Pryncyp

Military Justice and Protection of the Rights of Military Personnel

Review of International Experience and Trends in Ukraine

Kyiv 2023 — Report

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Human Rights Center “Pryncyp” — is a non-governmental organisation established in 2023 to provide legal protection for military personnel and veterans. Our primary goal is to protect the dignity of military personnel and to ensure transparency in the processes they go through. To achieve this, we work in the following areas: legal education of military personnel and veterans, their relatives about the available mechanisms and opportunities during treatment and rehabilitation; analytical work to develop systemic solutions in reforming the system; advocacy for changes in this system in cooperation with the authorities.

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Introduction

The military justice system comprises specialised law enforcement and justice agencies: specialised police, prosecution bodies and courts.

Over the years of independence, we have managed to abandon military courts, reintroduce and then abandon the military prosecution body, and still have only a military quasi-police force represented by the Military Law Enforcement Service in the Armed Forces of Ukraine (MLES).

Currently, the system of criminal military justice bodies looks like as follows: The MLES identifies the causes, preconditions and circumstances of criminal offences committed in military units and military facilities, searches for persons who have left military units (places of service) without permission and prevents and stops criminal and other offences in the AFU, while investigators of the State Bureau of Investigation (SBI) investigate them under the procedural guidance of prosecutors of specialised prosecution bodies in the military and defence sphere, and then all these cases are considered by ordinary local courts.

In other words, of all these parties involved, only the representatives of the MLES are military, while the rest, namely the SBI investigators, special prosecutors and local judges, are civilians.

The full-scale invasion has intensified discussions around the need to reintroduce the military 'trio': military police, military prosecution body and military court. The arguments in favour are very different:

- **Specialisation:** It is explained by the fact that the body of military legislation is quite voluminous, specific and complex. However, in our opinion, this argument is completely levelled by proper education and training.
- **Access:** Allegedly, civilian investigators and prosecutors do not have access to crime scenes in the combat zone. However, in practice, this is not an urgent problem and is solved by clear legislative powers of civilian investigators and prosecutors in the combat zone.
- **Risks to life:** According to the supporters of military justice, only a military officer can and should risk his or her life in the course of performing his or her duties. However, this is a very dubious and subjective argument, as civilian law enforcement also involves risks to life and health, and improper performance of duties is a matter of professional aptitude, not a specific type of uniform.

Perception: Allegedly, a person in military uniform can only be perceived as equal and assisted by the similar person in military uniform. In our opinion, this is a very 'conceptual' argument that has no solid basis in reality, because a military uniform can be worn by an unqualified whip-cracker whose actions are not respected.

In all this pro et contra discussion, the main question is lost: how to ensure a proper balance between maintaining discipline in the army and the defence capability of the state, on the one hand, and human rights, on the other hand.

When a person joins the military, either voluntarily or compulsorily, in fulfilment of his or her constitutional duty, he or she is restricted in the exercise of some of the rights enjoyed by civilians (including the right to engage in business and politics) and becomes part of a very clear system with a rigid vertical hierarchy. At the same time, those who devote a period of their lives to military service continue to have the right to life and health, to a fair trial and to legal assistance.

Criminal proceedings against military personnel have the same complex task as those against civilians. It is not only to protect society and the state from criminal offences, but also to protect the service member him/herself. In this case, we are talking about both bringing to justice a service member who has committed a crime, and avoiding the accusation or conviction of innocent people. Therefore, a military member should be subject to due process by protecting his or her rights, freedoms and legitimate interests as a participant in criminal proceedings.

Our research shows that there is currently a significant predominance of state interests, which can be explained by the need for the state itself to survive in the fight against an enemy that is unequal in terms of manpower and equipment - the Russian Federation. This survival is ensured not only by international support and our invaluable people, but also by strict discipline in the army.

However, we are convinced that disregard for the basic rights of a service member as a human being and the classic game of numbers played by the military justice system can, in the long run, do the enemy a favour and significantly reduce the attractiveness of military service.

Every service member should be aware that he or she is not only criminally liable for insubordination, desertion and violence against a superior, but also that the military justice system will effectively protect him or her from illegal orders, abuse and violence by commanding officers.

This approach is in line with the Comprehensive Strategic Plan for the Reform of Law Enforcement Agencies as a Part of the Security and Defence Sector of Ukraine for 2023-2027 recently approved by the President of Ukraine, which identifies the guarantee of human and civil rights and freedoms as one of the priority changes.

It is worth noting that this comprehensive strategic plan does not require that representatives of the military justice system necessarily have the status of military personnel in order to achieve its goals. On the contrary, one of the areas of reform is to strengthen the guarantees of independence of law enforcement and prosecution agencies from external and internal interference in their professional activities. At the same time, the dual oath of office of a person as a prosecutor and a military officer, as well as the principles of unity of command and strict military discipline, weaken such independence.

This report aims to show the current state of affairs in the military justice system, provide our vision and recommendations for improving the situation, and show that in the 9th year of the war we must have a sustainable system of military justice, which, with or without military uniforms, is capable of ensuring effective investigation of military criminal offences and a balance between the interests of the state and human rights.

List of main abbreviations

ATO - Anti-terrorist operation

SMC - Supreme Medical Commission

VRU - Verkhovna Rada of Ukraine

MF - Military Forces

MLES - Military Law Enforcement Service of Ukraine

SBI - State Bureau of Investigation

DS AFU - Disciplinary Statute of the Armed Forces of Ukraine

OUO - For Official Use Only

ECtHR - European Court of Human Rights

USRV - Unified State Register of Voters

URPTI - Unified Register of Pre-trial Investigations

AFU - Armed Forces of Ukraine

Law - Law of Ukraine

CC - Criminal Code

CCU - Criminal Code of Ukraine

ME - Municipal non-profit enterprise

CPC - Criminal Procedure Code of Ukraine

CUAO - Code of Ukraine on Administrative Offenses

MoD - Ministry of Defence of Ukraine

NaUKMA - National University of Kyiv-Mohyla Academy

NABU - National Anti-Corruption Bureau of Ukraine

NATO - North Atlantic Treaty Organisation

PDP - Permanent Disposition Point

SSU - Security Service of Ukraine

AWOL - Absence without official leave from a military unit or place of service

SOF - Special Operations Forces of the Armed Forces of Ukraine

TRC - Territorial Recruitment and Social Support Centre

ALC - Additional Liability Company

TDF - Territorial Defence Forces of the Armed Forces of Ukraine

DSP - Department of State Protection of Ukraine

FSS - Federal Security Service of the russian federation

Section I. Review of International Experience and Comparative Analysis

1.1. General review of international standards in the establishment of military justice systems

The specifics of each country's military justice system depend on a variety of factors, such as the traditional role of the armed forces in society, the general legal system, the influence of international law, in particular international human rights law, the constitutional system, etc. The main idea behind the functioning of a separate military justice system in countries where such a system is separate from the general civilian system is to ensure the maintenance of discipline and good order in the armed forces[1]. For example, the Canada Supreme Court has justified the existence of a separate military justice system on the basis of the need to "allow the armed forces to decide matters that directly affect the discipline, efficiency and morale of the military[2]", the need to "deal swiftly and often more severely" with breaches of military discipline, and the "inadequacy" of the capabilities of ordinary (civilian) criminal courts to meet the "disciplinary needs of the military". In addition, the operation of the military justice system ensures that military specificities are taken into account in the administration of justice in cases where it is necessary[3], although critics of the military justice system question whether the consideration of military specificities is any different from the consideration by 'civilian' judges of specificities relating to, for example, medical interventions in cases of inadequate medical care[4].

At the same time, the coexistence of military and civilian justice systems raises a number of problematic issues, including the demarcation of jurisdiction between them, the independence and impartiality of military justice bodies, the slow integration of proper judicial principles into military justice, etc. In the context of the protection of human rights, a key challenge for the military justice system is to ensure that discipline is enforced in a manner consistent with the right to a fair trial and due process, in particular by ensuring equality of rights between members of the armed forces and defendants in ordinary criminal courts, and to guarantee the independence of military courts and other military justice bodies[5]. In response to such problematic issues, there has been a recent trend towards the 'civilianisation' of military justice: This is expressed either by reforming existing bodies and bringing the standards of investigation, prosecution and trial in the military justice system in line with those in the non-military, civilian system, or by limiting the jurisdiction of military courts and sometimes even abolishing them altogether[6].

In any case, the development and reform of the military justice system should be guided primarily by the fact that "military justice should be an integral part

1 – Mindia Vashakmadze, Understanding Military Justice Guidebook, link: https://www.dcaf.ch/sites/default/files/publications/documents/Milit. Justice_Guidebook_ENG.pdf , p.10.

2 – 'R. v. Généreux, [1992] 1 S.C.R. 259', Canada Supreme Court Reports, No. 1 (13 February 1992), 259.

3 – Mindia Vashakmadze, Understanding Military Justice Guidebook, link: https://www.dcaf.ch/sites/default/files/publications/documents/Milit. Justice_Guidebook_ENG.pdf , p.10.

4 – Benjamin Heng, «Military Justice in a Comparative and International Perspective: A View from the Asia Pacific», Journal of International Peacekeeping, 20 (2016) 133-142, p. 135.

5 – Hans Born and Ian Leigh, «Discipline and Military Justice, Handbook on Human Rights and Fundamental Freedoms of Armed Forces Personnel» (Geneva: OSCE and DCAF, 2008), p. 219.

6 – Mindia Vashakmadze, Understanding Military Justice Guidebook, link: https://www.dcaf.ch/sites/default/files/publications/documents/Milit. Justice_Guidebook_ENG.pdf , pp.14-15.

of the general justice system, functioning in accordance with human rights standards, including the right to a fair trial and guarantees of due process[7]". This is important in order to unify the approaches and principles underpinning the process and to guarantee the rights of military personnel, which are generally no less than those of defendants in ordinary criminal courts.

This trend of introducing civilian elements and standards into military justice systems is also a tool used by states to improve the independence and impartiality of military courts[8]. Ensuring the full independence of military courts from the chain of military command is another foundation for building a quality military justice system: This can be achieved, in particular, by establishing the same principles of appointment, responsibility and career development for military judges as for non-military courts[9]. This can be achieved in particular by excluding military courts from any subordination to military authorities (e.g. the Ministry of Defence or the country's General Staff) and by ensuring that military judges are not held accountable for the outcome of cases within their jurisdiction[10].

Another important aspect of international practice in developing a military justice system is to ensure the impartiality of military justice. This can be achieved in particular by involving civilian (non-military) judges in the administration of justice in military courts and by ensuring that civilian and military judges receive the same training in the administration of justice and legal standards[11]. Furthermore, a state of martial law or emergency is not a ground for denying the right to a fair trial, and any restrictions strictly necessitated by the criticality of the situation must always be consistent with the principle of the due administration of justice[12].

In general, ensuring civilian control and oversight over the functioning of the military justice system is a key principle for ensuring its proper functioning. Thus, based on international practice in the development and reform of military justice institutions, it is also necessary to ensure, in particular, strict civilian oversight of the military justice system, proper training of military prosecutors, judges and defence counsel, availability of appropriate mechanisms and avenues for all military personnel to file complaints, including against the military leadership, and awareness of relevant opportunities among such military personnel, etc[13].

This section provides a comparative analysis of approaches to the organisation of military justice in the five selected countries. Five countries with different histories, armed forces and legal systems were selected for the study, namely: The United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the UK"), Canada, the Republic of Lithuania (hereinafter referred to as

7 – Resolution adopted by the Human Rights Council 25/4, Integrity of the judicial system, March 2014 A/HRC/RES/25/4 paras. 2, 10. Available at: https://www.right-docs.org/doc/a-hrc-res-25-4/.

8 – Mindia Vashakmadze, Military Justice in Ukraine: A Guidance Note, Geneva (2018), p. 5.

9 – Mindia Vashakmadze, Military Justice in Ukraine: A Guidance Note, Geneva (2018), p. 4.

10 – Mindia Vashakmadze, Military Justice in Ukraine: A Guidance Note, Geneva (2018), pp. 4-5.

11 –Draft Principles Governing the Administration of Justice Through Military courts, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux to the UN Commission on Human Rights in 2006 [Decaux Principles]. Available at http://www1.umn.edu/ humanrts/instree/DecauxPrinciples.html, Principle 13

12 – Draft Principles Governing the Administration of Justice Through Military courts, U.N. Doc. E/CN.4/2006/58 at 4 (2006), Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux to the UN Commission on Human Rights in 2006 [Decaux Principles]. Available at http://www1.umn.edu/ humanrts/instree/DecauxPrinciples.html, Principle 3

13 – Military Justice Foundamentals, National Institute of Military Justice and DCAF, p. 48.

"Lithuania"), Turkey and Israel. Despite the differences in experience, socio-cultural and political contexts between these countries, building a quality system requires taking into account a variety of experiences, not limited by conventional affiliation to a particular legal family, intergovernmental organisation, etc. Moreover, an analysis of such diverse experiences allows us to better identify trends common to all military justice systems, which can be used as a basis for building such a system for Ukraine.

The analysis was conducted through a review of the available legislation in force in each country, as well as analytical articles, reviews, manuals and other information available in open sources.

The main objective of the analysis was to obtain a generalised description of the experiences of several countries in terms of their approach to the organisation of the military justice system. These experiences may be useful in planning future reforms of the Ukrainian military justice system. In particular, it will help to find the most acceptable and practical model of military justice organisation.

Taking into account the differences in the structure of the studied national military justice systems, the following general indicators were selected for comparison:

1) General profile of the country;

2) Classification of service offences in national legislation;

3) Existence of specialised bodies with jurisdiction over service offences:

(i) courts;

(ii) prosecution bodies;

(iii) investigative bodies.

4) Powers of commanding officers to consider military (service) offences;

5) Division of jurisdiction between civilian (non-military) and military justice authorities;

6) Penalties applied in the military justice system.

Detailed descriptions of the military justice systems in each of the countries surveyed can be found in the annexes to this report.

1.2. General profile of the country

The countries selected for comparison vary in size, military strength, legal systems, length of time a particular legal tradition has existed, etc. Four of the

five countries (the United Kingdom, Canada, Lithuania and Turkey) are members of the North Atlantic Treaty Organisation (NATO)[14]. In addition, the UK and Canada are two of the twelve founding members of NATO[15], while Turkey and Lithuania joined later (in 1952[16] and 2004[17] respectively). Israel is not a member of NATO, although it remains a strategic partner of the Alliance, in particular as a member of the Mediterranean Dialogue platform[18]. However, NATO membership does not directly affect the standards of military justice. The organisation of the military justice system remains at the discretion of individual countries and is governed by existing national traditions.

In order to understand the need for a developed military justice system, it is also worth noting the size of the armed forces of the countries analysed. In 2020, the Turkish army consisted of 355,000 permanent personnel and 380,000 reservists[19]. The Israeli army is estimated to consist of 173,000 permanent personnel and a further 465,000 official reservists[20]. The UK Armed Forces currently have 193,890 personnel, including regulars, reservists and other personnel, and are on a downward trend[21]. In spring 2021, the Canadian Armed Forces numbered 97,625 personnel[22]. However, according to the national security programme "Strong, Secure, Engaged", 106,700 people are expected to serve, including regular army, reservists and other personnel[23]. Ultimately, the Lithuanian army currently consists of 15,000 active duty personnel and 100,000 reservists[24].

Such significant differences in the size of the armed forces are certainly primarily explained by differences in the size of the total population, but also to some extent by the frequency and scale of the country's involvement in armed conflicts. For example, Turkey and Israel have the largest number of professional and regular service members in their armed forces, as well as guaranteed reserves, which is partly explained by their constant involvement in conflicts in the regions where their countries are located.

The last but very important basic indicator is that the countries studied belong to different legal systems, which influences both the organisation of the military justice system and the clarity of the rules and procedures. For example, the United Kingdom and Canada, which are generally common law countries (with certain peculiarities), have characteristically developed institutions in accordance with

14 – For more information on NATO and the United Kingdom, please click here: https://www.nato.int/cps/en/natohq/declassified_162351.htm; for more information on NATO and Canada, please click here: https://www.nato.int/cps/en/natohq/declassified_161511.htm; for more information on NATO and Turkay, please click here: https://www.nato.int/cps/en/natohq/declassified_191048.htm?selectedLocale=en; for more information on NATO and Lithuania, please click here: https://kam.lt/en/lithuanias-membership-in-nato/. NATO Member Countries, please click here: https://www.nato.int/cps/en/natohq/topics_52044.htm#founding

15 – NATO Member Countries, please click here: https://www.nato.int/cps/en/natohq/topics_52044.htm#founding

16 – NATO Member Countries, please click here: https://www.nato.int/cps/en/natohq/topics_52044.htm#gre-tur

17 – NATO Member Countries, please click here: https://www.nato.int/cps/en/natohq/topics_52044.htm#coldwar2

18 – Mediterranean Dialogue, please click here: https://www.nato.int/cps/en/natohq/topics_52927.htm

19 – The Turkish Military: In Numbers, 6 березня 2020, див. за покликанням: https://www.forces.net/world/turkish-military-numbers.

20 – 2023 Israel Military Strength, див. за покликанням: https://www.globalfirepower.com/country-military-strength-detail.php?country_id=israel.

21 – National Statistics, Quarterly service personnel statistics 1 July 2022, оновлено 15 грудня 2022 року, покликання: https://www.gov.uk/government/statistics/quarterly-service-personnel-statistics-2022/quarterly-service-personnel-statistics-1-july-2022.

22 – Ministerial Transition Material: Department of National Defence, Defence 101 – Transition binder 2020, покликання: https://www.canada.ca/en/department-national-defence/corporate/reports-publications/transition-materials/defence-101/2020/03/defence-101/caf-101.html.

23 – Ministerial Transition Material: Department of National Defence, Defence 101 – Transition binder 2020, покликання: https://www.canada.ca/en/department-national-defence/corporate/reports-publications/transition-materials/defence-101/2020/03/defence-101/caf-101.html.

24 – Lithuania. NATO, link:: https://shape.nato.int/lithuania.

the British tradition of government and administration (e.g. Judge Advocate General, the form of military courts generally similar to ordinary courts, the use of an adapted jury system, etc.).

Lithuania, which is the only country among the five studied that does not have a specific military justice system, is a country with a continental legal system, which is reflected in the clarity of the wording of the laws on military service, the codification of norms, etc. Israel and Turkey, as countries whose legal systems were formed under the influence of different legal families and traditions, contain signs of the influence of different legal systems and even certain common institutions. This will be discussed in more detail below.

1.3. Classification of service offences in national legislation

The countries surveyed differ considerably in the classification, listing and description of service (military) offences in national legislation[25]. For example, due to the lack of a separate military justice system in Lithuania, military crimes and misdemeanours are regulated in a special section of the Lithuanian Criminal Code - Chapter 46 (Crimes and Misdemeanours against Service in the National Defence Forces)[26]. The Criminal Code divides them into crimes and infractions according to a relatively simple criterion: An infraction is an offence for which the Criminal Code does not provide for imprisonment. All but one of the offences listed in Section 46 are crimes according to this classification: Evasion of compulsory military service, unless it is done by causing damage to one's health, feigning illness or health problems, falsifying documents or using other deceptive means, is an offence.

In the national legislation of Canada, as a country with a separate military justice system, the list of military offences is contained in a separate law - the National Defence Act. Articles 73-129 cover a variety of service offences that can be committed by military personnel of different branches and ranks. They are all considered to be criminal offences (service offences), as opposed to disciplinary offences (service infractions), which are discussed below.

The UK system, where military (service) offences are set out in the Armed Forces Act, has an identical approach to this issue. It is noteworthy that the latter classifies service offences according to their degree of seriousness. Some specifically defined offences, such as aiding the enemy, desertion or mutiny, are effectively equivalent to crimes, while other less serious offences can be dealt with under a simplified procedure and have less serious consequences.

The Turkish legal system has a separate law - the Military Penal Code - which, by analogy with the regular Turkish Penal Code, provides the corpus delicti of

25 – Note: The study does not focus on war crimes, crimes against humanity, crimes of aggression and genocide, which constitute a separate category of crimes that can be committed by military personnel and are enshrined in the national legislation of the countries studied.

26 – The Criminal Code of the Republic of Lithuania, approved by Law No. VIII-1968 of 26 September 2000, Section 46;

relevant military offences and the punishment for them. Similarly, the Israeli Military Justice Law lists the offences that are subject to review by the military justice authorities.

1.4. Existence of specialised bodies with jurisdiction over service offences

Of the five countries studied, four (the United Kingdom, Canada, Israel and Turkey) have developed military justice systems with a long history and tradition. Their functions and powers are largely similar in these four countries, but there are some peculiarities, which will be analysed below. Lithuania, unlike the other countries, subordinates the trial of war crimes to the civilian (non-military) justice system. The only 'specialised' body in Lithuania is the military police.

(I) COURTS

According to the Turkish Constitution, the judicial bodies of the military justice system include military courts and disciplinary tribunals[27]. The same Article 145 defines four main grounds for the jurisdiction of such courts:

1. A service member has committed a military offence;

2. A service member has committed an offence against another service member;

3. A service member has committed an offence on military premises;

4. A service member has committed an offence related to military service and military duties.[28]

Military courts are established by decision of the Turkish Minister of Defence in **units** of corps level or above. This is a key difference between Turkey and the other countries analysed. These courts are permanent and consist of three members - two permanent professional military judges with legal education and military training, and one senior officer without legal education, appointed by the senior permanent judge of the relevant military court from a list submitted by the commanding officer of the unit under which the court is established.

In Canada and the United Kingdom, military courts are not attached to specific military units. Instead, they are common to all the armed forces.

In the **United Kingdom**, the military court is a permanent institution, although it can sit anywhere and in different configurations. The judge is a Judge Advocate, a professional military lawyer who is a member of the Office of the Judge Advocate General, the chief legal officer in the British military justice system. He or she is accompanied by a panel of 5 or more lay members (officers or non-commissioned

27 – Turkish Constitutional Law No. 2709, Article 145

28 – Ibid

officers who have no legal training). The latter decide on the guilt of the accused (guilty/not guilty).

Military courts in the UK have a fairly wide jurisdiction, covering not only military offences committed by military personnel, but also civilians associated with the armed forces. Military courts can also deal with non-military offences committed by persons within their jurisdiction.

Canada has an identical system of military court organisation, but the military court has two possible formations: (1) a general military court, consisting of a military judge and a panel of five lay members (officers or non-commissioned officers without officer rank or legal training), and (2) a permanent military court, with only one military judge. The latter is designed to deal with cases of lesser gravity and less severe punishment.

The peculiarity of the Canadian system of military justice is that there is no clear distinction between civilian and military jurisdiction. Military courts in Canada will therefore deal not only with the commission of service offences, but also with the commission of ordinary non-military offences by members of the armed forces (although the latter may also be the subject of a non-military court). This is discussed below.

The system of military courts in Israel operates in a similar manner, although here the courts are established as courts of first instance on a regional basis. The composition of the court hearing the case is decided on a case-by-case basis, but must always include at least one professional military judge and at least one lay member. For a certain list of offences, it is also possible for a single (professional) judge to hear the case.

Lithuania does not have military courts, so war crimes and infractions are tried by ordinary courts of general jurisdiction.

(II) PROSECUTION

In addition to special military courts, the countries surveyed also have specialised prosecution bodies. Again, Lithuania is an exception: In military crimes trials, a civilian prosecutor also provides procedural guidance.

In **Canada**, the prosecutorial function is carried out by the Director of Military Prosecutions and the service he or she heads - the Canadian Military Prosecution Service. The Director is appointed by the Minister of National Defence and is generally separate and independent from the armed forces. In a military court, the Director, or a prosecutor appointed on his or her behalf, represents the prosecution. The functions of the prosecution body include advising the investigating authorities on the gathering and analysis of initial information about a possible offence and, once such information has been gathered and the

investigation has produced a charge sheet, approving or rejecting the charge and then presenting the charge to the court.

Similarly, in the **United Kingdom** there is a Director of Military Prosecutions and a Military Prosecution Service appointed by him or her to carry out prosecution functions.

Similar bodies exist in **Turkey** and Israel. In Turkey, for example, there are a number of military prosecution bodies, each consisting of at least two military prosecutors. They also conduct public prosecutions in military tribunals. Unlike similar services in the UK or Canada, military prosecutors in Turkey are more involved in investigations: When a suspect's commanding officer refers a case to them or they identify it themselves, military prosecutors are responsible for gathering evidence and building a case. At the end of the investigation, the military prosecutor assesses the evidence and makes one of three decisions: to end the investigation and close the case if the evidence is insufficient; to suspend the investigation if the circumstances warrant; or to submit a charge sheet to the court.

The **Israeli** Military Advocate General's Office was established on a principle closer to that of the United Kingdom and Canada. In 2007, it was separated from the Attorney General's Office in order to ensure its independence and impartiality. In practice, the decision to open a case and launch an investigation is taken by the Chief Military Prosecutor or his or her authorised subordinates. The Office of the Military Prosecutor is less involved in the investigation than in procedural control, while the investigation and collection of the necessary evidence is carried out by the Military Police.

(III) INVESTIGATION

Common to all the systems compared is the variety of bodies and officials that can investigate war crimes.

For example, **Lithuanian** law allows pre-trial investigations to be conducted by the body that discovered the offence in the course of performing its core functions. This means that both the military police and ordinary police or other law enforcement agencies can investigate whether a military offence has been committed by a service member. However, the military police have a wider range of powers in terms of access to sensitive facilities, inspection of military vehicles, etc., and therefore remain the preferred agency for pre-trial investigations.

The **Canadian** National Defence Act also does not give the military police exclusive jurisdiction. Instead, military offences can be investigated by the civilian police, the military police, the National Military Investigation Service, which is a structural unit of the military police, and persons authorised to conduct investigations at the level of the units themselves. The specific investigative body is determined on a case-by-case basis, taking into account many factors, such as

the complexity of the case, availability of resources, etc. In practice, however, unit investigators investigate only the most minor offences, those requiring greater authority and expertise are transferred to the military police, and serious offences, particularly in sensitive cases such as sexual assault, remain under the jurisdiction of the National Military Investigation Service.

The military police in Canada have relatively broad powers, including the right to arrest any member of the armed forces, regardless of rank or position, without a warrant if there is reasonable suspicion that the person has committed, is committing or is about to commit a military offence.

1.5. Powers of commanding officers to consider military (service) offences

In each of the jurisdictions examined, the commanding officer of a military member who commits a disciplinary offence has certain powers of review. The powers of commanding officers vary from jurisdiction to jurisdiction, as do the procedures used.

In Canada, for example, a form of 'summary hearing' was introduced in 2021, rather than the 'summary trial' still typical in the UK. In Lithuania, a commanding officer has direct authority to impose punishment for disciplinary offences.

Although Israeli law also empowers the commanding officer to do so, another typical form of response to misconduct can be an 'operational briefing'. Finally, the Turkish model provides for additional bodies, such as disciplinary tribunals, in addition to the commanding officer's authority to hold subordinates accountable for misconduct.

Summary hearings, based on the **Canadian** model, are a way of dealing with the most minor disciplinary offences, which are not military offences, but minor violations of the law as defined by the King's Regulations and Orders. These include minor breaches of military discipline, such as taking or using property without authorisation, behaviour that calls into question the authority of a superior officer, inappropriate appearance, being on duty under the influence of alcohol or drugs, etc.

In summary hearings, justice is administered by members of the chain of command (presiding officers). In most cases, the presiding officers are the accused's commanding officers or officers subordinate to such commanders who have been delegated to perform this function (authorised officers). Presiding officers are neither professional lawyers nor judges; however, they receive the necessary training and certification of their skills and ability to administer justice from the Judge Advocate General (the highest official in the military justice system).

Penalties which may be imposed by the presiding officers following summary In summary hearings, include:

(a) reduction in rank;

(b) severe reprimand;

(c) reprimand;

(d) deprivation of pay or other benefits for a period not exceeding 18 days;

(e) such lesser penalties as may be prescribed
by order of the Governor General of Canada.

The procedure in summary hearings is very different from that in a military court. For example, the accused does not have a representative (lawyer). Instead, he or she is assisted by an 'assisting officer', who may be an officer or, in exceptional circumstances, a person who is not an officer but is of a rank higher than sergeant.

The assisting officer must be appointed by the presiding officer if the accused requests the appointment of such an officer. An assisting officer may be appointed only if he or she agrees to act in that capacity during the hearing and may cease to assist the accused at any time, after which the presiding officer must appoint another assisting officer.

The assisting officer will assist, advise, make statements and otherwise represent the accused throughout the trial and any review, if the accused so wishes.

After the case has been decided in a summary hearing, and the sentence has been pronounced, the case may be reviewed by the Chief of the Defence Staff or another body specified in the King's Regulations and Orders, namely: an officer more senior in disciplinary control than the officer who presided in summary hearings.

The UK military justice system follows a similar model. Unlike the Canadian system, the jurisdiction of the responsible commanding officer includes not only minor (non-criminal) disciplinary offences, but generally low-level service offences, including criminal offences.

The responsible commanding officer has the right to impose a sentence of up to 28 days' imprisonment, which can be extended to up to 90 days' imprisonment with the approval of a higher authority.

In any case, however, the accused retains the right to request a trial by military court instead of a summary trial;

The Responsible Commanding Officer may try a case against a person subject to military law if:

1. The offence is one that can be dealt with in a summary hearing. These include most non-criminal offences listed in the Law (e.g. absence without official leave; failure to apprehend deserters and absentees without official

leave; misconduct towards a superior officer, etc.) and some criminal offences (e.g. theft; possession of controlled drugs, etc.).

2. The accused has the appropriate grade title/rank, i.e. an officer of the rank of commander, lieutenant colonel or wing commander or below, or of the grade title or rank of warrant officer or below;

3. The accused is a person who:

a. From the moment the offence is committed until the end of a summary hearing of the charge, is subject to military law;

b. From the moment the offence is committed until the end of a summary hearing of the charge, is a member of a volunteer force; or

c. Is a former member of a regular reserve force (see paragraph 10b) who has additional responsibilities. The Responsible Commanding Officer does not have the authority to consider charges in a summary hearing after the accused has been discharged from such forces.

However, when the Responsible Commanding Officer decides whether to consider a criminal offence in a summary hearing, he or she must seek legal advice in all but the simplest and clearest cases.

The penalties that can be imposed by the Responsible Commanding Officer are limited. For example, he or she cannot impose imprisonment. However, any Responsible Commanding Officer has the right to request permission from a Higher Authority to extend his or her sentencing powers. In addition, Responsible Commanding Officers with the rank of Rear Admiral, Major General or Air Vice Marshal or higher have unlimited sentencing powers (i.e. similar to those of a Military Court).

The **Lithuanian** system is simpler. It is completely separate from the system of war crimes and infractions. The Disciplinary Statute of the Lithuanian Armed Forces empowers military commanders to investigate disciplinary offences (which are not administrative or criminal offences) committed by members of the armed forces and to impose punishment in a simplified manner (together with preventive measures). According to the Disciplinary Statute of the Armed Forces, the following penalties (sanctions) are possible for disciplinary offences Reprimand, additional service duties, prohibition to leave the territory of military premises, reduction of official salary, demotion in rank, dismissal from military service, deprivation of the right to wear military uniform at festive events, reduction of scholarship, dismissal from office, expulsion from a military educational institution.

The level of command that can impose sanctions depends on the rank (or title) of the offender and the type of sanction. The system does not provide for a military tribunal or similar institution to impose these sanctions. The commander does not

need the approval of a judge or court to impose the above-mentioned sanctions.

The **Turkish** system allows commanders to either prosecute the offender themselves or refer the case to a disciplinary tribunal. If the commander decides to prosecute the offender personally, he or she draws up a memorandum describing the situation and the charges. The military member will be given the right to reply. After considering the reply, the commander will impose a penalty. If the military member disagrees, he can ask the unit commander to review the case.

The second option is for the commander to refer the case to the disciplinary officer. The officer will conduct an investigation and, if the evidence collected indicates that the military member should be brought before a disciplinary tribunal, the officer will prepare a charge sheet. It is then for the court to decide whether the accused is guilty and to impose the penalty.

1.6. Division of jurisdiction between civilian (non-military) and military justice authorities

In each of these countries, military personnel remain subject to civilian (non-military) law in addition to military law. A distinctive feature is the approach to determining the jurisdiction of civilian and military justice authorities.

Lithuania, which does not have a separate military justice system, legislates that military personnel remain subject to general (non-military) criminal law, i.e. for acts constituting non-military crimes, they are generally liable under the relevant articles of the Criminal Code.

As noted above, there is no clear distinction between the functions of military and non-military police: In general, the pre-trial investigation is carried out by the body that discovered the fact of the offence, unless the prosecutor decides to transfer the case to another body.

More interesting is the approach of the **United Kingdom and Canada**: Crimes and other offences in both countries are included in the respective lists of war crimes. For example, the list of war crimes for which liability is established **in the UK** Armed Forces Act includes a clause for any other crimes established by the Criminal Code or other Acts of Parliament. This de facto makes the commission of an ordinary (non-military) offence by a person subject to the Armed Forces Act (mainly military personnel) at the same time a military offence, an offence against military discipline.

This is the legal basis for giving the military justice system jurisdiction over cases of non-military offences committed by military personnel. In practice, however, the powers of the military and civilian justice systems are more or less separate: For example, if a non-military offence has caused damage to a civilian person or property, such offences are usually dealt with by the civilian (non-military) justice system.

Similarly, **Canada's** National Defence Act includes non-military offences in the Code of Service Discipline. Certain offences (namely premeditated murder, involuntary manslaughter and child abduction) are specifically assigned to civilian criminal courts - military courts do not hear these cases.

The situation is different for other non-military offences: As a result of the incorporation of the Criminal Code into the Service Discipline Code, the commission of a non-military offence is a service offence, even in circumstances that are in no way related to military service. For example, the theft of goods from a shop committed by a military member outside the area of military service (e.g. on leave) can still be considered in military proceedings. For example, one of the judges of the Supreme Court stated that "criminal or dishonest behaviour, even if it is committed in circumstances not directly related to military duties, may have an impact on discipline, efficiency and morale".

The delegation to military prosecutors and military police of the decision on the judicial system in which a case should be tried is often criticised. The lack of principles and standards of separation leads to abuses and delays in the administration of justice. Another problem is the lack of mechanisms to resolve jurisdictional disputes between civilian and military justice authorities. If civilian and military authorities cannot agree on which system should prosecute an offender, they simply have to continue consultations until the issue is resolved.

Turkey's approach to this distinction is somewhat different. As noted above, the military justice system will hear cases (and has exclusive jurisdiction to do so) if: (i) a member of the armed forces commits a military offence; (ii) a member of the armed forces commits an offence against another member of the armed forces; (iii) a member of the armed forces commits an offence on military territory; or (iv) the offence committed is a consequence of the performance of a task or duty by the member of the armed forces.

Thus, any offence committed by a member of the armed forces falls under the jurisdiction of a military court if there is a connection with military service (either through the place of commission of the offence, the context of the offence or the identity of the victim). In other cases, civilian courts have jurisdiction.

Finally, **Israel** also places ordinary (non-military) offences under the jurisdiction of military courts when committed by service members. However, unlike in the UK and Canada, this jurisdiction is exclusive and therefore no distinction is required.

1.7. Conclusions of the comparative analysis

Based on the research and comparison of the available information on the military justice systems of the countries studied, the following trends and general features have been identified:

- With the exception of Lithuania, the national legal systems of the countries studied include military (service) offences in special legal acts, which either relate to the organisation of the military justice system (**Israel**) or to the organisation of the armed forces (**the United Kingdom, Canada**), or constitute a separate set of rules for such service offences (**Turkey**). In addition, all countries are characterised to some extent by the classification of service offences according to their seriousness, which affects (1) the classification of the offence as a crime or misdemeanour (Lithuania, Israel) or other service disciplinary offence (Canada), as well as (2) the severity of the punishment and (3) the specifics of the trial.

- In each of the countries surveyed, minor disciplinary offences are considered to be simply official disciplinary offences, which are considered to be even less significant. Such disciplinary offences are, for example, enshrined in the Disciplinary Statute of the Armed Forces in the Republic of **Lithuania**, the King's Regulations and Orders in **Canada**, and the Code on the Establishment and Trial Procedures of Disciplinary Courts in **Turkey**. The distinction between simple disciplinary offences and more serious offences serves a practical purpose: To ensure that the investigation and prosecution of the most minor (and therefore most common) disciplinary offences is as quick and simple as possible, without being burdened by more complex legal procedures such as those required in criminal proceedings.

- In general, in all the countries compared, except Lithuania, the system of military courts is designed to deal primarily with service offences committed by members of the armed forces. However, their jurisdiction does not end there: Some countries clearly define that military courts hear cases that are in any way related to military service or a member of the armed forces (**Turkey**), while others do not clearly address the distinction between civilian and military criminal jurisdiction and continue to apply it simultaneously, for example in cases where military personnel commit non-military offences (**Canada, the United Kingdom**).

- The countries differ fundamentally in their establishment models. The **Israeli** model provides for the establishment of regional military courts as courts of first instance with jurisdiction over the respective territory, while the national legal systems of **the United Kingdom and Canada** consider the military court as a single institution with jurisdiction over the entire territory of the respective countries and the territories of other countries where their armed forces operate, as well as all military personnel and, in certain cases, civilians associated with the armed forces. Finally, **Turkey** has a completely different approach, as military courts are established on the basis of a military unit (corps level and above) and extend their jurisdiction to the respective unit.

- A common feature of all the countries surveyed (with the exception of Lithuania) is that military courts are usually composed not only of professional judges, but also of lay members who are active officers in the armed forces: Either as

members of a panel that acts similarly to a jury and determines the guilt of the accused under the general legal guidance of a professional judge (**Canada, the United Kingdom**), or as almost equal members of the court (**Turkey, Israel**). This feature in all countries is explained by the need to take into account the military expertise and experience of people who serve directly in the same structure as the accused, which allegedly allows for a fairer decision.

- With the exception of **Lithuania**, the military justice system in each country has an independent, specialised military prosecution body Turkey stands out among the others in the extent of the prosecutor's involvement in the investigation: While in other jurisdictions the prosecutor mainly supervises the initial investigation, advises and makes recommendations to the pre-trial investigation authority, but generally refrains from influencing the latter, in **Turkey** the prosecutor is the main investigating authority, with law enforcement agencies only supporting this function.

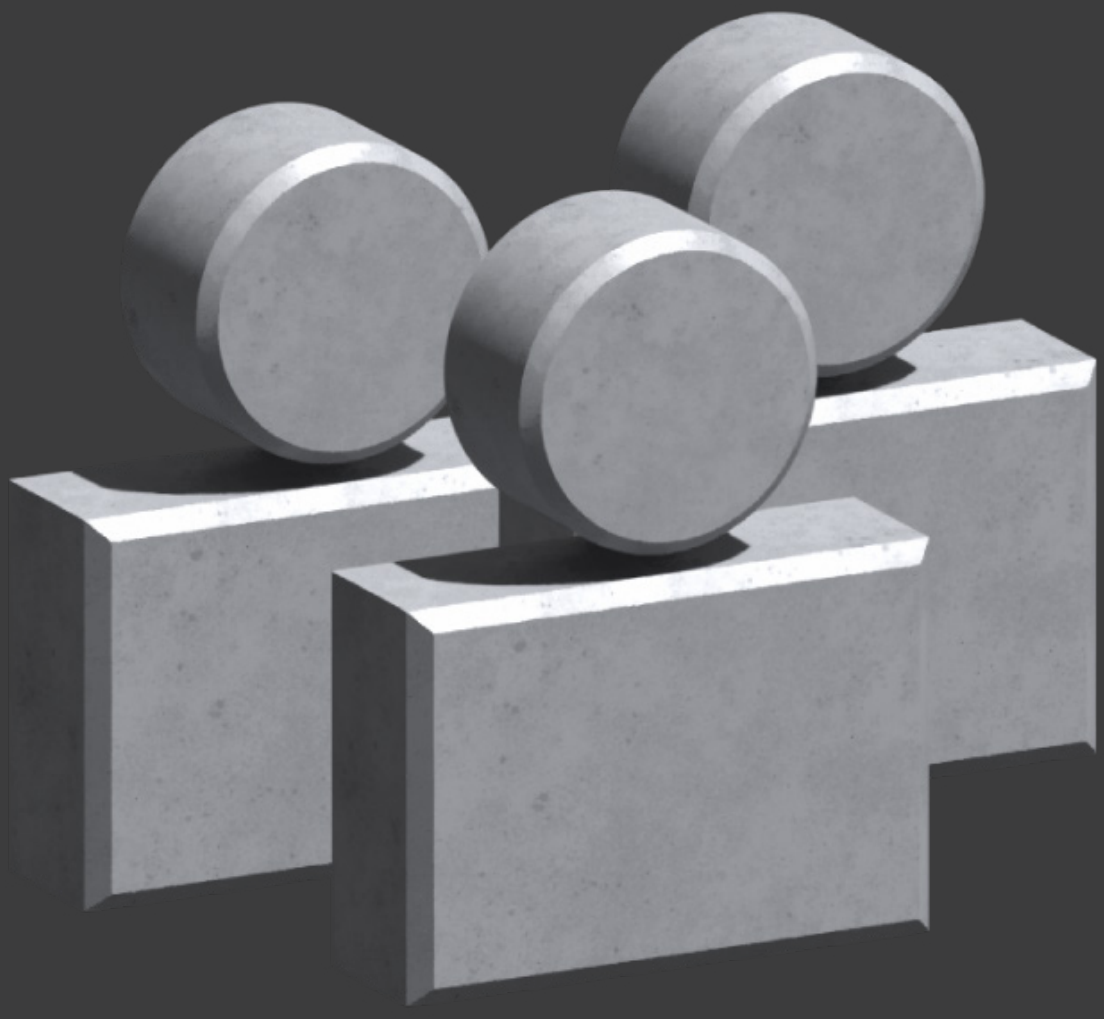
- The functions and role of the military prosecutor - namely to represent the prosecution in a military court - are generally the same as those of civilian prosecutors.

  The investigative role in each country is carried out by the military police, which generally have similar powers to the civilian police, but have greater access to sensitive facilities and fewer restrictions on arrest and search, including for military personnel of any rank or grade title.

- Summary hearings or other forms of commander review of misconduct cases are an important element of the justice system in all five countries. The advantage of this form is that relatively minor misconduct at unit level can be investigated more quickly.

- In all countries, the military justice system overlaps closely with the civilian justice system: While in **Lithuania** military crimes and infractions are dealt with by the civilian justice system itself, in the other countries surveyed the civilian and military systems compete for jurisdiction. In general, the link between the crime committed and military service is a key factor in justifying the jurisdiction of military authorities over ordinary non-military crimes. This issue is best addressed in **Turkish** law, which clearly defines the criteria for the jurisdiction of a military court ((i) a member of the armed forces commits a military offence; (ii) a member of the armed forces commits an offence against another member of the armed forces; (iii) a member of the armed forces commits an offence on military territory; or (iv) the offence committed is a consequence of the performance of a task or duty by the member of the armed forces). In **Canada and the United Kingdom**, there is a deliberate overlap between the civil and military jurisdictions for non-military offences committed by members of the armed forces, leaving it to the competent authorities to decide on a case-by-case basis, depending on the circumstances, under which system the offence will be dealt with.

Section II. Overview of the Military Justice System in Ukraine



2.1. Overview of law enforcement and pre-trial investigation bodies

MILITARY LAW ENFORCEMENT SERVICE OF THE ARMED FORCES OF UKRAINE

The Military Law Enforcement Service of the Armed Forces of Ukraine (**MLES**) is a special law enforcement unit within the Armed Forces of Ukraine, whose task is to ensure law and order and military discipline among military personnel of the Armed Forces of Ukraine at the locations of military units, military camps, on the streets and in public places, to prevent criminal and other offences in the Armed Forces of Ukraine, to protect the rights of military personnel, to protect property, and to counteract sabotage and terrorist acts at military facilities.

In the event of a decision to declare **martial law or a state of emergency** in Ukraine or in certain regions of Ukraine, the law enforcement service is also tasked with participating in the fight against enemy sabotage and reconnaissance groups on the territory of Ukraine, organising the escort and protection of prisoners of war, ensuring compliance with curfews in garrisons, protecting military facilities, restoring and maintaining order and discipline in military units, and controlling the movement of vehicles and cargo of the Armed Forces of Ukraine.

At present, the powers of the Military Law Enforcement Service of the AFU do not include operational and search activities, pre-trial investigation of military offences and bringing the perpetrators to justice. In view of this, it can be said that there is no law enforcement agency in Ukraine with exclusive military jurisdiction, although this was the expectation of the Western partners with regard to the reform of the AFU and the approximation of Ukrainian legislation and legal practice in this area to NATO standards.[29]

Therefore, it is worth paying attention to the innovations proposed by the draft law "On Military Police" No. 6569-1 of 15.02.2022. According to the draft law, the powers of the Military Police should include the prevention, detection, suppression, investigation and disclosure of crimes and criminal infractions related to military justice, thus entrusting the newly created body with the complex task of ensuring law and order in the Armed Forces of Ukraine and other military formations.

STATE BUREAU OF INVESTIGATION

The main legislative act regulating the activities of the State Bureau of Investigation (**SBI**) is the Law of Ukraine "On the State Bureau of Investigation". According to Article 5 of this Law, the SBI's jurisdiction includes military offences, with the exception of those provided for in Article 422 of the Criminal Code of

29 – Public expectations of the military police URL: https://www.pravda.com.ua/columns/2023/06/11/7406365/

Ukraine. It should also be noted that the SBI performs tasks and exercises powers in accordance with Article 6 of the Law. However, these powers are not exhaustive and the SBI may exercise other powers provided for by the Law.

In view of the above, it can be concluded that it is the SBI that is currently investigating crimes committed by military personnel. However, the general lack of resources due to the number of offences under the SBI's jurisdiction, the difficulty of accessing the place where a military offence was committed due to the conduct of hostilities, the impossibility of conducting investigative and search operations, and the lack of specialisation of SBI investigators - all these circumstances significantly affect the effectiveness of military justice in Ukraine.

As a matter of fact, due to the lack of a specialised body, the SBI conducts pre-trial investigation of offences which, due to their specificity and the subject of the offence, are not typical for this pre-trial investigation body.

NATIONAL ANTI-CORRUPTION BUREAU OF UKRAINE

The National Anti-Corruption Bureau of Ukraine (**NABU**) is governed by the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine".

NABU investigators conduct pre-trial investigations of crimes related to military service in accordance with the Criminal Procedure Code of Ukraine, exclusively in accordance with Article 410 of the Criminal Code of Ukraine, if at least one of the following conditions is met:

- if the offence was committed by a high-ranking officer of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the State Special Transport Service, the National Guard of Ukraine, and other military formations established in accordance with the laws of Ukraine;
- if the amount of the object of the crime or the damage caused by it is equal to or exceeds five hundred times or more the minimum wage established for the relevant year, if the crime was committed by an official of a military formation.

The tasks of the NABU are defined in Article 16 of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine". In relation to military offences, the NABU directly (but not exclusively) performs the following tasks:

— Carries out operational and investigative measures for the prevention, detection, suppression and resolution of criminal offences under its jurisdiction, as well as in operational and investigative cases requested by other law enforcement bodies;

— Conducts pre-trial investigation of criminal offences within its jurisdiction,

as well as pre-trial investigation of other criminal offences in cases determined by law.

OTHER BODIES

The National Police of Ukraine and the Security Service of Ukraine may also participate in pre-trial investigation in accordance with the tasks, functions and powers assigned to them by law.

SPECIALISED PROSECUTION BODIES

The Military Prosecutor's Office of Ukraine has undergone significant reforms and its existence is defined by the periods 1991-2012 and 2014-2020. The staff of the Military Prosecutor's Offices included Ukrainian citizens from among the officers who had served in the military or were in the reserves and had higher legal education.[30]

On 19 September 2019, the Verkhovna Rada of Ukraine adopted Law No. 1032 "On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of Prosecution Bodies". The law provided for the liquidation of the military prosecutor's offices, including the position of Chief Military Prosecutor, the reduction of the prosecution bodies' staff and the suspension of the Prosecutor's Qualification and Disciplinary Commission until 1 January 2021. The amendments also allowed for the establishment of specialised prosecution bodies, if necessary.

In particular, in his letter of 30 April 2021 No. 05/5/1-100вих21, the Prosecutor General noted that, in accordance with the requirements of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of Prosecution Bodies" No.113-IX of 19 September 2019, military prosecution bodies wherein military procurators with the status of military personnel served, were excluded from the system of prosecution bodies. In order to ensure that prosecutors exercise their powers in the military and defence sphere, specialised prosecution bodies have been established. At the same time, the prosecutors of these prosecution bodies are civilian prosecutors and do not have the status of military personnel.

With the beginning of the full-scale invasion, the system and powers of the prosecution bodies changed. Accordingly, the powers defined in Article 9 of the Law of Ukraine "On Prosecution", the Office of the Prosecutor General issued Order No. 75 of 17 March 2023 defining the list of specialised prosecution bodies (with the rights of district prosecution bodies) and Order No. 130 of 17 May 2023 (Order No. 130) defining the specifics of their activities.

30 – Belaniuk M. V. Transformation of Military Prosecutor's Offices in Ukraine: Historical and Legal Analysis. Information and Law. No. 1(40)/2022. p. 147

Pursuant to Order No. 130, the Specialised Defence Prosecutor's Office organises and conducts procedural management of pre-trial investigations in criminal proceedings for the following offences:

- against the established procedure of military service;
- committed by military personnel, persons liable for military service and reservists during training, as well as by volunteers of voluntary formations of territorial communities;
- committed during the performance of service duties by employees of enterprises under the control of the Ministry of Defence of Ukraine, the Armed Forces of Ukraine, other military formations, the defence industry of Ukraine, and public bodies staffed (formed) by military personnel;
- committed on the territory of military units, institutions, organisations of the Ministry of Defence of Ukraine, the Armed Forces of Ukraine, other military formations, the State Space Agency of Ukraine, and enterprises of the defence industry of Ukraine;
- in the sphere of service activities and against property, the object of which is military property and/or funds for defence purposes;
- other crimes in accordance with the procedure established by the CPC of Ukraine.

The Specialised Defence Prosecutor's Office of the General Prosecutor's Office organises and conducts pre-trial investigations in current, high-profile criminal cases referred to in paragraph 130 of Order No. 130 "On the Special Features of the Organisation of the Activities of Specialised Defence Prosecutor's Offices and Proceedings Concerning Particularly Serious Crimes".

In addition, the specialised defence procurator's office ensures the organisation and supervision of the observance of the law in the course of the operational and investigative activities of the relevant bodies (operational units of the Security Service of Ukraine, the Security Service of Ukraine, the Defence Intelligence Service of Ukraine, etc.). Its powers include organising and supervising compliance with the law in the execution of court decisions in criminal cases, ensuring the organisation and implementation of the representation of the interests of the State in court, assessing the actions or inactions of relevant officials for signs of administrative offences under Chapter 13-B of the Code of Administrative Offences, and other powers defined by Order No. 130.

2.2. Places of detention of suspected, accused and convicted military personnel

In accordance with the Procedure for the Detention of Convicted, Remanded, Arrested and Detained Military Personnel, approved by the Order of the Ministry of Defence of Ukraine No. 394 of 03.11.2020, the following definitions are used to determine the status of military personnel:

an arrested military member is a military member who, in accordance with a court decision that has entered into force, has been subjected to an administrative penalty in the form of arrest with detention in the military detention facilities for up to ten days;

a convicted military member is a military member who, according to a court verdict that has entered into force, has been sentenced to arrest with serving a sentence in the military detention facilities for a period of one to six months;

a remanded military member is a military member remanded in accordance with the established procedure by the relevant authorised official (officer) for committing an administrative offence or a criminal offence, before the transfer of such a military member to the pre-trial investigation authorities, as well as a military member who has been remanded without documents until his/her identity has been established.

a detained military member means a military member in respect of whom a preventive measure in the form of detention has been applied in accordance with the procedure and on the grounds determined by law.

Detention of military personnel in the military detention facilities and in a disciplinary battalion are special types of sanctions related to the specifics of their military service.

GUARDHOUSE (MILITARY DETENTION FACILITIES)

The main normative acts defining and regulating the specifics of the detention of military personnel in the guardhouses are the Procedure for the Detention of Convicted, Remanded, Arrested and Detained Military Personnel (Procedure) and the Statute of the Garrison and Guard Service of the AFU (Annex 12 “About the Guardhouse”).

According to the Procedure, a guardhouse is a special facility equipped in the building of the management body of the Law Enforcement Service (unit of the Law Enforcement Service in the garrison) for the execution of punishment against military personnel sentenced to arrest, military personnel who have been subjected to an administrative punishment in the form of arrest with detention in a guardhouse, detention of detained and remanded military personnel, or

a facility (tent) that can be temporarily set up on training grounds, in training centres and in areas where the Armed Forces of Ukraine perform their assigned tasks.

It should also be noted that pursuant to Article 321 of the Code of Administrative Offences, detention in the guardhouse does not apply to female military personnel. Despite the increasing number of offences committed by military personnel in the combat zone, courts are increasingly applying this type of sanction, as evidenced by information from the Unified State Register of Court Decisions.

DISCIPLINARY BATTALIONS

The main normative act defining and regulating the peculiarities of serving the sentence of convicted military personnel in the form of detention in a disciplinary battalion is the "Procedure for serving the sentence of convicted military personnel in the form of detention in a disciplinary battalion" approved by the Order of the Ministry of Defence of Ukraine dated 04.06.2025 No 155. It is also necessary to take into account the Resolution of the Plenum of the Supreme Court of Ukraine No. 15 of 28.12.96 "On the Practice of Imposing Punishment on Military Personnel in the Form of Detention in a Disciplinary Battalion".

The reason for detaining a military member in a disciplinary battalion is a valid court sentence, so this applies only to convicted military personnel.

OTHER PLACES OF DETENTION

In addition, there are temporary detention facilities (TDF) for military personnel, i.e. facilities for detained and arrested military personnel, which are set up in the guardhouse or, in the absence of a guardhouse, in the building of the management body of the law enforcement service (unit of the law enforcement service in garrison), or a facility (tent), which can be set up temporarily on training grounds, in training centres and in areas where the Armed Forces of Ukraine perform assigned tasks.

If there is no guardhouse in the management body of the law enforcement agency in whose area of operation the military unit (facility) is located, detained military personnel subject to arrest for up to three days may be detained in the TDF for a special period by court order, provided that this is necessarily indicated in the decision on the application of arrest with detention in the guardhouse.

In practice, detainees are often held in remand centres due to the insufficient number of guardhouses and the lack of space in them. This is due to the increase in the number of military personnel and the number of offences committed by them. This is a significant gap, as the detention of military personnel and civilians

who commit offences can have a demoralising effect due to the specific nature of military offences.

2.3 Courts for military offences

In 2010, the military courts that administered justice in the armed forces and other military formations were abolished. Their jurisdiction was limited to hearing only criminal cases and cases of administrative offences related to corruption. Currently, these categories of cases are handled by local common courts, courts of appeal and the Supreme Court. Certain categories of cases may be heard by the Supreme Anti-Corruption Court of Ukraine (e.g. cases of theft, misappropriation, extortion of weapons, ammunition, chemicals or other military property by a member of the military, as well as their acquisition through fraud or abuse of office).

The issue of reinstating military courts is as controversial as the creation of the military police. In particular, several draft laws have been registered in the VRU, including the Draft Law on Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" regarding military courts No. 8392 of 22.05.2018. According to it, the system of military courts would have a three-tier structure: Garrison Military Court, Military Court of Appeal and Military Chamber of the Court of Cassation.

At present, the courts are regulated by the Law of Ukraine "On the Judiciary and the Status of Judges", which provides for the regulation of the courts:

- **Local common courts** shall consider civil, criminal, administrative and administrative offence cases in the cases and in accordance with the procedure established by the procedural law;
- **Courts of appeal** for civil, criminal and administrative cases are appellate courts established in appellate districts;
- **The Supreme Court** shall be the highest court in the judicial system of Ukraine, ensuring the stability and unity of judicial practice in the manner and under the conditions established by procedural law. The Supreme Court includes, in particular, the Court of Cassation. Each Court of Cassation, taking into account the specialisation of the judges, establishes judicial chambers for the consideration of certain categories of cases.

The outbreak of the full-scale invasion of Ukraine by the Russian Federation has led to a discussion about the establishment of specialised courts to try crimes committed by military personnel. However, experts believe that the solution could be to specialise judges in war crimes cases.

It should be noted that there is currently a tendency towards other approaches, namely amendments to the Criminal Code. For example, on 27 January 2023

the Law of Ukraine "On Amendments to the Code of Administrative Offences of Ukraine, the Criminal Code of Ukraine and Other Legislative Acts of Ukraine on the Particularities of Military Service in Martial Law or Combat Situations" came into force, which prohibits: 1) to impose on a military member who has committed certain military crimes a punishment lower than the minimum specified in the sanction of an article (sanction of a part of an article) of the Special Part of the Criminal Code, or to transfer him/her to another, more lenient type of basic punishment not specified in such sanction; 2) to release a military member (except for a military member who is a pregnant woman or a woman with a child under the age of 7) from parole. The law generally provides for increased criminal liability for the following offences Disobedience of orders, threats or violence against a superior, unauthorised leaving of a military unit or place of service, desertion and unauthorised leaving of the battlefield or refusal to use weapons during combat, which has attracted considerable criticism from scholars and legal practitioners.[31] This approach is seen as an instrument of personnel management. The Supreme Court, through a panel of judges of the First Judicial Chamber of the Court of Cassation, in case no. 726/78/23, ruled that a military member deserved to be imprisoned without the possibility of parole, so that other military members would not think that they could ignore the orders of commanders.[32]

31 – Khavroniuk Mykola. Strengthening the criminal liability of military personnel. On the contradictions of the new law. URL: https://pravo.org.ua/blogs/posylennya-kryminalnoyi-vidpovidalnosti-vijskovosluzhbovtsiv-pro-superechnosti-novogo-zakonu/

32 – Resolution of 11.07.2023 No. 726/78/23 of the Supreme Court. Criminal Court of Cassation. URL: Resolution of 11.07.2023 No. 726/78/23 of the Supreme Court. Касаційний кримінальний суд - Пошук Google

Section III. Particularities of Types of Responsibility of Military Personnel

In accordance with Articles 26 and 27 of the Statute of the Internal Service of the Armed Forces of Ukraine, military personnel are subject to disciplinary, material, administrative, civil and criminal liability, depending on the nature of the offence or fault committed. Military personnel subject to disciplinary sanctions for a committed offence are not exempt from material and civil liability for such offences. Military personnel shall be held criminally liable for committing an offence on general grounds (with the possibility of applying Article 44 of the Criminal Code of Ukraine).

3.1. Disciplinary liability

The Disciplinary Statute of the Armed Forces of Ukraine (AFU DS) provides that in each case of an offence, the commander is obliged to decide whether to bring the offender to justice, depending on the circumstances of the offence, the degree of guilt, the previous behaviour of the offender, the amount of damage caused to the state and other persons, as well as taking into account the combat immunity defined by the Law of Ukraine "On the Defence of Ukraine."

The authorities involved in the investigation and prosecution are the military unit (represented by the commander/superior) and, if the actions of the service member constitute an administrative or criminal offence, the MLES and law enforcement agencies, with the subsequent transfer of the materials of the internal investigation.

In accordance with the Disciplinary Statute of the Armed Forces of Ukraine, an internal investigation may precede a commander's decision to impose a disciplinary sanction on a subordinate. It is conducted to clarify the reasons and conditions that contributed to the commission of the offence and the degree of guilt.

The internal investigation must be completed within one month of its appointment by the commander (superior). A disciplinary sanction must be imposed no later than 10 days from the date the commander (superior) became aware of the offence and, in the case of an internal investigation, within one month from the date of its completion, without taking into account the time spent by the service member in treatment or on leave.

Unfortunately, a number of violations can occur during internal investigations, including:

- Failure to notify in good time the commencement of the investigation and the reasons for it;
- Refusal by the command to take into account oral or written statements made by military personal;
- Violation of the terms of their conduct;

- Failure to inform the military personal of the internal investigation and refusal to provide copies of the internal investigation or other internal investigation materials.

In addition, persons conducting internal investigations may not take into account the individual circumstances of the case, or the investigation itself may be used as a method of influencing service members by imposing disciplinary sanctions.

If a service member has not committed a crime and believes that he has been disciplined unlawfully, he has the right to file a complaint with a senior commander (superior) within one month from the date of the disciplinary sanction, or to file an appeal with a court within the time limit established by law.

3.2. Characteristics of financial responsibility

According to the Law of Ukraine "On Financial Responsibility of Military Personnel and Persons Equivalent to Them for Damage Caused to the State", financial responsibility is a type of legal liability that consists in the obligation of military personnel and certain other persons to compensate, in full or in part, direct actual damage caused by their fault as a result of destruction, damage, loss, theft or illegal use of military and other property during the performance of military service or official duties, as well as additional charges to the state revenue as a sanction for illegal actions in case of application of increased financial responsibility.

The conditions for the application of financial responsibility are as follows:

- The existence of damage;
- Unlawful conduct of a person in connection with failure to perform or improper performance of military service or official duties;
- The causal link between the wrongful conduct of the person and the damage caused;
- The fault of the person in causing the damage.

The damage caused shall not be subject to compensation and persons shall be exempted from financial responsibility if the damage was caused as a result of: Force majeure; necessary defence; extreme necessity; execution of an order or instruction of a commander (superior), except in the case of execution of a manifestly criminal order or instruction; justified danger to the service; detention of a person who has committed a crime; physical or mental coercion; performance of a special task to prevent or detect criminal activities of an organised group or criminal organisation. Damages are also excluded in the event of the death of the perpetrator.

Circumstances that exclude financial responsibility are to be established in the course of the investigation. Holding a person liable for damage does not exempt him or her from disciplinary, administrative or criminal liability established by law. A person may be held financially liable within three years from the date of discovery of the damage.

Military personnel may be subject to limited, full and increased types of financial responsibility. If a person's guilt is proven, the commander (superior) shall issue an order to hold the guilty person financially liable, specifying the amount to be recovered, within fifteen days from the date of completion of the investigation. In the event that the person who caused the damage is held criminally liable, compensation for the damage shall be made by a military unit, institution, organisation or establishment by filing a civil claim in criminal proceedings in accordance with the procedure established by law.

N.B. An investigation may not be ordered if the causes of the damage, its amount and the guilty person have been established by an audit (inspection), an inventory, a preliminary investigation or a court.

Transfer of a person to another place of work or dismissal from his/her position or service may not be a reason for exemption from financial responsibility established by law.

In the case of dismissal of a person held liable or if the decision to hold a person liable is not taken before his/her dismissal from service, compensation for the damage shall be made in court if the person refuses to make the compensation voluntarily or in another manner prescribed by law.

In addition, Resolution of the Cabinet of Ministers of Ukraine No. 604 of 15.07.2020 establishes "The list of weapons, arms and ammunition, the loss or theft of which must be compensated by the perpetrators in multiples of their value" (the List). The List provides for compensation of two, five and ten times the value, depending on the type of weapons, arms and ammunition.

N.B. The Law of Ukraine "On Amendments to the Criminal Code of Ukraine and Other Legislative Acts of Ukraine on Determination of Circumstances Excluding Criminal Illegality of an Act and Ensuring Combat Immunity during Martial Law" of 15.03.2022 establishes legal protection for military commanders, service members, 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, and persons defined by the Law of Ukraine "On Ensuring the Participation of

Civilians in the Defence of Ukraine" by introducing the concept of 'combat immunity' and amending the general part of the Criminal Code of Ukraine regulating immunity from criminal liability for the loss of military equipment or other military property.

Court decisions in cases of administrative or criminal offences may also contain information on compensation or non-compensation for material damage. For example, in case No. 381/2798/22 on negligent attitude to military service, at the time of the trial the accused voluntarily compensated for material damage in the amount of ten times the value of the lost property. The voluntary nature of such compensation was taken into account by the court as a mitigating circumstance[33].

The issue of compensation for material damage can be resolved both in the course of administrative or criminal proceedings (by filing a civil claim) and in civil proceedings, as evidenced by the legal position of the Supreme Court below.

In accordance with the position of the Supreme Court in case No. 935/695/20, composed of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation, pursuant to Part 7 of Article 128 of the CPC of Ukraine, a person who has not filed a civil claim in criminal proceedings, as well as a person whose civil claim has been left without consideration, has the right to file it in civil proceedings[34].

In addition, Article 22 of the Civil Code of Ukraine provides that a person who has suffered damage as a result of a violation of his or her civil right is entitled to compensation.

Part two of this article defines damages as, inter alia, damages incurred by a person in connection with the destruction of or damage to an object, as well as expenses incurred or to be incurred by a person in order to restore the violated right (actual damages).

Property damage caused by unlawful decisions, acts or omissions to the personal non-property rights of a natural person or legal entity, as well as damage to the property of a natural person or legal entity, shall be compensated in full by the person who caused it (Part 1 of Article 166 of the Civil Code of Ukraine).

Pursuant to paragraphs 1 and 2 of the Regulation on Financial Responsibility of Military Personnel for Damage Caused to the State, approved by Resolution of the Verkhovna Rada of Ukraine No. 243/95-VR of 23 June 1995, this Regulation establishes the grounds and procedure for holding military personnel and persons called up for military training liable for damage caused to the State in the course of their official duties, as provided for by laws, military regulations, manuals, instructions and other regulatory acts.

The Regulation provides for compensation for direct actual damage caused by theft, damage, loss or illegal use of military property, deterioration or reduction

33 – https://reyestr.court.gov.ua/Review/110214970

34 – https://reyestr.court.gov.ua/Review/108422659

of its value, which resulted in additional costs for military units, institutions, organisations, enterprises and military educational institutions (military units) for restoration, purchase of property or other material assets, or excessive payments.

Thus, compensation for damage caused by theft, damage, loss or misuse of military property may be a way of protecting a civil right or interest.

3.3. Administrative liability

In accordance with Part 2 of Article 45 of the AFU DS, military personnel are subject to disciplinary liability for administrative offences under the AFU DS, except in cases provided for by the CUAO. In accordance with the provisions of the CUAO, military personnel are liable for committing administrative offences on general grounds and in a special procedure.

On general grounds (in accordance with the norms of the CUAO), military personnel are liable for committing the offences provided for in Article 15 of the CUAO. In addition, military personnel cannot be subjected to public works, correctional labour or administrative detention. In cases not provided for in this article of the CUAO, administrative liability is applied to military personnel in accordance with the AFU DS.

A fine as an administrative penalty shall not be applied in the case of violation of traffic rules by drivers of vehicles of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine, and of the State Special Transport Service by conscripts, as well as in the case of commission of military administrative offences under Chapter 13-B of the CUAO.

In the cases referred to in Article 15 of the CUAO, the bodies (officials) authorised to impose administrative sanctions shall forward the material on the offence to the competent authorities for a decision on the disciplinary liability of the perpetrators. Military personnel, persons liable for military service and reservists during training are liable for the commission of military administrative offences under Chapter 13-B of the CUAO, provided that these offences do not entail criminal liability.

Appeals. Article 294 of the CUAO provides that the decision of a judge in a case of administrative offence may be appealed by the person held administratively liable within ten days from the date of the decision.

An appeal filed after the expiration of this period will be returned by the appellate court to the person who filed it, unless he or she requests an extension of this period or if the extension of the period is denied.

If there are valid reasons for missing the time limit for filing an appeal, a request for extension of the time limit may be filed. If the deadline is missed for

genuine reasons, the appellate courts usually extend the appeal.

Since the full-scale invasion of the territory of Ukraine by the Russian Federation, the number of administrative offences committed by military personnel has increased. The probable reason for this increase is the increase in the number of military personnel.

Based on the analysed case law and statistics on appeals in administrative offences, it appears that most cases are not appealed, as it is common for a person to be found guilty during the trial in a court of first instance.

It is also worth noting that decisions on negligent attitude to military service do not sufficiently explain and clarify the concept of 'negligent attitude', which does not allow for an objective analysis of the circumstances of the case and the decision itself.

The courts take into account the fact that the deadlines for bringing administrative responsibility to bear have been missed, and therefore cases of administrative offences are closed due to the expiry of the deadline for imposing an administrative penalty. In particular, such a conclusion was reached by the court in the decision of the Yavorivskyi District Court of Lviv oblast dated 21.03.2022 in case No. 944/330/22, according to which the proceedings in the case of bringing the military personnel to administrative responsibility under Part 2 of Article 172-10 of the Code of Ukraine on Administrative Offences was closed due to the expiry of the administrative penalty.

In the analysis of court practice, a sample of decisions made between 24.02.2022 and 06.2023 was selected. The cases were also filtered and sorted by categories, the statistics of which are presented below. These categories of cases were chosen for the study (see Annex 1) on the basis of the frequency of these types of offences committed by military personnel and the number of court decisions.[35]

GENERAL CONCLUSIONS FROM THE ANALYSIS OF JUDICIAL PRACTICE:

— There is a gap in the application of parts of the articles relating to their application during a special period (other than martial law), namely: As of 24.02.2022, the courts have issued decisions with sanctions in parts that should be applied only during a special period. This is due to the simultaneous application of several legal regimes;

— The most common type of penalty is a fine;

— The sanction of imprisonment in the guardhouse for up to 6 months remains relevant (e.g. for unauthorised leaving of a military unit or place of service);

35 – https://reyestr.court.gov.ua/Review/103744705

— Insignificant number of appeals due to the overwhelming majority of guilty pleas for administrative offences by military personnel;

— Insufficient description in court decisions of the circumstances of the case and the material examined in the court proceedings.

STATISTICS OF COURT DECISIONS (FROM 24.02.2022 TO 06.2023):

— **Article 172-10** Refusal to comply with the legal requirements of a commander (superior): 1105 court decisions

— **Article 172-11** Unauthorised leaving of a military unit or place of service: 7964 court decisions

— **Article 172-12** Negligent destruction of or damage to military property (in connection with financial responsibility): 26 court decisions

— **Article 172-15** Negligent conduct in military service: 2974 court decisions

3.4. Characteristics of criminal liability

A military offence is an offence against the procedure established by law for the performance or completion of military service committed by military personnel, persons liable for military service and reservists during training.

According to the relevant articles of the section of the Criminal Code of Ukraine "Crimes against the established procedure of military service" (military crimes), military personnel of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and other military formations established in accordance with the laws of Ukraine, the State Special Transport Service, the State Service for Special Protection of Communications and Information of Ukraine, as well as other persons specified by law (Parts 1 and 2 of Article 401 of the Criminal Code of Ukraine).

A person who has committed an offence under the articles of this section, except for police officers of the Special Police of the National Police of Ukraine, may be released from criminal liability in accordance with article 44 of this Code with the application of measures provided for in the Disciplinary Statute of the Armed Forces of Ukraine.

In addition, one of the important concepts regulating the criminal liability of military personnel is 'combat immunity'.

The Law of Ukraine "On Amendments to the Criminal Code of Ukraine and

Other Legislative Acts of Ukraine on Determination of Circumstances Excluding Criminal Illegality of an Act and Ensuring Combat Immunity during Martial Law" amended a number of legislative acts, in particular introduced the concept of combat immunity.

Combat immunity is the exemption of military commanders, service members, special police officers of the National Police of Ukraine, volunteers of the Territorial Defence Forces of the Armed Forces of Ukraine, law enforcement officers participating in the defence of Ukraine within the limits of their authority, and persons specified in the Law of Ukraine "On Ensuring the Participation of Civilians in the Defence of Ukraine" from liability, including criminal liability, for the loss of personnel, military equipment or other military property, consequences of the use of armed and other force in repulsing armed aggression against Ukraine or liquidation (neutralisation) of armed conflicts, performance of other tasks for the defence of Ukraine with the use of any type of weapon (armament), the occurrence of which could not be foreseen with due diligence when planning and performing such actions (tasks), or which are covered by a justified risk, except for cases of violation of the laws and customs of war or use of armed force as defined by international treaties ratified by Ukraine.

Persons to whom combat immunity may apply: Military personnel, including military commanders; TDF volunteers; law enforcement officers participating in the defence of Ukraine; citizens of Ukraine, foreign nationals and stateless persons legally residing in Ukraine.

N.B. Combat immunity does not apply to violations of the laws and customs of war, so the person who committed the offence is liable on a general basis.

The basis for initiating a pre-trial investigation is a statement or report of an offence or circumstances independently identified by law enforcement authorities that may indicate the commission of an offence. Concerning the jurisdiction over military crimes: Crimes committed by military personnel are under the jurisdiction of investigators of the State Bureau of Investigation, with the exception of Article 422 of the Criminal Code of Ukraine (which is under the jurisdiction of the SBU).

Also, if the offence under Article 410 of the CCU is committed by a senior officer of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the State Special Transport Service, the National Guard of Ukraine and other military formations established in accordance with the laws of Ukraine, it is under the jurisdiction of the NABU.

Since Russia's full-scale invasion of Ukraine, the number of criminal cases against the established procedure for military service has increased significantly.

There are objective reasons for this, such as: an increase in the number of military personnel, an increase in the number of referrals of the results of internal investigations to law enforcement agencies.

It should also be noted that the number of cases that reach court is not as high as the number of criminal proceedings, as some categories of cases, such as desertion, may be closed at the pre-trial stage due to the absence of a criminal offence.

Objective reasons for difficulties in carrying out pre-trial investigations may also include:

- The fact that the service member is a prisoner of war of the Russian Federation;
- The status of the service member as a missing person, etc;
- Committing an offence on the territory where active hostilities are taking place or on the territory not controlled by Ukraine.

If a service member commits an offence in relation to the categories of cases under consideration, it is customary for the accused and the prosecutor to conclude a plea agreement. The courts, taking into account the objectivity of the agreement, do not raise any objections and apply the sanction stipulated in the agreement.

It should also be noted that, in the case of a guilty plea and remission, the courts apply Part 3 of Article 349 of the Criminal Code of Ukraine, according to which the court has the right, if the parties to the proceedings do not object, to declare it inappropriate to consider evidence concerning circumstances which are not disputed by anyone. At the same time, the court checks whether the said persons have a correct understanding of the content of these circumstances, whether there is no doubt about the voluntariness of their position, and also explains to them that in this case they will be deprived of the right to contest these circumstances on appeal.

In the analysis of court practice, a sample of judgments delivered between 24.02.2022 and 06.2023 was selected. The cases were also filtered and sorted by categories, the statistics of which are presented below. These categories of cases were selected for the study (a detailed overview of practice is provided in Annex 2 to this report) because of the prevalence of these types of offences committed by military personnel and the number of sentences handed down by the courts.

GENERAL CONCLUSIONS FROM THE ANALYSIS OF JUDICIAL PRACTICE:

– The practice of entering into a plea agreement between the accused and the prosecutor is widespread;

— The number of guilty verdicts far exceeds the number of acquittals (in all categories of cases reviewed), with almost no acquittals in some categories, in particular under Article 402 “Disobedience” resulted in one acquittal during the period under review;

— The courts often use Part 3 of Article 349 of the Criminal Code of Ukraine, according to which the court has the right, if the parties to the proceedings do not object, to declare it inappropriate to consider evidence concerning circumstances, which are not disputed by anyone. At the same time, the court checks whether the said persons have a correct understanding of the content of these circumstances, whether there is no doubt about the voluntariness of their position, and also explains to them that in this case they will be deprived of the right to contest these circumstances on appeal. The courts mostly apply this article in case of a guilty plea.

🔨 STATISTICS OF COURT DECISIONS OF THE FIRST INSTANCE (AS OF 24.02.2022):

— **Article 402.** Disobedience: 556 judgements.

— **Article 405. T**hreat or violence against a superior: 77 judgements

— **Article 407.** Unauthorised leaving of a military unit or place of service: 2274 judgements

— **Article 408.** Desertion: 199 judgements

— **Article 410.** Theft, appropriation, extortion by a military person of weapons, ammunition, explosives or other combat substances, means of transportation, military and special equipment or other military property, as well as taking possession of them by fraud or abuse of official position: 24 judgements.

— **Article 425.** Negligent conduct in military service: 9 judgements

Section IV. Problematic Aspects of Military Justice and Protection of the Rights of Military Personnel

The protection of the rights of military personnel is now more important than ever. The practice of human rights organisations, the system of free legal aid and the statistics of various hotlines show us that there are gaps and problems in the protection of the rights of military personnel. At the same time, this points to a number of challenges and trends in the existing military justice system.

A high quality, transparent, understandable and operational military justice system is one of the keys to success not only in protecting the rights of military personnel, but also for the functioning of the military service in general. Constant monitoring of its effectiveness and efforts to improve it are therefore essential.

In the course of the study, we analysed secondary data from organisations that protect the rights of military personnel, namely: All Ukrainian Rights Protection Organisation Legal Hundred, the Volunteer Movement "Lawyers of the Armed Forces of Ukraine" and the Free Legal Aid System.

In addition, a series of expert interviews were conducted with experts in the field, as well as with beneficiaries serving in the Armed Forces of Ukraine, in order to analyse in more depth the pain points of military personnel in the military justice system. A total of 10 in-depth interviews were conducted.

4.1. Overview of statistical data

One of the tools for protecting the rights of military personnel are the hotlines of the relevant bodies, where military personnel can submit a complaint, suggestion, application or request. Among the hotlines provided by the State are the hotlines of the Ministry of Defence of Ukraine, the Human Rights Commissioner of the Parliament of Ukraine, the Government Hotline, the Hotline of the Command of the Territorial Defence Forces, etc.

In addition, there are non-governmental organisations in Ukraine that provide legal advice or assistance to military personnel. For example, the hotlines of the all-Ukrainian legal protection organisation Legal Hundred and the volunteer movement "Lawyers of the Armed Forces of Ukraine" are currently active.

According to the statistics of the Legal Hundred for the period from 24.02.2022, we can observe the following trend. In the area of criminal liability, the majority of applicants are interested in refusal to execute a combat order - 160 applications, which is 29.3% of all applications in criminal cases. One of the most popular appeals is for absence without leave - 90 appeals, or 16.9%. Desertion is also in the top five, with 34 appeals in the period under review, representing 6% of all appeals in criminal cases.

CRIMINAL CASES

565 appeals for the period from 24.02.2022 to 19.05.2023

Case category	Number of appeals	% of the total number of appeals
Other cases	201	35,5 %
Refusal to carry out an order	160	29,3%
AWOL	90	16,9%
Request for lawyers	43	7,6%
Desertion	34	6%
Unlawful relations	15	2,6 %
Mobilisation	12	2,1 %
Alcohol and drug related cases	12	2,1 %
Homicide cases	10	1,7 %
Aggravated assault	8	0,5 %
Bribery cases	3	0,3 %

With regard to liability for administrative offences, the most common cases reported by service members were alcohol consumption - 39 cases (28.5%), leaving the unit without permission (before committing the offence) - 9 cases (6.57%), and failure to report to the Territorial Recruitment and Social Support Centre on call - 5.84%.

ADMINISTRATIVE OFFENCE CASES

137 appeals for the period from 24.02.2022 to 19.05.2023

Case category	Number of appeals	% of the total number of appeals
Other cases	66	48,2%
Alcohol consumption	39	28,5%
Unauthorised leaving of the unit (before the criminal offence is committed)	9	6,57%
Failure to arrived at the Territorial Recruitment and Social Support Centre	8	5,84%

Consumption of drugs	3	2,19%
Refusal to comply with orders	3	2,19%
Alimony	2	1,45%
Exceeding the scope of official duties	2	1,45%
Guardhouse	2	1,45%
Bringing to justice for the same act twice	1	0,72%
Refusal to comply with orders	1	0,72%
Negligence in office	1	0,72%

The total number of appeals processed in the period from 24.02.2022 to 19.05.2023 is **44,697.**

According to the statistics of the volunteer movement "Lawyers of the Armed Forces of Ukraine", from the beginning of its establishment on 16.04.2022 until June 2023 they processed 11,168 appeals of military personnel. Most often, military personnel were interested in dismissal from service (2050 appeals), medical issues and Military Medical Commission (1615 appeals), and payments (1225 appeals). The number of appeals concerning administrative liability for the entire period is 654 appeals, and the number of appeals concerning criminal liability is 263. Below is a breakdown of military appeals statistics by category and number of appeals.

Case category	Number of appeals
Dismissal from service	2050
Medical care, Military Medical Commission	1615
Payments to military personnel	1225
Missing persons	979
Administrative liability	654
Transfer	649
Preparation of documents	499
Fatalities	424
Captured	345

Leave of absence	277
Appealing against actions of the military unit	265
Criminal liability	263
Mobilisation	215
Social security	71
Internal military issues	55
Equipment and training issues	25

We also analysed the statistics of the free legal aid system. According to Oleksandr Baranov, the director of the Coordination Centre for Legal Assistance, from 1 January to the end of May 2023, 588 orders for defence during detention were issued in cases of military crimes, with most detentions taking place in the Donetsk, Zaporizhzhia, Luhansk and Kharkiv oblasts. In addition, during the same period, 560 orders for defence by appointment were issued. Most of them were issued in Dnipro, Donetsk, Zaporizhzhia, Luhansk and Kharkiv oblasts. In cases of AWOL, 105 orders were issued for defence during detention and 273 for defence by appointment.

4.2. General challenges in protecting rights

There is currently no procedure that would explain their rights to military personnel and help them protect them. In addition to appealing to superior commanders, as provided for in the AFU statutes, one of the available ways to protect the rights of military personnel is through the Ministry of Defence hotline. In most cases, the hotline provides advice or clarification on a particular issue. In complex cases that require more in-depth research and analysis, the hotline registers the request and processes it within 30 days. If necessary, if the hotline staff is unable to respond to such an appeal, it is forwarded to an authorised body, which will be obliged to respond within the established timeframe. Each appeal has a unique registration number, which can be used to find out the stage of consideration of the appeal.

However, one of the interviewed service members notes that there are often cases when calling the hotline leads to problems and punishment. Thus, the service member explains, an appeal or complaint left on the hotline is forwarded to the same battalion in which the service member is serving, and the issue is often resolved by the same person or his/her department against whom the service member complains.

In general, as expert Illia Kostin notes: “There is no structure within the Armed Forces that should systematically take care of the rights of service members at the level of the task.” According to Kostin, the existing system of protection of military personnel’s rights, which is provided for in the Disciplinary Statute and the Internal Service Statute, is ineffective. The expert believes that these problems can be partially solved by creating a military police, the draft law on which defines the protection of the rights of service members as one of the tasks of this body.

Another problem is the so-called ‘casteism’ of military personnel and the privileging of certain categories. According to one of the servicewomen interviewed, “the lawyer in the unit will always be on the side of the HQ because he works for the HQ”. The interviewee also complained about the lack of a system of effective bodies that would help military personnel to protect their rights and solve problems without any problems for the military personnel themselves, as only a few organisations are currently involved in this area. It is also possible to resolve problems through personal contacts with the relevant authorities, but not in a centralised way and not for all military personnel. Giving feedback on the work of the hotline, the interviewee notes that military personnel are afraid to contact the MoD hotline because, as a rule, after an appeal and a reaction from the ‘top’ to the unit, the attitude towards the military member in the unit worsens. There is a lack of an anonymous counselling line that would help military personnel to understand the situation and give advice on how to act in a given situation.

The interviewees also noted that one of the manifestations of violations of the rights of military personnel is the use of physical violence and threats by law enforcement agencies (SBI, MLES, etc.) during investigations into crimes or serious disciplinary violations.

Such physical violence is often used to quickly ‘extract’ a confession or testimony against other persons. It also violates a military member’s right to a lawyer.

Some of the experts interviewed believe that one of the main problems is that military crimes are dealt with by civilian law enforcement agencies, which do not always understand and take into account the specificities of the military. It is often difficult for a non-military person to understand why a service member acted in one way in a given situation and not another. In their view, either military courts should be established or judges should be appointed who specialise in military cases only.

Application of criminal and administrative liability

Members of the Armed Forces of Ukraine, the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine and

other military formations established in accordance with the laws of Ukraine shall bear administrative and criminal liability in accordance with the laws in force in the event of committing an administrative or criminal offence. However, such liability is not always proportionate to the social danger of the act committed by the service member, and the procedure for bringing a person to criminal liability is not always sufficiently transparent and takes into account the specificities of military affairs. For example, a military memeber may be punished for arriving late after being treated in a military medical facility for a serious injury, or for failing to perform the duties of a commanding officer because he or she was suddenly ill. These and other problems of holding military personnel administratively and criminally accountable are discussed below.

Vulnerable groups

According to activist and service member Viktor Pylypenko, service members belonging to vulnerable groups, including the LGBTQI+ community, are often discriminated against and rejected by their units, and as a result, “hey are put in a position where their career development is hindered or their service is simply unbearable.” The only solution that commanders resort to is to transfer the victim to another unit. As a rule, there are no prosecutions or educational talks with the perpetrators.

Viktor recalls the case of a service member who came out on social media about his sexual orientation, whereupon his commanders forced him to delete all publications on the subject and, when he refused, transferred him to another unit. A similar decision was taken in the case of another service member who was bullied by his fellow service members because of his sexual orientation. The service member then turned to a gender advisors, and through connections and communication, the higher command responded, but did not legally influence the perpetrators.

Viktor emphasises that one of the mechanisms for protecting the rights of LGBTQI+ service members and women is to contact a gender advisor in the armed forces. However, such advisors do not address these issues “in a legal way, but simply through direct influence, for example through direct calls, but this does not completely solve the problem.” One of the most effective non-legal mechanisms to protect vulnerable groups is media exposure, as commanders cannot help but respond.

4.3. Criminal liability of military personnel

4.3.1. Absence without leave

1. The legislation does not establish any time limits for the absence of a service member in the case of unauthorised leaving of a military unit or place of service, as well as failure to report on time for service without valid reasons, which is punishable by criminal liability.

One of the problems with liability for unauthorised absence is that there is no time limit after which a person who does not return to the unit is considered to have left without permission. In other words, a service member who is absent from his unit for one hour and a service member who is absent for four months are in practice considered the same offenders and will be punished in the same way when their case is considered in court. "For these reasons, there is room for abuse," says Serhii Horbatiuk, an expert.

For example, a service member is treated in Lviv oblast while serving in Donetsk oblast. Due to the complicated logistical chains that have developed as a result of the hostilities, the service member does not have time to get to the military unit on time and arrives three days after being discharged.

On the same day, he learns that he is on the list of people who have left the military unit without permission and that representatives of the Military Law Enforcement Service have already been called to investigate. The next step is for the commander of the military unit to inform the State Bureau of Investigation and open a criminal case against the service member. In this case, however, it is difficult to talk about the social danger of such an individual's actions, but the command does not recognise the validity of the reasons.

2. Impossibility of applying administrative liability to service members who have left their military unit without permission during martial law.

Part 5 of Article 407 of the Criminal Code provides for liability for unauthorised abandonment of a military unit or place of service, as well as for failure to report for duty on time without valid excuse, committed under martial law or in a combat situation.

Similarly, Part 4 of Article 172-11 of the Code of Administrative Offences provides for liability for unauthorised abandonment of a military unit or place of service by a service member, as well as for failure to report on time for military service without valid reasons in the case of appointment or transfer, failure to report from a secondment, leave or medical institution, committed during a special period.

In other words, the optional features of the objective side (martial law, combat situation) are not provided for by the norm of this article.

In addition, Part 5 of Article 15 of the Code of Administrative Offences provides that military personnel, persons liable for military service and reservists during training are liable for military administrative offences under Chapter 13-B of this Code, provided that these offences do not entail criminal liability.

Thus, it follows from an analysis of these provisions that unauthorised abandonment of a military unit or place of service by a service member, committed under martial law or in a combat situation, regardless of the duration of such actions, constitutes a criminal offence under Part 5 of Article 407 of the Criminal Code of Ukraine and excludes administrative liability under Article 172-11 of the Code of Administrative Offences, which is not always proportionate to the act committed by the person.

3. Declaring a service member to have committed AWOL as a manifestation of commanders' abuse of power.

The instrument of bringing to responsibility for AWOL is currently often used unqualifiedly. This is confirmed by the fact that commanders are often not interested in the return of a service member. The expert Maryna Lilichenko points out that, as a rule, none of the commanders waits for explanations from the offender, does not understand the circumstances of the case and does not try to solve the problem of the return of a service member who has left the unit without permission on his own, but immediately initiates a criminal case.

Ms Maryna recalls a case in which a service member was reported to have gone AWOL, but no one looked for him, did not contact him or his relatives about the reasons for his absence, although the commanders had the opportunity to do so. At the same time, the service member did not know the address of the unit he was supposed to report to or the telephone numbers of his commanders.

The AWOL report is often used by unscrupulous commanders to manipulate, blackmail and punish service members who are biased. Oleksandr Baranov, the director of the Coordination Centre for Legal Assistance, cites as an example a case where a servicewoman was declared AWOL in response to her intention to report harassment in her unit. The reason for the AWOL declaration was purely formal - the servicewoman was not in the unit during the air raid alert as all personnel had been ordered to leave the unit to avoid casualties.

One of the experts interviewed notes that commanders often use the so-called internal AWOL just to avoid paying additional remuneration.

Commanders usually do not officially inform the relevant authorities. As a result, commanders do not remove the AWOL status for several months, even though the service members declared AWOL are in the unit and performing their duties. For certain reasons, the commander "does not remove the status of AWOL" and for these reasons they do not receive additional remuneration in the amount of 30 or 100 thousand UAH for all the months of "having the status of AWOL."

4. Discriminatory changes to criminal law that increase the responsibility of military personnel for certain military crimes.

Human rights activist Maksym Tymochko says the recent changes to the criminal code, which actually increase liability for a number of war crimes, are a disproportionate measure. Mr Tymochko takes the opposite view to the legislator: "AWOL should be partially decriminalised and made a serious breach of discipline, because the only real incentive that keeps people from committing AWOL is rather money and material losses." According to the expert, leaving the PDP or returning late to the unit should be criminalised, while leaving the battlefield or positions in the combat zone should be criminalised.

In addition, the expert believes that the existing legislation should include a time limit after which a person is considered to be absent without leave in order to prevent abuse.

Serhii Horbatiuk notes that, despite the above-mentioned amendments to the Criminal Code, the courts still have a mechanism for handing down fair sentences. The courts have the right to refer to ECHR case law in this case because, as the expert notes, "if Ukrainian legislation contradicts ECHR judgments, the judge has the right to refer to the case law of the European Court of Human Rights." In practice, however, this is unlikely, given the difficulty of describing the court's motivation and the lack of a guarantee that the appellate court will not overturn the decision. Commanders and law enforcement agencies may also consider the situation and decide to close the case if the person was absent for valid reasons, returned to the unit and continues to serve in good faith.

4.3.2. Disobedience

1. Prosecution of military personnel for disobedience if there are valid reasons for the impossibility of carrying out a combat order.

For example, Article 402 of the Criminal Code of Ukraine provides that disobedience, i.e. open refusal to obey an order of a superior, as well as other intentional failure to obey an order committed under martial law or in a combat situation, is punishable by imprisonment for a term of five to ten years. However, neither Article 402 nor any other legislation provides for the possibility of refusing to carry out such an order if there are valid reasons for doing so. For example, a service member has a chronic illness that has become worse. He reports this to the medical unit, where he is given painkillers (since there is no comprehensive treatment in the field). A day passes, another day passes, the service member does not feel better, on the contrary, his condition deteriorates significantly. In the same week, the commander of this unit receives a combat order stating the need to move to the area of active hostilities and perform relevant tasks there. The service member realises that he is physically unable to perform this task and reports severe pain and the need for hospitalisation. The commander considers this a refusal to carry out a combat order and informs the State Bureau of Investigation that the service member has committed a criminal offence.

There is a need to legislate on the interpretation of the concept of open refusal to obey a superior's order and the valid reasons why such refusal should not be open or result in criminal liability.

2. The lack of clearly defined limits of disobedience as a criminal offence under Article 402 of the Criminal Code of Ukraine.

Commanders of military personnel often use their discretion to determine whether a military member's actions show signs of open refusal to obey a superior's order. Even the exercise by a service member of his or her right under Article 37 of the Statute of Internal Service (a subordinate has the right to ask the commander (superior) for clarification of an order) may be interpreted by the commander as a refusal to carry out such an order. In turn, this subjectivity and the lack of clear limits to signs of disobedience lead to unjustified appeals by the commander to the pre-trial investigation authorities and the opening of a criminal case against the service member. Moreover, this mechanism of influence is used by the command to punish a service member in case of personal animosity, which can negatively affect the future fate of a person and destroy his or her life.

4.3.3. Disobeying a combat order during martial law

During martial law, a service member can only be held criminally liable for disobeying a combat order. A service member is effectively deprived of the right to clarify a combat order during combat, as this can be interpreted as failure to carry out a combat order. As a result, service members are used for other purposes and without proper support and training, without the possibility of refusing to carry out such an order (task) or at least clarifying it.

Civil-military expert Yevhen Dykyi spoke to commanders who drew his attention to another problem. In particular, the concept of 'failure to carry out an order' includes a situation where the commander knows what his platoon is capable of and what it is not, but the higher-ups do not take this into account: "Roughly speaking, an anti-tank platoon is used as a miner, and a radio platoon as an assault infantry. This is not a failure to follow orders - there are units trained to do different things, and they know what they can and cannot do. Good commanders understand this, and bad ones just have a list of personnel," Yevhen Dykyi explains.

Another example is the decision of the Industrialnyi District Court of Dnipro in case No. 202/1850/23 of 21 February 2023. Although the case does not specify the reason for the refusal to perform combat duty, the problem is the reasons for such refusal, which often include low morale, lack of necessary support or poor health.[36]

At the same time, criminal liability for failure to carry out an order under martial law or in a combat situation was also increased (Article 403 of the Criminal Code of Ukraine). Failure to carry out an order has a fine line with incomplete/untimely execution of an order, of which the service member must inform the commander in a timely manner, taking into account the objective circumstances, using the right granted to him/her under the Statute of the Internal Service of the Armed Forces of Ukraine. Service members exercise this right when they have received a criminal order or an order that cannot be carried out for objective reasons, in particular due to the lack of appropriate weapons or personal protective equipment, which makes it impossible to carry out the order.

An example of this is the situation when, after two unsuccessful attacks with only machine guns and the loss of half of the personnel, the service members refused to follow the order to storm the enemy's positions.

At present, there is also a risk of increased attempts to prosecute service members who exercise their right under the Internal Service Statute of the Armed Forces of Ukraine, namely para. 37 ("A subordinate has the right to appeal to the commander (superior) with a request for clarification of the order").

36 – The judgement of the Industrialnyi District Court of Dnipro in case No. 202/1850/23 of 21 February 2023 URL: https://reyestr.court.gov.ua/Review/109144380

4.3.4. Sexual harassment and rape

Rape is a sexual act involving the vaginal, anal or oral penetration of another person's body with the genitals or any other object without the voluntary consent of the victim.

Sexual harassment is verbal (threats, intimidation, obscene comments) or physical (touching, patting) conduct of a sexual nature that humiliates or insults persons in a relationship of labour, service, material or other subordination.

Sexual harassment during military service may take the following forms: any hugging, kissing, touching of exposed parts of the body without permission and consent; any patting, placing of hands on, pinching of the buttocks, thighs or any other part of the body without permission and consent; persistent offers of massage or direct performance of such massage without permission and consent; refusal to leave the room where the person is changing, washing or naked; requests to expose/show any part of the body; indecent jokes on sexual topics (especially those in which the joke is about the objectification of the body); gestures, body movements of a sexual nature directed at the person, etc. However, it should be noted that there is no exhaustive list of manifestations of sexual harassment.

The algorithm of action in case a person has been sexually harassed or raped in the service is as follows. First, the person should record information about the crime (date and time of the incident; location of the incident (address, type of premises, landmarks, etc.); eyewitnesses to the harassment and other evidence (CCTV cameras, job titles, names and contacts of possible witnesses, etc.); job title, name and other information about the perpetrator; if possible, it is worth collecting evidence (turn on the recorder or camera on the phone to record the conversation with the perpetrator).

The victim should then seek psychological or medical help and legal assistance. Such cases are emotionally draining and procedurally complex, so a lawyer is a must. Before reporting sexual violence to your command and/or law enforcement authorities, you should consult a lawyer to properly assess and legally qualify what has happened, develop a strategy and defence plan, and prepare and submit a written statement.

After such incidents, it is difficult for victims to be in the same place and especially to continue to serve with their perpetrator. This raises the question of how to separate from the perpetrator.

The perpetrator can only be removed after the investigation has begun (only on the basis of a decision by the investigating judge at the request of the investigator/prosecutor). The Disciplinary Statute of the AFU also provides for the suspension of the offender from duty by order of the commander. However, in order for such a suspension to be granted under Article 47 of the Statute, there must be 'serious consequences', which is an evaluative concept.

In practice, the only effective way to remove the victim from the unit is to transfer/assign him/her to another military unit for the duration of the investigation, if the investigator and/or prosecutor decides to apply security measures. The investigator/prosecutor should be asked to take such measures with the assistance of a lawyer before the investigation begins.

To protect your rights and bring the perpetrator to justice, you must report the crime to the offender's commanding officer. This means that if the offender is a platoon leader, you should inform his or her company commander. If the offender's immediate commanding officer does not take action, you should contact higher commanders (including the unit commander and the General Staff of the Armed Forces of Ukraine) until an appropriate response is received.

The commander's proper response to such a report is to order an internal investigation. If the unit commander does not stop the sexual violence and does not report it to law enforcement authorities, the victim may file a complaint against him/her under Article 426 of the Criminal Code of Ukraine ("Inaction of Military Authorities").

The situation should then be reported to law enforcement authorities. Sexual violence against military personnel is a military offence and is punishable under the Criminal Code of Ukraine. A report of the offence must be filed with the State Bureau of Investigation, the Specialised Military and Defence Prosecutor's Office, and the Military Law Enforcement Service. Although the Military Law Enforcement Service does not investigate crimes, it can verify the facts, including conducting interviews in the unit, taking statements from witnesses, etc.

Problems in protecting the rights of victims of military personnel in these cases:

According to human rights activist and lawyer Oksana Huz, one of the biggest problems in investigating sexual harassment or rape is that it usually takes place without witnesses, meaning that "there are the words of the victim and the words of the offender, who is often higher in rank and therefore more authoritative." At the same time, the victim rarely has any injuries after the violence, or if they do, they have disappeared by the time of the examination, as the law enforcement agencies do not react promptly to such statements, do not immediately enter information into the URPTI and do not start the investigation in time. For these reasons, law enforcement agencies either do not start the investigation process at all or quickly close it due to lack of corpus delicti. Appealing to an investigating judge does not really solve the problem either, as time is lost in taking samples, collecting evidence and conducting an investigation.

In addition, there is the problem of psychological pressure - there are cases where people of higher rank than the victim are forced to have sexual intercourse by threatening to send them to a front line "hot spot" from

which “no one returns” or to transfer them to a lower position.

Another problem is the access of the law enforcement authorities to the unit in order to carry out an investigation, which is often impossible in the case of such crimes committed on the frontline or in frontline areas.

The human rights activist notes that the problem generally lies in the management of the process, in the people, as law enforcement agencies are immediately sceptical and do not believe the victims in such cases.

According to lawyer Oksana Huz, there are mechanisms to protect rights in such cases, but they are not effective in practice: “There is no protection mechanism for female military personnel that is simple, accessible and transparent. There is no single hotline number that they can call to report violence, and then the system itself starts giving signals to the MLES, the police, the prosecutors to solve it.”

4.3.5. Procedural violations and loopholes

Due to the lack of control of commanders at the battalion level, there are cases where service members who refuse to obey orders or leave their posts are detained by the military prosecutor’s office until a preventive measure is imposed by a court, and are placed in so-called temporary cells without the right to contact lawyers and relatives.

The expert, Serhii Horbatiuk, notes that the execution and enforcement of sentences after a court verdict is the responsibility of military units. The expert gives the example that if a court sentences a service member to the guardhouse, the relevant commanders must find a guardhouse and take the service member there. There is also the question of what to do if there are no free places in the guardhouse, but the sentence must be carried out.

4.4. Administrative liability of military personnel

1. The impossibility of holding persons administratively liable during martial law, in accordance with Articles 172-10, 172-11 and 172-13 of the CUAO.

- Unauthorised abandonment of a military unit or place of service by a service member during martial law or in a combat situation, regardless of the duration of such actions, constitutes a criminal offence under Part 5 of Article 407 of the Criminal Code of Ukraine and excludes administrative liability under Article 172-11 of the Code of Ukraine on Administrative Offences.

  The same applies to failure to carry out a combat order, as only criminal liability is provided for during martial law.

2. Article 172-15 of the Code of Ukraine on Administrative Offences (negligent attitude to military service) contains value judgements and does not define the limits of negligence.

3. Procedural violations in the preparation of administrative reports.

- When drafting administrative reports, units often fail to comply with procedural norms, and these reports are of the same type, without a description of the circumstances, explanations and details.

  Another problem is the reluctance to attach the service member's explanations to the administrative report "even if they are available, such explanations are often 'lost' on the way to court," says lawyer Maryna Lilichenko.

  The situation of service members accused of an administrative offence is further aggravated by the fact that many commanders require them to sign a statement on the case being considered in court without their participation. Sometimes this demand is accompanied by threats.

4. Double jeopardy for military personnel.

- Expert Serhii Horbatiuk identifies double jeopardy as one of the problems, citing the example of alcohol consumption, which is subject to both administrative and disciplinary liability. In this case, however, disciplinary liability does not imply moral punishment, but rather material sanctions, while administrative liability for such an offence is provided for in the form of a fine, which is also a material sanction. As a result, the offender is held financially liable twice.

  The expert notes: "The Code of Ukraine on Administrative Offences should clearly regulate who is liable. In turn, it should specify whether disciplinary measures should be taken when material sanctions are involved." According to Mr Serhii, it would be worthwhile to return to the old system of disciplining military personnel for administrative offences.

5. Inability to appeal against administrative liability protocols

- There is also a problem with appealing against a decision on administrative liability. Courts usually do not send or delay sending copies of the decision to bring a military member to justice to the unit. As a result, the military member is unaware of the need to appeal and consequently misses the deadline for such an appeal altogether.

6. Considerable distance from the courts.

- Another technical obstacle to fair justice is the considerable remoteness of

the courts that hear military members' cases. In such cases, commanders often force the military members concerned to write a statement requesting that the trial be conducted without their participation, as it is time-consuming and resource-intensive to bring such a military member to court.

4.5. Disciplinary liability of military personnel

The Disciplinary Statute of the Armed Forces of Ukraine contains a list of disciplinary sanctions, but there are no clear criteria for offences that trigger a particular type of disciplinary liability.

Expert Serhii Horbatiuk notes that the Disciplinary Statute speaks in general terms about breaches of discipline and does not define specific offences. On the one hand, this gives the command wide discretionary powers in the context of court proceedings, but on the other hand, it does not allow service members to refer to the Statute in order to protect their rights.

For example, for the same offence (e.g. being late for formation), different commanders may apply different types of disciplinary sanctions based on their own views, beliefs or simply for practical reasons. One commander may give a remark, another a reprimand, another a severe reprimand. Or different types of disciplinary sanctions may be applied to different service members in the same military unit for the same offence, based on the personal beliefs and subjective attitude of the commander. There is no effective way to defend a service member who is subjected to a certain type of punishment.

Lawyer Maryna Lilichenko highlights the selectivity of punishment as one of the problems of military liability: "If the offence was committed by an officer, he or she is not held accountable, while service members are punished to the maximum, in any form, from disciplinary to criminal."

4.6. Financial responsibility of military personnel

Financial responsibility of military personnel is a type of legal liability that consists in the obligation of military personnel and certain other persons to compensate, in full or in part, direct actual damage caused by their fault as a result of destruction, damage, loss, theft or illegal use of military and other property during the performance of military service or official duties. The following is a list of problems identified during the study.

1. Holding financially liable a commander (most often a platoon commander) who actually disposed of the property instead of the person (subordinate), or vice versa.

An example is the following case. During a battle, a grenade launcher left his grenade launcher on the battlefield because he had to leave his position quickly due to mortar fire.

There was no immediate internal investigation into the loss of property. After some time, the grenade launcher transferred or resigned from this military unit, and later, during an inspection, a lost, unrecorded grenade launcher was found. In this case, the platoon commander can be held liable.

The situation cited by lawyer Maryna Lilichenko is the opposite. According to experts, there are cases when a subordinate was responsible for the lost property registered to the commander. For example, according to the documentation, only the commander can receive a thermal imager, and it is forbidden to register it with a private service member. After receiving the thermal imager, the company commander gave it to a private service member to carry out his duties. When the equipment was lost under certain circumstances, it was the private's responsibility, not the commander's.

Maryna Lilichenko also cites an example of a service member who lost a grenade launcher in battle and then wrote a report detailing all the circumstances of the loss. When the service member was transferred to another unit some time later, he was informed that an internal investigation was being conducted into the loss of his weapon and that he would have to pay compensation. Without such compensation, the service member cannot be transferred to another unit, and it is almost impossible to 'retroactively' write off the property due to the passage of time.

2. Lack of an effective mechanism for writing off property lost in combat.

In general, the process of writing off lost property is also difficult. There are several reasons for this: Chaotic accounting of weapons in the combat zone, inconsistencies between the circumstances of the loss of weapons reported by the service member and the combat logs, etc.

Another problem is that commanders refuse to write off lost property because the service member responsible for the loss cannot provide evidence of valid reasons for the loss, such as photos, videos or witness statements. As the vast majority of official investigations are initiated long after the loss of property, it is often difficult to gather sufficient evidence, especially during hostilities.

This problem will be exacerbated after the end of the war, but even now, with the transfer of military personnel in positions of financial responsibility, problems arise with property that was transferred, even as voluntary aid, under the certificate of acceptance and transfer, but not written off after the loss.

Section V. Conclusions and Recommendations

The report shows that, unfortunately, in the ninth year of the Russian-Ukrainian war, we do not have a fully-fledged system of military justice and military legislation that can simultaneously support the defence capability of the state and discipline in the army, on the one hand, and effectively prevent violations of the rights of military personnel, especially conscripts, on the other.

Human rights practice in the military sphere shows that, in the context of active hostilities, military personnel are perhaps the most vulnerable category of the population. To confirm this, it is enough to cite examples from the voluntary practice of lawyers, when commanders, abusing their official position, threaten 'disgruntled' service members to send them knowingly on a fatal combat mission.

Practice shows that in a «commander-subordinate» relationship, it is the subordinate service member who is least protected from violence and abuse by the commander, who may be under the influence of alcohol or drugs, incompetent, and of low morale and business qualities.

In view of this, the criminal law, as the law that has the greatest impact on the rights of service members, should be as clear and understandable as possible with regard to crimes against the order of military service.

It is important to note that any changes in the administration of justice in cases involving service members do not require the creation of new structures from scratch, as international practice and the recommendations of international institutions offer significant and helpful developments in this direction.

Therefore, the key to developing any military justice system and establishing bodies with jurisdiction in this area is to balance the need to maintain proper discipline in the armed forces, to ensure the speed of the procedures applied and, at the same time, to comply with the guarantees of due process and fair trial. This requires ensuring civilian oversight of the military justice system and the implementation of safeguards and checks to ensure the impartiality and independence of the military justice system, in particular from the chain of command.

Military personnel involved in court proceedings in military matters, regardless of their role, should enjoy the full range of rights guaranteed to civilians in ordinary, non-military proceedings in accordance with international human rights law and the Constitution of Ukraine. This includes, inter alia, the creation of additional and the protection of existing ways and mechanisms for members of the armed forces to lodge complaints against those above them in the chain of command, and for such complaints to be properly addressed and brought to an appropriate conclusion.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE

1. For changes in the law regarding liability for disobedience and failure to obey orders

The report shows that one of the most common military crimes since the full-scale invasion is the offence under Article 402 of the Criminal Code of Ukraine ("Disobedience"), i.e. open refusal to obey an order of a superior, and other deliberate failure to obey an order.

The main difficulty with this military offence is to determine whether the order was actually given in its form and content, and whether the order was appropriate in terms of, inter alia, the combat situation, the reality of its execution, the existence of objective reasons preventing the subordinate from carrying out the commander's order, etc.

For example, it is impossible not to agree that two situations are fundamentally different: one in which a service member refuses to carry out an order because of fear, low moral qualities, i.e. subjective reasons. The other is when, for example, a commander, in a state of alcohol intoxication, sends a subordinate unit on a combat mission, knowing in advance that the ratio of forces and means, the combat situation, the enemy's numerical superiority, the inadequacy and inability of the available weapons of the subordinates to withstand the enemy's heavy equipment will definitely and irrevocably lead to unjustified casualties among the personnel. This example demonstrates the need for commanders and subordinates to clearly understand the criteria for both lawful and unlawful orders.

At present, Article 42 of the Criminal Code of Ukraine provides a very general definition of a 'lawful order' as an order "given by the relevant person in a proper manner and within the scope of his/her authority, which does not contradict the legislation in force and does not involve violation of the constitutional rights and freedoms of a person and a citizen", while at the same time not defining a 'manifestly criminal order', which is mentioned in the same article.

The draft of the new Criminal Code[37] does not address this issue either. The following definitions are proposed in the text of this draft:

- A lawful order is an order or instruction if it is given by an authorised person in accordance with the established procedure and within the scope of his or her powers (note: the authors have removed the words "and in terms of its content does not contradict the legislation in force and does not involve a violation of the constitutional rights and freedoms of a person and a citizen").

- A manifestly criminal order is an order or instruction to commit:

37 – https://newcriminalcode.org.ua/upload/media/2023/05/22/kontrolnyj-tekst-proektu-kk-22-05-2023.pdf

a) an act or omission which is a criminal offence under this Code, knowingly committed by the person giving the order or instruction or by the person carrying it out;

b) a crime of genocide, a crime against humanity or a war crime.

Special military legislation, in particular the section "Procedure for Issuing and Executing Orders" of the Law of Ukraine "On the Statute of the Internal Service of the Armed Forces of Ukraine", also does not provide legal certainty in this matter, using the phrase 'manifestly criminal order' without explaining what kind of order it is.

It is worth noting that during martial law, the punishment for disobedience is imprisonment for up to ten years, and therefore, for such significant consequences, the criminal law should have the maximum possible legal certainty, so that a service member without a legal education can understand what he can and cannot be held criminally liable for.

Moreover, Article 402 of the Criminal Code of Ukraine does not distinguish between the significance of the order, which effectively creates a situation in which, under martial law, one can be held criminally liable both for open refusal to obey an order to take up positions and engage the enemy and for open refusal to obey an order to clear the territory.

In this part, it is recommended to add a note to Article 402 of the CC of Ukraine in order to provide a legal definition of an order within the meaning of the CC of Ukraine, as well as a definition of a 'manifestly unlawful order' as an order which, inter alia, does not obviously correspond to the combat situation.

The recommendation is based on the fact that in practice it is difficult for an outsider without special military knowledge to assess whether an order given by a commander was lawful, especially in a combat situation.

To this end, it is recommended to supplement Part 2 of Article 242 of the CPC of Ukraine with such a ground for mandatory expert examination as establishing the relevance of the order to the combat situation. Such a mandatory examination can be implemented by conducting a military forensic examination, which already exists and is defined in Section IX "Military examination" of the Order of the Ministry of Justice of Ukraine dated 08.10.1998 No. 53/5 "On Approval of the Instruction on Appointment and Conduct of Forensic Examination and Expert Examination and Scientific and Methodological Recommendations on Preparation and Appointment of Forensic Examination and Expert Examination."

Such a mandatory examination can serve as a safeguard in cases of unjustified criminal prosecution of service members who refused to carry out an order that was obviously not in accordance with the combat situation and the execution of which could have caused knowingly unjustified and unavoidable casualties.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE

2. For clarification of the term of unauthorised abandonment of the place of service

As noted earlier in this report, the shortcomings in the legislative technique of Parts 4 and 5 of Article 407 of the Criminal Code of Ukraine have led to a situation in which, in the conditions of a a special period, martial law and a combat situation, the absence of a service member for any length of time can be recognised as a crime under this Article.

In order to eliminate this problem completely and never to return to it, it is enough to make very simple legislative amendments to the above-mentioned parts, namely:

CURRENT VERSION	RECOMMENDED CHANGES
Article 407. Unauthorised leaving of a military unit or place of service	**Article 407.** Unauthorised leaving of a military unit or place of service
1. The unauthorised leaving of a military unit or place of service by a service member on compulsory service, as well as the failure to report for duty on time without a valid reason in the case of dismissal from a unit, appointment or transfer, failure to report from a secondment, leave or medical institution for more than three days but not more than one month,	1. The unauthorised leaving of a military unit or place of service by a service member on compulsory service, as well as the failure to report for duty on time without a valid reason in the case of dismissal from a unit, appointment or transfer, failure to report from a secondment, leave or medical institution for more than three days but not more than one month,
shall be punishable by detention in a disciplinary battalion for up to two years, or imprisonment for up to three years.	shall be punishable by detention in a disciplinary battalion for up to two years, or imprisonment for up to three years.
2. The unauthorised leaving of a military unit or place of service by a service member (except for compulsory service), as well as the failure to report for duty on time without a valid reason for more than ten days but not more than one	2. The unauthorised leaving of a military unit or place of service by a service member (except for compulsory service), as well as the failure to report for duty on time without a valid reason for more than ten days but not more than one

CURRENT VERSION	RECOMMENDED CHANGES
month, or even for less than ten days but more than three days, committed repeatedly within one year, shall be punishable by a fine of between one thousand and four thousand tax-free minimum incomes, or by restriction of service for a period of up to two years, or by imprisonment for a period of up to three years.	month, or even for less than ten days but more than three days, committed repeatedly within one year, shall be punishable by a fine of between one thousand and four thousand tax-free minimum incomes, or by restriction of service for a period of up to two years, or by imprisonment for a period of up to three years..
3. The unauthorised leaving of a military unit or place of service, and the failure to report on time for duty without a valid reason for more than one month, committed by the persons referred to in Parts one or two of this Article, shall be punishable by imprisonment for a term of two to five years.	3. The unauthorised leaving of a military unit or place of service, and the failure to report on time for duty without a valid reason for more than one month, committed by the persons referred to in Parts one or two of this Article, shall be punishable by imprisonment for a term of two to five years.
4. The unauthorised leaving of a military unit or place of service, and the failure to report on time for duty without a valid reason, committed under conditions of a special period, except for martial law, committed by persons referred to in Parts one or two of this Article, shall be punishable by imprisonment for a term of three to seven years.	4. The acts envisaged by Parts one or two of this Article, committed in conditions of a special period, except for martial law, shall be punishable by imprisonment for a term of three to seven years.
5. The unauthorised leaving of a military unit or place of service, and the failure to report on time for duty without a valid reason, committed by a service member under martial law or in a combat situation, shall be punishable by imprisonment for a term of five to ten years.	5. The acts envisaged by Parts one or two of this Article, committed under martial law or in a combat situation, shall be punishable by imprisonment for a term of five to ten years.

These changes will provide legal certainty to the timeframes and return law enforcement to a clear understanding of the long-standing specific timeframes: (1) 3 days for service members on compulsory service and (2) 10 days for all other service members.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE

3. For the provision of security for a service member reporting a crime committed by a commander.

Human rights practice shows that service members are reasonably afraid to report crimes committed by their commanders, such as violence (including sexual violence), embezzlement, abuse, etc., because of the risk of being subjected to negative measures, including being sent on a known lethal combat mission.

Currently, Section II "Measures to Ensure Criminal Proceedings" of the CPC of Ukraine provides for such a measure as removal from office, which is implemented by the decision of the investigating judge.

However, in our opinion, this measure is not sufficient to ensure the safety of a service member who reports a crime to his or her commander, since there may be a considerable period of time between the moment of reporting a crime and the issuance of a positive court decision on removal, during which the service member may be subjected to negative measures.

In view of this, it is proposed to supplement the above-mentioned section of the CPC of Ukraine with such a measure to ensure criminal proceedings as the immediate transfer of a service member to another subdivision or military unit upon a reasoned decision of the investigator or prosecutor receiving a report of a crime, if there are grounds to believe that the service member is in danger, or in case of violence (including sexual violence) against a service member.

The investigator or prosecutor should be empowered to take such a decision without judicial review in order to ensure the effectiveness and efficiency of the implementation of such a decision.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE AND THE MINISTRY OF DEFENCE OF UKRAINE

4. For the introduction of a single window for reporting by service members

Given that service member who report crimes committed by their commanders face the same (and sometimes greater) risks of retaliation as corruption whistleblowers, it is necessary to provide them with a safe, effective and single channel for such reports.

The handling of reports received through such a single window should be governed by a specific procedure, which could be developed and adopted at the

level of a regulation.

A service member who reports an offence in his or her unit through such a single window should have the right to confidentiality, which should not prevent the report from being considered and effective action from being taken.

Through such a single window, the service member should also be able to make a request for legal assistance, which may be referred to the free legal aid system, and for psychological assistance.

The contractor receiving such a request must take steps to verify it and organise it in such a way that the direct command of the requesting service member cannot identify him or her.

In addition, if the contractor who considers the request sees grounds to ensure the safety of the service member by transferring him or her to another unit, he or she must initiate such transfer and ensure that it is timely and effective.

Recommendations

TO THE MINISTRY OF DEFENCE OF UKRAINE

5. For the development of detailed instructions for conducting an internal investigation with standardised samples of documents

Practice shows that although there is a procedure for conducting an internal investigation in the Armed Forces of Ukraine, approved by Order of the Ministry of Defence of Ukraine No. 608 dated 21.11.2017, each military unit has its own approach to implementing this procedure, its own vision of the content and form of documents to be prepared during an internal investigation, etc.

This situation and the lack of a unified approach create a certain chaos on the ground, so we recommend eliminating this problem by developing and approving detailed instructions for conducting an internal investigation, which would regulate each stage and phase of such an investigation, set specific deadlines for each stage of the investigation and, most importantly, approve uniform forms of standard documents to be drawn up during an internal investigation.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE, THE CABINET OF MINISTERS OF UKRAINE, THE MINISTRY OF DEFENCE OF UKRAINE

6. For the restoration of the right to mitigation and exemption from punishment for military personnel

In January this year, the Law of Ukraine “On Amendments to the Code of Administrative Offences of Ukraine, the Criminal Code of Ukraine and Other Legislative Acts of Ukraine on the Particularities of Military Service in Martial Law or Combat Situations” came into force.

This law deprived service members of the possibility of a lighter sentence and exemption from serving their sentence by amending Articles 69, 75 of the Criminal Code of Ukraine as follows: “a criminal offence related to corruption» with the words and figures «a criminal offence under Articles 403, 405, 407, 408, 429 of this Code committed under martial law or in a combat situation.”

In our opinion, these discriminatory amendments will not solve the problem of the country’s defence capability in the long run, but on the contrary will only further discourage military service, since in case of abuse by the command and/or law enforcement agencies, the price of such abuse is the years that a service member will spend behind bars.

Human rights practice in the military sphere shows that such articles of the Criminal Code of Ukraine as 403 and 407 are often used by dishonest commanders as a means of revenge and pressure on service members who complain about abuse and negligence of commanders. Thus, these changes will only contribute to the latency of crimes committed by commanders themselves, as service members will be afraid to report them.

It is also worth noting that these changes did not affect such ‘command articles’ as 426-1 (“Excess of power or authority by a military official”) and 426 (“Inaction of military authorities”).

These changes also do not contribute to a prompt and impartial investigation and trial, as each situation is individual, and in cases where it would be possible to switch to a plea agreement with a fine, this is now impossible.

We recommend that the subjects of the legislative initiative reconsider the real expediency and validity of such changes and restore the right of military personnel to a lighter sentence and exemption from punishment.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE

7. For the establishment of a pre-trial investigation body in the form of the military police

We are convinced that in times of war Ukraine needs a separate specialised pre-trial investigation body in the form of the Military Police, which will be able to focus on the detection, prevention, interdiction and investigation of crimes committed by military personnel.

Such a full-fledged military pre-trial investigation body could be created on the existing material, technical and personnel basis of the Military Law Enforcement Service of the Armed Forces of Ukraine, which is currently a military quasi-police that does not have the authority to investigate military crimes.

The creation of the Military Police should also include amendments to Article 216 of the CPC of Ukraine, removing military crimes from the jurisdiction of the State Bureau of Investigation and transferring this category of crimes entirely to the investigative units of the newly created Military Police.

Such a change in jurisdiction will, among other things, relieve the investigators of the State Bureau of Investigation and focus their attention on other important categories of crime. Otherwise, without transferring jurisdiction over military crimes from the SBI to the Military Police, we risk further complicating the system of military criminal justice bodies, as we will have both the SBI and the Military Police instead of a single military pre-trial investigation body with clear powers.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE, THE CABINET OF MINISTERS OF UKRAINE, THE PRESIDENT OF UKRAINE

8. For the legislative initiatives to restore the military prosecutor's office

In our view, the existing system of civilian specialised defence prosecutor's offices is sufficient to provide effective and highly specialised prosecutorial oversight in the form of procedural guidance in the investigation of military crimes.

Returning to the format of military prosecutors creates a situation in which the prosecutor will effectively be guided by two different and sometimes contradictory oaths (that of a prosecutor and that of a military person).

Moreover, the principles and characteristics of the military service, such as sole authority, unconditional execution of orders of the commander, strict military discipline and strict vertical subordination, pose a real threat to the principle of independence of the prosecutor, which provides guarantees against undue political, material or other influence on the prosecutor's decision-making in the performance of his/her duties.

With regard to the alleged problem of limited powers of prosecutors during their procedural actions in sensitive facilities, in combat zones, etc., we recommend that, in order to solve this problem, appropriate amendments be made to the Law of Ukraine "On the Prosecutor's Office" in order to expand the powers of the Prosecutor and provide for unimpeded access of the Prosecutor with a certificate to military facilities, combat zones, etc., when carrying out

procedural actions within criminal proceedings and performing other functions of the Prosecutor's Office.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE

9. For the introduction of military specialisation of judges

At present, we have a situation where there is a specialised Defence Prosecutor's Office, which is potentially able to provide highly specialised and effective procedural guidance and support to the prosecution in cases of military crimes.

At the same time, we do not have specialised judges with sufficient experience and expertise in the vast and complex body of military law, as well as an understanding of the particularities and peculiarities of military service.

We do not recommend the creation of military courts, as this creates the same problem of dual oath taking as in the case of military prosecutors, and also threatens the real independence of such judges.

Similarly, we do not recommend the creation of a separate specialised High Military Court with exclusive jurisdiction over military crimes, as we believe that proceedings for military crimes should be geographically accessible to participants in criminal proceedings.

In light of the above, and the fact that the majority of military crimes are committed in the combat zone in eastern and southern Ukraine, it is proposed to introduce positions of specialised military judges in ordinary local courts, who should be appointed according to a separate specific procedure.

Such a specific selection procedure may include a special requirement for candidates, namely compulsory experience of military service, including in the combat zone. We believe that such specialised judges should be retired officers with real combat experience, which will enable them, as civilians, to have the necessary knowledge and experience to decide military cases. We are also convinced that such a requirement for the status of such specialised judges will increase the confidence of military personnel involved in criminal proceedings, who will understand that their fate will be decided by judges who, although civilians, know what military service is and understand its peculiarities, the specific terminology of military legislation and the practice of its application.

This recommendation can be implemented by amending the Law of Ukraine "On the Judiciary and the Status of Judges." These amendments should stipulate that local courts in the areas of permanent deployment of military units should

have one position of a specialised judge in the military sphere, and in the frontline areas from 3 to 5 positions of such judges, given the significant workload of this category of cases. Amendments to this law may also require such judges to have military service experience.

Recommendations

TO THE VERKHOVNA RADA OF UKRAINE

10. For the expansion the rights of lawyers defending military personnel

We would like to draw attention to the fact that in the course of the discussion about the current restrictions on prosecutors' access to military facilities and the combat zone, a similar problem has been left unaddressed for lawyers defending military personnel in criminal proceedings.

We propose that the Law of Ukraine "On the Bar and the Practice of Law" be amended to provide for the right of a lawyer defending a service memeber in criminal proceedings to have unimpeded access to him or her at any time on the territory of a military unit in a special room (similar to the way it is implemented in pre-trial detention centres), if he or she has the appropriate powers of a defence lawyer.

It is also necessary to provide that a lawyer defending a member of the armed forces in criminal proceedings has the right to participate in investigative measures (e.g. inspection of the scene of the crime, examination of evidence, etc.) when such investigative measures are carried out in the combat zone and in military facilities, and that the investigator and/or prosecutor are obliged to ensure such participation of the defence lawyer and to create all appropriate conditions for it.

In addition, human rights practice shows an extremely negative trend in the ability of a lawyer to obtain information from military units and institutions at the request of a lawyer. It should be stipulated that the lawyer may, upon request, also receive restricted information if it relates to the military client and only in the unit of such a military client.

In addition, we have a separate recommendation for the Ministry of Defence of Ukraine and the General Staff of Ukraine to issue instructions to inform subordinate military units and emphasise the need for strict compliance with the Law of Ukraine "On the Bar and the Practice of Law" in terms of full and timely response to lawyers' inquiries, including those sent to e-mails of military units and institutions with a qualified electronic signature.

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ANNEXES

Annex 1. Review of court practice in criminal cases and cases of administrative offences

CRIMINAL OFFENCES

Article 402. Disobedience

1. Disobedience, i.e. open refusal to obey an order of a superior, and other wilful disobedience of an order shall be punishable by restriction of service for up to two years, or detention in a disciplinary battalion for up to two years, or imprisonment for up to three years.

2. The same act, if it is committed by a group of persons or if it has serious consequences shall be punishable by imprisonment for a term of three to seven years.

3. Disobedience committed under the conditions of a special period, other than martial law, shall be punishable by imprisonment for a term of five to seven years.

4. Disobedience committed under martial law or in a combat situation shall be punishable by imprisonment for a term of five to ten years.

Note. In section XIX of this Code, a combat situation is understood to be a situation of offensive, defensive or other general military, armoured, anti-aircraft, air, naval, etc. combat, i.e. the direct use of military weapons and equipment against a military enemy or by a military enemy. The combat situation in which a military formation, unit (ship) or subdivision participates begins and ends with the order to engage in combat (cessation of combat) or with the actual beginning (end) of combat.

REVIEW OF COURT DECISIONS:

CASE NO. 207/1733/22 (Judgement of the Bahliiskyi District Court of Dniprodzerzhynsk in Dnipropetrovsk oblast dated 13.07.2022)

Link: https://reyestr.court.gov.ua/Review/105224929

Circumstances of the case: On 4 March 2022, the citizen arrived at the Territorial Recruitment and Social Support Centre for military registration, knowing that martial law had been declared in Ukraine since 24 February 2022 in connection with the military aggression of the Russian Federation against Ukraine and that, if necessary, he could be called up for mobilisation in the Armed Forces of Ukraine.

On the same day, the citizen was sent to the Military Medical Commission (MMC), which he passed during the day and received a certificate from the MMC that he was medically fit for military service.

On 4 March 2022, the service member was sent to a military unit of the Armed Forces of Ukraine for further military service.

By order of the Commander of the Military Unit of the Armed Forces of Ukraine No. 6 dated 04.03.2022, the service member was appointed to the position of rifleman, entered into the personnel lists of the Military Unit of the Armed Forces of Ukraine, and the service member is considered to have accepted the case and the position from 04.03.2022 and started to perform his duties.

From the moment of joining the military unit of the Armed Forces of Ukraine, i.e. from 04.03.2022, the service member acquires the status of a service member of the Armed Forces of Ukraine.

On 06.03.2022 the service member of the military unit of the Armed Forces of Ukraine took the oath of allegiance to the people of Ukraine.

From 07.03.2022 till 26.04.2022 the service member of the military unit of the Armed Forces of Ukraine underwent basic firearms training.

According to Article 29 of the Statute of the Internal Service of the Armed Forces of Ukraine, the head of a personnel group of a military unit of the Armed Forces of Ukraine, a major by position and military rank, is the superior in relation to a rifleman, a service member who, in accordance with the provisions of Articles 29, 35, 37 of the Statute of the Internal Service of the Armed Forces of Ukraine, the rifleman is obliged to strictly execute the order given to him within the time limit specified by his superior.

Notwithstanding the foregoing, a service member of the Armed Forces of Ukraine of a military unit of

the Armed Forces of Ukraine, a service member, committed a serious criminal offence against the established procedure of military service in the following circumstances:

On 09 May 2022 in the period from 10:00 to 10:10 during the formation of the personnel of the rifle company of the military unit of the Armed Forces of Ukraine at the place of temporary location of the military unit, the head of the personnel group of the military unit of the Armed Forces of Ukraine, Major, who is the superior in position and military rank in relation to the service member of the military unit of the Armed Forces of Ukraine, brought to execution the written order No. 26 OUO of 07. 05.2022 of the commander of the military unit of the Armed Forces of Ukraine, Lieutenant Colonel, for the direct implementation of the requirements of the combat order of 24. 04.2022, the combat order of the Commander-in-Chief of the Armed Forces of Ukraine of 23.04.2022, the combat order of the Head of the RD of the Regional Management of the TDF of 24.04.2022, the order of the commander of the military unit of 25.04.2022, the order of the commander of the military unit of 25.04. 2022 to march along the route Kostiantynivka-Bakhmut-Bakhmutske and take up defence in a certain place in Donetsk oblast in order to prevent the enemy from breaking through and inflicting maximum losses in enemy manpower and equipment.

However, the service member, service member, being a service member of the Armed Forces of Ukraine, called to military service during mobilisation as a rifleman, being aware of the procedure for passing, performing internal service, the procedure for giving and executing orders by service members, in violation of the requirements of Articles 17, 65 of the Constitution of Ukraine, Articles 11, 29, 35, 37, 49 of the Statute of Internal Service of the Armed Forces of Ukraine, Articles 4, 6 of the Disciplinary Statute of the Armed Forces of Ukraine, Articles 11, 17 of the Law of Ukraine "On Defence of Ukraine" of the Law of Ukraine "On Defence of Ukraine", acting intentionally, i.e. e., being aware of the socially dangerous nature of his actions, foreseeing their socially dangerous consequences, deliberately desiring their occurrence, on 09 May 2022 at 10:10, being at the formation of the personnel of the said military unit, openly refused to comply with the order of the Chief of the Commander of a separate territorial defence battalion of a military unit of the Armed Forces of Ukraine, Lieutenant-Colonel dated 07.05. 2022, which was communicated to him by the head of the personnel group of the military unit of the Armed Forces of Ukraine, a major, to march along the route Kostiantynivka-Bakhmut-Bakhmutske and to take up defence at a certain place in the Donetsk oblast in order to prevent the enemy's breakthrough and to inflict maximum losses on the enemy's personnel and equipment, and personally informed the Major and the Company Commander of the military unit of the Armed Forces of Ukraine, thereby committing insubordination - open refusal to obey an order of a superior, committed under martial law, i.e. e. an offence under Part 4of Article 402 of the Criminal Code of Ukraine.

Precautionary measure: Bail.

Evidence and other circumstances taken into account by the court:

- Sincere remorse of the accused;
- Assistance in solving the case;
- Plea agreement between the accused and the prosecutor.

The court's conclusions and decisions:

The court found that the service member was reasonably accused of committing a criminal offence under Part 4 of Article 402 of the Criminal Code of Ukraine, which, according to Article 12 of the Criminal Code of Ukraine is a serious crime.

The court also took into account the circumstances mitigating the accused's punishment under Article 66 of the Criminal Code of Ukraine, namely sincere remorse and active assistance in solving the crime. The court found no aggravating circumstances.

The plea agreement concluded on 13 July 2022 between the prosecutor of the Mariupol Specialised Military and Defence Prosecutor's Office of the Joint Forces and the accused in the presence of a defence lawyer in criminal proceedings was approved.

To find the service member guilty of committing a criminal offence under Part 4 of Article 402 of the Criminal Code of Ukraine and sentence PERSON_4 to punishment with the application of Articles 58, 69 of the Criminal Code of Ukraine in the form of two (2) years restriction of service for service members and deduction

of 20% (twenty percent) of the amount of financial support to the state.

The bail was returned to the bailor.

CASE NO. 468/1586/22-K (Judgement of the Tsentralnyi District Court of Mykolaiv dated 28.12.2022)

Link: https://reyestr.court.gov.ua/Review/108160428

Circumstances of the case: : Since 11 May 2022, the service member has been performing military service under conscription during mobilisation for a special period.

By order of the commander of the military unit of 11 May 2022, he was entered in the personnel lists of this military unit and was provided with all types of support.

By order of the commander of the same military unit dated 21 August 2022, he was appointed assistant grenade launcher of the 2nd mechanised platoon of the 5th mechanised company of the 2nd mechanised battalion of this military unit.

By order of the commander of the same unit dated 22 August 2022, he participated in the implementation of measures to ensure national security and defence, to repel and deter the armed aggression of the Russian Federation on the territory of Mykolaiv oblast.

On 14 September 2022, at approximately 18:00, the service member, who was near the village of Murakhivka, Bashtanka district, Mykolaiv oblast, received the order to occupy the defensive area of the T-junction of field roads at the coordinates x(28379) y(12049) and the T-junction of field roads at the coordinates x(25756) y(10502) by 22:00 on 14 September 2022, to begin the construction of the front line, to create a fire system in order to prevent the enemy from breaking through in the direction of the settlements Bruskinske and Bilohorivka, and to seize Bilohorivka.

However, the service member explicitly expressed his unwillingness to comply with this order and openly expressed his negative attitude towards it.

On 25 September 2022, at approximately 14:00, the service member, who was near the village of Murakhivka, Bashtanka district, Mykolaiv oblast, received the order to occupy the defensive area of the T-junction of field roads at the coordinates x(28379) y(12049) and the T-junction of field roads at the coordinates x(25756) y(10502), to begin the construction of the front line, to create a fire system in order to prevent the enemy from breaking through in the direction of the settlements Bruskinske and Bilohorivka, and to seize Bilohorivka.

However, the service member explicitly (orally and in writing) expressed his unwillingness to comply with this order and openly expressed his negative attitude towards it.

Evidence used:

- During the preliminary proceedings - on 23 December 2022 - a plea agreement was reached between the accused and the prosecutor.
- No evidence was presented to the court by the parties to the criminal proceedings, including the defence, to refute the fact that the accused committed the crime.

Findings and decision of the court:

The Court finds the accused guilty of committing the crimes under the circumstances established by the Court.

In accordance with Article 66(1) of the Criminal Code of Ukraine and the content of the plea agreement, the court took into account the accused's sincere remorse and active assistance in solving the crime as mitigating circumstances. The Court also took into account the young age of the accused (23 years).

As to the aggravating circumstances: All the acts committed by the accused are either not fully committed or closely border on an aggravated continuing offence.

Taking into account the above circumstances, the court considers that in this case the repeated acts of disobedience did not increase the public danger of the acts committed by the accused or his person.

Therefore, the Court considers it possible to disregard this circumstance as an aggravating factor.

The plea agreement was accepted. The service member was found guilty. The sentence was imposed in the form of imprisonment for a period of 04 months.

There are no court costs or material evidence in this case.

No civil action was brought in this criminal case.

The period of his pre-trial detention, i.e. the period from 25 September 2022 until the entry into force of this sentence, has been counted towards his sentence at the rate of 1 day of pre-trial detention for 1 day of arrest.

CASE NO. 233/2394/22 ((udgement of the Kostiantynivskyi City District Court of Donetsk oblast dated 15.05.2023)

Link: https://reyestr.court.gov.ua/Review/110861932

Circumstances of the case: A service member in military service during mobilisation for a special period and serving as a senior rifleman of the 2nd mechanised division of the 1st mechanised platoon of the 8th mechanised company of the 3rd mechanised battalion, on 17.10.2022, at approximately 12: 32, being at the place of temporary deployment of the military unit, having received a lawful verbal order from his immediate superior, the commander of the 8th mechanised company of the 3rd mechanised battalion, captain, issued on the basis of combat order No. 7 of 16 October 2022, issued by the captain on the basis of a written combat order of the commander of the military unit of 16 October 2022, on the necessity of moving to the platoon fortification in order to reinforce it and defend it with the task of preventing the enemy from breaking through in the specified direction, openly refused to comply with the order of his superior, which undermined the combat readiness and combat effectiveness of the unit, which could have led to a breakthrough of the defence of the Armed Forces of Ukraine in the specified defence area by the Russian occupation forces.

When questioned by the court, the accused did not admit his guilt. He explained that on 17 October 2022, before lunch, possibly at 11 o'clock, the commander arrived and read an order from a sheet of paper. The essence of the order was clear to him, he was to go to the fortress, stay there and hold off the enemy. He then asked who refused and for what reason. Of the 8 service members who were present when the order was given, 4 refused to obey it, including him, for health reasons. The commander personally approached each of them to find out the reason for their refusal to obey the order. He said that he refused to comply with the order for health reasons, and that his toothache and swollen cheek prevented him from carrying out the order. The command knew he had dental problems before the order was issued. He believes that at the time he had good reasons for not carrying out the order. He knows that one of the other service members went to carry out the order in his place. Those who disobeyed the order were taken to the SBI and interrogated. The accused said that under different circumstances (no toothache) he would have obeyed the order.

He noted that he had carried out the previous order before this one. He was in Zaitseve and had been in the cold in the rain for the last 3 days without warm clothes, after which his teeth began to hurt. He reported to the command that he had no warm clothes because they were staying in their positions. He turned to his platoon leader about the toothache, who gave him pills, and when the pills did not help, he was given injections. Then the platoon leader said that he had run out of medicine because it was getting cold and everyone was sick, and that he would have to buy medicine at his own expense.

He said that he and a group of service members were taken to a military medical commission in Dobropillia and they stayed there for a week without a day. In Dobropillia, around 13 March, he went to a private dentist, the doctor examined him and said that he needed dentures and dental treatment, told him to take painkillers and advised him to take pills. He added that, according to the MMC, he was fit, but healthy and fit are two different things.

After returning to Kostiantynivka, the pain got worse, his cheek swelled up more, painkillers did not help, and he could not sleep at night.

In Kostiantynivka he went to the platoon doctor, who has since died, who gave him pills, but they did not

help, and then he gave him injections. He did not go to a private dentist in Kostiantynivka because, as a service member, he was not allowed to move around the town without permission from his command. He reported his problem to the company doctor, who referred him to the medical unit of Kostiantynivka, and he waited for a dentist from the morning until 16:00, but then an emergency occurred near Bakhmut and the doctors were away, so he was not provided with any assistance, and this was the day before his arrest. The information about seeking medical care was recorded in a notebook at the medical company.

He added that he solved the problem of his toothache only during his stay in the guardhouse. After 18 October 2022, he asked the medical staff of the guardhouse to take him to the dentist, but they would not take him alone, so he had to wait until the group gathered. To relieve his toothache, he went to the medical unit to get painkillers, was given pills and then injections. The information about the medicines and injections was recorded in the guardhouse's medical diary. In the period from 18 to 30 October 2022, he does not remember the exact date, he was taken to a public dentist (1st floor of a multi-storey building in Pavlohrad) and had a tooth removed (lower right cheek tooth). Two weeks after the extraction, he returned to the same hospital for a filling.

Evidence examined by the court:

- Hearing of a witness in court (captain, commander of the accused): He stated that those service members who agreed to obey the order were given weapons and equipment and moved to the fortress. The accused stepped forward from the line and said that he was physically unable to obey the order due to his health, moral and psychological state. He said he was worried about a toothache. He could not remember if he had mentioned this before. He was informed that, according to the certificate of the Military Medical Commission, he was fit for military service. He, representatives of the MLES and the platoon commander personally explained the consequences of disobeying a combat order. The consequences of the accused's actions could have led to the undermining of morale, the loss of positions and the death of other service members. The circumstances of the order were recorded on a telephone and the order itself was videotaped to record the giving of the order and the persons who could refuse to obey it. Other service members were with him when the order to fight was announced, as well as the service member who recorded the order on camera. Before the order was announced, he did not know whether the accused would refuse to obey it. Some service members hesitated and were given time to think. It was the first time the accused had refused to obey an order, having previously carried out combat orders. The fact of the refusal was reported to the MLES and the Military Prosecutor's Office, and the service members, including the accused, were taken to the SBI. He added that if a service member approached him and complained of a painful condition, the most he could do was to send him to a medical station, and if they could not help him, they would note it in a book and send him to hospital. If the accused's cheek was swollen and he complained of toothache, he could not say what he should have done, given the situation. Theoretically, a swollen cheek would have been enough to send the service member to a medical unit, but at that time the medical unit was on a mission to transport the wounded and the order was to be carried out immediately.

- Interrogation of another witness, during which the latter began to speak: Physically, the accused looked satisfactory, he does not remember what he was complaining about. During the announcement, he stood to the left of the service members, parallel to them. He could hear the reaction of the service members who refused to obey the combat order. At the time, he heard the response of the accused, but now he does not remember it verbatim. Those who refused to obey the order were taken to the SBI.

- Three other witnesses were questioned, two of whom confirmed that the accused had been suffering from toothache for a long time.

Written evidence:

- Notification of the discovery of a criminal offence in accordance with Article 214 of the Criminal Code of Ukraine;
- Statements of witnesses;
- Military identification card of the accused;
- Extract from the Order of the Commander of the Military Unit of 24 February 2022 concerning the

accused, who should be considered to have taken up his official duties on the basis of the Mobilisation Order of the Supreme Commander of the Armed Forces of Ukraine of 24 February 2022 No. 32/321/13т, the Decree of the President of Ukraine of 24 February 2022 "On the introduction of martial law in Ukraine";

- Certificate No. 9254/11 of 16 October 2022, issued to the accused , stating that he was performing military service in a military unit;
- Extract from Order No. 156 of 22.06.2022 concerning a captain who, on the basis of Order No. 134 of the Commander of the Operational Command of 08.05.2020, should be considered to have assumed his duties as commander of the 8th mechanised company of the 3rd mechanised battalion.
- Response of the commander of the military unit to the request;
- Certificate of the Military Medical Commission No. 2058 of 13 October 2022 concerning the accused, which shows that a medical examination was carried out by the Military Medical Commission on 13 October 2022. According to the certificate, the diagnosis was subjective noise, so related to military service, medial occlusion - partial adentia of the upper and lower jaw, the disease is not related to military service, based on Article 49 (a), column II of the Table of Diseases, column of additional requirements (TDV) - fit for military service;
- Combat order of the tank battalion commander;
- Combat order of the tank battalion commander dated 16.10.2022;
- Protocol of the reading of technical devices and technical means with photo, film, video recording functions dated 17 October 2022, regarding the issuance of an order by the Captain of the 8th Mechanised Company of the 3rd Mechanised Battalion of the Military Unit and the refusal of the service members, including the accused, to comply with the order;
- Protocol of the interrogation of the captain;
- Protocols of the interrogation of other witnesses;
- Medical profile of the accused;
- Response from the head of the Luhansk-Pavlodar Zonal Department No. 2123 dated 12.04.2023;
- Letter of the Pavlodar City Hospital No. 1 No. 622 dated 12.05.2023.

The court's conclusions and decisions:

The court found no evidence that the accused refused to obey a combat order, repeatedly performed combat missions, and that the reason for not obeying the order of 17 October 2022 was his poor health, namely a swollen cheek and toothache, which affected his performance and physical readiness.

According to the video recording, the defendant stated that the reason for not complying with the order was a swollen cheek, a toothache and the lack of medical care the day before due to the absence of doctors in the medical company on the day of his request. The service member thus acted in accordance with Article 254 of the Statute of the Armed Forces of Ukraine, which requires service members to report illness immediately to their immediate superior, who is obliged to refer the sick person to the unit's medical centre.

According to Articles 14, 18 of the Statute, a service member must address his immediate superior on official and personal matters and, if he is unable to resolve them, to the next immediate superior. Military personnel are under the protection of the state and have all the rights and freedoms enshrined in the Constitution of Ukraine.

At the same time, Article 58 of the Statute regulates the duties of commanders (superiors): To be sensitive and attentive to subordinates, to combine accuracy and integrity with respect for their honour and dignity, to understand their everyday life, to ensure their social and legal protection and, if necessary, to intercede on their behalf with higher commanders (superiors); to know the needs and requests of the personnel, to decide on their applications, complaints and other appeals; to organise the timely provision of all types of assistance and to check its completeness; to organise cultural and educational work, to create conditions for health and physical development;

From the material submitted to the Court, namely the certificate of the Military Medical Commission No.

2058 dated 13 October 2022, it is clear that the accused has a medial overbite, partial adentia of the upper and lower jaw.

According to the Disease Manual, adentia is a dental disease characterised by the complete or partial absence of the dentition (complete and partial adentia). Adentia can be either congenital or acquired during life. This disease causes severe discomfort in everyday life, leads to a drooping lip, malocclusion and atrophy of the jaw, so adentia requires serious dental treatment.

Also during the interrogation at the court hearing on 30 January 2023, the witness (captain) confirmed that the accused was disturbed by toothache, adding that the accused had previously carried out combat orders, but refused to do so for the first time precisely because of his dental disease.

During the court hearing, the accused's motion to request medical documents from the guardhouse regarding his dental disease was granted. Thus, the head of the guardhouse reported that on 25 October 2022 the accused was referred to a dentist in Pavlohrad and received a consultation, and on 7 November 2022 he was readmitted for medical treatment. According to the medical records provided by the hospital, the accused had a tooth extracted on 24 October 2022.

Most of the witnesses questioned during the trial stated that the accused's refusal to obey a combat order was motivated by his poor health and dental disease.

This indicates that the accused's actions were aimed at exercising the social rights of a service member, i.e. the accused did not seek medical care because of his own criminal intentions, but solely because of his ill health.

At the same time, none of the witnesses provided the Court with any information that could directly or indirectly confirm the prosecution's version of the accused's criminal intent to refuse to perform his constitutional duty to defend the motherland, nor does any other evidence confirm such intent.

However, the health condition of the accused was not checked either by the command of the unit or by the law enforcement authorities, who were aware of the reasons for the refusal to carry out the combat order on the basis of the video of its announcement. At the same time, the commander questioned in court said that theoretically, the accused's swollen cheek was enough to send him to a medical unit, but the medical unit was carrying out a combat order at the time. Such actions of the commander indicate that he did not take measures to provide medical care to the accused, did not ensure that the service member could carry out the order for health reasons, but referred him to the law enforcement authorities of the SBI.

In view of the above, there is no criminal intent (desire) on the part of the accused to evade his duty to defend the Motherland in a direct conflict with the enemy under martial law, and therefore the Court finds that there is no evidence of the subjective side of the crime charged against the accused.

The evidence collected in the case proved that the accused, after receiving the order of the commander, reported the impossibility of its execution and gave a valid reason for not executing the order directly to the commander, did not violate the relationship of subordination and military honour, and even apologised to the commander when reporting a toothache. Such actions of the accused did not endanger the object protected by this rule.

Thus, having received a negative answer to two of the above questions, the Court concluded that the actions of the accused PERSON_5 did not contain all the elements of the offence charged under Part 4 of Article 402 of the Criminal Code of Ukraine.

The service member was found not guilty of committing a criminal offence under Part 4 of Article 402 of the Criminal Code of Ukraine and acquitted on the grounds that his actions did not constitute a criminal offence. The detention order was lifted and he was immediately released from custody.

There is no practice of the Supreme Court on the application of this article for the period starting from 01.01.2019.

Article 405. Threat or violence against a superior

1. Threatening to kill or inflict bodily harm or beatings on a superior, or to destroy or damage his or her property in connection with the performance of his or her duties in military service

shall be punishable by detention in a disciplinary battalion for up to two years, or imprisonment for the same term.

2. Causing bodily harm, beating or committing other violent acts against a superior in connection with the performance of his/her duties in military service

shall be punishable by imprisonment for a term of two to seven years.

3. The acts envisaged by Parts one or two of this Article, committed in conditions of a special period, except for martial law,

shall be punishable by imprisonment for a term of five to eight years.

4. The acts envisaged by Parts one or two of this Article committed by a group of persons, or with the use of weapons, or under martial law or in a combat situation,

shall be punishable by imprisonment for a term of five to ten years.

REVIEW OF COURT DECISIONS:

The practice of entering into a plea agreement between the accused and the prosecutor is widespread.

CASE NO. 335/4568/22 (Judgement of the Ordzhonikidzevskyi District Court of Zaporizhzhia dated 30.08.2022)

Link: https://reyestr.court.gov.ua/Review/105977195

Circumstances of the case: By the order of the commander of the military unit dated 26 February 2022, a service member 1 (service member) was entered in the personnel lists of the military unit and appointed to the position of driver of the 1st security unit of the security platoon of the ammunition supply company of the logistics battalion.

By order of the commander of the military unit, another service member was appointed to the position of the head of the rocket and artillery armament service of the technical department of the same military unit.

By order of the commander of the military unit dated 29 December 2019, a service member 2 was promoted to the rank of major.

By order of the commander of the military unit, a service member 3 was appointed deputy commander of the ammunition supply company of the logistics battalion of the same military unit.

By MoD Order No. 226 of 19.06.2021, the service member 3 was promoted to the rank of lieutenant.

In accordance with Articles 29-32 of the Statute of the Internal Service of the Armed Forces of Ukraine, a major holding the position of chief of the rocket and artillery armament service of the technical department of a military unit is superior in position and military rank to a service member, the driver of the 1st security unit of the security platoon of the ammunition supply company of the logistics battalion of a military unit.

In accordance with Articles 29-32 of the Statute of the Internal Service of the Armed Forces of Ukraine, a lieutenant holding the position of a deputy commander of the ammunition supply company of the logistic battalion of a military unit is superior in position and military rank to a service member, the driver of the 1st security unit of the security platoon of the ammunition supply company of the logistic battalion of a military unit.

The service member, being aware of his duties under the legislation regulating the procedure for the performance of military duty and military service and being able to perform them properly, being aware of the socially dangerous nature of his action, foreseeing its socially dangerous consequences and wishing them to occur, i.e. acting with direct intent, deliberately allowed their violation and committed a military crime against the established procedure for military service.

On 08 July 2022, on the territory where military personnel of a military unit were performing combat operations, the service member threatened to kill the major in connection with the latter's performance of military service.

Thus, on 06 July 2022, while performing his duties related to combat and mobilisation readiness, combat

training, education, military discipline, and the moral and psychological state of personnel, the major issued an order to the personnel of the military unit to conduct training to repel a simulated enemy attack (circular defence training), during which the service member publicly expressed dissatisfaction with the commander's order and unwillingness to comply with it.

Subsequently, on 08 July 2022, at approximately 18: 00, on the territory where the service members of the military unit were performing combat missions, the service member, in a state of intoxication, moved towards the premises of the Rocket and Artillery Service, where the personnel of the said unit were stationed, being aware of the illegal and extra-legal nature of his actions, foreseeing their socially dangerous consequences and wishing them to occur, knowing with certainty that the major was his superior by position and military rank, realising a direct intention, which had arisen the day before, with the aim of threatening to kill the head of the rocket and artillery weapons service of the technical department of the military unit, the major, in connection with the performance of the latter's duties in military service, combat and mobilisation readiness, combat training, education, military discipline and the moral and psychological state of the personnel, took an F-1 grenade from his trouser pocket, removed the fuse, placed it in a combat position and, seeing the major, threatened to kill him by detonating the above grenade.

Moreover, on 08 July 2022, on the territory where military personnel of a military unit were performing combat operations, the service member threatened to kill the lieutenant in connection with the latter's performance of military service.

Thus, on 08 July 2022, at about 18:05, the lieutenant received information that the service member had threatened to kill the major. In connection with the above, the lieutenant decided to search, check and confiscate the weapons assigned to the service member in order to prevent further illegal actions of the latter and to avoid negative consequences in the form of damage to the life and health of the existing personnel. In implementation of the above, in the performance of his duties to ensure proper order, organise the technically correct operation of weapons, examine the business, moral and psychological qualities of mechanic-drivers (drivers) of combat and other vehicles, the lieutenant entered the temporary residence of the service member on the territory of the military unit to search, check and confiscate the AK-74 assault rifle assigned to the service member.

Subsequently, on 08 July 2022, at approximately 18: 15, on the territory where combat missions are performed, the service member, being in a state of intoxication, entered the room where he was temporarily staying, saw the lieutenant, being aware of the unlawful and extra-legal nature of his actions, foreseeing their socially dangerous consequences and wishing them to occur, knowing with certainty that the lieutenant is his superior in position and military rank, acting repeatedly, realising a direct intention that suddenly arose, aimed at threatening to kill the deputy commander of the ammunition supply company of the battalion logistics of the military unit, in connection with the performance of the latter's duties in the military service, ensuring proper order, organising the technically correct operation of weapons, studying the business, moral and psychological qualities of mechanic-drivers of combat and other vehicles, ran up to the vehicle URAL-43202, took an AK-74 assault rifle from its cabin, which was assigned to a service member of the military unit, loaded a cartridge into the chamber and fired three single shots upwards. The service member then moved towards the lieutenant with the aforementioned assault rifle in his hands, loaded, and threatened to kill him by shooting him with the aforementioned assault rifle.

The Court considered it inappropriate to apply Part 4 of Article 405 of the Criminal Code of Ukraine - a threat to kill a superior in connection with the performance of his military service duties, committed under martial law.

Evidence used:

- During the pre-trial investigation, on 28.07.2022, a plea agreement was concluded between the prosecutor of the Zaporizhzhia Specialised Military and Defence Prosecutor's Office of the Pivdennyi Region and the accused, with the participation of a defence lawyer.
- Victim No. 1 gave his written consent to the plea agreement and agreed with the proposed nature and extent of the punishment to be imposed on him. The victim was informed of his rights under Articles 394,424,473 of the Criminal Code of Ukraine.
- Victim No. 2 gave his written consent to the plea agreement and agreed with the proposed nature

and extent of the punishment to be imposed on him. The victim was informed of his rights under Articles 394,424,473 of the Criminal Code of Ukraine.

- AK-74 assault rifle with marking No. 1;
- AK-74 rifle with marking No. 2;
- Sand-coloured RGD-5 grenade with fuze;
- Sand-coloured F-1 grenade with fuze

The court's conclusions and decisions:

By questioning the parties to the criminal proceedings, the court satisfied itself that the conclusion of the agreement by the parties was voluntary, i.e. that it was not the result of force, coercion, threats, promises or actions other than those provided for in the agreement. At the same time, the court found that the accused was fully aware of the content of the plea agreement concluded with the prosecutor, the nature of the charge to which he was pleading guilty and his rights under Article

474, Part 4 para. 1 of the Criminal Code of Ukraine, as well as the consequences of entering into and accepting this agreement, as set forth in Article 473, Part 2 of the CPC of Ukraine, and the consequences of its non-fulfilment, provided for in Article 476 of the CPC of Ukraine.

The plea agreement was accepted. The service member was found guilty of an offence under Part 4 of Article 405 of the Criminal Code of Ukraine and sentenced the service member to the punishment agreed upon by the parties to the agreement in accordance with Part 4 of Article 405 of the Criminal Code of Ukraine in application of Article 69 of the Criminal Code of Ukraine in the form of four (4) months of detention in the guardhouse.

The measure of restraint in the form of detention pending the entry into force of the sentence was left unchanged.

The term of the service member's sentence will be counted from the moment of actual detention, i.e. from 28 July 2022.

On the basis of Part 5 of Article 72 of the Criminal Code of Ukraine, the period of pre-trial detention from the moment of his arrest, i.e. from 28.07.2022 until the date of the entry into force of the verdict, should be counted towards the term of the sentence imposed by the court, at the rate of one day of pre-trial detention for one day of arrest.

CASE NO. 344/7898/22 (Judgement of the Ivano-Frankivskyi City Court of Ivano-Frankivsk dated 20.07.2022)

Link: https://reyestr.court.gov.ua/Review/105322733

Circumstances of the case: On 25.04. 2022, at about 12:10, a service member performing military service under conscription during mobilisation as a rifleman of the 2nd guard division of the 3rd guard platoon of the 1st guard company of the 4th guard battalion of the military unit, in violation of the requirements of Articles 11, 16, 30, 37, 49 of the Statute of the Internal Service of the Armed Forces of Ukraine, Article 4 of the Disciplinary Statute of the Armed Forces of Ukraine, acting intentionally, being aware of the socially dangerous nature of his action, foreseeing its socially dangerous consequences and wishing for their occurrence, being drunk, under martial law, in the presence of military personnel of the military unit, in violation of the order of military service, relations of subordination, military honour and discipline, in an attempt to demonstrate his pretended superiority over his superior, to humiliate his honour and dignity, thereby asserting his own authority in the military team, while in the premises of the corridor of the Reception Department he got into a dispute with his direct superior, and then hit him with his right fist once in the face and with his right foot once in the knee of his right leg, as a result of which the victim sustained bodily injury in the form of a bruise on the head, which is classified as light bodily injury.

At the court hearing, the accused pleaded guilty to the offence in full and confirmed the circumstances of the offence as set out in the charge sheet.

He explained to the court that on 25 April 2022, at about 12:10, in connection with the examination for

alcohol intoxication, he was in the regional narcological dispensary at 21 Mlynarska St. in Ivano-Frankivsk. He explained to the court that on 25 April 2022 at about 12:10, in connection with the examination for alcohol intoxication, he was in the regional narcological dispensary located at 21 Mlynarska St. in Ivano-Frankivsk. The captain, who was his direct superior, demanded to see his passport of the citizen of Ukraine in order to process the documents. Being highly intoxicated (3 ppm) and knowing that the captain had his military ID card, he refused to comply with his superior's request. The captain then approached and repeated the order to produce his passport. He reacted inappropriately to this request, punching the victim in the face with his right hand and kicking him with his right foot around the knee of his right leg. The service members present stopped the offence. He expressed remorse for his actions, compensated the victim for non-pecuniary damages and apologised to him. He asked for a lighter sentence than that proposed by the prosecutor. He intends to continue his military service in the future.

The victim did not appear at the court hearing, although he was duly notified by the court of the time and place of the criminal proceedings. He submitted a written request for the trial to be conducted without his participation, stating that he had no property or non-property claims against the service member.

Evidence used:

- From 25.04.2022 to 27.04.2022, the accused was hospitalised at the Municipal Non-Commercial Enterprise "Prykarpattia Narcological Centre";
- in 2021, the accused was hospitalised at the Municipal Non-Commercial Enterprise "Prykarpattia Regional Clinical Mental Health Centre of Ivano-Frankivsk Regional Council" with a diagnosis of dissociative personality disorder. Mental and behavioural disorders caused by alcohol consumption, intoxication syndrome.
- According to the conclusion of a forensic psychiatric expert dated 13.06.2022, the accused does not suffer from any mental disorder and did not suffer from any mental disorder during the period relevant to the alleged unlawful acts, but was in a state of simple intoxication, which, according to ICD-10 F10. 0 is a result of alcohol consumption with acute complicated intoxication; during the period relevant to the alleged offence, the person was and is in a state in which he is able to fully understand and control his actions and no compulsory medical measures are required;

Mitigating circumstances: Sincere remorse, active cooperation in the investigation of the crime, as confirmed by the prosecutor in court, voluntary compensation for damages.

Aggravating circumstances: Committing an offence by a person in a state of intoxication.

The court's conclusions and decisions:

In view of the above, taking into account the circumstances of the seriousness of the offence, the identity of the perpetrator and other circumstances of the criminal proceedings, the absence of previous convictions, sincere remorse, active assistance in solving the offence, voluntary compensation for the damage caused, the position of the prosecutor, who requested that the accused be sentenced to 5 years' imprisonment, the position of the victim, who reported the absence of any property or non-property claims against the service member, the position of the accused and his defence lawyer, who requested a lesser sentence not involving deprivation of liberty, the court considers that the accused should be sentenced in accordance with Part 4 of Article 405 of the Criminal Code of Ukraine under the sanction of this article in the form of imprisonment. Taking into account the above, the correction of the accused is possible without isolation from society, and therefore Article 75 of the Criminal Code of Ukraine, releasing him from serving the main sentence of imprisonment with probation and imposing appropriate responsibilities on him.

The service member was found guilty of committing a criminal crime under Part 4 of Article 405 of the Criminal Code of Ukraine and sentenced to five years' imprisonment. On the basis of Article 75 of the Criminal Code of Ukraine., the service member was released from serving the principal sentence of imprisonment on probation, with a probationary period of one year.

In accordance with Part 1 Article 76 of the Criminal Code of Ukraine the service member has the following obligations: to report periodically to the authorised probation body for registration; to notify the authorised probation body of any change of residence, place of work or place of study.

According to Part 4 Article 76 of the Criminal Code of Ukraine, the commander of the military unit at the place of military service is responsible for the supervision of the service member during the probationary period, and in case of dismissal - the authorised probation body at the service member's place of residence.

The victims have not filed a civil claim.

There are no court costs or material evidence in the criminal proceedings.

No measure of restraint was imposed

Article 407. Unauthorised leaving of a military unit or place of service

1. The unauthorised leaving of a military unit or place of service by a service member on compulsory service, as well as the failure to report for duty on time without a valid reason in the case of dismissal from a unit, appointment or transfer, failure to report from a secondment, leave or medical institution for more than three days but not more than one month,

shall be punishable by detention in a disciplinary battalion for up to two years, or imprisonment for up to three years.

2. The unauthorised leaving of a military unit or place of service by a service member (except for compulsory service), as well as the failure to report for duty on time without a valid reason for more than ten days but not more than one month, or even for less than ten days but more than three days, committed repeatedly within one year,

shall be punishable by a fine of between one thousand and four thousand tax-free minimum incomes, or by restriction of service for a period of up to two years, or by imprisonment for a period of up to three years.

3. The unauthorised leaving of a military unit or place of service, and the failure to report on time for duty without a valid reason for more than one month, committed by the persons referred to in Parts one or two of this Article,

shall be punishable by imprisonment for a term of two to five years.

4. The unauthorised leaving of a military unit or place of service, and the failure to report on time for duty without a valid reason, committed under conditions of a special period, except for martial law, committed by persons referred to in Parts one or two of this Article,

shall be punishable by imprisonment for a term of three to seven years.

5. The unauthorised leaving of a military unit or place of service, and the failure to report on time for duty without a valid reason, committed by a service member under martial law or in a combat situation,

shall be punishable by imprisonment for a term of five to ten years.

REVIEW OF COURT DECISIONS:

CASE NO. 553/538/22 (Judgement of the Leninskyi District Court of Poltava dated 29.03.2022)

Link: https://reyestr.court.gov.ua/Review/103782325

Circumstances of the case: By the order of the acting head of 03.09.2021 "On Personnel", the senior sergeant was appointed to the position of Border Guard Inspector of the 3rd category of the 3rd group of border control inspectors of the Border Guard Inspectorate (Type A) of the Border Guard Service Department.

In accordance with the provisions of Articles 2, 4, 24 of the Law of Ukraine "On Military Duty and Military Service", at the time of the offence the senior sergeant was a service member performing military service under a contract.

Thus, the senior sergeant, as a contractual service member, holding the position of a border service inspector of the 3rd category of the 3rd group of border control inspectors of the Border Guard Inspectorate (Type A) of the Border Guard Service Department, carrying out his criminal intention due to unwillingness to

perform military service and in order to illegally evade it, having objective opportunities to arrive in time at this unit, under martial law, in violation of the requirements of Articles 65, 68 of the Constitution of Ukraine, Article 17 of the Law of Ukraine "On Defence of Ukraine", Articles 1, 2, 24 of the Law of Ukraine "On Military Duty and Military Service", Articles 11, 16, 30, 37, 49 of the Statute of the Internal Service of the Armed Forces of Ukraine, Articles 1-4 of the Disciplinary Statute of the Armed Forces of Ukraine, failed to report in time to the place of duty of the Border Guard Service Department on 24.02.2022 without permission of the competent commanders or superiors, and spent time at his own discretion not related to the performance of military service duties.

On 24 March 2022, the senior sergeant voluntarily and on his own initiative came to the Kharkiv Specialised Military and Defence Prosecutor's Office (1b Maidan Nezalezhnosti, Poltava).

Thus, from 24.02.2022 to 24.03.2022, the senior sergeant was illegally absent from his place of service at the Border Guard Service Department, committing an offence under Part 5 of Article 407 of the Criminal Code of Ukraine, i.e. failure to report for duty on time without a valid reason, committed under martial law, committed by a person referred to in the second part of Article 407 of the Criminal Code of Ukraine, i.e. a service member (except for conscripts).

Evidence used:

On 24 March 2022, the prosecutor of the Kharkiv Specialised Military and Defence Prosecutor's Office of the Joint Forces and the accused, in the presence of a defence lawyer, concluded a plea agreement in accordance with the requirements of Article 468 of the CPC of Ukraine, according to which the parties to the agreement agreed on the legal classification of the accused's actions in accordance with Part 5 of Article 407 of the Criminal Code of Ukraine and the application of Article 69 of the Criminal Code of Ukraine by changing to another, more lenient type of basic punishment not specified in the sanction of the article (sanction of the part of the article) of the Special Part of this Code for this criminal offence and agreed to impose a fine in the amount of 1800 (one thousand eight hundred) tax-free minimum incomes, which is UAH 30,600.00

The court's conclusions and decisions:

At the hearing, the court found that the accused was reasonably accused of committing an offence classified as a serious crime, the parties entered into the agreement voluntarily; the content of the agreement met the requirements of Article 471 of the CPC of Ukraine and the law.

When choosing the measure and type of punishment, the court takes into account the seriousness of the crime, the identity of the accused and the terms of the agreement between the accused and the prosecutor, which takes into account the identity of the accused, who has no previous convictions, has a good reputation in his place of residence and work, has a minor child, and has mitigating circumstances in the form of a confession, sincere remorse and active assistance in solving the crime, unconditional recognition of his guilt, i.e. the existence of circumstances provided for in Article 66 of the Criminal Code of Ukraine, mitigating circumstances and the absence of aggravating circumstances, and with the application of Article 69 of the Criminal Code of Ukraine, agreed by the parties to the criminal proceedings, to another milder type of basic punishment not specified in the sanction of Part 5 of Article 407 of the Criminal Code of Ukraine and to sentence the accused to a fine in the amount of 1800 tax-free minimum income, i.e. UAH 30,600.00

The plea agreement was accepted. The senior sergeant was found guilty of committing an offence under Part 5 of Article 407 of the Criminal Code of Ukraine in application of Articles 53, 69 of the Criminal Code of Ukraine and was sentenced to a fine of 1800 (one thousand eight hundred) tax-free minimum income, i.e. UAH 30,600.00 (thirty thousand six hundred hryvnia)

CASE NO. 462/1623/23 (Judgement of the Zaliznychnyi District Court of Lviv dated 26.04.2023)

Link: https://reyestr.court.gov.ua/Review/110449904

Circumstances of the case: A sergeant during military service under conscription during mobilisation in a military unit, in violation of Article 17 of the Law of Ukraine "On Defence of Ukraine", Part 1 of Article 1 of the Law of Ukraine "On Military Duty and Military Service", Articles 11, 16, 129, 130, 199 of the Statute of the Internal

Service of the Armed Forces of Ukraine and Article 4 of the Disciplinary Statute of the Armed Forces of Ukraine, acting with direct intent, i.e. being aware of the socially dangerous nature of his actions and foreseeing their socially dangerous consequences and wishing them to occur, without intending to permanently evade military service, under martial law, without obtaining permission from the competent commander, on 14 November 2022 at approximately 12:00, he left the military unit without permission and remained outside its location until the moment of voluntary reporting, namely on 02 February 2023 to the Territorial Department of the State Bureau of Investigation located in Lviv, at 6 M. Kryvonosa, Lviv.

The actions of the sergeant are classified under Part 5 of Article 407 of the Criminal Code of Ukraine.

Evidence used:

During the court hearing, the accused pleaded guilty to the offence under Part 5 of Article 407 of the Criminal Code of Ukraine. He explained that after returning to the military unit from the combat zone, he asked the commander for leave, but was refused. Due to difficult family circumstances, he decided to leave the military unit on his own. After settling his family affairs, he decided to return to the unit, but was informed that he could only do so after a court decision. The accused stated that he has since cooperated with the investigation, is sincerely remorseful for his actions, and believes that he can reform without being sentenced to prison, as he plans to continue his military service in the field with his comrades.

In accordance with Part 3 of Article 349 of the CPC of Ukraine, the court did not consider any other evidence in the criminal proceedings. The court considered it inappropriate to consider other evidence, as the accused did not deny the fact of committing an offence under Part 5 of Article 407 of the Criminal Code of Ukraine in the above circumstances, and the participants in the proceedings did not object to this.

The court's conclusions and decisions:

The court concluded that the sergeant's guilt had been fully proven and that the pre-trial investigation had correctly classified the accused's actions under Part 5 of Article 407 of the Criminal Code of Ukraine, as the accused committed unauthorised desertion of a military unit under martial law.

The offence committed by the sergeant is a serious crime.

There are no aggravating circumstances pursuant to Article 67 of the Criminal Code of Ukraine.

As a mitigating circumstance, provided for in Article 66 of the Criminal Code of Ukraine, the court recognises sincere remorse and active assistance in solving the crime.

In sentencing the accused, the court takes into account the seriousness of the offence, the martial law in force in Ukraine at the time of the offence, the identity of the accused, who is not registered with a psychoneurological clinic, is not registered with a narcologist and has not been diagnosed with a disability, and therefore considers that the sergeant should be sentenced to imprisonment.

The service member was found guilty of committing a criminal offence under Part 5 of Article 407 of the Criminal Code of Ukraine and was sentenced to five (5) years imprisonment.

In accordance with Article 75 of the Criminal Code of Ukraine, he was released from imprisonment on probation and a probationary period of three (3) years was set.

In accordance with Part 4 of Article 76 of the Criminal Code of Ukraine, supervision over a service member released from serving a sentence of imprisonment on probation is entrusted to the commander of the military unit, in the case of a change of service to the commander of the military unit at the new place of service, and in the case of dismissal from military service, control over the execution of the sentence is entrusted to the authorised probation body.

In the case of dismissal from military service, the service member is obliged to comply with Part 1 of Article 76 of the Criminal Code of Ukraine: to notify the authorised probation body of any change of place of residence, work or study; to report periodically to the authorised probation body for registration.

No measure of restraint was imposed. No civil claim was filed in the criminal proceedings.

The issue of the fate of material evidence was resolved in accordance with Article 100 of the CPC of Ukraine.

Article 408. Desertion

1. Desertion, i.e. unauthorised departure from a military unit or place of service with the intention of evading military service, and failure to report for service for the same purpose in the case of appointment, transfer, secondment, leave or from a medical institution

shall be punishable by imprisonment for a term of two to five years.

2. Desertion with arms or by prior conspiracy of a group of persons

shall be punishable by imprisonment for a term of five to ten years.

3. The act envisaged by parts one or two of this Article, committed in conditions of a special period, except for martial law,

shall be punishable by imprisonment for a term of five to ten years.

4. The act envisaged by parts one or two of this Article, committed under martial law or in a combat situation,

shall be punishable by imprisonment for a term of five to twelve years.

REVIEW OF COURT DECISIONS:

CASE NO. 465/1056/22 (Judgement of the Frankivskyi District Court of Lviv dated 04.03.2022)

Link: https://reyestr.court.gov.ua/Review/103610896

Circumstances of the case: A contract service member of the Armed Forces of Ukraine, performing military service in a military unit - field post, in violation of the requirements of Articles 17, 65 of the Constitution of Ukraine, Article 17 of the Law of Ukraine "On Defence of Ukraine", Part 1 of Article 1 of the Law of Ukraine "On Military Duty and Military Service", Articles 11, 16, 129, 130, 199 of the Statute of the Internal Service of the Armed Forces of Ukraine and Article 4 of the Disciplinary Statute of the Armed Forces of Ukraine, acting intentionally, namely being aware of the socially dangerous nature of his actions, foreseeing socially dangerous consequences and desiring their occurrence, in order to evade military service and for reasons of unwillingness to endure the difficulties of military service due to personal indiscipline and negligence in the performance of official duties, during a special period, at 08: 00 on 19.10.2017, the field postman left the military unit without permission and did not perform his military service duties at the time of the trial.

At the court hearing, the service member pleaded guilty to the offence and stated that he had left his place of service without permission on 19.10.2017 and had not performed his military service duties to date. He expressed sincere remorse for his actions and asked for lenient punishment.

Evidence:

In addition to the accused's full admission of guilt, his guilt is confirmed by the evidence collected in the case, the validity and reliability of which is not disputed by the participants in the trial.

The court's conclusions and decisions:

The court classifies the actions of the accused under Part 3 of Article 408 of the Criminal Code of Ukraine as unauthorised desertion of a military unit with the intent to evade military service, committed under the conditions of a special period.

In sentencing the accused, the court takes into account the seriousness of the criminal offence, which is serious, the personality of the accused, who is a young man, is not registered in drug treatment and psychoneurological clinics, and is positively characterised at the place of service.

The court recognises the accused's sincere remorse as a mitigating circumstance.

The court found no aggravating circumstances.

Taking into account the circumstances of the crime and the data on the personality of the accused, the court considers it necessary to sentence him to imprisonment, as in the opinion of the court, such a punishment is necessary and sufficient to reform the accused and prevent him from committing new criminal offences.

At the same time, taking into account the fact that this is the first time the service member has been found criminally liable and the absence of aggravating circumstances, the court considers that the correction and re-education of the accused is possible without isolation from society, and therefore, in accordance with the requirements of Article 75 of the Criminal Code of Ukraine, he should be released from serving his sentence with probation and the establishment of a probationary period with the imposition of obligations under Article 76 of the Criminal Code of Ukraine.

The service member was found guilty of an offence under Part 3 of Article 408 of the Criminal Code of Ukraine and sentenced to five (5) years' imprisonment.

Pursuant to Article 75 of the Criminal Code of Ukraine, the convicted person was released from serving his sentence of imprisonment if he did not commit a new criminal offence within one (1) year of probation and fulfilled his obligations.

Pursuant to Article 76 of the Criminal Code of Ukraine, the convicted person is obliged to report periodically for registration to the military unit (institution) where he is performing military service, and in case of discharge - to the authorised probation body;

- to inform the commander (head) of the military unit (institution) in which he is performing military service, and in case of discharge from military service - to the authorised probation body about the change of place of residence, work or study.

In accordance with the provisions of Part 3 of Article 76 of the Criminal Code of Ukraine, the commander (head) of the military unit (institution) where the convicted person is serving and, in the case of discharge from military service, the authorised probation body at the place of residence are responsible for monitoring the convicted person's behaviour.

CASE NO. 335/3204/22 (Judgement of the Ordzhonikidzevskyi District Court of Zaporizhzhia dated 05.01.2023)

Link: https://reyestr.court.gov.ua/Review/108266407

Circumstances of the case: A service member, performing military service under a contract as a gunner of a security unit of a security platoon of a security company, on 26 February 2022, while under martial law, acting intentionally, in order to evade military service, in violation of legal requirements, arbitrarily left his place of service - the location of a field artillery depot, and evaded military service.

Thus, on 28 November 2019, the accused was called up for military service.

According to the order of the acting commander of the military unit dated 06 August 2020, the accused was entered in the personnel lists and provided with all kinds of assistance.

According to the order of the acting commander of the military unit dated 21 August 2020, the accused was appointed to the position of a gunner of a security platoon of a security company of a military unit.

According to the order of the commander of the military unit dated 30 September 2020, the accused signed a contract for military service of Ukrainian citizens in the Armed Forces of Ukraine as privates for a period of three (3) years and was enlisted for military service under a contract as a private.

On 27 July 2021, by order of the commander of the military unit, the service member was assigned to the Field Artillery Depot No. 2 for further service.

On 26 February 2022, while performing military service, the service member, realising the socially dangerous nature of his actions, foreseeing socially dangerous consequences and desiring their occurrence, decided to evade military service and leave the place of service without permission.

On 26 February 2022, at approximately 12 o'clock, the service member, being under martial law, acting deliberately, intending to evade military service, in violation of legal regulations, left his place of service - the

location of the field artillery depot No. 2 and evaded military service.

Since 26 February 2022, the service member did not perform his military service duties, did not report to his place of service without a reason, and spent time at his own discretion. At the same time, he has not taken any measures to report to the military unit, to contact the police or other state or military authorities, given the real possibility of doing so.

Thus, on 26 February 2022, the service member, being a service member, in violation of the requirements of Articles 11, 16 of the Statute of the Internal Service of the Armed Forces of Ukraine, while under martial law, acting with the intent to evade military service, without valid reasons, arbitrarily left his place of service in order to evade military service, i.e. committed desertion.

When questioned by the court, the accused PERSON_5 stated that he did not admit to having committed the offence. At the same time, the accused said that he understood the charges, the rights provided by the CPC of Ukraine, he agreed with the circumstances stated in the charge sheet in terms of the fact that he had left the place of service without permission, but he did not admit that he had left the place of service intentionally. He explained that he had done so to save his life.

During the interrogation in court, the accused explained that on 26 February 2022 there was complete confusion, they were on alert, saw tanks in the distance driving across the field, near the warehouses in the immediate vicinity, then artillery shelling began nearby. Everyone said they were retreating to the medical warehouses to evacuate. They went there. He didn't see any vehicles in the warehouses, the drivers refused to go, there was confusion, no one knew what to do, and he saw the company commander take off his bulletproof vest and put on civilian clothes and walk off in an unknown direction. He stood there for a couple of hours, not knowing what to do, seeing enemy vehicles shooting across the field, the warrant officer coming and not knowing what to do. Therefore, the service member decided to save his life, changed into civilian clothes and left. He had no aim to avoid service, he had no proper combat experience and skills. He was on his way from Melitopol to Kherson. He was stopped at a checkpoint and during the inspection Russian service members found numbers in his mobile phone and detained him. He was interrogated and told what to say. He was put under moral pressure, threatened, the text was given to him and the FSS officers forced him to say what they wanted him to say.

In response to clarifying questions from the participants in the trial, the service member stated that, yes, he was partially guilty of leaving the unit without permission, but he had no intention of evading service. He had been on duty since 2020 and knew the procedure for performing service. On 26.02.2022, he did not hear any orders. From 26.02.2022 he looked for an apartment in Tokmak, found one through his friends, and stayed there for two weeks. Then he went to Melitopol, where he stayed for 1 day, then to Kherson oblast, travelling via Mykolaiv to Kherson. At that time there were no buses to Zaporizhzhia. On his way to Kherson, he was stopped at the checkpoint in Henichesk. He was heading first to Kherson, then to Kherson. He knew that his military unit was in Kryvyi Rih. He wanted to leave the uncontrolled territory through Kherson. On 26.02.2022 there was a combat situation, one of the witnesses told him that there would be an evacuation. He knows the procedure for a service member to leave the uncontrolled area, at that time he just wanted to save his life. He cannot explain why he was stopped at the checkpoint. He also said that he had seen an advertisement for the transport on the Internet, but it was only an advertisement for the transport of people. There was no transport route from Tokmak to Zaporizhzhia. He did not call anyone from the command, did not report his journey because he did not think about it. He thought the commander was busy with his own affairs, so he did not call him. As for the interview on the TV channel, he also said that he had rehearsed this text three times and had been pressured by people in uniform. After giving the interview, he was immediately taken to the guardhouse, then interrogated, then put with other POWs and then exchanged. He found out about the evacuation from the Internet, he did not contact anyone from the unit about the evacuation, he called another witness, his company commander. He also contacted the first witness and he did not inform anyone in particular. He only reported to the second witness when he met him in Tokmak. He had no desire to hide from military service, but he took no action to inform the commander. He was on his own in this situation, so he did not tell anyone. The first witness told him to wait for the evacuation, but he no longer believed him. He also said that he had to follow orders, but that he was saving his life. On 26 February 2022, there was no order to leave the field artillery depot, no clear orders to hold the line or to retreat. He wants to do military service in the future. In addition, he stated that he has been in military service since 2019, serving in the regular service, and signed a contract in 2020. He clarified that his friends suggested the route, other friends gave him a lift, he travelled in a minibus towards Crimea and Kherson. He had no reason to go to Crimea; he has no relatives in Moscow. He was saving his life.

Evidence:

- Testimony of 4 witnesses, according to which it was established:

The testimony of a witness who explained in court on 05.10.2022 that he was a military member. He maintains a professional relationship with the accused. On 26.02.2022, it was calm in the morning, then they did not know the location of the troops, artillery shelling began through Tokmak, which made everyone scared, and then they tried to figure out what to do. People started to panic, people went to the territory of the medical warehouses, as they were told that there was transport to get out of the encirclement. When they got there, they realised that there was no transport, there was nothing. He called the captain, asked him whether they should leave and what to do, and the captain gave the order to go back, he did not give the order to leave. They went out and announced to everyone who was there that they were going back. When they returned, the unit commanders counted the personnel, there were no people from other units, and the accused was not present. They do not know where he went, then the SOF and TDF units started approaching them, the enemy came in a column at night, the night was relatively calm, and in the morning of 27 February the shelling of the territory started and around 12-13 o'clock they received an order from the captain to leave the place, change into civilian clothes and go to the city, to disperse. The witness also explained that he personally remained under occupation until 13 April. Then he returned to his military unit. When he was in Tokmak, he met the accused in a queue, they greeted each other and he asked him why he had not left when he had the opportunity, to which the latter said that he was fine, but did not say where he lived. Another man was with the witness and had a conversation with the accused.

After the battle on 27.02.2022, there was one dead and one wounded. On the territory of the medical warehouses, they had already started to change into civilian clothes. There were no instructions, and the captain gave the order to go back. The accused was there at the time. Some of the service members left the warehouses by private transport after the order to return.

Other circumstances were also established that confirm the circumstances described above.

- Written evidence, namely:

— an extract from the order of the commander of the military unit (routine order No. 149 dated 06.08.2020);

— an extract from the order of the commander of the military unit (routine order No. 160 dated 21.08.2020);

— an extract from the order of the commander of the military unit (routine order No. 139 dated 26.07.2021);

— an extract from the order of the commander of the military unit (routine order No. 202 dated 25.10.2020);

— an extract from the order of the commander of the military unit (routine order No. 205 dated 28.10.2021);

— an extract from the order of the commander of the military unit (personnel order No. 33-PC dated 30.09.2020);

— Materials of an internal investigation against a service member of a military unit in connection with unauthorised leaving of the place of service;

— Internal investigation report dated 01.04.2022;

— Extract from the order of the commander of the military unit (on the main activity) dated 02.04.2022 No. 42/вс/агд, on the results of the internal investigation against the service member in connection with unauthorised leaving of the place of service;

— Inspection report dated 25.05.2022 and its annex (an interview of the accused on the Internet regarding the circumstances of his service in the Armed Forces of Ukraine and the events that took place after the beginning of the armed aggression of the Russian Federation against Ukraine and the subsequent surrender of the service member);

— Report of the superior dated 04.05.2022 No. 101/1033 in response to the request dated 27.04.2022 No. 17-01-1230 regarding the capture and detention of the service member and his subsequent release, indicating the date and circumstances of his release;

— Notification of a criminal offence dated 23.04.2022 No. 101/847.

The court's conclusions and decisions:

Analysing and evaluating the testimony of the witnesses, the court finds that all witnesses provided interrelated and mutually reinforcing testimony that is fully consistent with the written evidence collected in the proceedings does not contain significant contradictions and contains factual data that generally confirm the existence of the crime charged in the actions of the accused. The witnesses did not establish any motives for slandering the accused, all testimonies were given under oath, and the witnesses also confirmed the circumstances that are not disputed by the accused regarding his unauthorised leaving of the place of service.

Thus, all the interviewed witnesses confirmed that the accused had left the place of service without permission on 26 February 2022 before the battle with the enemy on 27 February 2022. They confirmed the commander's order to return from the medical warehouse to the territory of the FAD and the possibility to go to the government-controlled territory, and the obligation to report to the place of deployment of his military unit upon returning to the government-controlled territory. Another witness confirmed that the accused had been given an order by the commander to return to the FAD territory, and that during a conversation with the accused in Tokmak after he had left the military unit without permission, the latter stated that he had not contacted the commander, was not going to return, and had thrown away his weapons. Similar explanations are also set out in the report attached to the official investigation report dated 01.04.2022. The witness confirmed the announcement of the commander's order to return to the FAD territory at the medical warehouse. The captain (witness) confirmed that he had not given an order to leave the territory of the FAD on 26.02.22, and that the accused had not contacted him after leaving the place of service.

Assessing the written evidence in terms of relevance, admissibility, reliability, and the totality of evidence in terms of sufficiency and correlation with the testimony of witnesses, the court finds that the above evidence fully proves the service member's guilt in committing the crime in the circumstances described in the verdict;

The arguments of the defence on the fact that the pre-trial investigation body did not correctly distinguish the criminal offence under Article 408 of the Criminal Code of Ukraine from a similar criminal offence under the relevant part of Article 407 of the Criminal Code of Ukraine were considered by the court and were not confirmed, since during the hearing of the criminal case the court found sufficient grounds to believe that the accused was aware that he was illegally leaving the place of service with the aim of completely evading his military service obligations, with continuous disregard of his military service obligations, i. e. acted with direct intent to do so, based on the following.

In the opinion of the Court, the accused attempted to reduce the public danger of his actions in court by giving the Court the impression that his actions should be classified under a less serious article of the Criminal Code of Ukraine, which provides for a less severe punishment.

In view of these circumstances, the written appeal of the accused's mother to his superiors does not refute or exclude the existence of the service member's intention to commit the crime charged.

The Court critically assesses the accused's arguments regarding the lack of intent to evade military service as contradictory to the Prosecution's case and the circumstances of his unlawful actions established in court, as such testimony does not correspond to the actual circumstances of the case and is refuted by the testimony of witnesses and other evidence examined in court as a whole.

Moreover, the actions of the accused proved the existence of circumstances that are characteristic only of desertion, namely: Destruction and throwing away of his military uniform and weapons (which he was not ordered to do, as he did so before the order to disperse in the city was given by the captain on 27 February 2022 after the battle and after the accused had left his place of service without permission on 26 February 2022), frequent changes of residence, attempts to travel abroad from the controlled territory, failure to take any measures to return to the military unit or to contact law enforcement or other state or military authorities when there was a real opportunity to do so.

The court did not find any mitigating circumstances under Article 66 of the Criminal Code of Ukraine or aggravating circumstances under Article 67 of the Criminal Code of Ukraine.

As the parties to the proceedings did not submit any requests to change the measure of detention, the Court considers it necessary to leave the previously imposed bail unchanged until the entry into force of the sentence.

He was found guilty of committing a crime under Part 4 of Article 408 of the Criminal Code of Ukraine and

sentenced under Part 4 of Article Criminal Code of Ukraine to 6 (six) years' imprisonment.

The term of imprisonment shall be counted from the date of execution of the sentence.

The measure of restraint in the form of bail shall remain unchanged until the sentence comes into force and shall be terminated after the sentence comes into force.

Article 410. Theft, appropriation, extortion by a military person of weapons, ammunition, explosives or other combat substances, means of transportation, military and special equipment or other military property, as well as taking possession of them by fraud or abuse of official position

1. Theft, appropriation, extortion by a military person of weapons, ammunition, explosives or other combat substances, means of transportation, military and special equipment or other military property or their acquisition by fraud

shall be punishable by imprisonment for a term of three to eight years.

2. The same acts committed by a military person with abuse of official position, or repeatedly, or by prior group conspiracy, or those that have caused significant damage

shall be punishable by imprisonment for a term of five to ten years.

3. The acts envisaged by parts one or two of this Article, if they are committed in conditions of a special period, except for martial law,

shall be punishable by imprisonment for a term of five to twelve years.

4. The acts envisaged by parts one or two of this Article, if they are committed under martial law or in a combat situation, robbery with the purpose of seizing weapons, ammunition, explosives or other warfare substances, means of transport, military and special equipment, as well as extortion of these items, combined with violence dangerous to the life and health of the victim,

shall be punishable by imprisonment for a term of ten to fifteen years.

REVIEW OF COURT DECISIONS:

CASE NO. 495/4211/22 (Judgement of the Bilhorod-Dnistrovskyi City District Court of Odesa oblast dated 05.07.2022)

Link: https://reyestr.court.gov.ua/Review/105092529

Обставини справи: The accused, being a conscript of the military service as a border guard inspector of the 3rd category - service number 4 of the mortar section of the firing department of the mortar outpost of the Border Commander's Rapid Response Unit of the Border Detachment of the State Border Guard Service of Ukraine in the rank of sergeant, in violation of Articles 9, 11, 12, 14, 16 of the Statute of the Internal Service of the Armed Forces of Ukraine and Article 4 of the Disciplinary Statute of the Armed Forces of Ukraine, in the period from 15:00 to 17:00 on 26 February 2022, a more precise time was not established during the pre-trial investigation, in the vicinity of a GAZ-53 car on the territory of a military unit during the protection of the facility, taking advantage of the fact that he was alone near an unsealed box with weapons, which was located in the body of the said car, and of free access to the said box, making sure that no one observed his actions, being aware of the socially dangerous nature of his actions and foreseeing socially dangerous consequences, wishing them to occur under martial law, secretly stole weapons and ammunition, namely: 2 PM pistols of 9 mm calibre and PS 5334 series, manufactured in 1967, and 5 magazines of 9 mm ammunition: 40 items in total.

Subsequently, in the period from approximately 17:00 to 18:00 on 26 February 2022, a more precise time was not established by the pre-trial investigation, being on the second floor of the administrative building of the military unit, continuing to implement the criminal intent, taking advantage of the fact that he was alone near the boxes of ammunition on the floor and had free access to the unsealed and open boxes, making sure that no one was observing his actions, under martial law, secretly stole ammunition, namely: 5.45 mm calibre

ammunition marked 38-88 in boxes, 48 units in total, 5.45 mm calibre ammunition marked 539-89 and 3-84 in boxes, 270 units in total, hiding the stolen weapons and ammunition behind a bedside table on the second floor of the administrative building of the military unit, thereby being able to dispose of the stolen weapons and ammunition at his own discretion, i.e. the accused has committed an offence under Part 4 of Article 410 of the Criminal Code of Ukraine - theft of weapons and ammunition by a service member under martial law.

Without contesting the factual circumstances of the offence in court, the accused fully admitted the criminal offence under Part 4 of Article 410 of the Criminal Code of Ukraine and explained to the court that he had indeed signed a contract with the State Border Guard Service of Ukraine and was serving under contract as a border guard inspector of the 3rd category - service number 4 of the mortar section of the firing department of the mortar outpost of the Border Commander's Rapid Response Unit of the Border Detachment of the State Border Guard Service of Ukraine in the rank of sergeant and was serving in a military unit.

On 26 February 2022 at about 15:00 he was on the territory of the said military unit near a car with boxes of weapons and ammunition and, taking advantage of the fact that no one was watching his actions, he stole 2 PM pistols and 5 magazines of ammunition from the box of weapons, and later, being on the second floor of the said military unit, he also took advantage of the fact that no one was watching his actions and stole ammunition, namely: bullets. He hid all the stolen items behind a bedside table on the second floor of the military unit's administrative building, then moved them to his place of residence, but after the unit's leadership discovered the missing weapons and ammunition, he voluntarily returned them. He sincerely regretted his actions and asked not to be severely punished.

Evidence:

The court, having found out the opinion of the parties to the criminal proceedings, declared that the requirements of Part 3 of Article 349 of the Criminal Procedure Code of Ukraine and the consequences of limiting the scope of evidence, and found it inappropriate to examine other evidence, except for the interrogation of the accused on the actual circumstances of the crime, as they were not disputed by anyone, and to examine evidence characterising the accused 's personality.

The accused agreed that the trial should be limited to his questioning and the examination of the evidence relating to his character. It was explained to him that in this case he would be deprived of the right to challenge the facts of the offence on appeal.

Material evidence in the case: PM pistols of 9 mm calibre and PS 5334 series, manufactured in 1967, and 5 magazines with 9 mm bullets, a total of 40 units, 5.45 mm calibre bullets marked 38-88 in boxes, a total of 48 units, 5.45 mm calibre bullets marked 539-89 and 3-84 in boxes, a total of 270 units, which were transferred to the representative of the military unit for safekeeping in accordance with the decision of 22.06.2022 on the transfer of material evidence for safekeeping, to be left in the appropriate place.

The court's conclusions and decisions:

After examining the case file and hearing the accused's explanations, the court concluded that the accused was guilty of committing the offence under Part 4 of Article 410 of the Criminal Code of Ukraine. The court's conclusion is supported, in particular, by the accused's statements, in which he explained in detail how, when and under what circumstances he committed the crime. The court takes into account that the accused's explanations do not contradict other objective evidence in the case and allow to reliably establish the circumstances of the crime committed by the accused.

Having assessed the evidence as a whole, the court finds the accused guilty of the offence charged and sentences him in accordance with Part 4 of Article 410 of the Criminal Code of Ukraine, i.e. theft of weapons and ammunition by a service member under martial law.

According to Article 66 of the Criminal Code of Ukraine, the court considers sincere remorse and active assistance in solving the crime as mitigating circumstances for the accused PERSON_3.

Taking into account that the accused has sincerely repented of the crime committed in the context of armed aggression against Ukraine, is actively participating in its defence and has expressed a firm intention to continue defending the borders of the State, and has voluntarily handed over the stolen weapons and

ammunition, the court agrees with the Prosecutor's Office that there are grounds for applying Articles 69, 69-1 of the Criminal Code of Ukraine to the accused in the course of sentencing, namely: to impose a different, more lenient type of punishment than that provided for in Part 4 of Article 410 of the Criminal Code of Ukraine, the court recognised the above circumstances as exceptional in this case.

He was sentenced to a fine in accordance with Article 69 of the Criminal Code of Ukraine, in the form of a fine in favour of the State in the amount of 10,000 tax-free minimum incomes, i.e. UAH 170,000.

CASE NO. 335/2010/22 (Judgement of the Ordzhonikidzevskyi District Court of Zaporizhzhia dated 07 April 2022)

Link: https://reyestr.court.gov.ua/Review/103877885

Circumstances of the case: The accused, while performing military service under a contract as a deputy commander of the first patrol company for work with the personnel of the first patrol battalion of the military unit of the National Guard of Ukraine, in the rank of senior lieutenant, under martial law, while performing official duties to protect the Zaporizhzhia Regional State Administration, in violation of Articles 9, 11, 16, 49, 58 of the Statute of the Internal Service of the Armed Forces of Ukraine, Article 14 of the Disciplinary Statute of the Armed Forces of Ukraine, having free access to the safe for storage of weapons of military unit personnel, located in the basement of the Zaporizhzhia Regional State Administration, where the Central Observation Post is located, with the direct intention of stealing weapons and ammunition, on 02.03.2022 at noon (the exact time has not been established) stole a firearm, namely a Makarov 9 mm pistol, LU 5100, made in 1974, the value of UAH 349. 00, assigned to a service member of the Military Unit of the National Guard of Ukraine, Commander of the First Patrol Company of the First Patrol Battalion of the Military Unit of the National Guard of Ukraine, and 16 bullets of 9 mm calibre for the said pistol with a total value of UAH 99. 20, which are on the balance sheet of the Military Unit of the National Guard of Ukraine, and then hid them in a desk drawer in office No. 402, located on the 4th floor of the Zaporizhzhia Regional State Administration, with the aim of further disposing of them at his discretion.

Thus, the accused has committed an offence (crime) under Part 4 of Article 410 of the Criminal Code of Ukraine (hereinafter referred to as the CC of Ukraine), namely the theft of weapons and ammunition by a service member under martial law.

The accused, who was interrogated at the court hearing, pleaded guilty to the offence, expressed sincere remorse for the crime and stated that on 02.03.2022, at noon, while on duty, he went down to the basement of the building of the Zaporizhzhia Regional State Administration, where the personnel weapons safe was located, from where he secretly stole a Makarov 9 mm pistol, made in 1974, in a holster, and two magazines with bullets for it. He then placed the pistol and bullets on a table in room 402 of the building. He stated that he did not know that the pistol was assigned to the commander of the first patrol company of the first patrol battalion of the military unit. He took the pistol and bullets for self-defence. He did not intend to harm the military unit. He stated that he had drawn conclusions about the illegality of his behaviour, promised to prevent future violations of legal regulations and expressed his wish to continue his military service.

Evidence:

Since the accused and other participants in the proceedings did not dispute all the factual circumstances of the case, and the court found that they correctly understood the content of these circumstances, there was no doubt about the voluntariness and truthfulness of their position, the court, after explaining to the participants in the proceedings the provisions of Article 349 of the CPC of Ukraine on the deprivation of the right to appeal against these circumstances on appeal, the court held a trial applying the rules of Part 3 of Article 349 of the CPC of Ukraine, finding it inappropriate to examine the evidence of the circumstances that are not contested by anyone, limiting the interrogation of the accused and the examination of the data on the identity of the accused.

The court's conclusions and decisions:

The court finds that the guilt of the service member in committing the incriminated act is proved and qualifies his actions in accordance with Part 4 of Article 410 of the Criminal Code of Ukraine as theft of weapons

and ammunition by a service member under martial law.

In sentencing the accused PERSON_4, the Court takes into account: the gravity of the crime, which, in accordance with Article 12 of the CC of Ukraine as a particularly serious crime, the consequences of the crime were not serious, but the crime interfered with the established procedure of military service. The damage was compensated by the return of the stolen weapons and ammunition.

The court took into account the identity of the accused, which is a member of the military, has no criminal record, has a permanent place of registration and residence, is not registered with a psychiatrist or narcologist, and has no health problems. According to his marital status, the accused is single and has no dependent children or disabled persons.

The mitigating circumstances are sincere remorse and confession. The court also considers it possible, in accordance with Part 2 of Article 66 of the Criminal Code of Ukraine to recognise as a mitigating circumstance the fact that the service member is a participant in hostilities, as evidenced by a series of certificates issued by the Commander of the National Guard of Ukraine on 14.05.2020.

The court did not find any aggravating circumstances.

The combination of the above-mentioned circumstances and the data on the personality of the accused significantly reduces the seriousness of the crime committed by him.

No civil claim was filed in the criminal proceedings. There are no court costs in the criminal proceedings.

The court resolved the issue of material evidence in accordance with Article 100 of the CPC of Ukraine.

The service member was found guilty of an offence under Part 4 of Article 410 of the Criminal Code of Ukraine and sentenced him to punishment in accordance with Part 1 of Article 69 of the Criminal Code of Ukraine in the form of five (5) years' imprisonment.

On the basis of Article 75 of the Criminal Code of Ukraine, he was released from the sentence of five (5) years' imprisonment with probation if he does not commit a new criminal offence within three (3) years of the probation period and fulfils his duties.

The service member is obliged to report regularly to the authorised probation body for registration, to notify the authorised probation body of any change of residence or place of work, and not to travel outside Ukraine without the consent of the authorised probation body.

On the basis of Article 54 of the Criminal Code of Ukraine, he was deprived of his military rank of 'Senior Lieutenant'.

Article 425. Negligent conduct in military service

1. Negligent attitude of a military official to service, if it has caused substantial damage,

shall be punishable by a fine of two hundred and eighty-five to three hundred and twenty-five tax-free minimum incomes, or restriction of service for a period of up to two years, or imprisonment for a term of up to three years.

2. The same act, if it has serious consequences,

shall be punishable by imprisonment for a term of three to seven years.

3. The acts envisaged by parts one or two of this Article, committed in conditions of a special period, except for martial law,

shall be punishable by imprisonment for a term of five to seven years.

4. The acts envisaged by parts one or two of this Article, committed under martial law or in a combat situation,

shall be punishable by imprisonment for a term of five to eight years.

Note. 1. Military officials are defined as military commanders and other military personnel who hold permanent or temporary positions related to the performance of organisational, administrative or economic

duties, or who perform such duties under special instructions from the competent command.

2. For the purposes of Articles 425 and 426 of this Code, material damage shall be deemed to be damage equal to two hundred and fifty times or more the tax-exempt minimum income of citizens, and serious damage shall be deemed to be damage equal to five hundred times or more the tax-exempt minimum income of citizens, in the same circumstances.

REVIEW OF A COURT DECISION:

CASE NO. 381/2798/22 (Judgement of the Vasylkivskyi City District Court of Kyiv oblast dated 12.04.2023)

Link: https://reyestr.court.gov.ua/Review/110214970

Circumstances of the case: Thus, the accused, while performing military service under a contract, holding the position of commander of a communications company of a military unit, being a military officer with administrative, economic and organisational functions, and being a person materially responsible for military property (weapons and ammunition) of his subordinate unit, on 26 March 2022, while staying in the village of Plesetske, Fastiv district, Kyiv oblast, in violation of Articles 9, 11, 16, 58, 59, 112, 145-153 of the Statute of the Internal Affairs Service of the Armed Forces of Ukraine, Article 4 of the Disciplinary Statute of the Armed Forces of Ukraine, paras. 4, 7 of Section I, paras. 4, 19 of Section II, paras. 3, 5, 8 of Section XX of the Instruction on the Organisation of Accounting, Storage and Issuance of Small Arms and Ammunition in the Armed Forces of Ukraine, approved by Order of the Ministry of Defence of Ukraine No. 569 of 20 October 2015, Regulation on the Procedure of Accounting, Storage, Write-Off and Use of Military Property in the Armed Forces of Ukraine, approved by Resolution of the Cabinet of Ministers of Ukraine No. 1225 of 04 August 2000, Articles 1, 3, 7 of the Law of Ukraine "On the Legal Regime of Property of the Armed Forces of Ukraine" dated 21.09.1999 No. 1075-XIV, para. 9.1.7 of the Regulation on the Military (Naval) Economy of the Armed Forces of Ukraine, approved by the Order of the Ministry of Defence of Ukraine dated 16.07. 1997, No. 300, acting recklessly, with criminal negligence, contrary to the interests of the service, in violation of functional duties, improperly performing his official duties due to negligence, under martial law, failed to ensure proper control over the availability of property of the military unit's communications company and its storage, thereby failing to ensure a storage procedure that would prevent the loss of weapons, as a result of which three AK-74s of 5. 45 mm calibre, each worth UAH 2,885.15, which caused significant non-pecuniary damage to the state in the form of possibility that an unidentified person secretly stole three AK-74 weapons of 5.45 mm calibre from the box of the communications company of the military unit at an unspecified time;

withdrawal of the above weapons from the control of the military unit;

undermining the authority and prestige of military command and control bodies and the military service in general, the combat readiness of a subordinate unit under martial law and the defence capability of the state, as well as reducing the authority of the command in the eyes of subordinates;

gross violation of the established procedure for accounting and storage of weapons, which resulted in the undermining of the authority of the Armed Forces of Ukraine among the civilian population and public mistrust in the quality of military officials' performance of their duties in relation to weapons storage;

presence of three AK-74 rifles of 5.45 mm calibre in free circulation as a result of the creation of a real public danger to the population by means of an object directly intended for the lethal destruction of manpower, which was the negligent attitude of a military official to the service performed under martial law, which caused significant damage.

On 12 April 2023, the accused, with the participation of his defence lawyer, entered into a plea agreement with the prosecutor of the Bila Tserkva Specialised Defence Prosecutor's Office of the Central Region, in which the parties agreed to sentence the accused to punishment under Part 4 of Article 425 of the Criminal Code of Ukraine, with application of Article 69 of the Criminal Code of Ukraine, in the form of imprisonment for a term of one year. On the basis of Article 58 of the Criminal Code of Ukraine, taking into account the circumstances of the case and the identity of the accused, to impose, instead of imprisonment for a term of one year, a punishment in the form of restriction of military service for the same period, namely one year, with a 10 per cent deduction to the state budget from the amount of his salary.

At the preliminary hearing, the prosecutor filed a motion to approve the plea agreement.

The accused and his defence lawyer did not object to the approval of the plea agreement at the court hearing and confirmed that they understood the consequences and conditions of its conclusion.

The court found that the agreement in question met the requirements of Article 472 of the CPC of Ukraine, was entered into voluntarily by the accused, was not the result of force, coercion, threats, promises or other circumstances other than those provided for in the agreement.

The accused has sincerely repented of the crime, is not registered with a psychiatrist or narcologist, has the status of a combatant, is married, has a minor child, has voluntarily compensated the state for the damage caused in the amount of ten times UAH 86554.5, and has no criminal record.

The court's conclusions and decisions:

Taking into account the existence of mitigating circumstances (sincere remorse, active assistance in solving the crime, voluntary compensation for the damage caused in the amount of ten times) and the absence of aggravating circumstances, the court considers it possible to sentence the accused to the punishment agreed upon by the parties in the plea agreement under Part 4 of Article 425 of the Criminal Code of Ukraine, with the application of Article 69 of the Criminal Code of Ukraine, in the form of imprisonment for a term of one year. On the basis of Article 58 of the Criminal Code of Ukraine, taking into account the circumstances of the case and the identity of the accused, to impose, instead of imprisonment for a term of one year, a punishment in the form of restriction of military service for the same period, namely one year, with a 10 per cent deduction to the state budget from the amount of his salary.

Administrative offences

Article 172-10 Refusal to comply with the legal requirements of a commander (superior)

Refusal to comply with the legal requirements of a commander (superior)

shall be punishable by a fine of between one hundred and five hundred tax-free minimum incomes or arrest with detention in the guardhouse for up to ten days.

The act envisaged by part one of this Article, committed in conditions of a special period, except for martial law,

shall be punishable by a fine of between five hundred and one thousand tax-free minimum incomes, or arrest with detention in the guardhouse for ten to fifteen days.

REVIEW OF COURT DECISIONS:

CASE NO. 199/1525/22 (Judgement of the Amur-Nyzhnodniprovskyi District Court of Dnipro dated 23.03.2022)

Link: https://reyestr.court.gov.ua/Review/103731362

Circumstances of the case: A service member who, in the presence of two officers of the unit command, received a verbal, legal and specific order from the unit commander to move to the unit's military camp, to form a combat team and to command a subordinate unit, to which the service member openly and without good reason refused to obey, during a special period of martial law, has committed an administrative offence for which liability is provided for in Part 2 of Article 172-10 of the Code of Ukraine on Administrative Offences.

At the court hearing, the service member stated that he had indeed refused to comply with the commander's order due to his serious moral and psychological condition caused by his mother's long and serious illness. The commander's order was not clearly criminal, but his refusal to obey the order did not lead to serious consequences.

Evidence used in the case:

- Information from the administrative offence report drawn up in accordance with the requirements of Article 256 of the CUAO;

- An extract from the order;

- Explanations by the officer held responsible;

- Characteristics of the service;

- Statements of other persons.

Penalty: Administrative penalty in accordance with Part 2 of Article 17210 of the CUAO in the form of a fine equal to one hundred and forty-five tax-free minimum incomes, i.e. UAH 2,465.00 (two thousand four hundred and sixty-five).

CASE NO. 944/330/22 (Judgement of the Yavorivskyi District Court of Lviv oblast dated 21.03.2022)

Link: https://reyestr.court.gov.ua/Review/103744705

Circumstances of the case: A service member from among the officers under conscription, who, in the conditions of a special period, perform military service duties on the territory of a military unit, in violation of the requirements of Article 37 of the Statute of the Internal Service of the Armed Forces of Ukraine, refused to fulfil the legal requirements of the commander of the military unit, did not come into office within the time limits specified in Article 64 of the Statute of the Internal Service of the Armed Forces of Ukraine, thereby committing an administrative offence under Part 2 of Article 172-10 of the Code of Ukraine on Administrative Offences.

The case was considered by the court in the absence of the service member. The service member filed a petition in which he stated that after three months of service he was afraid to come into office and sign documents not only because of his incompetence and inexperience, but also because of the biased attitude.

After signing the relevant reports with the shortcomings and deficiencies he found, all the property can be further dismantled or stolen because of his position and attitude. At present he does not wish to serve in any military unit, although he intended to sign a contract with the Armed Forces of Ukraine.

Evidence used in the case:

Order of the commander of the military unit appointing the service member to the position (dated 08.09.2021);

Commander's order No. 216.

The court's conclusion:

The service member should have complied with the order of the commander of the military unit No. 216 dated 15.09.2021 before 19.09.2021, therefore, the period of the commission of the offence is considered to be from the moment of the expiry of the term for coming into office by the service member and his failure to comply with the order.

Penalty: None. Proceedings in the case of bringing the service member to administrative liability under Part 2 of Article 172-10 of the Code of Ukraine on Administrative Offences shall be closed due to the expiration of the time limit for imposing an administrative penalty.

Article 172-11 Unauthorised leaving of a military unit or place of service

The unauthorised leaving of a military unit or place of service by a service member on compulsory service, as well as the failure to report for duty on time without a valid reason in the case of dismissal from a unit, appointment or transfer, failure to report from a secondment, leave or medical institution for more than three days,

shall be punishable by an arrest with detention in the guardhouse for up to ten days.

The acts envisaged by part one of this Article, committed by a person who, during the year, has been subject to an administrative penalty for the same violations,

shall be punishable by an arrest with detention in the guardhouse for seven to fifteen days.

The unauthorised leaving of a military unit or place of service by a service member (except for compulsory service), and persons liable for military service and reservists during training, as well as the failure to report for duty on time without in the case of appointment or transfer, failure to report from a secondment, leave or medical institution for more than ten days,

shall be punishable by a fine of between five hundred and one thousand tax-free minimum incomes, or arrest with detention in the guardhouse for up to ten days.

The acts envisaged by parts one or three of this Article, committed in conditions of a special period, except for martial law,

shall be punishable by a fine of between one and two thousand tax-free minimum incomes, or arrest with detention in the guardhouse for ten to fifteen days.

REVIEW OF COURT DECISIONS:

CASE NO. 336/2190/23 (Judgement of the Shevchenkivskyi District Court of Zaporizhzhia dated 30.03.2023)

Link: https://reyestr.court.gov.ua/Review/110326839

Circumstances of the case: A service member performing military service in a military unit did not report to the military unit on 17.12.2022 without a valid reason. He did not report until 24.12.2023, i.e. he left the territory of the military unit and the place of service during the special period from 17.12.2022 to 24.12.2022 without the permission of the unit command.

The service member did not appear in court, the case file contained his guilty plea and the case was considered in his absence.

Evidence used in the case:

- Written explanations;

- Other materials of the case on the administrative offence.

The court's conclusion: The actions of the offender show signs of an offence under Part 4 of Article 172-11 of the Code of Ukraine on Administrative Offences, namely: unauthorised leaving of a military unit or place of service by a service member, failure to appear from a secondment, leave or medical institution for up to ten days, committed in a special period.

CASE NO. 202/1184/23 (Judgement of the Slovianskyi City District Court of Donetsk oblast dated 31.03.2023)

Link: https://reyestr.court.gov.ua/Review/109923726

Circumstances of the case: On 1 January 2023, at 09:00, a military service member (mobilised), a junior sergeant, was absent from checking the presence of the military personnel of the security company performing the task of protecting warehouses in Sloviansk, Donetsk oblast, at the place of service. The search by the military personnel was unsuccessful, and he did not answer his phone calls. The absence of the sergeant was confirmed by the military personnel of the security company.

On 01 January 2023, at about 17:00, the junior sergeant returned to the unit. He refused to explain his whereabouts. By his wilful conduct, being aware of its nature, in breach of military discipline and in knowledge

of his responsibility, the sergeant violated the mandatory provisions of Articles 9, 11, 12, 16, 49, 241 of the Statute of the Internal Service of the Armed Forces of Ukraine, Articles 1-4 of the Disciplinary Statute of the Armed Forces of Ukraine, thereby committing an offence under Part 4 of Article 172-11 of the Code of Ukraine on Administrative Offences.

The service member did not appear at the court hearing, requested that the case be considered in his absence and pleaded guilty in full.

Evidence used in the case:

- Report on an administrative offence;
- Testimony of military personnel of the security company;
- Personal confession of guilt.
- The court's conclusion:

The guilt of the service member in committing the offence under Article 172-11, Part 4 of the Code of Ukraine on Administrative Offences was fully proven; no circumstances mitigating the liability for the administrative offence were established in court. No circumstances aggravating the liability for the administrative offence were established in court.

Penalty: Administrative penalty in the form of a fine in favour of the state in the amount of 1000 (one thousand) non-taxable minimum incomes, i.e. UAH 17,000.00 (seventeen thousand).

Article 172-12 Negligent destruction of or damage to military property (in connection with financial responsibility)

Negligent destruction of or damage to weapons, ammunition, means of transportation, military and special equipment or other military property

shall be punishable by a fine of between one hundred and one thousand tax-free minimum incomes or arrest with detention in the guardhouse for up to ten days.

The acts envisaged by part one of this Article, committed in conditions of a special period,

shall be punishable by a fine of between one and two thousand tax-free minimum incomes, or arrest with detention in the guardhouse for ten to fifteen days.

REVIEW OF COURT DECISIONS:

CASE NO. 495/1448/22 (Judgement of the Bilhorod-Dnistrovskyi City District Court of Odesa oblast dated 06.03.2022)

Link: https://reyestr.court.gov.ua/Review/103687729

Circumstances of the case: On 10 March 2022, at about 15:00, the chief sergeant consumed alcoholic beverages while performing military service duties, in violation of the above requirements of the Internal Service Statute of the Armed Forces of Ukraine, the Law of Ukraine "On the State Border Guard Service of Ukraine", Instruction 595 and the Law of Ukraine "On Road Traffic", and committed a military administrative offence under Part 1 of 3 of Article 172-20 of the Code of Ukraine on Administrative Offences, namely: performing military service in a state of intoxication.

While in a state of intoxication, at 18:30, he was driving a service vehicle, and at 18:40, having lost control of the service vehicle entrusted to him, he collided with a concrete electricity pylon. He did not report the accident and left the scene.

According to the results of the medical examination for alcohol intoxication, conducted on 11 March 2022 at 03:45, the service member was in a state of alcohol intoxication - 0.45%.

The service member did not appear at the court hearing, but submitted a statement to the court to consider the case in his absence, pleading guilty to committing administrative offences under Part 1 2 of Article 172-12, Part 3 of Article 172-20 of the CUAO and requested that a fine be imposed.

Evidence used in the case:

- Report on an administrative offence;
- Conclusion of the results of a medical examination;
- Plea of guilty by the service member.
- The court's conclusions:

The service member was found guilty of committing an administrative offence under Part 2 of Article 172-12, Part 3 of Article 172-20 of the Code of Ukraine on Administrative Offences.

Penalty: Fine of UAH 3,655.00.

CASE NO. 584/446/23 (Judgement of the Putyvlskyi District Court of Summy oblast dated 01.05.2023)

Link: https://reyestr.court.gov.ua/Review/110583592

Circumstances of the case: A service member, a machine gunner of a military unit, in the conditions of a special period, on 1 April 2023, at about 11:00, on the territory of the Konotop district of Sumy oblast, accidentally destroyed a TM-62M mine.

As a result of his deliberate actions, he committed an administrative offence under Part 2 of Article 172-12 of the Code of Ukraine on Administrative Offences.

The service member pleaded guilty in full and stated that on 1 April 2023, at approximately 11:00, while driving a car in the Konotop district of Sumy oblast, he accidentally hit a TM-62M mine, causing it to detonate. He regretted his actions.

- **Evidence used in the case:**
- Report;
- Statements from other military personnel;
- Copy of the service member's military identification card.

The court's conclusions: Taking into account the totality of the circumstances and the identity of the perpetrator, who had not previously been subject to administrative sanctions, who was a member of the armed forces and who had a good record at the place of service, the court considered it possible to exempt him from administrative sanctions on the grounds of the minor nature of the offence, limiting him to a verbal reprimand, and closed the case.

Penalty: None. Exempt from administrative liability.

Article 172-15 Negligent conduct in military service

Negligent attitude of a military service member to military service

shall be punishable by a fine of between one hundred and one thousand tax-free minimum incomes or arrest with detention in the guardhouse for up to ten days.

The act envisaged by part one of this Article, committed in conditions of a special period,

shall be punishable by a fine of between one and two thousand tax-free minimum incomes, or an arrest with detention in the guardhouse for ten to fifteen days.

REVIEW OF COURT DECISIONS:

CASE NO. 944/857/22 (Judgement of the Yavorivskyi District Court of Lviv oblast dated 28.02.2022)

Link: https://reyestr.court.gov.ua/Review/103634775

Circumstances of the case: A service member of a military unit, a conscript, being on military service during a special period, on the territory of a military unit on 10 February 2022 at 16:00, performing military service duties assigned to him by Articles 11, 13, 16, 200 of the Statute of the Internal Service of the Armed Forces of Ukraine, he did not perform them properly, namely: while on duty as a barracks duty officer, he was in a state of intoxication and withdrew from performing his duties as a duty officer, failed to organise and control the daily routine and personnel, thereby committing an administrative offence under Part 2 of Article 172-15 of the Code of Ukraine on Administrative Offences, i.e. negligent attitude of a military service member to military service during a special period.

The service member did not appear in court.

Evidence used in the case:

- Report on an administrative offence;
- Report on medical examination to establish the fact of use of psychoactive substances and intoxication;
- Written statements of the person brought to administrative liability;
- Other evidence in the case file.

The court's conclusions: The court considers it necessary to release the service member from administrative responsibility in accordance with Part 2 of Article 172-15 of the Code of Ukraine on Administrative Offences on the grounds of insignificance and to give him a verbal reprimand, since the act committed by him had all the legal and subjective characteristics of an offence under Part 2 of Article 172-15 of the CUAO, but due to all the specific circumstances it did not correspond to the public danger typical for this type of offence, in particular, the actions of the offender were not subjectively aimed at harming the public interest, legal entities and individuals, and the administrative offence did not cause significant damage to the public or state interests, rights and freedoms of other persons.

Penalty: None. Exempt from administrative liability.

CASE NO. 352/632/22 (Judgement of the Tysmenytskyi District Court of Ivano-Frankivsk oblast dated 09.05.2022)

Link: https://reyestr.court.gov.ua/Review/104289065

Circumstances of the case: On 6 May 2022 at 01:40, a conscript, while on duty on a daily patrol on the territory of a military unit, neglected his military service, in particular, fell asleep at his post, which took place in a special period.

The service member pleaded guilty before the court, expressed sincere remorse for his actions and requested that the case be dismissed on the grounds of the minor nature of the offence, given that it was the first time he had been brought to administrative responsibility.

Evidence used in the case:

- Report on an administrative offence;
- Other case material.

The court's conclusions: The actions of the service member show signs of an offence under Part 2 of Article 172-15 of the Code of Ukraine on Administrative Offences, as he, as a service member, neglected his military service during a special period on the territory of the military unit, which was fully proved in court.

Taking into account the nature of the offence, the personality of the offender, his sincere remorse and the

fact that it was the first time that he was brought to administrative responsibility, the court considers that there are grounds to believe that the offence committed by him is insignificant. He was found guilty of committing an administrative crime under Part 2 of Article 172-15 of the Code of Ukraine on Administrative Offences.

Penalty: None. Exempt from administrative liability.

CASE NO. 521/5259/22 (Judgement of the Malynivskyi District Court of Odesa dated 15.04.2022)

Link: https://reyestr.court.gov.ua/Review/104638435

Circumstances of the case: On 14 April 2022, a service member in the city of Odesa, was negligent in the performance of his duties and did not respond to comments.

A report on an administrative offence was drawn up against the service member under Part 2 of Article 172-15 of the Code of Ukraine on Administrative Offences.

The service member, who was interrogated in court, admitted his guilt and confirmed the circumstances described in the report.

Evidence used in the case:

- Report on an administrative offence;
- Plea of guilty.

The court's conclusions: After examining the case file, the judge found that the actions of the service member showed signs of an administrative offence under Part 2 of Article 172-15 of the Code of Ukraine on Administrative Offences, with the qualifying feature of negligent attitude of the service member to military service committed in a special period.

Penalty: To imposed a fine of UAH 2,465.00 in favour of the state.