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ПОРУШЕННЯ ПРАВ ЛЮДИНИ ВОЄННИМИ ЗЛОЧИНАМИ: ТЕОРІЯ ТА ПРАКТИКА

Анотація. Дана стаття присвячена комплексному дослідженню теоретичних та практичних проблем порушення прав людини воєнними злочинами, захисту законних інтересів осіб у національному та міжнародному праві внаслідок такого порушення. Мета даного дослідження полягає у комплексному аналізі теоретико-прикладних питань, що стосуються захисту порушених прав та законних інтересів осіб у міжнародному публічному праві, внаслідок вчинення воєнних злочинів та формулювання науково обґрунтованих пропозицій щодо вдосконалення чинного законодавства України та практики його застосування у цій сфері. У роботі проаналізовано існуючі наукові позиції та законодавство щодо регулювання протиправного діяння та відповідальності за завдану шкоду потерпілим внаслідок порушення прав та основоположних свобод людини воєнними злочинами. Крім того, було визначено існуючі форми, способи та засоби захисту прав та законних інтересів таких осіб в Україні та на міжнародній арені. Проведено комплексне дослідження існуючого поняття, правової природи та основних ознак воєнних злочинів та їх правового регулювання у вітчизняному законодавстві. Запропоновано законодавчі зміни до нормативно-правових актів, які регулюють дане питання та обґрунтовано позицію про існування виключно судового порядку вирішення питань порушення прав людини воєнними злочинами, результатом якого має бути прийняття судового рішення. В результаті проведеного дослідження чітко виокремлені вже існуючі наукові твердження та здобутки, а також ті, що виникли з причин постійного розвитку суспільних відносин та суттєвих змін в міжнародних відносинах різних держав, що спричиняє збройні конфлікти та воєнні злочини. Одним із звершень наукової статті є доведеність важливості проблематики порушених прав людини в сучасному суспільстві та крайньою необхідністю її дослідження. Адже сучасне законодавство потребує суттєвих змін та вдосконалені вже існуючих норм з подальшою можливістю їх застосування на практиці

Ключові слова: права і свободи людини, збройні конфлікти, військові злочини, гуманітарне право

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HUMAN RIGHTS VIOLATIONS BY WAR CRIMES: THEORY AND PRACTICE

Abstract. *This paper provides a comprehensive study of theoretical and practical issues of violation of human rights by war crimes, protection of legitimate interests of individuals in national and international law as a result of such violation. The purpose of this study is a comprehensive analysis of theoretical and applied issues related to the protection of violated rights and legitimate interests of individuals in public international law as a result of the commission of war crimes, and the formulation of scientifically sound proposals for improving the current legislation of Ukraine and the practice of its application in this area. The paper analyses the current scientific opinions and legislation on the regulation of illegal acts and liability for damage caused to victims as a result of violation of human rights and fundamental freedoms by war crimes. Furthermore, the existing forms, methods, and means of protecting the rights and legitimate interests of such persons in Ukraine and in the international arena were determined. The paper also provides a comprehensive study of the existing concept, legal nature and main features of war crimes and their legal regulation in Ukrainian legislation. Legislative amendments to the regulations governing this issue are proposed and the study justifies the position regarding the existence of an exclusively judicial procedure for resolving issues of human rights violations by war crimes, the result of which should be the adoption of a court decision. As a result of the study, the current scientific statements and achievements are clearly identified, as well as those that have emerged due to the constant development of public relations and substantial changes in international relations of various states, which causes armed conflicts and war crimes. One of the achievements of the scientific study is the proof of the importance of the problem of violated human rights in modern society and the extreme need for its research. After all, modern legislation requires substantial changes and improvement of the existing provisions with the subsequent possibility of their practical application*

Keywords: *human rights and freedoms, armed conflicts, war crimes, humanitarian law*

INTRODUCTION

A person, their life and health, honour and dignity, inviolability and security are recognised by the Constitution of Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and areas of the state's activities. The state is accountable for its activities before the individual. The establishment and enforcement of human rights and freedoms is the main responsibility of the state. In a broad sense, the level of satisfaction of human rights is determined by the level of socio-economic development, perfection, and stability in the organisation of state power in the country and in the international arena [1-3]. In a narrower aspect, it depends on the existence of an effective mechanism for ensuring human rights and freedoms. This refers not only to the number of law enforcement and other state bodies, but also to the quality of their law-making, law enforcement and advocacy activities [4; 5].

In the international legal system and in the general system of international crimes (offences) and other acts that describe modern interstate relations, one of the leading places belongs to war crimes directed against humanity (civilian population, military personnel and prisoners of war, etc.) [6; 7]. Their illegal nature is determined as a result of serious and massive violations, and often on a large scale, of humanitarian provisions, basic human and civil rights and freedoms [8]. People in different parts of the world do not deny that

international war crimes are not only illegal in nature, but also undermine the foundations of international law, international security and a new worldview, and also have serious consequences, first and foremost, for the states against which they are committed [9-11].

In the modern world, a huge number of international treaties have been concluded with an aim of protecting individuals both in peacetime and during armed conflicts. Unfortunately, this codification has not led to greater protection of people during war and does not fully protect their rights from the arbitrariness of authoritarian regimes. In 1945, the UN Charter banned war [12], but since then more armed conflicts have begun than ended and they have claimed increasingly more civilian lives. This negative trend is clearly illustrated by the example of two conflicts of different centuries. In the 19th century, when war was allowed, its customs were not yet codified, and human rights were only on the brink of the discussion at the national level, only 2% of civilians died in the Franco-Prussian War. But the Vietnam War took 3 million lives of the civilian population compared to 150 thousand military personnel, that is, 95% [13].

The nature of armed conflicts is also changing. If in the 19th century these were mainly conflicts between states, nowadays they are more intra-state conflicts, often with the intervention of foreign armed forces of one or more states; asymmetric conflicts involving non-state armed groups; transnational conflicts that flow across state borders; conflicts with a variety of warring parties, whose participants can be the forces of international organisations, the armed forces of states, rebel groups, private military campaigns, and terrorist organisations. Accordingly, legal regimes for regulating such conflicts are becoming more complex [14; 15].

The purpose of this study is a comprehensive analysis of theoretical and applied issues related to the protection of violated rights and legitimate interests of individuals in public international law as a result of the commission of war crimes, and the formulation of scientifically sound proposals for improving the current legislation of Ukraine and the practice of its application in this area.

1. THEORETICAL OVERVIEW

It is noteworthy that after the declaration of independence of Ukraine, one of the priority areas for the development of the state's legal system was the development of an effective legal policy of the rapprochement with the international standards in the field of justice, criminal prosecution, international relations, and security of human rights and freedoms. More than two decades have passed since then, and the reform of legal institutions and tools for their regulation is still ongoing. During all these years, the areas and priorities of reform have changed, various kinds of research and scientific experiments have been observed, but the issue of protecting the rights and legitimate interests of Ukrainian citizens and persons in the criminal sphere, in particular the issue of human rights violations through the lens of war crimes, has always remained relevant.

Notably, such a violation is one of the examples where the issue of observing the rights and legitimate interests of a person as a result of their violation and ensuring a balance between the interests of a particular person and the state in general is most acute [16]. Measures to protect and implement the interests of national security, ensure the stable functioning of the political and economic systems of the state require a high level of effectiveness in combating criminal activity in this area and promoting the consolidation of the legal regime therein. The implementation of the military legal reform in Ukraine raises many questions for lawmakers and the Ukrainian legal science. Most of them require extensive theoretical research [17].

Nevertheless, scientists believe that the understanding of the term “war crime” was obtained in the second half of the 19th century and was adopted by the Geneva Convention [18], which regulated the procedure for conducting military operations. War crimes are also mentioned in the Lieber Code [19], but the term has not yet been used. The term “war crime” itself appeared only in 1945. In Article 6 of the Charter of the International Military Tribunal in Nuremberg [20], which stated that it should be considered as a violation of the laws and customs of war, including the killing, ill-treatment or deportation of civilians in the occupied territory, the killing or ill-treatment of prisoners of war, the killing of hostages, property, senseless destruction of settlements, not because of military necessity. Notably, the Geneva Conventions [21], which codified international humanitarian law after the Second World War, among other things, contain the first list of war crimes in history, which meant serious violations of the conventions, given the specific features of the relations regulated by each of them.

Moreover, each of the four Geneva Conventions [21] represents its own translation of serious violations of the conduct of war, which together create a single system. These include the following acts: premeditated murder; torture and inhuman treatment, including biological experiments; intentional infliction of serious suffering or serious injury; harm to health; unlawful destruction and seizure of property, if not caused by military necessity; forcing a civilian or prisoner of war to serve in the enemy's armed forces; deprivation of the right to an impartial trial; unlawful deportation, displacement of protected civilians; unqualified arrest of protected civilians; hostage-taking [22].

This list was substantially supplemented by Protocol Additional I [23], including the following violations: engagement in certain medical experiments; turning civilians, individual civilian or demilitarised and safe zones into targets for attack; engagement in an indiscriminate attack on the civilian population or civilian targets, knowing that such an attack would result in a large number of civilian deaths and injuries; perfidious use of the coat of arms of the Red Cross, Red Crescent and other protective and identification marks; transfer by the occupied state of part of its civilian population to the occupied territory or deportation; unjustified delay in the repatriation of prisoners of war or civilians; apartheid; attack on historical monuments and a number of others [24].

Some elements of war crimes are stipulated in a number of other documents. They are contained in Article 28 of the Hague Convention [25] for the protection of cultural property during military conflicts, Article 5 of the Convention on the Prohibition of military [26] or any other hostile use of means of influencing the natural environment. Furthermore, the constituent documents of international criminal justice bodies, in particular the charters of international and mixed military and criminal cases, should be highlighted separately. As for issues related to the protection of the rights and interests of victims, they currently remain understudied in legal science. At the same time, these issues, considering the modern realities, the adoption of amendments and approval of the new Criminal Code of Ukraine [27], acquire special significance both from the standpoint of theory, as well as legislative regulation and practice [28].

2. MATERIALS AND METHODS

The history of war crimes, their analysis in the modern world at the level of legislative consolidation and the periodicals of their commission have become the subject of comparative analysis in order to determine the main problems of human rights violations by war crimes in theory and practice. To achieve the purpose of this study, the paper focuses on solving the following main tasks: clarification of the state of scientific research on the subject in Ukraine and the world; identification of the legal nature, grounds, and concept of war crimes in Ukraine and the world; identification of the circle of persons who can acquire the status of victims as a result of committing war crimes in criminal law; establishment of the rights and legitimate interests of victims; identification of the forms and methods of protecting the rights and legitimate interests of persons as a result of committing a criminal illegal act; investigation of the procedure for protecting the rights and legitimate interests of persons in practice, and, on this basis, identification of negative actions and gaps in legislation and practice, which hinder the effective protection of the rights and legitimate interests of victims in Ukraine.

The methodological framework of the study is represented by the philosophy of individualism, which develops the terminology and allows describing the anthropological block of philosophical and legal problems from a new point of view. At present, the philosophy of individualism is considered a cultural guide to the development of society. Notably, collectivist or individualistic ideas can dominate at different stages of society's development. Which principle prevails, what content each of these concepts acquires, depends on the epoch, the level of material and spiritual culture, location, specific conditions, type of cultures. It should be agreed that philosophy of individualism absorbed all the progressive achievements of the philosophy of law, laid the foundation for a modern understanding of humanism and human rights, and became the foundation of modern European civilisation [29]. The main method used in the study is the general scientific dialectical method, which made it possible to analyse the social and legal phenomena covered by the problems of scientific research in development, interrelation, and interdependence. The historical legal method allowed tracing the historical origins and evolution of views on the content of violated human and civil rights and freedoms in Ukrainian legislation and the legislation of other countries, etc.

The comparative legal method was used to investigate the features of legal regulation of the protection of the rights of victims of war crimes in different countries and analyse published opinions on the subject matter in the legal literature. The Aristotelian method was used in the analysis of theoretical developments of the current legislation and the practice of its application, concerning the protection of the rights and legitimate interests of individuals, and made it possible to identify the existing contradictions in the legislation and scientific approaches to the subject under study, as well as to suggest amendments and additions to the legislation in order to improve it in the field of human rights violations caused by war crimes. System-structural method made it possible to identify the circle of persons who may be victims whose rights were violated by war crimes in international and national law.

Using the sociological method (analysis of published surveys), the study clarified the positions and opinions of lawyers, prosecutors, and judges regarding the current state of research on these issues. The statistical method is used to generalise and analyse the conclusions of Ukrainian and foreign scientists and investigate the subject matter. The theoretical basis of this study includes the papers of Ukrainian and foreign scientists in the field of criminal law and other branches of law related to the subject area. The statutory basis

of the study includes the Constitution of Ukraine [30], international legal treaties in force in Ukraine, the Criminal Code of Ukraine [27], and other Ukrainian regulations. The empirical base comprises the results of studied and processed 5 court cases on human rights violations caused by the commission of war crimes in Ukraine; statistical data on the implementation of these decisions and the results of the work of executive services at the stage of enforcement proceedings.

3. RESULTS AND DISCUSSION

In the classics of legal regulation, human rights are defined by the Universal Declaration of Human Rights [31] adopted by the UN on December 10, 1948. Since then, a considerable number of declarations and conventions (international agreements) have been created that contain a more detailed description of human rights. In addition, two World conferences were held, where states pledged to promote the protection of human rights around the world. That is why, in the theory of law, there are several ways to classify human rights. Most often, they are divided into civil, political, economic, social, and cultural ones. There are also various mechanisms for protecting human rights, including legislative initiatives, public campaigns, personal expression of the will of members of society, and public debates. Human rights are subject to interpretation on a case-by-case basis, and sometimes it is necessary to consider the positions that were proclaimed and discussed during the international debate on the adoption of a particular document.

Furthermore, the law is considered in the context of all legislation, so that its interpretation does not contradict other branches of law. A prime example of this is the possibility of restricting certain human rights after declaring a state of emergency in the country. However, there are some rights that are considered absolute and from the exercise of which it is forbidden to deviate by law. These include, first and foremost, the right to life, the prohibition of torture and slavery, as well as freedom of thought, conscience, and religion. This is just an example of them, because this list is much more extensive.

Along with this, there are international rules for waging war and protecting civilians during war. The rules for the protection of military and civilian populations are called humanitarian law, which was enshrined in the Geneva Conventions [21]. That was the time when the main provisions of humanitarian law in the world were laid down. However, the emergence of new types of war crimes, the development of public relations, and the speed of modernisation processes in the world required the adoption and approval of new regulations. The increase in the number of human rights violations, in particular of civilians, prisoners of war, and military personnel, provoked a number of international treaties between aggressor countries and conventions that were signed by most countries of the world. Some of them still regulate and consolidate the rights of victims of internal conflict (civil wars) or conflicts between the armed forces of the state and opposition military formations that control a certain part of the country. In international practice, there is an example of a similar military conflict between the Kosovo Liberation Army and Serbian government forces in 1998-1999, which led to large-scale violations of the rights of the civilian population and total insecurity [32].

Furthermore, war crimes against humanity also imply serious inhumane acts, for example: premeditated murder, torture, and rape, which are carried out in terms of widespread use during armed conflict by relevant actors of offences directed against the civilian population due to national, political, ethnic, racial, or religious motives. The definition of these crimes was given during the trial of German Nazis after World War II [33]. In the same process, the definition of genocide was provided, which is a particularly serious confrontation against humanity. In this case, states are obliged to prevent war crimes and crimes against humanity and punish those responsible for their commission. However, in many cases the national courts fail to handle this task or are guided by political bias. Most often, such crimes go unpunished. Therefore, it is crucial to establish an international court that would handle and consider such cases and pass sentences in cases for which the courts of the national justice system in the state are responsible.

In practice, the violation of human rights by war crimes in Ukraine has been manifested in recent years by armed conflicts in the country, which has a devastating impact on people's lives and the human rights system in the country. The events near Ilovaisk in August 2014 symbolise violations of human rights and international humanitarian law that have repeatedly occurred during the conflict in eastern Ukraine: shelling of residential areas resulting in civilian casualties, killing of civilians and other protected persons, illegal detentions, enforced disappearances and torture. Cases that have been documented and analysed by authorised persons indicate that during the fighting near Ilovaisk, all parties to the conflict committed serious violations of human rights and international humanitarian law, and some of the violations may constitute war crimes [34]. The events in the east of the country have left deep physical and emotional reminders to the civilian population of the cities and its environs, as well as to all those who have been deprived of their liberty, subjected to torture and ill-treatment, their relatives, and those who have gone missing and still have no relatives and friends found [35].

Analysing the judicial practice of this subject matter, one can conclude on the impunity for human rights violations committed in the context of the armed conflict in Ukraine, which also applies to the events near Ilovaisk. Notably, the efforts made by the country's authorities to date do not reflect the full scale of violations of rights and do not guarantee the punishment of those responsible for the damage and harm caused. Through the impartial collection and recording of testimonies of victims and witnesses of violations of human rights and international humanitarian law that took place during the events in the eastern Ukraine, activists and journalists seek to promote the exercise of the right of victims, their relatives, communities, and society, as well as to learn the truth in general. This imperative is closely linked to access to justice, the right to effective remedies and redress [36].

To date, there is a sufficient amount of reliable information, which is supported by numerous reliable sources and is consistent with them, in order to initiate a full-fledged criminal investigation by the relevant national and international judicial authorities regarding the events in the eastern Ukraine and facilitate its proceedings [37; 38]. As a result, analysing theoretical achievements and practical developments, one can identify some ways and tools for protecting violated rights as a result of war crimes:

1) law enforcement agencies need to conduct an effective, immediate, thorough, and impartial investigation of all allegations of human rights violations, with due regard to the rights of victims, regardless of who is responsible for the offence committed;

2) the government of a state shall ensure that those who claim to have been victims of a violation of human rights or international humanitarian law have equal and effective access to justice, as referred to in the Constitution of Ukraine and other regulations of the state [30];

3) it should be undertaken not to grant amnesty to persons suspected, accused, or convicted of international crimes, including war crimes, crimes against humanity or serious violations of human rights, given that amnesties are not granted if they conflict with the right of victims to an effective remedy, including compensation for damage and harm caused;

4) the legislative branch of government should convene a temporary commission of inquiry or establish another effective, independent commission with appropriate powers, which should complete the investigation of the events that took place in the east of Ukraine and publish a public report with its conclusions;

5) guarantee that documented violations of human rights and international humanitarian law will be comprehensively addressed in all future transitional justice processes covering the full scope of judicial and non-judicial measures, including criminal prosecution initiatives, truth-seeking programmes, reparations programmes, institutional reform or an appropriate combination, as well as the conduct of comprehensive national consultations, especially with those affected by human rights violations;

6) actively promote that judges, lawyers, and other employees of the justice system involved in the consideration of conflict-related cases are fully protected from threats, harassment, and other external pressures that threaten their independence and impartiality.

One of the most effective means of protecting violated rights in the state is to ensure the development and provision of timely and comprehensive aid to all persons affected by conflict, in particular affected civilians and victims of torture, including medical, psychological, and legal services. To urge all parties involved in the conflict to ensure a thorough and effective investigation of all allegations of human rights violations, regardless of the identity of the perpetrators, as an important element of sustainable peace and reconciliation is the key to a healthy population in a country of peace and tranquillity. Therefore, regardless of the presence or absence of armed conflicts that cause the commission of war crimes, it is necessary to always support measures aimed at strengthening confidence and respect for human rights, carry out work to protect human rights, monitor human rights, and investigate human rights violations, as well as measures aimed at resolving conflicts on both sides of the contact line.

In modern international legal doctrine and science, the prevailing opinions are that war crimes are understood as international actions of subjects who violate generally recognised laws and customs of war [39; 40]. In and of themselves, war crimes are expressed in various illegal actions: the use of means and methods of war, which are prohibited by current provisions and provisions of international law. However, one of the features is that the international legal prohibition of aggressive wars in itself does not eliminate the causes that give rise to armed conflicts and wars from public life. However, there is an international legal prohibition on the use of armed force in interstate relations. That is why states often resort to this prohibition in order to resolve disputes and conflicts that arise between them. This circumstance determines the need for legal regulation of public relations that arise during an armed conflict in order to humanise it as much as possible.

CONCLUSIONS

Thus, the laws and customs of war developed in international law were aimed at limiting the arbitrariness of the warring parties in order to humanise it to the fullest extent. It can be noted that these laws and customs have become an independent international legal branch, a set of convention and ordinary legal provisions regulating relations between actors operating in an armed conflict. Thus, one can conclude that currently there is a situation where the uneven development of different countries and regions, confrontations, economic, and other crises, and especially extremism, separatism and terrorism, seriously threaten and undermine interstate relations, create big problems for the world community, its existence and sustainable development. Due to these circumstances, any security is impossible without joint interstate efforts, since members of this community are known to be considered as special social phenomena and organisms with certain capabilities in solving these problems.

Therewith, this does not mean that the purpose of global security, for instance, should be limited to the survival of humanity, or that the role of international security should be limited exclusively to the task of preventing conflict. Instead, this means that the existence of an integral system for the dissemination of humanism and the development of humanitarian law in the world is the key to a peaceful existence, a democratic mechanism for resolving conflict situations in the international arena, as well as ensuring respect for and ensuring all types of rights and legitimate interests of a person and citizen in the world of each of the states.

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