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Strategic Directions for Adapting National Legislation to the Requirements of International Humanitarian Law in the Context of Armed Aggression and Martial Law

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ABSTRACT

The subject of this study is the process of adapting Ukrainian legislation to the standards of international humanitarian law in the context of the ongoing armed aggression by the Russian Federation and the legal regime of martial law. The object of study is the social relations arising from the application of international humanitarian law norms at the domestic level, and their impact on the Ukrainian legal system. The relevance of our topic is determined by the novelty of the armed conflict, within which Ukraine has adopted large-scale norms in parallel with the application of international humanitarian law. The formulation of such a demand on the legal system – to wage war and simultaneously reform legislation in accordance with international obligations – is an event that requires separate scholarly analysis. The methodological basis of the study comprises comparative legal, systemic-structural and formal-legal methods. The method of legal modelling is also used in formulating proposals de lege ferenda. The findings of the study highlight that Ukraine is largely fulfilling its obligations under the 1949 Geneva Conventions and their Additional Protocols, with the main exceptions being “systemic gaps” in the areas of criminal liability for violations of international humanitarian law, the protection of the civilian population, and the status of internally displaced persons. The study argues that these gaps must be addressed through targeted amendments to the Criminal Code of Ukraine and the adoption of a dedicated law on cooperation with the International Criminal Court.

KEYWORDS

international humanitarian law, martial law, armed aggression, legislative adaptation, Geneva Conventions, protection of civilians, internally displaced persons, war crimes, European integration, criminal liability.



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СОЦІАЛЬНИЙ РОЗВИТОК: економіко-правові проблеми

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Стратегічні напрями адаптації національного законодавства до вимог міжнародного гуманітарного права в умовах збройної агресії та воєнного стану

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СТАТТЯ

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Предметом дослідження є процес адаптації законодавства України до стандартів міжнародного гуманітарного права в умовах триваючої збройної агресії Російської Федерації та правового режиму воєнного стану. Об'єктом є суспільні відносини, що виникають внаслідок застосування норм міжнародного гуманітарного права на внутрішньодержавному рівні, та їх вплив на систему законодавства України. Актуальність теми визначається самою унікальністю збройного конфлікту, де в Україні одночасно з безпосереднім застосуванням міжнародного гуманітарного права ухвалюється законодавство у великих масштабах. Формулювання такого запиту до правової системи – вести війну та водночас реформувати законодавство відповідно до міжнародних зобов'язань – це подія, яка вимагає окремого наукового осмислення. Методологічну основу дослідження складають порівняльно-правовий, системно-структурний та формально-правовий методи. Метод правового моделювання також використовується при формулюванні пропозицій *de lege ferenda*. Висновки дослідження підкреслюють, що Україна значною мірою виконує свої зобов'язання за Женевськими конвенціями 1949 року та Додатковими протоколами до них, головним чином за винятком «системних прогалин» у сферах кримінальної відповідальності за порушення міжнародного гуманітарного права, захисту цивільного населення та статусу внутрішньо переміщених осіб. У дослідженні стверджується, що для усунення цих прогалин потрібно не лише внести деякі зміни до Кримінального кодексу України, а й прийняти спеціальний закон про співпрацю з Міжнародним кримінальним судом.



КЛЮЧОВІ СЛОВА

міжнародне гуманітарне право, воєнний стан, збройна агресія, адаптація законодавства, Женевські конвенції, захист цивільного населення, внутрішньо переміщені особи, воєнні злочини, європейська інтеграція, кримінальна відповідальність.

1. Introduction

Russia's full-scale invasion of Ukraine on February 24, 2022 has presented the state's legal system with a task that we can hardly describe in the comforting categories of "reform" or "improvement": to adapt legislation to the requirements of international humanitarian law (IHL) in real time – when this right is already applied in combat conditions, and not just discussed in classrooms. The daily practice of violations by the aggressor and the daily need to qualify these violations in legal categories – this is a circumstance that turns strictly abstract academic discussions about the relationship between international and national law into an urgent practical task.

The legal regime of martial law established in Ukraine by the Decree of the President of Ukraine No. 64/2022 of February 24, 2022 and approved by the Verkhovna Rada on the same day [16], expanded the discretionary powers of public authorities, but at the same time exacerbated the issue of the limits of permissible restrictions on rights and freedoms defined by IHL. Article 4 of the International Covenant on Civil and Political Rights [9] and Article 4 of the UN Convention against Torture [11] allow derogations from certain obligations "in cases of extreme necessity" – but not from those rules that belong to the norms of customary IHL and are absolutely mandatory. This limit is still not clearly defined in domestic legislation.

The vector of European integration adds another dimension to the problem. For example, the Association Agreement [15] concluded between Ukraine and the EU, and the negotiation process on EU accession, launched in June 2024, are pending and provide not only for the harmonization of civil and administrative legislation, but also for compliance with humanitarian law standards, which are sought by the mechanisms of the International Criminal Court and the practice of the ECtHR. Compliance with IHL standards is, in fact, an informal criterion of the legal culture of the candidate country, which is assessed by the European Commission in the Progress Reports.

Finally, in March 2023, the ICC issued an arrest warrant for Putin, and the Prosecutor General's Office opened hundreds of thousands of criminal proceedings for war crimes. This circumstance makes the question of the compliance of national legislation with the requirements of IHL regarding the definition of elements of crime and jurisdiction no longer theoretical, but one that has immediate practical consequences.

2. Literature Review

Domestic legal science has a modest stock of developments on the implementation of IHL. Works by Mytsyk et al. [4] laid the theoretical basis for understanding customary IHL in the system of the legal order of Ukraine. Later development – monographs and articles by Butkevych, et al. [2] – made it possible to trace the development of the state's position in the context of international protection mechanisms.

In the financial and legal section of harmonization processes, Shevchuk's research on the adaptation of legislation on financial services in the context of the implementation of the Association Agreement between Ukraine and the EU is important [5], which demonstrates the methodology of comparative legal analysis of adaptation processes, which was also used in this study. In foreign doctrine, the problems of adaptation of national law to the needs of IHL were developed in the theory of transformation and incorporation. Macias Betancourt [3] analyzes the practice of states that survived armed conflicts and, at the same time, carried out legislative reforms – a kind of legal reform caused by the conflict. Burke-White [1] explores the role of the ICC in stimulating the internal implementation of the Rome Statute. The ICRC regularly publishes National Implementation Databases, which monitor the state of legislation of each state party to the Geneva Conventions.

3. Problem Statement

The aim is to systematically analyze the state of adaptation of Ukraine's national legislation to the norms of IHL under martial law, identify key gaps and formulate certain proposals *de lege ferenda*. The objectives are: to determine Ukraine's international legal obligations in the field of IHL; to analyze the

compliance of current legislation with these obligations; to assess law enforcement practice; to identify systemic contradictions and gaps; and to develop legislative recommendations.

The methodological basis is the comparative legal method (comparison of the norms of IHL with the provisions of the Criminal Code of Ukraine, laws on the legal regime of martial law and on ensuring the rights of internally displaced persons); system-structural method (analysis of IHL as a system of norms with its own hierarchy and principles); the method of legal modeling (when formulating your own proposals for amendments to the legislation).

4. Methods and Materials

The methodological framework of the study is based on general scientific and specialized legal research methods, including comparative legal analysis, systemic-structural analysis, and formal legal interpretation. The comparative legal method is used to examine and contrast international humanitarian law norms with provisions of Ukrainian national legislation, particularly the Criminal Code of Ukraine and laws regulating the legal regime of martial law and the protection of internally displaced persons. The systemic-structural approach is applied to analyze international humanitarian law as an integrated normative system with its own hierarchy of principles and implementation mechanisms. The formal legal method is employed to interpret applicable legal norms and identify gaps and inconsistencies in the existing legal framework. In addition, legal modelling is used to develop *de lege ferenda* proposals aimed at improving national legislation and strengthening the implementation of international humanitarian law under conditions of martial law.

5. Results and Discussion

International humanitarian law, as a legal system, regulates the behavior of the parties to an armed conflict, and not the grounds for it. This fundamental difference from *jus ad bellum* explains the autonomous nature of IHL: it applies regardless of who the aggressor is, which makes its application as important for Ukraine as it is for Russia – an obligation under the Geneva Conventions of 1949 [8] and Additional Protocols I and II of 1977 [10] apply to the Armed Forces of Ukraine, as well as to all parties to the conventions, on an equal basis. The mere fact of Russian armed aggression does not exempt Ukraine from responsibility for non-compliance with decisions on IHL standards – and this is one of the foundations of modern doctrine.

The doctrine traditionally distinguishes between three groups of subjects of IHL protection: combatants and those who are out of action, the civilian population and the civilian objects themselves. Article 48 of Additional Protocol I establish the principle of distinction between civilians and combatants, between civilians and military objectives as the basic principle on which the protection of civilians from the consequences of hostilities is based. The implementation of this principle in the context of a hybrid war, when the conflict combines regular operations and the actions of irregular formations, requires special regulatory mechanisms, which Ukrainian legislation currently does not have sufficiently. Of particular importance at the international legal level is the issue of agreements ratified by Ukraine and the degree of their implementation. Ukraine is a party to the four Geneva Conventions of 1949 and Additional Protocols I and II, the Hague Conventions on the Laws and Customs of War on Land [7], the UN Convention against Torture [11], and the Rome Statute of the ICC, ratified by Law No. 1618-IX of 20 August 2021 [17]. The ratification of the Rome Statute is a special step: it opened the way for the international prosecution of war crimes and, at the same time, established a requirement for the introduction of relevant elements of crimes into the Criminal Code in accordance with Article 17 of the Statute – the principle of complementarity.

The principle of complementarity of the ICC means that the Court enters into force only when the state is unwilling or unable to carry out criminal prosecution on its own. It is this norm that directly inspires the reform of the Criminal Code of Ukraine: if our courts can properly prosecute persons guilty of war crimes, the need to refer cases to the ICC will disappear. Since February 24, 2022, the Prosecutor General's Office has initiated hundreds of thousands of criminal proceedings under Articles 437–438 of the Criminal Code of Ukraine, but the provisions of these articles, formulated back in 2001, do not fully correspond to the current classification of crimes under IHL.

The current Criminal Code of Ukraine contains Chapter XX “Crimes against peace, security of humanity and international legal order”, articles 437–447 of which punish crimes related to armed conflicts [13]. But a comparison with the Rome Statute reveals anomalies here, too: from the absence of separate provisions on crimes against humanity as a separate class; the lack of criminalization of the unlawful restriction of humanitarian access, which is a crime under IHL; the responsibility of commanders is too narrow compared to Article 28 of the Charter; the absence of a separate law on the ICC, which would regulate the procedure for cooperation between Ukraine and the Court.

Law enforcement practice after February 24, 2022, reflects an extremely heavy burden on the investigative apparatus and conceptual unpreparedness for a large-scale investigation of war crimes. Most of these proceedings were initiated under Article 438 of the Criminal Code (violation of the laws or customs of war), but there are problems of qualification regarding the differentiated description of this provision from Article 437 (planning of aggressive war) and Article 442 (genocide).

Judicial practice has not yet led to such a well-established consideration and understanding of the key terms of IHL – “combatant”, “civilian object”, “direct participation in hostilities” – in the meanings they should have under IHL. Also, special protection of internally displaced persons (IDPs) is another area in which there is a gap in international and national regulations. UN Guiding Principles on Internal Displacement (Dan Principles) [6], although not formally mandatory, reflect customary legal standards for the protection of IDPs. Law of Ukraine “On Ensuring the Rights and Freedoms of Internally Displaced Persons” [14] has been revised repeatedly since 2022, but according to UNHCR and the Ombudsman, the Law still contains gaps in housing, access to justice and documentation for IDPs in case of loss of documents. The issue of the legal status of volunteers and civilians participating in defense deserves special attention.

It is not clear from the current legislation – in particular the Law of Ukraine “On the Legal Regime of Martial Law” [16] and by-laws on the Territorial Defense Forces – what this should be in the sense of this term under IHL: the lack of clear national regulation may lead to the deprivation of these persons of the status of combatants, with the corresponding denial of protection under IHL in case of captivity. This gap is even more dangerous in practice and requires immediate legal regulation. Among the negative features of the regulation, attention should be paid to the inconsistency of the terminology of the Criminal Code of Ukraine with the concept of IHL: the phrase “civilian population” instead of “civilian population” according to IHL, the vagueness of the concept of “prisoner of war” compared to Art. 4 III of the Geneva Convention [8] are not technical errors, but conceptual ones: the legal factor of the crime, and therefore the readiness for criminal prosecution, depends on the correctness of the terminology. These issues will be extremely relevant when Ukraine organizes criminal trials of war crimes perpetrators for its citizens.

The foreign experience of states that have chosen such a path is indicative. In the 1990s, before joining the EU, the Baltic States carried out an internal gradual reform of their criminal legislation in the field of IHL, in particular, including elements of war crimes and crimes against humanity in accordance with the Rome Statute. Croatia, for its part, has introduced a special criminal law on international crimes in the transitional post-conflict period. For Ukraine, which is carrying out this process simultaneously with an active conflict, these are minimal requirements rather than ideal models.

The first and most urgent proposal *de lege ferenda* is to amend the Criminal Code of Ukraine in order to supplement Chapter XX. First, add a separate element of crimes against humanity as defined in Article 7 of the Rome Statute [12]. Secondly, to criminalize the illegal restriction of humanitarian access as an independent element of the crime. Thirdly, to amend the provisions on the responsibility of the commander: the current version of Article 438 of the Criminal Code of Ukraine provides for liability only for the direct commission of a crime, while Article 28 of the Statute also covers the inaction of the commander who knew or should have known about the crimes of his subordinates.

The second area of reform is the adoption of a special law “On Cooperation between Ukraine and the International Criminal Court”, which should determine the procedure for fulfilling the ICC’s requests, the conditions for the transfer of persons, the exchange of evidence and the protection of witnesses. Accordingly, similar laws have been adopted in the Netherlands, Austria and some new EU member states. Without such a law, Ukraine, despite this active interaction with the ICC *de facto*, is deprived of a clear *de jure* legal mechanism that the defense can use to challenge the admissibility of evidence.

6. Conclusions

Based on the results of the scientific research, we conclude that the gap between conventional obligations and national legislation – largely criminal – is not just a technical problem that can be corrected by one national legislative act. It arises due to the lack of a systematic concept of war (implementation of IHL) in the legal tradition of Ukraine, the roots of which go back to the approaches of the Soviet era, when international treaties were ratified as declaratory obligations, and not as mandatory norms.

The study confirmed the initial hypothesis that the identified gaps are systemic and not specific. However, the author is forced to warn against a naïve parallel with the experience of the Baltic States: Latvia, Lithuania and Estonia have reformed their criminal legislation in the field of IHL in peacetime and under the influence of unambiguous institutional incentives for potential EU membership – Ukraine is deprived of this operational balm. The proposed amendments to the Criminal Code and the adoption of the law on the ICC are necessary, but insufficient, and without a certain interagency general adaptation program, they risk becoming local lats of a systemic problem.

The scientific value of the article, in my opinion, lies not so much in the list of recognized gaps – they are to some extent obvious to practitioners – but in an attempt to comprehend “adaptation in conflict” as a separate legal phenomenon, which, therefore, requires its own methodological tools. Classic studies of IHL implementation take into account the time distance between conflict and reform; The Ukrainian case renders this distance non-existent, making Ukraine not just an object of study, but a potential source of new doctrinal experience for international law.

Among the promising areas of further research, first of all, it is necessary to mention the comparative experience of Croatia, Georgia and the Baltic States – not as ready-made templates, but as contrasting cases that will help us more accurately outline the contours of “conflict” adaptation. The problem of protecting the rights of IDPs in judicial practice after 2022 deserves special attention, and the impact of ICC practice on the formation of national criminal law is also an area where theory and practice have not yet met – and Ukraine, given the scale of its participation in international criminal justice, has a unique potential for the development of this area.

Therefore, effective counteraction to war crimes committed against Ukraine and the Ukrainian people requires the formation of an integral state and legal mechanism for the practical implementation of the norms and provisions of international humanitarian law. Such a mechanism should be based on systemic and interrelated changes in the legislative, organizational and institutional planes. First of all, it is about improving criminal legislation by supplementing the Criminal Code of Ukraine with new corpus delicti, which would directly provide for responsibility for violation of the norms of IHL and ensure proper qualification of acts in accordance with international standards. At the same time, it is important to introduce effective organizational mechanisms, in particular, the creation of specialized monitoring and control and supervision missions for compliance with IHL norms with the broad involvement of civil society institutions, which will contribute to increasing transparency, objectivity and trust in the process of documenting and investigating war crimes. Institutional support is also of key importance, which provides for the development and adoption of appropriate legislation for the functioning of the Office of the Commissioner for International Humanitarian Law as a central element of the system of coordination, control and implementation of IHL norms under martial law. Taken together, these measures form the basis of an effective mechanism for bringing perpetrators to justice, ensuring the inevitability of punishment and establishing the principle of the rule of law in the field of human rights protection during armed conflict.

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