

PROPOSALS AND ALGORITHMS FOR CRIMINAL LAW AND CRIMINAL PROCEDURE ACTIONS IN FULFILLING REQUIREMENTS OF ARTICLE 615 OF THE CRIMINAL PROCEDURE CODE OF UKRAINE

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Summary

The article is devoted to the analysis of scientific approaches to determining the essence of criminal law and criminal procedure characteristics of offenses committed in the occupied territories of Ukraine. Attention is paid to the need to distinguish between the following scientific concepts: "criminal law characteristics of a certain type of a criminal offense", "criminal law characteristics of a group of crimes", and "forensic characteristics". The problem of shaping a criminal law characteristic as a system of generalized data on the generic elements of criminal offenses, given their connections, is considered. The author emphasizes the practical significance of the relevant characteristics in managing the investigation of offenses committed in the occupied territories of Ukraine and formulating methodological recommendations for the pre-trial investigation of the specific group of criminal offences. In addition, there is a lack of an overall study of the internal processes determining the development of foundations for specific methods of investigation of offenses in domestic criminology. Since the relevant process is natural, there is an objective need to elaborate methods for solving tasks characteristic of all cases of investigation. In that context, the author provides a list of comprehensive, in his opinion, proposals and algorithms for criminal law and criminal procedural actions in fulfilling the requirements of Art. 615 of the Criminal Code of Ukraine by prosecutors and investigators of law enforcement agencies of Ukraine.

Key words: methods of investigation, military operations, full-scale war, temporarily occupied territories of Ukraine, specific and interspecific methods of investigation of offenses.

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1. Introduction

In formulating a scientific concept on the development of theoretical foundations of criminal law and criminal procedure qualification of offenses committed in the occupied territories, it is necessary to determine the main categories acting as the research subject. In the case at hand, one of the main categories is the criminal law definition of certain offenses following the requirements of Art. 615 of the Criminal Procedure Code of Ukraine (CPC of Ukraine) (*Kryminalnyi kodeks Ukrainy*). To accomplish the goal, it is essential to identify research lines and objectives, find a coordinated interpretation of the main category by

scientists and legal practitioners, and define the concept of the criminal law characteristics of the crime concerned.

The research subject of criminal law science is the criminal offense as a specific action (omission) of the entity, behavior, or act of a person or group of persons prohibited by criminal law (*Honcharenko, Nor, Shumylo, 2012*). Scientists in various branches of humanities, natural and technical sciences made a significant contribution to analyzing the phenomenon of crime (criminal offense) and criminality as a social phenomenon. Thus, research findings are presented in the works of academic criminologists, forensic scientists, and specialists in criminal psychology and other legal sciences.

Analysis of recent research and publications. The classification of offenses upon criteria and qualification of socially dangerous acts fell under the notice of such criminal law specialists as P. P. Andrushko, Ya. M. Brainin, M. V. Volodko, A. A. Hornytskyi, V. A. Klymenko, M. N. Kovalov, P. K. Kryvoshein, V. K. Matviichuk, P. S. Matyshevskiy, V. M. Smitiienko, V. V. Stashys, S. A. Tararukhin, and V. Ia. Tatsii. The socio-political essence of crime was investigated in the contributions of V. V. Durdynets, O. M. Lytvak, M. I. Melnyk, O. V. Mykychuk, H. O. Omelchenko, O. V. Skrypnyuk, O. S. Sainchyn, V. I. Shakun, and others.

Domestic and foreign scientists specializing in criminology, criminal law, and criminalistics considered some aspects of military offenses, namely: V. I. Andreitsev, M. I. Verevycheva, O. V. Vynogradova, S. B. Havrysh, V. O. Hlushkov, A. P. Hetman, S. A. Holub, V. K. Hryshchuk, O. M. Dzhuzhi, O. O. Dudorov, S. O. Knyzhenko, A. G. Kniazhev, M. I. Korzhanskyy, V. V. Kostytskyi, Z. H. Korcheva, V. A. Landina, B. M. Leontiev, N. O. Lopashenko, V. K. Matviychuk, M. I. Melnyk, I. I. Mytrofanov, V. O. Navrotskyi, O. V. Oderiy, V. D. Pakytin, Ye. A. Plotnikov, H. S. Polishchuk, V. M. Prysiazhnyi, B. H. Roskovskiy, N. L. Romanov, O. V. Sasov, T. L. Serhieiev, O. V. Skvortsova, V. V. Stashys, V. Ia. Tatsiy, V. P. Tykhyi, M. I. Khavroniuk, S. V. Khyliuk, D. B. Churakov, O. I. Chuchaiev, Yu. S. Shemshuchenko, V. A. Shyrovkov, and A. M. Shulha.

Statement of article goals. There is currently no consensus on an algorithm for criminal law actions in qualifying criminal offenses adopted as of February 24, 2022, within Art. 615 of the CPC of Ukraine. That fact does not contribute to a clear understanding of the relevant terms by scientists and practitioners (*Honcharenko, Nor, Shumylo, 2012; Oderii, 2015*).

2. Presentation of basic material

On the morning of February 24, 2022, the troops of the Russian Federation unleashed full-scale hostilities against the state of Ukraine. The President and the Verkhovna Rada of Ukraine adopted legislative acts required for the work of state authorities and citizens, in particular, the Decree of the President of Ukraine “On General Mobilization”, the Law of Ukraine “On Approval of the Decree of the President of Ukraine “On the Imposition of Martial Law in Ukraine”, the Law of Ukraine “On Approval of the Decree of the President of Ukraine “On General Mobilization”, the Law of Ukraine “On the Fundamentals of National Resistance”, the Law of Ukraine “On the Imposition of Martial Law in Ukraine”, the Law of Ukraine “On the Legal Regime of Martial Law”.

One of the ensuing adverse effects evident in the Ukrainian cities temporarily occupied by terrorist groups and Russian military units is a significant increase in crime and particularly serious crimes against the person, i.e., felonious homicide, robbery, theft, extortion, etc.

The number of recorded offenses for the period of hostilities has almost tripled over the past 8 years in Ukraine. The military prosecutor’s office registered criminal proceedings, but

there was no examination of the crime scene and the victims, and the whereabouts of more than 600 have not yet been established. Since February 2022, the commission of all categories of offenses has increased sharply. Before the de-occupation of the territory of Ukraine, some offenses are attributed to a latent account. More than 2,300 persons of military personnel are in captivity by militants, the military of the Russian Federation, and their condition is unknown to law enforcement agencies of Ukraine.

Based on the complex of perception and fixation, the information found should be grasped by the search subject, as follows: a) its potential or actual involvement in the relevant event is clarified; b) its nature and source of acquisition are clarified (people as carriers of ideal and tangible traces, items, documents, tracks); c) its form of representation (verbal, alphanumeric, digital, graphic, magnetic recording, video recording, etc.) is determined; d) it is decoded as necessary, that is, its content and value are clarified and conveyed from one semiotic system to another using specific knowledge and hardware and software.

The author shares the above point of view and strives to add that acquired information should be kept for further storage, analysis, and use. Amidst intelligence operations, information is recorded in all cases using procedural means and hardware and software according to the investigator's decision. Therefore, information recording includes the actions taken by the relevant subject of investigation aimed at procedural, technical-forensic, or operational consolidation and certification of acquired information (in some cases, together with its carrier) in the manner required by law and bylaws for further examination, storage, and use.

As Ukraine has not implemented the norms of international humanitarian law into the national criminal legislation in terms of not prosecuting combatants for participating in hostilities against Ukraine, law enforcement agencies should provide a legal assessment of their actions under the requirements of the Criminal Code of Ukraine.

In particular, armed attacks on the territory of Ukraine and any related actions should be qualified as an encroachment on Ukraine's territorial integrity and inviolability. Thus, Part 3 of Art. 110 of the Criminal Code of Ukraine (following the qualifying factors of commission of actions by a group of persons upon a prior conspiracy which caused harsh consequences) is considered the key qualification of specific actions of servicepersons of the Russian Federation, members of the terrorist organizations "Donetsk and Lugansk People's Republics", and mercenaries of the private company "Wagner" (*Kryminalnyi kodeks Ukrainy; Zakon Ukrainy vid 12.08.2014, No. 1631-VII; Zakon Ukrainy vid 27.04.2021, No. 1422-IX; Zakon Ukrainy vid 15.03.2022, No.2125-IX*). At the same time, depending on the commission by individuals of other actions related to armed aggression, they should be qualified as follows.

1) The facts of armed attacks on military formations and military facilities shall be qualified under Part 3 of Art. 110 of the Criminal Code of Ukraine (CC of Ukraine) (according to qualifying factors – upon a prior conspiracy by a group of persons, which caused harsh consequences); the actions of persons from among the top brass of the Armed Forces of the Russian Federation are qualified under Art. 437 of the CC of Ukraine.

2) The facts of armed attacks on civilian objects and the civilian population shall be qualified under Art. 438 of the CC of Ukraine (if as a result of shelling, artillery or air strikes, civilians who are not participating in hostilities were injured or killed, or civilian infrastructure objects were damaged – residential buildings, hospitals, schools, kindergartens, private enterprises, etc., that are not military targets).

3) The facts of armed attacks on industrial or other facilities, the damage of which may lead or have led to an environmental catastrophe (for example, shelling of fuel storage facilities, radioactive waste storage facilities, buildings and structures of hydroelectric power plants,

nuclear power plants, thermal power plants, etc.) shall be qualified under Art. 441 of the CC of Ukraine “Ecocide”.

4) In case of detention of soldiers from the aggressor country’s regular troops during a military clash, their actions shall first be qualified under the totality of Part 3 of Art. 110 of the CC of Ukraine “Infringement of the territorial integrity and inviolability of Ukraine” and Part 3 of Art. 332-2 of the CC of Ukraine “Illegal crossing of the state border of Ukraine” (with the qualifying element “actions provided for in parts one or two of the article, combined with violence or the use of weapons”).

5) In case of detention of persons who are not members of the regular military formations of the aggressor country (for example, servicepersons of the so-called “armed forces of the Donetsk People’s Republic” or other illegal formations), their actions shall be qualified, except for the articles specified in the previous paragraph (Arts. 110, 332-2 – upon preliminary crossing of the state border), under Part 5 of Art. 260 of the CC of Ukraine “Creation of unlawful paramilitary or armed formations” with a qualifying element “participation a member of unlawful armed formations in attacks on business, institutions, organizations or citizens, which have led to harsh consequences”. If the mentioned persons are citizens of Ukraine, their actions are not qualified under Art. 332-2 of the CC of Ukraine.

6) The facts of committing acts that led to the occurrence of the consequences specified in clause 2 shall be additionally qualified under Part 1 of Art. 438 of the CC of Ukraine “Violation of rules of the warfare”. According to Art. 51 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, the civilian population as such, as well as individual civilians, shall not be the object of attack. Indiscriminate attacks are prohibited. According to Article 52 of the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, civilian objects shall not be the object of attack or of reprisals. Civilian objects are all those that are not military.

7) The facts of the use by the aggressor country’s military of the uniforms or insignia of the Armed Forces of Ukraine and other military formations for concealment shall be additionally qualified under Part 1 of Art. 438 of the CC of Ukraine “Violation of rules of the warfare”, since such actions are expressly prohibited by Part 2 of Art. 39 of the Protocol Additional to the Geneva Conventions of 12 August 1949. The actions of persons who use the symbols of international organizations (for example, the UN, the Red Cross Society), the press, etc. for concealment shall be qualified similarly. Such actions are prohibited by Art. 39 of the Additional Protocol.

8) In case of detention of persons who committed sabotage or were preparing to commit them, their actions shall be qualified (including an attempt or preparation for crime):

– under Arts. 111 and 113 of the CC of Ukraine if such actions are committed by citizens of Ukraine;

– under Arts. 110 and 113 of the CC of Ukraine if such actions are committed by citizens of foreign states.

At the same time, the participation of sabotage-reconnaissance groups in the armed confrontation with the Ukrainian military does not contain elements of sabotage within the meaning of the requirements of Art. 113 of the CC of Ukraine. In that case, the actions of participants of sabotage-reconnaissance groups shall be qualified under para. 4.

9) In case of detention of persons who set marks on the ground, their actions should be qualified:

– under Art. 111 of the CC of Ukraine if these persons are citizens of Ukraine who assist a foreign state in conducting subversive activities against Ukraine;

– under Art. 110 of the CC of Ukraine, additional qualification as organizers or accomplices in a crime is applied if these actions are committed by citizens of Ukraine to assist the armed forces of the aggressor country in the landing of enemy troops or conducting other military operations;

– under Part 1 of Art. 14, Art. 113 of the CC of Ukraine “Diversion” (in addition) if there are elements of preparation for sabotage.

10) The facts of committing acts not directly related to the attack on the Armed Forces of Ukraine or other military formations but aimed at reducing their combat capability (blocking traffic, disseminating “fake” information inhibiting the activities of the armed formations of Ukraine, etc.) shall be qualified under the specific act provided for in Art. 114-1 of the CC of Ukraine “Obstruction of the legitimate activities of the Armed Forces of Ukraine and other military formations”.

It is worth keeping in mind that the armed formations, in addition to the Armed Forces of Ukraine, consist of the National Guard of Ukraine, the State Border Guard Service of Ukraine, the Security Service of Ukraine, the State Guard Service of Ukraine, the State Special Transport Service of the Ministry of Defense of Ukraine, the State Service for Special Communications and Information Protection of Ukraine, the Intelligence Body of the Ministry of Defense of Ukraine, the Foreign Intelligence Service of Ukraine, etc.

12) It is necessary to determine the “basic” criminal proceedings under Art. 110 of the CC of Ukraine for each area falling under Russian invasion and clashes, which will accumulate information about the Russian military corpses (subject to investigative and procedural work). The Security Service of Ukraine will be vested with the pre-trial investigation. In case of acquiring or registering information about the discovered corpses of Russian servicepersons (participants of sabotage-reconnaissance groups or unlawful armed groups) by housing management organizations, it should be accumulated in the specified criminal proceedings. Therefore, investigators of the National Police or public prosecutors, if possible, examine corpses and death sites and collect physical evidence to confirm their identification, belonging to the party to the conflict (if possible, identify and confiscate mobile phones; military tickets, orders, and other documents; distinguishing and identification marks of the dead (confirming the identity, military formations, position, etc.)). During the examination, the weapons of the dead are recorded, and withdrawal issues are settled as applicable. Forensic examinations for such corpses are not appointed (*Sainchyn, 2018; Syvodied, 2021*).

13) An algorithm for the application of Art. 615 of the CPC of Ukraine is as follows. If investigating judges are precluded from exercising their powers within the time limits established by law, their powers defined in Art. 615 of the CPC of Ukraine are entrusted to the public prosecutor (procedural manager).

The State Judicial Administration of Ukraine must regularly update a list of temporarily inactive courts to make objective delegation of authority to public prosecutors. In the absence of such a list (the SJA needs more time) or a specific court in the list, the public prosecutor (procedural manager), on an individual basis, decides on the investigating judge’s inability to exercise his powers. Any additional documents and reports are not required, but the circumstance can be documented via the investigator’s report addressed to the public prosecutor.

If a decision on the application of Art. 615 of the CPC of Ukraine is approved, the public prosecutor (procedural manager) decides on temporary access, search, covert investigative (detective) activities, and custody in the form of a resolution. Filing of motions is not required. The resolution shall state that on February 24, 2022, due to the military aggression of the Russian Federation against Ukraine, martial law was introduced by the Decree of the President of

Ukraine No. 64/2022 from 05:30 on February 24, 2022, for 30 days, while the investigating judges of a particular court cannot fulfill their powers within the time limits established by law (they are specified with reference to the article of the CPC of Ukraine), hence, the decision is made by the public prosecutor under Art. 615 of the CPC of Ukraine.

The resolution shall meet the requirements of Art. 110 of the CPC of Ukraine, as well as the requirements for the decision made following the consideration of the relevant request. The extension of terms of covert investigative (detective) activities is carried in similar fashion.

14. Criminal proceedings with the completed pre-trial investigation shall be forwarded to the Appeal Court of a particular region to establish jurisdiction; in case of impossibility of considering the issue by the mentioned court, they shall be forwarded to the nearest Appeal Court of another region, which can consider it.

15. The facts of common criminal offenses (for example, looting, infliction of bodily harm, destruction of property, etc.) shall be qualified under general norms of the CC of Ukraine and special – Art. 294 of the CC of Ukraine, and act following the procedure provided for in Art. 615 of the CPC of Ukraine.

16. In criminal proceedings upon which persons have not been notified of suspicion and the terms of proceeding investigation expire, a decision on termination following paras. 2, 3 of Part 1 of Art. 284 of the CPC of Ukraine shall be made if it is impossible to extend the terms in a prescribed legal procedure.

17. In criminal proceedings upon which persons are notified of suspicion and the terms of the investigation of the proceedings expire, the territorial jurisdiction shall be changed over the territory where the courts and prosecutors work through the Office of the Prosecutor General.

18. Current lists of persons held in pre-trial detention facilities, indicating the terms of detention, qualifications and severity, shall be compiled and controlled.

By relying on the general concept of criminal law, the author believes that other offenses, which will be introduced into the CC of Ukraine, can be further specified using the proposed algorithm.

Taking into account the peculiarities of conducting warfare and the liberation of the previously occupied territory where the court has not yet begun operate, it should be borne in mind that the head of the prosecutor's office is authorized with the below provided that it is objectively impossible for the investigating judge to perform his duties: to resolve issues on the occasion (Art. 140 of the CPC of Ukraine); seizure of property (Art. 170, 173 of the CPC of Ukraine); on permission to conduct a search of a dwelling or other possession of a person (Art. 234 of the CPC of Ukraine); on obtaining samples for examination (Art. 245 of the CPC of Ukraine); consideration of applications for temporary access to items and documents (Art. 163, 164 of the CPC of Ukraine); on permission to conduct secret investigative (search) actions (Art. 250 of the CPC of Ukraine); on the prolongation of the pre-trial investigation within the terms specified in paras. 2,3 of Part 3 of Art. 294 of the CPC of Ukraine (Art. 294 of the CPC of Ukraine), interrogation, identification via videoconference during the pre-trial investigation (Art. 232 of the CPC of Ukraine). Decisions on the above issues are made in the form of resolutions and shall contain a proper justification of legitimacy to exercise the powers of an investigating judge by the head of the prosecutor's office. At the same time, the head of the prosecutor's office is entrusted with the obligation to enjoy the rights of the person who is subject to a preventive measure of detention under Art. 206 of the CPC of Ukraine, including the verification of the legality of such detention.

3. Conclusions

Amidst the military aggression of the Russian Federation against Ukraine, the collection of evidence, its relevance and admissibility are extremely important for achieving the objectives of criminal justice and bringing the perpetrators to liability, proving their guilt in court. The author regards proposals and algorithm of criminal law and criminal procedure actions in meeting the requirements of Art. 615 of the CPC of Ukraine effective. Thus, they should be considered by officials, who conduct the pre-trial investigation and supervise compliance with laws during the pre-trial investigation in the form of procedural guidance of the pre-trial investigation, in practice.

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