

# Implementation of the protection function during the pre-trial investigation of war crimes under the conditions of the state of martial law

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**Abstract.** It has been established that the criminal-legal characteristics of war crimes, the peculiarities of the mechanism of their commission and the operation of the legal regime of martial law in their entirety determine the peculiarities of the pre-trial investigation of the specified type of crimes and directly affect the implementation of the defence function in this category of criminal proceedings. The main ways of implementing the protection function are allocated and characterized: mandatory involvement of a defender; use of procedural opportunities to collect evidence and build your line of defense; participation in procedural actions; making comments and objections during certain procedural actions; obtaining access to the materials of criminal proceedings, the ability to make copies of them or their reflection; appeal against decisions, actions or inaction of a pre-trial investigation body, prosecutor, investigating judge; awareness of the progress of the pre-trial investigation, etc.

**Key words:** pre-trial investigation, war crimes, implementation of the protection function, martial law, right to defense, guarantees of the right to defense.

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**Problem statement.** Ukraine has been living in a full-scale war for more than two years. This factor has a direct impact on the structure and dynamics of crime. In particular, on the territory of Ukraine, the facts of criminal offences against peace, human security, and international law and order are recorded and documented on a daily basis. According to the statistics of the Prosecutor General's Office, in 2021, 253 such offences were registered, of which 172 were violations of the laws and customs of war (Article 438 of the Criminal Code of Ukraine), 12 were war propaganda (Article 436 of the Criminal Code of Ukraine), and 8 were planning, preparing, initiating, and waging an aggressive war (Article 437 of the Criminal Code of Ukraine). At the same time, in 2022, these indicators increased dramatically. A total of 62,128 criminal offences against peace, human security, and international law and order were registered, of which the largest share accounted for violations of the laws and customs of war (Article 438 of the Criminal Code of Ukraine)—60,387. A large number of offences under Art. p. 436-2 (1354), 436-1 (233) of the Criminal Code of Ukraine, In addition, the dynamics of committing criminal offences under Art., p. 436 (42), 437 (67), 441 (15), 442 (22), and 447 (7) of the Criminal Code of Ukraine. Similar rates of criminal offences against peace, human security, and international law and order continued in 2023. In particular, 62,667 such offences were registered, of which the largest share falls on those provided for in Art. 438 of the Criminal Code of Ukraine – 60944, Art. 436-2 of the Criminal Code of Ukraine – 1282, 436-1 of the Criminal Code of Ukraine – 367, Art. 436 of the Criminal Code of Ukraine – 31, Art. 437 of the Criminal Code of Ukraine – 25<sup>1</sup>.

From the above, it is evident that the largest proportion of criminal offences committed against peace, human security, and international law and order fall on war crimes. In this context, the issue of formulating recommendations on the procedural order and forensic

support for the pre-trial investigation of war crimes is urgent. At the same time, special attention should be paid to the issue of the implementation of the defence function during the pre-trial investigation of this type of criminal offense. The issue of forming recommendations on the procedural order and forensic support for the pre-trial investigation of war crimes. At the same time, special attention should be paid to the issue of the implementation of the defence function during the pre-trial investigation of this type of criminal offence.

**State of the study.** The concept and signs of war crimes, the peculiarities of their criminal law qualification, and pre-trial investigation were studied in their scientific works by many scientists, including: A.O. Dragonenko, O.O. Ivanochk, O.M. Lysyk, Y.V. Orlov, V.M. Repetsky, V.V. Tymoshko, I.O. Khar, etc. However, scientists did not pay attention to determining the specifics of the implementation of the protection function, taking into account the peculiarities of the pre-trial investigation of war crimes under martial law, which is why this issue remains unexplored.

**Purpose and objectives of the study.** The purpose of this article is to clarify the features of the pre-trial investigation of war crimes under martial law and their impact on the implementation of the defence function. This goal leads to the setting of the following tasks: firstly, to define the concept and identify the signs of war crimes; secondly, to establish the specifics of the pre-trial investigation of war crimes under martial law; thirdly, to reveal the content of the implementation of the protection function, taking into account the specifics of the pre-trial investigation of war crimes under martial law.

**Scientific novelty of the study.** It has been proven that the criminal law features of war crimes, the peculiarities of the mechanism of their commission, and the effect of the legal regime of martial law in their entirety determine the features of the pre-trial investigation of this

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<sup>1</sup>On registered criminal offenses and the results of their pre-trial investigation. Office of the Prosecutor General. URL: <https://gp.gov.ua/ua/posts/prozayestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>.

type of crime and directly affect the implementation of the defence function in this category of criminal proceedings. The features of the implementation of the defence function during the pre-trial investigation of war crimes under martial law are disclosed through the prism: definition and change of jurisdiction; obtaining information about possible cases of war crimes under conditions of time shortage and/or access to the source of information, in particular due to the fact that the settlement is under occupation; recognition as victims in proceedings on war crimes against a person and against property only of persons protected by international humanitarian law; specifying the content of the subject matter and the limits of proof in this category of proceedings; the procedural status of the perpetrators of war crimes; specifics of the special pre-trial investigation procedure; cooperation with the ICC. The main ways of implementing the protection function are defined.

**Presentation of the main material.** In the Criminal Code of Ukraine, the legislator does not use the term "war crime" to designate the relevant *corpus delicti* of a criminal offence and provides its interpretation. This concept is used in international legal acts. In particular, in the Rome Statute of the International Criminal Court (hereinafter referred to as the Rome Statute), paragraph 1 of Art. Article 8 states that the International Criminal Court (ICC) has jurisdiction over war crimes, in particular in cases where they are committed as part of a plan or policy or as part of the large-scale commission of such crimes<sup>2</sup>. At the same time, paragraph 2 of this article provides a list of acts that are war crimes: gross violations of the Geneva Conventions of August 12, 1949, defined in subparagraph (a) of paragraph 2 of Art. 8 of the Rome Statute; Other serious violations of the laws and customs applicable in international armed conflicts within the established framework of international law are defined in subparagraph (b) of paragraph 2 of Art. 8 of the Rome Statute; in the event of an armed conflict of a non-international character, gross violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely: any of the acts referred to in subparagraph (c) of paragraph 2 of Art. 8 of the Rome Statute, committed against persons who do not take an active part in hostilities, including servicemen who have laid down their arms, and persons disabled as a result of illness, injury, detention or for any other reason; other serious violations of the laws and customs applicable in non-international armed conflicts within the established framework of international law<sup>3</sup>.

From the above, it can be seen that at the international level, the definition of war crimes is not enshrined in legal acts, but a list of acts that should be considered military acts has been formed. As for the national legislation, it actually contains the composition of criminal offences, which by their characteristics are war crimes,

provided for in Art. 438 of the Criminal Code of Ukraine under the title "violation of the laws and customs of war." That is, in Art. 438 of the Criminal Code of Ukraine, the legislator defines the main features of a criminal offense and refers to the provisions of international treaties, which, in turn, provide lists of actions that should be qualified as war crimes [1, p. 103].

The question of the essence and types of war crimes, as well as the peculiarities of their criminal law qualification, did not go unnoticed by legal scholars. In particular, V.M. Repetsky, V.M. Lysyk, and I.O. Khar believe that a war crime is an international crime that is intentionally or grossly negligently committed by a combatant and persons equated to them or in relation to them by a civilian during an armed conflict and consists in a massive and serious violation of the norms of international humanitarian law and encroaches on the defendants, their rights, or the most important principles of international humanitarian law [2, p. 125; 3, pp. 138–174]. A.O. Dragonenko also defines war crimes as a gross violation of international humanitarian law applied in armed conflicts (international and non-international), while specifying that they entail individual criminal responsibility in accordance with the norms of international criminal law [4, pp. 151–157]. V.V. Tymoshko proposes to understand the concept of war crimes as a type of international crime, which is a culpable (deliberate) socially dangerous act that consists in a serious violation of the laws and customs of war, defined by international humanitarian law, and is committed by a special subject (combatant, persons equated to them) [1, p. 104]. V. Savulyak argues that war crimes are a deliberate, gross violation of the laws and customs of war, for which the perpetrators (combatants and persons who give them orders) bear criminal responsibility, determined by the decision of international military tribunals [5]. O.O. Ivanochko proposes to understand war crimes as criminal acts committed during and in connection with an armed conflict of international and non-international nature, which violate the norms of prohibition or restriction of the use of methods and means of warfare, as well as norms aimed at protecting a person during an armed conflict [6, p. 32]. Y.V. Orlov points out that a war crime is a serious violation of international humanitarian law (the laws and customs of war), which is punishable at the national and international levels; it is one of the four types of international crimes within the jurisdiction of the International Criminal Court, along with the crime of aggression, crimes against humanity, and genocide [7, p. 9].

The analysis of the approaches to the interpretation of war crimes formed in science demonstrates that the relevant definitions focus on the features that distinguish them from other crimes against peace, human security, and international legal order. First of all, we are talking about

<sup>2</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: United Nations Convention of 12.08.1949. Official Bulletin of Ukraine. 2010. № 62. Page. 177. Art. 2180; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea: United Nations Convention of 12.08.1949. Official Bulletin of Ukraine. 2010. № 62. Page. 193. Art. 2181; Geneva Convention relative to the Treatment of Prisoners of War: United Nations Convention of 12.08.1949. Official Bulletin of Ukraine. 2010. № 62. Page. 132. Art. 2179; Geneva Convention relative to the Protection of Civilian Persons in Time of War: United Nations Convention of 12.08.1949. Official Bulletin of Ukraine. 2013. № 27. Page. 370. Art. 942.

<sup>3</sup> Rome Statute of the International Criminal Court: United Nations Statute of 17.07.1998. Voice of Ukraine. 2024. No. 110.

their international character; committing a gross violation of international humanitarian law in the part relating to the laws and customs of war; connection of acts with armed conflict; special subject.

In general, it should be noted that the signs and elements of war crimes affect not only their correct qualification but also the procedural features of the pre-trial investigation. In this context, we agree with O.V. Pchelina that the peculiarities of the pre-trial investigation of the category of crimes under study are due to many factors: the legal regulation of the list of war crimes and the procedure for documenting them not only at the national but also at the international level; properties of criminal law and forensic characteristics of war crimes; resonance of the investigated elements of criminal offences; the limits of proof in this category of criminal proceedings; carrying out pre-trial investigation in the conditions of war and the legal regime of martial law; creation of specialised units in the structure of law enforcement agencies that deal exclusively with the documentation and investigation of war crimes; jurisdiction over the investigation of the investigated category of criminal offenses; a large number of criminal proceedings, as well as a large amount of information that needs to be recorded during the pre-trial investigation of war crimes and war-related criminal offenses; conducting pre-trial investigation in conditions dangerous to the life and health of a person (for example, during artillery shelling and/or rocket bombardment or their threat, in conditions of mine danger, threat of attack by sabotage and reconnaissance groups and/or military personnel of the aggressor state, etc.); inability to timely record and study trace and other evidentiary information due to the fact that certain territories of Ukraine are under occupation; a large number of internally displaced persons, as well as persons who have found refuge abroad; the use of new methods and means of documenting war crimes; development of standards for the investigation of war crimes; the need to cooperate with international, including law enforcement and judicial, organizations, as well as law enforcement and judicial authorities of other states, in particular the member states of the European Union [7, pp. 180–181].

Accordingly, the above-mentioned signs of war crimes, as well as the factors that determine the specifics of the investigation of these crimes, directly affect the implementation of the defence function in this category of criminal proceedings. After all, both the suspect and his lawyer will first of all build a line of defence based on the presence and sufficiency of grounds for making certain procedural decisions and conducting certain procedural actions, taking into account the provisions of international humanitarian law to substantiate and motivate a procedural decision, etc. In view of this, we will dwell in

more detail on highlighting the key features of the pre-trial investigation of war crimes, which, in turn, determine the specifics of the implementation of the defence function during its implementation.

The first feature of the pre-trial investigation of war crimes concerns the definition and change of jurisdiction. Thus, guided by Art. 216 of the Criminal Procedure Code of Ukraine, the pre-trial investigation of war crimes is carried out by investigators of security agencies. However, in practice, guided by Part 5 of Art. 36 of the Criminal Procedure Code of Ukraine, the pre-trial investigation of a large number of war crimes is entrusted to the investigative units of the National Police. In addition, in order to optimise the process of collecting evidence in criminal proceedings on war crimes in accordance with Part 4 of Art. 39 of the Code of Criminal Procedure of Ukraine, "the head of the pre-trial investigation body during martial law has the right, by his motivated resolution, agreed with the heads of the relevant pre-trial investigation bodies, to form interdepartmental investigation groups and appoint a senior investigator who will supervise the actions of other investigators"<sup>4</sup>.

The second peculiarity of the pre-trial investigation of war crimes is that information about possible cases of war crimes is obtained under conditions of time shortage and/or access to the source of information, in particular due to the fact that the settlement is under occupation. But, despite these circumstances, after collecting primary information, it is necessary to identify and correctly describe socially dangerous acts that may have signs of war crimes and were committed on the territory of the relevant settlement during its occupation. Because a high-quality and specific plot of the crime is essential for pre-trial investigation as, on the one hand, it narrows and concretises the boundaries of proof, and on the other hand, it is the plot of the crime that operative officers, investigators, prosecutors, experts, judges, and lawyers rely on and will further participate in the pre-trial investigation<sup>5</sup>.

The third peculiarity of the pre-trial investigation of war crimes is that victims in proceedings on war crimes against a person and against property can only be persons protected by international humanitarian law: combatants hors de combat (wounded, sick, or shipwrecked who have ceased to participate or did not take part in hostilities; prisoners of war (combatants, who fell under the power of the enemy (laid down their arms and surrendered or were captured by the enemy)); civilians; medical and religious personnel of the armed forces (they are not combatants, but in case of falling into the power of the enemy they can be detained and in this case enjoy all the rights and benefits of prisoners of war); civil defence organisation personnel; personnel assigned to the protection of cultural property<sup>6</sup>.

<sup>4</sup> Criminal Procedure Code of Ukraine: Law of Ukraine dated 04.13.2012 No. 4651–VI. Information of the Verkhovna Rada of Ukraine. 2013. No. 9–10, No. 11–12, No. 13. Art. 88.

<sup>5</sup> Standards of investigation of war crimes. Illegal deprivation of liberty and torture: methodical recommendations, approved by the protocol of the methodical council meeting dated March 16, 2023 No. 3. Kyiv, 2023. P. 16. URL: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_katuvannya.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_katuvannya.pdf).

<sup>6</sup> Standards for the investigation of war crimes. General part: methodological recommendations approved by the minutes of the meeting of the methodological council dated 16.03.2023 No. 3. Kyiv, 2023. P. 15. URL: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_zagalna-chastyna.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_zagalna-chastyna.pdf).



The next, fourth, feature of the pre-trial investigation of war crimes is that the content of the subject and the limits of proof in this category of proceedings are specified, taking into account the criminal law qualification of a specific socially dangerous act and the qualitative and specific plot of a war crime. Most of all, it should be understood that the evidence collected in criminal proceedings is used to: identify and prosecute specific perpetrators of the crime; identify and prosecute specific commanders of military units who gave the order to commit crimes; and bring to justice the military and political leadership of the Russian Federation for committing international crimes. Separately, it should be noted that despite the presence of a large, sometimes even excessive, amount of evidence that directly or indirectly confirms the events of a war crime, as well as other circumstances that are subject to proof, evidence that directly indicates (makes it possible to identify and prove guilt) the perpetrators or organisers of a war crime may not be enough. That is, in criminal proceedings of the studied category, there is a large amount of evidence about the event of a criminal offence but a small (insufficient) amount of evidence about the identity of the criminal. Accordingly, the main problem in proving war crimes in criminal proceedings is to establish and sufficiently identify the perpetrators of the crime, as well as to identify persons from the command who could have given the order to commit a war crime<sup>9</sup>.

The fifth feature of the pre-trial investigation of war crimes, which determines the specifics of the implementation of the defence function, is the procedural status of the subjects of war crimes. In particular, a large proportion of criminal proceedings for war crimes are carried out in absentia, i.e., in the absence of the suspect/accused. Therefore, in order to ensure the protection of the rights of the suspect during the special pre-trial investigation of war crimes under martial law, the "in absentia" procedure should be strictly followed. No less important in the context of the implementation of the defence function is the issue of the procedural process for serving a notice of suspicion to an absent person. From the moment a person is notified of suspicion of committing a war crime, a lawyer must be involved in criminal proceedings. At the same time, in the period from the moment of serving the notice of suspicion to the completion of the pre-trial investigation, it is necessary to collect additional possible evidence to clarify or strengthen the position of the prosecution, in particular those that may refute the defence's version of the events of the crime

or their client's participation in it<sup>10</sup>.

Another feature of determining the procedural status of subjects of war crimes during their pre-trial investigation is that such persons have the status of prisoners of war. That is, in fact, a suspect in criminal proceedings for a war crime is at the same time a prisoner of war. Therefore, such a suspect, along with the general rights of a suspect defined in the national criminal procedure law, also enjoys the rights of a prisoner of war. In particular, in this category of criminal proceedings, the participation of a defence attorney is mandatory. The implementation of the function of defence during the pre-trial investigation of war crimes committed by prisoners of war, along with ensuring the promptness of criminal proceedings and the participation of the defence lawyer of the prisoner of war, provides for compliance with the procedure for criminal prosecution, detention, and the selection of a measure of restraint in relation to a prisoner of war. In particular, it is said that after serving a notice of suspicion to a prisoner of war, the investigator, the prosecutor, notifies the protecting state, the representative of the prisoners of war. In addition, the application of a measure of restraint in the form of detention is allowed in exceptional cases and should not exceed three months at the stage of pre-trial investigation. Also, the prosecutor or the investigator on his behalf is obliged to provide access to the materials of the pre-trial investigation at his disposal, including any evidence, to the prisoner of war in a language he understands. Simultaneously with providing a prisoner of war with a copy of the indictment and a copy of the register of pre-trial investigation materials, the prosecutor shall explain to the prisoner of war the right to use the assistance of one of his fellow prisoners, as well as the right to use the legal assistance of a lawyer. If a prisoner of war has not engaged a defender, the Protecting Power shall engage a defender for him or her, having at least one week to do so. In the event that neither the prisoner of war nor the Protecting Power has invited a defence counsel, the court shall engage a defence counsel as appointed<sup>11</sup>.

Another feature of the pre-trial investigation of war crimes, which is reflected in the implementation of the defence function, is due to such a feature of war crimes as the extension of the jurisdiction of the ICC to them. In view of this, during the pre-trial investigation of war crimes, cooperation with the ICC takes place. In particular, in the case of fulfilling requests of the ICC, the person to whom such a request relates is additionally explained the rights provided for in Art. 627 of the Criminal Procedure Code of Ukraine.

<sup>7</sup> Standards for the investigation of war crimes. Unlawful deprivation of liberty and torture: methodological recommendations approved by the minutes of the meeting of the methodological council dated 16.03.2023 No. 3. Kyiv, 2023. P. 19. URL: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_katuvannya.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_katuvannya.pdf).

<sup>8</sup> Standards for the investigation of war crimes. Unlawful deprivation of liberty and torture: methodological recommendations approved by the minutes of the meeting of the methodological council dated 16.03.2023 No. 3. Kyiv, 2023. P. 24. URL: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_katuvannya.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_katuvannya.pdf).

<sup>9</sup> Standards for the investigation of war crimes. General part: methodological recommendations approved by the minutes of the meeting of the methodological council dated 16.03.2023 No. 3. Kyiv, 2023. P. 25. URL: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_katuvannya.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_katuvannya.pdf).

<sup>10</sup> Standards for the investigation of war crimes. Unlawful deprivation of liberty and torture: methodological recommendations approved by the minutes of the meeting of the methodological council dated 16.03.2023 No. 3. Kyiv, 2023. P. 26. URL: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_katuvannya.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_katuvannya.pdf).

<sup>11</sup> Geneva Convention relative to the Treatment of Prisoners of War: United Nations Convention of 12.08.1949. Official Bulletin of Ukraine. 2010. № 62. P. 132. Art. 2179.

**Conclusions.** Thus, the criminal law features of war crimes, the peculiarities of the mechanism of their commission, and the effect of the legal regime of martial law in their entirety determine the features of the pre-trial investigation of this type of crime and directly affect the implementation of the defence function in this category of criminal proceedings. The main ways to implement the protection function are: mandatory involvement of a defender; use of procedural

opportunities to collect evidence and build your line of defence; participation in procedural actions; making comments and objections during certain procedural actions; obtaining access to the materials of criminal proceedings, the ability to make copies of them or their reflection; appeal against decisions, actions, or inaction of a pre-trial investigation body, prosecutor, investigating judge; awareness of the progress of the pre-trial investigation, etc.

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