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SPECIFIC FEATURES OF THE CLASSIFICATION OF WAR CRIMES AGAINST PROPERTY INVOLVING ELEMENTS OF THEFT

The article is devoted to the development of theoretical foundations and practical recommendations for the correct classification of war crimes directed against property and involving elements of theft. Additional arguments are presented in favour of interpreting theft as the unlawful removal of property from the owner's possession against their will, as well as the conversion of such property for the benefit of other persons. Approaches to the classification of war crimes against property are identified, provided that it is recognised as an additional optional object of encroachment, which depends on both the perpetrator of the crime and the characteristics of the object, the victim, the method and context of the socially dangerous act. Three typical situations of criminal law classification have been established and characterised, and a number of legal options have been identified within which the grounds for classification are determined, either as a war crime under Article 438 of the Criminal Code of Ukraine, or as a military offence with signs of a war crime, including looting (Articles 432, 433 of the Criminal Code of Ukraine), or as an ordinary criminal offence. The characteristics of the international legal blanket nature of the disposition of Part 1 of Article 438 of the Criminal Code of Ukraine in terms of causing damage to property in conditions of armed conflict as a result of acts with signs of theft are provided.

It has been proven that acts involving theft, robbery, extortion, appropriation of civilian property, and unlawful seizure of vehicles committed by combatants on the side of the russian federation should be classified under Part 1 of Article 438 of the Criminal Code of Ukraine as other violations of the laws and customs of war provided for by international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine. 438 of the Criminal Code of Ukraine as other violations of the laws and customs of war provided for by international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine. This classification is based on the violation of the prohibition on the appropriation of such property, established by Part 1 of Article 53 of the Hague Convention of 1907, Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949, and Rule 51 of Customary International Humanitarian Law. It is emphasised that this rule of criminal law classification is also applicable to a corresponding group of acts committed by civilians who are agents of the occupation. Such persons may include both citizens of the aggressor state and citizens of Ukraine who, as a result of predicate collaboration activities (Parts 5–7 of Article 111-1 of the Criminal Code of Ukraine), have acquired the status of subjects of occupation.

Keywords: *war, armed conflict, classification, war crime, military criminal offence, contextual element, theft, looting.*

Original article

INTRODUCTION. The international armed conflict ongoing in Ukraine as a result of the russian federation's aggression is accompanied by human rights violations, destruction and environmental pollution on a scale unprecedented in post-war Europe (since World War II). The war is causing enormous trauma, both collectively and ontologically (Sokurenko et al., 2024). The brutal violation of international law in its human dimension cannot fail to shock with its tragedy and cannot fail to strike a chord with consciences sensitive to injustice. Whatever explanations for the aggression may be offered by political scientists or criminologists, which force us to talk again and again about the phenomenon of modern russian fascism, its course leaves not only a noticeable mark on the legal system of Ukraine and international law, but also causes a radical break with the basic conventional principles of human coexistence. The collapse beyond the ethical minimum in

relations between social groups, peoples and states, the dehumanisation of public authority, the instrumentalisation of human beings as such – all this manifests a real tectonic shift at the level of the foundations of European civilisation. Antiquity, Christianity and modernity as the "three pillars of true Europe" (Baumeister, 2024), as a trinity of ideas of dignity, love (of God) and nation, faced the threat of remaining solely at the level of facts of consciousness. The need to move from extramental reality to real practice requires intellectually courageous and politically determined efforts aimed at a large-scale restoration of the core values of European civilisation. Fair justice occupies a prominent place in this system of efforts – ensuring the inevitability of criminal responsibility for war crimes and restoring violated rights and freedoms.

Significant progress has already been made in this area: Ukraine has ratified the Rome Statute of the International Criminal Court (hereinafter referred to as the ICC) and made numerous amendments to the Criminal Code of Ukraine (hereinafter referred to as the CC of Ukraine). Theoretical work in the field of criminal liability for international crimes is also significant. Noteworthy are the scientific works of N. Antoniuk, O. Vodyannikov, A. Voznyuk, V. Gryshchuk, O. Dudorov, K. Zadoia, O. Litvinov, R. Movchan, A. Muzyka, V. Navrotsky, N. Orlovska, Ye. Pysmensky, M. Khavronuk, K. Yurtaeva and a number of other domestic researchers. Foreign contributions are also significant, represented by the works of G. Werle, A. Greenawalt, G. K. McDonald, T. Meron, D. Robinson, H. Tigroudja and many others. Therefore, it would be unfair to deny the significant scientific achievements of these distinguished researchers. At the same time, it would be wrong to assume that the issue of criminal responsibility for international crimes in general and war crimes in particular has been fully developed and does not require further intellectual progress. This is obviously not the case. And the situation of the Russian-Ukrainian war is a clear confirmation of this. Among the acute theoretical and practical tasks that await their earliest possible solution is the correct classification of war crimes against property (property as an additional object). For obvious reasons, property is one of the least attractive topics for those who consider themselves humanist researchers during periods of armed conflict. Indeed, war brings to the fore issues related to the protection of life, health, personal freedom and integrity, sexual freedom and integrity, and the environment. The problems of property protection often find themselves on the periphery of attention, which, in turn, affects law enforcement practice. The latter, unfortunately, shows signs of heterogeneity, violation of the principle of equality of citizens before the law, difficulties in interpreting the signs of relevant war crimes, their differentiation and correct qualification. Moreover, the inviolability of property is one of the cornerstones of a liberal democratic social order – the very thing that the aggressor's main efforts are aimed at destroying. Therefore, adequate criminal law protection of property in the context of armed conflict is not only about the property rights of citizens, but also about protecting the foundations of European civilisation.

PURPOSE AND OBJECTIVES OF THE RESEARCH. The purpose of this scientific article is to determine the characteristics of war crimes against property that involve theft. The objectives of the study are: 1) to identify typical situations in the practice of law enforcement agencies that require the application of Article 438 of the Criminal Code of Ukraine to cases of military-contextual encroachment on property with signs of theft; 2) to identify legally significant circumstances that affect the classification of crimes; 3) to formulate recommendations for the correct classification of this category of crimes.

METHODOLOGY. The philosophical level of the research methodology is based on the principles and laws of dialectical determinism: universal connection, historicism, systematicity, dialectical contradiction, and equilibrium. Their application, supplemented by general scientific methods (analysis, synthesis, induction, comparison, modelling, etc.), made it possible to develop a situational model for the application of criminal law in proceedings concerning war crimes against property. The use of scientific methods such as statistical analysis (based on official statistical reports), content analysis (98 media reports), documentary analysis (37 court judgments), expert surveys (15 prosecutors and 23 investigators of the National Police of Ukraine with significant experience in documenting and investigating war crimes), and hermeneutics (interpretation of national and international law), made it possible to identify problematic aspects of the classification of the relevant category of acts and to formulate law enforcement recommendations.

RESULTS AND DISCUSSION. First of all, we would like to emphasise that the basic criterion for distinguishing between ordinary and war crimes, including those that cause damage to property, is the contextual element. As N. Antoniuk (2023, p. 31) rightly notes, it is the contextual element that makes it possible to distinguish war crimes from so-called general crimes. In fact, the contextual element, as a cross-cutting feature of

war crimes, differentiates criminal liability, as it changes the criminal law assessment of the act committed, taking into account the context of the armed conflict, the subject committing the criminal offence, and their awareness of the conflict. There is consensus on this issue both in doctrine and in law enforcement practice.

At the same time, contemporary scientific research on the protection of property rights in the context of armed conflicts notes: "Despite the existing regulation of the protection of civilians during armed conflict at the international and national levels, it is insufficient from the point of view of protecting private relations, in particular those arising in the field of property rights" (Suslin, Stolbovyi, 2024). And not without reason. Our analysis of investigative and judicial practice, the media space, and the system of norms on criminal responsibility for war crimes allows us to identify two groups of socially dangerous acts that infringe on property in the context of armed conflict – with and without signs of theft.

Incidentally, we note that the concept of "theft" in criminal law is controversial. This is clearly evidenced by the very fact of the preparation and defence in 2022 of a dissertation for the degree of Doctor of Philosophy (speciality 081 "Law") by Ya. Tatarkevych (2022) on the topic "Theft in Ukrainian criminal law: concept and forms". The researcher expresses the following opinion: "Theft, from the perspective of the current Criminal Code of Ukraine, is only the unlawful, gratuitous physical removal of another person's property or other items, regardless of the presence or absence of grounds for possession of the latter, committed by means of theft and non-violent robbery". It is difficult to agree with this interpretation of the category of "theft". First, it is unclear why violent robbery is not included in the list of thefts, since it is fundamentally no different from the non-violent manifestation of this criminal offence. Except, of course, for the use of violence that is not dangerous to the life or health of the victim, or threats to use such violence (Part 2 of Article 186 of the CC of Ukraine)[1]. However, with regard to the theft itself, such violence serves a purely instrumental function and does not affect its substance as such. Secondly, according to the characteristics of theft identified by Ya. Tatarkevych (2022), the signs of theft (in particular, illegality, gratuitousness, physical removal of someone else's property or other items, independence from the presence or absence of grounds for possession of the latter) this category should include not only theft and robbery, but also a number of other unlawful actions with someone else's property, in particular those that correspond to the characteristics of robbery, extortion, fraud, and appropriation of property entrusted to a person or under their control. A similar position is expressed by V. Kundeus (2004).

Although scientific debate continues regarding the specific list of these actions (in particular, regarding the relevance of the position set forth in Article 51 of the Code of Ukraine on Administrative Offences)[2], it nevertheless seems more consistent and consistent with the understanding of theft as the unlawful removal of property from the possession of the owner outside or contrary to his will or the conversion of such property for the benefit of other persons. The opposite point of view is expressed by V. Navrotskyi (2011) and R. Maksymovych (2015), who insist on the need to use the category of "theft" as a generic term for the acts we have listed. Instead, in their opinion, the concept of "theft" should be applied only to those criminal offences whose legislative description of the elements directly uses this term. While agreeing that the legislator does indeed use the category of "theft" in a very limited number of criminal offences, and that its literal, legal interpretation requires its application exclusively within the scope of these offences, it nevertheless seems inappropriate to create a situation of artificial competition between legislative and doctrinal categories. Moreover, it is frankly difficult to suspect the domestic legislator of impeccable legal technique and complete doctrinal balance.

In addition, the semantic and contextual paradoxicality of the category of "theft" (розкрадання in Ukrainian) is striking when applied in contemporary criminal law discourse. As is well known, the verbal prefix "роз-" is used to denote a reverse action; it denotes an action or process for the implementation of which another action, opposite in meaning, must first take place (Russu, 2013). Therefore, theft can be discussed in one of two cases: 1) when theft has previously taken place, and the guilty party commits unlawful actions in relation to the subject of this predicate criminal offence (a kind of "robbing the robbed"). Probably, it was within the former paradigm of "socialist legality" that the category of "theft" was appropriate and understandable – but not in the modern legal system of Ukraine; 2) when the object of theft is returned to its owner and the violated

[1] Verkhovna Rada of Ukraine. (2001). *Criminal Code of Ukraine* (Law No. 2341-III). https://zakon.rada.gov.ua/laws/show/2341-14.

[2] Verkhovna Rada of Ukraine. (1984). *Code of Ukraine on Administrative Offences* (Law No. 8073-X). https://zakon.rada.gov.ua/laws/show/80731-10.

property right is restored. Neither the first nor the second case has anything to do with socially dangerous acts that infringe on property in the sense in which it is protected by the CC of Ukraine. Therefore, we consider the use of the category of "theft" to be justified from both a theoretical and an applied point of view.

Having defined the terminology, we can finally turn to its specific application in the context of armed conflict. After all, all of the categories mentioned (theft, robbery, extortion, fraud, misappropriation of property) are mostly used for the legal description of so-called ordinary criminal offences and require adequate projection onto the plane of war crimes.

War crimes against property that have the characteristics of theft consist of the criminally unlawful seizure of property from its owner against his will or contrary to it, or the conversion of such property for the benefit of other persons, committed in the context of an armed conflict contrary to the provisions of international humanitarian law (hereinafter referred to as IHL) and, accordingly, the national legislation of Ukraine. These crimes can be both international and those recognised as criminal offences only under national law. It is believed that the classification of a particular war crime as international or one that should be prosecuted exclusively at the national level depends on the relative seriousness of the human rights violation and the degree of infringement on values of global significance. The latter causes the act to fall outside the scope of national jurisdiction, which indicates a transition to a national-international transgression in the legal assessment of the crime (Greenawalt, 2021). At the same time, this division is mainly procedural in nature – it determines whether a particular situation can be considered by the ICC or another international ad hoc criminal court. Based on well-known positions, the jurisdiction of Ukraine and the application of Ukrainian criminal law extend to all criminal offences committed on the territory of Ukraine without exception (Article 6 of the CC of Ukraine). Reference to the provisions of the Rome Statute of the ICC is of an exclusively indicative nature.

Part 1 of Article 438 of the Criminal Code of Ukraine; the nature and direction of the actions; the characteristics of the victim and the subject of the crime; the characteristics of the perpetrator. Legally significant combinations of factors make it possible to identify a number of typical situations of criminal law qualification.

Situation 1. A combatant fighting on the side of the aggressor country commits theft of civilian property. Note that Part 1 of Article 438 of the CC of Ukraine does not contain any semantic means of direct, immediate description of the specified act. Therefore, they should be classified as "other violations of the laws and customs of war provided for by international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine"[1]. Referring to international conventions and customary law allows us to identify the following normative and regulatory provisions that must be cited in procedural documents regarding criminal law classification:

1) robbery is prohibited (Part 2 of Article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949)[2]. While the Convention does not define the category of "robbery", it is most likely intended to cover instances of the open seizure of another's property in the form of looting or robbery. The English version of the Convention uses the term "pillage", commonly translated as "robbery".

The International Committee of the Red Cross comments on this article as follows: This prohibition is general in nature. It refers not only to robberies committed by individuals without the consent of the military authorities, but also to organised robberies, the consequences of which are described in the histories of past wars, when the spoils allocated to each soldier were considered part of his pay. Part 2 of Article 33 is extremely concise and clear; it leaves no loopholes. The High Contracting Parties prohibit giving orders and allowing robbery. In addition, they undertake to prevent or, if they have begun, to stop acts of robbery. Therefore, the Parties must take all necessary legislative steps. The prohibition of pillage extends to the territory of the party to the conflict as well as to occupied territories. The inviolability of all forms of property is guaranteed, regardless of whether they belong to private individuals, communities or the state[3]. At the same time, the right to requisition or seizure remains unaffected[4].

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1 Verkhovna Rada of Ukraine. (2001). *Criminal Code of Ukraine* (Law No. 2341-III). https://zakon.rada.gov.ua/laws/show/2341-14.

2 United Nations. (1949). *Geneva Convention relative to the Protection of Civilian Persons in Time of War*. https://zakon.rada.gov.ua/laws/show/995_154.

3 Mechelynck, A. *La convention de La Haye*. International Review of the Red Cross. https://international-review.icrc.org/sites/default/files/S1816968600037555a.pdf.

4 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Commentary of 1958. https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-33/commentary/1958.

Thus, it refers exclusively to the prohibition of robbery. Rule 52 of Customary IHL is substantially identical: "Robbery is prohibited"[1]. Other types of encroachment on property, including those with signs of theft, robbery, extortion, misappropriation, illegal seizure of a vehicle, are not covered by the prohibition formulated in part 2 of Article 33 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and in the process of qualification under Article 438 of the CC of Ukraine require reference to other conventional norms;

2) any seizure of private or municipal property by a combatant should be considered unlawful, except in cases of urgent military necessity or extreme necessity. This judgement follows from Article 53(1) of the Hague Convention of 1907, which literally states the following: "The occupying army may take possession only of money, funds and securities which are exclusively the property of the State, of arms depots, vehicles, industrial stocks and, in general, of all movable property of the State which may be used for military operations". This implies a derivative prohibition on the seizure of all other types of property that are: a) not state property or b) not for military purposes.

International humanitarian law allows for the seizure of private property exclusively for military purposes. For example, Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War prohibits "appropriation of property not justified by military necessity and carried out unlawfully and wantonly"[2]. Similarly, Rule 51(c) of Customary IHL states that "private property must be respected and not be taken, except in cases of exigent military necessity"[3]. First of all, the terminological pluralism of translations and authentic texts in denoting the content of a socially dangerous act against property is noteworthy. "Appropriation", "seizure", "taking possession", "confiscation" are connotations of the illegal alienation of property, in fact, theft, committed in the context of an armed conflict. Despite their semantic differences, the essence remains the same: the unlawful seizure (and/or conversion in favour of the perpetrator or others) of property from the funds of the owner, who is a civilian or a community.

An equally important factor in determining the legality or illegality of the seizure (and/or conversion for the benefit of the perpetrator or others) is the purpose of such actions. International humanitarian law clearly stipulates that an act is unlawful if its purpose is other than that which can be identified with military necessity. In this context, the example of the well-known case of V. Shishimarin is relevant. The following picture emerges from open sources of information, including the court verdict. On 28 February 2022, a convoy of russian military equipment, in which Sergeant V. Shishimarin was a member, was broken up by the armed forces of Ukraine in Sumy region. The 21-year-old russian soldier V. Shishimarin, together with other members of the russian armed forces, tried to reach their surviving units. On the way, on the order of his commander, V. Shishimarin, using an assault rifle, killed an unarmed resident of Chupakhivka village, Sumy region, who was riding a bicycle on the roadside. Later, while fleeing, V. Shishimarin and four other servicemen of the russian armed forces seized a private car VAZ-2109 of a local resident and tried to escape in it, but were ambushed and disarmed[4]. In the guilty verdict[5] the court found V. Shishimarin exclusively for the murder of a civilian and, accordingly, referred only to Articles 50 and 51 of the Additional Protocol to the Geneva Conventions of 12 August 1949[6]. In the guilty verdict, the court found V. Shishimarin exclusively for the murder of a civilian and, accordingly, referred only to Articles 50 and 51 of the Additional Protocol to the Geneva Conventions of 12 August 1949 in their systemic legal connection with Part 2 of Article 438 of the CC of Ukraine.

1 Customary international humanitarian law. Norms. (2006). *Ukrainian Journal of International Law, 2*, 7–16. https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/ukr-irrc_857_henckaerts.pdf.

2 United Nations. (1949). *Geneva Convention relative to the Protection of Civilian Persons in Time of War*. https://zakon.rada.gov.ua/laws/show/995_154.

3 Customary international humanitarian law. Norms. (2006). *Ukrainian Journal of International Law, 2*, 7–16. https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/ukr-irrc_857_henckaerts.pdf.

4 I-UA.tv. (2022, May 11). A russian soldier will be tried for the murder of a civilian in Sumy region for the first time. https://i-ua.tv/news/36254-na-sumshchyni-vpershe-sudytymut-rosiiskoho-viiskovoho-za-vbyvstvo-myrnoho-meshkantsia.

5 Judgement of the Solomyansky District Court of Kyiv of 23.05.2022 (case No. 760/5257/22, proceedings No. 1-кп/760/2024/22). https://reyestr.court.gov.ua/Review/104432094.

6 Protocol Additional to the Geneva Conventions dated 12 August 1949, and Relating to the Protection of Victims of Armed Conflicts (Protocol I), dated 8 June 1977. https://zakon.rada.gov.ua/laws/show/995_199.

The court rightly recognised the seizure of the vehicle as lawful, since in the situation, the combatants of the aggressor country used the vehicle for military purposes, in order to get to other units of the armed forces of the russian federation.

In this context, it is advisable to make a certain deviation from the direct subject of the study and draw attention to the fact that domestic law enforcement practice usually avoids references to customary humanitarian law in legal documents, arguments of legally significant decisions and criminal law qualifications. In particular, the rules summarised and promulgated by the International Committee of the Red Cross are not taken into account[1]. And in vain. In our opinion, such a reference is not only possible, but in some cases may be necessary. We believe that we should agree with those scholars who stand for the effectiveness and efficiency of international custom in criminal law regulation: "Firstly, as practice shows, international courts and tribunals regularly refer to international custom. Secondly, custom, being a more flexible source of law, is able to respond more quickly to changes in society, it does not need to be amended, it evolves on its own. Thirdly, unlike a treaty, which is binding only on the parties, international custom applies to all states" (Nurullaiev, 2018). A. Cassese (2006) rightly considers it a well-established international legal tradition that judges of international courts, including the ICC, may go beyond positive substantive rules if the implementation of the "spirit and purpose of the Statute" (referring to the Rome Statute of the ICC. – *Yu. O.*) requires it.

In addition, it cannot be considered a coincidence that the disposition of Part 1 of Article 438 of the CC of Ukraine clearly states in the description of the elements of a war crime that it is a violation of not only the laws but also the customs of war. However, it further links these customs to those "provided for by international treaties ratified by the Verkhovna Rada of Ukraine"[2]. The paradoxical nature of this statement is obvious. A custom cannot be provided for in a contract. Otherwise, it ceases to be a custom. Therefore, the contradictory logical and semantic construction embodied in Part 1 of Article 438 of the CC of Ukraine should be regarded as a technical and legal error that should not prevent the effective application of the criminal law provision.

Consequently, acts containing signs of theft, robbery, extortion, misappropriation of civilian property, as well as the illegal seizure of vehicles committed by a combatant on the side of the Russian Federation should be qualified under part 1 of Art. 438 of the CC of Ukraine as "other violations of the laws and customs of war provided for by international treaties ratified by the Verkhovna Rada of Ukraine" based on the criterion of violation of the prohibition on seizure of such property established by part 1 of Article 53 of the Hague Convention of 1907, Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) and Rule 51 of Customary IHL. It is important to note that the same rule of criminal law qualification also applies to the relevant group of acts committed by civilians - subjects of the occupation. These persons may include both citizens of the aggressor country and citizens of Ukraine who, as a result of predicate collaboration (parts 5-7 of Article 111-1 of the CC of Ukraine), have acquired the status of a subject of occupation support.

Situation 2. A combatant acting on the side of Ukraine commits theft of civilian property. In the structure of this situation, depending on the peculiarities of the legal status of the subject of the criminal offence, it is possible to distinguish two variations:

1) theft of property of a civilian is committed by a person who meets the criteria set out in part 2 of Art. 401 of the CC of Ukraine, i.e. the conditional basic (given the absolute majority) type of combatants on the side of Ukraine - a serviceman of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and other military formations established in accordance with the laws of Ukraine, the State Special Transport Service, the State Service for Special Communications and Information Protection of Ukraine, as well as special police officers of the National Police of Ukraine who are involved in direct participation in hostilities during martial law[3].

First of all, to qualify the described actions of this category of persons, the norms of Article 433 of the CC of Ukraine should be applied, which contains two special corpus delicti of military criminal offences with signs of war crimes: a) in terms of "unlawful seizure of property under the pretext of military necessity committed against the population in the area of hostilities" (part 1 of Article 433 of the CC of Ukraine); b) "robbery committed

1 Customary international humanitarian law. Norms. (2006). *Ukrainian Journal of International Law, 2*, 7–16. https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/ukr-irrc_857_henckaerts.pdf.

2 Verkhovna Rada of Ukraine. (2001). *Criminal Code of Ukraine* (Law No. 2341-III). https://zakon.rada.gov.ua/laws/show/2341-14.

3 Ibid.

against the population in the area of hostilities" (part 2 of Article 433 of the CC of Ukraine)[1].

As for the content of the category "seizure of property", it seems that it should be interpreted exclusively in a logical and semantic connection with the phrase "under the pretext of military necessity". This means that it is not about any open or secret theft of property, the illegality of which is obvious to both the perpetrator and the victim, but about creating a false impression in the victim and/or third parties that the property was seized from the owner or rightful owner. At the same time, even when such a seizure of property is resisted by the victim or third parties, the perpetrator acts in the environment created by him/her in which the property is deemed to be lawfully seized. Thus, we cannot speak of an open theft of property (i.e. robbery), since this form implies that the perpetrator is aware of the obvious unlawfulness of his actions for other persons – the victim or witnesses – and that is why the theft is considered open. At the same time, all cases of property seizure that are committed contrary to the grounds and procedure set out in the Law of Ukraine "On Transfer, Compulsory Alienation or Seizure of Property under the Legal Regime of Martial Law or State of Emergency" of 17 May 2012, No. 4765-VI should be considered unlawful[2]. Thus, the seizure can be both violent and non-violent, including in the immediate absence of the victim at the time of the seizure of property from his/her funds. However, in any case, such actions must be objectively open, i.e. committed: a) in the presence of other persons, which situationally determines the content of misleading them by appealing to military necessity as a reason for the relevant actions and/or b) in the absence of third parties (sporadically, in individual episodes), but in the general pre-created atmosphere of fake (in the sense of the absence of real legal grounds) forced alienation or seizure of property under the legal regime of martial law.

In this context, the opinion of Ya. Lyzohub (2022b, p. 33), who notes: "The unlawful of property in the sense of a specific action is not always objectively the personification of physical or mental harm in itself. It can be carried out as a parallel illegal activity against the background of previously used elements of intimidation of the population… such a seizure is possible without the victim's participation. This will consistently lead to the absence of violence". In general, the approach according to which the seizure of property as an act constituting an offence under Part 1 of Article 433 of the Criminal Code of Ukraine may be committed in the absence of the victim, and therefore without the use of violence, is reasonable. The grounds for this conclusion have already been set out above. Instead, the thesis that it is, according to Ya. Lyzohub (2022b, p. 33), "can be carried out as a parallel illegal activity against the background of previously used *elements of intimidation* of the population" (italics is ours. – *Yu. O.*). It seems that we should not talk about optional predicate intimidation of the population (since intimidation as such does not concern the legal alienation or seizure of property), but about predicate or background actions of the military authorities aimed at legal or quasi-legal (sham) forced alienation or seizure of property under the legal regime of martial law. In such circumstances, it is advisable to talk either about the illegality of systematic, controlled activities aimed at seizing property carried out only under the pretext of military necessity, or about generally legal activities, if there are grounds and in compliance with the procedure established by the Law of Ukraine "On the Transfer, Compulsory Alienation or Seizure of Property under the Legal Regime of Martial Law or a State of Emergency". In the course of such activities, however, certain individuals, under the guise of military necessity, direct their unlawful behaviour towards property that is not subject to alienation or seizure at all or not subject to it in specific circumstances.

Thus, part 1 of Art. 433 of the CC of Ukraine, which concerns the unlawful seizure of property under the pretext of military necessity committed against the population in the area of hostilities, covers actions that can be identified by their content with theft, extortion, fraud, misappropriation or embezzlement of entrusted property, as well as with the illegal seizure of vehicles. In fact, the following actions are committed by a special subject:

a) secret theft of another's property in the absence of the owner, combined with the perpetrator's creation of the impression of the legitimacy of his actions under the pretext of military necessity (seizure with signs of theft)

b) demanding the transfer of someone else's property with the threat of violence against the victim or his/her close relatives or restriction of their rights, freedoms or legitimate interests under the pretext of military necessity (taking with signs of extortion);

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1 Verkhovna Rada of Ukraine. (2001). *Criminal Code of Ukraine* (Law No. 2341-III). https://zakon.rada.gov.ua/laws/show/2341-14.

2 Verkhovna Rada of Ukraine. (2012). *On the transfer, compulsory alienation or seizure of property under the legal regime of martial law or a state of emergency* (Law No. 4765-VI). https://zakon.rada.gov.ua/laws/show/4765-17.

c) seizure of another's property by deceiving about the existence of a real military necessity (fraudulent seizure);

d) misappropriation or embezzlement of entrusted property under false pretences of military necessity (seizure with signs of misappropriation or embezzlement).

Acts with signs of ordinary theft, i.e. secret theft of another's property, when secrecy is not caused by actions to create the appearance of legitimacy of the perpetrator's actions (or use of such appearance created in context), as well as robbery and assault are not covered by part 1 of Article 433 of the CC of Ukraine. The first of the two types of abductions, i.e., with the elements of theft and robbery, are subject to qualification under Part 1 of Article 438 of the CC of Ukraine, due to the presence of a contextual element – armed conflict. In the third case, the perpetrator's actions should be classified under Part 2 of Article 433 of the CCU – "robbery committed against the population in the area of hostilities"[1]. This differentiation of qualification of related acts committed by the same special subject leads to an imbalance in the system of criminal legal protection. In some cases, they are qualified according to the norm that provides for a "privileged" composition of a war crime (Article 433 of the CC of Ukraine as a war crime with war crimes elements), and in others – according to the main norm without mitigating circumstances (Article 438 of the CC of Ukraine). Comparison of the sanctions of Part 1 of Art. 433 and Part 1 of Art. 438 of the CC of Ukraine gives grounds to assert that less socially dangerous acts (military contextual theft, robbery – Part 1 of Art. 438 of the CC of Ukraine) are punishable by imprisonment for up to 12 years, while obviously more socially dangerous acts (robbery committed against the population in the area of hostilities – Part 2 of Art. 433 of the CC of Ukraine) are punishable by imprisonment for a term of seven to ten years[2].

Even more striking are the differences in the severity of punishments for the seizure of property with signs of theft, combined with the perpetrator creating the impression of legitimacy of his actions under the pretext of military necessity, as well as extortion or fraud (part 1 of Article 433 of the CC of Ukraine – imprisonment for a term of three to eight years) – on the one hand, and for theft or robbery as war crimes (part 1 of Article 438 of the CC of Ukraine – imprisonment for a term of eight to twelve years) – on the other[3].

Correcting this situation requires legislative changes. Given that the imbalance in the system of criminal legal protection, similar to the one described above, concerns not only encroachments on property, but also other goods, in particular, sexual freedom and sexual inviolability of a person, committed by a special subject in the context of armed conflict, and taking into account the logic of building privileged corpus delicti of war crimes in chap. XIX of the Special Part of the Criminal Code of Ukraine (where the basis for mitigation of liability is the status of a party defending itself from aggression), it seems appropriate to provide for a provision identical to Article 438 of the Criminal Code of Ukraine among the corpus delicti of war crimes. Such a provision could combine, streamline and supplement the corpus delicti currently set out in Articles 432-435 of the CC of Ukraine.

Situation 3: A combatant commits theft of other combatants' property. Depending on the subject of the crime, the identity of the victim, the situation and the contextual element of the theft, the criminal law assessment of such an act may change, acquiring a variable meaning, namely:

– as a war crime – looting (Part 1 of Article 438 of the CC of Ukraine) – in case of an act committed by a combatant on the side of the aggressor country. According to the disposition of the above provision, looting is "another violation of the laws and customs of war provided for by international treaties ratified by the Verkhovna Rada of Ukraine"[4]. Article 28 of the 1907 Hague Convention expressly prohibits looting in a city or locality, even if it is taken by storm[5]. At the same time, none of the international conventions provide a clear definition of the term "looting". In this regard, in order to avoid artificial competition of norms and law enforcement uncertainty at the national level, we believe it is appropriate to use the definition of looting provided in Part 1 of Article 438 of the CC of Ukraine to qualify the actions of combatants on the side of the aggressor country under Part 1 of Article 432 of the CC of Ukraine. Of course, with the only difference in the subject of the crime;

– looting as a war crime with signs of war (part 1 of Article 432 of the CCU, i.e. "theft on the

1 Verkhovna Rada of Ukraine. (2001). *Criminal Code of Ukraine* (Law No. 2341-III). https://zakon.rada.gov.ua/laws/show/2341-14.

2 Ibid.

3 Ibid.

4 Ibid.

5 IV Convention on the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. (1907). https://zakon.rada.gov.ua/laws/show/995_222.

battlefield of things that are with the killed or wounded")[1]. This qualification applies if the perpetrator of the crime is a combatant on the side of Ukraine who meets the criteria set out in part 2 of Article 401 of the CC. Other combatants on the side of Ukraine who do not meet these criteria will be subject to criminal liability for looting under Article 438(1) of the CC of Ukraine.

In this context, it is important to emphasise that only property that is on the battlefield when killed or wounded is recognised as looted. At the same time, the battlefield should not be understood as any territory that is subject to shelling (in particular, conditional rear regions affected by missile strikes or attacks by unmanned aerial vehicles, as suggested by O. Buleiko (2022)), but only the place where direct mutual fire contact took place. The nature of the category "combat" lies in the mutual use of weapons and other means of destruction. The unilateral use of weapons, in particular long-range weapons, does not create a situation and, accordingly, is not a battlefield. In this regard, the scientific literature rightly notes that the rear, as a territory separate in its military purpose and location, has features that are not only not inherent in the battlefield, but, on the contrary, actually define it as the opposite category (Lyzohub, 2022a). That is why the theft of items belonging to the dead or wounded in such places should be classified as an ordinary criminal offence - without reference to the context of armed conflict;

– as a war crime (part 1 of Article 438 of the CC of Ukraine) – in case of unlawful seizure of property of a prisoner of war by a combatant acting both on the side of the aggressor country and Ukraine. Article 4 of Annex IV of the Convention relative to the Laws and Customs of War on Land states: "Prisoners of war shall be under the authority of the Government of the adverse party and not of the individuals or units which took them prisoner. They shall be treated humanely. All their personal effects, with the exception of arms, horses and military papers, shall remain their property"[2]. Therefore, the unlawful seizure of such items in the context of an armed conflict should be considered a war crime. At the same time, the absence of an appropriate context (e.g., theft of a prisoner of war's belongings in a camp committed by another prisoner of war or a guard) requires qualifying such actions as an ordinary criminal offence.

CONCLUSIONS. Summarizing the research, we note that the approaches to the qualification of war crimes against property as an additional optional object show a dependence on both the subject of their commission and the characteristics of the object of the crime, as well as the victim, the method and context of the socially dangerous act. In the course of the study three typical situations of criminal law qualification are identified and characterized, within which a number of legal options are distinguished, within which the grounds for qualification are determined either as a war crime under Article 438 of the CC of Ukraine, or as a war crime with warlike features, including looting (Articles 432, 433 of the CC of Ukraine), or as an ordinary criminal offence. The author describes the peculiarities of the international legal blanket nature of the disposition of Part 1 of Article 438 of the CC of Ukraine in terms of causing damage to property in the context of armed conflict as a result of committing acts with signs of theft. Prospects for further research are seen in identifying the problems and developing the ways of their solution in the area of qualification of war crimes which encroach on property without signs of theft, in particular, in terms of their distinction from permissible and lawful collateral damage.

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ОСОБЛИВОСТІ КВАЛІФІКАЦІЇ ВОЄННИХ ЗЛОЧИНІВ, ЩО ПОСЯГАЮТЬ НА ВЛАСНІСТЬ І МАЮТЬ ОЗНАКИ ВИКРАДЕННЯ

Статтю присвячено розробленню теоретичних підстав і практичних рекомендацій щодо правильної кваліфікації воєнних злочинів, спрямованих проти власності та пов'язаних з ознаками викрадення. Наведено додаткові аргументи на користь тлумачення викрадення як протиправного вилучення майна з володіння власника поза його волею, а також обернення такого майна на користь інших осіб. Визначено підходи до кваліфікації воєнних злочинів, що посягають на власність, за умови її визнання додатковим факультативним об'єктом посягання, який виявляє залежність як від суб'єкта злочину, так і від характеристик предмета, потерпілого, способу й контексту вчинення суспільно небезпечного діяння. Встановлено й охарактеризовано три типові ситуації кримінально-правової кваліфікації, виокремлено низку юридичних варіантів, у межах яких визначено підстави для кваліфікації або як воєнного злочину, передбаченого ст. 438 Кримінального кодексу України, або як військового з ознаками воєнного, включаючи мародерство (статті 432, 433 Кримінального кодексу України), або як ординарного кримінального правопорушення. Надано характеристику особливостям міжнародно-правової бланкетності диспозиції ч. 1 ст. 438 Кримінального кодексу України в частині заподіяння шкоди власності в умовах збройного конфлікту внаслідок учинення діянь з ознаками викрадення.

Доведено, що діяння з ознаками крадіжки, розбою, вимагання, привласнення майна цивільних осіб, а також незаконного заволодіння транспортними засобами, вчинені комбатантом на боці російської федерації, слід кваліфікувати за ч. 1 ст. 438 Кримінального

кодексу України як інші порушення законів і звичаїв війни, передбачені міжнародними договорами, згоду на обов'язковість яких надано Верховною Радою України. Така кваліфікація ґрунтується на порушенні заборони заволодіння відповідним майном, установленої ч. 1 ст. 53 Гаазької конвенції 1907 р., ст. 147 Женевської конвенції про захист цивільного населення під час війни 1949 р. та нормою 51 Звичаєвого міжнародного гуманітарного права. Наголошено, що зазначене правило кримінально-правової кваліфікації є застосовним і до відповідної групи діянь, учинених цивільними особами – суб'єктами забезпечення окупації. До таких осіб можуть належати як громадяни держави-агресора, так і громадяни України, які внаслідок предикатної колабораційної діяльності (частини 5–7 ст. 111-1 Кримінального кодексу України) набули статусу суб'єкта забезпечення окупації.

Ключові слова: *війна, збройний конфлікт, кваліфікація, воєнний злочин, військове кримінальне правопорушення, контекстуальний елемент, викрадення, розграбування.*

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