

NOVELIZATION OF THE CRIMINAL CODE OF UKRAINE DURING THE 2022 RUSSIAN INVASION¹

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Abstract. The article is devoted to an essential and highly relevant topic – the amendment of the Criminal Code of Ukraine during the war. The authors emphasize that the state of Ukraine and its population faced a terrible challenge to state sovereignty, territorial integrity, and independence due to the Russian Federation’s attack. The introduction of martial law and the immediate opening of hostilities in large areas of Ukraine initiated new social relations, which urgently needed legal settlement and consolidation. The author’s position is that despite the vast range of tasks that required a quick solution, the Verkhovna Rada of Ukraine was able to respond quickly to new social realities and amended the Criminal Code of Ukraine, introducing criminal liability for collaboration and identifying circumstances that exclude illegal illegality of the act and provide combat immunity under martial law. The new provisions of the criminal law correspond to the principles of the rule of law, legality, and legal certainty. In addition, they still need some clarifications and acquisitions, particularly regarding the combat immunity of military medics. As for collaborative activities, according to the authors, this act is a specific manifestation of treason, which in connection with the situation and time of its implementation.

Keywords: war, collaboration, military immunity, criminal law, novelization

INTRODUCTION

On February 24, 2022, the state of Ukraine and our state’s population faced a terrible challenge to state sovereignty, territorial integrity, and independence caused by the attack of

the Russian Federation. Of course, military aggression has taken place in some areas before, but the full-scale war began at the end of the winter of 2022. Military action significantly distorted the social order, the normal functioning of the economy and political processes, etc. In addition, the imposition of martial law and the direct introduction of hostilities in large areas of Ukraine initiated new social relations, which urgently needed legal settlement and consolidation. It should be noted that since the beginning of the military aggression in eastern Ukraine in 2014, domestic legislation has undergone substantial changes, in particular: in the context of determining the status of temporarily occupied territories, the order of border crossing between areas controlled by Ukraine and those temporarily occupied (1); concerning the legal status of persons residing in Luhansk and Donetsk oblasts and the Autonomous Republic of Crimea (2); the legal group of internally displaced persons (3); the procedure for conducting a joint force operation (4); legal liability for offenses against the foundations of national security (5) and others. In addition, the war in Ukraine created a new reality to which all institutions and the public had to adapt. From the first days of the war, two issues were particularly acute: the cooperation of the population with the occupiers (1) and the fulfillment of the duty to defend the Fatherland, independence, and territorial integrity of Ukraine (2). On the positive side, despite the significant number of tasks that required rapid response, the Verkhovna Rada of Ukraine responded quickly to new social realities and amended the Criminal Code of Ukraine, introducing criminal liability for collaboration and identifying circumstances that exclude the unlawful illegality of the act and provide combat immunity in martial law.

MATERIALS AND METHODS

The study of short stories of the Criminal Code of Ukraine (Criminal code of Ukraine, 2001) during the war was carried out using general and special methods of cognition. That is why we were able to carry out the analysis comprehensively and fully and achieve the goal of the study. We used the method of empirical research to analyze the legal meaning of the concepts of “combat immunity” and “collaborative activities”. The method of analysis and synthesis was used to determine the impact of war on the legislative process. The extrapolation method was used to identify best practices of foreign countries in the context of the concept of “collaboration activities”. The comparative method will be used to generalize foreign experience in the field.

RESULTS AND DISCUSSION

Combat immunity

During the war and the constant commission by the military of the Russian Federation of both war crimes related to violations of the laws and customs of war and crimes against peace and security of humanity and international law, the issue of defending the Fatherland became especially acute.

The war inevitably imposes a high economic burden on the state, and it is not surprising that the authorities, realizing this, tried to restrict the extent to which legal liability could increase this burden. Implicit combat immunity is a priority of collective freedom at the expense of the individual soldier or citizen (Nir, 2008). In general, the concept of combat immunity in international humanitarian law provides that soldiers on both sides of the war

enjoy impunity for crimes of murder, mutilation, destruction of property, etc. committed during their country's military efforts. That is, those who kill during an attack enjoy the same immunity as those who defend their country (Thorburn, 2019).

Taking this into account, the Verkhovna Rada of Ukraine adopted some normative legal acts to regulate new social relations. First, the Law of Ukraine "On Ensuring the Participation of Civilians in the Protection of the Population", stipulates those civilians are not criminally liable for the use of firearms against persons carrying out armed aggression against Ukraine if such weapons are used following the requirements of Law of Ukraine "On Ensuring the Participation of Civilians in Defense of Ukraine." This law applies to military command (1), servicemen (2), volunteers of the Territorial Defense Forces of the Armed Forces of Ukraine (3), and law enforcement officers involved in Ukraine's defense. (4) civilians involved in repelling and deterring armed aggression (5).

Secondly, the Law of Ukraine "On Amendments to the Criminal Code of Ukraine and Other Legislative Acts of Ukraine on Determining Circumstances That Exclude Criminal Unlawfulness of an Act and Ensure Combat Immunity in Conditions of Martial Law." It was envisaged to amend the Criminal Code of Ukraine to supplement it with a new Article 43-1, "Fulfillment of the duty to protect the Fatherland, independence and territorial integrity of Ukraine." This article contains a unique circumstance that excludes the criminal illegality of the act. According to the criminal legislation of Ukraine, there are cases when a person has formally committed a criminal offense. At the same time, such an act was engaged in "special conditions" and/or under the influence of extraordinary circumstances. Given the complexity and importance of ensuring the security of the population, we consider it quite justified to take a legislative step to expand the list of such circumstances, given the military aggression of the Russian Federation. Yes, now it is not a criminal offense (act or omission) committed in a martial law or during an armed conflict and aimed at repelling and deterring armed aggression of the Russian Federation or attack of another country if it caused harm to life or health, who commits such aggression or harms law enforcement interests in the absence of signs of torture or use of means of warfare prohibited by international law, other violations of the laws and customs of war provided by international treaties approved by the Verkhovna Rada of Ukraine. In addition, it was emphasized that every person has the right to defend the Fatherland, independence, and territorial integrity of Ukraine, regardless of the possibility of avoiding conflict, causing harm, or seeking help from other persons or public authorities, the Armed Forces of Ukraine. A person is not subject to criminal liability for weapons (weapons), ammunition, or explosives against persons who carry out armed aggression against Ukraine and damage or destruction of property in this connection. In addition, an act (action or omission) aimed at repelling and deterring armed aggression of the Russian Federation or attack of another country, which does not correspond to the danger of charge or the situation of repulse and deterrence, is not considered the fulfillment of the obligation to protect the Fatherland, independence and territorial integrity of Ukraine., was not necessary to achieve a critical socially beneficial goal in a particular situation and posed a threat to the lives of others or a threat of environmental catastrophe or the occurrence of other significant emergencies (Criminal Code of Ukraine, 2001).

The belief that the chosen legislative structure is wholly balanced and reflects the need of Ukrainian citizens to follow the norms of international law, even in the case of illegal and

inhumane actions of the enemy. Moreover, such an approach shows that even though the Russian Federation and its service members openly ignore the requirements of international law on the means of warfare, our state still adheres to them, i.e., it is legal. Therefore, if a person commits torture, murder, violates the laws or customs of war, takes an unjustified risk that endangers the lives of others or threatens an environmental catastrophe, etc., he is subject to criminal liability on general grounds.

However, since this law was adopted under the conditions of action, in our opinion, it does not contain some important provisions. For example, J. K. Kelly aptly states that according to the doctrine of combat immunity, a soldier remains protected on the battlefield from any allegations of negligence for negligent acts or omissions committed during combat. In other words, combatants do not need to worry about their comrades on the battlefield. However, a non-combat medic, although sometimes acting in the same hostile circumstances as a combat soldier, is unlikely to benefit from combat immunity due to clinical negligence on the battlefield (Kelly, 2012). Thus, in our opinion, it would be reasonable to write separately in the Law of Ukraine “On Ensuring the Participation of Civilians in the Defense of Ukraine” the legal status of medical workers.

COLLABORATIVE ACTIVITIES

Concerning collaboration activities, I would like to note that it has traditionally been studied in a historical context in the study of the history of Ukraine during the Great Patriotic War.

In the first decades after 1945, the understanding of resistance and collaboration was strongly shaped by national and Cold War norms. In West Germany under Adenauer, war crimes were attributed exclusively to the SS as a radical organization on the periphery of “normal” German society, while Germans who fought for the Nazi regime – for whatever reason – were portrayed as either criminals or mentally unstable. In the formerly German-occupied Western Europe, the semi-official doctrine of *résistancealisme* (that is, the idea that all but a handful of lunatics or traitors resisted the Nazis in the occupied territories) called for the marginalization of those who fought voluntarily (or under different types of pressure), 2018).

It is noteworthy that today the criminal legislation of European countries does not contain direct references to collaborationism as a basis for the emergence of this type of responsibility. The only exception is the Republic of Lithuania, which provides for criminal liability for actions of a citizen of the Republic of Lithuania to assist the illegitimate authorities in asserting the occupation or annexation of the Republic of Lithuania, including suppressing resistance from Lithuanians or assisting illegal authorities 120 of the Criminal Code of the Republic of Lithuania “Collaborationism” (Lietuvos Respublikos baudžiamojo kodekso, 2000) It is also vital that collaborationism (Article 120 of the Criminal Code of the Republic of Lithuania) is considered as a separate form of acts defined in Art. 117 “Treason” and Art. 118 “Assisting another state in carrying out activities hostile to the Republic of Lithuania”. After all, a person in collaborationism promotes activities contrary to the interests of the Lithuanian state. The main difference between these crimes is that in the case of collaborationism, it happens in a particular period – during the annexation or occupation. Therefore, collaborationism is an independent select type of criminal betrayal (Article 117) and (or) assisting another state in carrying out activity’s hostile to the Republic of Lithuania (Article 118) (Of the Criminal

Code of the Republic of Lithuania, 2000). Therefore, the punishment for collaborationism is milder than for committing the above crimes (Pismensky, 2020). In our opinion, the existence of responsibility for collaborationism in Lithuanian legislation has a historical precondition.

Lithuania survived half a century of foreign rule in the 20th century. It is doubtful whether the whole period between 1940 and 1990 can be called “occupation” in any other sense than purely legal. By the end of the 1950s at the latest, the world community and many people in Soviet Lithuania, of course, no longer viewed the state of the country as an “occupation.” The accusation of “collaborationism” against those who joined the CPSU has largely lost its sting, but the situation changed when the rapid collapse of the Soviet regime and further easing of censorship led to a change in the political climate in the late 1980s. in which “cooperation” and “occupation” “returned to the center of public and scientific debate” (Kasperavicius, 2002).

In addition, since 2014, the concept of “collaboration” for Ukraine has acquired a new meaning. In our opinion, the social conditionality of adopting a law that would provide for legal liability for collaborative activities has existed for a long time. However, for unknown reasons, this process was constantly slowed down. In particular, O. Ustymenko stressed the expediency of adopting a law on collaborationism in Ukraine, limiting the right to participate in elections at all levels and be elected to councils at all levels, the right to be appointed executive and law enforcement, judicial and local authorities, levels, the right to establish public and political organizations of all citizens of Ukraine who held senior positions in quasi-state bodies in the occupied territories of Donetsk and Luhansk regions after April 14, 2014, and violated the oath of law enforcement officers, prosecutors, judges, service members and civil servants (Ustymenko, 2018).

It should be noted that there were scientists who stressed the inexpediency of such a legislative step. First, “collaborationism” has never been a legal concept. After the Second World War, when “collaborationism” took on a familiar meaning, cooperation with the enemy state was punishable by two categories of crimes. The first is treason, and the second is war crimes. M. Rubashchenko was convinced that criminal liability for collaborationism is already provided (criminalized) as part of such a crime as treason. Therefore, introducing a new (independent) form of such an act will lead to confusion and the risk of violating human rights and freedoms. The scientist stressed that collaboration activities could take many conditions of treason provided for in Article 111 of the Criminal Code of Ukraine and be carried out in the military, administrative (administrative), economic, and even domestic spheres. However, criminal liability for such activities will occur only for intentional acts and cause significant damage to the sovereignty, territorial integrity and inviolability, defense, state, economic, or information security of Ukraine or pose a real threat to its commission (Rubashchenko, 2016).

We believe that such a position is not entirely correct. In our opinion, treason and collaborationism are related as general and particular. Treason is a more systematic and comprehensive concept, as it provides for liability for an act intentionally committed by a citizen of Ukraine to the detriment of sovereignty, territorial integrity, and inviolability, defense, state, economic, or information security of Ukraine: transition to the enemy during armed conflict, armed conflict, assisting a foreign state, foreign organization or their representatives in carrying out subversive activities against Ukraine (Criminal Code of Ukraine, 2001). Instead, collaborative activity means the voluntary cooperation of the

population under occupation with the occupying power. The term “collaborationism” comes from the French word “collaboration” and means “cooperation”. It was used in France and Belgium after the First World War to denote the cooperation of residents with the German occupation authorities (Punishment for collaborationism: what lessons of world history should Ukraine consider, 2021).

V. Kubalskyi calls the amendment of the Criminal Code of Ukraine an extraordinary norm on responsibility for collaborative activities, which, according to him, will increase the attention of society and law enforcement agencies to this negative phenomenon, will help to combat it more effectively and will have some preventive effect. The very fact of establishing independent criminal liability for collaborative activities in the context of its spread will indicate recognition of the significant damage caused by such actions, as well as the legislator’s understanding of the importance of ensuring an adequate level of criminal protection for Ukraine’s sovereignty (Kubalsky, 2018).

According to the Criminal Code of Ukraine, collaborationism is a complex concept expressed in several forms:

- public denial by a citizen of Ukraine of armed aggression against Ukraine, establishment and approval of temporary occupation of part of Ukraine or public appeals by a citizen of Ukraine to support decisions and / or actions of the aggressor state, armed formations and / or occupation administration of the aggressor state, cooperation with the aggressor state, armed formations and / or occupation administration of the aggressor state, non-recognition of the extension of Ukraine’s state sovereignty to the temporarily occupied territories of Ukraine (1);
- voluntary occupation by a citizen of Ukraine of a position not related to the performance of organizational or administrative functions in illegal bodies of power established in the temporarily occupied territory, including in the occupation administration of the aggressor state (2);
- propaganda by a citizen of Ukraine in educational institutions regardless of types and forms of ownership in order to facilitate armed aggression against Ukraine, establishment and approval of temporary occupation of part of Ukraine, avoidance of responsibility for the aggressor state’s aggression against Ukraine, and actions of Ukrainian citizens on the implementation of educational standards of the aggressor state in educational institutions (3);
- transfer of material resources to illegal armed or paramilitary formations established in the temporarily occupied territory and / or armed or paramilitary formations of the aggressor state, and / or conducting economic activities in cooperation with the aggressor state, illegal authorities established in the temporarily occupied territories including the occupation administration of the aggressor state (4);
- voluntary occupation by a citizen of Ukraine of a position related to the performance of organizational or administrative functions in illegal authorities established in the temporarily occupied territory, including the occupation administration of the aggressor state, or voluntary election to such bodies, as well as participation in the organization and conduct of illegal elections and / or referendums in the temporarily occupied territory or public calls for such illegal elections and / or referendums in the temporarily occupied territory (5);
- organization and holding of political events, information activities in cooperation with the aggressor state and / or its occupation administration aimed at supporting the aggressor state, its occupation administration or armed groups and / or avoiding responsibility for armed aggression

against Ukraine, for absence of signs of treason, active participation in such events (6);

- voluntary employment of a citizen of Ukraine in illegal judicial or law enforcement bodies established in the temporarily occupied territory, as well as voluntary participation of a citizen of Ukraine in illegal armed or paramilitary formations established in the temporarily occupied territory and / or in armed formations of the aggressor state assistance in fighting against the Armed Forces of Ukraine and other military formations formed in accordance with the laws of Ukraine, voluntary formations formed or self-organized to protect the independence, sovereignty and territorial integrity of Ukraine (7) (Criminal Code of Ukraine, 2001).

We believe that the presence of such a vast number of manifestations of the objective side of this criminal act is due to social reality. Thus, the legislator considered it necessary to reflect all possible expressions of collaborationism. Unfortunately, such a complete list is caused not by the desire to prevent and long-term planning but by analyzing the facts in Ukraine.

At the same time, as we know, the law has no retroactive effect. Therefore, those who committed such acts before the entry into force of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Criminal Liability for Collaborative Activities” cannot be prosecuted. Another innovation was the launch of the register of collaborators, which had not yet been published when writing this article. At the same time, the Center for Strategic Communications and Information Security announced that there are now 245 people in the register, including many public figures (The National Security and Defense Council maintains a record of collaborators, including TV presenters, 2022). The National Agency created the register itself for the Prevention of Corruption for the Security Service of Ukraine. The list includes officials at various levels who help Russians or share their ideology (1); people who cooperate with the Russians (in particular, spread their propaganda, as well as undermine Ukraine’s defense capabilities and sovereignty) (2).

It should be noted that this is not the first such initiative. The Register of Traitors has also launched the Honest movement: activists gather information about government officials who have become collaborators. Now their list includes 17 people, including Viktor Yanukovich, Ilya Kiva, Viktor Medvedchuk, and the self-proclaimed leader of the occupied Melitopol, Halyna Danylchenko (Kramar, 2022).

CONCLUSIONS

Summarizing the above, we would like to note that Ukraine, unfortunately, found itself in a situation where all spheres of public life were first stopped and then distorted. At the same time, we remain strong and repel the enemy in all possible directions. In the context of the emergence of new social relations that require legal settlement, the state, in a flash, as was the case with the concept of “combat immunity” and release from criminal liability of persons endowed with it, or with an unavoidable delay, as in the case of “collaborative activities” Of the Criminal Code of Ukraine. Despite the need for prompt decision-making, in our opinion, the new provisions of criminal law meet the principles of the rule of law, legality, and legal certainty. In addition, they still need some clarifications and acquisitions, particularly regarding the combat immunity of military medics. In general, combat immunity is both a requirement of international humanitarian law and a need to protect the interests of the Defenders of Ukraine. On the positive side, combat immunity is not absolute because,

in any case, it requires those to whom it applies to comply with the laws and customs of war. Collaborative activities are the antithesis of defending the homeland and involve cooperation and assistance to the enemy. In our opinion, this act is a specific manifestation of treason. In connection with the particular situation and the time of its implementation, the legislator decided to allocate a separate criminal offense. We consider the creation of a public register of collaborators to be a significant achievement.

Finally, we would like to emphasize that these changes are not the only ones introduced in the Criminal Code of Ukraine. However, they affect all segments of the population without exception and are evidence of Ukraine's recognition of international law, even if our enemy completely ignores it.

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