

## Note from the Field

### Access to Justice Amid War in Ukraine Gateway

# MILITARY JUSTICE OF UKRAINE: PROBLEMS OF DETERMINING THE BODIES THAT GOVERN THE CONSTRUCTION OF ITS SYSTEM

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## ABSTRACT

*The article focuses on the current issue of creating a military justice system for modern law enforcement practice. Based on the idea of military justice as a system of bodies, its composition, in the authors' opinion, should include: (1) the body that carries out the pre-trial investigation and/or supports law and order; (2) the body which oversees legality; (3) military courts.*

*In the article, the authors consider the genesis of the functioning of each of the bodies mentioned above, which, in their opinion, should be part of the military justice system, and emphasize that the idea of creating a system of military justice in this completed form was constantly discussed among scientists and practitioners. However, after Russia's armed aggression against Ukraine began, it ceased to be an idea and should be implemented soon.*

*Considering proposals for the creation of a pre-trial investigation body, which should investigate criminal offences committed by military personnel or other persons belonging to the armed formations as the first stage in the system of criminal justice bodies, the authors give a list of existing risks, which, in particular, include their subordination, which should not affect the independence and impartiality of the investigation.*

*Despite some turbulence in the legislative regulation of the work of the military prosecutor's office in Ukraine, this body, with different names, structural construction, subordination and staffing for a long time, in accordance with the system of the law, carried out the pre-trial investigation of war crimes, supervision over the legality of pre-trial investigation bodies and procedural management of the investigation.*

*Particular attention in the article is paid to arguments supporting the opinion on creating a system of military courts. The reasoning is strengthened by the appeal to the Memorandum of the Council of Europe on military courts and the experience of the functioning of military justice in Switzerland, Poland and Spain.*

## 1 INTRODUCTION

In order to understand the purpose of the authors of this article, the essence of their desire to develop appropriate approaches laid down based on the presented research, extreme relevance, and theoretical and practical significance for Ukrainian legal science, we invite the reader to imagine the situation in which the legal system of Ukraine finds itself. On 24 February 2022, at 5 a.m., residents of many Ukrainian cities and villages woke up to the impacts of multiple launch rocket systems, which were fired, among other things, at civilians of the country, buildings, enterprises, institutions, schools, kindergartens. Russia's full-scale aggression against the sovereign, independent, democratic, social, the rule of law state of Ukraine has begun.

Since the Russian invasion of Ukraine began, almost a third of Ukrainians have been forced to leave their homes. According to the United Nations, this is the most significant crisis of the movement of people in the world today. More than 7.1 million people remain displaced due to the war. An estimated 15.7 million Ukrainians urgently need humanitarian assistance and protection.<sup>5</sup> According to estimates of the Kyiv Institute of Economics, as of 08 June,

<sup>5</sup> See: 'Ukraine Situation: Refugees from Ukraine across Europe' (Office of the United Nations High Commissioner for Refugees (UNHCR) : Official site, 16 June 2022) <C:/Users/asus/Downloads/Ukraine%20situation%20flash%20update%20No%2017%2017%2006%202022.pdf> accessed 01 July 2022.

the total amount of direct losses to the Ukrainian economy from damage and destruction of residential and non-residential buildings and infrastructure is \$ 103.9 billion or UAH 3 trillion.<sup>6</sup>

In the situation of carrying out armed aggression in the territories that were subjected to shelling, where hostilities were conducted, the work of many state institutions, including bodies and institutions of justice, was paralyzed. Judges, among whom the vast majority are women, stopped their work and went to safe cities, including abroad, saving their lives and the lives of their families.

On 24 February, the President of Ukraine declared martial law in the state. However, the justice system had to work since the statistics of committed military and war crimes were added to the traditional statistics of cases to be considered by Ukrainian courts. In addition, law enforcement agencies did not stop carrying out pre-trial investigations that required judicial control over the rights and legitimate interests of persons involved in criminal proceedings, comply with reasonable deadlines or obtain admissible evidence during investigative (search) or covert investigative (search) actions. Each fact of not only the death or injury of people but also the destruction of housing, moving property or structures, as a result of any shelling of the aggressor is entered into the Unified Register of Pre-trial Investigations on the fact of violation of the laws and customs of war, and a pre-trial investigation is carried out, the result of which should be bringing the perpetrators to justice.

In the context of armed aggression in Ukraine, the issue of completing the creation of a system of military justice was significantly actualized, and it ceased to be controversial and turned into a direction toward concrete actions.

Attempts to build a slender effective structure of military justice existed before, starting from 2014. However, the reforms were not completed, which significantly affected the maintenance of legality in the state after 24 February 2022, in the territories where the fighting took place or close to them.

In part, this situation is understandable because any state builds its legal system, first of all, for a peaceful life and good neighbourly coexistence with other countries. But history demonstrates the need for a pragmatic attitude to the institutions of military justice, which, like the armed forces of the state, must carry out their functional activities, taking into account the existing risks, be able to predict them, manage them or neutralize them.

The victory of Ukraine is one of the fundamental conditions for the realization of the right of the Ukrainian people to self-determination, preservation of statehood and ensuring sustainable development of Ukraine based on the highest values of democracy, the rule of law, freedom, dignity, security and prosperity of citizens of all nationalities. Under Part 1 Art. 17 of the Constitution of Ukraine, the protection of the sovereignty and territorial integrity of Ukraine is the most crucial function of the state, the work of the entire Ukrainian people. The implementation of this norm of the Constitution of Ukraine in conditions of martial law, imbalance of martial law of Ukraine and Russia causes the need to mobilize all state resources, all institutions that, realizing their functional potential, can contribute to the victory. In this context, the creation of a system of justice capable of ensuring the right to a fair trial, which is guaranteed by Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Legality in the State. At the same time, the realities of

6 See: Project 'Russia will pay', KSE Institute (analytical center at the Kyiv School of Economics) together with the Office of the President of Ukraine, the Ministry of Economy, the Ministry of Reintegration of the Temporarily Occupied Territories, the Ministry of Infrastructure of Ukraine, the Ministry of Communities and Territories Development of Ukraine <<https://kse.ua/ua/russia-will-pay/>> accessed 01 June 2022.

today dictate the need to look from a different perspective at the justice system, which, under martial law, is forced to overcome the challenges it faces.<sup>7 8</sup>

## 2. MILITARY JUSTICE SYSTEMS IN UKRAINE: DE LEGA LATA AND DE LEGA FERENDA

There are many definitions of a 'system' in science. Despite the differences in wording, all of them, in one way or another, rely on the translation of the Greek word 'systema' – a whole consisting of parts, a set of elements that are in certain relationships with each other, interact (function) with each other, form a certain integrity, interact with the environment as a whole and obtain new properties that are absent from these objects if they exist separately.

Consideration of justice as a system serves as a conceptual basis, which the authors lay down in the study.

Speaking about the construction of a system of military justice, we proceed from the paradigmatic position that these are connected by relations of subordination and coordination of law enforcement agencies and judicial bodies, the substantive competence of which arises regarding the activities of the Armed Forces of Ukraine and other paramilitary groups, as well as other persons who have the status of a soldier. Based on the idea of military justice as a system of bodies, its composition, in our opinion, should include: (1) the body that carries out the pre-trial investigation and/or supports law and order; (2) the body which oversees legality; (3) military courts.

2.1. *The Military Law Enforcement Service in Ukraine* in the Armed Forces of Ukraine was established in 2002 and operates on the basis of the Law of Ukraine of the same name.<sup>9</sup> In accordance with Art. 1 of the said Law of Ukraine, military law enforcement service, a special law enforcement formation within the Armed Forces of Ukraine, is designed to ensure law and order and military discipline among service members of the Armed Forces of Ukraine in places of deployment of military units, in military educational institutions, institutions and organizations, military towns, on the streets and in public places; to prevent criminal and other offences in the Armed Forces of Ukraine, their termination; to protect the life, health, rights and legitimate interests of service members, conscripts during the passage of their trainings, employees of the Armed Forces of Ukraine, as well as to protect the property of the Armed Forces of Ukraine from theft and other unlawful encroachments, as well as to participate in countering sabotage manifestations and terrorist acts at military facilities.

The military law enforcement services in the Armed Forces of Ukraine, among others, are entrusted with the following essential tasks: a) identifying the causes, prerequisites and circumstances of criminal and other offenses committed in military units and military facilities; search for persons who voluntarily left military units (places of service); b) prevention of commission and termination of criminal and other offenses in the Armed Forces of Ukraine; c) participation in the protection of military facilities and ensuring public order and military discipline among military personnel in places of deployment of military units, military towns, on the streets and in public places; d) execution in cases stipulated

7 Constitution of Ukraine: Law of Ukraine No 27-IX of 28 June 1996 <[https://zakon.rada.gov.ua/laws/show/254\\_k/96-vr#Text](https://zakon.rada.gov.ua/laws/show/254_k/96-vr#Text)> accessed 13 June 2022.

8 The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 <[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)> accessed 13 June 2022.

9 The Law of Ukraine 'On the Military Law Enforcement Service in the Armed Forces of Ukraine' of 7 March, 2002 No 3099-III (as amended on 1 April 2022) (Official website of the Verkhovna Rada of Ukraine: official web portal) <<https://zakon.rada.gov.ua/laws/show/3099-14#Text>> accessed 13 June 2022.

by law of decisions on the detention of military personnel in the guardroom; e) ensuring the execution of criminal penalties against military personnel who, according to the court verdict, are sentenced to be detained in a disciplinary battalion; f) participation in countering sabotage and terrorist acts at military facilities, etc.

When deciding on the introduction of martial law or state of emergency regime in Ukraine or some of its localities, the Law Enforcement Service is additionally tasked with: a) participation in the fight against hostile sabotage and reconnaissance groups on the territory of Ukraine; b) organization of the collection, escort and protection of prisoners of war from the places (localities) where they are held after their capture, to prisoners of war camps or prisoners of war; c) ensuring compliance with the curfew in garrisons; d) protection of military facilities, military towns and their population, assistance in its evacuation; e) restoration and maintenance of order and discipline in military units; f) control over the movement of vehicles and transportation of goods of the Armed Forces of Ukraine (Art. 3 of the Law of Ukraine).

It can be concluded that the Military Law Enforcement Service is not empowered to carry out the pre-trial investigation of military criminal offenses. However, for a long time, a proposal was discussed to create military police on its basis, which would have these powers, or another pre-trial investigation body.

At the same time, on 17 September 2021 by the Decree of the President of Ukraine No. 473/2021, the Decision of the National Security and Defense Council of Ukraine 'On the Strategic Defense Bulletin of Ukraine' was put into effect.<sup>10</sup> For this purpose, it was planned to develop the capabilities of investigative units and units of operational and investigative activities of the Military Police; develop the capabilities of the military police management bodies to ensure law and order and antiterrorist support at potentially dangerous objects in the system of the Ministry of Defense of Ukraine; achieve the compatibility of the Military Police with the relevant structures of NATO member states.

Attempts to create military police have repeatedly ended with the introduction of relevant draft laws to the Verkhovna Rada of Ukraine. For example, the Draft Law 'On Military Police' was developed in 2015, but it was not even included in the agenda.<sup>11</sup> In the memo, the developers of the draft law indicated that they relied on the fact that in the vast majority of the leading countries of Europe and the world, there are military police, law enforcement agencies with military status (military police, carabinieri, gendarmerie) operate in the structure of their armed forces, subordinate to the Minister of Defense or have dual subordination, endowed with broad powers to identify, stop and investigate crimes committed by military personnel, and perform police and administrative functions in the interests of the whole country.<sup>12</sup> During the adoption of the new Criminal Procedure Code in 2012, investigative units of the Law Enforcement Service were not created. As a result, at this time in the state, there is a situation when, in fact, in combat conditions, during the execution of tasks in the area of the antiterrorist operation, the current system of pre-trial investigation bodies does not provide an effective and prompt investigation of mass war crimes, which adversely affects the state of readiness of military units and units

10 Decree of the President of Ukraine №473/2021 About commissioning Decision of the National Security and Defense Council of Ukraine of August 20, 2021 'On the Strategic Defense Bulletin of Ukraine'. See. : Official website of the President of Ukraine. Electronic resource. URL: <https://www.president.gov.ua/documents/4732021-40121> accessed 13 June 2022.

11 See, for example: Draft Law of Ukraine 'On military police' No. 1805 from 21.01.2015 Official website of Verkhovna Rada of Ukraine [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53648](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53648) accessed 01 June 2022.

12 Draft Law of Ukraine 'On Military Police' No. 1805 from 21.01.2015 Official website of Verkhovna Rada of Ukraine [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=53648](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53648) accessed 01 June 2022.

of the Armed Forces of Ukraine and other military formations established in accordance with the laws of Ukraine.<sup>13</sup>

Subsequently, the development of laws on military police was entrusted to the Ministry of Defense of Ukraine, but the relevant units were never created.

After Russia's armed aggression against Ukraine began, it significantly intensified discussing the need to create military police. In particular, the acting head of the Military Law Enforcement Service in the Armed Forces of Ukraine - the head of the Main Directorate of the Military Law Enforcement Service of the Armed Forces of Ukraine, Colonel Volodymyr Hutsol, recently presented the next Law of Ukraine 'On Military Police'. In the report, he noted that during the preparation of the draft law, the experience and laws on the military police of all NATO member states were studied, and as a basis in the development of the concept of military police, an example of Poland was taken. "The management in Poland is carried out by their head of the defence ministry, and we lay down the norms for management with coordination, which will be carried out by the Minister of Defense. In addition, there will be an increase in the powers of the military police, namely, the functions of pre-trial investigation and operational-search activities have been added."<sup>14</sup>

The main difference between the military police and the existing Military Law Enforcement Service lies in the expansion of its competence to investigate crimes committed by military personnel and/or war crimes.

At the same time, empowering military police to conduct pre-trial investigations is associated with certain risks.

First, it should be borne in mind that determining the jurisdiction of the military police can create a conflict with the competence of the State Bureau of Investigation and the Security Service of Ukraine. Of course, investigating crimes committed by military personnel would be more effective in carrying out pre-trial investigation by the military police. However, the impartiality of the investigation carried out by the military police may be threatened since the military police and its objects of activity belong to the Ministry of Defence's management sphere.

The second problem that may be avoided when introducing the military police as a pre-trial investigation body in the military justice system is that the creation of this body may not correspond to doctrinal ideas regarding ensuring the impartiality of the exercise of its powers by such a pre-trial investigation body. The functions of the pre-trial investigation body are: 1) out-of-departmental status; 2) independence from any public authorities, local self-government bodies, public associations and organizations; 3) full institutional independence of the investigative function performed. It is in this combination that the objectivity and impartiality of the investigation should be ensured. This was also indicated by the Constitutional Court of Ukraine in the Decision of 24 April 2018, in the case on the constitutional submission of the Ukrainian Parliament Commissioner for Human Rights regarding the conformity (constitutionality) of part six of Art. 216 of the CrimPC of Ukraine. In its legal position, the constitutional jurisdiction body noted that

13 Criminal Procedure Code of Ukraine of April 13, 2012 Official web-portal of the Verkhovna Rada of Ukraine. <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 01 June 2022.

14 "The law 'On Military Police' is needed today": Briefing of Acting Head of the Military Law Enforcement Service in the Armed Forces of Ukraine — Head of the Main Directorate of the Military Law Enforcement Service of the Armed Forces of Ukraine Colonel Volodymyr Hutsola (Armiya Inform, 15 February 2022) <<https://armyinform.com.ua/2022/02/15/zakon-pro-vijskovu-policziyu-potriben-uzhe-sogodni/>> accessed 01 June 2022.



the independence of the investigation of violations of human rights to life and respect for human dignity... means, in particular, that from the point of view of an impartial observer there should not be any doubts about the institutional (hierarchical) independence of the state body (its officials), authorized to carry out an official investigation... In this aspect, the independence of the investigation cannot be achieved if the competent public authority (its officials) is institutionally dependent on the body (its officials) to which the system is subordinated.<sup>15</sup>

As expected, the military police should be directed and coordinated by the Minister of Defense of Ukraine. Therefore, in this context, the subordination of the new pre-trial investigation body is of great importance to ensure the pre-trial investigation's independence and impartiality.<sup>16</sup>

*2.2. Military Prosecutor's Office.* Legislation on the military prosecutor's office was constantly in the zone of turbulence, relatively negatively affecting personnel, and even sometimes the results of actual functioning of this body. The military prosecutor's office was included in the system of the Ukrainian prosecutor's office by the new law of Ukraine 'On the Prosecutor's Office' of 29 November 1993. In 2012, the military prosecutor's office was liquidated after the liquidation of military courts. Instead, the direction of work of the prosecutor's office in the military and defence sphere was singled out.

The armed conflict of 2014 again forced scientists and practitioners to return to the issue of returning to military prosecutor's offices, whose competence included the pre-trial investigation of violations of the laws and customs of war. The following figures show the effectiveness of the work of the military prosecutor's office:

'During the period from September 2014 to April 2019, prosecutorial and investigative employees of military prosecutor's offices investigated 98,500 criminal proceedings, in 30,066 of them the pre-trial investigation was completed, including in 20,519 cases by sending indictments to the court. In the process of pre-trial investigation, 509.3 million UAH were reimbursed. During the work on representing the state's interests and citizens in the courts, the courts satisfied 5,856 lawsuits brought by prosecutors for a total amount of 2,367.4 million UAH. The defendants voluntarily reimbursed 302 million UAH, executed court decisions in the amount of 2716.8 million UAH, the area of returned land is 61,622 hectares. According to the materials of military prosecutors, a pre-trial investigations were launched in 6,114 criminal proceedings. Four thousand six hundred thirty-four protocols on committing administrative offences were drawn up and sent to the court; 4,530 of them were considered by the courts today. While maintaining the public prosecution, military prosecutors took part in the trial of 18,433 criminal proceedings, in respect of which 12,995 verdicts were adopted.<sup>17</sup>

- 15 Decision of the Constitutional Court of Ukraine of 24 April 2018 No 3-p/2018 in the case No 1-22/2018 (762/17) by the constitutional submission of the Verkhovna Rada Commissioner for Human Rights on the conformity (constitutionality) of part six of Art. 216 of the CrimPC of Ukraine (*Official website of the Verkhovna Rada of Ukraine*) <<https://zakon.rada.gov.ua/laws/show/v003p710-18#Text>> accessed 01 June 2022.
- 16 A Shoshura, 'The trial of the military should also be military' (*Official website of the Specialized Prosecutor's Office in the military and defense sphere of the Central region*, 17 November 2021) <[https://vppnr.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=307997&fp=20](https://vppnr.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=307997&fp=20)> accessed 01 June 2022. See also, MZ Lutsiv, 'As for the creation of an effective system of military justice bodies in Ukraine' (*Ukrainske Pravo*, 26 May 2022) <<https://ukrainepravo.com/scientific-thought/naukova-dumka/dostvorenniya-v-ukrayini-diyevoyi-systemy-organiv-viyskovoyi-yustytysiy/>> accessed 01 June 2022.
- 17 V Vdovitchenko, 'Military Justice System As Part Of The Military Organization Of Ukraine' (2019) 2 (60) *Bulletin of the National Academy of Prosecutor's Office of Ukraine* 16-27.

However, on 19 September 2019, the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine regarding Priority Measures for the Reform of the Prosecutor's Office' eliminated the military prosecutor's office, the regional prosecutor's offices, leaving district prosecutor's offices only in case of successful certification. Also, in case of successful certification by prosecutors and investigators of military prosecutor's offices, who are servicemen, the issue of their dismissal is resolved within the framework of the Law of Ukraine 'On Military Duty and Military Service', and those who undergo military service under the contract are granted the right to terminate the contract early. Thus, the demilitarization of military prosecutor's offices took place, and the reform processes did not even take into account the specifics of the activities of its personnel and the fact that many military prosecutors apart from general law competences, also had knowledge in the field of military law, as well as regarding tactics and combat use of troops, possessed special methods for detecting and investigating crimes in the military sphere.<sup>18 19</sup>

Also, the Law mentioned above gave the Prosecutor General the right, if necessary, to create specialized prosecutor's offices as a structural unit of the Office of the Prosecutor General, regional or district prosecutor's offices.

Exercising the powers granted, the Order of the Prosecutor General established: 1) Specialized Prosecutor's Office in the military and defense sphere of the Central region, which ensures the implementation of the functions of the prosecutor's office on the territory of Vinnytsia, Zhytomyr, Kyiv, Poltava, Sumy, Cherkasy, Chernihiv regions and the city of Kyiv; 2) Specialized Prosecutor's Office in the military and defense sphere of the Southern region (as a regional prosecutor's office), which ensures the implementation of the functions of the prosecutor's office on the territory of Dnipropetrovsk, Zaporizhzhia, Kirovograd, Mykolayiv, Odesa, Kherson regions; 3) Specialized Prosecutor's Office in the military and defense sphere of the Western region' (as the regional prosecutor's office), which is entrusted with the implementation of the functions of the prosecutor's office in accordance with the competence on the territory of Volyn, Zakarpattia, Ivano-Frankivsk, Lviv, Khmelnytsky, Rivne, Ternopil, Chernivtsi regions; 4) Specialized Prosecutor's Office in the military and defense sphere of the joint forces (as a regional prosecutor's office), which ensures the implementation of the functions of the prosecutor's office on the territory of Donetsk, Luhansk and Kharkiv regions.<sup>20</sup>

The list of district prosecutor's offices in the military and defense sphere was approved in accordance with the order of the Prosecutor General of 02 March 21 No. 54 'On Certain Issues of Ensuring the Start of Work of Specialized Prosecutor's Offices in the Military and Defense Sphere (as District Prosecutor's Offices)'.<sup>21</sup>

However, during the military prosecutor's office liquidation, social guarantees were also eliminated to prosecutors, some of whom were exercising their functional duties in conditions of essential hostilities.

An extensive review of the transformation of legislation on the creation of a specialized prosecutor's office illustrates the expediency of the existence of this specialization. It should

18 The Law of Ukraine of 19 September No 113-IX 'On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecutor's Office' <<https://zakon.rada.gov.ua/laws/show/113-20#Text>> accessed 01 June 2022.

19 Ibid.

20 Order of the Prosecutor General 's Office No 66 'On Certain Issues of Ensuring the Start of Work of Specialized Prosecutor's Offices in the Military and Defense Sphere (as Regional Prosecutor's Offices)' <https://zakon.rada.gov.ua/laws/show/v0066905-20#Text> accessed 01 June 2022.

21 Order of the Prosecutor General of Ukraine of 2 May 2021 No 54 'On Certain Issues of Ensuring the Start of Work of Specialized Prosecutor's Offices in the Military and Defense Sphere (as District Prosecutor's Offices)' (Prosecutor General's Office of Ukraine Official) <[https://old.gp.gov.ua/ua/ngpu2019.html?\\_m=publications&\\_t=rec&id=286098&s=print](https://old.gp.gov.ua/ua/ngpu2019.html?_m=publications&_t=rec&id=286098&s=print)> accessed 01 June 2022.



be agreed with the opinion that the existence and further development of the military prosecutor's office is due to the need for specialization of prosecutorial supervision, since the military prosecutor's office is one of the types of specialized prosecutor's offices operating in special conditions of functioning of military formations stationed on an extraterritorial principle, specific legal relations regulated by combined arms statutes and acts of military management; the needs of proper supervision over the implementation of the Armed Forces of Ukraine and other military formations of their powers exclusively within the limits determined by the Constitution and the relevant laws of Ukraine; the presence of a special jurisdiction of criminal cases (for war crimes); ensuring the implementation of prosecutorial powers during military formations of antiterrorist measures on the territory of Ukraine, providing military assistance to other states, in case of participation in international military cooperation and in international peacekeeping operations, as well as in a combat situation; observance of the legality of military formations involved in the implementation of measures to ensure the legal regime of martial law and state of emergency, strengthening the protection of the state border of Ukraine and the exclusive (maritime) economic zone, the continental shelf of Ukraine and their legal registration, elimination of the consequences of natural and man-made emergencies.<sup>22</sup>

3. *Military courts.* As of today, the system of military courts has not been created in Ukraine. However, the proposals about the need to introduce it are constantly heard. The number of opinions in support of the creation of a system of military justice has increased significantly recently at the highest scientific level, emphasizing the fallacy of the decision regarding the liquidation of military courts. In particular, on 24 November 2015, a conference was held at the National Institute of Legislation of the Verkhovna Rada of Ukraine 'Military Justice in modern conditions: Prospects for Development and Reformation'<sup>23</sup>; the Roundtable meeting 'Military Justice in Ukraine: Actual Problems of Organization and Implementation' was held on 6 June 2017 at V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine. Moreover, the creation of military justice was supported by the first deputy head of the Union of Lawyers of Ukraine, the first Ombudsman of Ukraine, Nina Karpacheva, who took part in the roundtable meeting and noted that<sup>24</sup>

the issue of the restoration of military justice is extremely relevant, because the liquidation of military courts in 2010 was a serious mistake... The majority of members of the Executive Committee of the Union of Lawyers of Ukraine are in favour of the restoration of military justice. This coincides with the position of the General Staff of the Armed Forces of Ukraine, the Military Prosecutor's Office, Yaroslav the Wise National University, the Verkhovna Rada of Ukraine and representatives of civil society. The liquidation of military justice led to a decrease in the level and guarantees of legal protection of servicemen, access to military state secrets for too wide a range of persons, and in the conditions of military operations in the east of the country, these issues become of special importance.

The workshop of the Geneva Centre for the Democratic Control of Armed Forces (DCAF) 'Legal Frame of the Security Sector Reform' was held on 05 October 2017 at Yaroslav Mudryi

22 Lutsiv (n 16).

23 'Military Justice into Modern Conditions: Prospects Development and reforming': roundtable meeting, 24 November 2015 <<http://kubg.edu.ua/struktura/pidrozdili/yurydychna-klinika-astreya/zakhody/3620-viiskova-iustytisia-v-suchasnykh-umovakh-perspektyvy-rozvytku-ta-reformuvannia-kruhlyi-stil-shcho-vidbuvsia-v-instytutu-zakonodavstva-verkhovnoi-rady-ukrainy-24-lystopada-2015-r-za-uchasti-yuk-astreya.html>> accessed 01 June 2022.

24 The Recovery of Military Courts – a Priority step in the Reform of Military Justice (*Ukrainske Pravo*, 19 June 2017) <<http://www.ukrainepravo.com/scientific-thought/pravova-pozytsiya/vidnovlennya-viyskovikh-sudiv-prioritetniy-krok-u-reformuvanni-viyskovoi-yustitsii/>> accessed 01 June 2022.

University<sup>25</sup>. The round table 'Military Justice of partner states aiming at protecting military personnel' was held on 17 February 2018 with the participation of the Armed Forces of Ukraine.<sup>26</sup> On 26 January 2022, 'Certain issues of legislative regulation of the creation of a system of military justice' were discussed in Kharkiv<sup>27</sup>. Almost all participants of these events supported the restoration of the military justice system in Ukraine.

This issue became acute after Russia's armed aggression against Ukraine began. According to practitioners,

Today, a very popular statement in team building processes is 'The manager needs to develop empathy for subordinates'. A military judge will have a 'proper' empathy for the military. He/she will understand the motive of the crime committed and the influence of external factors (combat situation, relations in the team). The court is guided not only exclusively by law but also by its convictions. If one knows the peculiarities of the guard service and its nuances, if one knows how military rituals go, this is all important for one's own conviction. Therefore, the trial of the military should also be military.<sup>28</sup>

The monitoring of military justice, which the Committee on Human Rights conducted, gives grounds to point out that there are three main models of building a system of military courts worldwide. *The first model* exists in states where military courts operate permanently, both in peacetime and during hostilities.

*The second model* operates in those states where there is a 'mixed jurisdiction', that is, military 'courts' operate on a permanent basis in general civil courts. Moreover, this is not a full-fledged link of the judicial system, but it comprises only chambers, departments, council offices, formed by officers with legal education.

*Third model* is applied in those states where military courts begin to exercise their powers during the war or exercise them if the state has military bases abroad.<sup>29</sup>

Some states, such as Australia and Ukraine, are at the stage of reforming the military justice system, discussing these issues and getting acquainted with the experience of other states.<sup>30</sup>

Let us turn to the experience of the of military justice functioning in some European countries, which is necessary to conclude that military justice should be introduced in Ukraine.

25 Legal Frame of the Security Sector Reform <<http://legalforum.nlu.edu.ua/en/events/workshop-of-the-geneva-centre-for-the-democratic-control-of-armed-forces-dcaf-legal-frame-of-the-security-sector-reform-october-5th/>> accessed 01 June 2022.

26 'Military Justice Of Partner States Aiming At Protecting Military Personnel' (*Official site of the Ministry of Defense of Ukraine*) <<http://www.mil.gov.ua/news/2018/01/17/v-komanduvanni-suhoputnih-vijsk-zs-ukraini-vidbuvsya-kruglij-stil-za-temoju-vijskova-yusticziya-krain-partneriv-spryamovana-nazahist-vijskovosluzhbovcziv/>> accessed 01 June 2022.

27 Round table 'Certain issues of legislative regulation of the creation of a system of military justice' Yaroslavl the Wise National Law University <<https://nlu.edu.ua/perspektyvy-vijskovoyi-yustycziyi-v-ukrayini-obgovoryly-na-kruglomu-stoli/>> accessed 01 June 2022.

28 A Shoshura A. The trial of the military should also be military. Official website of the Specialized Prosecutor's Office in the military and defense sphere of the Central region URL: [https://vppnr.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&tid=307997&fp=20](https://vppnr.gp.gov.ua/ua/news.html?_m=publications&_t=rec&tid=307997&fp=20) accessed 01 June 2022.

29 F Andreu-Guzmán, 'Fuero militar y derecho internacional : los tribunales militares y las graves violaciones a los' (Comisión Colombiana de Juristas 2003) 137-149; BJ Kyle, AG Reiter., *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy: The Politics of Military Justice* (Routledge 2021).

30 D Denton, 'A proposed new military justice regime for the Australian Defence Force during peacetime and in time of war' (The University of Western Australia 2020) < <https://doi.org/10.26182/5e780a9802ff3>> accessed 01 June 2022; D Denton, 'The Australian Military Justice System: History, Organisation and Disciplinary Structure',(2016) 6 (1) Victoria University Law and Justice Journal 27-36.

In particular, Switzerland has not fought wars on its own territory for more than 200 years but has not yet abandoned the military justice system. The Swiss legislator proceeds from the fact that for the effective implementation of military proceedings, the legal knowledge alone is not enough- it is necessary to know special military statutes that future lawyers do not study in classical universities when obtaining legal education, as well as the availability of sufficient experience in military service, which must be known from the inside. The Attorney General of the Canton of Bern, a lecturer in Lucernes, and the Academy of Prosecutors, points to this argument as the main one for the supporter of preserving military justice in Switzerland.<sup>31</sup>

The peculiarity of The Swiss Justice is that the primary sources of its functioning are the Military Criminal Procedure Code (literally - Military Criminal Procedure - Militärstrafprozess) of 23 March 1979, Decree on the implementation of military criminal proceedings of 24 October 1979, the Federal Law on The Army and Military Administration (<sup>32</sup> <sup>33</sup>*Bundesgesetz über die Armee und die Militärverwaltung*) of 3 February 1995 and the Military Criminal Code.<sup>34,35</sup>

The system of courts in Switzerland has three links, as is customary in most western European countries, which is preserved in systems of military justice; 2) military appellate courts that consider appeals against verdicts and other decisions of garrison courts. There are three such courts in Switzerland - French-speaking, German-speaking and Italian-speaking; 3) military court of cassation, which considers cassation complaints.

In the Swiss military justice system, there is a prosecutor called an auditor and an investigating judge who investigates cases to be considered in a garrison court. The investigating judge, a member of the garrison court is the only official authorized to conduct a preliminary investigation. The investigating judge investigates independently, without interfering in his/her activities on the part of the head or the prosecutor's office; in turn, the prosecutor (auditor) carries out procedural supervision over the activities of the investigating judge.

The system of military justice bodies of Spain has the following structure. The Spanish Constitution declares that 'the principle of unity of jurisdiction is the basis for the organization and functioning of courts'. Accordingly, it establishes that 'the law provides for the exercise of military jurisdiction strictly in the military sphere and in cases of state of siege (martial law), in accordance with the principles of the Constitution' (Para. 5 of Art. 117).<sup>36</sup>

Thus, military justice in Spain is a constitutionally enshrined institution integrated into the judiciary. Such integration was achieved by the creation of another (fifth) chamber – the Military chamber in the Supreme Court, which 'is the highest judicial body in all branches

31 MA Fels, 'Militärjustiz aus der Sicht der zivilen Strafverfolgungsbehörden', in Jusletter (13. Mai 2019) <[https://jusletter.weblaw.ch/dam/publicationssystem/articles/jusletter/2019/979/openaccess/militarjustiz-aus-de\\_11f0de8210/Jusletter\\_militarjustiz-aus-de\\_11f0de8210\\_de.pdf](https://jusletter.weblaw.ch/dam/publicationssystem/articles/jusletter/2019/979/openaccess/militarjustiz-aus-de_11f0de8210/Jusletter_militarjustiz-aus-de_11f0de8210_de.pdf)> accessed 01 June 2022.

32 Militärstrafprozess (MStP) vom 23. März 1979 (Stand am 1. Januar 2017) <<https://www.admin.ch/opc/de/classified-compilation/19790061/201701010000/322.1.pdf>> accessed 01 June 2022.

33 Bundesgesetz über die Armee und die Militärverwaltung < <https://www.admin.ch/opc/de/classified-compilation/19950010/index.html>> accessed 01 June 2022.

34 Bundesgesetz über die Armee und die Militärverwaltung vom 3. Februar 1995 (Stand am 1. Januar 2022) < <https://www.admin.ch/opc/de/classified-compilation/19950010/index.html>> accessed 01 June 2022.

35 Swiss Criminal Code of 21 December 1937 (Status as of 1 June 2022) < [https://www.fedlex.admin.ch/eli/cc/54/757\\_781\\_799/en](https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en)> accessed 01 June 2022.

36 Spanish Constitution of 1978 <[https://www.lamoncloa.gob.es/documents/constitucion\\_inglescorregido.pdf](https://www.lamoncloa.gob.es/documents/constitucion_inglescorregido.pdf)> accessed 01 June 2022.

of justice, except for provisions relating to constitutional guarantees' (Para. 1 of Art. 123 of the Spanish Constitution).<sup>37</sup>

In the second half of the 80s of the twentieth century, after the entry into force of the Constitution, there was a significant reform of military justice, which culminated in the creation of a specialized jurisdiction in which the exercise of the judiciary is carried out exclusively by military courts, which, in accordance with Art. 1 of The 4/1987 Act is 'an integral part of the judiciary.' This connection is primarily because the Supreme Court (as the highest ordinary court) is also the highest court of military justice. That is, a special and unique jurisdiction was created to consider cases in the purely military sphere, consisting of:<sup>38</sup>

- Fifth Military Chamber of the Supreme Court (Sala Quinta de lo Militar del Tribunal Supremo);
- Central Military Court (Tribunal Militar Central);
- Territorial Military Courts (los Tribunales Militares Territoriales).<sup>39</sup>

The structure of military courts is the same in peacetime and wartime. In peacetime, the jurisdiction of military justice extends to offenses provided for by the Military Criminal Code (for example, treason, espionage). In addition, in peacetime, Spanish troops stationed abroad were also subject to the jurisdiction of military courts. Of course, military courts' competence is significantly expanded during military operations.

An essential difference between the military courts of Spain is that, depending on the military rank of the accused, a competent court is determined, which will be the court of the first instance. For example, for non-commissioned officers and junior officers, the court of the first instance will be the Territorial Military Court, and for generals – the Military Chamber of the Supreme Court. The appellate court within the framework of military justice is not provided. At the same time, convicted persons can file a cassation appeal to the military chamber of the Supreme Court, except for generals whom the Military Chamber convicted in the first and last instance.

In addition to the courts, the system of bodies of military jurisdiction includes the military legal prosecutor's office, which, under Art. 12 of Act 50/1981, incorporated into the public prosecutor's office and acts under the Spanish Attorney General (Art. 87 of Act 4/1987)<sup>40</sup>

In accordance with Art. 88 of law 4/1987 in the field of military jurisdiction, the Military Legal Prosecutor's Office promotes the action of justice and will act in defense of the legality and rights and interests protected by law, ex officio or on demand. Their functions are very strictly limited exclusively by competence within military jurisdiction.

The judicial police, as a body of military jurisdiction, within the powers established by law, carries out 'investigation of crimes, detection and delivery of the offender to military judicial bodies and military legal prosecutors' (Art. 86 of Law 4/1987).

37 Spanish Constitution of 1978 <[https://www.lamoncloa.gob.es/documents/constitucion\\_inglescorregido.pdf](https://www.lamoncloa.gob.es/documents/constitucion_inglescorregido.pdf)> accessed 01 June 2022.

38 A number of laws regulating the activities of military jurisdiction bodies were adopted, in particular: Ley Orgánica 4/1987, de 15 de julio, de la Competencia y Organización de la Jurisdicción Militar. <<https://www.boe.es/eli/es/lo/1987/07/15/4/con>> accessed 01 June 2022 ; Ley Orgánica 2/1989, de 13 de abril, Procesal Militar. <<https://www.boe.es/eli/es/lo/1989/04/13/2/con>> accessed 01 June 2022 ; Ley Orgánica 14/2015, de 14 de octubre, del Código Penal Militar <<https://www.boe.es/eli/es/lo/2015/10/14/14/con>> accessed 01 June 2022 ; Ley 44/1998, de 15 de diciembre, de Planta y Organización Territorial de la Jurisdicción Militar <<https://www.boe.es/eli/es/l/1998/12/15/44/con>> accessed 01 June 2022.

39 Manual básico de tribunales y procedimientos militares. Ministerio de Defensa. Tribunal Militar Central. 2014. 456

40 Ley 50/1981, de 30 de diciembre, por la que se regula el Estatuto Orgánico del Ministerio Fiscal. <<https://www.boe.es/eli/es/l/1981/12/30/50/con>> accessed 01 June 2022.

From the point of view of building a military justice system, it is also advisable to turn to the experience of Poland, where military courts carry out justice in criminal cases, as well as the military prosecutor's office and military police which have been established and is fully operational.

The composition of the Military Courts, their functions and powers are provided for by the Constitution of the Republic of Poland, the Law 'On the System of Military Courts' of 21 August 1997, and the Law 'On the System of General Courts' of 27 July 2001.<sup>41 42</sup>

In particular, in accordance with Art. 175 of the Constitution of Poland: 'Justice in the Republic of Poland is exercised by the Supreme Court, general courts, administrative courts and military courts. A special court or simplified proceedings may be opened only during the war.'<sup>43</sup> As for criminal proceedings, the jurisdiction of military courts is provided by the Criminal Procedure Code of Poland.

According to the law, military courts administer justice in criminal cases when committing a crime by a person serving in the Armed Forces of the Republic of Poland, as well as other persons, if provided for by law.

In accordance with this law, the system of military courts consists of military district courts and military garrison courts (Art. 3). In Poland, there are ten garrison courts, which act as courts of first instance, and two military district courts, which act as courts of appeal. Geographically, they are located in Warsaw and Poznan. At the same time, military district courts consider cases as courts of the first instance in some categories of cases.

The independence of the judiciary guarantees that the heads of military garrison and district courts and their deputies are appointed and dismissed from among the judges of these courts by the Minister of Justice of the Republic of Poland. The Minister of Defense only agrees to this. In accordance with Art. 5, 18 'On the System of Military Courts') control over the activities of military courts in the part of court decisions is carried out by the Supreme Court. The Minister of Justice supervises military courts' activities in terms of organization and administrative activities. The minister of national defence oversees the passage of active military service by military personnel of military courts.

The Military Chamber of the Supreme Court of Poland is an appellate court in respect of cases that district courts considered as courts of the first instance, as well as by the cassation instance in all cases considered by the military courts. In addition, the jurisdiction of the Military Chamber includes consideration of cases of disciplinary offences of military judges, military prosecutors, and legal advisers who are military personnel or civil servants of the Armed Forces of the Republic.

The civil authorities of the state control the activities of military courts. Thus, the Minister of National Protection, with the consent of the Minister of Justice, after agreeing with the State Council of Justice, by adopting an order, creates and liquidates military courts, as well as determines their location and other characteristics, aiming to rationally organize the implementation of military proceedings by establishing the number of courts, their staff, location in accordance with the location of military formations of the Armed Forces (paras. 3-4 of Art. 3 of the Law 'On the System of Military Courts').

41 Prawo o ustroju sądów wojskowych. Ustawa z dnia 21 sierpnia 1997 r. <<https://lexlege.pl/prawo-o-ustroju-sadow-wojskowych/>> accessed 01 June 2022.

42 Prawo o ustroju sądów powszechnych. Ustawa z dnia 27 lipca 2001 r. - Prawo o ustroju sądów powszechnych < <https://lexlege.pl/prawo-o-ustroju-sadow-powszechnych/>> accessed 01 June 2022.

43 Konstytucja Rzeczypospolitej Polskiej. Tekst uchwalony w dniu 2 kwietnia 1997 r. przez Zgromadzenie Narodowe < <https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>> accessed 01 June 2022.

At the same time, the principle of access to justice, reducing the duration of court proceedings and their consideration within a reasonable period, and guaranteeing the exercise of the right to claim (judicial protection) are being implemented. When making decisions on the formation and location of military courts, the needs of the Armed Forces are also taken into account in the event of a declaration of mobilization and during the war (martial law).

The Supreme Court carries out the review of decisions of military courts, and organizational and administrative supervision belongs to the powers of the Ministry of Justice, which includes the Department of Military Courts.

Judges of the military courts of the Republic of Poland can only be military personnel who undergo active military service.

Thus, the three-level system of courts in Poland, the procedure for their organization and the administration of justice, on the one hand, ensure the realization of the right of military personnel to a fair trial in accordance with international standards. On the other hand, it is devoid of the risks that scientists and practitioners point to as negative factors in the functioning of military courts.

It should be noted that such a system is quite close and understandable for Ukrainian lawyers and, with minor national corrections, can be borrowed in implementing judicial reform in Ukraine.

It is known that in many states, reforms of military justice bodies are currently being carried out<sup>44</sup>. However, it is unconditional that in the context of the implementation of armed aggression imposed in the state of martial law and after the end of hostilities of the post-conflict society, the functioning of the Armed Forces of Ukraine, the number of which is approaching a million, the existence of military justice is vital.

### 3. CONCLUSIONS

The study allows the authors to draw the following conceptual conclusions. Ukraine's victory over the aggressor, the success of protecting Ukraine's national interests, and achieving peace and stability on the European continent, largely depend on the Armed Forces of Ukraine.

Russia's armed aggression and the introduction of martial law have significantly actualized attention to the legal problems associated with the completion of the creation of a full-fledged system of criminal justice bodies, which in tough conditions should maintain law and order, pre-trial investigation of military and war crimes, procedural management of the pre-trial investigation, as well as justice and judicial control, ensuring criminal prosecution of those responsible, preventing violations and procedural terms, ensuring legality in the application of measures to ensure criminal proceedings, the rights and legitimate interests of a person involved in military-criminal justice. The incompleteness of the initiated military justice reform adversely affected law enforcement practice after 24 February 2022 and the beginning of armed aggression against Ukraine.

The above task can be performed only by the systems of military justice, which should include subordinated and coordinated law enforcement agencies and judicial bodies, the substantive competence of which arises regarding the activities of the Armed Forces of

44 D Cotelea, AP Alcántara, C Tempera, M Brach, C Foisseau and GA Ira, under the supervision and guidance of M Blokken, 'The Role of Military Courts Across Europe: A Comparative Understanding of Military Justice Systems' (28 April 28 2020) < <https://finabel.org/the-role-of-military-courts-across-europe-a-comparative-understanding-of-military-justice-systems/> > accessed 01 June 2022.



Ukraine and other paramilitary groups, as well as other persons who have the status of a soldier. Based on the idea of military justice as a system of bodies, its composition, in the authors' opinion, should include: 1) the body that carries out the pre-trial investigation and/or supports law and order; 2) the body to which it oversees legality; (3) military courts.

In the first link of the system of military justice, the bodies should maintain law and order and investigate criminal offenses committed by military personnel or other persons in the armed formations. Moreover, during its creation, risks associated with its subordination should be avoided since being subordinate to the Ministry of Defense of Ukraine can affect the independence and impartiality of persons to investigate.

The second body in the system of military justice should be the one that supervises in the form of procedural guidance on the conduct of the pre-trial investigation by a specialized body of pre-trial investigation of military justice and maintains public prosecution in court for war crimes. Despite some turbulence in the legislative regulation of the work of the prosecutor's office in Ukraine, this body (with different names, structural construction, belonging to military services and staffing) implemented a constitutional function for a long time, in accordance with the powers assigned by law.

The liquidation of military courts was a false step in the reform processes in Ukraine, and it became noticeable during the beginning of Russia's armed aggression against Ukraine. In particular, Switzerland, Poland, Spain and other examples indicate that the closest for Ukraine is the experience of functioning of the military justice in Poland.

The establishment of military courts will ensure the availability of justice competence and professionalism, compliance with the procedural terms of the stage of judicial investigation; reasonable terms of criminal proceedings; effective judicial control over the application of measures to ensure criminal proceedings.

At the same time, it is necessary to take into account the fact that the effective functioning of military courts is possible only if several problems facing the state are solved: 1) the creation of a network of these courts, taking into account the deployment of military facilities; 2) determination of the substantive jurisdiction of these courts, which should be distinguished from the competence of other courts (whether only cases of war crimes or other cases in the military sphere will relate to it); 3) determining the place of these courts in the judicial system, taking into account the principle of instance (whether military courts will act only at the level of courts of the first instance, or include a relatively separate subsystem of courts of different instances); 4) ensuring the independence of military courts and their judges from the military command.

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