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A CRIMINAL AND LEGAL ASSESSMENT OF COLLABORATIONISM: A CHANGE OF VIEWS IN CONNECTION WITH RUSSIA'S MILITARY AGGRESSION AGAINST UKRAINE

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Summary: 1. Introduction. – 2. The Background of Changes to the Criminal Code. – 3. Key Changes to Crimes Against the Foundations of Ukraine's National Security After the Start of the War. – 4. The Essence of Collaboration Activities under the Criminal Code of Ukraine. – 5. Conclusions.

Keywords: *treason, collaborationism, war, martial law*

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ABSTRACT

Background: *The dynamics of amendments to the Criminal Code of Ukraine after the start of the war show that the criminal law was not sufficiently ready for application during the war. First of all, a number of acts that are socially dangerous have not been singled out as criminal acts. Some existing articles needed to be amended to differentiate criminal liability.*

Methods: *This article is based on the use of comparative, historical, and statistical methods, which are the basis for proving the grounds for criminalisation or differentiation of acts, taking into account the martial law caused by the war waged by the Russian Federation against Ukraine.*

Results and Conclusions: *Following the research conducted, we consider it possible to state that collaboration activities have a high level of public danger and should therefore be criminalised. The severity of punishment for such actions depends on the type of collaborationism. Scholars and law enforcers in countries analysing Ukraine's experience and changes in criminal law in connection with the war should clearly delineate the criminal range of acts of treason and analyse whether there are any socially dangerous acts that are obviously harmful to national security but remain outside of the notion of treason.*

Keywords: *treason, collaborationism, war, martial law, Ukraine-Russia war, access to justice*

1 INTRODUCTION

For all Ukrainians, recent history is divided into two stages: before 24 February 2022, i.e., the time of relatively peaceful existence of the state of Ukraine, and after 24 February 2022, i.e., the time after the full-scale military invasion of sovereign Ukraine. After the aggressive actions of the Russian Federation in 2014, Ukraine tried to resist the enemy, looking for ways to find a political solution to the issue of capturing part of the territory of our state. However, it is now clear that Russia had its own plans, which were to destroy Ukraine as a state in general.

We would like to note that after 2014 and the beginning of Russia's aggressive actions in eastern Ukraine and Crimea, there was no radical change in the Criminal Code of Ukraine in terms of establishing criminal liability for cooperation with the enemy. The reason was that Ukraine was looking for ways to resolve this conflict and even discussed ways to release from criminal liability those who were involved in cooperation with the so-called republics, artificially created under the auspices of the Russian Federation in Donetsk and Luhansk regions.

However, since 2014, the enemy had no plans to peacefully seek a way out of the conflict and de-occupy Ukrainian territories but instead recruited people who would be their support during a full-scale offensive against Ukraine. Such people settled all over Ukraine and were involved in searching for information about the location of certain objects, their function, the mood of the population, the organisation of demonstrations, and the information war against Ukraine.

After 24 February 2022, all spheres of state activity had to be reorganised at an extremely rapid pace, taking into account martial law, which was introduced by the Decree of the President of Ukraine No 62/2022 'On the Imposition of Martial Law'.² As it turned out, the domestic criminal code was also not fully adapted to the application in wartime. Therefore, after the war, the legislator made several necessary changes and additions to it, which would

2 Decree of the President of Ukraine No 64/2022 of 24 February 2022 'On the Imposition of Martial Law' <<https://www.president.gov.ua/documents/642022-41397>> accessed 29 May 2022.

take into account the current situation in the country and allow the law enforcement bodies, in general, to respond properly to criminal acts.

This article aims to analyse the changes relating to criminal liability for treason and collaboration that have been made to the criminal law of the state undergoing armed aggression. To this end, the study examined the legislation that amended the Criminal Code of Ukraine, the relevant draft laws with explanatory notes to them, and the positions of domestic scientists who spoke about the changes.

2 THE BACKGROUND OF CHANGES TO THE CRIMINAL CODE

The Ukrainian experience in amending the criminal law is crucial for scholars to study in countries that live in peace and do not know what war is. After all, the legislation of each state must be ready for application in any situation, i.e., in peacetime and in wartime.

In fact, the codes of most, if not all, European states, as well as the Criminal Code of Ukraine (hereafter, the CrPC of Ukraine), were built, taking into account historical knowledge about the Second World War. However, too much has changed since the Second World War. The advent of computer technology, free access to the Internet and mobile communications alone have added a lot of changes. These changes, primarily of a technological nature, obviously did not affect the course of World War II.

However, in a period of parallel warfare to seize another state through the destruction of its titular nation, as well as information warfare, it is necessary to assess a number of actions in terms of their social danger or take into account certain criteria to increase criminal responsibility (differentiate it) considering martial law.

If we describe the amendments to the CrPC of Ukraine, we can state the following:

1. Amendments were mostly made to the Special Part of the CrPC of Ukraine, although two additions were made to the General Part of the CrPC of Ukraine.
2. The amendments to the Special Part of the CrPC of Ukraine did not concern only the sections that provide for liability for crimes against the foundations of national security and war crimes – changes have been made to the sections on property crimes, economic crimes, and computer crimes.
3. The changes mostly concerned dispositions, not sanctions of articles.

If we characterise the changes made in terms of content, they should be divided into two groups. The first group concerned the criminalisation of acts that were not previously considered criminal, and the second group concerned the differentiation of criminal liability. The term 'differentiation of criminal liability' in domestic criminal law means that the legislator takes into account the public danger of encroachment and/or the perpetrator with the subsequent definition of various measures of criminal influence for the offence.

The war in Ukraine has clearly shown the need for such differentiation of criminal responsibility, given that the actions were committed during martial law. We would like to note that earlier in the Criminal Code of Ukraine, there was such a circumstance that aggravated punishment as 'committing a crime based on the use of martial law' (para. 11, part 1 of Art. 67 of the CrPC of Ukraine). However, the war has shown that such an instruction in the CrPC of Ukraine is not enough.

In this publication, we will focus on the changes that have been made to the section that provides for liability for crimes against the foundations of national security of Ukraine, i.e., section 1 of the Special Part of the CrPC of Ukraine. This is discussed in the next part of the article.

3 KEY CHANGES TO CRIMES AGAINST THE FOUNDATIONS OF UKRAINE'S NATIONAL SECURITY AFTER THE START OF THE WAR

The legislator supplemented Part 2 of Art. 111 (treason) and Part 2 of Art. 113 (sabotage) of the CrPC of Ukraine with such an aggravating feature as the commission of crimes under martial law. In this case, both treason and sabotage, which are martial law, are punishable by imprisonment for a term of fifteen years or life imprisonment and confiscation of property, taking into account the time of their commission. In fact, the discretion of the court is minimised, as even imprisonment is certain. It is obvious that committing treacherous or sabotaging acts during martial law increases the degree of public danger of the perpetrator, and the danger to the object of encroachment increases the danger to national security.

Since 2014, the scientific community has been discussing the expediency of supplementing the CrPC of Ukraine with a separate article that would provide for criminal liability for collaborative activities. Opposite views were expressed on such expediency. Some scholars have argued that an article on treason can cover all manifestations of a collaborator's criminal activity.³ Others supported the opposite approach, arguing that a number of socially dangerous acts were outside the boundaries of treason.⁴

The expediency of establishing criminal liability for collaborationism was discussed in a separate article of the CrPC of Ukraine, given the possible excessive severity of the sanction of the article on 'Treason' for some categories of citizens. After all, this is a particularly serious crime (Art. 111 of the CrPC of Ukraine), the commission of which is punishable by imprisonment for a term of twelve to fifteen years with or without confiscation of property.

Another debate that arose among scholars was to decide whether the crime scene should affect a person's criminal responsibility. It was a question of whether the facts of taking appropriate actions in the occupied territories were less socially dangerous. Thus, E. Pysmenskyi argues that treason applies to any act, regardless of the place of their commission, while collaborationism is a type of behaviour that necessarily takes place in the occupied territories and is demonstrated during the occupation.⁵

We note that criminal liability for collaborationism is provided for in a separate article in the Criminal Code of the Republic of Lithuania (Art. 120).⁶ It deals with the actions of a citizen of the Republic of Lithuania, which assisted the illegal authorities in establishing the occupation or annexation of the Republic of Lithuania, suppressing the resistance of residents, and helping illegal authorities in the occupation or annexation.

We will not go into more detail in this discussion, as it has partially lost its relevance after the addition of Art. 111-1 'Collaborative Activities' to the CrPC of Ukraine.

The explanatory note to the draft law states that it is intended to limit access to positions related to the performance of state or local government functions for a period of fifteen years and provide for other appropriate penalties for persons who cooperated with the aggressor state, its occupying authority, its administration, and/or its armed or paramilitary

3 M Rubashchenko, 'Criminal Liability for Collaborationism under the Current Criminal Code of Ukraine' in V Tatsiy, V Borisov (eds), *Social Function of Criminal Law: Problems of Scientific Support, Lawmaking and Law Enforcement* (Materials of the international scientific-practical conference, Pravo 2016) 329-330.

4 E Pysmenskyi, 'Collaborationism in Modern Ukraine as a Criminal Law Problem' (2020) 12 *Law of Ukraine* 116-128.

5 Pysmenskyi (n 3) 121.

6 Lietuvos Respublikos baudžiamasis kodeksas <<https://www.infolex.lt/ta/66150:str120>> accessed 29 May 2022.

formations.⁷ It seems that the legislators are demonstrating to the citizens of Ukraine who are in the temporarily occupied territories and carrying out active anti-Ukrainian activities that they are ready to recognise a number of actions as collaborationism and mitigate criminal liability by rejecting them as treason.

Thus, **public denial** by a citizen of Ukraine **of armed aggression** against Ukraine, the establishment and approval of temporary **occupation** of part of the territory of Ukraine, or **public appeals** by a citizen of Ukraine **to support decisions and/or actions of the aggressor state**, armed formations, and/or occupation administration of the aggressor state, **to collaborate** with the aggressor state, armed formations, and/or the occupation administration of the aggressor state, or the **non-recognition of the extension of the state sovereignty of Ukraine** to the temporarily occupied territories of Ukraine shall be punished by deprivation of the right to hold certain positions or engage in certain activities for a period of ten to fifteen years. This is the so-called lustration procedure, which is the only major punishment for such acts.

Decisions on the expediency of creating a special rule on collaborationism or changes to existing articles on treason should be based on a domestic doctrinal understanding of the range of acts that are considered treason. Only after a clear understanding of the scope of the acts of treason should it be clarified whether there are manifestations of collaborationism that are not covered by existing criminal prohibitions and whether they pose a degree of public danger that is one of the grounds for criminalisation. In Ukraine, the addition of a new article on collaborationism was carried out in a very short time. Therefore, there was no broad discussion on improving the structure and terms used by the legislator for objective reasons.

The article on collaborationism in the Criminal Code of Ukraine is extremely vast and consists of eight parts and a note (Art. 111-1 of the CrPC of Ukraine). This is not typical of domestic criminal law, as the traditional requirement for its text is clarity and conciseness. It seems that this is not without reason. The fact is that after the events of 2014 (Russia's attack on eastern Ukraine and the annexation of Crimea) in a number of criminal proceedings involving treason, the defence tried to narrow the range of criminal acts that are treason. Such manipulations with the content of the terms of the criminal law and appeals to legal uncertainty served as a prerequisite for the appearance of an article on collaborationism in the widest possible format with a significant specification of actions that are collaborationism.

4 THE ESSENCE OF COLLABORATION ACTIVITIES UNDER THE CRIMINAL CODE OF UKRAINE

Let us now focus on the understanding of treason and collaboration under the Criminal Code of Ukraine.

Only a citizen of Ukraine is a subject of treason (Art. 111 of the Criminal Code). He/she acts to the detriment of the sovereignty, territorial integrity and inviolability, defence capability, state, economic, or information security of Ukraine. Treason itself is committed in three forms: 1) the transition to the side of the enemy during an armed conflict; 2) espionage; 3) providing assistance to a foreign state, foreign organisation, or their representatives in carrying out subversive activities against Ukraine.

7 Explanatory note to the draft Law of Ukraine 'On Amendments to Certain Legislative Acts (Concerning Establishing Criminal Liability for Collaborative Activities' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71220> accessed 8 April 2022.

During the preparation of the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine',⁸ it was proposed to supplement the article on treason with a separate act. It was a question of envisaging collaborative activities along with the above-mentioned forms of treason. However, no such changes were made. As a result, they had to be adopted on 3 March 2022 by adopting the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Establishment of Criminal Liability for Collaborative Activities'.⁹

The very term collaborationism comes from the French. Collaboration is cooperation, i.e., conscious, voluntary, and intentional cooperation with the enemy in their interests and to the detriment of their state and its allies.¹⁰ It is well known that the discussion about the expediency of self-criminalisation of collaborationism and the relationship of these actions with treason was conducted in most European countries after World War II. Indeed, the limits of criminal responsibility for such acts must be drafted with such care as to ensure, on the one hand, the territorial integrity and sovereignty of the state itself and, on the other, to prevent arbitrary and excessive restrictions on freedom of expression.

However, it seems that the level of freedom of speech, the dependence of citizens on propaganda, access to truthful information, and encroachment on the integrity and sovereignty of the state together allow us to conclude whether the state remains democratic and legal and whether criminal liability for collaborationism is excessive. In Ukraine, most acts recognised as collaborationism are a minor crime or even a misdemeanour (Part 1 of Art. 111-1 of the CrPC of Ukraine). However, some forms of collaborationism are particularly serious crimes.

According to law enforcement statistics, during the first 50 days of the war, the State Bureau of Investigation opened more than 240 criminal proceedings on suspicion of treason and collaboration.¹¹ Participants in these proceedings are often village council chairmen, deputies of various levels, and officials.

There are the following types of collaborationism:

- military collaborationism – service in military formations, police structures, intelligence, and counterintelligence bodies of the occupier;
- economic collaborationism – cooperation in any sector of the economy;
- cultural (spiritual) collaborationism – cooperation with the occupiers in the spiritual sphere, which, during the Second World War, contributed to the spread of loyal feelings among the population, promoting the exclusivity of the 'Aryan race', and improving the psychological mood of the occupiers;
- domestic collaborationism – associated with the establishment of friendly relations between the occupiers and the population;
- political, administrative collaborationism – cooperation in the occupying authorities.¹²

8 Draft Law 'On Ensuring the Rights and Freedoms of Citizens in the Temporarily Occupied Territory of Ukraine No 4473-1' of 19 March 2014 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=50320> accessed 29 May 2022.

9 Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on the Establishment of Criminal Liability for Collaborative Activities' of 3 March 2022 <<https://zakon.rada.gov.ua/laws/show/2108-20#n12>> accessed 29 May 2022.

10 Encyclopedia of Modern Ukraine <https://esu.com.ua/search_articles.php?id=4446> accessed 14 April 2022.

11 'State Bureau of Investigation Investigates More Than 230 Cases of Treason, Two Thirds of Which Are in Donetsk and Luhansk Oblasts' (*State Bureau of Investigation*, 15 April 2022) <<https://dbr.gov.ua/news/dbr-rozslidue-ponad-230-provadzhen-za-derzhavnu-zradu-dvi-tretini-z-yakih-u-doneckij-taluganskij-oblastyah>> accessed 29 May 2022.

12 The Concept of 'Collaborationism' <<https://uk.wikipedia.org/wiki/%D0%9A%D0%BE%D0%BB%D0%B0%D0%B1%D0%BE%D1%80%D0%B0%D1%86%D1%96%D0%BE%D0%BD%D1%96%D0%B7%D0%BC>> accessed 14 April 2022.

The Ukrainian legislator recognised the collaborative activity of helping the enemy in the occupation of Ukraine in the occupied territories.

The lion's share of proceedings under this article is the so-called political collaborationism. Thus, often people in the temporarily occupied territories form 'alternative' local authorities in the occupied cities. Thus, in Mariupol, the mayor elected by the citizens refused to cooperate with the occupiers, so they manually selected a collaborator who agreed to cooperate.¹³ There are dozens of similar examples in modern realities.

M.I. Havroniuk draws attention to the fact that collaborationism has four mandatory features. It is carried out under occupation, in the form of cooperation with the aggressor state, with representatives of the population of the state, and in order to harm the state of Ukraine, its patriots, or allies.¹⁴ Indeed, several acts that the national legislature recognised as collaborationism were committed in the occupied territories. However, some of them, for example, the transfer of material resources to illegal armed or paramilitary formations established in the temporarily occupied territory or may be carried out in the territory of the state that is not occupied by the aggressor.

If we turn to the provisions of the CrPC of Ukraine, domestic collaborationism includes: public denial of armed aggression against Ukraine; establishment and approval of temporary occupation of part of the territory of Ukraine; public appeals to support the decisions and/or actions of the aggressor state (hereafter, the aggressor), armed formations, and/or the occupation administration of the aggressor state, to cooperate with the aggressor, armed formations, and/or the occupation administration of the aggressor; public calls for non-recognition of the extension of Ukraine's state sovereignty to the temporarily occupied territories of Ukraine.

In the absence of signs of political, administrative, or military collaboration, domestic collaboration can also include a voluntary holding by a citizen of Ukraine of the position not related to organisational and administrative or administrative-economic functions in illegal authorities established in the temporarily occupied territory, including in the occupation administration of the aggressor.

According to the Ukrainian criminal law, cultural collaboration is propaganda by a citizen of Ukraine in educational institutions to promote armed aggression against Ukraine, the establishment and approval of temporary occupation of part of Ukraine, the avoidance of responsibility for the aggressor's aggression against Ukraine, or actions of citizens of Ukraine aimed at implementing the standards of education of the aggressor in educational institutions.

Economic collaborationism can manifest itself in the transfer of material resources to the aggressor and/or conducting economic activities in cooperation with the aggressor, as well as voluntary occupation by a citizen of Ukraine of a position related to the performance of organizational or administrative functions in illegal bodies of power established in the temporarily occupied territory.

The most dangerous manifestations of collaborationism are political or administrative, which may take the form of participation in and conduct of illegal elections and/or referendums in the temporarily occupied territories or public calls for such illegal elections and/or referendums in the temporarily occupied territories, or carrying out information activities in cooperation with the aggressor.

13 'The Protege of the Occupiers in Mariupol Lied about the Number of People in the Besieged City' (24 Channel, 8 April 2022) <https://24tv.ua/ru/stavlennik-okkupantov-mariupole-zavralsja-okolichestve-ljudej_n1940576> accessed 29 May 2022.

14 M Havroniuk, 'Collaborators from the Point of View of the Criminal Code' <<https://racurs.ua/ua/b222-kolaboranti-z-tochki-zoru-kriminalnogo-kodeksu.html>> accessed 29 May 2022.

For example, the Russian occupation administration has prepared to hold ‘pseudo-referendums’ in the temporarily occupied territories of the Kherson region in order to create a so-called ‘people’s republic’ and join Russia. Some locals and pro-Russian deputies are helping to organise such actions. In particular, they print ballots, forms, brochures, posters, and booklets for voting in a ‘referendum’ to create another pseudo-republic and recognise the occupying authority.¹⁵ With a certain degree of caution, this type of collaboration can also include the voluntary holding of a position by a citizen of Ukraine in illegal judicial or law enforcement agencies established in the temporarily occupied territory. Voluntary participation of a citizen of Ukraine in illegal armed or paramilitary formations established in the temporarily occupied territory and/or in the armed formations of the aggressor state or providing such formations with assistance in fighting against the Armed Forces of Ukraine is a manifestation of military collaborationism.

The subtleties of the criminal-legal qualification of treason and collaboration should be discussed in a separate independent study.

A few words about punishment – the Ukrainian legislator has decided that economic and cultural collaborationism are minor crimes, and domestic collaborationism is a criminal misdemeanour. However, military, political, and administrative collaborationism has been recognised as a particularly serious crime. Characteristically, any manifestation of collaborationism is punishable by deprivation of the right to hold certain positions or engage in certain activities for a period of ten to fifteen years.

5 CONCLUSIONS

In conclusion, we would like to state that scholars and law enforcement officers in the countries analysing the Ukrainian experience and changes in criminal law in connection with the war should clearly outline the criminal range of acts of treason and analyse whether there are socially dangerous acts that are obviously harmful to national security but remain outside the notion of treason.

Collaborative activities, i.e., cooperation with the aggressor state, its occupation administration, and/or its armed or paramilitary formations in the military, political, informational, administrative, economic, and labour spheres, have a high degree of public danger because they aim to completely undermine and overthrow the state authority of a country that suffers from aggression. As a result, such actions should lead to criminal liability. The choice of type and degree of punishment, obviously, should depend on the type of collaboration. After all, for example, domestic and political collaborationism are incomparable things and differ significantly in the degree of social danger.

Equally important is the study of other changes to the Criminal Code of Ukraine made after the beginning of the armed aggression of the Russian Federation against Ukraine. After all, only conditions of martial law clearly demonstrate the gaps in the domestic criminal code or the need to differentiate responsibility for actions already envisaged in it. However, these changes will be the subject of a separate study.

¹⁵ ‘The Main Intelligence Directorate: The Occupiers are Preparing “Pseudo-referendums” in the South of Ukraine, Bulletins Are Ready’ (*Nvynarnia*, 19 April 2022) <<https://novynarnia.com/2022/04/19/okupanty-gotuyut-psevdoreferendumy-na-pivdni-ukrayiny-vzhe-ye-byuleteni-gur/>> accessed 29 May 2022.

REFERENCES

1. Rubashchenko M, 'Criminal Liability for Collaborationism under the Current Criminal Code of Ukraine' in V Tatsiy, V Borisov (eds), *Social Function of Criminal Law: Problems of Scientific Support, Lawmaking and Law Enforcement* (Materials of the international scientific-practical conference, Pravo 2016) 329-330.
2. Pysmenskyi E, 'Collaborationism in Modern Ukraine as a Criminal Law Problem' (2020) 12 Law of Ukraine 116-128.
3. Havroniuk M, 'Collaborators from the Point of View of the Criminal Code' <<https://racurs.ua/ua/b222-kolaboranti-z-tochki-zoru-kriminalnogo-kodeksu.html>> accessed 29 May 2022.