних підрозділів указаних утворень слід кваліфікувати як державну зраду або колабораційну діяльність за наявності підстав. У випадку примусової мобілізації країною-агресором чи її окупаційною адміністрацією мобілізований таким чином громадянин України має визнаватися жертвою злочину, передбаченого ч. 1 ст. 438 КК України, та не підлягати утриманню як військовополонений.

**Ключові слова:** війна, деокупація, обстріл, мінування, заподіяння смерті, військовий злочин, теракт, диверсія.

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