



Some aspects of improvement of understanding combat immunity under Ukrainian criminal legislation

Vadym Khashev*

PhD in Law, Associate Professor
 Dnipro State University of Internal Affairs
 49005, Nauky Ave. 26, Dnipro, Ukraine
<https://orcid.org/0000-0002-2240-0713>

Ruben Antonyan

Adjunct
 Dnipro State University of Internal Affairs
 49005, Nauky Ave. 26, Dnipro, Ukraine
<https://orcid.org/0009-0006-5377-9240>

Abstract. The full-scale invasion of russian troops caused the immergence in Ukrainian criminal legislation of new rules, aimed at raising the effectiveness of combating this military aggression. Among these rules one of the key ones is the article 43.1 of the Criminal Code of Ukraine, regulating the combat immunity. The research paper's objective was the development of some suggestions concerning interpretation of combat immunity and the improvement of its regulation under Ukrainian criminal legislation. While conducting this research the authors used in particular the following methods: gnoseological, systemic-structural, dialectical, logic-semantic and comparative-legal. Some proposals to improve regulatory framework of circumstances excluding criminal illegality of action stipulated by the Criminal Code of Ukraine were elaborated, as well as interpretation of its some attributes. The suggestion was to exclude the definitions of "ammunitions" and "explosive materials" from the text of the Criminal Code of Ukraine, because under their content they are covered by the understanding of concepts "weapon" and "armament". It was found that when repelling and deterring armed aggression of the russian federation or aggression of another country, it is permissible to use not only armed force, but also any other force capable of striking the enemy, and it is important that such use complies with the rules of international humanitarian law. They emphasised that actions of military personnel or civilians who used poison or other items or weapons prohibited by international humanitarian law to repel and deter the armed aggression of the russian federation, despite the fact that their actions were aimed at countering the occupiers, are subject to criminal liability under Criminal Code of Ukraine. The authors suggested to seek ways of legal possibility to use stricter, except treacherous ones, means and methods of conducting war against armies of those countries, whose armed forces do not absolutely respect rules of international humanitarian law during warfare. The practical value of this work lies in the fact that its results can be used in further research on combat immunity in criminal law, as well as in the application of certain provisions of the Criminal Code of Ukraine in the practical activities of law enforcement agencies

Keywords: laws and customs of war; means of warfare; weapon; armament; circumstances, excluding criminal unlawfulness of action

Introduction

The importance of the chosen research topic lies in the fact that after 24 February 2022, the Criminal Code of Ukraine (2001) was supplemented with several pro-

visions aimed at improving criminal law enforcement against the russian federation's invasion of Ukraine. In order to be effective, these legal provisions require a

Suggested Citation:

Khashev, V., & Antonyan, R. (2025). Some aspects of improvement of understanding combat immunity under Ukrainian criminal legislation. *Philosophy, Economics and Law Review*, 5(2), 60-70. doi: 10.63341/2786-491X-2025-2-60.

*Corresponding author



Copyright © The Author(s). This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (<https://creativecommons.org/licenses/by/4.0/>)

thorough interpretation and, if necessary, the development of proposals for their improvement. In the work by N. Antonyuk (2022) it was pointed out that in the context of the ongoing conflict, with Russia possessing significant military potential, an effective propaganda apparatus and international influence, Ukraine must adapt its criminal law policy in response to the aggression. This situation requires a reassessment of the public danger posed by various acts, taking into account the conditions imposed by martial law.

One of the new rules was the appearance among the circumstances excluding criminal illegality of an act of the circumstance regulated by Art. 43.1 of the Criminal Code of Ukraine (2001). This circumstance is one of the manifestations of broader concept of “combat immunity” giving legal possibility to cause harm to armed aggressor without threat of appearing of criminal liability for repelling and deterring such aggressor’s acts. Criminal law plays a key role in ensuring justice. It is no coincidence that criminal punishment is often determined by the principle of justice, especially in the sense of retribution. In this context, a society outraged by unprovoked and brutal attacks by an adversary demands that the authorities use the most severe means of influence available under criminal law (Yakoviyk *et al.*, 2024). Acting precisely within the framework of combat immunity, it is possible to inflict serious damage on the aggressor without being subject to criminal liability under either national or international law. Accordingly, the question arises as to the correct interpretation of all the characteristics of the aforementioned circumstance, which excludes the criminal illegality of the act, as well as the development of proposals for improving the criminal law provision that provides for it.

The issue of combat immunity in the criminal-legal context is a complex intersection between international humanitarian law (IHL), criminal law and human rights law. Its features were analysed by international courts (the International Criminal Court and tribunals), international organisations (the International Committee of the Red Cross), national courts and authoritative scholars who create the theoretical basis of this legal institution. At the global level, the following fundamental work on this issue by Y. Dinstein (2022) should be noted, where the principal *jus in bello* (law during war) was considered in detail. In this book the author analysed in particular means and methods of current warfare; issues of general non-combatant protection, the principle of proportionality of collateral damage to the civilian population, as well as special protection, particularly of the environment and cultural values; various aspects of the legal regulation of hostilities in Ukraine also have been analysed (Dinstein, 2022). The work by H. Frowe (2023), in which the scholar focusing on philosophical matters concerning modern war ethics, presented the theory of just war and covers in particular such key topics as follows: theories of self-defence

and national defence; *jus ad bellum*, *jus in bello* and *jus post bellum*; combatants’ moral status; humanitarian intervention; weapon and technologies; principle of non-combatants’ immunity; nature of terrorism and terrorists’ moral status. A. Kleczkowska (2023) has paid attention to the use of autonomy weapon, in particular unmanned aerial vehicles, in defensive systems and evaluated conditions of lawfulness of the use of such weapon from the point of view of the right to self-defence.

The work by S. Bosch (2024) explained the content of legal rights, duties and circumstances related to the status of mercenary, combatant and war-prisoner, the legal status of foreign members of the Ukrainian International Legion of territorial defence was studied and the illegality of Russia’s decision to classify these persons as mercenaries was proven. In the research by M. Biszczanik (2024) there was justification of necessity of harmonisation of legal rules on international level for appropriate initiation and conducting criminal proceeding through determination of circumstances excluding jurisdictional, material and personal immunities, thus restoring criminal liability for international crimes. In the work by I. Rosenzweig (2024) author has proposed the revised view *lex ferenda* on the IHL fundamental principles through internationalisation of values of combatants’ lives. This scholar stated that such interpretation of IHL would enable to refuse from automatic need to attack combatants, thus, to regard in proper way the value of combatants’ lives (both adversarial and its own combatants) while assessing the use of force at armed conflicts, in particular through the reduction of military superiority, forced protection and adjusted analysis of proportionality.

Although the aforementioned scientific works do not directly concern legal regulation of combat immunity in Ukrainian criminal legislation, but they can make fundamentals of interpretation of its signs provided for in Art. 43.1 of the Criminal Code of Ukraine (2001), because the aforementioned researches dealt with analysis of different aspects of regulatory framework of rules and customs of war in IHL. As for the Ukrainian scientists’ works, given that Art. 43.1 was added relatively recently, there is no proper case law regarding the interpretation of the provisions contained in this rule. At the same time, among Ukrainian scholars, the mentioned topic is the subject of research. A. Begunts (2022) concluded that immunity is military and civilian, noted the problematic nature of the subject composition of persons entitled to civilian military immunity, and determined the need to use the provisions of IHL to define this category of persons. G. Mamedov & V. Khekalov (2025) in their study have drawn attention to the fact that the application of combat immunity exempts combatants from criminal liability for actions committed during armed conflicts, but combat immunity does not lead to impunity for combatants, since they can be held liable for carrying out a clearly criminal order or for

committing serious international crimes. However, a number of issues related to the correct understanding of “combat immunity” from the point of view of the criminal law of Ukraine remain debatable, which requires further research into various aspects of the legal regulation of the possibility of exercising the right to defend the Fatherland, in particular, in terms of what means can be used to repel and deter the enemy’s armed aggression.

The purpose of this article was to develop some proposals for improving the regulatory framework concerning circumstances excluding criminal illegality of an act, provided for in Art. 43.1 of the Criminal Code of Ukraine (2001), as well as to interpret some of its features. The authors have attempted to find out what tools and means can be used to repel and deter armed aggression of the Russian Federation or aggression of another country, as well as what the conditions for their use should be.

Materials and Methods

The stages of the study were: formulation of a research problem (certain aspects requiring improvement in the understanding of combat immunity in the criminal legislation of Ukraine were identified); definition of the research methodology; bibliographic analysis (scientific sources review); analysis of the current legislation of Ukraine; analysis of the practice of applying certain provisions of Art. 43.1 of the Criminal Code of Ukraine (2001); identification of certain problems; formulation of proposals for the interpretation and improvement of Art. 43.1 of the Criminal Code of Ukraine (2001); conclusions formulation. The study was based on the works of foreign and Ukrainian scholars dealing with analysis of individual components of combat immunity in criminal law, as well as the regulation in the legislation of Ukraine of means of warfare prohibited by international law, other violations of laws and customs of war provided for in international treaties. The relevant regulatory framework has also been analysed, namely: Criminal Code of Ukraine (2001), Order of the Ministry of Defence of Ukraine of No. 164 (2017), Law of Ukraine No. 2114-IX (2022), and so on.

Using the epistemological method, the content of individual components, sources and limits of application and some aspects of the legal justification of combat immunity in criminal law were clarified, in particular, the depth of scientific understanding of the criminal legal liability of persons who repel and deter armed aggression of the Russian Federation was increased. The logical-semantic method contributed to a deeper understanding of the conceptual apparatus of the analysed topic. The system-structural method was useful in studying individual components of the circumstance excluding criminal illegality of the act, provided for in Art. 43.1 of the Criminal Code of Ukraine (2001), as an integral part of the general concept of “combat immunity”. The dialectical method of cognition allowed authors

to clarify the content of individual features of combat immunity in the criminal legislation of Ukraine. Using the comparative legal method features of regulation of the right to use weapons (armament) in repelling and deterring armed aggression of the Russian Federation under criminal legislation of Ukraine (Art. 43.1 of the Criminal Code of Ukraine, 2001) were compared with the provisions of other regulatory legal acts of this state (Law of Ukraine No. 1932-XII, 1991). Thus, the use of a comprehensive research methodology allowed for a full analysis of the legal nature of combat immunity in the context of Art. 43.1 of the Criminal Code of Ukraine.

Results and Discussion

Part 3 of Art. 43.1 of the Criminal Code of Ukraine (2001) contains a provision according to which a person is not subject to criminal liability for the use of weapons (armament), ammunition or explosives against individuals committing armed aggression against Ukraine, and for damage or destruction of property in connection with this. D. Ptashchenko (2022) noted that the provisions of Part 3 of Art. 43.1 of the Criminal Code of Ukraine (2001) “expanded” the list of means by which a person can repel and deter armed aggression of the Russian Federation or aggression of another country: these are not only firearms and ammunition for them, as defined in Law of Ukraine No. 2114-IX (2022), but any weapon, including ammunition, explosives, as well as cold weapons.

According to the literal interpretation of this criminal-legal provision, only the following tools can be used to repel and deter the activities of persons committing armed aggression against Ukraine: weapons (armament); ammunition; explosives. At the same time, to counter the Russian military, Ukrainian citizens can use various tools and means that, at first glance, do not belong to those defined in Part 3 of Art. 43.1 of the Criminal Code of Ukraine (2001). It should be noted that along with the military, the natural right to counter the aggressor is also possessed by “ordinary” citizens who, either with the help of weapons or in another way, destroy enemy equipment, manpower, damage material objects that are used or can be used by the enemy, or otherwise cause harm to him (Begunts, 2022). It is worth noting that international law does not provide for the participation of civilians in armed resistance to aggression. At the same time, the Ukrainian government decided to involve civilians in the resistance, which was an unprecedented step and drew the attention of the international community to the issue of the level of the state’s trust in its own population. The civilians’ desire to participate in deterring armed aggression of the Russian Federation or aggression of another country is evidence of a desire to live in a unitary, sovereign and independent, democratic, social and legal state (Korabel & Pavlenko, 2022). As P. Prikhodko (2022) argued, manifestations of the struggle of the peaceful Ukrainian population against the occupiers at the beginning of the full-scale

invasion were not isolated. It can be assumed that such cases are not excluded at the stage of war as of 2025.

In addition, to eliminate occupiers and the equipment they use for fighting, as well as other property belonging to them, Ukrainians can use various homemade striking devices, including incendiary ones. To defeat the enemy, it is also possible to use objects that are capable of causing bodily harm, but do not belong to the classical understanding of the concepts of “firearms” and “cold weapons”, such as: smooth-bore hunting rifles, kitchen knives, axes and other agricultural equipment, or in general to counteract the enemy only with the help of hand-to-hand combat techniques, setting traps, using objects prepared in advance for causing bodily harm etc. As for the judicial practice of applying the provisions of Art. 43.1 of the Criminal Code of Ukraine (2001), it is rather fragmentary. For example, in Case No. 183/5056/22 (2022), the court recognised that although the accused was pursuing the offender, the accused had the opportunity to stop him by other means, except for firing thirteen shots from an AKS-74 automatic weapon into the back. Because of this, the application of Part 4 of Art. 43.1 was deemed inappropriate, and the exemption from liability was not applied. As N. Shchercbyna (2024) suggested, a shod foot could cause more serious bodily harm than a bare foot, and that there were no objections to the use of knives and axes, and the use of knives and axes does not see any objections. That is, all of the above-listed means, in the author’s understanding, can be recognised as weapons. Therefore, it is necessary to find out whether the specified items are included in the content of those tools that are defined in Part 3 of Art. 43.1 of the Criminal Code of Ukraine (2001). O. Sharmar (2022) has noted that in general, Ukraine does not have a law regulating public relations related to the use of weapons. The Criminal Code of Ukraine (2001) also does not define the concept of “weapons”, and even more so “armament”.

In the first days of the full-scale russian invasion, the Law of Ukraine No. 2114-IX (2022) was adopted, according to Art. 4 of which, during the period of martial law, Ukrainian citizens may participate in repelling and deterring armed aggression of the russian federation and/or other states, using their own award-winning weapons, sporting weapons (pistols, revolvers, rifles, smooth-bore rifles), hunting rifled, smooth-bore or combined weapons and ammunition for them. At the same time, the above provisions limit the civilians’ ability to participate in the defence of their Fatherland only with the specified types of weapons, of which there are usually more. In this context, it should be noted that the draft of the new Criminal Code of Ukraine (2025) contains the definition of the concept of “weapon” in its glossary: weapon – an object (tool, device), except for smooth-bore hunting weapons, which: a) is suitable or can be adapted without the use of special equipment to cause death of a person, harm to his/her health,

combined or not combined with the destruction or damage of a material object, b) has a special legal regime – withdrawn from civil circulation or is subject to a licensing system and c) belongs to one of the following types: firearms capable of firing a bullet, arrow with a diameter of more than 4.5 mm with an initial velocity of 100 or more m/sec; artillery weapons, in particular mortars; grenade launchers; rocket weapons; cold and throwing weapons. However, in this definition, its authors generally embodied a “narrow” understanding of the concept of “weapon”, the content of which includes mainly firearms and cold weapons. It is also important that only those tools that have a special legal regime of circulation are classified as weapons.

In order to clarify the correctness of such a practice, it is advisable to turn to clarifying the meaning of the relevant terms. In the dictionary, the concept of “weapon” was interpreted in three meanings: 1) a tool for attack or defence or a set of means used for waging war or battle, that is, armament; 2) a symbol of military affairs; 3) a means for fighting someone or something that helps achieve a certain goal (in a figurative sense) (Busel, 2005). The following types of weapons were also mentioned: automatic, bacteriological (biological), firearm, smooth-bore, weapons of mass destruction, semi-automatic, rifled, toxic, chemical (including poisonous substances), cold one (Busel, 2005). Instead, the term “armament” refers to a set of means for conducting military operations; military equipment; weapons (Busel, 2005). A comparison of the content of the interpretation of the two above-mentioned terms shows that they have almost identical content, since the term “armament” almost completely reproduces the essence of the concept of “weapons”, is actually a synonym. At the same time, the difference between them is that the content of the concept of “armament” includes the concept of “military equipment”.

The concept of “equipment” refers to a set of objects, devices necessary for something; items of armament, uniforms and household goods of a fighter, as well as devices for their transportation (Busel, 2005). That is, in relation to the analysed article 43.1 Criminal Code of Ukraine (2001), military equipment is not only the weapon itself, but also everything that is not directly a weapon. Therefore, “weapons” are specific tools used to defeat enemy personnel, equipment or objects, individual units, for example: a machine gun, pistol, cannon, grenade, rocket, knife, etc. While “armament” is a systematic set of weapons and equipment that an individual serviceman, unit or army or state as a whole has. Accordingly, for a civilian who repels and deters armed aggression of the russian federation or aggression of another country, weapons can be any objects and tools with which they inflict physical and property damage on the enemy. As for ammunition, they are a component of the concept of “armament”, since they can also be attributed to military equipment. This conclusion is

confirmed by the legislator's position. According to Art. 1 of the Law of Ukraine No. 1991-III (2000) ammunition is a type of weapon intended to defeat enemy personnel, destroy its military equipment, destroy fortifications, structures, and perform other tasks. For example, a Molotov cocktail may be part of the equipment of a person who repels and deters armed aggression of the Russian Federation or aggression of another country, that is, it is a weapon. At the same time, in its essence, it may also be a munition intended to destroy the occupiers' military equipment. The Order of the Ministry of Ecology and Natural Resources of Ukraine No. 56/m (2003) considers ammunition to be one of the types of weapons. It is also appropriate to recognise explosives as a type of weapon, since they can be an integral part of the equipment of a person who repels and deters armed aggression of the Russian Federation or aggression of another country.

According to Art. 1 of the Law of Ukraine No. 2288-IV (2004), explosives are chemicals capable of rapid chemical transformation under the influence of external actions, which occurs with the release of a large amount of heat and gaseous products. In paragraph 6 of the Resolution of the Plenum of the Supreme Court of Ukraine No. 3 (2002), it is noted that explosives include gunpowder, dynamite, TNT, nitroglycerin and other chemical substances, their compounds or mixtures capable of exploding without access to oxygen. Moreover, the above-mentioned substances, compounds and mixtures are an integral component of ammunition. Criminal law scholars also support this opinion. For example, V.V. Holubosh (2020) has concluded that ammunition and explosives are related as a general and a partial, because the latter are an integral component of ammunition, from which explosives can always be obtained. In Part 3 of Art. 43.1 of the Criminal Code of Ukraine (2001) the general concepts of weapons (armaments) were used, which encompassed the meaning of the concepts of ammunition and explosives. Such legislative use of terms, the meaning of which may coincide, is called a hidden tautology, in the case of which, as Z.A. Trostyuk (2000) rightly noted, the subsequent repetition in sign design is different, although the meaning of such terms is completely or partially the same. Hidden tautology leads to a violation of the requirements of clarity, comprehensibility and brevity of the conceptual apparatus, therefore hidden tautology must be eliminated, because terms that are different in sound create the illusion that they are different in meaning. This creates additional difficulties in studying legislation and in law enforcement. That is, the question arises as to the appropriateness of the existence of concepts of "ammunition" and "explosives" in the text of Part 3 of Art. 43.1 of the Criminal Code of Ukraine (2001).

In this context it should be noted that Law of Ukraine No. 1932-XII (1991) was amended by the concept of "combat immunity" which means the exemption

of military command, military personnel, special police officers of the National Police of Ukraine, volunteers of the Territorial Defence Forces of the Armed Forces of Ukraine, law enforcement officers who, in accordance with their powers, participate in the defence of Ukraine, persons specified by Law of Ukraine No. 2114-IX (2022), from liability, including criminal liability, for the loss of personnel, military equipment or other military property, the consequences of the use of armed and other force during the repulsion of armed aggression against Ukraine or the elimination (neutralisation) of armed conflict, the performance of other tasks for the defence of Ukraine with the use of any type of weapon (armament), the occurrence of which, taking into account reasonable caution, could not have been foreseen when planning and carrying out such actions (tasks) or which are covered by justified risk, except in cases of violation of the laws and customs of war or the use of armed force as defined by international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine. That is, according to this definition, when repelling and deterring armed Russian aggression, both combatants and civilians may use not only armed, but also any other force that strikes the enemy. But taking into account the provisions of Part 1 of Art. 43.1 Criminal Code of Ukraine (2001) it is important that the use of authorised armed and other force does not violate the laws and customs of war regulated by IHL.

Regarding the connection between Art. 43.1 of the Criminal Code of Ukraine (2001) and IHL, the limits exceeding of legality established by this article will mean a violation of IHL rules, and serious violations of IHL rules are war crimes, which are primarily criminalised by the rules of international criminal law. IHL is a system of legal regulatory of conducting armed conflicts in order to limit their consequences for the civilian population, the wounded, prisoners of war, as well as objects that do not participate in hostilities. In the context of the armed aggression of the Russian Federation against Ukraine, compliance with IHL rules is not only a legal obligation, but also an element of moral, strategic and political legitimacy not only of the Armed Forces of Ukraine, but also of other formations and individual citizens who repel and deter Russian aggression.

D. Ptashchenko (2022) stated that Part 1 of Art. 43.1 of the Criminal Code of Ukraine (2001) refers to the means of waging war, as well as violations of the laws and customs of war, which are: war criminal offenses; such offenses must have a "double" illegality: the acts are prohibited not only by international criminal-legal rules, but also in accordance with Part 3 of Art. 3 of the Criminal Code of Ukraine (2001) and the provisions of the criminal legislation of Ukraine (for example, the legal components of crimes provided for in Art. 438, 439 of the Criminal Code of Ukraine, 2001). To find out which means of warfare are prohibited under international law, it is advisable to refer to the Order of the Ministry

of Defence of Ukraine No. 164 (2017). Although this document is addressed only to military personnel and employees of the Armed Forces of Ukraine in order to ensure their compliance with the principles and rules of IHL, it is nevertheless important for the study and interpretation of IHL provisions as a whole, as it contains the results of the analysis of international treaties (Voznyuk & Zhuk, 2022). This normative document summarises the main provisions of universal IHL acts relating to the definition of the laws and customs of war.

Thus, according to paragraph 2 of Chapter 3, Section I of the Order of the Ministry of Defence of Ukraine No. 164 (2017), the means of warfare prohibited by international law include: explosive bullets and bullets that easily unfold or flatten in the human body (bullets with a hard shell that does not completely cover the core or has notches); poisons, toxic substances and highly toxic substances; bacteriological (biological) and toxic weapons; any weapon whose action consists in inflicting damage with fragments that are not detected in the human body by X-rays; mines designed to explode from the presence, proximity or direct impact of a person, which disable, maim or kill one or more people; any self-deactivating mines equipped with a non-removal element that can function after the mine has lost its ability to trigger; booby-traps (any device or material, other than anti-personnel mines, that is designed, constructed or adapted to kill or injure, and that is triggered suddenly when a person touches or approaches a seemingly harmless object or performs a seemingly safe action), which are in some way connected or associated with internationally recognised protective emblems, signs or signals, as well as with other items (objects) that do not pose a danger to humans (wounded or dead, medical equipment, kids toys, etc.). The above provision establishes an absolute prohibition in the conduct of war to use certain alternative means that may cause excessive suffering; not to distinguish between civilians and military personnel; to violate the principles of humanity, distinction and proportionality.

It should be noted that the Ukrainian servicemen, when conducting hostilities, generally adheres to the provisions of the above-mentioned regulatory act, and accordingly to the IHL rules, while the Russian side, in order to gain a military advantage, constantly violates the rules and customs of warfare. As noted in the article War crimes of the Russian Federation against Ukraine: The Office of the Prosecutor General spoke about the most common ones (2025), as of May 2025, according to the Office of the Prosecutor General of Ukraine, since February 24, 2022, more than 160,000 cases of war crimes committed by Russian servicemen have been officially recorded, among which the largest part is violations of the laws and customs of war (Criminal Code of Ukraine, 2001).

Having analysed the IHL acts on the restriction or prohibition of the use of certain means of warfare,

M. Zubansky (2023) noted that such prohibitions state that the parties to an armed conflict should be guided by the following provisions: the requirements of humanity are higher than the needs of the parties in the course of waging war; states during hostilities must set a single goal, which is to weaken the enemy's forces; to achieve the goal in war, it is enough to incapacitate (injure) the largest number of people, and not necessarily to destroy them; the use of weapons that cause unnecessary suffering to the enemy or make death inevitable is recognised as contrary to the legitimate goal of waging war; the use of the above-mentioned weapons is in contradiction with the requirements of humanity. That is, according to the IHL provisions the criteria for prohibiting the means of warfare are, in particular, the indiscriminate action of such means and the possibility of causing excessive harm and unnecessary suffering by their use (Botnarenko & Kryzhna, 2024).

As G. Mamedov & V. Khekalov (2025) pointed out, the main principles that parties should be guided by in an armed conflict are as follows: the distinction between military necessity, proportionality and humanity. These principles define key limitations in order to reduce the potential consequences of an armed conflict. Violation of these principles, depending on their nature, can be perceived as an international crime. These principles remain unchanged and are used to evaluate any new methods and means of warfare. Accordingly, the means and methods used in modern wars must comply with the long-established and fixed IHL principles. The principle of military necessity imposes the requirement that the use of the minimum amount of force that combatants are required to use to achieve a military objective is permissible. This requirement is crucial for considering the possibility of using a weapon system, both for lethal and non-lethal purposes (Blanchard & Taddeo, 2022). According to IHL, combatants are legitimate targets. However, although the combatant's right to life is diminished and limited, it should not and cannot be completely rejected. Combatants have the right to life and an inherent human value that cannot be deprived of. This value must be respected and protected from arbitrary deprivation (Rosenzweig, 2024).

In support of the importance of adhering to IHL rules regarding the admissibility of the use of new or prohibited types of weapons, it is worth noting that a revision of the relevant provisions that would legalise the use of new means of destruction could lead to a large-scale escalation of weapons and a loss of control over restrictions on the military operations conduct, namely, to the fact that in the future inventors will only care about the effectiveness of weapons, and not about their legality, since they will know that the international legal framework can be adjusted in any case. Thus, while nations are allowed to seek ways to counter new threats to their security, they must adhere to basic legal principles for the sake of international peace and security (Kleczkowska, 2023).

G. Mamedov & V. Khekalov (2025) noted that in military and political history there are known cases when military commanders and soldiers, who were considered national heroes in their country, were recognised as war criminals for committing international crimes and cite as an example the case of the Bosnian-Croat politician and general Slobodan Praljak, convicted to 20 years of imprisonment for torture and mass murder, destruction of civilian infrastructure and cultural heritage in the city of Mostar. It is important to prevent a similar scenario from recurring for the command staff and military personnel of the Armed Forces of Ukraine. The above scholars' theses of also apply to civilians. Thus, the use of poison and other prohibited means by both military and civilian citizens to destroy the enemy is a violation of the norms of IHL and national criminal legislation.

Although the issue of the legality of their use may arise in the context of just defence against an aggressor's invasion, from the point of view of law and justice the answer must be negative. Recognising the above actions as complying with warfare rules may be an argument for the aggressor to legitimise its war crimes, referring to the right to give a "symmetrical response". In addition, recognising cases of violations of IHL rules as lawful may harm the image of Ukraine as a state governed by the rule of law, since this state clearly declares its compliance with the provisions of this area of law, which is key to international support from the states of the democratic world. However, it is very difficult and exhausting to conduct combat operations with strict compliance with the laws and customs of war and at the same time obtain positive results against the military forces of those countries that almost completely do not comply with IHL rules. Furthermore, as K. Amarasinghe (2021) noted, the rapid development of science and technology and the polarisation of power relations may call into question the ability of law to adapt in regulating human behaviour, especially in the most dramatic circumstances of war.

Accordingly, in times of conflict and transformation of international relations, nations need to find new ways to identify shared interests and signal a willingness to abide by certain norms. As P. Stephan (2022) suggested this may mean designing rules that nations will abide by while maintaining the plausible possibility of denying that their observance constitutes a broader obligation to cooperate or any indication of the regulatory influence of the rule of law. It is useful to refer to the experience of regulating combat immunity in other countries, in particular in the United States of America. The Federal Tort Claims Act (Contino & Kuersten, 2023) provides for the preservation of national immunity from civil liability for the actions of the military during combat operations in times of war. Although the legislative materials do not contain a clear explanation of the purpose and scope of this exception, case law indicates that it is aimed at preventing domestic or foreign law from interfering with the activities of the armed forces

during hostilities, as well as ensuring the freedom of decision-making by military commanders without the risk of civil prosecution.

The concept of combat immunity is not enshrined in the criminal legislation of the Republic of Poland, therefore the relevant actions are considered to have been committed lawfully if they contain all the signs of necessary defence, in accordance with Art. 25 of the Criminal Code of the Republic of Poland (1997). At the same time, Law of Poland No. 1228 (2024) was supposed to supplement Art. 25a, which regulated immunity in border defence, namely: exemption from criminal liability of military personnel, border guards and police officers for the use of firearms or force in cases of: repelling a direct and illegal attack on the border or personnel; protection of life, health or freedom; necessary actions in situations requiring urgent intervention. However, the official text of the code as of April 9, 2025 does not contain the mentioned rule. Accordingly, it can be assumed that Law of Poland No. 1228 (2024) did not enter into force because it was heavily criticised by Polish legal scholars and the Council of Europe Commissioner for Human Rights as giving military personnel and other officers a "license to kill."

The German Criminal Code (1998) also does not contain the concept of combat immunity, and cases of using weapons against the enemy during hostilities, in order to provide grounds for exemption from criminal liability, must include features such as self-defence or excusable emergency. The Law on the Legal Status of Soldiers (1956) contains provisions defining the personal responsibility of military personnel for each act they commit. In addition, every soldier must carry out the orders of their commanders to the best of their ability, fully, conscientiously and without delay. An order may not be executed if it would constitute a criminal offense. If a soldier executes such an order knowingly, that soldier will be liable on an equal footing with the person who gave the order.

In France, Art. L4123-12 of the Defence Code. Book I: General Status of the Military (2004) states that a military member who, after warning, uses armed forces that are absolutely necessary to prevent or interrupt any invasion of a territory within which military property is located or deployed, the loss or destruction of which could cause very serious harm to the population or endanger the vital interests of national defence, and to arrest the perpetrator of this invasion, is not criminally liable. Likewise, a military member who, in accordance with international law rules of and within the framework of an operation to mobilise military potential taking place outside French territory or French territorial waters, regardless of its purpose, duration or scale, including numerous actions, the release of hostages, the evacuation of citizens or patrols on the high seas, carries out coercive measures or uses armed force, or gives the order to do so, when necessary for the performance of his mission, shall

not be criminally liable. According to A. Paphiti (2014), in the UK, combat immunity is not regulated by a separate law, but by the general principles of IHL and case law. The analysed immunity was confirmed, in particular, by the cases of *Mulcahy v Ministry of Defence* (1996), *Multiple Claimants v Ministry of Defence* (2003) and *Smith and Others v the Ministry of Defence* (2013), from which it follows that there is no general legal liability for negligence in respect of acts or omissions on the part of those who actually participate in armed combat. However, the question remains open whether this protection covers in a broad sense the preparation or conduct of active operations against the enemy, or whether it is narrowly limited to death/injury of subordinate personnel received during active combat operations.

An analysis of legislation shows that only military personnel have combat immunity, and even then, not in all countries. In Ukraine, however, both military and civilian personnel are granted combat immunity. In addition, combat immunity in the analysed countries is guaranteed not by criminal law, but by other legislative acts regulating the service activities of the military, while in Ukraine this type of immunity is guaranteed both in criminal and other legislation. In this, the legislation of Ukraine is ahead of the relevant legislation of other countries, which is logical, given that it is Ukraine that is waging a military campaign to repel Russian aggression. At the same time, it is important that all legislative acts, including Ukrainian ones, regulate the “honest” rules of waging war against an enemy that adheres to the laws and customs of war. But given the fact that almost all nations in the world have access to modern technologies, including those that completely disregard such rules when conducting hostilities, gaining an advantage over the armed forces of such nations with conventional weapons becomes an almost impossible task. Therefore, at the international level, it is advisable to raise the issue of the legality of using harsher, except for treacherous, means and methods of warfare, with the help of which it is possible to effectively neutralise or destroy a large number of personnel of the enemy army. It is advisable to allow the use of appropriate means and methods in relation to the armed forces of those states that completely disregard the IHL rules when conducting hostilities.

Conclusions

As a result of the study, it was found that when repelling and deterring armed aggression of the Russian

federation or aggression of another country, it is possible to use not only armed, but also any other force that strikes the enemy. However, in order to comply with the provisions of the Criminal Code of Ukraine, it is necessary that such cases of use of armed and other force do not violate the laws and customs of war. The use of poison belongs to one of the manifestations of the use of chemical weapons and belongs to the means of warfare prohibited by the IHL rules. That is, military or civilian persons who, in order to counteract the occupiers, used poison or other objects or means of armament prohibited by the laws and customs of war, despite the fact that their actions were aimed at repelling and deterring the armed aggression of the Russian Federation, are subject to criminal liability under the Criminal Code of Ukraine, since the provisions of the Criminal Code of Ukraine and the IHL rules do not provide grounds for their exemption from criminal liability under the said article. As for other objects and means, if the methods of using the said objects and means do not belong to the means of warfare prohibited by international law, then they can be classified as “weapons” and “armament” and they can be used to repel and deter the armed aggression of the Russian Federation or the aggression of another country and their individual representatives. To improve the regulatory framework of the circumstance that excludes the criminal illegality of an act provided for by the Criminal Code of Ukraine, it is considered appropriate to exclude the terms “ammunitions” and “explosives” from the text of Part 3 of this rule, since in their content they are covered by the understanding of the concepts of “weapons” and “armament”. A promising direction for further research is the search for ways to improve the understanding of combat immunity under IHL and the criminal legislation of Ukraine in terms of regulating the rights of persons who repel and deter armed aggression of a country whose armed forces absolutely do not adhere to the rules and customs of war when conducting hostilities.

Acknowledgements

None.

Funding

None.

Conflict of Interest

None.

References

- [1] Amarasinghe, K. (2021). [The shape of war in the 21-st century: An analysis of the challenges posed by the contemporary armed conflicts with reference to international humanitarian law](#). *International Journal of Law*, 7(1), 1-6.
- [2] Antonyuk, N. (2022). [A criminal and legal assessment of collaborationism: A change of views in connection with Russia's military aggression against Ukraine](#). *Access to Justice in Eastern Europe*, 5(3), 139.
- [3] Begunts, A. (2022). Criminal law characterization of civil combat immunity. *Uzhhorod National University Herald. Series: Law*, 72(2), 116-120. [doi: 10.24144/2307-3322.2022.72.51](#).

- [4] Biszczanik, M. (2024). The inadmissibility of jurisdictional immunity of persons responsible for the commission of international crimes in terms of domestic universal jurisdiction proceedings. *Polish Yearbook of International Law*, 43, 311-321. doi:10.24425/pyil.2024.152304.
- [5] Blanchard, A., & Taddeo, M. (2022). *Jus in bello* necessity, the requirement of minimal force, and autonomous weapons systems. *Journal of Military Ethics*, 21(3-4), 286-303. doi: 10.1080/15027570.2022.2157952.
- [6] Bosch, S. (2024). Exploring the international humanitarian law status of foreign fighters in the Ukrainian international legion of territorial defence. *Potchefstroom Electronic Law Journal*, 27, 1-20. doi: 10.17159/1727-3781/2024/v27i0a14600.
- [7] Botnarenko, I., & Kryzhna, V. (2024). Means of warfare as a subject of a criminal offense provided for in Article 438 of the Criminal Code of Ukraine (violation of the laws and customs of war). *New Ukrainian Law*, 2, 122-131. doi: 10.51989/NUL.2024.2.16.
- [8] Busel, V.T. (Ed.). (2005). *Large explanatory dictionary of the modern Ukrainian language: 250,000 entries (1st ed.)*. Kyiv; Irpin: VTF Perun.
- [9] Case No. 183/5056/22 of the Novomoskovsk City District Court of Dnipropetrovsk Region. (2022, November). Retrieved from <https://reyestr.court.gov.ua/Review/107311829>.
- [10] Criminal Code of Ukraine. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.
- [11] Criminal Code of Ukraine. (2025, April). Retrieved from <https://newcriminalcode.org.ua/upload/media/2025/04/03/00-kontrolnyj-proyekt-kk-02-04-2025.pdf>.
- [12] Ciobanu, C. (2024). *Poland passes law granting soldiers immunity when using firearms at Belarus border*. Retrieved from <https://balkaninsight.com/2024/07/29/poland-passes-law-granting-soldiers-immunity-when-using-firearms-at-belarus-border/>.
- [13] Contino, M.D., & Kuersten, A. (2023). *The federal tort claims act (FTCA): A legal overview*. Retrieved from <https://sgp.fas.org/crs/misc/R45732.pdf>.
- [14] Criminal Code of the Republic of Poland. (1997, April). Retrieved from <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf>.
- [15] Defense Code. Book I: General Status of the Military. (2025, July). Retrieved from https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071307/LEGISCTA000006137720/.
- [16] Dinstein, Y. (2022). *The conduct of hostilities under the law of international armed conflict* (4th ed.). Cambridge University Press. doi: 10.1017/9781009106191.
- [17] Frowe, H. (2023). *The ethics of war and peace: An introduction*. New York: Routledge, Taylor & Francis Group. doi: 10.4324/9780203808160.
- [18] German Criminal Code. (1998, November). Retrieved from <https://dejure.org/gesetze/StGB>.
- [19] Holubosh, V.V. (2020). *Criminal liability for crimes against public safety involving weapons, ammunition, explosives and explosive devices (Articles 262, 263, 263-1, 264 of the Criminal Code of Ukraine): Monograph*. Ivano-Frankivsk: Symphonia forte.
- [20] Kleczkowska, A. (2023). Autonomous weapons and the right to self-defence. *Israel Law Review*, 56(1), 24-40. doi: 10.1017/S002122372200019X.
- [21] Korabel, M.H., & Pavlenko, T.A. (2024). *Criminal law. General part. Educational and methodological complex*. Kharkiv: H.S. Skovoroda Kharkiv National Pedagogical University.
- [22] Law of Poland No. 1228 "On Amendments to the Law – the Criminal Code and Certain Other Laws". (2024, June). Retrieved from <https://dziennikustaw.gov.pl/D2024000122801.pdf>.
- [23] Law of Ukraine No. 1932-XII "On the Defense of Ukraine". (1991, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1932-12#Text>.
- [24] Law of Ukraine No. 1991-III "On State Support for Enterprises, Research Institutes and Organizations that Develop and Manufacture Ammunition, Their Elements and Special Chemical Products". (2000, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/1991-14#Text>.
- [25] Law of Ukraine No. 2114-IX "On Ensuring the Participation of Civilians in the Defense of Ukraine". (2022, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2114-20#Text>.
- [26] Law of Ukraine No. 2288-IV "On the Handling of Explosive Materials for Industrial Purposes". (2004, December). Retrieved from <http://zakon4.rada.gov.ua/laws/show/2288-15>.
- [27] Law on the Legal Status of Soldiers (1956, March). Retrieved from https://www.gesetze-im-internet.de/sgl_BJNR001140956.html.
- [28] Mamedov, G., & Khekalov, V. (2025). International legal regulation of the concept of combat immunity and its application in the conditions of the armed conflict in Ukraine. *International Scientific Journal "Military Science"*, 2(4), 188-205. doi: 10.62524/msj.2024.2.4.16.
- [29] Mulcahy v Ministry of Defence. (1996, February). Retrieved from <https://www.lawteacher.net/cases/mulcahy-v-mod.php?vref=1>.

- [30] Multiple Claimants v Ministry of Defence. (2003, May). Retrieved from <https://www.casemine.com/judgement/uk/5b46f2172c94e0775e7f2184#:~:text=The%20Claimants%20are%20former%20members%20of%20the%20Armed,to%20prevent%2C%20detect%2C%20diagnose%2C%20or%20treat%20such%20illnesses.>
- [31] Order of the Ministry of Defense of Ukraine of No. 164 “On Approval of the Instructions on the Procedure for Implementing the Norms of International Humanitarian Law in the Armed Forces of Ukraine”. (2017, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0704-17#Text>.
- [32] Order of the Ministry of Ecology and Natural Resources of Ukraine No. 56/m “On Approval of the Instructions on the Procedure for the Seizure and Transfer for Storage to the Internal Affairs Bodies of Firearms and Other Weapons and Ammunition Seized from Violators of Environmental Legislation”. (2003, March) Retrieved from <http://zakon2.rada.gov.ua/laws/show/z0298-03>.
- [33] Paphiti, A. (2014). *UK Armed Forces personnel and the legal framework for future operations*. Retrieved from <https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/writev/futureops/law06.htm>.
- [34] Prikhodko, P. (2022). *A grandmother in Mariupol poisoned two occupiers with pies – they left for Russia in zinc coffins*. Retrieved from https://www.dialog.ua/ukr/war/252242_1653125902.
- [35] Ptashchenko, D. (2022). Fulfillment of the duty to protect the Motherland, independence and territorial integrity of Ukraine (Article 43-1 of the Criminal Code of Ukraine): Certain features of legislative regulation. *Legal Scientific Electronic Journal*, 4, 520-532. doi: 10.30525/978-9934-26-223-4-158.
- [36] Resolution of the Plenum of the Supreme Court of Ukraine No. 3 “On Judicial Practice in Cases of Theft and Other Illegal Handling of Weapons, Ammunition, Explosives, Explosive Devices or Radioactive Materials”. (2002, April). Retrieved from <http://zakon5.rada.gov.ua/laws/show/v0003700-02>.
- [37] Rosenzweig, I. (2024). “When you have to shoot, shoot!” Rethinking the right to life of combatants during armed conflicts. *International Review of the Red Cross*, 106(926), 863-896. doi: 10.1017/S181638312400016X.
- [38] Sharmar, O. (2022). Fulfillment of the obligation to protect the Motherland, independence and territorial integrity of Ukraine as a circumstance that excludes criminal wrongfulness of the act. *Herald of the Association of Criminal Law of Ukraine*, 1(17), 24-35. doi: 10.21564/2311-9640.2022.17.257792.
- [39] Shchcerbyna, N. (2024). Understanding the concept of “weapon” in the general part of the Criminal Code of Ukraine. *Legal Scientific Electronic Journal*, 3, 445-448. doi: 10.32782/2524-0374/2024-3/107.
- [40] Smith and Others v Ministry of Defence. (2013, June). Retrieved from <https://www.casemine.com/judgement/uk/5b46f2172c94e0775e7f2184#:~:text=The%20Claimants%20are%20former%20members%20of%20the%20Armed,to%20prevent%2C%20detect%2C%20diagnose%2C%20or%20treat%20such%20illnesses.>
- [41] Stephan, P. (2022). The crisis in international law and the path forward for international humanitarian law. *International Review of the Red Cross*, 104(920-921), 2077-2096. doi: 10.1017/S1816383122000285.
- [42] Trostyuk, Z.A. (2000). *The concept device of Ukraine Criminal Codex Special Part*. (PhD dissertation, Taras Shevchenko National University of Kyiv, Kyiv, Ukraine).
- [43] Voznyuk, A., & Zhuk, I. (2022). General characteristics of signs of objective side of a violation of laws and customs of war. *Bulletin of the Penitentiary Association of Ukraine*, 4(22), 5-19. doi: 10.34015/2523-4552.2022.4.01.
- [44] War crimes of the Russian Federation against Ukraine: The Office of the Prosecutor General spoke about the most common ones. (2025). Retrieved from <https://unn.ua/en/news/war-crimes-of-the-russian-federation-against-ukraine-the-office-of-the-prosecutor-general-spoke-about-the-most-common-ones>.
- [45] Yakoviyk, I., Kharytonov, S., & Zaytsev, O. (2024). *Combatant immunity and the Russian-Ukrainian war: Reopening the debate on a longstanding doctrine*. *Access to Justice in Eastern Europe*, 7(4), 38-66.
- [46] Zubansky, M. (2023). Legal restrictions in the choice of methods and means of warfare. *Uzhhorod National University Herald. Series: Law*, 2(78), 180-185. doi: 10.24144/2307-3322.2023.78.2.28.

Деякі аспекти удосконалення розуміння бойового імунітету за українським кримінальним законодавством

Вадим Хашев

Кандидат юридичних наук, доцент
Дніпровський державний університет внутрішніх справ
49005, просп. Науки, 26, м. Дніпро, Україна
<https://orcid.org/0000-0002-2240-0713>

Рубен Антонян

Ад'юнкт
Дніпровський державний університет внутрішніх справ
49005, просп. Науки, 26, м. Дніпро, Україна
<https://orcid.org/0009-0006-5377-9240>

Анотація. Повномасштабне вторгнення військ російської федерації обумовило появу у кримінальному законодавстві України нових норм, які спрямовані на підвищення ефективності протидії цій військовій агресії. Серед цих норм однією з ключових є ст. 43.1 Кримінального кодексу України, що регламентує бойовий імунітет. Метою роботи була розробка окремих пропозицій з тлумачення бойового імунітету та удосконалення його регламентації за кримінальним законодавством України. При проведенні відповідного дослідження використано, зокрема, наступні методи: гносеологічний, системно-структурний, діалектичний, логіко-семантичний та порівняльно-правовий. Напрацьовано окремі пропозиції з удосконалення нормативної регламентації обставини, що виключає кримінальну протиправність діяння, передбаченої Criminal Code of Ukraine, а також тлумачення її деяких ознак. Пропонується виключити терміни «бойові припаси» та «вибухові речовини» з тексту Criminal Code of Ukraine, оскільки за своїм змістом вони охоплюються розумінням поняттями «зброя» та «озброєння». Встановлено, що при здійсненні відсічі та стримуванні збройної агресії російської федерації або агресії іншої країни, допускається застосування не лише збройної, але й будь-якої іншої сили, що здатна вразити противника, при чому важливо, щоб таке застосування відповідало нормам міжнародного гуманітарного права. Наголошується, що дії військових або цивільних осіб, які для відсічі та стримування збройної агресії російської федерації використовували отруту або інші заборонені міжнародним гуманітарним правом предмети чи засоби озброєння, незважаючи на те, що їх дії були спрямовані на протидію окупантам, підлягають кримінальній відповідальності за Criminal Code of Ukraine. Пропонується здійснити пошук шляхів правової можливості застосування більш жорстких, крім віроломних, засобів і методів ведення війни проти армій тих країн, збройні сили яких абсолютно не дотримуються норм міжнародного гуманітарного права при веденні бойових дій. Практична цінність роботи полягає у тому, що її результати можливо використовувати при подальших дослідженнях бойового імунітету у кримінальному праві, а також при застосуванні окремих положень Criminal Code of Ukraine у практичній діяльності правоохоронних органів

Ключові слова: закони та звичаї війни; засоби ведення війни; зброя; озброєння; обставини; що виключають кримінальну протиправність діяння