QUALIFICATION OF MILITARY CRIMINAL OFFENCES COMMITTED BY SERVICEMEN IN COMPLICITY UNDER MARTIAL LAW

The article examines some problematic aspects of the qualification of military criminal offences committed by service members in complicity under martial law. The author considers the features of servicemen as particular subjects of this category of offences and analyses the approaches of scholars to the qualification of actions of co-perpetrators.

The authors analyse the scientific literature on this issue and consider the positions of leading scholars on the arguments for the criminal law qualification of such acts. The author focuses on the issue's relevance in the period of repulsion of the Russian Federation's full-scale armed aggression against Ukraine.

The author provides up-to-date statistics on crimes committed by military personnel in collaboration with other military personnel and civilians. Attention is drawn to the effectiveness of legislative strengthening of responsibility for specific war crimes. The author focuses on the problematic issues of criminal liability for war crimes committed in collaboration, depending on the form of the crime.
Statement of the problem. The performance of military duty as a sphere of social activity of the country's population and relations between citizens and the State involves several interrelated factors that directly or indirectly affect the quality and State of military security. One of these factors is the legal awareness level of military personnel, persons liable for military service and reservists, and the civilian population.

According to the Donetsk Specialised Defence Prosecutor's Office in the Eastern Region, during the full-scale invasion, from February 2022 to January 2024, military personnel committed 13 crimes in complicity with civilians in the Donetsk region (2022 - 1 (August), 2023 - 3 (August, October, December), 2024 - 5 (January—2, February—1, March—1, April—1)).

By category: Art. 186 para. 4 of the CCU - 1 civilian + 1 military (08.2022); Art. 185 para. 4 of the CCU - 1 civilian + 1 military (08.2023); Art. 185 para. 5 of the CCU - 2 civilians + 1 military (10.2023); Art. 185 para. 4 of the Criminal Code of Ukraine - 1 civilian + 1 military (01.2024); Art. 201-2 para. 3 of the Criminal Code of Ukraine - 1 civilian + 1 military (01.2024); Art. 185 para. 4 of the Criminal Code of Ukraine - 1 civilian + 1 military (02.2024); Art. 307 para. 3 of the Criminal Code of Ukraine - 3 civilians + 1 military (03.2024); Art. 187 para. 4 of the Criminal Code of Ukraine - 2 civilians + 1 military (04.2024).

During the same period, 7,664 criminal proceedings were initiated under the articles of Chapter XIX of the Criminal Code of Ukraine, "Criminal offences against the established procedure for military service (military criminal offences)", under the procedural guidance of the Donetsk Specialised Defence Prosecutor's Office in the Eastern Region. Under this category, 944 criminal proceedings were referred to court.

According to Article 401 of the said section of the Criminal Code of Ukraine (hereinafter—the CC of Ukraine), military criminal offences are offences against the procedure established by law for performing or completing military service committed by military personnel, persons liable for military service, and reservists during training [1].

According to the Donetsk Specialised Defence Prosecutor's Office in the Eastern Region, between 24 February 2022 and 31 January 2024, the most criminal proceedings were initiated for desertion (part 4 of article 408 of the Criminal Code) - 3790; unauthorised leaving of a military unit or place of service (part 5 of article 407 of the Criminal Code) - 2369; insubordination (part 4 of article 402 of the Criminal Code of Ukraine) - 775; abuse of power or authority by a military official (Article 426-1(5) of the Criminal Code of Ukraine) - 113; violation of the rules for handling weapons, as well as substances and objects that pose a high risk to others (Article 414(1) of the Criminal Code of Ukraine) - 111; violation of the rules for driving or operating machinery (Article 415(1) of the Criminal Code of Ukraine) - 91.

Even though such criminal offences are, in the vast majority of cases, committed by a certain category of subjects alone, in our opinion, the greatest public danger is posed by crimes committed by servicemen in complicity.

According to the Donetsk Specialised Prosecutor's Office for Defence of the Eastern Region, between February 2022 and January 2024, the most frequently committed crimes by service members in collaboration under the articles of Section XIX of the Criminal Code of Ukraine were those under Article 402 of the Criminal Code of Ukraine (disobedience) - 760 criminal proceedings; Article 408 of the Criminal Code of Ukraine (desertion) - 1,530 criminal proceedings; Article 429 of the Criminal Code of Ukraine (unauthorised leaving the battlefield or refusal to use weapons) - 23 criminal proceedings.

Given the above and the problematic situation of Ukraine's security and defence forces, the relevance of our study is undeniable.

Recent research analysis. A significant cumulative contribution to the development of criminal legislation in terms of analysis, study and interpretation of legal provisions regulating social relations in the area of military service by servicemen was made by V. I. Kosyniuk, V. M. Bilokonev, R. M. Ovchinnikov, T. B. Nikolaienko, S. O. Kharytonov, M. I. Karpenko, M. I. Khavroniuk in their scientific works which studied the problematic issues of criminal law characteristics of military criminal offences. The scientific result of such research is understanding the conditions for correctly qualifying military criminal offences committed by servicemen and persons liable for military service and reservists during training.

The purpose of the study proposed by the authors is to study and analyse certain problematic aspects of...
criminal law qualification of offences committed by servicemen in complicity.

Summary of the main material. Military criminal offences, as a group of relatively separate legal provisions within criminal law, belong to the system which regulates interdependent legal relations within the framework of the established procedure for military service and ensures criminal law prohibition of violation of law and order in the area of military relations.

The system of war crimes is composed of Articles 401-435 of the CC of Ukraine. Depending on the direct object encroached upon by war crimes, the following groups are distinguished:

1. Crimes against the order of subordination and military dignity: insubordination (Art. 402); failure to obey an order (Art. 403); resistance to a superior or forcing him/her to violate official duties (Art. 404); threats or violence against a superior (Art. 405); violation of the statutory rules of relations between servicemen in the absence of a relationship of subordination (Art. 406); insult to the honour and dignity of a serviceman, threatening a serviceman (Art. 435).

2. Crimes against the procedure of military service: unauthorised leaving of a military unit or place of service (Article 407); desertion (Art. 408); evasion of military service by self-mutilation or other means (Article 409).

3. Crimes against the procedure for the preservation and use of military property: theft, misappropriation, extortion by a serviceman of weapons, ammunition, explosives or other munitions, vehicles, military and special equipment or other military property, as well as their acquisition by fraud or abuse of office (Art. 410); intentional destruction or damage to military property (Art. 411); negligent destruction or damage to military property (Art. 412); loss of military property (Art. 413).

4. Crimes against the operation of military equipment: violation of the rules for handling weapons, as well as substances and objects that pose a high risk to others (Art. 414); violation of the rules for driving or operating machinery (Art. 415); violation of the rules for flights or preparation for them (Art. 416), violation of the rules for ship navigation (Art. 417).

5. Crimes against the order of combat duty and other special services: violation of statutory rules of guard service or patrolling (Art. 418); violation of regulations of border service (Art. 419); violation of rules of combat duty (Art. 420); violation of statutory rules of internal service (Art. 421).

6. Crimes in the sphere of state secrets protection: disclosure of military information constituting a state secret or loss of documents or materials containing such information (Article 422).

7. Military service crimes: negligent attitude to military service (Art. 425); inaction of military authorities (Art. 426); abuse of power or authority by a military official (Art. 4261).

8. Crimes against the order of military service on the battlefield and in the area of hostilities: surrender or abandonment of means of warfare to the enemy (Art. 427); abandonment of a warship that is being destroyed (Art. 428); unauthorised abandonment of the battlefield or refusal to use weapons (Art. 429); voluntary surrender (Art. 430); criminal acts of a serviceman in captivity (Art. 431); looting (Art. 432).

9. Crimes for which liability is stipulated by international conventions and treaties: violence against the population in the area of hostilities (Article 433); ill-treatment of prisoners of war (Article 434); illegal use and abuse of the symbols of the Red Cross, Red Crescent, Red Crystal (Article 435) [2].

The criminal law qualification of military criminal offences should be based on the following general principles of law:

- the principle of equality of citizens before the law;
- the principle of justice;
- the principle of presumption of innocence;
- the principle of objectivity;
- the principle of completeness;
- the principle of accuracy;
- the principle of motivation.

The analysis of the dispositions of the articles contained in the above section allows us to distinguish the following qualifying and especially qualifying features of military criminal offences: repetition, the commission of a criminal offence by a group of persons, commission of a criminal offence by a prior conspiracy of a group of persons, causing significant damage to the protected interests, causing grave consequences, loss of life; use of weapons; use of violence against a subordinate; a commission by arson or other generally dangerous means; a commission by a military person with abuse of official position; and as well as the commission of criminal offences in the conditions of a special period, in the conditions of martial law or a combat situation.

The special features of a military criminal offence are:

- the procedure established by law for performing or completing military service as an object of encroachment;
servicemen, persons liable for military service and reservists during training as a subject;
- recognition of an act as a military criminal offence only if it is expressly provided for in Chapter XIX of the Special Part of the Criminal Code of Ukraine.

From the point of view of criminal law, a serviceman who is considered a subject of military criminal offences is a particular subject and has the following characteristics:
- mandatory (general), inherent in any subject of a crime (natural sane person who has reached the age of criminal responsibility for committing a crime);
- additional (state law, acmeological, legal);
- special (optional) (military service).

At the same time, its additional features are manifested in each of the mandatory features.

It should also be remembered that a person can acquire the status of a war crime perpetrator only after the beginning and before the end of military service, as defined by the Law of Ukraine "On Military Duty and Military Service".

Military criminal offences may be committed with the intentional joint participation of two or more persons in the form of simple or complex complicity. Military personnel and persons liable for military service and reservists called for training may act as perpetrators of a military offence, organisers, instigators or accomplices. Persons equated to military personnel can also be both perpetrators and accomplices of crimes qualified under the relevant articles of Chapter XIX of the Special Part of the Criminal Code of Ukraine.

Despite the legislator's apparent position that persons not specified in Article 401(2) of the CCU are liable for complicity in military criminal offences under the relevant articles of Chapter XIX, there is a scientific discussion about other persons who may be complicit in criminal offences with a particular subject of the crime.

The results of scientific research on this issue make it possible to distinguish two positions of scholars:
- qualification of collaboration of general and special subjects is impossible because such an approach would lead to an unlimited expansion of the circle of persons subject to criminal liability and undermine the independent idea of distinguishing independent corpus delicti with an independent subject;
- complicity of persons without additional special characteristics may occur in any crime committed by particular subjects.

In our opinion, the second approach is the right one. Thus, the task and main idea of criminal law is to protect certain social relations from criminal offences. For this purpose, punishment for possible unlawful encroachment on these relations is established.

In other words, if social relations are encroached upon by Articles 401-435 of the Criminal Code of Ukraine, there are clearly grounds for protecting the object of protection.

At the same time, a specific particular subject, despite its inherent peculiarities, is completely identical in legal terms to other special subjects, which implies the extension of the general rules of complicity to it.

Thus, the existence of a special subject of military criminal offences does not limit the possibility of qualifying the actions of a civilian who incited, organised, or facilitated the commission of a military crime as accomplices to such actions. The direction of the civilian's intent and the content of his or her actions are decisive for qualification. The courts applied a similar approach to qualifying collaboration of a special and general subject of a criminal offence under Articles 368 and 369 of the Criminal Code of Ukraine (paragraph 11 of the Resolution of the SCU Plenum No. 5 of 26.04.2002).

In addition, it should be noted that the legislator defines war crimes committed by military personnel under martial law as particularly qualified.

At the same time, the legislator's unified approach to determining the public danger of criminal offences committed under martial law has effectively ensured that the same legal consequences will occur in the event of a crime, regardless of the presence or absence of complicity.

In this regard, the consideration of the increased public danger of military criminal offences committed by special subjects in complicity is generally at the discretion of the court by exercising its discretionary powers in imposing and individualising punishment to each accomplice.

Therefore, when imposing punishment for complicity in the commission of military criminal offences, the prosecutor’s office and the court should independently consider the increased public danger of such crimes to ensure the formation of a balanced judicial practice based on the principles of justice and individual responsibility. An analysis of the sanctions of the articles that provide for criminal liability for committing military criminal offences during the legal regime of martial law shows that most articles provide for a sentence of five to ten years imprisonment. Taking into account the full-scale
invasion of Ukraine by Russia in 2022 and the statistics on war crimes offered in this article, such a position of the state, formulated in 2015 by adopting the Law of Ukraine "On Amendments to the Criminal Code of Ukraine on Strengthening Responsibility for Certain War Crimes" [4], is fully justified and effective.

References