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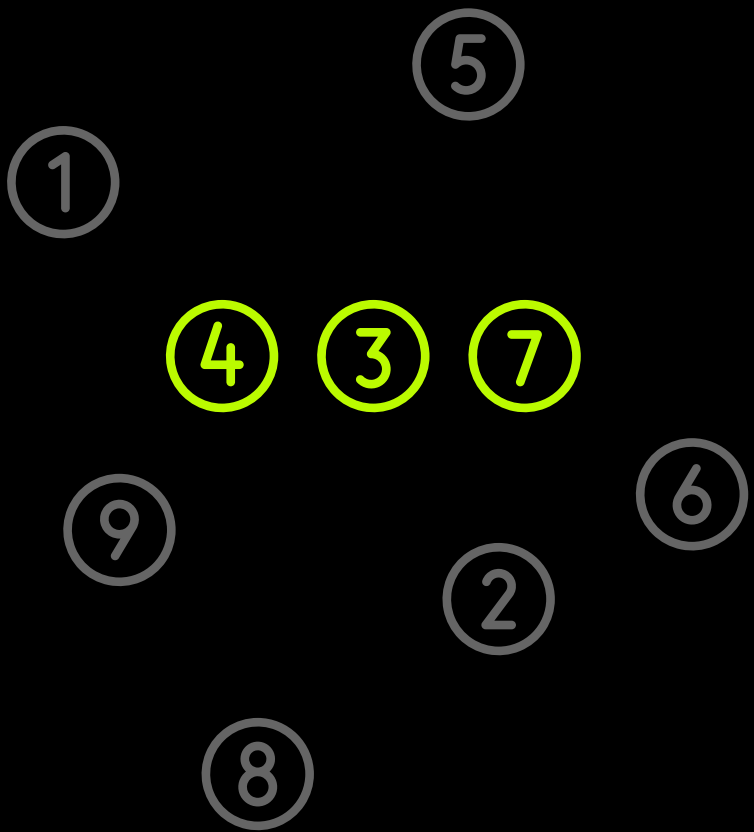

LEGAL ANALYTICS

Sources of interpretation of Article 438 of the Criminal Code of Ukraine

TRUTH HOUNDS

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Sources of interpretation of Article 438 of the Criminal Code of Ukraine

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LEGAL ANALYTICS

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TRUTH HOUNDS

Ukrainian civil society organization specializing in documenting and investigating international crimes and serious human rights violations in Ukraine and other conflict-affected regions of Eastern Europe, the Caucasus, and Central Asia.

Problem statement

1. Since 2014, despite the ongoing armed conflict in Ukraine, alleged war crimes either did not acquire systematic qualification on a domestic level, being defined as general criminal offences or were considered with a vague reference to Article 438 of the Criminal Code of Ukraine (CCU) without indicating a specific violation of international humanitarian law, which the article mentioned above covers.

2. Since February 2022, the scale of committed war crimes has increased drastically. For this matter, the need to develop a systematic and holistic approach to interpreting Article 438 of the CCU and to form an indicative base of sources for its interpretation is more acute than ever.

3. Thus, to provide a comprehensive and step-by-step interpretation of Article 438 of the CCU, one should do the following:

    - To consider that the comprehensive analysis of the blanket disposition of Article 438 of the CCU is possible only by referring to the relevant international treaties on the "laws and customs of war", the consent to the binding nature of which was granted by the Verkhovna Rada of Ukraine
    - To identify such relevant international treaties that have been ratified by Ukraine and that thematically satisfy the requirements of Article 438 of the Criminal Code of Ukraine
    - To establish which violations of these international treaties can be criminalized under Article 438 of the Criminal Code of Ukraine
    - To establish subsidiary sources for the systematic interpretation of the provisions of the Article, namely the practice of at least the following international courts and tribunals:

        - International Tribunal for Rwanda (ICTR)
        - Special Court for Sierra Leone (SCSL)
        - International Criminal Tribunal for the former Yugoslavia (ICTY)
        - International Criminal Court (ICC)
        - European Court of Human Rights (ECtHR)

Main sources and approaches to the interpretation of Article 438

4. Article 438 of the Criminal Code of Ukraine establishes criminal liability for "cruel treatment of prisoners of war or civilians, deportation of civilian population to

engage them in forced labour, pillage of national treasures on occupied territories, use of methods of the warfare *prohibited by international instruments*, or any other violations of rules of the warfare *stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine*, and also issuing an order to commit any such actions". (The translation is unofficial, but widely used and posted on the website of the Verkhovna Rada of Ukraine.[1] In turn, the authors note its imperfections, e.g., the phrase 'international instruments' instead of 'international law', but will use it for the sake of unification.)

5. The reference to *international law* means that the composition of a [war] crime within the framework of Article 438 implies the dual illegality nature of the provision: it is punishable under both national law and international law. Although there are alternative readings of such reference,[2] given the presence of both universal and special forms of crime in the article, the most balanced interpretation may be achieved if one follows the legislative interpretation *ejusdem generis.* According to the latter, "all [four] special forms of the crime under Article 438, as intended by the legislature, constitute manifestations of violations of the laws and customs of war" mentioned in the fifth - universal form of the crime.[3] For this matter, the phrase "international law" (instead of "international treaties", which is a narrower concept) in the fourth special form does not in itself criminalise either violations of international customary law or IHL treaties that Ukraine has not ratified. Thus, the complex analysis of the Article 438 disposition essence is only possible with reference to the relevant international treaties concerning "laws and customs of war" and "consent to the binding nature of which was granted by the Verkhovna Rada of Ukraine".

6. For a correct interpretation of the article, it is first of all necessary to dwell upon the meaning of "laws and customs of war" implied by the legislator when drafting the provision. In the international law literature of the first half of the twentieth century, this wording was used as a synonym with the Hague Conventions of 1899 and 1907 and the so-called "law of the Hague". As time passed, the semantic content of "laws and customs of war" has changed and, at least since the 1980s, its meaning has broadened its spectrum to the wider range of IHL treaties. Today, the majority of researchers and practitioners of

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[1] *The Criminal Code of Ukraine (Article 438).* Official web-portal of the Parliament of Ukraine, URL.

[2] *Implementation of norms of international humanitarian law at the national level in Ukraine*, (2016). Global Rights Compliance LLP, p. 37

[3] Zadoya K., (2017). Criminal liability for war crimes committed in the territory of Donbas. Criminal Law, Vol. 33, p. 20

international law and Ukrainian criminal law specifically,[4] follow the broad interpretation of the concept of "laws and customs of war", meaning that the latter includes the provisions of both the Hague Conventions and other international IHL treaties.[5]

7. Given that the analysed provision of the CCU does not contain a list of treaties, the breach of which should result in criminal liability, the next step is to identify such treaties. At least the following international agreements thematically (in terms of their subject/topic) meet the requirements of the Article and have been ratified by Ukraine:[6]

    a) The Hague Convention on the Laws and Customs of War (1907)
    b) The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous and Other Gases, and of Bacteriological Methods of Warfare (1925)
    c) Four Geneva Conventions of 1949 and three additional protocols to them (1977 and 2005)
    d) Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), and two protocols thereto
    e) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972)
    f) Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1976)
    g) Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980) with five Protocols thereto
    h) Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction (1993)
    i) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention of 1997)

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[4] *Ibid.,* p. 20-21

[5] This logic echoes the logic used by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its first case Prosecutor v. Duško Tadić. *Prosecutor v. Duško Tadić* (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* IT-94-1-AR72, ICTY, 2 October 1995, para. 87, URL.

[6] A separate discussion may take place as to when international treaties concerning the CCU should be adopted or ratified so that their violation could entail liability under national criminal law, however, this issue is not relevant in the context of this case.

j) The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (2000)
k) The International Convention for the Protection of All Persons from Enforced Disappearance (2006).

8. Then it is necessary to establish which specific violations of the above-mentioned international treaties are criminalized by Article 438 of the CCU. The article does not provide the answer to this question directly. However, it is quite obvious that it cannot imply the violation of all the existing provisions of these treaties. This straightforward conclusion dwells upon the very nature of these treaties: they always contain provisions that do not establish specific rules on the conduct of armed conflict or the protection of its victims (for example, provisions with the treaty definitions, objectives of the treaty, rules for establishing or operating information bureaux, aid societies, and other organisations that help achieve the goals of the treaties). In addition to that, the aforementioned treaties include norms that do not classify acts as criminal unless they reach a certain level of social harm for the committed acts to be qualified as criminal (such as norms on the salaries payment to prisoners of war or their correspondence).

9. Thus, not all violations of treaties on the laws and customs of war are criminally punishable. The definition of the norms referred to in Article 438 requires, first and foremost, the identification of the sources that a Ukrainian court may use to specify the range of norms of treaties on the laws and customs of war, the violation of which may be considered a crime.

10. One of the obvious sources that can help establish a list of norms, the violation of which should be criminally punishable, are the listed above international treaties themselves. It is worth noting that Article 3 of the CCU explicitly states that "laws of Ukraine on Criminal Liability must comply with the provisions contained in existing international treaties, the binding nature of which was granted by the Verkhovna Rada of Ukraine". Thus, the interpretation of norms that directly refer to international agreements of Ukraine is only reasonable once the respective international agreement is analysed comprehensively. It should be noted that the wording used in the context of Article 3 (and Article 438) as to the adoption of the Verkhovna Rada of a certain treaty should be understood in the light of the provisions of Articles 6 and 7 of the Law on the Succession of Ukraine. Therefore, both Article 3 and Article 438 of the CCU also apply to the treaties on the laws and customs of war between the Ukrainian Soviet Socialist Republic and the USSR, in respect of which Ukraine is the successor state.

11. Articles 49 of the Geneva Convention (**GC**) I, 50 GC II, 129 GC III, 146 GC IV, 86 of Additional Protocol I, Article 28 of the Hague Convention for the Protection of Cultural Party call on States to prosecute the parties violating the Convention. All the mentioned international treaties, except the last one,

require the criminalisation only of serious IHL violations (*grave breaches*). Articles 50 GC I, 51 GC II, 130 GC III, and 147 GC IV contain a list of acts that should be considered serious breaches of the respective treaties. This list is similar for all conventions, although it contains crime-specific offences. For example, GC I lists serious violations of the convention: "*willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly*".

12. GC IV offers the following catalogue of such violations: *"wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".*

13. Focusing primarily on Articles 50 of GC I, 51 GC II, 130 GC III, and 147 GC IV to determine the main list of *corpus delicti* is in line with the teleological and systematic approaches[7] of interpreting Article 438 of the CCU. This CCU article was adopted to fulfil Ukraine's international obligations arising, *inter alia*, from Articles 49 of GC I, 50 GC II, 129 of GC III, 146 of GC IV, 86 GC I, and 28 of the Hague Convention for the Protection of Cultural Property. This means that the legislator's intentions back in the day in 2001 were to create a more profound system of criminalization for grave breaches of the laws and customs of war than the one existing in the 1960 Criminal Code.

14. As noted above, the list of treaties ratified by Ukraine, which Article 438 of the CCU refers to, is not limited to the four Geneva Conventions of 1949 and Additional Protocol I thereto. This means that a reference merely to Articles 50 GC I, 51 GC II, 130 GC III, and 147 GC IV is not enough to compile a complete list of *corpus delicti* relevant to the interpretation of Article 438 of the CCU. In addition, the Geneva Conventions themselves allow and encourage the establishment of penalties (though not necessarily criminal) not only for serious violations of the Convention's provisions.

15. A similar problem of determining the explicit catalogue of war crimes when dealing with a broad and blanket norm at one time appeared before the International Criminal Tribunal for former Yugoslavia (**ICTY**). Thus, the Tribunal

[7] Systematic interpretation means clarifying the content of a legal norm by establishing its legal connections with other norms. Teleological (targeted) interpretation is called elucidation of the content of a legal norm through the establishment of its intended goal.

had to interpret Article 3 of its Statute, which directly referred to "violations of the laws and customs of war". The Tribunal paid particular attention to the historical significance which presupposed the existence and wording of the Article, i.e., the desire of the UN Security Council to put an end to all serious violations of international humanitarian law occurring on the territory of the former Yugoslavia, and not only to their most serious forms – "grave breaches" of the Geneva Conventions or the "Hague law" violations. As further described by the ICTY, Article 3 realizes the primary purpose of the establishment of this ad-hoc tribunal, i.e., not to leave unpunished any person guilty of violations of IHL, regardless of the context of committing such a violation and the severity of its form.[8]

16. Although such violations may not necessarily acquire the most serious forms (*grave breaches*), the Tribunal nevertheless "deemed it fitting to specify the conditions to be fulfilled for Article 3 of the Statute to be applicable". In other words, ICTY had to determine which acts are recognised as "violations of the laws and customs of war" and defined the following list of requirements for it: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. Further, the Tribunal went on to emphasize that the nature of the conflict – of international or non-international character – in which the "serious violation" occurred does not matter as long as the four conditions listed above are met.[9]

17. Thus, references to "violations of the laws and customs of war" in national law do not necessarily imply grave breaches of international humanitarian law. Serious violations of the laws and customs of war do not necessarily have to be understood identically in every case[10] in the way it is formulated in the Geneva

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[8] *Prosecutor v. Duško Tadić* (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* IT-94-1-AR72, ICTY, 2 October 1995, paras. 87-93, URL.

[9] *Prosecutor v. Duško Tadić* (*Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction),* IT-94-1-AR72, ICTY, 2 October 1995, paras. 94-95, URL.

[10] In different jurisdictions in war crimes trials, courts have interpreted IHL violations in a broad way. This mainly concerned the fact that any serious violations of the GC can be considered as crimes also in the case of non-international armed conflict, though the GCs concern only international conflicts: Arklof case in Sweedish court, Nzabonimana and Ndashyikirwa case in Belgium courts, etc. Ferdinandusse W., (2009). *The Prosecution of Grave Breaches in National Courts.* Journal of International Criminal Justice, p. 734. In Ukraine, a similar approach can be applied due to the lack of a clear line between international and non-international armed conflicts

Conventions or the case law of international criminal courts.[11] Nevertheless, the list of serious violations of the laws and customs of war of the Geneva Conventions, as well as other violations of the laws and customs of war, which entail international criminal responsibility under the Rome Statute of the International Criminal Court (ICC), are unambiguously punishable under Article 438 of the Criminal Code of Ukraine.

Subsidiary sources of law that help to interpret Article 438 of the Criminal Code of Ukraine

18. Since Article 438 of the CCU is of blanket character, a further interpretation of its components may be achieved by resorting to subsidiary sources, i.e., the practice of international courts. The practice or case law of international courts is not mentioned in the legislation (let alone in the Criminal Code) as a source of Ukrainian law. However, the possibility of its application follows from the principle of a friendly attitude to international law[12] (or the doctrine of interpreting the Constitution in a manner friendly to international law[13]). This principle was formulated in the Decision of the Constitutional Court of Ukraine № 2-рп/2016 providing that "*the Constitutional Court of Ukraine takes into account the provisions of international treaties in force the binding nature of which was approved by the Verkhovna Rada of Ukraine and the practice of interpretation and application of these treaties by international bodies whose jurisdiction is recognized by Ukraine, in particular by the European Court of Human Rights*".[14]

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in the Instruction on the Procedure for Implementing International Humanitarian Law in the Armed Forces of Ukraine

[11] Ferdinandusse W., (2009). *The Prosecution of Grave Breaches in National Courts.* Journal of International Criminal Justice, p. 734.

[12] For an interpretation of the principle, see also the article by the rapporteur judge in the cited case of the Constitutional Court of Ukraine. Shevchuk S., (2011). *Consistency of the practice of the European Court of Human Rights and the Constitutional Court of Ukraine.* Bulletin of the Constitutional Court of Ukraine, Vol. 4-5, p. 123, URL.

[13] *Separate Opinion of Judge Lemak V. V. on the Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 59 MPs of Ukraine on the compliance of Article 368-2 of the Criminal Code of Ukraine with the Constitution of Ukraine (constitutionality)*, Constitutional Court of Ukraine, 26 February 2019, URL.

[14] *Decision in the case on the constitutional petition of the Ukrainian Parliament Commissioner for Human Rights on the compliance with the Constitution of Ukraine (constitutionality) of the third sentence of part one of Article 13 of the Law of Ukraine 'On Psychiatric Care' (case on judicial*

19. Decision № 2-рп/2016 should be seen as establishing a roadmap for the interpretation of international legal categories by all national courts.[15] In other words, not only the Constitutional Court but also courts of general jurisdiction, in order to fall within the constitutional framework proclaimed by the Court, must participate in *transjudicial communication,*[16] or interaction with international courts recognised by Ukraine's international courts, in order to interpret for themselves the relevant categories of international law, taking into account their interpretation in other jurisdictions.

20. Decision № 2-рп/2016 calls on the courts to use the practice or case law of international courts "whose jurisdiction was recognized by Ukraine". There is no concept of "recognition of the jurisdiction of an international court" in Ukrainian legislation. However, Ukraine has recognized the jurisdiction of several categories of courts in one way or another: 1) courts established based on conventions ratified by Ukraine (European Court of Human Rights, UN International Court of Justice, International Tribunal for the Law of the Sea); 2) courts in the creation or modification of the statutes of which Ukraine participated (International Tribunal for Rwanda (**ICTR**),[17] Special Court for Sierra Leone (**SCSL**);[18] 3) courts with which Ukraine has concluded international agreements (**ICTY**);[19] 4) international courts whose jurisdiction Ukraine has recognized by a special statement of the Verkhovna Rada of Ukraine (**ICC**).[20]

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control over the hospitalisation of incapacitated persons to a psychiatric institution), No. 1-1/2016, Constitutional Court of Ukraine, 1 June 2016, URL.

[15] The author of the Constitutional Court Decision No. 1-1/2016 indirectly indicates the use of the principle by courts of general jurisdiction in his article: Shevchuk S., (2012). *The Principle of Subsidiarity in the Activities of the European Court of Human Rights and the Need to Harmonise Case Law.* Phoenix, p. 83, URL.

[16] For more detailed information on the concept: Dupré C., (2003). *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*. Hart Publishing, URL.

[17] Ukraine, as a temporary member of the UN Security Council, voted in favor of the Security Council resolution on amendments to the ICTR charter: *Unanimously adopting resolution 1329 (2000), Security Council decides to establish pool of ad litem judges in former Yugoslavia Tribunal,* (2000). Meetings Coverage and Press Releases, URL.

[18] Ukraine voted for the creation of SCSL: *Resolution 1315 (2000) / adopted by the Security Council at its 4186th meeting, on 14 August 2000,* (2000). Naciones Unidas Biblioteca Digital, URL.

[19] *Agreement between Ukraine and the United Nations on the Execution of Sentences Passed by the International Criminal Tribunal for the Former Yugoslavia*. Official website of the Parliament of Ukraine, 16.05.2012, URL.

[20] Ukraine recognized ad hoc jurisdiction of ICC by Verkhovna Rada statements of February 25, 2014 and of February 4, 2015: *Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court on Ukraine's recognition of the jurisdiction of the International Criminal Court over*

21. Thus, the practice or case law of international criminal courts such as the ICTR, the ICTY and the ICC can be used to specify Article 438 crimes.

22. Perhaps most important here is the case law of the ICC, as the most modern court, whose activities are based on predetermined (in the Rome Statute and the so-called Elements of Crimes)[21] elements of each specific *corpus delicti* of a war crime. As the ICC prosecutor stated in response to Bosco Ntaganda's appeal, unlike other statutes of international criminal tribunals, "the ICC statute not only defines crimes that fall under its jurisdiction [but], taking a stricter approach to the principle of legality, defines elements of crimes".[22] Article 8 of the Rome Statute proposes a catalogue of war crimes subdivided into various categories, which are undoubtedly considered to be violations of the laws and customs of war. The Rome Statute includes both grave breaches of the 1949 Geneva Conventions and other violations of international treaties on the laws and customs of war ratified by Ukraine. The Elements of Crimes are a source of law for the ICC additionally offer a specific list of components of each particular war crime, which, in line with the position of the Constitutional Court, can be used to determine the *corpus delicti* of offences under Article 438.

ECHR case law regarding international crimes

23. As Article 438 of the CCU does not clarify many of the categories used in it, the principle of *nullum crimen sine lege* ("no punishment without law") is an important guideline for clarifying elements of war crimes. This principle is enshrined in Article 58 of the Constitution of Ukraine and numerous international treaties, in particular in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (**ECHR**). In this context, this principle is important because the interpretation of terms and

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crimes against humanity committed by senior state officials, which led to particularly grave consequences and mass murder of Ukrainian citizens during peaceful protests between 21 November 2013 and 22 February 2014. Official website of the Parliament of Ukraine, 25.02.2014, URL; *Resolution on the Statement of the Verkhovna Rada of Ukraine 'On the Recognition by Ukraine of the Jurisdiction of the International Criminal Court over the Commitment of Crimes against Humanity and War Crimes by Senior Officials of the Russian Federation and Leaders of the DPR and LPR Terrorist Organisations, which Led to Particularly Grave Consequences and Mass Murder of Ukrainian Citizens'.* Official website of the Parliament of Ukraine, 04.02.2015, URL.

[21] *Elements of Crimes*, (2011). International Criminal Court (ICC), ISBN No. 92-9227-232-2, URL.

[22] *Prosecutor v. Bosco Ntaganda (Corrected version of "Prosecution's Response to Ntaganda's 'Appeal from the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9'", 17 February 2017),* ICC-01/04-02/06-1794, ICC, 21 February 2017, para. 42

concepts under Article 438 in relation to war crimes must correspond to the one that the accused could have foreseen at the time the act was committed. When interpreting this principle, it is necessary to consider the case law of the Constitutional Court and the European Court of Human Rights (**ECtHR**) (as required by the law On the implementation of decisions and application of the case law of the European Court of Human Rights).

24. To date, the ECtHR has developed a wide range of cases interpreting Article 7 of the ECHR.

25. In *Jorgić v. Germany,* the ECtHR pointed out that to satisfy the requirements of Article 7 of the Convention, two cumulative criteria must be met: accessibility and predictability.[23] The ECtHR further assessed whether a German court's interpretation of genocide as a crime that may not necessarily threaten a group's physical or biological existence was predictable. Today, the majority of case law of international criminal courts interpret genocide as a crime that requires intent to physically or biologically destroy a group. Relying on domestic law, the German court determined that it was sufficient for the intent to be aimed at destroying the group as a social unit. In order to assess the foreseeability of such a step by the German court, the ECtHR asked whether the accused Jorgic, after receiving legal advice, could have considered such an expanded interpretation of the national court possible.[24] The ECtHR draws an affirmative answer to this question from a significant number of scholarly works that support this broad interpretation of genocidal intent when committing the crime. Moreover, the ECtHR referred to several ICTY decisions that chose a similar German–extended approach to the interpretation of the crime of genocide.[25] All of the mentioned made the Court adjudicate that *Jorgić* could have foreseen the nature of the decision made by the German court. Therefore, the ECtHR did not find a violation of Article 7 in this case.

26. In *Kononov v. Latvia*, the ECtHR considered the predictability of criminal law in a slightly different context. The case concerned the application of the latest Latvian criminal code to the acts that took place in 1944 — at a time when national law did not comprise a single word about the concepts of war crimes or violations of the laws and customs of war. Similarly to the previous case, the ECtHR did not find a violation of Article 7 of the ECHR in terms of the predictability of the judgment. According to the Court, even an ordinary soldier

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[23] *Case of Jorgić v. Germany,* No. 74613/01, ECtHR, 12 October 2007, para. 100

[24] *Ibid.*, para. 110

[25] *Ibid.*, paras. 111-112

could not be unaware of certain limitations imposed on conducting a war,[26] e.g., the execution of civilians is a clear violation of IHL. At the time the crime was committed, such acts were qualified as a violation of international law. The Court paid particular attention to Kononov's command position in the army. The ECtHR argued that Kononov's high position in the military hierarchy only strengthened his ability to foresee the consequences of possible wrongdoings, e.g., in the form of criminal prosecution for violating IHL.[27]

27. Thus, in the context of insufficient certainty of the national criminal law on the issue of international crimes, the ECtHR in its decisions relied on the key (im)possibility for one to foresee that specific acts could be considered criminally punishable at the time they were committed. For this matter, the Court relied on the provisions of international treaties of the relevant period, the practice of international criminal courts, the doctrine and authoritative IHL commentaries.

28. Following the logic of the ECtHR, when applying Article 438 of the CCU it is necessary to be similarly balanced in identifying the specific elements of each war crime. Such a list of elements should find its 'support' in the relevant international treaties, in the practice of international courts and authoritative commentaries on international IHL treaties, and therefore be predictable and foreseen for a potential violator of the laws and customs of war at the time of the offence.

Application of the definition of [war] crimes proposed by the Rome Statute of the International Criminal Court

29. Even with a wide range of sources for the interpretation of Article 438 of the CCU being in place, the question of adverting to the Rome Statute as a source for the interpretation of this article remains relatively unanswered. This is explained by the fact that the Rome Statute offers a convenient catalogue of war crimes, and the Elements of Crimes attached to it provide an explicit description of the elements of each particular war crime. Ukraine signed the Rome Statute back in January 2000, and still has not ratified it.[28] Nevertheless, the very act of signing the Rome Statute carries the power to impose legal obligations on Ukraine — ones stipulated by the Vienna Convention on the Law

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[26] *Case of Kononov v. Latvia,* No. 36376/04, ECtHR, 17 May 2010, para. 236

[27] *Ibid.*, para. 238

[28] Kersten M., (2022). *After all this time, why has Ukraine not ratified the Rome Statute of the International Criminal Court*. Justice in Conflict, URL.

of Treaties **(VCLT)**.[29] Within the framework of Article 18 of the Vienna Convention, a signatory state is obliged to act in good faith and refrain from acts which by their nature would "defeat the object and purpose of a treaty".[30] Thus, by signing the Rome Statute itself, a state expresses its intention to abide by the provisions of the treaty and expresses its intention to ratify the treaty in the future (unless the state asserts otherwise, such as in the case of the United States and Israel).[31] Furthermore, the signature of a treaty also signifies the adoption and authentication of its text by the signing state.[32] This statement is also consistent with the decision of the International Court of Justice in the Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Thus, the Court indicated that the treaty signature constitutes a first step towards participation in the treaty and establishes a certain "provisional status in favour of that signatory state".[33] In light of the obligations imposed on the signatory states by Article 18 of the VCLT and the object and purpose of the Rome Statute relayed from its Preamble and preparatory works ('travaux préparatoires'), it is reasonable to assume that such obligations, among other things, may consist in the signatory states' refraining from establishing their own interpretation of crimes, in particular, war crimes, which would be terminologically and essentially different from the one proposed by the Rome Statute. The general rules of treaty interpretation provided in Article 31 of the VCLT set out the obligation to interpret a treaty in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Therefore, it is possible to assume that even the very act of Ukraine's signature of the Rome Statute two decades ago imposes on it an obligation to at least refrain from its own, different from the one provided by the Rome Statute, interpretation of [war] crimes and allows for referral to the Statute when interpreting the Article 438 of the CCU, at least when dealing with international crimes.

Conclusions

30. Hence, in the reality of continuous and daily incidents of the alleged war crimes committed on the territory of Ukraine, the necessity of creating a toolbox for the interpretation of Article 438 of the CCU and designating the relevant sources

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[29] *Vienna Convention on the Law of Treaties*. United Nations, 23 May 1969, vol. 1155, p. 331

[30] *Ibid.*; Article 18

[31] Klamberg M., (2017). *Commentary on the Law of the International Criminal Court.* TOAEP, pp. 752-753

[32] *Ibid.*

[33] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. ICJ, (1951), p. 17

for such interpretation is at stake. The blanket disposition of the article refers to international treaties on the "laws and customs of war", the consent to the binding nature of which was granted by the Verkhovna Rada of Ukraine. If it is not possible to identify such relevant international treaties from the text of the provision itself, it is proposed to refer to such international treaties that thematically satisfy the requirements of the analyzed article of the CCU. Further, it is required to directly identify the treaty provisions that can be considered criminally punishable within the framework of Article 438 of the CCU (which, in terms of the level of social harm and the degree of severity, reach the necessary level for the qualification of the act as criminal) and refer to the subsidiary sources for the treaty interpretation, such as the practice of international courts (ICJ, ICTY, SCSL, ICTR, ECtHR). Finally, when interpreting the norm, it is suggested to also refer to the Rome Statute, in relation to which Ukraine is a signatory state, i.e., embracing the obligations dictated by Article 18 of the Vienna Convention on the Law of Treaties. Such obligations may include, *inter alia*, to refrain from acts which would defeat the object and purpose of the treaty, i.e., constructing one's own definition of [war] crimes, different from that proposed by the Rome Statute.