

RESPONSIBILITY FOR VIOLATION OF THE LAWS AND CUSTOMS OF WAR: NATIONAL AND INTERNATIONAL ASPECTS

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The article examines the problems of responsibility for violations of the rules and customs of war at the national and international level. Acts of international humanitarian law do not prohibit the conduct of war as such and always operate regardless of whether the outbreak of a given international armed conflict is lawful.

The law of war, despite the prohibition of the use of force by a state against the sovereignty and territorial integrity of another state, is valid in certain cases: it is applied in the case of aggressive war in violation of the UN Charter, or in the case of self-defense, that is, regardless of the legality of the armed conflict.

During armed conflicts, both international and non-international, torture is prohibited, as well as cruel, degrading treatment and punishment. It should be noted that belligerents must always respect and protect the civilian population and civilian objects. There are other provisions derived from the Geneva Conventions.

Conventionally, there is a division into four groups of prohibitions: prohibited methods of warfare and prohibited types of weapons, nuclear weapons as a risk group and protection of civilians and objects. Responsibility for violations of the laws and customs of war is borne by combatants (that is, those who have the right to take direct part in hostilities: personnel of the armed forces of the parties to the conflict, members of organized resistance movements, members of the personnel of regular armed forces who declare their loyalty to the government or authorities, which are not recognized by the state that detains them as prisoners of war), persons authorized to issue orders to combatants, civilians, including persons who for certain reasons are not recognized as combatants.

The absence of the concepts of "combatants" and "non-combatants" in the adapted circulation of criminal legal terminology, in particular, in Article 438 of the Criminal Code of Ukraine and other criminal offenses against peace, human security and international legal order (Chapter XX of the Special Part of the Criminal Code of Ukraine) creates a certain inconsistency between international and domestic legislation. This gap should be eliminated at the legislative level.

Key words: international law, violation of laws and customs of war, responsibility.

Сотула О. С. Відповідальність за порушення законів та звичаїв війни: національні та міжнародні аспекти

У статті досліджуються проблеми відповідальності за порушення правил і звичаїв війни на національному та міжнародному рівнях. Акти міжнародного гуманітарного права не забороняють ведення війни як такої і завжди діють незалежно від того, чи є правомірним початок даного міжнародного збройного конфлікту.

Право війни, незважаючи на заборону застосування сили державою проти суверенітету та територіальної цілісності іншої держави, діє в певних випадках: воно застосовується у разі агресивної війни з порушенням Статуту ООН або в випадок самооборони, тобто незалежно від законності збройного конфлікту.

Під час збройних конфліктів, як міжнародних, так і неміжнародних, заборонені катування, а також жорстоке, таке, що принижує гідність, поводження та покарання. Слід зазначити, що воюючі сторони повинні завжди поважати та захищати цивільне населення та цивільні об'єкти. Є й інші положення, виведені з Женевських конвенцій.

Умовно існує поділ на чотири групи заборон: заборонені методи ведення війни та заборонені види зброї, ядерна зброя як група ризику та захист цивільного населення та об'єктів. Відповідальність за порушення законів і звичаїв війни несуть комбатанти (тобто особи, які мають право брати безпосередню участь у бойових діях: особовий склад збройних сил сторін конфлікту, учасники організованих рухів опору, учасники особовий склад регулярних збройних сил, який заявляє про свою лояльність до уряду або органів влади, які не визнаються державою, яка утримує їх як військовополонених), особи, уповноважені віддавати накази комбатантам, цивільні особи, включаючи осіб, які з певних причин не визнані учасниками бойових дій.

Відсутність в адаптованому обігу кримінально-правової термінології, зокрема у статті 438 Кримінального кодексу України та інших кримінальних правопорушень проти миру, безпеки людини та міжнародного правопорядку, понять «комбатанти» та «некомбатанти» (Розділ XX Особливої частини КК

Протидія злочинності: проблеми практики та науково-методичне забезпечення

України) створює певну суперечність між міжнародним і внутрішнім законодавством. Цю прогалину необхідно усунути на законодавчому рівні.

Ключові слова: міжнародне право, порушення законів і звичаїв війни, відповідальність.

Formulation of the problem. Acts of international humanitarian law do not prohibit the conduct of war as such and always operate regardless of whether the outbreak of a given international armed conflict is lawful: “The recent past and the present show that wars between states occur very often, despite the fact that law prohibits the use of force. The situations are different:

- one state attacks another, thereby committing a prohibited act of aggression against another state;
- the state defends itself from the aggressor, exercising its right to self-defense; it can use the help of a third party (collective self-defence);
- the UN decides on collective armed action when one of the members, contrary to its obligations under the UN Charter, threatens or violates the peace or commits an act of aggression” [1].

Such acts include: Geneva Convention on the Amelioration of the Fate of the Wounded and Sick in Active Armies (JK I) [2]; Geneva Convention on the Amelioration of the Fate of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (JK II) [3]; Geneva Convention on the Treatment of Prisoners of War (JK III) [4]; Geneva Convention on the Protection of the Civilian Population in Time of War (JK IV) [5]; Additional Protocol to the Geneva Conventions of August 12, 1949, concerning the protection of victims of international armed conflicts (DP I) [6]; Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the protection of victims of armed conflicts of a non-international character (DP II) [7]; Additional protocol to the Geneva Conventions of August 12, 1949, concerning the adoption of an additional distinctive emblem (DP III) [8]; Convention on the Rights of the Child dated November 20, 1989 [9]; Optional Protocol to the Convention on the Rights of the Child on the Participation of Children in Armed Conflict dated January 1, 2000 [10]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of December 10, 1984 [11].

Review of recent research and publications. Comparative criminal law study of various types of violations of laws and customs of war in Ukraine did not become the subject of a special study. Various aspects of the mentioned problems were studied by domestic specialists, in particular M.I. Bazhanov,

A.V. Bailov, Yu.V. Baulin, V.K. Hryshchuk, T.G. Katkova, M.I. Melnyk, V.O. Mironova, V.O. Navrotsky, L.A. Ostapenko, O.L. Starko, V.V. Stashis, V.Ya. Tatsyj, M.I. Havronyuk and others. However, there are no comprehensive comparative legal studies of criminal liability for violations of the laws and customs of war, which indicates the need for a detailed study of this problem.

The purpose of this article is further theoretical development of the topic of criminal liability for violations of the laws and customs of war, taking into account the modern achievements of criminal law comparativistics.

Presentation of the main research material. The law of war, despite the prohibition of the use of force by a state against the sovereignty and territorial integrity of another state, is valid in certain cases: it is applied in the case of aggressive war in violation of the UN Charter, or in the case of self-defense, that is, regardless of the legality of the armed conflict.

During armed conflicts, both international and non-international, torture is prohibited, as well as cruel, degrading treatment and punishment. It should be noted that belligerents must always respect and protect the civilian population and civilian objects. There are other provisions derived from the Geneva Conventions.

Article 1 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 states that “The High Contracting Parties undertake in all circumstances to observe and enforce this Convention“. And further - “apart from the provisions which shall enter into force in time of peace, the present Convention shall apply in the event of a declared war or any other armed conflict arising between two or more High Contracting Parties, even if one of them does not recognizes states of war” [2].

So, Geneva law deals with one main strategic goal, namely the preservation of the life of a person who is involved in an armed conflict.

The laws and customs of war applied at the international level are described in sufficient detail by the German jurist Hans-Peter Gasser [1]. So, conditionally there is a division into 4 groups of prohibitions: prohibited methods of warfare and prohibited types of weapons, nuclear weapons as a risk group and protection of civilians and objects [1].

Article 41 of Additional Protocol I prohibits in all circumstances the order to “leave no one alive” or the conduct of hostilities on that basis (sparing no one). It is prohibited to attack a person who is

recognized or who in the circumstances should be recognized as a person who has become incapacitated. The destruction of a soldier who has ceased hostilities is considered murder [6].

In accordance with paragraph 2 of this article, “any person is considered disabled if he: (a) is in the power of the adverse party; b) clearly expresses the intention to surrender; or (c) is unconscious or otherwise incapacitated by injury or disease and is therefore incapable of defending himself, provided that in any such case that person refrains from any act of hostility and does not attempt to escape” [6].

The next group of laws of warfare includes rules relating to the use of prohibited weapons.

For example, Protocol I prohibits attack with indiscriminate weapons. Article 51, paragraph 4, states that “Indiscriminate attacks are prohibited.

The use of weapons capable of causing unnecessary injury and unnecessary suffering is also prohibited (Article 35, paragraph 2 of Additional Protocol I) [6]. “This prohibition is often misunderstood or even considered very cynical, saying that all suffering is unnecessary. This is true, of course, just as it is true that war itself is cruel. But the rule is something else. It prohibits the use of weapons and ammunition that cause damage that is not necessary to achieve the set military goal, that is, unnecessary. That is, the task can be performed by other, less cruel methods, such damage is disproportionate to the goals” [6]. Thus, nuclear weapons are classified as indiscriminate weapons and, accordingly, are banned under international humanitarian law.

And finally, a group of norms that provide for the protection of the civilian population and objects. In accordance with Art. 54 of Protocol I, the prohibited methods of warfare include the following:

“1. The use of civilian starvation as a method of warfare is prohibited.

2. It is prohibited to attack or destroy, remove or render useless objects essential for the survival of the civilian population, such as food supplies, food-producing agricultural areas, crops, livestock, facilities for the supply and conservation of drinking water, and irrigation facilities. specifically for the purpose of preventing their use by the civilian population or the adverse party as a means of subsistence, regardless of the motive, whether for the purpose of starving civilians, forcing them to leave, or for any other reason” [6].

It should be noted that international legal norms in the field of the protection of civilians are legally binding as customary rules and for states not bound by Protocol I.

In article 23 of the Convention, “except for the restrictions established by special agreements, it is prohibited:

- use poison or poisoned weapons;
- treacherously kill or injure persons belonging to the population or troops of the enemy;
- to kill or injure an enemy who, having laid down his weapon or having no more means of defending himself, has unconditionally surrendered;
- declare that no quarter will be given to anyone;
- use weapons, projectiles or substances capable of causing unnecessary suffering;
- it is unlawful to use the parliamentary or national flag, military signs and uniforms of the enemy, as well as the distinctive signs established by the Geneva Convention;
- destroy or seize enemy property, unless such destruction or seizure is urgently required by military necessity;
- to declare null and void, suspended or deprived of judicial protection the rights and claims of the citizens of the opposite side.

Likewise, it is forbidden for a belligerent to force the subjects of the opposing side to take part in hostilities directed against their country, even if they were in his service before the start of the war.

In accordance with Art. 4 of the Convention for the Protection of Civilian Persons in Time of War of August 12, 1949, civilians are understood to mean “persons not taking part in hostilities who at any time and in any way, in the event of a conflict or occupation, are in the power of a party in conflict or an occupying Power of which they are not nationals” [5].

Ill-treatment of the civilian population includes violence to life (including murder), health, physical or mental condition, torture of all kinds, corporal punishment, mutilation, abuse of human dignity, forced prostitution or indecent assault in any form, capture hostages, collective punishment, threats to commit these actions [5]. Article 75 of the Additional Protocol states as fundamental guarantees: “The following acts are prohibited and will remain prohibited at any time and in any place, whether committed by civil or military authorities:

- a) violence against the life, health and physical or mental state of persons, in particular:
- murder;
 - torture of all kinds, whether physical or mental;
 - physical punishment; And
 - injuries;

b) abuse of human dignity, in particular degrading and degrading treatment, forced prostitution or indecent assault in any form;

c) taking hostages;

d) collective punishments;

e) threats to commit any of the above actions” [6].

In the Ukrainian criminal legislation, Article 438 “Violation of the laws and customs of war” provides for responsibility for “cruel treatment of prisoners of war or the civilian population, deportation of the civilian population for forced labor, looting of national values in the occupied territory, use of means of warfare prohibited by international law, other violations of the laws and customs of war provided for by international treaties, the binding consent of which was given by the Verkhovna Rada of Ukraine, as well as the issuing of an order to commit such actions” [13]. The content of the specified article gives grounds for asserting that the following are responsible for these crimes:

“1) as a rule, combatants are both from the side of the aggressor state and from the side of Ukraine;

2) persons authorized to issue orders to combatants;

3) civilians, including persons who for certain reasons are not recognized as combatants (for example, those who took up arms and did not join the military formation, spies, saboteurs, mercenaries)” [14].

The Geneva Convention on the Treatment of Prisoners of War (Article 4a), as well as the Additional Protocol to the Geneva Conventions of August 12, 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Articles 43, 44) [4; 6], refer to combatants, that is, those who have the right to take direct part in hostilities, persons who belong, in particular, to:

1) personnel of the armed forces of the party to the conflict (with the exception of medical and spiritual personnel, as well as spies and mercenaries). In the Russian-Ukrainian armed conflict of 2022-2023, these are representatives of: the regular armed forces of the Russian Federation; other armed forces of the Russian Federation: border troops, internal troops (“Rosgvardiya”), the federal security service, the foreign intelligence service, state security agencies, rescue military formations of civil defense, the military prosecutor’s office, military investigative bodies, the investigative committee, the federal body for ensuring mobilization training, special formations, military educational institutions, etc. [14]. Protocol I puts forward one requirement for them - subordination

to the internal disciplinary system, which, among other things, ensures compliance with the norms of international law applied during armed conflicts;

2) members of organized resistance movements who meet the following conditions:

“a) they are commanded by a person who is responsible for his subordinates;

b) they have a permanent distinguishing mark, well recognizable from a distance;

c) they carry weapons openly;

d) they carry out their operations in accordance with the laws and customs of war” [2; 3; 4].

Partisans or militants of the so-called “DPR”/ “LPR” can serve as an example. This category also includes representatives of private military campaigns. “Their membership in organized resistance movements can be questioned if they ignore the laws and customs of war, the observance of which is an obligatory feature of combatants” [14]. However, paragraph 2 of Article 44 of Protocol I states: “although all combatants are obliged to observe the norms of international law applicable in the period of armed conflict, violations of these norms do not deprive a combatant of his right to be considered a combatant and, if he falls into the power of the opposing party, - to be considered a prisoner of war (with some exceptions, for example, in the case when a combatant disguises himself as a civilian while participating in an attack)” [6];

3) members of the personnel of the regular armed forces who declare their loyalty to the government or authorities, which are not recognized by the state that detains them as prisoners of war: “the civilian population of the unoccupied territory, which spontaneously took up arms when the enemy approached and did not have time to organize into regular the armed forces of the parties to the conflict - levée en masse (provided open carrying of weapons and respect for the laws and customs of war)” [15, p. 80].

Conclusions. The absence of the concepts of “combatants” and “non-combatants” in the adapted circulation of criminal legal terminology, in particular, in Article 438 of the Criminal Code of Ukraine and other criminal offenses against peace, human security and international legal order (Chapter XX of the Special Part of the Criminal Code of Ukraine) creates a certain inconsistency between international and domestic legislation [13]. In our opinion, this gap should be eliminated at the legislative level.

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