

ANALYSIS OF CRIMINAL LIABILITY FOR THE ISSUANCE AND EXECUTION OF ORDERS TO COMMIT WAR CRIMES BY SERVICEMEN OF THE ARMED FORCES OF THE RUSSIAN FEDERATION: FEATURES OF CRIMINAL LIABILITY UNDER UKRAINIAN LEGISLATION

Zoia Zahynei-Zabolotenko¹
Nataliia Khatniuk²
Dmytro Gorbachov³
Hanna Andrusiak⁴
Roman Kvasha⁵
Oksana Chapliuk⁶

ABSTRACT

Objectives: The article examines the issue of criminal liability for orders given by commanders and servicemen of the Armed Forces of the Russian Federation to their subordinates regarding violations of the laws and customs of war in Ukraine. It aims to establish the basis of criminal liability in such cases, focusing on the concept of command responsibility as outlined in international humanitarian law.

Methods: The analysis is based on a review of judicial practice in Ukraine, specifically examining how courts address the actions of commanders and servicemen of the Armed Forces of the Russian Federation. The study investigates the legal framework surrounding command responsibility and the application of international humanitarian law in the context of the ongoing conflict.

Results: The findings indicate that courts typically do not charge commanders and servicemen of the Armed Forces of the Russian Federation with the act of giving orders. Instead, they attribute specific violations of the laws and customs of war committed by their subordinates. The article confirms the formation of a legal axiom in judicial practice, stating that criminal liability arises for all servicemen of the Russian Armed Forces who, as part of a criminal organization, violate the laws and customs of war on the territory of Ukraine. An irrefutable legal presumption is identified, asserting that all servicemen are aware of and informed about the laws and customs of war they violated while executing criminal orders from the military-political leadership of the aggressor state.

Conclusion: The article concludes that considering the actions of servicemen through the lens of factual circumstances that exclude the criminal unlawfulness of their actions, such as executing an order or directive, is unacceptable. This perspective aligns with the standards of international humanitarian law, reinforcing the notion that accountability must be upheld for violations committed during armed conflict.

¹ Department of Criminal Law, Criminology and Judiciary, V. M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine, Kyiv - 01011, Ukraine.
E-mail: vizavi.zoya@gmail.com

² Department of Public Law, Borys Grinchenko Kyiv Metropolitan University, Kyiv - 04053, Ukraine. E-mail: n.khatniuk@kubg.edu.ua

³ V. M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine, Kyiv - 01011, Ukraine. E-mail: Platinumgdm@gmail.com

⁴ Department of Criminal Justice and Law Enforcement, Lesya Ukrainka Volyn National University, Lutsk - 43000, Ukraine. E-mail: a.m.andrusyak@gmail.com

⁵ Department of Criminal Law, Criminology and Judiciary, V. M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine, Kyiv - 01011, Ukraine.
E-mail: romankvasha1@gmail.com

⁶ Department of Public Law, Borys Grinchenko Kyiv Metropolitan University, Kyiv - 04053, Ukraine. E-mail: o.chapliuk@kubg.edu.ua

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1 INTRODUCTION

War crimes committed by Russian servicemen in Ukraine are becoming widespread and involve serious violations of international humanitarian law. Following Ukraine's ratification of the Rome Statute of the International Criminal Court (ICC) with declarations on August 21, 2024, Ukraine has taken steps towards more effective responses to war crimes committed by servicemen of the Russian Armed Forces on the international stage (Verkhovna Rada of Ukraine, 2024). At the same time, the ICC extends its jurisdiction according to the principle of complementarity only to cases where the state under whose jurisdiction the perpetrator falls is unwilling or unable to conduct proper investigations or initiate criminal prosecutions. For unlawful acts that fall under national jurisdiction concerning individuals guilty of committing the most serious international crimes, the ICC will not exercise its jurisdiction according to the principle of complementarity laid out in the Rome Statute (Articles 17, 20) (Verkhovna Rada of Ukraine, 1998). As noted in the scientific literature, this principle allows the ICC to extend its jurisdiction to any war crimes while respecting the sovereign authority of states to prosecute war criminals domestically, as national criminal prosecutions are more effective due to the access of national courts to evidence, witnesses, and resources (Singh *et al.*, 2024).

Thus, the primary burden of prosecuting war criminals for crimes committed in Ukraine will fall on national courts. The mass nature of war crimes will place additional burdens on the Ukrainian judicial system, related both to the large number of cases in this category and the lack of skills among judges to conduct trials in such cases.

2 LITERATURE REVIEW

Criminal liability for war crimes is provided for in the Criminal Code of Ukraine (CCU) in one article, namely Article 438, which establishes criminal liability for cruel treatment of prisoners of war or civilians, the forced displacement of civilians for labor, the looting of national valuables in occupied territories, the use of means of warfare prohibited by international law, and other violations of the laws and customs of war as provided by international treaties ratified by the Verkhovna Rada of Ukraine, as well as for giving orders to commit such acts (part 1) and for committing the same acts if they are combined with intentional murder (part 2). In the presence of signs of war crimes defined in part 1 of Article 438 CCU, punishment is provided in the form of imprisonment for a term of 8 to 12 years, and in part 2 of this article, for a term of 10 to 15 years or life imprisonment.

According to the Office of the Prosecutor General, in 2021, 60,387 criminal offenses under Article 438 CCU were recorded, of which 135 individuals were notified of suspicion (Office of the Prosecutor General, 2022). In 2022, 60,944 war crimes were recorded, with 88 individuals notified of suspicion (Office of the Prosecutor General, 2023). From January to September 2024, 21,629 violations of the laws and customs of war were recorded, with 51 individuals notified of suspicion (Office of the Prosecutor General, 2024). Thus, from February 2022 to September 2024, national criminal prosecution authorities in Ukraine recorded 142,960 criminal proceedings under Article 438 CCU.

Regarding sentences issued under Article 438 CCU, there were about 90 at the time of writing, with approximately 100 expected by the end of 2024. About one-third of first-instance court sentences were appealed, and in two cases, cassation appeals were filed against the decisions of the first and appellate courts. In one case, the cassation court refused to open cassation proceedings, while in the other, it upheld the decisions of the previous courts.

As mentioned above, one form of violation of the laws and customs of war provided for by the legislator in Article 438 CCU is the giving of orders to commit war crimes. This is a national manifestation and the inception of

command responsibility, the grounds for which are provided in the norms of international humanitarian law.

3 METHODOLOGY

The bloody military clashes of recent centuries have led to the creation of norms of international humanitarian law, which are actively developing both at the conventional level and in the practice of ad hoc international criminal tribunals. The foundation of this body of international humanitarian law consists of the norms of so-called "Geneva" and "Hague" law, which have led to the emergence of specific institutions (constructs) for criminal liability. One such construct is command responsibility, which historically arose from processes established after World War I and developed in case law after World War II.

It should be noted that the rule of commanders' responsibility for giving orders to their subordinates is provided in many sources of international humanitarian law, including customary norms that are not codified in written form, consisting of rules that arise from "general practice accepted as law," existing independently of treaty law and playing a crucial role in modern armed conflicts, as they fill gaps left by treaty law (Korotky & Lukyanchenko, 2017).

4 RESULTS AND DISCUSSION

Currently, the concept of command responsibility is provided in many international conventions. For example, it is mentioned in all Geneva Conventions (Article 49 of the Geneva Convention on the Improvement of the Wounded and Sick in Armed Forces in the Field Article 50 of the Geneva Convention on the Improvement of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 129 of the Geneva Convention on the Treatment of Prisoners of War, Article 146 of the Geneva Convention on the Protection of Civilian Persons in Time of War) (Verkhovna Rada of Ukraine, 1949a,b,c,d). The concept is most fully articulated in paragraph 2 of Article 86 of the Additional Protocol to the Geneva Conventions of August 12, 1949,

concerning the protection of victims of international armed conflicts (Protocol I) of July 8, 1977 (Verkhovna Rada of Ukraine, 1977). According to this concept, "the fact that violations of the Conventions and this Protocol were committed by a subordinate does not relieve their superiors of criminal or disciplinary responsibility if they knew or should have known that such subordinate was committing or intended to commit such a violation and if they did not take all feasible measures within their power to prevent or suppress such violations" (Zelenko, 2020).

The emergence of such a criminal law construct as command responsibility is due to the necessity, broadly speaking, to hold commanders (superiors) criminally liable for directing subordinates to commit any crime, including violations of the laws and customs of war, or for tolerating its commission, regardless of their status. Commanders (superiors) have more opportunities compared to their subordinates, being more informed about the situation in which the crime is committed and having the authority to restrain or, conversely, direct their subordinates to commit the crime.

At the same time, the rules of command responsibility do not apply when commanders directly commit a war crime, executing the objective side of the violation of the laws and customs of war. In this case, they act as perpetrators of war crimes and bear criminal responsibility for the specific form of violation of the laws and customs of war provided for in Article 438 CCU, distinct from giving an order.

The construct of command responsibility has developed in the Rome Statute. According to Article 28 of this Statute, the responsibility of commanders and other superiors for war crimes that fall under the jurisdiction of the ICC may arise under the following conditions:

- a) A military commander or a person who is acting as a military commander is criminally responsible for crimes within the jurisdiction of the Court committed by forces under their actual command and control or, depending on the circumstances, under their actual authority and control, as a result of their failure to exercise proper control over such forces in cases where: i) such military commander or person knew or should have known that these forces were committing or intended to

commit such crimes; and ii) such military commander or person failed to take all necessary and reasonable measures within their power to prevent or suppress their commission or to refer the matter to competent authorities for investigation and prosecution;

- b) Regarding the relationship between superiors and subordinates not described in point (a), a superior is criminally responsible for crimes within the jurisdiction of the Court committed by subordinates who are under their actual authority and control, as a result of their failure to exercise proper control over such subordinates in cases where: i) the superior knew or consciously disregarded information that clearly indicated that subordinates were committing or intended to commit such crimes; ii) the crimes related to activities that fell under the superior's actual responsibility and control; and iii) the superior did not take all necessary and reasonable measures within their power to prevent or suppress their commission or to refer the matter to competent authorities for investigation and prosecution (Rome Statute, 1998).

As O. M. Bronevytska rightly points out, "unlike the established approach in international law theory, there are no self-executing treaties in criminal law" (Bronevytska, 2011), and therefore the relevant provisions of the Rome Statute regarding the establishment of command responsibility must be implemented into national criminal legislation and presented as an independent socially dangerous act in the criminal law provision.

The problem of analyzing such a form of violation of the laws and customs of war as giving an order for it is practically unclaimed at the doctrinal level, although it borders on the study of such a circumstance that excludes the criminal unlawfulness of an act, such as executing an order or directive (Article 41 CCU).

A similar situation exists in judicial practice. For example, V. O. Navrotsky emphasizes that "the actions of the sadly known first convicted Russian serviceman in Ukraine, Shishimarin, who executed a criminal order to shoot a peaceful Ukrainian resident, were qualified under part 2 of Article 438 CCU as violations of the laws and customs of war combined with intentional murder. However, the actions of those who directed Shishimarin and others like



him to Ukraine to commit murders, rapes, robberies, and violate the peaceful life of the country, its territorial integrity, and sovereignty were left without criminal assessment" (Navrotsky, 2022).

Of course, holding the leadership of the Russian Federation criminally liable for giving orders to commit war crimes on the territory of Ukraine is still ahead. Currently, the resolution of relevant issues largely concerns lower-ranking commanders, whom Ukrainian courts recognize as guilty of committing the crime provided for in Article 438 CCU. At the same time, in the sentences of first-instance courts issued by Ukrainian courts, a clear hierarchy of orders is traced—from the highest orders from the leadership of the Russian Federation and the Armed Forces of the Russian Federation to the orders of commanders regarding specific violations of the laws and customs of war (for example, the verdict of the Chernihiv District Court of Chernihiv Oblast dated January 12, 2023, in case No. 748/1773/22, left unchanged by the ruling of the Chernihiv Court of Appeal dated April 6, 2023; the verdict of the Obolon District Court of Kyiv dated March 6, 2024, in case No. 367/3486/22) (Unified State Register of Court Decisions 2023a,b, 2024).

At the same time, as can be seen from the analysis of the sentences issued by Ukrainian courts, the act of giving orders to violate the laws and customs of war is not itself charged against the accused. Typically, the giving of orders by commanders of the respective units of the Armed Forces of the Russian Federation, although noted by Ukrainian courts, occurs only in conjunction with other forms of violations of the laws and customs of war (for example, with cruel treatment of civilians).

As noted by N. Antoniuk and A. Miroshnychenko, in the absence of the ability to identify a specific executor who fired a shot, launched a rocket, or dropped a bomb, it is often entirely possible to identify the commander under whose orders the shelling was carried out. This is especially evident in cases of systematic shelling, usually carried out by units subordinate to the same military commander. It is worth emphasizing that in such cases, commanders who directed actions that constitute violations of the laws and customs of war bear responsibility for the actions committed as perpetrators of the respective crime. Given the hierarchical structure of the armed forces of any country,

holding a commander accountable is not only simpler in many cases but also much more important than holding lower-level executors accountable. After all, it is primarily the commander who is responsible for ensuring that the entire unit adheres to the laws and customs of war (Antoniuk & Miroshnychenko, 2024).

As mentioned above, in the sentences issued under Article 438 CCU that were analyzed, commanders who gave orders to their subordinates to violate the laws and customs of war are usually not charged with such a form of committing this crime as giving an order or directive for such a violation. In the formulation of the accusation, they are mostly charged with the specific violation of the laws and customs of war that was the content of the order or directive given and executed by the subordinates of such a commander. For example, in the verdict of the Zhovtnevyi District Court of Kryvyi Rih, Dnipropetrovsk Oblast, dated May 15, 2023, under part 2 of Article 28 - part 1 of Article 438 CCU, two military commanders were convicted—the deputy commander of the Black Sea Fleet of the Russian Federation for material and technical support and the commander of a separate guards engineering brigade—who gave orders and participated in the attack on civilian infrastructure facilities—the hydraulic structures of the North Crimean Canal, resulting in the unlawful supply of water from the Kakhovka Reservoir to the temporarily occupied territory of the Autonomous Republic of Crimea through the North Crimean Canal, which hinders the functioning of irrigation systems and the agricultural sector in the territory of the Kherson region. However, the giving of orders to violate the laws and customs of war was not charged against these two commanders (Unified State Register of Court Decisions, 2023c).

Let us also consider how to evaluate the giving of orders by commanders to their subordinates, servicemen of the Armed Forces of the Russian Federation, to violate the laws and customs of war in the context of such a circumstance that excludes the criminal unlawfulness of an act, such as executing an order or directive (Article 41 CCU). It is provided that the action or inaction of a person that caused harm to protected interests is recognized as lawful if it was committed for the purpose of executing a lawful order or directive (part 1). An order or directive is lawful if it is given by the appropriate

person in the proper manner and within their authority and does not contradict current legislation and is not associated with a violation of constitutional rights and freedoms of man and citizen (part 2). A person who refused to execute an obviously criminal order or directive is not subject to criminal liability (part 3). A person who executed an obviously criminal order or directive for actions committed for the purpose of executing such an order or directive is subject to criminal liability on general grounds (part 4). If a person did not realize and could not realize the criminal nature of the order or directive, then for actions committed for the purpose of executing such an order or directive, only the person who gave the criminal order or directive is liable (part 5).

In Article 7 of the Nuremberg Tribunal Statute, the principle of the inadmissibility of invoking official or service status was formulated for the first time, according to which the official status of the defendants, their position as heads of state or responsible officials of various government agencies should not be considered as grounds for exemption from responsibility or for mitigating punishment (Nuremberg Tribunal Statute, 1945). This principle was reiterated in part 2 of Article 7 of the Statute of the International Tribunal for the Former Yugoslavia (International Tribunal for the Former Yugoslavia, 1993) and part 2 of Article 6 of the Statute of the International Tribunal for Rwanda (International Tribunal for Rwanda, 1994) (ZAKON online, 2024a,b,c).

As V. Pylypenko notes, "although many criminal laws recognize such a circumstance that excludes the criminality of an act committed in execution of an order, the mentioned legal institution has formed within the norms of international criminal law. Thus, in principle IV of international law, expressed in the Statute and decisions of the Nuremberg Tribunal, there is a reference that the execution of an order by a government or superior does not relieve that person (the executor) from responsibility under international law if a conscious choice was factually possible for them" (Pylypenko, 2017). The same principle is enshrined in many international documents. For example, in part 3 of Article 2 of the Convention Against Torture of 1984, it is provided that an order from a superior officer or a public authority cannot be invoked as a justification for torture (Verkhovna Rada of Ukraine, 1984).



The principle of the inadmissibility of exempting a person for executing an order from a superior is undoubtedly traced in the judicial practice of Ukraine when making decisions regarding violations of the laws and customs of war. Even in cases where the accused servicemen of the Armed Forces of the Russian Federation claim that as servicemen they were obliged to unconditionally execute the orders of their commander.

For instance, in the verdict of the Desnyansky District Court of Chernihiv dated August 8, 2022, in case No. 750/2891/22, it was indicated that despite the fact that the accused is a serviceman of the Armed Forces of the Russian Federation, executing an order from a commander that contradicts Article 25 of the Regulations on the Laws and Customs of War on Land, which is an Annex to the IV Convention on the Laws and Customs of War on Land of October 18, 1907, is illegal and criminal, as it prohibits in any way attacking or bombing undefended cities, towns, residential houses, or structures. In the circumstances of the case, this accused, being a tank operator, unconditionally executing the orders of his immediate commander, fired a targeted shot at a residential building, which is not a military target, with a fragmentation-fuze shell, damaging it (Desnyansky District Court, 2022).

Another example from the judicial practice of Ukraine is when the court rejected the arguments of the accused, a serviceman of the Armed Forces of the Russian Federation, who claimed in court that he was executing a commander's order by shooting at a civilian moving towards him, and that the order was not aimed at intentionally killing a civilian but at saving the lives of servicemen of the Armed Forces of the Russian Federation. In the circumstances of the case, the accused, who directly fired at the civilian, had the opportunity not to execute his commander's order and not to shoot at the civilian. The unknown person who gave this order was without identifying marks reflecting their military rank; the accused did not personally know them, the order was illegal, and therefore he should not have executed it, but he did so to avoid trouble. In motivating its decision, the first-instance court referred to part 4 of Article 41 CCU, according to which a person who executed an obviously criminal order or directive for actions committed for the purpose of executing such an order or directive is subject to criminal liability on general grounds. At the same



time, in the court's opinion, understanding that the order given to him was obviously criminal and not wishing to execute it, the accused could have refused his commander, which would not have led to any negative consequences for him. Moreover, the accused could not perceive the unknown person as an officer and, even more so, as a direct commander, as he did not know either their surname or military rank, and the commanding tone of the conversation is not a criterion for subordination for servicemen (a case of Solomiansky District Court in 2022a). This verdict was modified in terms of the imposed punishment but left unchanged in terms of qualification by the ruling of the Kyiv Court of Appeal dated July 29, 2022, in case No. 760/5257/22 (Unified State Register of Court Decisions, 2022a,b,c).

Thus, the judicial practice of national courts regarding the criminal-legal assessment of the actions of servicemen of the Armed Forces of the Russian Federation through the prism of the existence of factual circumstances that exclude the criminal unlawfulness of their actions, such as executing criminal orders from their commanders to violate the laws and customs of war, corresponds to international standards in this regard.

Similarly, it can be argued that a legal axiom is forming in this regard (from Greek: *axioma* - assertion, position), that is, a postulate, an initial position of any theory that is recognized within this theory as true without the need for proof and is used in proving other positions of the theory, which, in turn, are called theorems (Zelenko, 2021). This legal axiom refers to the unconditional emergence of criminal liability for all servicemen of the Armed Forces of the Russian Federation who, as part of this criminal organization, commit crimes on the territory of Ukraine, including violations of the laws and customs of war. The very fact of a person's belonging to the number of servicemen of the Armed Forces of the Russian Federation, as well as their participation in the war against Ukraine on the side of the Russian Federation, indicates that they are aware of the socially dangerous nature of their actions, foresee that they are committing such a socially dangerous act, and wish to commit it. Furthermore, there is an irrefutable presumption regarding the servicemen of the Armed Forces of the Russian Federation that they are aware of and informed about the laws and customs of war that they violated on the

territory of Ukraine while executing criminal orders from the military-political leadership of the aggressor state. That is, considering the actions of servicemen of the Armed Forces of the Russian Federation who violated the laws and customs of war on the territory of Ukraine through the prism of the existence of factual circumstances that exclude the criminal unlawfulness of their actions, such as executing an order or directive, is unacceptable and corresponds to the standards in the field of international humanitarian law.

5 CONCLUSION

Thus, the study of the problem of the peculiarities of criminal liability under Ukrainian legislation for giving and executing orders to commit war crimes by servicemen of the Armed Forces of the Russian Federation has allowed us to formulate the following main conclusions:

1. Criminal liability for commanders for giving criminal orders to violate the laws and customs of war on the territory of Ukraine is based on the concept of command responsibility found in sources of international humanitarian law, particularly in paragraph 2 of Article 86 of the Additional Protocol I and Article 28 of the Rome Statute;
2. In the sentences issued by Ukrainian courts, commanders and servicemen of the Armed Forces of the Russian Federation are usually not charged with the act of giving orders to violate the laws and customs of war when qualifying under Article 438 CCU, but rather with specific violations committed by their subordinates;
3. The execution of an order or directive as a circumstance excluding the criminal unlawfulness of an act initially has an international-legal character and originates from international criminal law;
4. The formation of a legal axiom in judicial practice regarding the unconditional emergence of criminal liability for all servicemen of the Armed Forces of the Russian Federation who commit crimes on the territory of Ukraine as part of a criminal organization is confirmed. The mere fact of a person's belonging to the number of servicemen of the Armed Forces of the Russian Federation, as well as their participation in

the war against Ukraine on the side of the Russian Federation, indicates that such a person is aware of the socially dangerous nature of their actions, foresees that they are committing such an act, and wishes to commit it. Within this legal axiom, an irrefutable legal presumption is distinguished: servicemen of the Armed Forces of the Russian Federation are aware of and informed about the laws and customs of war that they violated on the territory of Ukraine while executing criminal orders from the military-political leadership of the aggressor state. Considering the actions of servicemen of the Armed Forces of the Russian Federation who violated the laws and customs of war on the territory of Ukraine through the prism of the existence of factual circumstances that exclude the criminal unlawfulness of their actions, such as executing an order or directive, is unacceptable and corresponds to the standards of international humanitarian law.



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