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Articles

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Changes in the Ukrainian Criminal Code Related to the Ongoing War with the Russian Federation

Zmiany w ukraińskim Kodeksie karnym związane z toczącą się wojną z Federacją Rosyjską

ABSTRACT

Due to the Russian aggression against Ukraine, a need arose not only to adopt defensive measures, but also to adjust legal provisions (including criminal law) accordingly to the realities. The Ukrainian criminal law responds dynamically to problems arising out in a society forced to live in a completely new reality, a wartime reality. At the same time, since developments occur quickly, there are inaccuracies and defects in legislation, as identified in the paper. The article seeks to present and analyse the changes introduced both in the general part of the Ukrainian Criminal Code (mainly the issue of so-called combat immunity), and in the special part thereof where new types of crime were defined (e.g. collaboration with the enemy – Article 111[1], denying the fact of the aggression against Ukraine – part 1 of Article 111[1]), statutory criteria of some of those existing have been modified (e.g. Article 361) and sanctions for certain crimes have been aggravated, if the crimes are committed during

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martial law (e.g. part 2 of Article 111). As a rule, the authors consider the changes correct, and any imperfections (or interpretive doubts) seem to result mostly from the complexity of the situation and the need to carry out a quick legislative process.

Keywords: combat immunity; martial law; Homeland defence; collaboration; war propaganda

INTRODUCTION

On 24 February 2022, an invasion of the Russian Federation on Ukraine started, euphemistically named by Russia a "special military operation" (*spetsialnaya voyennaya operatsiya*), which was in fact an escalation of the conflict that has been under way since 2014.[1] Although there has been a war since then, even in Ukraine there is no reference to a state of war, but to a martial law. This is because Ukraine found itself in a situation where the Russian Federation was the first to openly attack Ukrainian ships under the Russian flag. Therefore, Ukraine had the right to defend itself. So, in a situation where the Russian Federation was the first to use military force against Ukraine without a declaration of war, the introducing of martial law without a declaration of war on the part of Ukraine was considered an appropriate solution. Such a situation (the introduction of martial law without declaring war by Ukraine) does not constitute a breach of law, nor does it preclude taking international legal consequences. An act of aggression is recognised as such regardless of a declaration of war, and public authorities and military governing bodies take measures to repel the aggression without waiting for a declaration of war (Article 4 of the Ukrainian Act No. 1932-XII of 6 December 1991 "On the defence of Ukraine"[2]).[3] A declaration of war in such circumstances both does not make sense and contradicts the essence of the state of self-defence in which Ukraine currently is. Such a situation made it necessary not only to take defensive measures, but also to adjust legal provisions (including criminal law) accordingly to the realities. In this article, exactly these changes (in criminal law) are going to

[1] At 4:55 a.m. EET (5:55 a.m. Moscow time, 3:55 a.m. Polish time), Vladimir Putin announced that he had decided to launch a "special military operation" in eastern Ukraine. Putin said in the speech that he had no plans to occupy Ukrainian territory, that the Ukrainian people had the right to independence, stating that Russia intended to "demilitarise and denazify" Ukraine and he called on Ukrainian soldiers to lay down their arms and go home. He also said that "all responsibility for possible bloodshed will rest solely on the conscience of the regime that is in power on Ukrainian territory". See Wikipedia, *Inwazja Rosji na Ukrainę*, https://pl.wikipedia.org/wiki/Inwazja_Rosji_na_Ukrainę (access: 3.6.2023).

[2] https://zakon.rada.gov.ua/laws/show/1932-12#Text (access: 3.6.2023).

[3] A. Guk, *Voyennyy stan: sproba vidpovidi na spirni pytannya*, 2022, https://uz.ligazakon.ua/ua/magazine_article/EA012217 (access: 3.6.2023).

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be discussed, with special emphasis on the so-called combat immunity.[4] Amendments made to the general part of the Criminal Code of Ukraine of 5 April 2001 (as amended)[5] are presented first.

AMENDMENTS TO THE GENERAL PART OF THE CRIMINAL CODE OF UKRAINE

Under Act No. 2124-IX of 15 March 2022 "On the introduction of amendments to the Criminal Code of Ukraine and other statutory acts of Ukraine concerning the determination of circumstances that exclude punishability of an offence and ensuring combat immunity during martial law", which became effective on 21 March 2022, the list of circumstances that exclude punishability of an offence has been supplemented with the case of performing the duty of defence of homeland, independence and territorial integrity of Ukraine.[6]

According to Article 43[1] CCU:

1. It is not criminal an act (action or omission) committed under martial law or during an armed conflict that is aimed at repelling and deterring an armed aggression of the Russian Federation or aggression of another state, if it has harmed the life or health of the person committing such aggression or caused damage to legally protected interests, provided that this has been done without resorting to torture or the use of means of warfare prohibited by international law and other violations of the laws and customs of war provided for in international treaties agreed to by the Verkhovna Rada of Ukraine.
2. Everyone has the right to defend the Homeland, independence and territorial integrity of Ukraine, regardless of the possibility of avoiding confrontation, causing harm or requesting assistance from other persons or state authorities or the Armed Forces of Ukraine.
3. Such a person shall not be subject to criminal responsibility for the use of arms (weapons), ammunition or explosives against persons committing an armed aggression against Ukraine and for resulting damage to or destruction of property.
4. The behaviour (action or omission) aimed at repelling and deterring an armed aggression by the Russian Federation or aggression by another state that

[4] We use herein the term "combat immunity" which is a literal translation of the newly introduced institution in Ukrainian criminal law. However, it is important to note that it is more a legal excuse in the meaning of Polish criminal law.

[5] https://zakon.rada.gov.ua/laws/show/2341-14#Text (access: 24.6.2023), hereinafter: CCU.

[6] https://zakon.rada.gov.ua/laws/show/2124-20#Text (access: 3.6.2023).

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was manifestly disproportionate to the aggression threat or the situation of repulsion and deterrence, was not necessary to achieve an important socially useful objective in the situation in question and gave rise to a threat to the lives of others or a threat of an environmental disaster or the occurrence of other extraordinary events, is not considered the performance of the duty to defend the Homeland, independence and territorial integrity of Ukraine.

First and foremost, it should be noted that according to Articles 17 and 65 of the Constitution of Ukraine of 28 June 1996,[7] to protect the sovereignty and territorial indivisibility of Ukraine, and to ensure its economic and informational security is a matter of concern for all the Ukrainian people; defence of the Motherland, of the independence and territorial indivisibility of Ukraine are the duties of citizens of Ukraine. The appropriate fulfilment by citizens of their obligations must be ensured by the State, pursuant to Article 23 of the Constitution of Ukraine, according to which every person has duties before the society in which free and comprehensive development of his or her personality is ensured. Analysing the phrase contained in Article 43[1] CCU about "the right to defend the Homeland, independence and territorial integrity of Ukraine", one can agree with the conclusion presented by O.M. Sharmar that it is not fully compatible with constitutional provisions. Hence, pursuant to Article 65 of the Constitution of Ukraine, defence of the Motherland, of the independence and territorial indivisibility of Ukraine, and respect for its state symbols, are the duties of the citizens of Ukraine. Citizens do military service in accordance with the law. This is why defence of the Homeland, independence and territorial integrity of Ukraine is treated in Article 43[1] CCU as both an individual right and duty. At the same time, there is criminal liability for evading conscription at the time of mobilisation for military service in the context of the calling up of reservists for a special period (Article 336 CCU).

This naturally entails the question of defending the homeland: Is it the right or duty of every Ukrainian citizen?[8]

In view of these provisions of the CCU, it can be concluded that the defence of the Homeland in the context of this circumstance, which renders the act unlawful, is considered to be a right. This right, in the meaning of Article 43[1] CCU is of an absolute character: every person has the right to defend their Homeland and the independence and territorial integrity of Ukraine regardless of the possibility of

[7] https://zakon.rada.gov.ua/laws/show/2341-14#Text (access: 24.6.2023). An English translation is available at https://biblioteka.sejm.gov.pl/wp-content/uploads/2017/06/Ukraina_ang_010117.pdf (access: 25.4.2024).

[8] O.M. Sharmar, *Vykonannya obovyazku shchodo zakhystu Vitchyzny, nezalezhnosti ta terytorialnoyi tsilisnosti Ukrayiny yak obstavyna, shcho vyklyuchaye kryminalnu protypravnist diyannya*, "Visnyk Asotsiatsiyi Kryminalnoho Prava Ukrayiny" 2022, vol. 1(17), http://vakp.nlu.edu.ua/article/view/257792 (access: 24.6.2023).

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avoiding confrontation, causing harm or seeking assistance from other persons or public authorities and the Armed Forces of Ukraine (part 2 of Article 43[1] CCU).

Defence of the Homeland, independence and territorial integrity of Ukraine as a circumstance excluding punishability of the act – the unlawfulness of the act is inherently related to the following elements:

1) committing the act under martial law or during an armed conflict. The martial law was declared in Ukraine on 24 February 2022 under Decree 64/2022 of the President of Ukraine of 24 February 2022 (the martial law is regularly extended for subsequent periods). The definition of martial law is provided for in Article 1 of the Ukrainian Act No. 389-VIII of 12 May 2015 "On the legal regime of martial law".[9] According to this provision, martial law is a special legal regime that is introduced in Ukraine or in certain areas of Ukraine in the event of an armed aggression or risk of an attack, a threat to Ukraine's state independence, its territorial integrity, and provides for the granting of the relevant state authorities, military commanders, military administration and local government authorities the powers necessary to prevent the threat, repel the armed aggression and ensure national security, eliminate the threat to Ukraine's state independence, its territorial integrity, as well as temporary restrictions on the constitutional rights and freedoms of natural persons and citizens and legal entities, with a specification of the duration of such restrictions. As regards the concept of armed conflict, it is of legal relevance, as aptly noted by M. Khavronyuk, for the classification of the offence, if such a conflict occurs while no martial law is declared – in the case of actual outbreak of hostilities but before the declaration of martial law, or in peacetime in general. At the same time, it should be noted that the Ukrainian legislature has not defined this concept, while its basic criteria and content are defined based on international law norms;[10]
2) conduct aimed at repelling and deterring an armed aggression of the Russian Federation or another state. Based on this element, the provision of Article 43[1] CCU, e.g. killing a prisoner of war or other crime committed without the need of repelling or deterring an armed aggression of the Russian Federation or aggression by another state;
3) it leads to causing damage: (a) to the life or health of the person who carries out the aggression or (b) to other legally protected interests, in the absence of signs of torture or the use of means of warfare prohibited by international

[9] https://zakon.rada.gov.ua/laws/show/389-19#Text (access: 3.5.2023).

[10] M. Khavronyuk, *Obovyazok zakhyshchaty Vitchyznu i novi statti Kryminalnoho kodeksu*, 25.4.2022, https://rpr.org.ua/news/obov-iazok-zakhyshchaty-vitchyznu-i-novi-statti-kryminalnoho-kodeksu (access: 3.6.2023).

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law, other violations of the laws and customs of war as defined by international treaties agreed to be binding by the Verkhovna Rada of Ukraine;
4) causing damage through the use of arms (weapons), ammunition or explosives to: (a) persons committing armed aggression against Ukraine or (b) property.[11]

At the same time, it should be noted that the legislature stipulates in part 2 of Article 43[1] CCU that every person has the right to protect the Homeland, regardless of the possibility of avoiding confrontation, causing harm or requesting assistance from other persons or public authorities or the Armed Forces of Ukraine.

In part 3 of Article 43[1] CCU the legislature grants a person defending the Homeland the right to use weapons (armaments), military means or explosives against those who carry out an armed aggression against Ukraine and consequently to damage or destroy any property as a result. The liability for such action does not arise even in the case of intentional property damage.

However, it should be emphasized that this right is not unrestricted. Parts 1 and 4 of Article 43[1] CCU define the limits within which a person should act when exercising this right. A conduct (action or omission) aimed at repelling and deterring an armed aggression of the Russian Federation or another state shall not be deemed to be the exercise of this right if the following conditions are met:

1) the conduct is intentional (due to its directionality);
2) it has been manifestly incommensurate to the threat of aggression or the situation of repulsion and deterrence;
3) it was not necessary for achieving an important socially useful objective in the specific circumstances and posed a risk to the lives of others or a threat of an environmental disaster or the occurrence of other extraordinary events of a larger scale.

It should be emphasized that all these conditions must be met cumulatively to allow finding that the limits of exercise of this right have been exceeded.

As rightly noted by M. Khavronyuk, an example of such transgression could be a deliberate artillery or mortar strike against residential buildings where the aggressor's tanks are deployed, causing the death of civilians, or blowing up a bridge long before the aggressor's troops approached it, making it impossible to evacuate people, or against a dam, or against a storage tank containing a hazardous substance, etc.[12]

[11] O.O. Dudorov, [in:] A.A. Voznyuk, O.O. Dudorov, R.O. Movchan et al., *Novely kryminalnoho zakonodavstva Ukrayiny, pryynyati v umovakh voyennoho stanu. Naukovo-praktychnyy komentar*, Kyyiv 2022, https://www.naiau.kiev.ua/files/naukova-diyalnist/naukovi-laborator/lab_nni1/2023/novely_krym_zakon_2022.pdf (access: 2.9.2024), p. 69.

[12] M. Khavronyuk, *op. cit*.

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At the same time, it should be noted that the CCU expressly states that the following elements constitute a transgression of the limits of the homeland defence right: (a) use of torture, (b) use of means of warfare prohibited by international law, and (c) other violations of the laws and customs of war provided for in international treaties recognised as binding by the Verkhovna Rada of Ukraine.[13]

Act No. 2124-IX of 15 March 2022, in addition to supplementing the CCU with Article 43[1], also amended Act No. 1932-XII of 6 December 1991 "On the defence of Ukraine". Article 1 of this Act was supplemented by a definition of combat immunity, the result of which is the exemption of military commanders, special officers of the National Police of Ukraine, volunteers of the Armed Forces of Ukraine, law enforcement officers who participate in the defence of Ukraine as part of their powers, people listed in the Act No. 2114-IX of 3 March 2022 "On ensuring the participation of the civilian population in the defence of Ukraine"[14] from liability, including criminal liability, for losses of personnel, military equipment or other military property, the consequences of the use of armed and other force during an armed aggression against Ukraine or the liquidation (neutralisation) of an armed conflict, the performance of other tasks in the defence of Ukraine using any type of weapon (armament), the occurrence of which could not have been foreseen with due diligence in the planning and execution of such conduct (tasks) or covered by reasonable risk, except in cases of violation of the laws or customs of war or the use of armed force as defined in international treaties recognised as binding by the Verkhovna Rada of Ukraine.

According to this definition, the content of the term "combat immunity" means the exemption from liability, including criminal liability, of military commanders, officers of other services, volunteers of the Territorial Defence Forces of the Armed Forces of Ukraine, law enforcement officers who participate, within their powers, in the defence of Ukraine, and persons defined in the Act No. 2114-IX of 3 March 2022 (meaning all citizens of Ukraine, foreigners and stateless persons legally residing in the territory of Ukraine), if:

1) the conduct occurred during the repulsion of an armed aggression against Ukraine or the liquidation (neutralisation) of an armed conflict, or when performing other tasks in the defence of Ukraine;
2) with any weapons (armament) used;
3) consequences such as the loss of personnel, equipment or other military property took place as a result of the use of armed force or other force;
4) there has been a mental attitude towards these consequences that takes into account reasonable diligence, which is the case when:

[13] *Ibidem*.

[14] https://zakon.rada.gov.ua/laws/show/2114-20#Text (access: 24.6.2023).

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- the consequences could not have been foreseen when planning and carrying out such activities (tasks); as rightly noted by O.M. Sharmar, the use of the phrase "could not have been foreseen" in this wording means that in this case the subjective side of the offence, in terms of inadvertence, covers the forms of both recklessness and negligence; this means that not all the statutory criteria of criminal offence have been met and there are no grounds for holding the person criminally liable,
- the consequences could have been foreseen but are affected by reasonable risk, except in case of violation of the laws and customs of war or of the use of armed force as defined by international treaties recognised as binding by the Verkhovna Rada of Ukraine.[15]

In this aspect, it should be stressed that in accordance with Article 42 CCU an act (action or omission) that has caused damage to legally protected interests is not a crime, if has been committed in the circumstances of reasonable risk in order to achieve a substantial socially useful objective (part 1), a risk is deemed to be reasonable if, in the situation at issue, the objective could not have been achieved by acting without the risk and the person who has undertaken the risk reasonably believed that the measures applied were sufficient to prevent damage to legally protected interests (part 2), a risk is not considered reasonable if it has knowingly endangered the lives of others or posed the threat of an environmental disaster or other extraordinary events (part 3).

Given the above interpretation of the terms "combat immunity" and "reasonable risk", one cannot agree with the view presented by M. Khavronyuk that the concept of "combat immunity" is not covered by the solutions provided for in part 3 of Article 42 CCU.[16]

Analysing the provisions of Article 43[1] CCU, it should also be noted that in accordance with Act No. 2114-IX of 3 March 2022, which entered into force on 7 March 2022, Section II "Final and transitional provisions" of the CCU has been supplemented with the new part 22. According to this part, civilians are not criminally liable for the use of firearms against persons committing armed aggression against Ukraine, if such weapons are used in accordance with the above-mentioned Act. Taking into account the provisions of Articles 1 and 4 of the said law, the conditions under which the offence (use of weapons by civilians) is not a crime are specified, namely:

1) the perpetrator is a co-called special entity ("civilians" – Ukrainian citizens, as well as foreigners and stateless persons legally residing in Ukrainian territory);
2) the act involves the use of firearms against individuals who commit an armed aggression against Ukraine;

[15] O.M. Sharmar, *op. cit*.
[16] M. Khavronyuk, *op. cit*.

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3) situation – during martial law, during participation in repelling and deterring an armed aggression waged by the Russian Federation and/or other states;
4) weapons – possession of award weapons, sporting weapons (pistols, revolvers, shotguns, smoothbore rifles), rifled, smoothbore or combination weapons and ammunition for hunting. According to Article 3 of the UN Firearms Protocol,[17] "firearm shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899";
5) according to the Instruction on the manner of manufacture, purchase, storage, registration, transport and use of firearms, pneumatic weapons, cold and cooled weapons, nationally manufactured devices for firing cartridges filled with rubber or, similar in their properties, non-lethal metal bullets, and cartridges for them, as well as for weapons, main elements of weapons and explosives, approved by the Ministry of Internal Affairs of Ukraine on 21 August 1998 (No. 622), "firearms" are weapons designed to strike targets with projectiles the directional movement of which is initiated in the barrel (due to the pressure force of the gases created by combustion of the propelling charge) and have sufficient kinetic energy to hit the target at a given distance;[18]
6) the consequences (damage) are undefined, i.e. may be of a various nature.

Taking into account the above-mentioned provisions of Article 43[1] CCU and part 22 of Section II "Final and transitional provisions" of the CCU, the following should be noted:

1) the subject – in Article 43[1] is generally determined ("each person"), while in part 22 is more specific – individual ("civilians");
2) the act – in Article 43[1] – means any action to repel and deter an armed aggression by the Russian Federation or by another state, and under part 22 the use of firearms against people who carry out an armed aggression against Ukraine;
3) the situation in which the right under Article 43[1] arose – under martial law or during an armed conflict, and under part 22 – under martial law while participating in repelling and deterring an armed aggression by the Russian Federation and/or other states;

[17] Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the General Assembly of the United Nations on 31 May 2001, UNTS, vol. 2326, p. 209.

[18] https://zakon.rada.gov.ua/laws/show/z0637-98#Text (access: 24.6.2023).

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4) the weapon used – in Article 43[1] – weapons (armament), ammunition, explosives, any other means of warfare not prohibited by international law, and in part 22 – offender's own award weapons, sporting weapons (pistols), revolvers, rifles, smoothbore weapons, rifled-bore, smoothbore or combination weapons and hunting ammunition;
5) consequences – in Article 43[1] – harm to the aggression perpetrator's life or health or other legally protected interests, but in the absence of indications of torture or violations of the laws and customs of war as provided for by international treaties approved by the Verkhovna Rada of Ukraine, and in part 22 – the consequences (harm) are not specified, i.e. they may vary. However, this is based on the presumption of prohibition of violations of the laws and customs of war provided for by international treaties, including the prohibition of torture.

When referring to the correlation between Article 43[1] CCU and part 22 of Section II CCU, as M. Khavronyuk rightly holds, one must start from the fact that Act No. 2124-IX of 15 March 2022 regulates the same legal relations as Act No. 2114-IX of 3 March 2022. However, since the first of the aforementioned laws was adopted and became effective later and regulates relevant issues in more detail, it effectively repealed the provisions of the second law, which are not in force as of 21 March 2022.[19]

Analysing the amendments to the CCU concerning defence of the Homeland, it should be noted that Act of 15 March 2022 No. 2124-IX also amended Act No. 580-VIII of 2 July 2015 "On the State Police"[20] and Act No. 2337-VIII of 15 September 2018 "On Disciplinary Regulations of the State Police of Ukraine".[21] Article 420 (9) of Act No. 580-VIII stipulates that in order to optimise police activity, including during martial law, a police officer has the right to use the coercion means provided for in this article against persons involved in an armed aggression against Ukraine, regardless of the requirements and prohibitions provided for in Article 43 (4) and Article 45 (5), as well as Article 46 (9) of this Act. In light of the foregoing, one can agree with the position put forward by A. Sharmar that the provision in question is not compatible with part 1 of Article 43[1] CCU because part 9 of Article 42 of Act No. 580-VIII refers only to the circumstances of martial law, while failing to take into account the presence of an armed conflict with the aggressor state without legally declaring a martial law.[22]

Thus, taking into account the legislation on the circumstances that exclude the punishability of an act constituting the performance of the duty to defend the

[19] M. Khavronyuk, *op. cit*.
[20] https://zakon.rada.gov.ua/laws/show/580-19#Text (access: 24.6.2023).
[21] https://zakon.rada.gov.ua/laws/show/2337-19#Text (access: 24.6.2023).
[22] O.M. Sharmar, *op. cit*.

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Homeland, independence and territorial integrity of Ukraine (Article 43[1] CCU), it should be emphasized that – despite the use by the legislature in the provisions of this article of the concept of duty in the wording of the circumstance – the protection of the Homeland is considered a right. The analysis of the aforementioned laws leads to the conclusion of the inconsistency of the provisions of the CCU with other legislation, in particular in the aspect of reasonable risk as an element of combat immunity and a circumstance excluding the punishability of an act (Article 42 CCU).

Only as a side note (although the change is not directly related to the ongoing war), it is worth adding that on 6 November 2022, Act No. 2690-IX of 18 October 2022 "On amendments to the Code of Administrative Offences, the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine with regard to the enforcement of judgments of the European Court of Human Rights"[23] entered into force, which, for the first time, established the possibility of converting a sentence of life imprisonment into a sentence of term imprisonment. According to the provisions of this law, a life sentence may be converted into a prison term of 15 to 20 years if the convict has served at least fifteen years of the sentence imposed by the court.

Another amendment to the general part of the CCU was introduced by Act No. 2472-IX of 28 July 2022 "On amendments to the Criminal Code, the Criminal Procedure Code of Ukraine and other legislative acts of Ukraine on the regulation of the procedure of exchange of persons as prisoners of war".[24] Pursuant to the provisions of this law, the CCU was supplemented by a new ground for the release of a convict from serving their sentence – the release from serving a sentence under a decision of an authorised authority to transfer the convict to be exchanged as a prisoner of war. According to part 1 Article 84[1] CCU, the convict shall be released from serving the sentence if the authorised body (namely the Headquarters for Coordination of Treatment of Prisoners of War established by the Council of Ministers of Ukraine) decides to transfer him or her for exchange as a prisoner of war, and the convicted person gives their written consent to such exchange. However, if the exchange does not take place, the court shall decide, at the request of the public prosecutor, to refer the convicted person released from serving his or her sentence in connection with their transfer for exchange as a prisoner of war to continue to serve the sentence originally imposed (part 2 of Article 84[1] CCU). Where a person who has been released by a court from serving a sentence due to a decision of an authorised body to transfer him or her for exchange as a prisoner of war, and such exchange has taken place, commits a new offence during the unexpired part of their sentence, the court shall sentence that person in accordance with the sentencing rules for aggregate sentences (part 3 of Article 84[1] CCU).

[23] https://zakon.rada.gov.ua/laws/show/2690-20#n28 (access: 24.6.2023).

[24] https://zakon.rada.gov.ua/laws/show/2472-20/sp:max50:nav7:font2#n11 (access: 24.6.2023).

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AMENDMENTS TO THE SPECIAL PART OF THE CRIMINAL CODE OF UKRAINE

It is also worth looking at the changes made by the legislature to the special part of the CCU. According to Act No. 2108-IX of 3 March 2022 "On making changes to some legislative acts of Ukraine regarding the establishment of criminal liability for collaborative activity",[25] Chapter I of the special part of the CCU was supplemented with new Article 111[1], which provides for liability for collaboration with the enemy. This article is composed of eight parts. Liability under part 1 of Article 111[1] CCU is provided for actions in the form of public statements (denial or calling), in one of the following forms:

- publicly denying that the armed aggression against Ukraine is being carried out;
- publicly denying that the temporary occupation of part of Ukrainian territory has been established and endorsed;
- public calls in support of the decisions and/or actions of the aggressor state, the armed formations and/or the occupation administration of the aggressor state;
- public calls for cooperation with the aggressor state, armed formations and/or the occupation administration of the aggressor state;
- public calls not to recognise the extension of Ukraine's state sovereignty to the temporarily occupied territories of Ukraine.

This crime is of a formal nature and does not require the occurrence of harmful consequences of such acts.

The criterion of public nature of such denial or calling is set out in part 1 of the note[26] to Article 111[1] CCU. It is of public nature to disseminate calls or denials to a non-specified circle of people, in particular on the Internet or through mass media. In this case, public denials will be considered criminal, because they will constitute deliberate and public denial (or at least belittlement) of, e.g., serious violations of international humanitarian law (war crimes). Such behaviour is punishable if it is aimed at collaboration with the occupying power. This offence may be punished by deprivation of the right to hold an official position or pursue a specific activity for a period of 10 to 15 years.

Liability under part 2 of Article 111[1] CCU is borne by a Ukrainian national for the act of voluntarily holding a non-managerial position (not related to the performance

[25] https://zakon.rada.gov.ua/laws/show/2108-20#Text (access: 24.6.2023).

[26] An integral part of the legal norm is the so-called notes (comments), which at the legislative level define the content of particular criteria of the provision. Cf., e.g., the note on Article 96[3], Article 110[2], Article 111[1], Article 127, Article 149, Article 152, Article 155, Article 156[1], Article 158[1], Article 158[2], Article 159[1], Article 160, Article 161, Article 164, Article 176, Article 182, Article 185, Article 188[1], Article 192, Article 197, Article 199, Article 200 CCU and a number of other provisions.

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of organisational, administrative or economic functions) in any illegal bodies established in the temporarily occupied territory, including the occupation administration of the aggressor state.[27] As regards the nature of the position, it may be a position of any rank in the illegal authorities. These include illegal authorities in the form of central-government or local-government bodies. All the bodies established in the temporarily occupied territory, except as provided by the applicable law of Ukraine, are illegal. For the classification of this crime, the place where it was committed – in the temporarily occupied territory of Ukraine – is relevant. Of course, the legislature had in mind in this provision not only the territories captured by the aggressor state in 2022 but also those taken earlier (i.e. the occupied territory of the Autonomous Republic of Crimea and occupied districts in the Donetsk and Luhansk regions).

Liability under part 3 of Article 111[1] CCU shall be borne for activities in the form of propaganda in educational establishments of any type or form (public, non-public) aimed at facilitating:

- an armed aggression against Ukraine;
- the establishment and confirmation of temporary occupation of part of the Ukrainian territory;
- the avoidance of responsibility for an armed aggression of the aggressor state against Ukraine;
- implementation of educational standards of the aggressor state in educational institutions.[28]

This crime should be distinguished from the crime of war propaganda (Article 436 CCU). War propaganda consists in public calls for an aggressive war or aggressive resolution of an armed conflict, as well as the production of materials with calls for such action intended for dissemination, or the distribution of such materials.

Liability under part 4 of Article 111[1] CCU shall be borne for actions involving the transfer of material resources to illegal armed or paramilitary groups established in the temporarily occupied territory and/or to armed or paramilitary groups of the aggressor state. Actions aimed at pursuing economic activities in cooperation with the aggressor state, illegal authorities established in the temporarily occupied territory, including the occupation administration of the aggressor state, are also criminalised under this section. The definition of "economic activity" can be found in Article 3 of the Economic Code of Ukraine of 16 January 2003,[29] according to which economic activity is the activity of economic operators in the field of public

[27] The perpetrator of this offence is subject to the penalty of disqualification from holding certain positions or carrying out certain activities for a period of 10 to 15 years with or without confiscation of property.

[28] The perpetrator of this offence is punishable by correctional labour for up to two years or detention for up to six months, or imprisonment for up to three years with disqualification from holding certain positions or carrying out certain activities for a period of ten to fifteen years.

[29] https://zakon.rada.gov.ua/laws/show/436-15#Text (access: 24.6.2023).

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manufacturing, with the aim of producing and selling goods, performing work or providing paid services at a specific price. As regards this provision, one can agree with the position presented by O. Kravchuk and M. Bondarenko that any supply of goods, works or services to such authorities (the occupation administration) or to the aggressor state falls into the category of economic activities in cooperation with illegal authorities established in the temporarily occupied territory.[30]

Part 5 of Article 111[1] CCU provides for criminal liability for such actions as:

- voluntary taking up by a Ukrainian citizen a position related to the performance of organisational, administrative or economic functions in illegal bodies established in the temporarily occupied territory, including the occupation administration of the aggressor state;
- voluntary acceptance of being elected for such illegal authorities;
- participation in the organisation and holding of illegal elections and/or referenda in the temporarily occupied territory;
- publicly calling for such illegal elections and/or referendums in the temporarily occupied territory.

As regards the first case (assuming a public position voluntarily) this means a managerial position, related to the performance of organisational and administrative-economic functions. It should also be noted that the legislature, in this part of the provision, provided for the element of voluntariness both for actions taken when holding the position and for standing for the election to specific bodies of the office holder. The offender can only be a Ukrainian citizen.

Part 6 of Article 111[1] CCU provides for criminal liability for such actions committed in cooperation with the aggressor state and/or its occupation administration in order to support the aggressor state, its occupation administration or armed formations and/or to avoid its responsibility for the armed aggression against Ukraine as:

- organising and hosting events of a political nature;
- active participation in these events;
- running publicity activities.

Liability for committing criminal offences such as organising and conducting events of a political nature and carrying out publicity activities under part 6 of Article 111[1] CCU shall be borne when there are no elements of the offence of high treason (Article 111 CCU). At the same time, an essential feature of these criminal acts is the fact of committing them in cooperation with the aggressor state and/or its occupation administration. What is meant by political events is partly defined in part 2 of the note to Article 111[1] CCU: conventions, meetings, rallies, marches, demonstrations, conferences, round tables, etc. This means that virtually any type of event can be considered political. The criminal offences under Article 111[1] (6)

[30] O. Kravchuk, M. Bondarenko, *Kolaboratsiyna diyalnist: analiz novoyi statti 111-1 Kryminalnoho kodeksu Ukrayiny*, 2022, http://hrvector.org/podiyi/22-03-20-mbo (access: 3.6.2023).

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CCU can be committed both inside and outside the temporarily occupied territory of Ukraine. The offender is of a general-type nature, i.e. the perpetrator is held liable regardless of whether he or she is a Ukrainian national or not.

According to part 7 of Article 111[1] CCU, the perpetrator shall be held liable for the following acts:

- voluntarily holding positions in illegal judicial or law enforcement bodies established in the temporarily occupied territory;
- voluntary participation in illegal armed or paramilitary formations established in the temporarily occupied territory;
- voluntary participation in the armed formations of the aggressor state;
- providing assistance to these formations in combat operations against the Armed Forces of Ukraine and other military formations established in accordance with the laws of Ukraine, volunteer formations that were established or spontaneously organised to defend the independence, sovereignty and territorial integrity of Ukraine.

In this part, as in part 5, the legislature refers to the voluntary participation of a Ukrainian citizen in illegal armed or paramilitary formations or the provision of assistance to them. Only a Ukrainian citizen can be the perpetrator of these crimes.

First seven parts provide for basic types of crime, and the legislature was probably guided by the aim to determine in part 8 of Article 111[1] CCU the aggravated type of acts described in parts 5 to 8 of that article.[31] However, as rightly observed by O. Kravchuk and M. Bondarenko, there was a technical error in the text of the Act in this section, and the legislature took into account not the acts provided for in parts 5 to 8 but the persons specified therein.[32] At the same time, both Ukrainian nationals and other persons are mentioned in these parts (part 6 of Article 111[1] provides for liability regardless of Ukrainian citizenship). As a result, the statutory criteria under part 8 of Article 111[1] CCU are fulfilled by any conduct defined in parts 5–7 of Article 111, resulting in human death or other serious consequences.[33]

Act No. 2198-IX of 14 April 2022 "On the introduction of amendments to the Criminal and Criminal Procedure Codes of Ukraine regarding the improvement of responsibility for collaborative activities and the specifics of the application of preventive measures for committing crimes against the foundations of national and public security"[34] has extended the scope of criminal liability for the activities of

[31] An offender under part 8 of Article 111[1] CCU shall be punishable by imprisonment for a term of 15 years or life imprisonment, with disqualification from holding certain positions or carrying out certain activities for a term of ten to fifteen years with or without confiscation of property.

[32] O. Kravchuk, M. Bondarenko, *op. cit*.

[33] The element of serious consequences in terms of the monetary value of the damage is defined in part 4 of the note on Article 111[1] CCU, according to which serious consequences are damage that exceeds one thousand or more times the non-taxable minimum income of citizens.

[34] https://zakon.rada.gov.ua/laws/show/2198-%D1%96%D1%85#Text (access: 2.9.2024).

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collaboration with the enemy. Therefore, Section I of the special part of the CCU has been supplemented with another article, namely Article 111², which establishes liability for providing assistance to the aggressor state, involving deliberate actions to help the aggressor state, armed formations and/or the occupation administration of the aggressor state, committed by a citizen of Ukraine, a foreign national or a stateless person, except for citizens of the aggressor state, for the purpose of harming Ukraine by: executing or supporting decisions and/or actions of the aggressor state, its armed formations and/or the occupation administration of the aggressor state; voluntarily collecting, preparing and/or transferring material or other assets to representatives of the aggressor state, its armed formations and/or the occupation administration of the aggressor state. This conduct is a particularly grave crime.[35]

It should be noted that the subjective side of the offences under Articles 111¹ and 111² CCU overlap in some aspects, requiring further work to harmonise these provisions. Furthermore, when analysing these crimes, attention should be paid to the definition of "aggressor state".

As rightly noted by O. Kravchuk and M. Bondarenko, following the general definition, aggressor state is a state that has first used armed force against another state, thereby committing aggression. It is not only one country that may be considered an aggressor, but also a group of countries, including those bound by mutual military aid agreements. For the purposes of classifying offences under Article 111¹ CCU, the Russian Federation is considered an aggressor state. In this context, consideration is given especially to: the resolution of the Verkhovna Rada No. 129-VIII of 27 January 2015 "On the Appeal of the Verkhovna Rada of Ukraine to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of NATO, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, the parliaments of the countries of the world regarding the recognition of the Russian Federation as an aggressor state", Presidential Decree No. 64/2022 of 24 February 2022 "On the introduction of martial law in Ukraine".[36]

Act No. 2110-IX of 3 March 2022 "On amendments to some legislative acts of Ukraine regarding the strengthening of criminal liability for the production and distribution of prohibited information products"[37] amended the title of Chapter V of the special part of the CCU (and currently reads "Offences against electoral, labour and other personal rights and freedoms"). Therefore, Article 161 CCU sets out criminal liability for, i.a., violating the equality of citizens due to their regional affiliation, i.e. a fact of citizen belonging, by birth or residence, to a region – part of

[35] The offender is liable to imprisonment for a period of 10 to 12 years with disqualification from holding certain positions or carrying out certain activities for a period of 10 to 15 years, with or without confiscation of property.

[36] See O. Kravchuk, M. Bondarenko, *op. cit*.

[37] https://zakon.rada.gov.ua/laws/show/2110-ix#Text (access: 2.9.2024).

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the territory of Ukraine or territory of congested settlement of Ukrainians outside the territory of Ukraine, which differs from other territories by a number of historical, geographical, linguistic and other features.[38] It has been taken into account that it is regional affiliation that has recently been the subject of various political speculation. This law also supplemented Title XIX of the special part of the CCU with Article 435¹, which in part 1 establishes criminal liability for insulting the honour and dignity of the soldier, as well as threatening a soldier.[39] In this case, there is some inconsistency, as the offender may of course be generally specified (that is to say, any person may be the perpetrator), whereas Article 401 CCU, which contains general provisions on military crime, provides that the offences set out in this chapter are of an individually specified offender nature.[40]

Moreover, the Act No. 2110-IX supplemented Chapter XX of the special part of the CCU with Article 436², introducing criminal liability for justifying, considering as lawful and denying the fact of the Russian Federation's armed aggression against Ukraine (meaning the invasion launched as early as in 2014, which is explicitly provided for in the provision) and glorifying participants in the aggression. This provision criminalises, i.a., denial of the fact of Russia's armed aggression against Ukraine, which in its content may seem similar to the legislative proposal contained in the bill No. 735 of 5 December 2017 "Amendments to certain legislative acts of Ukraine (regarding criminal liability for denying the military aggression of the Russian Federation in Ukraine)", which was remitted for further work due to the fact that expressing opposition is the implementation of the constitutional human right to freedom of thought and speech, to freely express one's views and beliefs, and the criminalisation of this conduct is inappropriate. Later, the bill was withdrawn in its entirety, but the element of "making public" the justification, considering as justified, denial of the fact of the Russian Federation's armed aggression against Ukraine is no longer discussed. Therefore, in accordance with part 1 of Article 436² CCU, not only public but also non-public activities described therein are considered crimes. It seems that the legislature is slightly inconsistent in its views, because in 2017, public denial of military aggression did not constitute a public danger necessary and sufficient to criminalise it, since it is rather the exercise of the constitutional human right to enjoy freedom of thought and speech, to freely express one's views and beliefs, and in 2022 the legislature considers non-public denial that

[38] This definition is contained in the note on Article 161 CCU.

[39] Part 2 of Article 435¹ CCU penalises the production and dissemination of material containing insults to the honour and dignity, threats of murder, use of violence, destruction of or damage to the property of a soldier performing duties intended to ensure national security and defence, repel and deter armed aggression of the Russian Federation, his/her close relatives or family members.

[40] I.S. Radkovska, *Deyaki novely osoblyvoyi chastyny Kryminalnoho Kodeksu Ukrayiny*, 13.6.2022, http://nauka.nlu.edu.ua/nauka/download/zbirniki_konf/yr_novelli_13.06.2022.pdf (access: 3.6.2023).

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there is the Russian Federation's military aggression against Ukraine to be a grave crime if special aggravating features are taken into account.[41]

By Act No. 2113-IX of 3 March 2022 "On amendments to the Criminal Code of Ukraine on aggravating liability for crimes against the foundations of Ukraine's national security under martial law",[42] changes were made to Articles 111 and 113, which form part of Chapter I of the special part of the CCU. Therefore, in the new wording of Article 111, which provides for liability for espionage, the act of going over to the enemy side during martial law is an aggravating circumstance. Similar amendments were introduced in Article 113 CCU, which provides for liability for sabotage: the commission of acts of sabotage under martial law or during an armed conflict constitutes an aggravated type of crime. Both are particularly serious offences punishable by 15 years imprisonment or life imprisonment and a mandatory additional penalty of confiscation of property.

By Act No. 2117-IX of 3 March 2022 "On amendments to the Criminal Code of Ukraine on the aggravation of liability for looting",[43] Articles 185 (theft), 186 (robbery), 187 (assault and robbery), 189 (extortion) and 191 (embezzlement or misappropriation of property or taking someone's property by abuse of power) of the CCU were amended to include an aggravating circumstance, namely, "the commission of the above offences during martial law or state of emergency". One may think that such classification should also be added to another article of this chapter, namely Article 190 CCU, which provides for criminal liability for fraud. Regretfully, with outbreak of the war, apart from initiatives to raise funds to help defenders and affected civilians, also those appeared who under the guise of good intentions pursued one goal – to enrich themselves through the abuse of trust. The Act No. 2117-IX also tightens up criminal liability for looting, penalised under Article 432 of Chapter XIX of the special part of the CCU. It now provides for a sanction of imprisonment for 5 to 10 years (the previous wording provided for a sentence of 3 to 10 years).

By Act No. 2149-IX of 24 March 2022 "On amendments to the Criminal Code of Ukraine Concerning increasing the efficiency of combating cybercrime in the context of martial law",[44] amendments were made to Section XVI of the special part of the CCU. Therefore, Article 361 CCU, which provides for liability for unauthorised interference with the work of information (automated) systems, electronic information and telecommunication systems, and electronic communication networks has been significantly amended. First and foremost, a special aggravating circumstance has

[41] O.M. Cheban, *Analiz okremykh zakonodavchykh zmin do Kryminalnoho kodeksu Ukrayiny u zvyazku iz zbroynoyu ahresiyeyu RF*, 2022, https://app-journal.in.ua/wp-content/uploads/2022/11/60.pdf (access: 3.6.2023).

[42] https://zakon.rada.gov.ua/laws/show/2113-20#Text (access: 24.6.2023).

[43] https://zakon.rada.gov.ua/laws/show/2117-20#Text (access: 24.6.2023).

[44] https://zakon.rada.gov.ua/laws/show/2149-20#n2 (access: 24.6.2023).

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been added, namely the commission of an offence under martial law. This offence (due to its gravity) is a particularly grave crime, punished by imprisonment for a period of 10 to 15 years and a mandatory additional penalty of deprivation of the right to hold certain positions or carry out certain activities for a period of up to three years.

By Act No. 2150-IX of 24 March 2022 "On amendments to Article 263 of the Criminal Code of Ukraine on the abolition of liability in cases of voluntary surrender of weapons, infantry sentences, explosives or devices",[45] amendments were made to part 3 of Article 263 CCU, contained in Chapter IX of the special part of the CCU. Consequently, a person who voluntarily surrenders weapons, ammunition, explosives or explosive devices to the authorities is not subject to criminal liability for acts under parts 1 or 2 of this article at all, rather than being exempted from it, as provided for in the previous wording.

Act No. 2155-IX of 24 March 2022 "On amendments to the Criminal Code of Ukraine regarding liability for the illegal use of humanitarian aid"[46] criminalises the unlawful use of humanitarian aid, charitable donations or free aid for profit. This offence is provided for in Article 201^2 (in Chapter VII of the special part of the CCU). At the same time, it should be noted that the commission of this offence during martial law constitutes particularly dangerous conduct and is a grave crime punishable with imprisonment of between 5 and 7 years with mandatory additional penalties, namely: deprivation of the right to hold certain positions or carry out certain activities for up to 3 years and confiscation of property.

By Act No. 2160-IX of 24 March 2022 "On the introduction of amendments to the Criminal and Criminal Procedure Codes of Ukraine",[47] Chapter I of the special part of the CCU was supplemented with the provision of Article 114^2, establishing liability for unauthorised dissemination of information on the movement, transport or deployment of weapons, armaments and military supplies in Ukraine or in the Armed Forces of Ukraine or other military formations established in accordance with Ukrainian law and committed under martial law or under a state of emergency.[48]

CONCLUSIONS

The analysis of changes made to the CCU since the beginning of the armed aggression against the country demonstrates that criminal law responds dynamically to problems arising in a society forced to live in a completely new reality – the reality of war. At the same time, due to the fact that the changes are implemented

[45] https://zakon.rada.gov.ua/laws/show/2150-20#n2 (access: 24.6.2023).
[46] https://zakon.rada.gov.ua/laws/show/2155-20#n2 (access: 24.6.2023).
[47] https://zakon.rada.gov.ua/laws/show/2160-20#n6 (access: 24.6.2023).
[48] I.S. Radkovska, *op. cit*.

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very quickly, there are some legislative inaccuracies and shortcomings, which is especially evident in the context of the institution provided for in Article 43[1] CCU: "fulfilling the obligation to defend the Homeland, independence and territorial integrity of Ukraine". Taking into account the provisions relating to that circumstance, it should be pointed out that, despite the use by the legislature of the concept of obligation in the wording of this institution, the defence of Homeland is regarded as a right. The analysis of the applicable legislation leads to a conclusion that the provisions of the CCU are inconsistent with other legal acts, in particular in terms of reasonable risk as a criterion of combat immunity and a circumstance which excludes the criminality of the act (Article 42 CCU). In the general part, the newly introduced institution of release from serving a sentence on the basis of a decision of the authorised authority to transfer the sentenced person for exchange as a prisoner of war (Article 84[1] CCU) deserves attention (and approval).

Regarding the amendments to the special part of the CCU, in addition to the introduction of new types of offences (e.g. collaboration with the enemy – parts 2–8 of Article 111[1], denying the fact of the aggression against Ukraine – part 1 of Article 111[1] and some modification of some already existing ones), they consist generally in increasing the sanctions for certain offences committed under martial law. For example, under normal circumstances, the crime of high treason (Article 111 CCU) is punishable by imprisonment for a term of 12 to 15 years, with or without confiscation of property (Article 111 (1) CCU). During martial law, such behaviour is punishable by imprisonment for 15 years or life imprisonment with confiscation of property (Article 111 (2) CCU). We cannot ignore the fact that the commission of a crime under martial law, state of emergency or another state of exception is considered as an aggravating circumstance (Article 67 (11) CCU). It should be stated that the changes made in Ukrainian criminal law due to the ongoing war seem to be generally appropriate and the shortcomings (or interpretative doubts) are mainly a result of the complexity of the situation and the need for a rapid legislative process.

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Resolution of the Verkhovna Rada No. 129-VIII of 27 January 2015 "On the Appeal of the Verkhovna Rada of Ukraine to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the Parliamentary Assembly of NATO, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, the parliaments of the countries of the world regarding the recognition of the Russian Federation as an aggressor state".

ABSTRAKT

W związku z agresją Federacji Rosyjskiej na Ukrainę zaistniała konieczność nie tylko podjęcia działań obronnych, lecz także dostosowania przepisów prawa (w tym karnego) do rzeczywistości. Ukraińskie prawo karne dynamicznie reaguje na problemy pojawiające się w społeczeństwie zmuszonym do życia w zupełnie nowej rzeczywistości – realiach wojny. Jednocześnie z uwagi na fakt, że zmiany są wprowadzane bardzo szybko, pojawiają się nieścisłości i usterki legislacyjne, które w opracowaniu zostały wskazane. Celem artykułu było przedstawienie i analiza zmian wprowadzonych zarówno w części ogólnej Kodeksu karnego Ukrainy (głównie kwestie tzw. immunitetu bojowego), jak i w części szczególnej, gdzie określono nowe typy przestępstw (np. kolaboracja – art. 111[1], zaprzeczanie faktowi agresji na Ukrainę – ust. 1 art. 111[1]), zmodyfikowano ustawowe znamiona kilku z tych już istniejących (np. art. 361) oraz podniesiono sankcje za niektóre przestępstwa, jeśli zostały one popełnione w stanie wojennym (np. art. 111 ust. 2). Autorzy oceniają dokonane zmiany jako co do zasady trafne, a występujące niedoskonałości (czy też wątpliwości interpretacyjne) zdają się wynikać przede wszystkim ze złożoności sytuacji i konieczności szybkiego realizowania procesu legislacyjnego.

Słowa kluczowe: immunitet bojowy; stan wojenny; obrona Ojczyzny; kolaboracja; propaganda wojenna