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**CRIMES AGAINST HUMANITY IN THE CONTEXT OF THE ARMED CONFLICT
IN UKRAINE: DEFINITION, PROBLEMS OF DISTINCTION WITH RELATED
OFFENCES**

The article is devoted to the characteristics of crimes against humanity as a category of international criminal law and in the context of the armed conflict in Ukraine. It has been stated that corpus delicti of crimes against humanity reveal many features which have a common meaning with the features of war crimes, and this creates difficulties in legal application. A table of the norms relevance and their drafts on crimes against humanity and war crimes under the Rome Statute of the ICC and the draft UN Convention on the Prevention and Punishment of Crimes against Humanity has been compiled. The criteria for distinction between these corpus delicti has been proposed. It has been established that the Criminal Code of Ukraine does not contain special corpus delicti of crimes against humanity. The conceptual direction of national criminal legislation improvement has been determined.

Key words: *aggression, armed conflict, crimes against humanity, genocide, war crimes, distinction, subject of crime, contextual element.*

Original article

INTRODUCTION. Russia's unleashing of an aggressive war against Ukraine, an unprovoked and definitely illegal initiation of an international armed conflict, naturally entailed a long criminal trail derived from the crime of aggression itself. It is associated with a large-scale violation of the rights and freedoms of Ukrainian citizens, systematic attacks on the territorial integrity and sovereignty of the state, and violations of the laws and customs of war. The range of these violations and encroachments is very wide and affects both the national legal system and the international legal order. At the same time, it manifests two groups of crimes – war crimes and crimes against humanity. At the same time, neither the former nor the latter are defined as such with the corresponding legal and linguistic identity in the national criminal law. The relevant criminal law provisions are semantically and structurally dispersed; the construction of their elements raises many questions in terms of completeness, consistency of the criminal law protection mechanism, adequacy of its components to the system and logic of criminal law regulation, policy and international legal instruments to combat these categories of crimes.

The involvement of international legal mechanisms of criminal justice in responding to the situation of the international armed conflict in Ukraine is generally (among civilised nations of

the world) considered a necessary step to restore the legal order, to bring those responsible for committing international crimes to international criminal liability on the basis of complementarity with national jurisdiction. These circumstances necessitate the synchronisation of national and international mechanisms of criminal law protection against threats of war, and the introduction of semantic and terminological clarity and relevance. First of all, this concerns crimes against humanity and war crimes, which, in addition to not having a clear legislative definition, represent situations of competition of corpus delicti that need to be resolved and the practice of correct and uniform application of the law on criminal liability established.

PURPOSE AND OBJECTIVES OF THE RESEARCH. *The purpose* of the article is to formulate proposals for the criteria for distinguishing between crimes against humanity and war crimes in the international legal format and to make a theoretical and model projection onto the legal system of Ukraine in the context of the armed conflict. *The objectives* of the article are: 1) to define crimes against humanity and war crimes; 2) to identify and describe the international legal sources of their criminal unlawfulness; 3) to determine the criteria for their distinction; 4) to establish the compliance of the elements of crimes against humanity and war crimes under international criminal law

with the provisions of Ukrainian criminal law; 5) to provide recommendations on their qualification when distinguishing them as related elements of crimes in the context of the armed conflict in Ukraine.

METHODOLOGY. The philosophical level of the methodology for studying the issues of qualification of crimes against humanity and war crimes is represented by the principle of systematicity, historicism, the laws of universal connection and dialectical contradiction, the application of which has determined the general research paradigm of parity and complementarity of international and national criminal law. At the general scientific and specific scientific levels, the methods of hypothesis, analysis, synthesis, as well as systemic legal analysis and hermeneutic (for the purpose of interpreting the elements of crimes against humanity and war crimes), content analysis (statutes of international ad hoc tribunals, UN resolutions, court verdicts under Art. 438 of the Criminal Code of Ukraine), expert assessments (120 pre-trial investigation officers of the National Police, 40 prosecutors, 10 heads and deputy heads of investigative departments of the Security Service of Ukraine, 23 judges who had experience in war crimes cases were interviewed).

RESULTS AND DISCUSSION. The categories of “crimes against humanity” and “war crimes” were formed in the depths of international criminal law and are used to refer to international crimes. In domestic criminal law, they do not have their identical normative projection, which does not mean that the CC of Ukraine does not have the relevant elements at all (and this opinion is common among law enforcement officers). However, in order to establish their relevance and further identify gaps, conflicts, other legal inconsistencies and areas for improvement of the Criminal Code of Ukraine and its application practice, it is necessary to clarify the content and correlation of these categories in international law.

In this context, it is appropriate to emphasise that, according to N. A. Zelinska (2017), the concept of “crime” is no longer as completely controlled by the state as it used to be. An international crime is an attack on universal ethics and human values that is the subject of solidarity criminal prosecution by the states or the international community. Solidarity in the prosecution of the most serious international crimes, in turn, requires that national and international jurisdictions “speak the same language”, so that domestic mechanisms for recording, documenting and investigating these crimes are adequate to those adopted by international criminal justice. This is

the basic grounds for the principle of complementarity in the activities of international criminal justice bodies; the principle of complementarity can only work when there is something to complement, but not to replace or substitute.

It is worth noting that the English-language phrase *crimes against humanity*, which is used in international legal acts, has found its ambiguous equivalent in Ukrainian. Although not a broad, but somewhat variable range of meanings, the term “*humanity*” can be translated into Ukrainian as “*людство*” or “*людяність*”, among other possible denotations. This duality is partially reflected in the regulations. Thus, in the national legal discourse, two actually synonymous categories are simultaneously present. The first is crimes against humanity, which is enshrined in the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity¹ and fragmented, in connection with security, in the title of Chapter XX of the Special Part of the Criminal Code of Ukraine “Crimes against Peace, Human Security and International Law and Order”². The second is actually crimes against humanity, which is contained in the title and text of the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes³. However, the analysis of these international treaties does not make it possible to clarify the exact content of the categories analysed. And while the European Convention defines crimes against humanity by referring exclusively to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity defines such crimes as follows: “Crimes against humanity, whether committed in time of war or in time of peace, as defined in the Statute of the Nuremberg International Military Tribunal dated 8 August 1945 and reaffirmed in resolutions 3 (I)

¹ Конвенція про незастосування строку давності до воєнних злочинів і злочинів проти людства : від 26.11.1968 // Zakon.cc. URL: https://zakon.cc/law/document/read/995_168 (Accessed 5 January 2023).

² Кримінальний кодекс України : Закон України від 05.04.2001. № 2341-III // База даних (БД) «Законодавство України» / Верховна Рада (ВР) України. URL: <https://zakon.rada.gov.ua/laws/show/2341-14> (Accessed 5 January 2023).

³ Європейська конвенція про незастосування строків давності до злочинів проти людяності та воєнних злочинів : від 25.01.1974 // БД «Законодавство України» / ВР України. URL: https://zakon.rada.gov.ua/laws/show/994_125 (Accessed 5 January 2023).

dated 13 February 1946 and 95 (I) dated 11 December 1946 of the General Assembly of the United Nations expulsion as a result of armed attack or occupation and inhuman acts resulting from apartheid policies, as well as the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if these acts do not constitute a violation of the domestic law of the country in which they were committed”¹.

This definition allows us to draw several conclusions. Firstly, the category under study is seen as generic in relation to a number of criminal manifestations, including genocide; it has a broader meaning and a specific object that is associated not with humanity as a population, but with humanity as a spiritual and value component, the quality of human coexistence, and some basic ethics of such coexistence. On this basis, secondly, it is still preferable to use the category of “crimes against humanity”. Thirdly, crimes against humanity are sufficiently clearly, at least discursively, normatively distinguished from war crimes. Fourth, for the first time, the definition of “crimes against humanity” is articulated and formally enshrined in the Charter of the Nuremberg Military Tribunal for the Trial and Punishment of the Major War Criminals of the European Axis Powers (hereinafter – the Nuremberg Military Tribunal), to which the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes refers.

In general, the Nuremberg modification of the international crime represented a triad of crimes: crimes against peace, war crimes and crimes against humanity. The latter, according to paragraph “c” of part 2 of Art. 6 of the Statute of the Nuremberg Military Tribunal was defined as murder, extermination, enslavement, exile and other cruel acts committed against civilians before or during the war, or persecution for political, racial or religious reasons in order to commit or in connection with any crime within the jurisdiction of the Tribunal, whether or not such acts constituted a violation of the domestic law of the country where they were committed².

¹ Конвенція про незастосування строку давності до воєнних злочинів і злочинів проти людства : від 26.11.1968 // *Zakon.cc*. URL: https://zakon.cc/law/document/read/995_168 (Accessed 5 January 2023).

² Устав Международного военного трибунала для суда и наказания главных военных преступников европейских стран оси от 08.08.1945 г. // *Нюрнбергский процесс. Сборник материалов* : в 2 т. / под ред. К. П. Горшенина, Г. Н. Сафонова,

At the first stage of establishing an international legal criminal sanction for crimes against humanity, the classification of crimes against humanity was developed based on the structure of Article 6(c) of the Nuremberg Tribunal Statute:

– “*murder type crimes against humanity*” – murder, extermination, enslavement, exile and other cruel acts committed against civilians before or during war;

– “*persecution-type crimes against humanity*” – persecution for political, racial or religious reasons for the purpose of committing or in connection with any crime within the jurisdiction of the Nuremberg Tribunal (Гнатівський, 2017).

The rational basis for this classification is that qualifying a person’s behaviour as a “persecution-type crime” requires discriminatory motives, while for “murder-type crimes” they are not required. However, all later codifications of international criminal law do not adhere to this classification (Гнатівський, 2017).

As can be seen, crimes against humanity largely overlap with the act known as “genocide”, which in the Roman modification of the international crime corresponds to the independent element of the international crime of genocide. However, such a rhyme (if not the correlation of both general and special legal compositions) also arises from the text of the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, Article 1 of which operates with the category “crimes against humanity as defined in the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations on 9 December 1948”³. Nevertheless, it should be noted that even within the meaning of the Nuremberg Tribunal Statute, despite the linkage of the group of persecution crimes to discriminatory motives, it is impossible to speak of a complete coincidence of the scope of the concepts of “crimes against humanity” and “genocide”. The former appears to be broader, which has served to preserve its independent epistemological and legal significance today.

In addition, the modern doctrine of international criminal law expresses the opinion that the possibility of considering the crime of genocide as

С. А. Голунского, И. Т. Никитченко. М. : Гос. изд-во юрид. лит., 1952. Т. 1. С. 12.

³ Європейська конвенція про незастосування строку давності до злочинів проти людяності та воєнних злочинів : від 25.01.1974 // БД «Законодавство України» / ВР України. URL: https://zakon.rada.gov.ua/laws/show/994_125 (Accessed 5 January 2023).

a type of crime against humanity or *lex specialis* (special rule that displaces the general rule) in relation to them is generally excluded. Unlike the crime of genocide, the elements of crimes against humanity always require a widespread or systematic attack against the civilian population. However, unlike crimes against humanity, the crime of genocide requires a specific intent of the subject of the crime to destroy a protected group completely or partially (Гнатівський, 2022). This opinion is quite vulnerable to criticism, since special intent can hardly be recognised as a sufficient basis for categorically denying the possibility of constituting crimes against humanity and genocide as general and special elements. After all, both crimes against humanity in the form of persecution and genocide have practically the same motive. And it is the motive that is the key feature that determines the direction of the intent. The specific outlines of the intellectual moment of the latter are not sufficient grounds for refusing to correlate the studied elements as general and special.

In our opinion, crimes against humanity and genocide are not related, as M. M. Hnatovskiy (2022) essentially points out, but are competing. As early as in the works of A. N. Traynin (1954), the need to distinguish between situations of adjacency and competition of *corpus delicti* was substantiated. Unlike generic and special *corpus delicti*, the researcher emphasised that related elements are, in fact, different *corpus delicti*, but close due to the proximity of their individual elements. According to L. P. Brych (2006), the norms providing for related elements of crimes have no subordination either in terms of content or scope, they are autonomous. Instead, the correlation of common features of *corpus delicti* provided for by the rules competing as general and special is characterised by the fact that all the features of *corpus delicti* named in the general rule are also contained in the special rule. And although it is difficult to form a vision of the basic composition of crimes against humanity from the Statute of the Nuremberg Tribunal (it contains a list of alternative acts that constitute the content of these crimes), nevertheless, their subsequent international modifications already provide such an opportunity and allow us to conclude that the international criminal law norms of “crimes against humanity” and “genocide” compete as general and special.

The Tokyo modification of the international crime (according to the Statute of the International Military Tribunal for the Far East (hereinafter – the Tokyo Tribunal)) actually duplicated the Nuremberg one, providing for liability for three

groups of crimes: *crimes against peace, conventional war crimes, and crimes against humanity*. The latter were defined by analogy with the Nuremberg Tribunal through a list of acts rather than a definition, namely (Article 5 (c)): “Murder, extermination, enslavement, exile (deportation), and other inhuman acts committed against civilian populations before or during the war, or persecution for political or racial reasons, committed in the commission of any crime or in connection with any crime, indictable by the Tribunal, whether or not such act violated the internal laws of the country where it was committed”¹.

The Tokyo Tribunal’s verdict, in Chapter VIII, appears to contain a valuable contextual element: “The evidence of atrocities and other ordinary war crimes submitted to the Tribunal establishes that from the outbreak of the war in China until the surrender of Japan in August 1945, torture, murder, rape and other cruelties of the most inhuman and barbaric nature were widespread and widely practised by the Japanese army and navy. For several months, the Tribunal heard oral or written testimony from witnesses who gave detailed evidence of atrocities committed in all theatres of the war on such a scale, but in such a general pattern in all theatres, that only one conclusion is possible: the atrocities were either secretly ordered or deliberately permitted by the Japanese Government or by individual members and leaders of the armed forces”². In the future, the indication of governmental legitimisation of criminal acts, their elevation to the rank of state policy, will become one of the determining contextual elements for establishing the existence and identification of crimes against humanity (as well as their distinction from war crimes), which will be embodied in the Hague and Roman modifications of international crime.

Moving further in the formation of the conventional definition of the category under study, it is worth paying attention to the provisions of Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia, which has already presented the first generic definition of crimes against humanity in the history of criminal law: “The International Court of Justice shall have

¹ International Military Tribunal for the Far East // United Nations. URL: https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (Accessed 5 January 2023).

² International Military Tribunal for the Far East : Judgment // Ibiblio. URL: <http://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html> (Accessed 5 January 2023).

the power to prosecute persons responsible for crimes against humanity when committed in armed conflict, whether of an international or internal character, and directed against any civilian population: a) murder; b) extermination; c) enslavement; d) deportation; e) imprisonment; f) torture; g) rape; h) persecution for political, racial or religious reasons; i) other inhuman acts”¹. Although this description is a mixed, definitional and species-specific one, it already allows us to draw conclusions about the normative generic features of these crimes. In particular, this concerns the linking of crimes against humanity to the context of armed conflict, their targeting of civilians, and their characterisation as “inhuman acts”. At the same time, the linkage to this context has added not so much certainty as confusion, creating additional difficulties for their distinction from war crimes, since the latter overlap with crimes against humanity in many respects.

Crimes against humanity were defined somewhat differently, albeit in a similar vein, in the Statute of the International Criminal Tribunal for Rwanda (Article 3, Crimes against Humanity): “The International Criminal Tribunal for Rwanda has the power to prosecute persons responsible for crimes against humanity when committed as part of a widespread or systematic attack against a civilian population based on national, political, ethnic, racial or religious motives: a) murder; b) extermination; c) enslavement; d) deportation; e) imprisonment; f) torture; g) rape; h) persecution for political, racial or religious reasons; i) other inhuman acts”². As it can be seen, in contrast to the statutory provisions of the International Criminal Tribunal for the former Yugoslavia, the Rwandan approach to crimes against humanity to some extent overlaps with the Tokyo

approach, as evidenced by the reference to the widespread or systematic nature of attacks on civilians. It is postulated that such attacks, characterised by large-scale or systematic nature, can only be carried out as a manifestation of state or organisational policy. In addition, a reference is made to the discriminatory nature of these crimes by indicating a special mandatory feature of the subjective side of their composition such as a national, political, ethnic, racial or religious motive.

It is quite clear that the causality of the statutory (ad hoc) definition of crimes against humanity was due to specific situations of international criminal law response to serious and large-scale human rights violations in different countries, with different reasons, and in the course of conflicts. However, this causality also reveals a tendency in the genesis of the international concept of crimes against humanity. Eventually, this tendency took shape in the Roman modification of the international crime, the normative features of which are enshrined in the Rome Statute of the International Criminal Court.

Thus, in accordance with Part 1 of Article 7 of the Rome Statute of the International Criminal Court, a “crime against humanity” means any act committed as part of a widespread or systematic attack directed against any civilian population and such attack is committed intentionally³. It also specifies that “an attack directed against any civilian population” means a course of conduct involving the repeated commission of acts referred to in paragraph 1 against any civilian population in pursuance of a policy of a State or organisation aimed at committing such an attack or in furtherance of such a policy. Therefore, the Rome modification of the international crime against humanity summarised the long-term evolution of attempts to normatively define it and eventually formed a definition with clearly defined acts and contextual elements. At the same time, it would be premature to state that the understanding set out in the Rome Statute of the ICC is final. International crimes are as dynamic as the means and methods of warfare, forms of aggression and inhuman treatment. The legal forms of response to them are also dynamic.

A clear indication of this is the fact that in 2014 The UN International Law Commission put the topic of “Crimes against Humanity” on its agenda and appointed S. Murphy as a special rapporteur. The purpose of the topic is to develop a

¹ Updated Statute of the International Criminal Tribunal for the Former Yugoslavia. September 2009 // International Residual Mechanism of Criminal Tribunals. URL: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (Accessed 5 January 2023).

² Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 // United Nations. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons> (Accessed 5 January 2023).

³ Римський Статут Міжнародного Кримінального Суду : від 17.07.1998 // БД «Законодавство України» / ВР України. URL: https://zakon.rada.gov.ua/laws/card/995_588 (Accessed 5 January 2023).

draft Convention on the Prevention and Punishment of Crimes against Humanity. In 2019, the Commission developed the document “Text of the Draft Articles on the Prevention and Punishment of Crimes against Humanity” (consisting of a Preamble and 15 articles) and submitted it to the UN General Assembly with a recommendation to develop a Convention on this basis. The project was approved by the UN General Assembly (Resolution A/RES/74/187 dated 18 December 2019) (Гнатівський, 2022). However, despite the significant progress in the development of international criminal law in this area, the process of legal conceptualisation of crimes against humanity can still be considered complete and exhausted. Firstly, the draft of the Convention has not been finally adopted yet. At the UN level, it was decided to continue studying the recommendations of the International Law Commission contained in paragraph 42 of its report (Держипільська, 2020). Secondly, even the articles of this Convention themselves do not fully resolve the problem of normative definition of the criteria for distinguishing between crimes against humanity and related crimes, primarily war crimes.

It should be noted that war crimes are defined as deliberate and serious violations of the laws and customs of war (Дрозд та ін., 2022). For the purposes of the Rome Statute of the International Criminal Court, “war crimes” are serious violations of the Geneva Conventions dated 12 August 1949, namely any act against persons or property protected under the provisions of the relevant Geneva Convention (Article 8(2)(a))¹. A detailed analysis of the provisions of Art. 8 of the Rome Statute in comparison with Art. 7 gives grounds to identify situations of criminal law overlap, a kind of “intersection points” of the corpus delicti of the two groups of international crimes. To illustrate these situations, we propose a table of relevance, i.e., the correspondence of both legal and semantic, as well as a series of substantive objective features of crimes against humanity and war crimes.

The comparable features presented in the table represent 7 groups of relevant elements of crimes against humanity and war crimes. Among them there are 3 groups of complete out-of-context relevance and 4 groups of relative out-of-context relevance. The indication of out-of-context means “bracketing” the meaning of the context of the crime (in the terminology of international criminal law), which is taken into account both for determining the essence, social content, nature of the social danger of a particular crime, and for distinguishing between corpus de-

licti. Intentional murder, torture and rape are fully compliant. This means that these acts, even if committed in the context of an armed conflict, including by military personnel of the armed forces of one of the parties, in particular the Russian Federation, can be qualified as war crimes and crimes against humanity, depending on the context. The problem with domestic law enforcement practice is that crimes against humanity do not exist for it; the statistical picture is filled exclusively with crimes under Article 438 of the Criminal Code of Ukraine, i.e. war crimes, which is not always true. In particular, this refers to the numerous and confirmed documented cases of mass killings of Ukrainian citizens by Russian military personnel in the cities of Bucha, Hostomel, Borodyanka in Kyiv region, Iziium, Kupyansk in Kharkiv region, and a number of settlements in Kherson region. And these are only those cases that were identified as a result of the de-occupation of the relevant territories. But even their recording leaves a lot of doubt that they are solely manifestations of violations of the laws and customs of war, rather than a deliberate policy of the aggressor state.

The other 4 groups of relative relevance concern cases of illegal detention, other forms of illegal deprivation of liberty, including enforced disappearances, as well as deportations and displacement of the population committed in the temporarily occupied territories by representatives of the armed forces of the Russian Federation, as well as by civilians from the occupation administration, and Ukrainian citizens who have chosen to collaborate with the occupier. Relativity of relevance in this case does not mean complete identity of the linguistic form, discursive ways of defining the elements of crimes in the relevant sources of law (their drafts). However, the teleological, systemic and grammatical ways of interpreting the relevant norms and their drafts give grounds to talk about the relevance of these groups of crimes against humanity and war crimes and the existence of a problem of their distinction. This includes, for example, numerous cases of illegal deprivation of liberty and torture of Ukrainian citizens on political grounds (pro-Ukrainian position, former participation in the ATO, JFO, etc.), committed by subjects of various affiliations, which are not always violations of the laws of war in the sense of war nexus. Nevertheless, the national practice of criminal prosecution follows the path of qualifying such acts exclusively as war crimes under Article 438 of the Criminal Code of Ukraine. That is, other circumstances, such as the fact that there is a sign of discriminatory treatment and the absence of a direct link to the armed conflict (the crime is a means of achieving

¹ Ibid.

the goal of the armed conflict), are not taken into account. Although, according to Article 7(1)(h) of the Rome Statute of the International Criminal Court, persecution of any identifiable group or

community on political, racial, national, ethnic, cultural, religious, gender or other grounds generally recognised as inadmissible under international law is considered to be a crime against humanity.

Table 1

Relevance of the norms and their drafts on crimes against humanity and war crimes under the Rome Statute of the ICC and the draft UN Convention on the Prevention and Punishment of Crimes against Humanity¹

| № | <i>Crimes against humanity under Article 7 of the Rome Statute of the ICC</i> | <i>Crimes against humanity under Article 2 of the draft articles on the prevention and punishment of crimes against humanity</i> | <i>War crimes under Article 8 of the Rome Statute of the ICC</i> |
|----------|--|---|---|
| 1 | a) murder | a) murder | i) intentional murder; xi) malicious murder or injury to persons belonging to the enemy nation or army |
| 2 | d) deportation or forced displacement of the population | d) deportation or forcible transfer of population | vii) unlawful deportation or transfer or unlawful deprivation of liberty |
| 3 | e) imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law | c) enslavement; f) imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law | vii) unlawful deportation or transfer or unlawful deprivation of liberty |
| 4 | f) torture | f) torture | ii) torture |
| 5 | g) зґвалтування | g) rape | xxii) rape, which also constitutes a serious violation of the Geneva Conventions |
| 6 | i) enforced disappearance of persons | i) enforced disappearance of persons | vii) unlawful deportation or transfer or unlawful deprivation of liberty |
| 7 | k) other inhuman acts of a similar nature that intentionally cause great suffering or serious bodily injury or serious harm to mental or physical health | k) other inhuman acts of a similar nature that intentionally cause great suffering or serious bodily or mental or physical injury | iii) intentionally causing great suffering or serious bodily injury or damage to health; xxi) outrages on human dignity, in particular humiliating and degrading treatment |

¹ Report of the International Law Commission Seventy-first session (29 April – 7 June and 8 July–9 August 2019) // ODS – Sedoc. URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/243/93/PDF/G1924393.pdf> (Accessed 5 January 2023).

The comparable features presented in the table represent 7 groups of relevant elements of crimes against humanity and war crimes. Among them there are 3 groups of complete out-of-context relevance and 4 groups of relative out-of-context relevance. The indication of out-of-context means “bracketing” the meaning of the context of the crime (in the terminology of international criminal law), which is taken into account both for determining the essence, social content, nature of the social danger of a particular crime, and for distinguishing between *corpus delicti*. Intentional murder, torture and rape are fully compliant. This means that these acts, even if committed in the context of an armed conflict, including by military personnel of the armed forces of one of the parties, in particular the Russian Federation, can be qualified as war crimes and crimes against humanity, depending on the context. The problem with domestic law enforcement practice is that crimes against humanity do not exist for it; the statistical picture is filled exclusively with crimes under Article 438 of the Criminal Code of Ukraine, i.e. war crimes, which is not always true. In particular, this refers to the numerous and confirmed documented cases of mass killings of Ukrainian citizens by Russian military personnel in the cities of Bucha, Hostomel, Borodyanka in Kyiv region, Izium, Kupyansk in Kharkiv region, and a number of settlements in Kherson region. And these are only those cases that were identified as a result of the de-occupation of the relevant territories. But even their recording leaves a lot of doubt that they are solely manifestations of violations of the laws and customs of war, rather than a deliberate policy of the aggressor state.

The other 4 groups of relative relevance concern cases of illegal detention, other forms of illegal deprivation of liberty, including enforced disappearances, as well as deportations and displacement of the population committed in the temporarily occupied territories by representatives of the armed forces of the Russian Federation, as well as by civilians from the occupation administration, and Ukrainian citizens who have chosen to collaborate with the occupier. Relativity of relevance in this case does not mean complete identity of the linguistic form, discursive ways of defining the elements of crimes in the relevant sources of law (their drafts). However, the teleological, systemic and grammatical ways of interpreting the relevant norms and their drafts give grounds to talk about the relevance of these groups of crimes against humanity and war crimes and the existence of a problem of their distinction. This includes, for example, numerous

cases of illegal deprivation of liberty and torture of Ukrainian citizens on political grounds (pro-Ukrainian position, former participation in the ATO, JFO, etc.), committed by subjects of various affiliations, which are not always violations of the laws of war in the sense of war nexus. Nevertheless, the national practice of criminal prosecution follows the path of qualifying such acts exclusively as war crimes under Article 438 of the Criminal Code of Ukraine. That is, other circumstances, such as the fact that there is a sign of discriminatory treatment and the absence of a direct link to the armed conflict (the crime is a means of achieving the goal of the armed conflict), are not taken into account. Although, according to Article 7(1)(h) of the Rome Statute of the International Criminal Court, persecution of any identifiable group or community on political, racial, national, ethnic, cultural, religious, gender or other grounds generally recognised as inadmissible under international law is considered to be a crime against humanity.

Thus, both in theory and practice, and especially in the context of the armed conflict in Ukraine, the problem of criminal law qualification arises when distinguishing between crimes against humanity and war crimes, at least within the groups of extra-contextual relevance that we have identified. The situation is complicated by: 1) contextual non-specificity and substantive (nature of public danger) inconsistency of the provisions of the Criminal Code of Ukraine (Articles 115, 121, 127, 146, 146-1, 152, 153) on liability for acts constituting crimes against humanity under international criminal law; 2) gap in national criminal legislation on certain categories of crimes against humanity in accordance with Art. 7 of the Rome Statute of the International Criminal Court, namely: deportation, illegal (forced) displacement of population, and some others; 3) doctrinal uncertainty of ways to either overcome competition or operate with clear criteria for distinguishing between related elements of the relevant groups of crimes. For example, according to M. M. Hnatovsky (2022), crimes against humanity do not exclude the qualification of the subject's actions as war crimes, so specific crimes contained in Articles 7, 8 of the ICC Statute (in particular, murder, torture, rape, deprivation of liberty) can be simultaneously qualified as crimes against humanity and war crimes. This position seems to be at least in need of clarification. It remains unclear whether we are talking about the possibility of an ideal combination, or about the qualification under different articles of the Rome Statute of the ICC of the same objective manifestations, but in different contexts?

Summarising the existing problematic areas of legal assessment of acts in the context of the international armed conflict in Ukraine, we can propose two basic criteria for distinguishing between crimes against humanity and war crimes: the subject and the contextual element.

As for the subject of a war crime, in particular, the subject of violations of the laws and customs of war (Article 438 of the CC of Ukraine), the scientific literature usually characterises it as a general one. However, there are doubts about the validity of this position. Criminal liability for violations of the laws and customs of war should obviously be borne by those who have a corresponding obligation to comply with these laws and customs. And such a duty, based on the logic of international humanitarian law, is imposed only on conventional parties to armed conflict, i.e. combatants. Thus, according to Part 2 of Article 43 of Additional Protocol (I) to the Geneva Conventions 1949, persons who are members of the armed forces of a party to the conflict (except for medical and clerical personnel) are combatants, i.e. they have the right to take direct part in hostilities¹. Consequently, the obligation to comply with the laws and customs of the country of participation in hostilities follows from the relevant law.

Other subjects, even if they are actively involved (fighting) in an armed conflict, are not conventional combatants (with the exception of people's self-defence units and equivalent formations). This applies, in particular, to members of various illegal armed groups that are not part of the armed forces of a country that is a party to an international armed conflict, including mercenaries. They have no right to participate in armed conflict. Therefore, they are not subject to obligations under the laws and customs of war. Their participation as fighting subjects in an armed conflict is illegal and criminal in itself. As is well known, law does not arise from wrong. A person who commits a crime cannot be subject to a positive obligation to comply with the rules of its commission. That is why, in our opinion, only a combatant in its international legal sense and definition can be a subject of a war crime. This is a special subject. Accordingly, the commission of an act that objectively correlates with a crime against humanity (see Table) by a general subject,

¹ Додатковий протокол до Женевських конвенцій від 12 серпня 1949 року, що стосується захисту жертв збройних конфліктів (Протокол I) : від 08.06.1977 // БД «Законодавство України» / ВР України. URL: https://zakon.rada.gov.ua/laws/show/995_199 (Accessed 5 January 2023).

a non-combatant, should be assessed either as a general criminal offence under the relevant articles of the Special Part of the Criminal Code of Ukraine, which provide for liability for criminal offences against human life and health, sexual freedom and sexual inviolability, or under newly criminalised (*de lege ferenda*) crimes against humanity, if there are grounds for this.

For example, in Kherson region, evidence of systematic torture committed by members of an illegal armed group, including the former head of the SBU, was recorded. According to the investigation, from April to May 2022, with the support of the Russian military command, an illegal armed group, the State Security Service of Kherson Region, was created in Kherson. This formation has become an analogue of the FSS for the occupied territories of Kherson region. Its goal is to ensure the separation of Kherson region from Ukraine and its joining the Russian Federation. The method was to suppress any manifestations of non-recognition of the occupation authorities' policy among the civilian population. Representatives of the so-called service searched for and detained Ukrainian citizens, pro-Ukrainian activists, opponents of the occupation authorities, and other civilians. In one of the seized buildings in Kherson, members of the group set up a place of illegal detention and torture. Civilians were held in inhumane conditions, subjected to psychological and physical violence. Every day they were subjected to beatings, torture with electric shocks, food and water restrictions, etc. As it can be understood, the perpetrators are not combatants and it is incorrect to qualify their actions under Article 438 of the Criminal Code of Ukraine in view of the above arguments.

Regarding the contextual element, it should be noted that their content is derived both from the statutory framework of international ad hoc tribunals (with a certain degree of certainty) and from the Annex to the Rome Statute of the ICC – “Elements of Crimes” (with greater clarity). For war crimes, judging according to the provisions of Article 8 of the Elements, there is only one element – the existence of a situation of armed conflict (international or non-international)². For crimes against humanity, the following are required: a) the context of a large-scale or systematic attack on the civilian population; b) the existence of a relevant state or organisational policy within which the relevant systematic nature is

² Elements of Crimes // International Criminal Court. URL: <https://www.icc-cpi.int/sites/default/files/ElementsOfCrimesEng.pdf> (Accessed 5 January 2023).

implemented. In particular, this applies to the relevant groups of war crimes and crimes against humanity that we have identified in the table.

At the same time, it is important to note that neither the widespread nature nor the existence of an armed conflict are exclusive contexts for the two groups of crimes under analysis. This means that, just as war crimes can be committed on a large scale (moreover, according to Article 8 of the Rome Statute of the ICC, the court has jurisdiction over war crimes, in particular when committed as part of a plan or policy or as part of a widespread commission of such crimes¹), so crimes against humanity can be committed in the context of an armed conflict. This further complicates the task of defining the elements of the offence. In our opinion, its solution should be based on three points.

The first point is that the commission of the relevant crime by a non-combatant (within the meaning of Additional Protocol I to the Geneva Conventions of 1949) clearly means that the act cannot be qualified as a war crime. And this point is important for the qualification of actions as part of private military campaigns, the so-called volunteer armed groups (such as the Sudoplatov Battalion). The theory of international criminal law emphasises this point separately: crimes against humanity can be committed by both state agents and other non-state agents, but in cases where they act as part of a policy to commit an attack (Murphy, 2020).

The second point is that the systematic nature of attacks on civilians is not mentioned as a contextual element of war crimes, either directly or indirectly (through Article 8(1) of the Rome Statute of the ICC). It is only inherent in crimes against humanity. In the context of the armed conflict in Ukraine, there is numerous evidence of the systematic nature of deliberate killings, torture, and illegal deprivation of liberty of civilians (both by RF combatants and by other non-combatants on the side of the aggressor state) in a number of settlements that have been and are being occupied. Of course, the signs of large-scale and systematic attacks (as well as the attack itself) require a separate study, which is beyond the scope of this article. However, even a cursory analysis of them is sufficient to use them among the distinguishing features of war crimes and crimes against humanity. Given that crimes against humanity can be committed outside the

context of an armed conflict, their commission in war, as an additional component of the aggressor country's policy, is, in our opinion, a defining distinguishing feature formed by a combination of contexts. It is this combination, in which the context of systematic crimes committed as a policy of the aggressor state dominates the context of the armed conflict as such, that is crucial for the distinction between crimes against humanity and war crimes.

The third point is that large-scale attacks are a sign of war crimes (Article 8(1) of the Rome Statute of the ICC) only to the extent that these crimes fall within the jurisdiction of the ICC. This does not mean that the absence of a large-scale crime should also mean the absence of a war crime. The latter will take place, but will fall exclusively under national jurisdiction. Therefore, while for a war crime the sign of large-scale is mainly a jurisdictional sign that determines the procedural aspects of further response to its commission, for a crime against humanity it is a substantive sign that determines the nature of its social danger, and therefore the material grounds for qualification.

The Prosecutor General of Ukraine's assessment of the rocket attack on the central part of Kremenchuk, Poltava region, is indicative and appropriate in this context. I. Venediktova (2022) made a statement that this attack was a manifestation of a crime against humanity: "The Kremenchuk tragedy is not just a war crime, it is a crime against humanity and a large-scale evidence of the Kremlin's systematic policy of killing civilians in Ukraine. An absolutely civilian object, a deliberate missile attack by the Russian Federation on a crowd of people". And we believe that it makes sense to agree with this opinion, as well as to state the complete lack of the national CC in defining the features (in the terminology of international criminal law – context) of large-scale, systematic, element of state policy as constitutive for the relevant group of crimes, crimes against humanity. Amendments to the Criminal Code of Ukraine are necessary and urgent. It is possible to allocate a group of articles on crimes against humanity in Section XX of the Special Part. Moreover, according to the draft UN Convention on the Prevention and Punishment of Crimes against Humanity, each state shall take the necessary measures to ensure that crimes against humanity become offences under its criminal law². Article 7

¹ Римський Статут Міжнародного Кримінального Суду : від 17.07.1998 // БД «Законодавство України» / ВР України. URL: https://zakon.rada.gov.ua/laws/show/995_588 (Accessed 5 January 2023).

² Запобігання та покарання злочинів проти людяності // LexInform. 25.05.2020. URL: <https://lexinform.com.ua/zakonodavstvo/zapobigannya-ta-pokarannya-zlochyniv-proty-lyudyyanosti/> (Accessed 5 January 2023).

of the Rome Statute of the International Criminal Court and the relevant provisions of the Elements of Crimes may well serve as a guide.

It should also be noted that the state often establishes a “law and order” that gives the appearance of legitimacy to gross and massive human rights violations by ordering the commission of serious crimes and creating thousands of accomplices to these crimes. In this case, the crime is manifested, as a rule, not in deviant, but in conformist behaviour. These are crimes that the state does not fight, but rather initiates. Such crimes are committed on the orders of governments, supported or systematically concealed by them (Зелінська та ін., 2017).

This is what Hannah Arendt (2021) calls the “redefinition of evil” as the result of the dominance of the ideology and practices of Nazi Germany. Outlining her own observations of the trial of A. Eichmann, the person responsible for “solving the Jewish question”, H. Arendt (2021) states: “The judges did not believe him because they were ... too conscious of the principles of their profession to recognise that an ordinary, ‘normal’ person, a person who was not stupid, indoctrinated, or cynical, was completely incapable of distinguishing good from evil... The whole case was based on the assumption that an ordinary person, like all ‘normal people’, had to be aware of the criminal nature of his actions, and Eichmann was indeed normal insofar as he ‘was not an exception during the Nazi regime’. However, under the conditions of the Third Reich, a ‘normal’ reaction could only be expected from ‘exceptions’...”. Here we are, of course, entering a completely different, deeper than criminal law, layer of criminological and psychological problems, which consist in clarifying the nature of such distortion and subjugation of millions. “The Führer’s order is the absolute core of the current legal framework”, the German constitutionalist expert T. Maunz (1943) emphasised in 1943. And this is a fundamental problem that has not been solved by world science and has re-emerged in connection with Russia’s full-scale aggression against Ukraine. It has its roots in the phenomenon of modern Russian fascism, which has yet to be studied on an interdisciplinary level. This is a matter for the future. And, despite the fact that we have already made some attempts in the Bulletin of the Criminological Association of Ukraine (2022, No. 2), it is still worth recognising that the problem of Russian fascism is deep and requires a series of fundamental scientific works.

It should be noted here that the diagnosis of such a redefinition, socio-political degeneration of morality, and the formation of a different, per-

verted domestic normativity (law, ethics, aesthetics, usually military), which can be detected in the Russian social and political system even with the unaided eye of sophisticated research optics, is clearly indicative of the state policy of committing gross and massive human rights violations that can be identified as crimes against humanity, political system, clearly indicates the state policy of committing gross and massive human rights violations, which can be identified as crimes against humanity, including in the context of the armed conflict in Ukraine. And this is a fundamentally different quality of the good, of the social value that suffers as a result of such crimes than those that are the object of war crimes (at least, the main direct object).

Another important aspect of understanding the nature and scope of crimes against humanity committed in the context of the armed conflict (crime of aggression) in Ukraine is not only the external vector of the deployment of relevant criminal practices against the Ukrainian people, but also the internal one, against Russian citizens who have shown the courage to stand in opposition to the current Russian political regime in connection with the armed conflict. The last contextual element, the connection with the conflict, is necessary, mandatory for the possibility of classifying a political discriminatory act as a crime against humanity, while maintaining all its other mandatory features, in particular the context of large-scale or systematic nature as a manifestation of state policy. The use of a law-making instrument to create a legislative framework may indicate that it belongs to the state policy and is systematic (“article 280.3 of the Criminal Code of the Russian Federation, which establishes criminal liability for (in the language of this law) public actions aimed at discrediting the use of the armed forces of the Russian Federation in order to protect the interests of the Russian Federation and its citizens, maintain international peace and security or the exercise of powers by state bodies of the Russian Federation for the above purposes”), legalisation of political persecution, systematic application of the relevant provisions on criminal liability related to imprisonment.

Although this is a separate topic for fundamental research that cannot be discussed on the basis of cursory considerations, we believe that there are already grounds to raise the issue of the foundations and mechanisms for bringing to criminal responsibility (including international) parliamentarians, judges, and prosecutors for the adoption and application of discriminatory laws that have been used to commit crimes against humanity. Despite the fact that legal practice is

aware of similar cases (the tribunal over Nazi lawyers, systematically described and theoretically comprehended by V. Kulesha (2013)), they are still sporadic, not sufficiently integrated into the doctrine of public international law and, in particular, criminal law. This is especially true of the assessment of parliamentarians' activities in terms of violations of basic provisions of international human rights law, violations of jus cogens, through lawmaking. This is a matter of the future, but it is an urgent matter, the deployment of which today can have a preventive effect, even if it is limited, restrained, but still. Therefore, we will define this area of research as promising and a priority.

CONCLUSIONS. Summing up, we should note that crimes against humanity are a widespread type of criminal practices committed on the territory of Ukraine in connection with the armed conflict as an element of the Russian Federation's foreign aggressive policy. According to the legal sources that used the category of "crimes against humanity", the latter has gone through a certain evolutionary path: from the Nuremberg to the Roman concept and today is set out in sufficient

detail in Article 7 of the Rome Statute of the International Criminal Court, Elements of Crimes as an annex to this Statute. At the same time, the corpus delicti of crimes against humanity reveal many features that have a common meaning with the corpus delicti of war crimes, which in theory creates difficulties in law enforcement. In fact, domestic law enforcement practice does not experience these difficulties at all, demonstrating the absolute dominance of anti-war policy, i.e. the qualification of acts that should be defined as crimes against humanity under international law as war crimes - violations of the laws and customs of war (Article 438 of the CC of Ukraine). And this is natural, since the Criminal Code of Ukraine does not contain special corpus delicti of crimes against humanity, which shows absolute maladaptation to the requests for synchronisation of national and international criminal justice in countering crimes related to the aggression of the Russian Federation against Ukraine. The article proposes the criteria for distinguishing between the said corpus delicti. The conceptual direction of improvement of the national criminal legislation is determined.

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ПРЕСТУПЛЕНИЯ ПРОТИВ ЧЕЛОВЕЧНОСТИ В КОНТЕКСТЕ ВООРУЖЁННОГО КОНФЛИКТА В УКРАИНЕ: ОПРЕДЕЛЕНИЕ, ПРОБЛЕМЫ РАЗГРАНИЧЕНИЯ СО СМЕЖНЫМИ СОСТАВАМИ ПРЕСТУПЛЕНИЙ

Статья посвящена характеристике преступлений против человечности как категории международного уголовного права и в контексте вооруженного конфликта в Украине. Констатировано, что составы преступлений против человечности выявляют немало признаков, имеющих общее содержание с признаками составов военных преступлений, что создает трудности в правоприменении. Сформирована таблица релевантности норм и их проектов о преступлениях против человечности и военных преступлениях по Римскому уставу МУС и проекту Конвенции ООН о предотвращении преступлений против

человечности и наказании за их совершение. Предложены критерии для разграничения указанных составов преступлений. Установлено, что УК Украины не содержит специальных составов преступлений против человечности. Определено концептуальное направление усовершенствования отечественного уголовного законодательства.

Ключевые слова: агрессия, вооруженный конфликт, преступления против человечности, геноцид, военные преступления, разграничение, субъект преступления, контекстуальный элемент.

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ЗЛОЧИНИ ПРОТИ ЛЮДЯНОСТІ В КОНТЕКСТІ ЗБРОЙНОГО КОНФЛІКТУ В УКРАЇНІ: ВИЗНАЧЕННЯ, ПРОБЛЕМИ РОЗМЕЖУВАННЯ ІЗ СУМІЖНИМИ СКЛАДАМИ ЗЛОЧИНІВ

Статтю присвячено характеристиці злочинів проти людяності як категорії міжнародного кримінального права та в контексті збройного конфлікту в Україні. Метою статті є формулювання пропозицій щодо критеріїв розмежування злочинів проти людяності та воєнних злочинів у міжнародно-правовому форматі та здійснення теоретико-модельної проєкції на правову систему України в контексті збройного конфлікту.

Здійснено аналіз положень статутів Нюрнберзького військового трибуналу для суду та покарання головних воєнних злочинців європейських країн осі, Міжнародного військового трибуналу для Далекого Сходу, Міжнародного кримінального трибуналу по колишній Югославії, Міжнародного кримінального трибуналу по Руанді, Конвенції про незастосування строку давності до воєнних злочинів і злочинів проти людства, Європейської конвенції про незастосування строків давності до злочинів проти людяності та воєнних злочинів, а також Римського статуту Міжнародного кримінального суду, проєкту Конвенції ООН про запобігання та покарання злочинів проти людяності, якими визначаються ознаки та перелік злочинів проти людяності.

Сформовано інтегративне бачення їх змісту та ключових ознак. Доведено, що міжнародні кримінально-правові норми «злочини проти людяності» та «геноцид» конкурують як загальні та спеціальні

Констатовано, що склади злочинів проти людяності виявляють чимало ознак, які мають спільний зміст з ознаками складів воєнних злочинів, що створює труднощі у правозастосуванні. Розроблено таблицю релевантності норм і їх проєктів про злочини проти людяності та воєнні злочини за Римським статутом МКС та проєктом Конвенції ООН про запобігання злочинам проти людяності та покарання за їх вчинення. Запропоновано критерії для розмежування вказаних складів злочинів на основі відмінностей у їх суб'єктному складі та контекстуальних елементах. Встановлено, що КК України не містить спеціальних складів злочинів проти людяності, чим виявляє абсолютну дезадаптивність щодо запитів синхронізації національної та міжнародної кримінальної юстиції у справі протидії злочинам, пов'язаним з агресією РФ проти України. Визначено концептуальний напрям удосконалення вітчизняного кримінального законодавства.

Ключові слова: агресія, збройний конфлікт, злочини проти людяності, геноцид, воєнні злочини, розмежування, суб'єкт злочину, контекстуальний елемент.

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