

## **РОЗДІЛ 8. КРИМІНАЛЬНЕ ПРАВО**

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### **FORENSIC EXAMINATIONS IN CRIMINAL PROCEEDINGS ON THE FACTS OF PILLAGE**

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The military of the Russian Federation committed many crimes on the territory of Ukraine, such as: mass murders, torture, enslavement or for other purposes of the civilian population of the occupied territory, destruction of residential and infrastructure facilities, robbery of state or private property. The investigation of large-scale war crimes involves the investigation of many events and the conduct of a large number of different forensic examinations.

V. Yu. Shepitko and M. V. Shepitko emphasized that the application of forensic science and expertise is a necessary prerequisite for the investigation of crimes at the local and national levels [1, p. 180].

According to V. V. Bondarenko-Beregovych, the purpose of the examination is to obtain a comprehensive assessment of the collected information regarding the establishment of the time,

place and other circumstances of the occurrence of problems with the object, if necessary, the study of the its production technology, during which its consumer properties are formed [2, p. 22].

The legislative definition of the concept of forensic examination is enshrined in Art. 1 of the Law of Ukraine “On Forensic Expertise”, according to which this is a study based on special knowledge in the field of science, technology, art, crafts, etc. of objects, phenomena and processes with the aim of providing a conclusion on issues that are or will be the subject of judicial review [3].

According to Art. 193 § 1 of the Criminal Procedure Code (hereinafter referred to as the CPC) of Poland, if the establishment of essential facts that are of essential importance for the resolution of the case require certain special knowledge, the court must refer to an expert or experts [4].

In the CPC of Lithuania, experts are divided into experts of expert examination institutions (Article 33) and invited experts (Article 34). An expert of an expert institution has the authority to conduct an examination if he has acquired the right to make certain types of them and received a task from the person who manages the proceedings. He may invite and instruct a person who is not an expert of the expert institution, but whose knowledge and practical experience are sufficient to conduct the examination, with the decision to fulfill it [5].

In Art. 94 of the CPC of Bosnia and Herzegovina states that the examination or reconstruction of the crime scene is carried out with the help of a specialist in criminology or another occupation, who helps in the search, protection and description of traces, takes certain measurements or photographs, makes sketches or photographs or collects other data. An expert may also be invited to inspect or reconstruct the scene if his presence would be useful for the findings [6].

According to the CPC of Ukraine, an expert is a participant in criminal proceedings. According to Art. 69 is a person who possesses scientific, technical or other special knowledge, has

the right in accordance with the Law of Ukraine “On Forensic Expertise” to conduct an expert opinion and who is entrusted with conducting research on objects, phenomena and processes containing information about the circumstances of the commission of a criminal offense, and give a conclusion on issues that arise during criminal proceedings and relate to the field of her knowledge. The conclusions of experts in Ukraine are classified as procedural sources of evidence (Article 84 of the CPC of Ukraine) [7].

A wide public interest is reflected in mass media and official government sources, which publish materials on cases of so-called “marauding”, i.e. illegal actions by servicemen of the Russian army, civilians, representatives of illegal military groups, as well as members of private military companies. These materials relate to the theft of goods from stores and personal property from private buildings.

According to the New Orleans report, the most widely “looted” items have always been disposable diapers, dry shoes, clothing, food of all kinds, and medicine to satisfy their needs. A. Nkub pointed out that people did not focus on looting weapons, jewelry or televisions [8].

While the pay and rations of a soldier at the Battle of Lützen (1632), the land of Saxony-Anhalt (Germany) were intended to be an incentive to join the army, frequent supply interruptions and delayed pay encouraged soldiers to loot, which unfortunately for the civilian population was often quite brutal [9]. That was also evidenced by the autobiographical story of the German mercenary P. Hagendorf [10].

A. Zimmerman and R. Gay assure that there is no official definition of the term “plunder”. However, it should be understood as the unauthorized appropriation or acquisition of property for the purpose of transferring it to oneself or a third party against the will of the rightful owner in their commentary on the Rome Statute of the International Criminal Court [11, p. 452].

Investigating the military conflict in Sudan that has been ongoing since 2018, L. Hemmeda, A. Ahmed, M. Omer note in their article that some hospitals were on the verge of closure due

to widespread looting or unstable water and electricity supplies. In the city of El Geneina, all medical facilities were closed due to attacks, robberies and assaults, as well as looting of central drug sales points, doctors' homes and Red Crescent offices [12].

In addition to the direct impact of the war in Ethiopia (Tigray region), women also suffered indirect and severe consequences of the war. As a result of damage to medical facilities and looting of ambulances, women in labor died at home [13].

The author of the book devoted to the principles of international criminal law, H. Verle, notes that pillage, expressly and unconditionally prohibited by Article 47 of the Hague Convention, is not allowed; private property of no importance to the military economy enjoys absolute protection [14, p. 572].

In the document prepared by the International Committee of the Red Cross regarding Article 8 (...) of the Statute of the International Criminal Court, pillage is defined as “appropriation” [15, p. 45].

This is confirmed by the elements of the crime provided for in Part 8 of Article 2 (b) (xvi), which respectively refer to the fact that the offender (1) must have appropriated certain property, (2) the offender intended to deprive the owner of the property and appropriate it for private or personal use, and that (3) the appropriation took place without the owner's consent [16].

According to Art. 1224 Australian Defense Force edition, no looting. Pillage is the seizure or destruction of private or public property or enemy money by representatives of a belligerent party, usually armed forces, for private purposes [17].

Germany's Law on the Implementation of the International Criminal Code (Section 9. War crimes against property and other rights) punishes anyone who, in connection with an international or non-international armed conflict, “loots ... the property of an opposing party” [18], the Benin Military Manual prohibits looting “even if the city concerned or the territory was taken by storm” [19].

The legal term in Ukrainian legislation refers to the specified crime under Art. 432 of the Criminal Code of Ukraine to

Chapter XIX [20], which automatically requires the suspect/accused to have military status. In the mentioned article, the concept of “pillage” is defined as the theft on the battlefield of things that are with the killed or wounded.

Therefore, the main immediate object of marauding is the combat glory of the Armed Forces of Ukraine and the honor of a serviceman, as well as the order of observing the customs and rules of war; an additional mandatory object is property (*object* of criminal offense, quantity, value, belonging to the killed or injured person). As a general rule, the objective side of any crime consists of an act, which is expressed either in the form of action or in the form of inaction.

In our case, based on the opinion of the legislator, looting should be understood exclusively as active actions consisting in the illegal application or removal without exclusive need of property belonging to someone else, namely, the theft of things located with the killed or wounded; a mandatory feature of the composition is *the time, the circumstances* of taking possession of someone else’s property and the clear *localization* of the place of the crime — the theft of property on the battlefield or in a certain area, the area of active military operations, as well as in the zone (locality located in the rear), which is subject to shelling the enemy. *A person* who has committed a criminal offense is a military serviceman.

On 23.03.2017 № 164 issued the official order of the Ministry of Defense of Ukraine “On the approval of the Instruction on the procedure for the implementation of norms of international humanitarian law in the Armed Forces of Ukraine”. This instruction includes provisions that are based on a significant part of the international law of The Hague and Geneva, and this repeatedly emphasizes the importance of strict adherence to the rules in the conduct of armed conflicts. The instruction also emphasizes that the pillage of populated areas, localities and property of the enemy is a prohibited method and means of conducting military operations and considers it a serious violation of property rights, if it is not justified by military necessity [21].

Scientists believe that carrying out an examination is its purpose and conduct, which should be understood as carrying out expert research [22, p. 82].

Collecting information from open sources (social networks, news sites, blogs, etc.) is possible to view photos and videos of marauding cases. After the examination, the investigator should appoint a *forensic portrait examination* or a *photo, video, sound recording examination* in order to identify the person who committed the criminal offense by voice, face, etc. it is necessary to appoint a computer and technical expertise to avoid traces of editing and editing of photo, video and sound recordings [23, p. 52].

Thus, during the investigation of criminal offenses related to pillage, it is advisable to appoint such examinations as:

1) Forensic medical examination (for investigation of gunshot wounds on clothing, associated with the simultaneous infliction of physical injuries on a person);

2) Genotyposcopic examination (molecular genetic examination) (individual identification (a kind of genetic passporting), establishment of blood kinship at the level of research on the structure of deoxyribonucleic acid (DNA);

3) Dactyloscopic examination (identification of a person by the traces of his hands, which were left at the scene of the incident);

4) Commodity examination (examination of machines, equipment, raw materials and consumer goods);

5) Trasological (identification or determination of the generic (group) belonging of individually determined objects by materially fixed traces — reflections of their trace-forming surfaces; diagnostics (establishment of properties, states) of objects; situational tasks (establishment of the mechanism of trace formation, etc.);

6) Examinations of weapons, traces and circumstances of their use (examination of weapons, traces of weapons, traces of a shot and situational circumstances of a shot).

It is recommended to ask the following questions for the decision of *the forensic medical examination*, among others:

1) Is the injury caused by a gunshot? 2) Which of the holes is the inlet or outlet? 3) What projectile is the injury caused? 4) Which weapon was the shot fired from? 5) What was the position of the victim and the shooter at the time of the shot? 6) What is the direction of the wound channel? 7) Did the fire-arm projectile interact with an obstacle to entering the body? 8) Was the injury caused by one or several shots? 9) What is the sequence of gunshot injuries? 10) Was the wound inflicted by your own hand or anyone's else? 11) Was the mortally wounded person capable for independent actions?

It is recommended to ask the following questions for the solution of *genotyposcopic examination (molecular genetic examination)*, among others: 1) Do the provided biological objects belong to a specific person? 2) Do the remains of a corpse belong to a specific person? 3) Are the persons relatives, whose tissue samples were provided for research?

Approximate list of issues to be resolved by *dactyloscopic examination*: 1) Are there handprints on the object? 2) Are these traces suitable for identifying a person? 3) Are the handprints left by a specific (one) person? 4) Did the same person leave handprints removed in different places? 5) Are there handprints on the object? If it is so, are they suitable for identification? 6) What parts of the surface of the palm have traces left? 7) As a result of which action was the mark left (grabbing, touching, etc.)?

An approximate list of issues that are resolved during *the commodity examination*: 1) What is the value of the research objects on the territory of Ukraine (with an indication of the date on which the assessment must be carried out)? 2) What is the name and purpose of the goods? 3) Do the marking data correspond to the valid product characteristics? 4) What defects does a specific product have? Are these defects significant? Is it possible to sell (use) the product in the presence of detected defects? 5) By which company and when was the product manufactured (provided there is labeling information or relevant accompanying documents)? 6) What is the degree of wear and tear of the object provided for research? 7) What is the amount

of material damage caused to the property owner as a result of damage to this property?

The following questions, among others, are recommended for solving a *traceological examination*: 1) Are the traces left by a given person or traces of shoes taken from another person? 2) What type of shoe did this marks leave? What are its characteristics and special features (size, degree of wear, etc.)? 3) What is the approximate height of the person who has left the tracks? 4) What features of a person's gait were reflected in the "track of footprints"? 5) What is the mechanism of formation of shoe marks? 6) Are there any damages on the clothes provided for research? 7) What is the mechanism of damage formation on clothes? 8) Is there damage to the clothing by tearing, cutting, cutting, etc.? 9) What type of tool (object) caused damage to clothing? 10) Are there traces of friction, pressure, pulling, etc., on the clothes provided for examination? 11) Are the items provided for research causing damage to the clothing? 12) Do the parts of clothing provided for research belong to the same group?

In order to resolve the examination of the weapon, traces and circumstances of its use, among others, it is recommended to ask the following questions: 1) Is the firearm (pneumatic weapon, gas pistol or revolver, domestically produced device for firing cartridges equipped with rubber or metal projectiles with similar properties) object seized from the suspect? 2) In what way (industrial or home-made) was the item (weapon, cartridge) seized from the suspect manufactured? 3) What type, system, model, caliber does this weapon belong to? 4) Is this weapon suitable for shooting? 5) Is this weapon functional? If not, what faults does it have? Do these malfunctions exclude the possibility of a shot? 6) What kind of weapon, system, model, caliber is the cartridge seized from the suspect intended for? 7) To which cartridge (type, model) does the fired casing belong? 8) Could this weapon, under certain conditions (for example, when it falls on the ground, floor, etc.), fire without pulling the trigger? 9) Was a bullet (shot, buckshot) fired from this weapon? 10) Are the given cartridges fired from the weapon provided for the



study? 11) Were the given bullets (cases) fired from the same weapon? 12) From which weapon (type, system, model) was this bullet fired? 13) Were the bullet and the casing provided for the shot as parts of the same cartridge? 14) With which bullet (shot, buckshot) was the last shot fired from a smoothbore rifle (gun barrel)? 15) What caliber was the bullet (shot, buckshot, gunpowder) fired from a smoothbore weapon recovered at the scene (from the victim's corpse)? 16) Was this damage caused by fire? 17) What caliber bullet, type (shell, semi-shell, etc.) caused the damage? 18) What is this damage — input or output? 19) In what direction and from what distance was the shot that damaged the object removed from the scene? 20) What was the position of the weapon relative to the victim (obstacle)?

Forensics are a useful tool in marauding investigations, as they can help to confirm the facts of the crime by analyzing evidence at the scene and comparing it with other information. In addition, specialized experts can detect traces that can indicate the specifics of methods and means of looting, as well as identify possible culprits. The results of the examinations can be used as evidence in the criminal proceedings regarding looting to prove the guilt of the defendants.

In conclusion, the important role of forensic examinations was considered in the investigation of criminal offenses related to pillage. It was found that such examinations as: portrait or photo, video, sound recording examination, computer and technical examination, forensic medical examination, genotypic (molecular genetic examination), dactyloscopic, commodity science, traceological examination, examination of weapons, traces and circumstances its use — play a key role in the collection, analysis and presentation of evidence before the court. They help to establish the circumstances of the crime, determine the damage, identify and analyze traces that may be left by criminals. Correctly conducted forensic examinations allow to ensure the fairness and efficiency of the judicial process in solving criminal proceedings based on the facts of pillage.

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