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Abstract

Ukrainian law enforcement agencies are working in cooperation with the International Criminal Court - ICC and countries that jointly support the ICC to collect evidence of Russia's atrocity crimes in order to hold the alleged perpetrators accountable. The collection of evidence in the situation of Ukraine ever turned into an unprecedented investigation of the likely international crimes committed by Russian armed forces in Ukraine. This study aims to determine the fundamental role and significance of the ICC in a collective investigation of the situation in Ukraine. Knowing that the definition of the term "war crimes" does not exist in the current legislation of Ukraine, this study attempts a correlative analysis of the term "war crimes" in the context of international law and finds that Ukrainian law enforcement agencies and institutions are capable of documenting war crimes committed in Ukraine by the Russian Federation. This suggests that the ICC, in comparison to its previous international investigations, definitively has a wide range of support resources to hold accountable "those most responsible" for alleged war crimes and crimes against humanity, as emphasized in its prosecutorial policy documents.

Keywords: International Criminal Court, Ukraine, investigation, war crimes, human rights.

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Evaluación de las responsabilidades de la Corte Penal Internacional en la investigación de los crímenes de guerra en Ucrania

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Resumen

Las fuerzas de seguridad ucranianas están trabajando en cooperación con la Corte Penal Internacional (CPI) y los países que en conjunto la apoyan para recopilar pruebas de los atroces crímenes cometidos por Rusia, con el fin de exigir responsabilidades a los presuntos autores. La recopilación de pruebas en la situación de Ucrania se ha convertido en una investigación sin precedentes de los probables crímenes internacionales cometidos por las fuerzas armadas rusas en Ucrania. Este estudio pretende determinar el papel fundamental y la importancia de la CPI en una investigación colectiva de la situación en Ucrania. Dado que la definición del término *crímenes de guerra* no existe en la legislación actual de Ucrania, este estudio intenta realizar un análisis correlativo del término en mención en el contexto del derecho internacional. De este modo, constata que los organismos institucionales policiales ucranianos son capaces de documentar los crímenes de guerra cometidos en Ucrania por la Federación Rusa. Esto sugiere que la CPI, en comparación con sus anteriores investigaciones internacionales, cuenta definitivamente con una amplia gama de recursos de apoyo para hacer rendir cuentas a "los máximos responsables" de presuntos crímenes de guerra y crímenes contra la humanidad, tal y como se subraya en sus documentos de política procesal.

Palabras clave: Corte Penal Internacional, Ucrania, investigación, crímenes de guerra, derechos humanos.

Introduction

The problem of effective protection of the aggrieved person's rights has always existed. However, as the historical events testify, the Second World War radically changed the views on the guarantees of world peace, because humanity understood the true value of human rights and freedoms, which led to a fundamental updating of the legal mechanism for their protection. Since that time, the protection of human rights has not been a purely internal competence of States, but has acquired international significance, embodied in the idea of creating a new international law and order based on respect for fundamental rights and freedoms¹. Humanity seems to be moving towards a more civilized, gentler post-pandemic world, while at the same time witnessing the brutality of an invasion on a scale, we thought impossible. Leaders meet, negotiations are concluded, wars are started, and acts of terror are committed. The scientific world turns its attention to the rising geopolitical tensions caused by the Russian invasion of a sovereign nation, waging a war that no one thought possible since the end of World War II².

Today Ukraine lives in difficult conditions of struggle against the armed aggression of the Russian Federation. Every day, law enforcement bodies record the facts of deliberate gross violations of the laws and customs of war - war crimes. Three-time Pulitzer Prize winner American journalist Thomas Friedman noted in his article for The New York Times, "Just an observation: this war has always belonged to Putin. He personally invented, planned, justified it, and started it" (Friedman, 2022). The current legislation of Ukraine does not contain a definition of the term "war crime". However, the scope of the "war crimes" category in the criminal legislation of Ukraine is determined by the composition of the crimes provided for in Part 2 of Article 433 of the Criminal Code of Ukraine (violence against population in an operational zone), Article 434 of the Criminal Code of Ukraine (maltreatment of prisoners of war), Part 2 of Article 435 of the Criminal Code of Ukraine (unlawful use or misuse of the Red Cross and Red Crescent symbols), Article 438 of the

¹ Ablamskyi, Serhii, Hennadii Hlobenko, Ruslan Chycha, Olena Martovytska, and Iryna Burlaka, "Ensuring Protection of the Rights of the Aggrieved Person in Criminal Proceedings through the Prism of Requirements of International Law Acts," *Journal of Legal, Ethical and Regulatory Issues* 23, Special Issue (2020): 1-7. <https://www.abacademies.org/articles/Ensuring-protection-of-the-rights-of-the-aggrieved-person-1544-0044-25-SI-540.pdf>; Serhii Yevhenovych Ablamskyi, Faiz Ayat Ansari and Andrii Volodymyrovych Nosach, "Evaluating the Current State of Realization of Victims' Rights in the Criminal Process: An Explanation Under Ukrainian and Indian Criminal Procedure Codes," *Novum Jus* 16 no. 2 (2022): 23-48. <https://doi.org/10.14718/NovumJus.2022.16.2.2>

² Laura C. Gamarra-Amaya, "EDITORIAL: The Roaring 20s: Facing an Uncertain Future while Waging the Wars of the Past," *Novum Jus* 16, no. 3 (2022): 13-15. <https://doi.org/10.14718/NovumJus.2022.16.3.1>.

Criminal Code of Ukraine (violation of the rules of war), Article 439 of the Criminal Code of Ukraine (use of weapons of mass destruction), Article 440 of the Criminal Code of Ukraine (development, production, acquisition, storage, distribution or transportation of weapons of mass destruction), Part 4 of Article 447 of the Criminal Code of Ukraine (mercenaries).

The disposition of most of the specified criminal offenses has a comprehensive character of international law. At the same time, in order to clarify the content of socially dangerous actions and their illegality, it is necessary to refer to the Hague Conventions of 1907, and the Geneva Conventions of 1949 (I, II, III, IV), additional protocols to them (I, II), other conventions prohibiting the use of certain means and methods of warfare (for example, the UN Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and on their Destruction dated 13.01.1993, the UN Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effect dated 10.10.1980, etc.). It should be noted that the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes establish that the statute of limitations does not apply to war crimes and crimes against humanity.

Violations of the laws and customs of war are considered serious if they endanger protected persons or objects or they breach important values; if they are committed intentionally, they are grave breaches. In this respect, the concept of grave breaches is linked to the principle of *mens rea*. The meaning of the term serious should be the *actus reus* of the crime, and the grave breaches should be the *mens rea* of the crime. The sum of both would be considered serious international crimes under the International Criminal Court, even in non-international armed conflicts³.

Methodology

The complex of general and special methods of scientific knowledge, widely used in modern jurisprudence, has been used in writing this article.

³ Denakpon Tchobo, "Potential international crimes in Ukraine: should atrocities in Bucha be classified as genocide, war crimes, or crimes against humanity?," *Law and Safety* 85, no. 2 (2022): 13-20. <https://doi.org/10.32631/pb.2022.2.01>

The philosophical level of the methodology for studying the issue of the role of the International Criminal Court in the investigation of war crimes committed on the territory of Ukraine is represented by the principle of consistency, the laws of universal connection and dialectical contradiction, the application of which determined the general research paradigm of parity and complementarity of international and national criminal law.

The objectivity method was used to determine the probability and completeness of the information used in the process of writing the article.

The dialectical systematic approach was useful in determining the main trends in the development of a modern collective security system to counter the new challenges and threats that arose in Ukraine after a full-scale invasion and the commission of war crimes on the territory of Ukraine by the Russian military. The comparative method has become interrelated, applicable to establish logical patterns regarding the activities (especially in terms of jurisdiction) and the role of the International Criminal Court in the investigation of war crimes.

At the general and specific scientific level, the methods of hypothesis, analysis, synthesis, as well as systemic legal analysis and hermeneutic are used, in particular, to interpret the possible creation of an international tribunal to investigate war crimes and bring the top leadership of the Russian Federation to justice.

Results and Discussion

An assessment of the Ukrainian respect of the international prescription to ensure the protection of human rights

Today, the state is the only entity authorized to carry out legislative regulation of social relations and, accordingly, to use legitimate coercion to ensure human rights and freedoms. In this regard, the function of administering justice, which is aimed at restoring the violated rights, freedoms and legitimate interests of all subjects of social relations, is assigned exclusively to the competence of the state⁴.

⁴ Valerii Sokurenko, Oleksandr Morhunov and Serhii Ablamskyi, "Assessing the Scope of Legal Immunity in Modern Legal Science: The Need for Questioning Under Ukrainian Law," *Journal of Liberty and International Affairs* 9, no. 1 (2023): 268. <https://doi.org/10.47305/JLIA2391270s>

On the pages of legal periodicals, scientists express the opinion that it would be logical and expedient to introduce a simplified procedure for the pre-trial investigation of certain categories of crimes against humanity, defined in Article 7 of the Rome Statute and provided by separate articles of the Criminal Code of Ukraine⁵. However, it should be noted that the current criminal procedural legislation of Ukraine does not provide an opportunity for prosecution for illegal acts committed on the territory of Ukraine, subjects who are not on its territory. Moreover, at the moment there is no possibility to really recover money from the aggressor country, to really bring to justice the higher military and political leadership of the Russian Federation. And this, despite the fact that the Verkhovna Rada of Ukraine adopted the Law No. 2236-IX of May 3, 2022, which added to the Criminal Procedure Code of Ukraine Chapter IX-2 “Characteristics of Cooperation with the International Criminal Court”. However, the specified section of the Criminal Procedure Code of Ukraine cannot function without the ratification of the Rome Statute of the International Criminal Court by Ukraine.

According to the Office of the President of Ukraine, the specified statute will not be ratified in the near future - “I would postpone the ratification of the Rome Statute, at least during the war, until the victory of Ukraine. Because, according to the Rome Statute, special competent bodies of foreign countries will receive a number of statements from the aggressor country about crimes allegedly (I emphasize - allegedly) committed by our military. And the same International Criminal Court will be obliged to assess these events,” explained the Deputy Head of the Office of the President. Despite the fact that Ukraine is not a state party to the Rome Statute, it accepted the jurisdiction of the Court in two declarations submitted on April 9, 2014 and November 8, 2015. This allowed the ICC to conduct a preliminary examination of the situation in Ukraine between April 25, 2014 and December 11, 2020. “The preliminary examination initially focused on possible crimes against humanity “committed in the context of the Maidan protests which took place in Kyiv and other regions of Ukraine between November 12, 2013 and February 22, 2014”.

It was then expanded to cover all alleged crimes committed on the territory of Ukraine from February 20, 2014 until its closure on December 11, 2020. Following this investigation, the OTP concluded that there were “reasonable

⁵ Nataliya Ortynska, Volodymyr Baranyak, Inna Tsyliuryk, Yana Koniushenko, and Ihor Krasiuk, “Investigation and Justice of Crimes Committed under War Conditions in Ukraine,” *Cuestiones Politicas* 40, no. 73 (2022): 311-29. <https://doi.org/10.46398/cuestpol.4073.16>

grounds to believe that war crimes and crimes against humanity were committed”⁶. Recall that “the second statement extended this period on an indefinite basis to include ongoing alleged crimes committed throughout the territory of Ukraine from February 20, 2014 “⁷. On February 28, 2022, the ICC Prosecutor announced that he would seek authorization to open an investigation into the situation in Ukraine, based on “the Office’s earlier conclusion” resulting from its preliminary examination and encompassing any new alleged crimes within the jurisdiction of the Court”⁸. From March 1 to 11, 2022, 43 States referred the situation in Ukraine to the Prosecutor’s Office. On March 2, 2022, based on the receipt of referrals from 39 States Parties, the Prosecutor announced that he had proceeded to open an investigation into the Situation in Ukraine⁹.

The extent of respect for human rights in Ukraine in the fight against war crimes

However, this does not mean that there are no investigations of war crimes at the national level. On the contrary, such investigations are conducted, but without using the resources of international criminal justice, which, according to the official materials of the International Criminal Court, as well as the well-known resolutions of the Verkhovna Rada of Ukraine on recognition of the jurisdiction of the International Criminal Court, the appeals of 43 countries to the Office of the Prosecutor of the International Criminal Court during March 1–11, 2022¹⁰, focused on the investigation of war crimes and crimes against humanity, there is a check for the presence of signs of the crime of genocide¹¹. Thus, at present, it is possible to speak about the activity of the International Criminal Court in Ukraine, but not to the full extent. The result of the activity of the mentioned court is the prosecution of specific persons for the commission of “certain” crimes. The goal today is to put

⁶ Denakpon Tchobo, *Russia’s Invasion of Ukraine: Creating a Special Tribunal for the Crime of Aggression Would Be a Danger to the Future of International Criminal Law* (March 11, 2022). <http://dx.doi.org/10.2139/ssrn.4078759>

⁷ **ICC-CPI. Situation referred to the ICC by 43 States Parties:** March - April 2022. <https://www.icc-cpi.int/ukraine>

⁸ Office of the Prosecutor. Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: “I have decided to proceed with opening an investigation”. 2022a. <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>

⁹ Office of the Prosecutor. Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation. 2022b. <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>

¹⁰ International Criminal Court. Situation in Ukraine. 2022. <https://www.icc-cpi.int/ukraine>

¹¹ Yurii Orlov and Nataliia Pribytkova, “War and Criminal Law Policy of Ukraine: Challenges and Responses,” *Law and Safety* 85, no. 2 (2022): 40-49. <https://doi.org/10.32631/pb.2022.2.04>

an end to the impunity for atrocity crimes in Ukraine and to bring criminal justice to Ukrainians. As defined by Tchobo, “(Criminal) justice is a process or action that seeks to protect the rights of victims as well as those presumed or accused, through a fair process, for normative purposes”¹².

By comparison, in many other past situations or ongoing investigations, where the ICC has faced significant obstacles to proceeding with the investigation and mostly lack of access to the territory concerned, such as the situations in Sudan, Libya, Palestine, Burundi, Myanmar, and the Philippines, among others, the Chief Prosecutor, Karim Khan, has already visited Ukraine several times¹³. The Prosecutor described the ICC team he sent to the country as “the largest ever single field deployment by [his] Office since its inception.” “This substantial ICC investigative team appears to be operating in Ukraine on an almost permanent basis. [...] Their ability to visit areas evacuated by Russian forces should allow them to document significant evidence of crimes. In some of these places, the speed of the withdrawal has likely limited the ability of Russian forces to destroy evidence and otherwise cover up atrocities”¹⁴. It is crucial to emphasize that this investigative team is working in synergy with a Joint Investigative Team (JIT) for Ukraine established by Eurojust.¹⁵ “The Prosecutor has publicly stated that Dutch, Belgian, and French investigators have either been seconded to the ICC or worked with ICC teams, including in gaining access to cell phones and other electronic sources of information”¹⁶.

In addition to the mentioned problem (the urgent need to ratify the Rome Statute), it is impossible not to mention the period of time during which the International Court of Justice of the United Nations will consider the relevant appeal and issue its decision on the case. Attention to this issue is due to the following fact. Ukraine's claim to the UN International Court of Justice against Russia was filed on January 16, 2017,¹⁷ with the aim of bringing the Russian Federation to court for committing acts of terrorism and discrimination during its illegal aggression against Ukraine.

¹² Tchobo, Denakpon. *Human Rights in International Criminal Law*. Eliva Press. 2022.

¹³ David Bosco, *The ICC's Impact in Ukraine* (LawFareBlog, 2022), <https://www.lawfareblog.com/iccs-impact-ukraine>

¹⁴ Ibid.

¹⁵ **ICC-CPI. Situation referred to the ICC by 43 States Parties:** March - April 2022. <https://www.icc-cpi.int/ukraine>

¹⁶ David Bosco, *The ICC's Impact in Ukraine* (LawFareBlog, 2022), <https://www.lawfareblog.com/iccs-impact-ukraine>

¹⁷ News. Ukraine Files Action against Russia in International Court of Justice. 2017. <https://web.archive.org/web/20170119061050/http://mfa.gov.ua/en/press-center/news/53743-ukrajina-podala-pozov-proti-rosijskykoji-federaciji-do-mizhnarodnogo-sudu-oon>

Based on this fact, the International Court of Justice of the United Nations has already established its jurisdiction to consider the case¹⁸. Representatives of Ukraine also appealed to the International Court of Justice of the United Nations with a request to introduce temporary measures aimed at preventing the continuation of human rights violations by the Russian Federation while the Court considered the case on its merits. Already in March 2017, when the International Court of Justice of the United Nations considered Ukraine's petition for temporary measures, the Court satisfied the requests for discrimination and obliged the Russian Federation to refrain from restrictions on the Crimean Tatar People in representing their interests, in particular, to restore the activities of the Mejlis, as well as to ensure the restoration of minority education in the Ukrainian language.

On November 8, 2019, the International Court of Justice issued a much-anticipated ruling on the preliminary objections raised by the Russian Federation with respect to the Court's lack of jurisdiction over claims brought by Ukraine under the Convention on the Elimination of All Forms of Racial Discrimination and the International Convention for the Suppression of the Financing of Terrorism. The Court overwhelmingly rejected all of Russia's preliminary objections under both Conventions and confirmed the admissibility of Ukraine's claims under the CERD. As a result, Ukraine's case will be heard in its entirety¹⁹.

The responsibility of the International Criminal Court in the fight against war crimes

On March 16, 2022, the International Court of Justice of the United Nations announced a decision on the request for the introduction of provisional measures in the case of genocide "Ukraine v. Russia"²⁰. It is a charge of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. According to the Court's decision, Russia must immediately cease all military operations in

¹⁸ L. V. Servatiuk and V.M. Tronts, *On the issue of limiting the international legal personality of the Russian Federation as a result of armed aggression against Ukraine*. International scientific conference "The role of legal science in establishing a new world order in wartime and post-war period", Conference Proceedings, July 29–30, 2022. Riga, Latvia: "Baltija Publishing."

¹⁹ Iryna Marchuk, "Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation) (Preliminary Objections) (I.C.J.)," *International Legal Materials* 59, no. 3 (2020): 339-416. <https://doi.org/10.1017/ilm.2020.26>

²⁰ Case «Ukraine v. Russian Federation» No. 166. 2022. <https://www.icj-cij.org/public/files/case-related/166/166-20220408-ORD-01-00-EN.pdf>

Ukraine and end all military or irregular armed formations under its control or influence. “By thirteen votes to two, the Russian Federation shall immediately cease the military operations on the territory of Ukraine; by thirteen votes to two, the Russian Federation shall ensure that any military or irregular armed units which it may direct or support, as well as any organizations and persons which may be subject to its control or direction, shall take no steps in furtherance of the military operations. And unanimously - the two parties shall refrain from any action that may aggravate or prolong the dispute before the Court or make it more difficult to resolve”, the Court announced²¹. As we can see, it took about 5 years for the court to make a decision, but the decision made did not in any way affect the real state of affairs in Ukraine, which once again emphasized the weaknesses in enforcement of decisions of international courts.

According to the “Elements of Interpretation” of the Statute of the International Criminal Court, adopted in 1998, three factors, namely the nature, gravity and extent, must be sufficiently important to justify a finding of a “manifest” violation. None of the elements alone is sufficient to meet the test of a “manifest” violation. At one time, the United States of America attempted to exclude the use of force when its purpose was to prevent genocide or other international crimes. Russia used this argument to justify its invasion of Ukraine. In its order of March 16, 2022, the International Court of Justice stated that it was “doubtful that the said Convention, having regard to its object and purpose, authorizes the unilateral use of force by a Party on the territory of another State for the purpose of preventing or punishing the alleged genocide.”

However, although the International Criminal Court is currently the only international criminal court with jurisdiction over the crime of aggression, it cannot exercise its jurisdiction over Putin’s alleged crime of aggression against Ukraine. “This is because Russia and Ukraine are not parties to the ICC. Moreover, the referral option of the UN Security Council under article 13 of the ICC is not possible either because of Russia’s veto power. The proof of this is that Russia used its right of veto to prevent the adoption of a “draft resolution” in this situation on February 25, 2022”. This is the reason why many legal scholars call for the creation of a special international tribunal of the “hybrid” type on this alleged crime of

²¹ Social News. The UN International Court of Justice in The Hague obliged Russia to immediately suspend military operations in Ukraine. 2022. <https://suspilne.media/218256-miznarodnij-sud-oon-v-gaazi-ogolosue-risenna-u-spravi-ukraina-proti-rosii-nazivo/>

aggression²². Therefore, it is considered expedient to amend the Rome Statute of the International Criminal Court, allowing in the event of a military invasion of one state into the territory of another to hold accountable the aggressor whose country is not a party to the Rome Statute and the immediate consideration of the issue.

Understanding the long way to bring the Russian Federation to international courts, Ukraine began its own criminal trials in courts of general jurisdiction. Thus, on May 23, 2022, the Solomianskyi District Court of the city of Kyiv issued the first verdict for a war crime²³. Russian military officer Vadym Shyshymarin, accused of murdering a civilian resident of the Sumy region, was sentenced to life imprisonment²⁴. It is quite likely that the criminal procedural perspectives of the specified criminal proceedings may continue in the European Court of Human Rights, which creates the conditions for the formation of a separate segment in the judicial practice of this institution, which, in turn, will influence the criminal procedural policy of the European Union. In her research, Dufeniuk²⁵ identified the following challenges that significantly affect the process of investigating war crimes: geopolitical, legal, security, tactical, logistical, information, and communication. Taking these factors into account when investigating war crimes helps to structure the activities of the authorized persons involved in this activity and to properly organize the interaction between units and services.

Speaking about the possibilities of investigating war crimes in the territories of Ukraine currently occupied by the Russian Federation, it is worth noting that the law enforcement agencies of Ukraine have experience in dealing with war crimes since 2014, when the Autonomous Republic of Crimea was annexed, and certain regions of Donetsk and Luhansk were occupied. With the beginning of the military aggression, the greatest burden fell on the units of the National Police of Ukraine. In addition to policing functions, this law enforcement agency also carries out a humanitarian mission. It should be noted that police officers are directly involved in the documentation of war crimes by conducting inspections of the places where such crimes were committed, as well as by monitoring the media and telegraphic

²² Denakpon Tchobo, *Russia's Invasion of Ukraine: Creating a Special Tribunal for the Crime of Aggression Would Be a Danger to the Future of International Criminal Law* (March 11, 2022). P. 8. <http://dx.doi.org/10.2139/ssrn.4078759>

²³ Case No. 760/5257/22. 2022. *Verdict of Solomianskyi District Court of the City of Kyiv*. <https://reyestr.court.gov.ua/Review/104432094>.

²⁴ Ukrainian Pravda. A captured Russian received a life sentence for killing a civilian. 2022. <https://www.pravda.com.ua/news/2022/05/23/7347972/>

²⁵ Oksana Dufeniuk, "Investigation of War Crimes in Ukraine: Challenges, Standards, Innovations," *Baltic Journal of Legal and Social Sciences* 1 (2022): 46-56. <https://doi.org/10.30525/2592-8813-2022-1-6>

channels in order to identify criminal acts committed, including in the temporarily occupied territory. In this difficult period of the Russian-Ukrainian war, an important role is assigned to law enforcement bodies, among which the National Police occupies a special place. The powers of the police under martial law are confirmed by Part 3 of Article 18 of the Law of Ukraine No. 2469-19 (2018) “On National Security of Ukraine”, which states that its activities are aimed at “... *formation and implementation of state policy in the field of national security*”, should be aimed at “... *civil protection, protection of the population and territories from emergency situations and prevention of their occurrence, elimination of emergency situations ...*” assisting emergency authorities in “*rescue work, fire extinguishing, fire and man-made safety, emergency rescue service activities ...*”²⁶.

For the law enforcement bodies of Ukraine, authorized to conduct pre-trial investigations, the procedural fixation (documentation) of war crimes, in particular according to international standards, has become a problematic issue. Such activity is very important because it is carried out with the aim, firstly, to create an evidence base of war crimes committed by Russia on the territory of sovereign, independent Ukraine; secondly, to send relevant materials to the international judicial body - the International Criminal Court. Every day, law enforcement agencies face difficulties in identifying, recording, and eliminating traces of war crimes, organizing and conducting expert research to ensure the proper quality of pre-trial investigation and the inevitability of punishing of the perpetrators of the crimes.

Since the first days of the war, the Prosecutor General's Office, the National Police of Ukraine (NPU), the Security Service of Ukraine (SSU), and the State Bureau of Investigation (SBI) have developed joint algorithms for investigating war crimes committed on the territory of Ukraine. Police officers register war crimes, carry out primary investigative actions and transfer the necessary materials to the SSU, since the investigation of war crimes falls within the competence of this law enforcement body. The team of the Training Center of Prosecutors of Ukraine, together with JustTalk, also joined the efforts of scientists and prepared short references on the main principles of international humanitarian law and the specifics of war crimes investigations²⁷.

²⁶ Law of Ukraine No. 580-VIII. 2015. “On the National Police.” <https://zakon.rada.gov.ua/laws/show/580-19#Text>

²⁷ Prosecutor’s Training Center of Ukraine. 2022. <https://ptcu.gp.gov.ua/uk/czentr-znan/informaczijni-dovidky-z-mizhnarodnogo-gumanitarnogo-prava/>

The units of the National Police in the conditions of martial law, in addition to their inherent functions, began to perform not only humanitarian functions, but also began to investigate criminal cases, which, according to Article 216 of the Criminal Procedure Code of Ukraine, are not under their competence. Thus, in order to implement the decisions of the Prosecutor's Office (Part 5 of Article 36 of the Criminal Procedure Code of Ukraine), the investigative units gained experience in a full-fledged investigation in the form of investigation of criminal misdemeanors under Part 1-2 of Article 111-1 of the Criminal Code of Ukraine²⁸. The units of the pre-trial investigation bodies are the first to go to the scene of the criminal offenses based on war crimes, conduct appropriate inspections, register criminal cases, and only then, after conducting urgent investigative (search) actions, hand them over to the Security Service of Ukraine for investigation. To date, the investigative units of the National Police have opened 753 criminal cases for collaboration. 175 people have been reported for suspicion of collaboration, 161 criminal cases have been sent to the court with an indictment, 137 cases have been decided to be closed, and 273 cases have been transferred to the jurisdiction. At the same time, 172 criminal cases continue to be investigated by the National Police, as individual prosecutors determine the jurisdiction in this category of offenses precisely by the territorial divisions of the National Police.

Ensuring respect for human rights in the case of war crimes committed in Ukraine

During the period of martial law (as of October 31, 2022), investigators of the National Police of Ukraine have already registered and initiated 135,562 criminal cases based on the facts of crimes committed during martial law. Among them are 40,742 criminal cases based on the facts of crimes committed on the territory of Ukraine by servicemen of the Armed Forces of the Russian Federation and their accomplices. From them:

Article 110 of the Criminal Code of Ukraine «Violation of territorial integrity and inviolability of Ukraine» – 8912.

Article 111-1 of the Criminal Code of Ukraine «Collaborative activity» – 1841.

Article 113 of the Criminal Code of Ukraine «Sabotage» – 37.

²⁸ Law of Ukraine No. 2108. 2022. “On Amendments to Certain Legislative Acts of Ukraine Regarding Establishing Criminal Liability for Collaborative Activities” entered into force, which added a new Article 111-1 to the Criminal Code of Ukraine. Parts 1 and 2 of the specified article are classified as criminal misdemeanors. “

Article 111 of the Criminal Code of Ukraine «High treason» – 87.

Article 258 of the Criminal Code of Ukraine « Terrorist act» – 18.

Article 281 of the Criminal Code of Ukraine «Violation of rules related to air flight safety» – 1.

Article 437 of the Criminal Code of Ukraine «Planning, Preparation and Conduct of Aggressive War» – 29.

Article 438 of the Criminal Code of Ukraine «Violation of rules of the warfare» – 29817.

International humanitarian law imposes on the occupying state the obligation to ensure the minimum humanitarian needs of the population, and its basic rights related to the preservation of life, health and dignity, with special emphasis on the effective protection of these rights and protection from any illegal violence, preserving the infrastructure of the territory. Unfortunately, the Russian occupation forces do not observe the principles of international and European law and violates people's rights during the war on the territory of Ukraine. Every day, the list of violations of generally recognized norms and principles of warfare by the aggressor state recorded in Ukraine is constantly growing²⁹. Thus, the units of the National Police received information about the death of 23,123 people, including 13,504 - servicemen of the Armed Forces of Ukraine (AFU), National Guard of Ukraine (NGU), State Border Guard Service (SBGS), Territorial Defense and others (including 101 police officers); 6,511 – civilians (including 360 children); 723 - servicemen of the Russian Federation and illegal armed paramilitary formations. Unfortunately, 2,385 people were not identified.

By October 2022, more than 23,000 citizens were found dead in “mass graves”. More than 1,500 civilians died in the territory of the Kiev region; these data testify to the deliberate destruction of the civilian population by the Russian military (and its allied forces). On the territory of Bucha, Irpin, Hostomel, and Borodianka, the bodies of people killed by snipers, from military equipment - tanks, armored personnel carriers - were found, despite the presence of white marks that the Russian military forced people to wear. Many people died in their apartments as a result of mine injuries, their bodies were found by explosives experts, forensic experts, and investigators. The large number of civilian casualties resulted in mass graves of

²⁹ L. I. Chulinda and O. S. Slutska, “Violations of human rights during the war in Ukraine,” in *Modern problems in science. XIX International scientific and practical conference*. Vancouver: Canada. 2022. <https://doi.org/10.46299/ISG.2022.1.19>

people, as evidenced by the Bucha grave, where 116 people were buried in one such grave, and smaller graves of 5-7 people were also discovered. Residents collected the bodies of the dead and buried them in parks. In Irpen, 2-5 people were buried in such graves. Those killed by entire families were buried separately. Among the dead, 75% are men, about 2% are children, and the rest are women. Of particular concern is the fact that the dead are civilians who had no relationship to the military or law enforcement agencies. In Izium, 447 bodies of the dead were exhumed after the liberation: 425 civilians, including 5 children, and 22 servicemen of the Ukrainian Armed Forces. The bodies of the dead continue to be found wherever the Russian military was stationed.

The main difficulties and peculiarities of the pre-trial investigation by the National Police of Ukraine in the conditions of the legal regime of martial law are a number of legislative peculiarities that directly affect the processes and procedures for establishing all objective and subjective factors and circumstances of the commission of criminal offenses related to the military aggression of the Russian Federation. In particular, it is about the dynamism of legislative changes, the specificity of the investigation and the need to conduct investigative (search) actions with a view of further application (use) of the obtained evidence at the International Criminal Court in order to prove the guilt of the Russian invaders in violation of the laws and customs of war, as well as other criminal offenses.

Standardization of war crimes investigation helps to unify the process of personnel training, algorithmize work at the scene, interaction between various units, expert institutions, ensure high-quality documentation of facts, and conduct procedural actions. At the same time, it is important to take into account foreign experience, as there are many achievements in this area today. These include, for example, the Handbook on Assisting International Criminal Investigations³⁰; the Investigation Manual for War Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina (Investigation Manual, 2013); the Minnesota Protocol on the Investigation of Potentially Unlawful Death³¹; the Forensic Guide to the Investigation,

³⁰ Maria Nystedt, Christian Axboe Nielsen and Jann K. Kleffner, *Handbook On Assisting International Criminal Investigations* (Folke Bernadotte Academy and Swedish National Defence College. 2011), <https://fba.se/contentassets/6f4962727ea34af5940fa8c448f3d30f/handbook-on-assisting-international-criminal-investigations.pdf>

³¹ OSCE. Investigation Manual for War Crimes, Crimes Against Humanity and Genocide in Bosnia and Herzegovina. 2013. <https://www.osce.org/bih/281491>; Goran, Šimić. War Crimes Trials Database. 2023. www.warcrimesdatabase.net

Recovery and Analysis of Human Skeletal Remains³²; the Bournemouth Protocol on the Protection and Investigation of Mass Graves³³ and others. The practice of war crimes tribunals (national and international) can also be very helpful.

Conclusions

The war, started by the Russian Federation as an aggressor state, reoriented the state policy of Ukraine in all directions. Criminal justice was not left out. In the conditions of the ongoing war, a number of challenges have arisen for the investigative bodies, the Prosecutor's Office and the court: from the need for a criminal legal response to actions that cause or may cause damage to the interests of the people of Ukraine and the state in terms of national security and defense, to the need to clarify the procedure of proceedings in conditions of active military operations, and to improve the investigation of war crimes and criminal offenses related to the war, including cooperation with international judicial and other institutions.

Despite the lack of full ratification of the Rome Statute of the International Criminal Court in the legal field of Ukraine, the activities of representatives of this institution in Ukraine were organized to document war crimes and further consideration in the specified judicial institution. Through complementarity, the ICC should follow its principle of accountable prosecution by holding accountable “those most responsible” for alleged war crimes and crimes against humanity as emphasized in its policy documents. According to Tchobo (2022-3), “the crime of aggression cannot be excluded, since it has become what he called “the scheme of crimes within crimes”. This is the crime that opened door to all other crimes in the situation of Ukraine. Therefore, it is recommended to amend the Rome Statute of the International Criminal Court in order to investigate and prosecute the aggressor who is not a party to the Rome Statute. It is also proposed to further amend the Charter of the International Court of Justice in order to provide for a procedure of responsibility of the aggressor country and immediate consideration of the issue in the event of a military invasion of one state into the territory of another. For its part, Ukraine (or other invaded state) must take all necessary measures to collect

³² Luis Fondebrider, *Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains* (Argentine Forensic Anthropology Team (EAAF), 2020). <https://eaaf.org/wp-content/uploads/2020/11/EAAF-Forensic-Guide-for-the-investigation-recovery-and-analysis-of-human-skeletal-remains.pdf>

³³ Melanie Klinkner and Ellie Smith, *The Bournemouth Protocol on Mass Grave Protection and Investigation* (Arts and Humanities Research Council, 2020), <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>

facts and evidence of crimes committed by the invading forces, but also, if such evidence is available, by its own forces.

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