

Research Article

REFLECTIONS ON THE LEGAL FEATURES OF COLLABORATIONIST ACTIVITY: THEORY AND PRACTICE IN TERMS OF THE RUSSIAN OCCUPATION OF UKRAINIAN TERRITORY

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ABSTRACT

Background: *In this article, the co-authors contribute to the development of Ukraine's criminal policy on the legal evaluation of collaboration with occupying forces, necessitated by the ongoing Russian Federation occupation of Ukrainian territory. The study, to some extent, continues the scientific discourse that was actualised after the addition of Article 111-1 to the Criminal Code of Ukraine. Its objective is to delineate the generic legal features of collaborationist activity, the responsibility for which was introduced in the Criminal Code of Ukraine in March 2022. By critically analysing the common features of collaboration with the occupier currently reflected in theory and practice, the authors develop a comprehensive vision of collaboration as a phenomenon distinct from high treason and related concepts.*

Methods: *The research methodology employs a blend of general scientific methods of cognition (induction, deduction, analysis, synthesis, abstraction) and historical, linguistic and system-structural research methods. The strategy focuses on identifying the features of collaboration with occupying forces, selecting the most typical and essential traits that differentiate it from related phenomena.*

*Structurally, the article consists of two parts. The first part explores existing definitions of collaboration in literature and identifies the five most frequently mentioned features. The second part involves a detailed analysis of each feature to determine its suitability for characterising collaboration and distinguishing it from related concepts. At the same time, the features set forth in the current criminal law of Ukraine (*lex lata*) are compared against the perspective of the ideal model (*lex ferenda*).*

Results and conclusions: *The phenomenon of collaboration with occupying forces has long been the subject of research by historians, while legal scholars traditionally examine it through the lens of high treason. However, establishing collaborationism as an independent crime in criminal law, along with high treason, requires its conceptualisation. This study demonstrates the impossibility of automatically transposing an array of effective historical research into the legal field. Criminal law requires clarity, unambiguity, and logic. At the same time, de lege lata, Ukrainian criminal law provides for a casuistic and eclectic set of features of collaborationist activity. Therefore, this article analyses each of the features that are commonly used to characterise collaborationism, aiming to improve the normative framework and formulate a clear concept that deserves to exist independently alongside the concept of high treason.*

1 INTRODUCTION

With the criminalisation of collaborationist¹ activities in the Criminal Code of Ukraine,² a quantum leap can be seen in the research of the collaborationism phenomenon, which is important not only for Ukrainian legal science but also serves as a starting point for extensive international studies. Previously, most publications on this topic focused on its retrospective historical analysis. Now, leveraging the substantial contribution of historians, modern researchers can observe the dynamics of this multidimensional and vague phenomenon. Moreover, collaboration with an occupier has been legally institutionalised, securing its official place in legal taxonomy. The Russian-Ukrainian war is not the only modern armed conflict in the world, but its uniqueness lies in the annexation of a large territory with a large population and, for the first time, the codified criminal law of a sovereign state in an ongoing conflict enshrined the concept of collaborationism (legalised its use). This legal recognition prompts the search for differences between collaborationist activities and other forms of high treason and related concepts. Therefore, this study attempts to contribute to the determination of the general legal features of collaborationism that distinguish it from related forms of behaviour.

A serious drawback of the legislative solution to the issue of criminal liability for collaborationist activity in Ukraine is the casuistic approach: Article 111-1 of the Criminal Code of Ukraine describes certain forms (types) of cooperation, while there is no general concept that would define the essential and necessary features of this phenomenon in

1 In this article, the author's translation of the name of the crime is used. The fact is that the Ukrainian legislator literally called the crime "collaborative activity", but in scientific sources this key word does not have a negative connotation and denotes positive activity. Therefore, instead of the adjective "collaborative" we use the adjective "collaborationist". The latter has a pronounced "traitorous" semantics, which actually corresponds to the true meaning of this term.

2 Criminal Code of Ukraine no 2341-III of 5 April 2001 (amended 28 March 2024) <<https://zakon.rada.gov.ua/laws/show/2341-14#Text>> accessed 30 April 2024.

general.³ In this regard, the legislator had to define the features of each form of collaboration separately. As a result, some of the features are duplicated, and some are mentioned in the description of certain forms but ignored in the definition of others. This approach has led to several collisions, ambiguities and heated debates among theorists and practitioners.

Therefore, determining the generic features of collaborationist activity may seem difficult and even unsolvable. However, it is necessary to move in this direction. Only clarifying all mandatory and essential features of criminalised collaborationism can allow us to correct the current drawbacks and provide greater clarity to criminal law policy in this area.

In general, the semantics of the word "collaboration" is neither positive nor negative, good or bad, until someone decides that this is so.⁴ In the French dictionary, the word "collaboration" has three meanings from the broadest to the narrowest: 1) cooperation, participation in work with another, 2) a policy of active cooperation with an enemy occupier, 3) the policy of cooperation with Germany by the Vichy government.⁵ In English, the primary meaning of this word is usually positive (although it can also be negative) – "the situation of two or more people working together to create or achieve the same thing", and the second one is special and exclusively negative – "the situation of people working with an enemy who has taken control of their country".⁶ Instead, "collaborationism" has an exclusively negative "traitorous" meaning.⁷ In the modern dictionary of the Ukrainian language, the words "collaboration" and "collaborationism" (adopted from other languages) are considered to be synonyms and identified exclusively negatively – as cooperation with the enemies of your state in the interests of the enemy invader to the detriment of your state.⁸

In the literature, even before the Criminal Code of Ukraine was amended with an article on collaborationist activities, Y. Pysmenskyi defined collaborationism as a type of criminal offence that encroaches on the security of the state. He described it as a special type of treason – characterised by the deliberate actions of a citizen of a state in an occupied territory who aligns with the invading state to assist the latter and its representatives in conducting disruptive activities during the occupation.⁹

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- 3 Oleksandr Marin, 'Criminal-Law Variations of High Treason in the Criminal Code of Ukraine' (2022) 11 Law of Ukraine 66-7, doi:10.33498/louu-2022-11-060.
 - 4 Bertram M Gordon, 'The Morphology of the Collaborator: The French Case' (1993) 23(1) Journal of European Studies 1, doi:10.1177/004724419302300102.
 - 5 'Collaboration', *Dictionnaire de Français* (Larousse 2024) <<https://www.larousse.fr/dictionnaires/francais/collaboration/17137>> accessed 30 April 2024.
 - 6 'Collaboration', *Cambridge Dictionary* (CUP & Assessment 2024) <<https://dictionary.cambridge.org/dictionary/english/collaboration>> accessed 30 April 2024.
 - 7 'Collaborationism', *Merriam-Webster.com Dictionary* (Merriam-Webster 2024) <<https://www.merriam-webster.com/dictionary/collaborationism>> accessed 30 April 2024.
 - 8 *Dictionary of the Ukrainian Language*, vol 7 (Naukova Dumka 2016) 231.
 - 9 Yevgen Pysmenskyi, *Collaborationism as a Socio-Political Phenomenon in Modern Ukraine (Criminal and Legal Aspects)* (Publ Rumyantseva HV 2020) 114-5.

A. Voronzov defines collaboration as cooperation with the occupying authorities to the detriment of one's own state ("Motherland").¹⁰ A. Benitskiy views it as a phenomenon that is associated with the cooperation between the person and the aggressor state, its armed forces and occupation administrations.¹¹ V. Kubalskiy describes it as an intentional and voluntary cooperation in any form with the occupying power or its representatives to the detriment of the national interests of Ukraine¹² while K. Honcharenko considers collaborationism as the cooperation of a state citizen with the aggressor state, directly with the enemy, to secure the interests of the enemy and harm their own state.¹³ According to V. Orlov, it is a special form of high treason that includes military, political, economic, administrative, cultural, informational, and media cooperation of a Ukrainian citizen with the aggressor state or its representatives.¹⁴

A. Muzyka proposes a more detailed definition. From the author's perspective, collaborationist activity is intentional acts aimed at assisting the aggressor state, armed or militarised groups formed in the temporarily occupied territory, and/or illegal authorities established in such territory. These acts are committed by a citizen of Ukraine, a foreigner (except for citizens of the aggressor state) or a stateless person in the absence of features of high treason.¹⁵

M. Khavroniuk identifies four mandatory features of collaboration as an act committed: (1) under occupation; (2) in the form of cooperation with the aggressor state; (3) by representatives of the state's citizens; (4) to harm the state of Ukraine, its patriots, or allies.¹⁶

10 AV Voronzov, 'Criminal Liability for Collaborative Activities (Art. 111-1 of the Criminal Code of Ukraine): Analysis of the Objective Side' (Current Issues of Criminal-Legal Qualification, Documentation and Investigation of Collaborationism: All-Ukrainian scientific and practical conference, Odesa, 21 July 2022) 29.

11 Andriy Benitskiy, 'Features of Criminal-Legal Qualification Crimes Provided for in Part 4 Article 1111 of the Criminal Code of Ukraine and Their Relationship with Related Elements of Crimes' (2022) 11 Law of Ukraine 90, doi: 10.33498/louu-2022-11-088.

12 Vladyslav Kubalskiy, 'Problems of Establishing Criminal Responsibility for Collaborationist Activities in Ukraine' (Deoccupation: Legal Front: International expert round table, Kyiv, 18 March 2022) 116.

13 K Honcharenko, 'Treason or Collaborative Activity of the Problem of Qualification of crimes Against the Foundations of National Security' (2022) 36 Collection of Scientific Papers of HS Skovoroda Kharkiv National Pedagogical University: Law 139, doi:10.34142/23121661.2022.36.16.

14 V Orlov, 'Combatants or Collaborators: Problems of Criminal Responsibility in the Conditions of Armed Conflict' (Current Issues of Criminal-Legal Qualification, Documentation and Investigation of Collaborationism: All-Ukrainian scientific and practical conference, Odesa, 21 July 2022) 78.

15 A Muzyka, 'Norms on Criminal Responsibility for Collaborationist Activity Need Urgent Amendments' (Criminal-Legal Responses to the Challenges of Martial Law in Ukraine: International scientific conference, Kharkiv, Pravo, 5 May 2022) 113.

16 Mykola Khavroniuk, 'Criminal Liability for Collaborationism' (*Center for Political and Legal Reforms*, 28 April 2022) <<https://pravo.org.ua/blogs/kolaboratsijna-diyalnist-nova-stattya-kryminalnogo-kodeksu>> accessed 30 April 2024.

O. Radutnyi draws special attention to the fact that a collaborator is a person who deliberately cooperates with the occupying civilian or military authorities to the detriment of the country with which he or she has a permanent or temporary legal relationship (for example, a citizen, a stateless person permanently residing in a certain territory, a monarchy national or a foreign citizen with the right of permanent or temporary residence, etc.).¹⁷

Even this brief review of sources proves that despite the different approaches to the definition of collaborationism, the legal literature generally uses several features in different numbers and various ways, combining them:

- 1) the feature of cooperation is a generic feature that limits collaboration to special forms of action - interaction, joint work, communication with a particular enemy actor (occupier, aggressor);
- 2) subjective feature limits the circle of collaborators to only a certain category of persons, primarily citizens and nationals of the sovereign state of the relevant territories;
- 3) connection of the act with the occupation of a particular territory (occupied territory, conditions of occupation, period of occupation);
- 4) voluntary nature of the collaboration;
- 5) the purpose or intent to harm the national security of the state (or other similar values).

Further, each of these features and collaboration, in general, will be examined from two perspectives: the ideal model (*de lege ferenda*) and the perspective of the current model of criminalisation of collaborationist activities in the Criminal Code of Ukraine (*de lege lata*). While the proposed model of *lex ferenda* is not yet part of positive law, it refers to something that, in a certain sense, should be law,¹⁸ i.e., the proposals made from this perspective aim to improve the current edition of Article 111-1 of the Criminal Code of Ukraine.

2 IS COLLABORATION AN INTERACTION? WITH WHOM?

First, the behaviour termed collaboration is traditionally defined through the cooperation or interaction of actors. Collaborationism can involve the joint work of actors in different areas. Analysing collaboration with the occupier on Ukraine territory during World War II, V. Shaikan identified collaborationism in the political, administrative, military, economic, domestic, and cultural spheres.¹⁹ Similarly, in her work, N. Antonyuk

17 O Radutnyi, 'Public Calls and Denials as Forms of Informational Collaborationist Activity under the Criminal Code of Ukraine' (2022) 2(41) *Information and Law* 104, doi:10.37750/2616-6798.2022.2(41).270372.

18 Hugh Thirlway, 'Reflections on *Lex Ferenda*' (2001) 32 *Netherlands Yearbook of International Law* 3, doi:10.1017/S0167676800001148.

19 Valentyna O Shaikan, *Collaborationism in the Territory of the Reichskommissariat "Ukraine" and the Military Zone During the Second World War* (Mineral 2005) 51-2.

distinguishes military, economic, cultural (spiritual), domestic and political (administrative) collaborationism.²⁰ Y. Pysmenskyi classifies collaborationist activities under Article 111-1 of the Criminal Code into the following areas: ideological (cultural and educational), administrative and military-political, and economic.²¹ K. Dolhoruchenko also emphasises information and media collaboration.²²

Undoubtedly, there are even more areas of collaboration, as well as criteria for their classification. Regardless of their number, however, the question arises: *is collaboration exclusively interaction, i.e., the mutual performance of actions by two parties, a certain joint activity in which they understand that they are acting together?* In other words, why, when defining collaboration, do we always say it is interaction or cooperation? Would it be true to say that collaboration is also a unilateral (without cooperation with anyone) act of behaviour of a person that harms the sovereign state and thus helps the enemy?

Joint activity is the core of the concept of collaboration. It is well known that the actions of two criminals who, unbeknownst to each other, simultaneously seize certain items from a shopkeeper, causing property damage, cannot be considered complicity in theft (they do not act together). Similarly, a criminal who, in the occupied territory, on his initiative and without any assistance from the occupier, called on other residents to cooperate with the enemy or neutralised an underground partisan camp organised by the sovereign state to fight the occupier cannot be considered a collaborator. He can be anyone - a traitor, diversionist, separatist, but not a collaborator. In this regard, collaboration with an appropriate degree of conditionality can be considered a kind of complicity in the occupation.

This logic may seem obvious, but it was not fully implemented in the legislation. Part 1 of Art. 111-1 of the Criminal Code of Ukraine defines two types of information acts as collaborationist activity: public calls for cooperation with or support of the aggressor and public denials of armed aggression against Ukraine or occupation of its territory. At the same time, the law is not only indifferent to cooperation with the enemy, but it does not distinguish between calls or denials made in the occupied versus "free" territory.

According to the official court statistics in Ukraine, from the moment Article 111-1 of the Criminal Code came into force (16 March 2022) until 31 December 2023, a total of 682 people were convicted of collaborationist activities. Of these, 374 people (almost 55%) were convicted

20 Natalia Antonyuk, 'A Criminal and Legal Assessment of Collaborationism: A Change of Views in Connection with Russia's Military Aggression against Ukraine' (2022) 5(3) Access to Justice in Eastern Europe 142-3, doi:10.33327/AJEE-18-5.3-n000312c.

21 Yevgen O Pysmenskyi, 'Collaborationist Activity (Article 111-1 of the Criminal Code)', in AA Vozniuk, RO Movchan and VV Chernej (eds), *Novels of the Criminal Legislation of Ukraine, Adopted in the Conditions of Martial Law: A Scientific and Practical Commentary* (Norma Prava 2022) 63.

22 K Dolgoruchenko, 'Collaborationism as a Phenomenon of War and a Scientific Concept within the Framework of Historical and Legal Research' (2022) 56 Scientific Bulletin of the International Humanitarian University, Series: Jurisprudence 18, doi:10.32841/2307-1745.2022.56.4.

under Part 1 of this article.²³ The majority of those convicted under Part 1 committed unilateral information acts with no proven connection to the occupier/aggressor, and most of these acts were committed mainly on the "free" territory of Ukraine.

This allows us to formulate two conclusions. First, *de lege lata*, the majority of collaborators convicted in Ukraine did not commit acts of collaboration in its traditional historical sense. They are considered collaborators only because the legislator has equated cooperation with an independent (unilateral) act. This harms the reflection of the overall picture of collaborationism in the Russian-Ukrainian war and leads to a distorted perception of collaboration. Secondly, *de lege ferenda*, collaboration should only cover acts that reflect interaction with the relevant hostile actor (for example, a person calls for support for the occupier at the request of the latter). Undoubtedly, the Russian Federation is actively waging an information war, a technology of systematic influence on mass and public consciousness to achieve information superiority and political or military goals²⁴. However, citizens are not always directly involved in this war, at least not consciously.

The absence of an act of cooperation does not mean that these acts should not be punished if they harm the state's national interests or are aimed at doing so. However, such acts (including informational ones) should be criminalised in a separate article or considered high treason or another crime against the state. It is noteworthy that in the draft of the new Criminal Code of Ukraine developed by the working group on criminal law reform (hereinafter - the Draft of the new Criminal Code),²⁵ the analysed informational acts are provided for in Articles 9.1.10 and 9.1.11, separately from the article describing collaborationist activities.

At the same time, it should be recognised that *de lege lata* informational collaborationism (Part 1, Article 111-1 of the Criminal Code) is often committed by persons who, in this way, express a peculiar readiness to cooperate with the occupier, as if making a public proposal to this effect. In this context, public calls and denials can be seen as a peculiar criminal preparation. However, it is clear that it must be proven that the person has an intention (or a goal) of further cooperation. This intention (goal) is often absent, or the investigative authorities cannot prove it.

It can be assumed that, in extreme circumstances, the legislator relied on previous legislative experience when amending the Criminal Code with Article 111-1. In particular, Articles 109 and 110 of the Criminal Code (encroachments on the constitutional order and on the territorial integrity of Ukraine) cover not only public calls for encroachments but also the

23 'Judicial Statistics: Annual Reporting' (*Judicial Power of Ukraine*, 2024) <https://court.gov.ua/inshe/sudova_statystyka/> accessed 30 April 2024.

24 Oleg Danilyan and others, 'Features of Information War in the Media Space in the Conditions of Russian Aggression Against Ukraine' (2023) 15(3) *Cogito* 61.

25 'Draft of the New Criminal Code of Ukraine' (*EUAM Ukraine: New Criminal Code*, 14 October 2023) <<https://newcriminalcode.org.ua/criminal-code>> accessed 30 April 2024.

encroachments themselves. Nevertheless, such experience is not relevant, as the specified encroachments do not require cooperation with a foreign state or another foreign element.

The next question is inextricably linked to the first one and could count on an independent status: *if it is cooperation, then with whom?* The literature provides different answers to this question. The addressee of cooperation is referred to as the occupier, the occupation authorities/administration,²⁶ the aggressor state and its representatives,²⁷ the aggressor state and its armed forces and the occupation administration,²⁸ and the enemy (occupier, aggressor state, etc.).²⁹ It can be assumed that the authors did not try to focus on this understanding of the addressee of the collaboration, leading to a lack of clarity and vagueness. The legislator also contributed to the uncertainty, as Article 111-1 of the Criminal Code of Ukraine mentions different addressees of cooperation in various combinations: the aggressor state and its occupation administration (Parts 4, 6), the occupation administration (Parts 2, 5, 7), and illegal armed or paramilitary formations of the aggressor state or created in the occupied territory (Part 4). In some cases, such as under Part 1 in relation to the previously mentioned information acts, the entity with which cooperation is supposed to take place is not mentioned at all.

In fact, the answer to the question of the addressee of the collaboration requires more clarity, as it directly affects the qualification of the crime. Cooperation with hostile elements in the criminal law of most states is traditionally considered high treason. The criminal law of Ukraine is no exception. For example, Article 111 of the Criminal Code of Ukraine defines high treason as, inter alia, siding with the enemy during an armed conflict and assisting a foreign state or foreign organisation in subversive activities against Ukraine. In other words, joint activities with the enemy are highly treasonous even in peacetime, and in such circumstances, no one would think of calling such activities collaborationist. However, under what conditions does high treason turn into collaboration? Is such a condition the emergence of a special kind of enemy - an aggressor state or an occupying state?

The collaboration is "as old as war and the occupation of foreign territory".³⁰ This widely quoted phrase by G. Hirschfeld has justifiably become axiomatic in historical studies of

26 See: Kubalskyi (n 12) 116; Radutnyi (n 17) 104; Valery L Zhydkov and Oleksandr B Zhyla, 'Proving Crimes of Collaborationist Activity: Problematic Issues of Law' (*Ukrainian Helsinki Human Rights*, 5 May 2023) <<https://www.helsinki.org.ua/articles/dokazuvannia-zlochyniv-pro-kolaboratsiyu-diialnist-problemni-pytannia-zakonu>> accessed 30 April 2024.

27 See: Honcharenko (n 13) 139; O Matushenko and A Ligun, 'Collaborative Activity: Problematic Issues and Prospects for their Solution' (2023) 2 South Ukrainian Law Journal 37, doi:10.32850/sulj.2023.2.6; Orlov (n 14) 78.

28 See: Benitskiy (n 11) 90; Musyka (n 15) 113.

29 See: Oleksandr Golovkin and Igor Skazko, 'Collaborationism in Ukraine: Debatable Aspects' (2017) 78 State and Law, Series: Legal Sciences 244; Oleksandr Illarionov, 'Public Request to Ban Collaborationism' *Legal Bulletin of Ukraine* (Kyiv, 31 March - 6 April 2017) 4.

30 Gerhard Hirschfeld, 'Collaboration in Nazi-Occupied France: Some Introductory Remarks', in G Hirschfeld and P Marsh (eds), *Collaboration in France: Politics and Culture During the Nazi Occupation, 1940-1944* (Berg 1989) 11.

collaborationism.³¹ As the history of the Second World War shows, after liberation, almost every previously occupied country had to come to terms with acts of treason and collaboration among its population.³² Occupations can be of different types,³³ of which, in most cases, regardless of whether they are legal from the point of view of *jus ad occupationem*,³⁴ are inherently linked to armed conflict. In the cases of the German conquests of the Second World War and the Russian-Ukrainian armed conflict that began in 2014, there is an illegal annexation occupation, so it is not surprising that in the literature on these topics, the occupier and the aggressor state are often confused. This is probably why the parallel reference to the aggressor state and the occupation administration are two addressees of interaction in Article 111-1 of the Criminal Code of Ukraine. However, from the view of legal accuracy required by criminal law, this approach is incorrect.

The existence of armed aggression or armed conflict does not in itself indicate the existence of collaboration. In non-international armed conflicts, as well as in international armed conflicts that do not involve the occupation of territory (e.g., when aggression occurs only by shelling the territory of a foreign state without physical control over that territory),³⁵ the question of collaboration cannot be raised. Cooperation with the aggressor state during such armed conflicts can be assessed as high treason or in any other way, but not as collaborationism. Collaborationism is a phenomenon caused by occupying a territory, not an armed conflict. Another thing is that the latter usually (though not always) goes hand in hand with the occupation. This understanding of collaborationism is enshrined in Article 120 of the Criminal Code of the Republic of Lithuania, the only case among European countries where collaboration is provided for in a separate article, similar to Ukrainian criminal law. According to this article, collaboration (in Lithuanian "kolaboravimas") is defined as assistance to illegal state structures in establishing occupation or annexation committed by a citizen of the Republic of Lithuania under conditions of occupation or annexation.³⁶

31 See, for example: Stathis N Kalyvas, 'Collaboration in Comparative Perspective' (2008) 15(2) *European Review of History* 109, doi:10.1080/13507480801931036; Fabian Lemmes, 'Collaboration in wartime France, 1940-1944' (2008) 15(2) *European Review of History* 157, doi:10.1080/13507480801931093.

32 Jeffrey W Jones, "'Every Family Has Its Freak': Perceptions of Collaboration in Occupied Soviet Russia, 1943-1948' (2005) 64(4) *Slavic Review* 747, doi: 10.2307/3649911.

33 Regarding the typology of occupation, see in detail in: Simon Collard-Wexler, 'Understanding Resistance to Foreign Occupation' (DPhil thesis, Columbia University 2013) 21-5, doi:10.7916/D8BZ6D8M.

34 In the law of occupation, the traditional concepts of *jus ad bellum* and *jus in bello* are transformed into *jus ad occupationem* and *jus in occupationem*. For more information, see, for example: Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (CUP 2017) 1-10, doi:10.1017/9781316536308.

35 In UN General Assembly Resolution 3314, which contains a list of acts of aggression, one can find a number of other acts by a state that are considered aggression but do not yet constitute occupation, such as blockades of the coast and airspace.

36 Criminal Code of the Republic of Lithuania no VIII-1968 of 26 September 2000 'Baudžiamasis kodeksas' (amended 27 March 2024) <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.111555/asr>> accessed 30 April 2024.

Expanding the definition of the addressee of collaboration to include other hostile actors blurs the phenomenon of collaborationism and makes it difficult to distinguish it from related phenomena such as high treason, espionage, sabotage, and separatism.

In terms of qualifying collaboration, this means that if, after the full de-occupation of Ukraine's territory within internationally recognised borders, the armed conflict between Ukraine and the Russian Federation continues (e.g., by shelling Ukraine's territory), the joint activities of Ukrainian citizens with Russia will be considered, for example, high treason (a more serious crime), but not collaboration.

The assessment of cooperation with the Republic of Belarus is also problematic. According to the well-known definition in UN General Assembly Resolution 3314, an act of aggression may include "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State".³⁷ In this regard, it is obvious that the Republic of Belarus acted as a co-aggressor, especially during the first phase of the large-scale Russian invasion in 2022. However, it can hardly be recognised as a co-occupier, as there are currently no established facts that the Republic of Belarus exercises control over a certain territory of Ukraine.

Under such circumstances, providing assistance to agents of Belarus to the detriment of Ukraine's national interests, transferring material resources to paramilitary formations of Belarus, conducting economic activities in cooperation with its bodies and institutions, or voluntary participation in the armed formations of Belarus, cannot be considered collaborationism. These actions should be classified as high treason or other crimes against the national security of Ukraine.

Finally, and more obviously, cooperation with organised crime groups or other criminal organisations not controlled by the occupier or with agents of states other than the occupying power cannot be considered collaborationism. Therefore, the initial characteristic of collaboration is that it involves some kind of interaction with the occupier, entering into a relationship with them. This feature combines two interrelated (inseparable) characteristics simultaneously: 1) the external aspect of collaborationism - a specific type of act of the person, which consists of joint activities as opposed to unilateral and independent acts of behaviour; 2) the addressee - the occupying state, on behalf of which the occupation administration, puppet bodies or armed groups may act.

Whatever terminology is used to refer to interaction with the occupier, one constant feature remains: the occupier is always one of the parties to this interaction. Without it, there is no point in considering this phenomenon separately. The occupation regime generates interaction between both representatives of the authorities of the displaced sovereign and ordinary people with an alien element.

37 UNGA Resolution no 3314(XXIX) of 14 December 1974 'Definition of Aggression' <<https://legal.un.org/avl/ha/da/da.html>> accessed 30 April 2024.

3 WHO CAN BE A COLLABORATOR? (QUESTION ABOUT THE SUBJECT OF THE COLLABORATIONIST ACTIVITY)

The statement that collaborationism, in its essence, involves at least some minimal interaction/communication with the occupier opens up debate on the following question without a clear answer: *who is on the opposite side of this cooperation, or can everyone who interacts with the occupier be called a collaborator?* Can these be only citizens (nationals) of the affected state, or perhaps every resident of the occupied territory, regardless of their citizenship, or even those who began living there after the occupation began, including citizens of the occupying country?

Historical research on collaboration during the Second World War usually does not focus on the citizenship of collaborators. Instead, historians operate with the concept of “the population of the occupied territory”³⁸ and analyse the peculiarities of collaboration depending on the national and ethnic composition of the collaborators³⁹ or their social role, position, or type of activity.⁴⁰

Although criminal law, like history, evaluates events and actions of the past, historians’ tasks are obviously significantly different from those that lawyers seek to solve. The former focuses on the laws of society development, the determination of events and actions of individual historical figures and their impact on the overall course of history. Lawyers, on the other hand, constantly seek justification for the responsibility of a particular person for their actions: why, for what and to what extent? Historians are not constrained by various official requirements and formalities, while lawyers are limited by strictly regulated procedures and the requirements of legal certainty.

38 See, for example: Jochen Böehler and Jacek Andrzej Młynarczyk, ‘Collaboration and Resistance in Wartime Poland (1939–1945): A Case for Differentiated Occupation Studies’ (2018) 16(2) *Journal of Modern European History* 235-6, doi:10.17104/1611-8944-2018-2-225; Mykola Borovyk, ‘Collaboration and Collaborators in the Everyday Perception of the Inhabitants of Ukraine (based on the materials of the oral history project “Ukraine during the Second World War: everyday experience of survival”)’ (2013) 16 *Pages of the Military History of Ukraine* 156; Gerhard Hirschfeld, ‘Collaboration and Attentism in the Netherlands 1940-41’ (1981) 16(3) *Journal of Contemporary History* 467-9, doi:10.1177/002200948101600304.

39 See, for example: Laura De Guissmé and others, ‘Attitudes Towards World War II Collaboration in Belgium: Effects on Political Positioning Towards the Amnesty Issue in the Two Main Linguistic Communities’ (2017) 57(3) *Psychologica Belgica* 32, doi:10.5334/pb.346; John Connelly, ‘Why the Poles Collaborated so Little: And Why That Is No Reason for Nationalist Hubris’ (2005) 64(4) *Slavic Review* 771, doi:10.2307/3649912; Bisser Petrov, ‘Collaboration in the Balkans During the World War II: Forms, Motives and Results’ (2002) 4 *Études Balkaniques* 13.

40 See, for example: Vitalii Gorobets, ‘Economic and Cultural Collaborationism: A Formula for Cooperation’ (2020) 1(27) *Military-Historical Meridian* 84 <https://vim.gov.ua/pages/ua/archive/number.php?archive_number=26.04.2020> accessed 30 April 2024; Daria T Rudakova, ‘Civilian Collaboration in Occupied Ukraine and Crimea’ (DPhil thesis, University of Western Australia 2018) doi:10.4225/23/5b28915c82bd3; Shaikan (n 19) 193-349.

In view of this, a wide range of historians' work on the phenomenon of collaborationism is not entirely suitable for defining the subject of collaborationist activity. It is legally impossible to define what is meant by the population of the occupied territory. It is unclear what composition should be considered: the population present at the time of occupation, during the occupation, at the time of de-occupation, or in any of the above periods. In any case, it is not possible to establish the exact number and compile an exhaustive list of persons who actually lived in a particular territory. It is impossible to do this in relation to the initial moment of occupation and even more so in relation to the subsequent development of events.

Another important circumstance is that after establishing control over the territory due to annexation, the occupier widely facilitates the migration of its citizens to the newly occupied territories. Thus, although Article 49 of the Geneva Convention (IV) prohibits the occupying power from transferring its population to the territory it occupies,⁴¹ the policy of colonisation is widely practised by the Russian occupier. It is reported that up to 800,000 Russian citizens have illegally arrived in Crimea since 2014, and the Russian authorities plan to move 300,000 of their subjects to occupied Mariupol by 2035.⁴² As a result, the occupied population largely consists of citizens of the occupying state. However, categorising them as collaborators undermines the concept of collaborationism from within, as it loses its pejorative meaning associated with treason against the sovereign state of the territory in question.

The ethnic and national dimension of collaborationism is of particular interest in historical analyses. However, in modern jurisprudence, national and ethnic affiliation cannot be a constitutional or any other feature of the subject of a criminal offence, as this automatically causes a violation of the constitutional principle of equality before the law regardless of national and ethnic origin.

The current Article 111-1 of the CC of Ukraine can serve as a model to demonstrate the prevailing uncertainty in the question of who can/should be considered a collaborator. The legislator differentially defined the subject of collaborationist activity depending on the forms (types) of collaboration. In most cases, it is explicitly stated that a citizen of Ukraine can only commit an act. We are talking about informational acts provided for in Part 1, about holding positions in the occupied territories (Parts 2, 5 and 7), and about educational and military types of collaboration (Parts 3 and 7). Therefore, regarding these types of

41 Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949 Geneva) <<https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949>> accessed 30 April 2024.

42 Vladyslav Miroshnychenko, 'Hundreds of Thousands of Russians Moved to the Occupied Territories Of Ukraine: Illustrative Examples of Colonization' (*Ukrainian Helsinki Human Rights*, 6 December 2023) <<https://www.helsinki.org.ua/articles/sotni-tysiach-rosiian-pereikhaly-na-okupovani-terytorii-ukrainy-pokazovi-prykklady-kolonizatsii/>> accessed 30 April 2024.

collaboration, scholars have no doubt that the circle of subjects of the crime should be limited exclusively to citizens of Ukraine.⁴³

In the case of economic collaborationism (Part 4), there is no indication of the subject at all. As a result, scientific sources note that in this case, the subject can be either a citizen of Ukraine, a foreigner or a stateless person.⁴⁴

Part 6 of Article 111-1 of the Criminal Code of Ukraine is unique (in a negative aspect), which provides for liability for organising and conducting political events and information activities in cooperation with the aggressor state and/or its occupation administration in the absence of signs of high treason. Since a mandatory feature of high treason (Article 111 of the Criminal Code) is that it can only be committed by a citizen of Ukraine, it appears that only a foreigner or stateless person can be the subject of these types of collaborationist activities since such actions by Ukrainian citizens would obviously contain signs of high treason.

Thus, *de lege lata*, the subject of collaborationist activity, depending on its forms, can be: a) only a citizen of Ukraine, b) only a foreigner or stateless person, c) a person regardless of citizenship.

This legislative approach does not seem to be justified. *De lege ferenda*, only a citizen of Ukraine, should be recognised as a subject of collaborationist activity. The justification for this can be summarised in the following arguments:

Firstly, collaboration under Article 111-1 of the Criminal Code of Ukraine, with some exceptions, is a special type of high treason, and the addition of a new article to the Criminal Code should be seen mainly as a way to differentiate responsibility for high treason, taking into account the conditions of occupation.

Secondly, historical research confirms that collaborators were mostly prosecuted in different countries under articles on high treason in one form or another,⁴⁵ and the subject of the

43 Benitskiy (n 11) 91; Khavroniuk (n 16); RO Movchan, "Military" Novels of the Criminal Code of Ukraine: Law-Making and Law-Enforcement Problems (Pravova Norma 2022) 41; Pysmenskiy (n 21) 85.

44 O Kravchuk and M Bondarenko, 'Collaborative Activities: Scientific and Practical Commentary on the New Article 111-1 of the Criminal Code' (2022) 3 Juridical Scientific and Electronic Journal 200, doi:10.32782/2524-0374/2022-3/45; Movchan (n 43) 41.

45 See, for example: Veronika Bílková, 'Post-Second World War Trials in Central and Eastern Europe', in M Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law*, vol 2 (FICHL Publ Series no 21, TOAEP 2014) 697-733; Jon Elster, 'Redemption for Wrongdoing: The Fate of Collaborators after 1945' (2006) 50(3) Journal of Conflict Resolution 324, doi:10.1177/0022002706286953; Jones (n 32) 747; Tetiana Pastushenko, "'Justice" in the Soviet Way: Qualification of Cooperation with the Nazis in the USSR, 1941-1956' (2013) 16 Pages of the Military History of Ukraine 124; Tanja Penter, 'Collaboration on Trial: New Source Material on Soviet Postwar Trials against Collaborators' (2005) 64(4) Slavic Review 782, doi:10.2307/3649913; T Vronska, 'The Phenomenon of "Accomplicity": To the Problem of the Qualification of Cooperation of the Civilian Population with the Occupiers in the First Period of the Great Patriotic War' (2008) 11 Pages of the Military History of Ukraine 88.

latter is known to be a citizen of the sovereign state of the relevant territory. It can be assumed that it is not least due to these investigations and based on the unfortunate cases of unjustifiably severe punishment for collaboration that the legislator resorted to privileging responsibility for collaborationism.

Thirdly, comparative studies⁴⁶ show that in the criminal legislation of foreign countries, interaction with the occupier is mainly covered by crimes whose subjects are citizens of the relevant state.

In the end, criminal liability for collaboration with the occupier, as well as for high treason, is based on a special legal relationship between the sovereign state of the territory in question and its citizens, which provides for mutual rights and obligations of the parties. Citizenship gives rise to not only privileges from the state (in particular, in comparison with the status of foreigners and stateless persons) but also obligations, among which is the duty of loyalty to the state, as reflected in a number of general constitutional provisions, including the duty to defend the Motherland. In some cases, the duty of loyalty to the state becomes more specific and is reflected in the formal procedure of taking an oath. At the same time, considering the conditions of the occupation and the fact that the sovereign state failed to protect its citizens from the aggressor state and its subsequent occupation of territories, the state resorts to softening its stance towards the expressions of disloyalty by its citizens under occupation.

On the other hand, recognising only citizens of Ukraine as subjects of collaboration should not make it impossible to bring foreigners and stateless persons to criminal liability for assisting the aggressor state in the establishment and consolidation of its occupation regime. According to the norms of international humanitarian law and the law of occupation, citizens of the occupying state may also be held liable for certain manifestations of assistance in the illegal (annexing) occupation, in particular, if they act in the occupied territory.

While the state has the right to rely on the unconditional loyalty of its citizens, foreigners and stateless persons should likely face lesser penalties for their assistance, qualified as another crime against the state rather than collaborationism.

If the affected state prosecutes only its own citizens for aiding the occupier and is indifferent to others, it may inadvertently benefit the occupier. Such conditions might even incentivize citizens of the sovereign state to renounce their citizenship because, among other things, it carries the threat of being accused of collaboration.

46 See more in: Movchan (n 43) 88-92.

4 OCCUPIED TERRITORY AS THE PLACE OF COLLABORATION

At first glance, it may seem that the indication of the occupier as the addressee of collaboration is sufficient to determine the connection between collaborationism and occupation. However, the literature also mentions where this crime occurs - the occupied territory - among other special and mandatory features.⁴⁷ We believe that it makes sense to add an additional feature.

Collaboration with the occupier can occur not only within occupied territories but also on "free" (unoccupied) territory or abroad. This includes interactions within Ukraine's partner countries and in other nations, including the Russian Federation. However, such joint activities cannot be called collaborationism but rather high treason or another crime against the state. This distinction arises because it involves assisting the enemy during a period of occupation rather than during peacetime. This approach can now be seen in law enforcement practices.

For example, a citizen of Ukraine was sentenced to life imprisonment for committing high treason (Part 2 of Article 111 of the Criminal Code of Ukraine). The individual, in collaboration with an agent of the FSB of the Russian Federation in unoccupied Kharkiv, took and sent photos of the locations of units of the Armed Forces of Ukraine, Ukrainian checkpoints and the movement of Ukrainian military equipment.⁴⁸ The qualification of joint activities with the occupier on the "free" territory of Ukraine to the detriment of Ukraine as high treason is correct.

Thus, an act of cooperation between a citizen of a sovereign state and an occupier does not in itself indicate collaborationism. This act must be committed in the occupied territory.

Collaborationism is a phenomenon that arises and exists within the occupied territory. Although Ukrainian legislation uses the term "temporarily occupied territory," in fact, according to the provisions of the law of occupation, the occupation is actually temporary,⁴⁹ so the additional indication of "temporary" rather emphasises Ukraine's intentions to de-occupy it, but does not carry any additional semantic load.

The legal definition of the temporarily occupied Russian Federation territory of Ukraine, contained in Paragraph 7 of Part 1 of Article 1-1 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine", is generally based on the provisions of the law of occupation. It is understood as parts of the territory of Ukraine within which the armed forces of the Russian

47 Kravchuk and Bondarenko (n 44) 199; Zhydkov and Zhyla (n 26).

48 'For the First Time, an Ex-Policeman was Sentenced to Life Imprisonment for Treason in the Kharkiv Region' (*Zmina*, 31 January 2024) <<https://zmina.info/news/na-harkivshhyny-za-derzhzradu-dovichnogo-uvyaznennya-vpershe-zasudyly-ekspoliczejskogo/>> accessed 30 April 2024.

49 Emily Crawford and Alison Pert, *International Humanitarian Law* (CUP 2015) 74; Gross (n 34) 17-8, 29-35.

Federation and the occupation administration of the Russian Federation have established and exercised *actual control* or within which the armed forces of the Russian Federation have established and exercised *general control* to establish the occupation administration of the Russian Federation.⁵⁰

Article 1 of the Law defines the dates marking the beginning of the occupation for certain territories, as well as the general procedure for determining the beginning and end of the occupation. The primary (general in relation to the armed conflict) date of the beginning of the occupation of certain territories of Ukraine by the Russian Federation is 19 February 2014. The occupation of Crimea and the city of Sevastopol by the Russian Federation began on 20 February 2014, while the occupation of certain territories of Donbas by the Russian Federation began on 7 April 2014. For other districts and settlements, the list of territories is dynamically maintained by the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine.⁵¹ In case of de-occupation of the territory, this list includes not only the initial but also the final date of occupation.

These provisions defining the temporarily occupied territory allow us to conclude that the concept is complex in the sense that it combines several components: *territorial* - it is a territory within certain boundaries; *temporal* - there are starting and ending points of occupation; *essential (contextual)* - the conditions of occupation, because both the territorial and temporal boundaries of occupation are not determined at random, but depending on whether effective control over the relevant territory is established and maintained.

The certainty of the beginning and end of the occupation of the territory helps to distinguish collaborationism from related criminal offences. The main feature affecting the recognition of territory as occupied is the existence of effective control over this territory by the occupier, i.e. the conditions of occupation. Effective control is *a conditio sine qua none* of belligerent occupation.⁵² Therefore, the fact that a territory is under the occupier's control determines both the temporal and territorial boundaries of collaborationism - it can exist where and as long as this control is maintained.

De lege lata, several forms of collaborationist activities provided for in Article 111-1 of the Criminal Code of Ukraine are formulated by the legislator in such a way that they also cover acts of cooperation outside the temporarily occupied territory. This mainly concerns information collaborationism (Part 1). Existing case law has already been mentioned above, according to which the vast majority of acts of collaborationism were de facto committed

50 Law of Ukraine no 1207-VII of 15 April 2014 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine' (amended 19 May 2024) <<https://zakon.rada.gov.ua/laws/show/1207-18#Text>> accessed 30 April 2024.

51 Order of the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine no 309 of 22 December 2022 'On the Approval of the List of Territories where Hostilities are (Were) Conducted or Temporarily Occupied by the Russian Federation' <<https://zakon.rada.gov.ua/laws/show/z1668-22#n15>> accessed 30 April 2024.

52 Yoram Dinstejn, *The International Law of Belligerent Occupation* (CUP 2009) 43.

outside the occupied territory. Additionally, many other forms are unclear regarding the place of collaboration, such as propaganda in educational institutions (Part 3) or the transfer of material resources to illegal armed or paramilitary groups established in the occupied territory (Part 4). Literally, the law does not contain any territorial restrictions.

More apparent in this context is the public office-related collaborationism defined in Parts 2, 5 and 7 of Article 111-1 of the CC, which means holding a certain type of position by a citizen of Ukraine in illegal authorities established in the temporarily occupied territory. Holding a position automatically means staying in the occupied territory where the relevant illegal authority is located and operates. However, we cannot exclude the remote holding of a position by a person not in the occupied territory. In the latter case, the qualification rule remains unclear.

Regarding the public office-related collaboration (Part 5 of Article 111-1 of the Criminal Code), the Supreme Court emphasised that the place of commission of the crime - the temporarily occupied territory of Ukraine - is an important feature.⁵³ It is worth noting how cautious and uncertain the position of the highest court is. The judges did not dare to point out the mandatory nature of this feature but only noted its importance, thereby levelling the significance of this position in general since many different features are important, and only some are mandatory.

Therefore, *de lege ferenda* collaborationism should be possible only within the occupied territory. This approach will allow us to distinguish by law between joint activities with the occupier under the conditions of occupation of the territory (collaborationist activities) and joint activities outside such conditions (high treason or other crimes). The latter will include acts committed primarily before or after the occupation or in the unoccupied territory. In addition, interaction with the occupier can be remote or take place "in exile", including after the de-occupation of the territory.

In this regard, it is worth noting that the working group on the development of the Draft New Criminal Code proposes to define collaborationist activities as those committed under the occupation of the territory of Ukraine or a part of it.⁵⁴ The draft law of Ukraine, submitted to the Parliament, also proposes to define collaborationist activity on the basis of its commission under the occupation of the territory of Ukraine.⁵⁵ Interaction with the occupier "under the conditions of occupation of the territory" is identical to interaction with it "in the occupied territory" since the latter is inherently characterised by the relevant conditions. At the same time, it should be borne in mind that a sign of collaborationism is

53 Case no 638/5446/22 (Supreme Court of Ukraine, 31 January 2024) <<https://reyestr.court.gov.ua/Review/116705070>> accessed 30 April 2024.

54 Draft of the New Criminal Code of Ukraine (n 25).

55 Draft Law of Ukraine no 7570 of 20 July 2022 'On Amendments to the Criminal and Criminal Procedural Codes of Ukraine on Improving Liability for Collaborative Activities and Related Criminal Offenses' <<https://itd.rada.gov.ua/billInfo/Bills/Card/40023>> accessed 30 April 2024.

the subject's presence in the occupied territory at the time of the act, i.e., in the territory controlled by the occupier. If the subject is under the control of the occupier and is not in the occupied territory (for example, a citizen of Ukraine who is in the territory of the Russian Federation), this fact can certainly be taken into account by the court, but it should not identify the act as collaborationism.

5 VOLUNTARY OR FORCED CHARACTER?

Another debatable feature of collaborationist activity is its *voluntary* nature. *De lege lata*, in Article 111-1 of the Criminal Code of Ukraine, the legislator has repeatedly pointed to the voluntary nature of collaboration, in particular with regard to public office-related and military collaboration: "voluntary holding of a position by a citizen of Ukraine..." (Part 2, 5, 7), "voluntary election to the authorities" (Part 5), "voluntary participation of a citizen of Ukraine in illegal armed or paramilitary groups..." (Part 7). The indication of "voluntariness" only in relation to certain types of collaboration naturally raises the question of whether such a characteristic also applies to those acts for which there is no special indication. Does this mean, for example, that educational (Part 3) or economic collaborationism (Part 4) are punishable even if they are involuntary? In general, what should be understood by the voluntariness of collaboration, and can collaboration under occupation be voluntary?

It is worth noting that scholarly works often emphasise the voluntary nature of interaction with the occupier as a sign of collaboration.⁵⁶ After all, the Draft of the New Criminal Code of Ukraine⁵⁷ and the draft amendments to the Criminal Code registered in Parliament⁵⁸ recognise the voluntary nature of collaboration as a mandatory feature in the definition of collaborationist activity. At the same time, Y. Pysmenskyi and R. Movchan note that the indication of the feature of voluntariness is the result of a banal mistake due to hasty military law-making in extreme circumstances.⁵⁹

We believe that the reference to the "voluntariness" of certain forms of collaborationist activity in Article 111-1 of the CC is unnecessary. The voluntariness of a human act in criminal law is traditionally associated with the absence of circumstances that exclude the criminal unlawfulness of an act, such as extreme necessity and coercion. Thus, in the context of the public office-related collaboration (Part 5 of Article 111-1 of the CCU), the Supreme Court noted that an act committed when it is possible to choose several options for behaviour, taking into account the totality of circumstances that may exclude criminal

56 See, for example: Illarionov (n 29); Khavroniuk (n 16); Zhydkov and Zhyla (n 26).

57 Draft of the New Criminal Code of Ukraine (n 25).

58 Draft Law of Ukraine no 7570 (n 55).

59 Ye Pysmenskyi and R Movchan, 'New Provisions of Criminal Law of Ukraine on Collaborative Activities: Discussion Issues and Attempt to Solve them' (2022) 6 Juridical Scientific and Electronic Journal 358, doi:10.32782/2524-0374/2022-6/79.

unlawfulness under Articles 39 and 40 of the CC of Ukraine, should be considered voluntary.⁶⁰ These articles contain universal prescriptions for determining the voluntariness/coercion of any act of a person, regardless of whether it concerns collaboration, theft, murder, or other crime. Their content is summarised as follows:

- 1) the behaviour of a person under the direct influence of physical coercion, as a result of which the person could not control his or her actions (insurmountable physical coercion), is not a crime;
- 2) criminal liability of a person for causing damage to law-protected interests under the influence of overwhelming physical coercion (when the ability to control one's actions is preserved) or under the influence of mental coercion (various threats) is made dependent on whether there was an extreme necessity: a) if there is, liability is excluded; b) if the limits of extreme necessity are exceeded (the damage caused is more significant than the damage prevented), liability is incurred on general grounds, and the commitment of a crime under duress is only taken into account as a mitigating circumstance when imposing a punishment.

Therefore, if "voluntariness" is understood to mean that it is excluded in the presence of insurmountable physical coercion/extreme necessity without exceeding its limits, then the reference to the voluntariness of collaboration is superfluous since the provisions of Articles 39 and 40 of the CC of Ukraine are applied regardless of whether the disposition of the article of the Special Part of the CC of Ukraine contains a reference to "voluntariness" or not. Otherwise, the definition of murder should have referred to the voluntary deprivation of life of another person, and the definition of theft should have referred to the voluntary seizure of another's property by secret means.

Reflecting on this feature, N. Savinova mentions a different understanding of "voluntariness" that has emerged in criminal law in connection with the strengthening of counteraction to domestic violence, including sexual crimes.⁶¹ In 2017, Article 152 of the Criminal Code of Ukraine ("Rape") was supplemented with a note that partially explains the meaning of the legislative wording "committing acts of a sexual nature... without the voluntary consent of the victim".⁶² According to the note, consent is considered voluntary if it results from a person's free will, taking into account the surrounding circumstances. In practical terms, this wording is defined as involuntary cases of consent obtained under the

60 Case no 638/5446/22 (n 53).

61 NA Savinova, 'Criminal law Without Revenge: Humanism and the Law of the Ukrainian State During the War and in the Post-War Period' (Criminal Law of Ukraine before the Challenges of Modernity and the Future: What it is and What it Should be: International scientific conference, Kharkiv, 21-22 October 2022) 23-4.

62 Law of Ukraine no 2227-VIII of 06 December 2017 'On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine in Order to Implement the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence' [2018] Official Gazette of Ukraine 6/244.

influence of virtually any threat (e.g., threat of dismissal from the position or threat to disclose private information).

The interpretation of "voluntariness" in the sense in which this concept is used to denote the lack of consent of the victim (in rape) may lead to the impossibility of criminal prosecution for collaborationism. According to this approach, for example, a citizen of Ukraine who worked as a Ukrainian prosecutor and, after the occupation and annexation of the territory, begins to serve in the prosecutor's office of the Russian Federation can easily argue that he or she collaborated because otherwise he or she would have lost his or her job and the necessary income for the survival of the family, would have been forced to move, leave his or her property, etc.

We believe that the definition of voluntary consent in the note to Article 152 of the CC of Ukraine cannot serve as a model for interpreting voluntariness as a feature of collaborationism, as it does not refer to the assessment of the person's actions but to the determination of the victim's consent, and is intended to be used only in the context of sexual crimes. The victim's lack of voluntary consent may be evidenced by the fact that she has expressed disagreement, even in the absence of any threats or use of force. The same cannot be said for the voluntariness of the perpetrator's actions.

At the same time, the issue raised actualises the consideration of the actions of collaborators from the other side. Since collaborationist activities are carried out in the occupied territory (under occupation), it is not so much about the voluntariness of cooperation, but rather about its inherently forced nature by occupation circumstances. It should be emphasized that the adjective "forced" in this context means that it is carried out under the pressure of circumstances and is different in meaning from the word "violent".

The conditions of occupation are an environment of potential violence. The occupied territory's population is under the full control of a large number of armed military forces. The occupying army is accompanied by heavy weapons, sophisticated military equipment and even air support. Explosions and shots are heard from time to time. Any protests are demonstratively suppressed, and those who not only cause the slightest obstacles or refuse to cooperate but also those who have nothing to do with obstacles or refusals are being punished. The legitimate authorities are deprived of any access and opportunity to help. The scale of the occupier's activities and goals makes the people realise that the new order and the occupier's power in this territory are clearly not for hours or days but for weeks, months, and possibly years.⁶³ In view of this, even non-compulsory (i.e. voluntary) actions of the population under such conditions - transfer of resources, organisation of referendums, performance of official functions, etc. - are essentially forced by abstract threats (probable harm) in case of disloyalty to the occupier.

63 MA Rubashchenko, 'Criminal Liability for Collaborationist Activity: Separate Problems' (Criminal Liability for Crimes against the Foundations of National Security of Ukraine, 1992-2022: Round table in memory of prof P Matyshevskiy and S Yatsenko, Kyiv, 18 November 2022) 47.

At the same time, the provisions of criminal law on extreme necessity and physical and mental coercion (Articles 39 and 40 of the Criminal Code) are not designed to address such potential risks and such a comprehensive scope. These norms require that the violence used or the danger to the protected interest be real (concrete, not abstract).

Of course, if a citizen in the occupied territory is directly subjected to violence or threats to his or her legitimate interests, the provisions of Articles 39 and 40 of the Criminal Code of Ukraine are automatically applied. However, the potential of these articles is limited to a specific act of violence or threat. It does not consider abstract threats caused by the extreme conditions of occupation. In this regard, R. Movchan, exploring the problems of assessing the collaboration of educators, emphasises that their liability should be excluded if it is proved, taking into account the specific circumstances of the case, an immediate and real threat to life and health that excludes the ability to control their actions, or in the presence of extreme necessity.⁶⁴

Assessing the overall appearance in the Criminal Code of Ukraine in March 2022 of an article on collaborationist activities, which provides for less severe liability compared to the article on high treason, it can be assumed that such a change in the criminal law is precisely an attempt by the legislator to take into account the extreme conditions in which citizens decide to cooperate with the occupier.

Therefore, the reference to voluntariness in Article 111-1 of the CC is only an unnecessary duplication of the provisions of Articles 39 and 40 of the CC of Ukraine. We assume that in this way, the legislator sought to further focus the attention of the investigating authorities and the court on a thorough examination of the facts of collaboration in terms of the potential use of coercion against a person. At the same time, there is no need to separately indicate in the law the somewhat forced nature of cooperation, as this follows from another feature - the occupied territory as a place of collaboration. The extreme conditions of the occupation make sense for separating collaborationist activities into a separate article of the Special Part of the Criminal Code. Ignoring or failing to recognise these conditions will inevitably lead to the equation of collaboration and high treason and, thus, to the disappearance of the reasons for lawyers to consider collaboration an independent phenomenon.

Another thing is that collaborationist activities are often carried out by Ukrainian citizens who, even before the occupation, were waiting for the occupier to arrive, preparing the ground for the occupation, and after the occupation of the territory by the Russian Federation, showed their activity and initiative.

In the works of some researchers on the relationship between the occupier and the occupied population during the Second World War, the identification of such subjects served as the basis for dividing the concept under study into two types: *collaborationism*

64 Movchan (n 43) 63-4.

and *collaboration* (including *collaboration d'etat*). The first reflected an open desire to cooperate and imitate the National Socialist regime,⁶⁵ or more organised and systematic forms of cooperation,⁶⁶ and active work for the victory of Germany.⁶⁷ The second was largely a necessary, unintended by-product.⁶⁸ In the end, however, this dichotomy was not widely recognised, and most studies equate the two concepts.

The existence of these ideological and proactive citizens naturally casts a shadow on the possibility of extending to them the signs of involuntariness that immanently follow from the conditions of occupation. In fact, after the establishment of the occupation regime, they probably not only did not feel any potential threats to their rights and legitimate interests but also got the opportunity to realise their desires and needs to a greater extent than they could afford before the occupation. Since the conditions of occupation of the territory are generally characterised by a certain degree of compulsion (i.e., extreme conditions are presumed), a separate legislative decision is needed in relation to these subjects. When implementing filtration measures after the de-occupation of the territory, they should be prevented from applying incentives and other similar norms that will be formed to meet the needs of reintegrating the territories, and additional lustration measures should be applied. Such "initiative" may also be considered as an aggravating circumstance.

Summarising the above, the introduction of the mitigating rule of liability for collaborationism can be explained by the following generalised scheme. A citizen has a duty of loyalty to the state. By collaborating with the occupier, he or she violates this duty and conditionally becomes a kind of accomplice to the occupation. If the citizen did not act under conditions of extreme necessity or under the influence of insurmountable physical coercion, the sovereign state may hold him or her liable for breach of the duty of loyalty. However, it does not punish him under the rule of high treason but under the rule of collaborationism, taking into account two mitigating factors: first, the state failed to fulfil its duty to protect this citizen on its territory from the occupier, and second, the citizen is in the territory controlled by the occupier, in special extreme conditions that cannot be ignored. At the same time, it is necessary to significantly limit the extension of the mitigating rule of collaboration to those who cooperate with the occupier for ideological reasons, identifying themselves with the occupier and proactively supporting it.

65 Stanley Hoffmann, 'Collaborationism in France during World War II' (1968) 40(3) *The Journal of Modern History* 376, doi:10.1086/240209.

66 John A Armstrong, 'Collaborationism in World War II: The Integral Nationalist Variant in Eastern Europe' (1968) 40(3) *The Journal of Modern History* 396, doi:10.1086/240210.

67 David Littlejohn, *The Patriotic Traitors: A History of Collaboration in German-Occupied Europe, 1940-45* (Heinemann 1972) 210.

68 Hoffmann (n 65) 376.

6 THE AIM OF HARMING THE NATIONAL SECURITY OF THE STATE

In academic literature, one can often find an indication that a mandatory feature of collaboration is the intention to harm the state or undermine social values foundational to national security.⁶⁹ At the same time, there are opposing positions. For example, A. Muzyka, in his definition of collaborationist activity, emphasises that the actions of a collaborator can be committed for any reason and any purpose.⁷⁰

De lege lata, the purpose, as a subjective feature, is directly mentioned in Article 111-1 of the CC of Ukraine only in relation to one of the forms of collaborationist activity. Part 3 of this article states that the aim of propaganda in educational institutions by a citizen of Ukraine is to facilitate the armed aggression against Ukraine, establish and consolidate occupation, and evade responsibility for such aggression. In other words, in most cases, the legislator does not consider this characteristic mandatory.

In the criminal law of Ukraine, the aim of a crime is usually understood as independent and distinct from intent, representing a specific desired outcome for which a person commits a crime.⁷¹ We believe that the aim of committing a criminal offence, as the final (desired) result of a person's act, should not be a mandatory feature of collaboration. The first counterargument is purely pragmatic: proving such an aim in practice is challenging due to its subjective and internal (hidden from the human eye) nature.

Second, outwardly identical acts of behaviour may be committed for different purposes. As a rule, in such cases, only the degree, but not the nature of the harmfulness of the act differs. A collaborator might not consider harming Ukraine's interests as a desirable result but might collaborate for personal reasons such as career advancement or material gain. This in itself should not exclude the possibility of criminal prosecution, while a thorough analysis of the collaborator's desired goals and motives should still be conducted to individualise the punishment.

Thirdly, it is equally important that the aim is not recognised as an imperative feature of high treason, in relation to which collaborationist activity can be considered a special type of treason. Recognising the aim of causing damage to the national security of Ukraine as a sign of collaborationist activity may lead to illogical conclusions: the presence of such an aim, which should generally aggravate liability, will indicate the application of a privileged norm under Article 111-1 of the CC of Ukraine, while its absence will indicate the application of the general norm on high treason (Article 111 of the CC) with a more severe sanction.

69 See, for example: Honcharenko (n 13) 139; Khavroniuk (n 16).

70 Muzyka (n 15) 113.

71 V Lomaco, 'The Subjective Side of a Criminal Offence' in V Tatsii, V Tiutiuhin and V Borysov (eds), *Criminal Law of Ukraine: General Part* (Pravo 2020) 177, 201.

Finally, the content of the purpose as a proposed feature of collaborationist activity is sufficiently covered by other features of *corpus delicti*. Specifically, the object of the criminal offence (the good encroached upon by the offender) and guilt - direct intent – address this sufficiently. Together, these features make the introduction of an additional feature of aim unnecessary.

The article on collaborationism is located within the section of the Special Part entitled “Crimes against the foundations of national security of Ukraine”. Consequently, the act of collaboration must objectively cause damage to national security or at least create a real threat of such damage. At the same time, given the intentional form of guilt, the offender must be aware of this and understand this fact.

7 CONCLUSIONS

Collaborationism is one of the most controversial historical phenomena, the seeds of which are beginning to take root in the legal sphere. Unlike historians, lawyers deal with strictly regulated procedures and are limited by the requirements of legal certainty, which leads to the search for clear criteria that would define a particular legal concept. The Russian occupation of certain territories of Ukraine and the immediate appearance in the Criminal Code of Ukraine of a separate article on collaborationist activities, along with the article on high treason, have created fruitful ground for new legal research that was previously hidden behind the general screen of the concept of high treason.

The research conducted in this article demonstrates that the *de lege lata* provisions of the Criminal Code of Ukraine on collaborationist activities are a crude attempt by the legislator to shade the phenomenon of collaboration from high treason. Although the idea of a separate article deserves a positive assessment, its implementation is evidently far from perfect and is subject to serious criticism.

De lege lata collaborationist activity under Article 111-1 of the Criminal Code of Ukraine is a casuistic mixture of individual forms of collaboration with the occupier, which differ significantly in terms of features. All forms are united by the fact that they involve intentional behaviour that causes harm or creates a real threat of harm to the national security of Ukraine. Most of the acts described in the law involve some kind of cooperation (joint activity) with an enemy actor to a greater or lesser extent, but some acts can be considered collaboration outside of cooperation (unilateral acts). The parties to cooperation also differ depending on the forms of behaviour. The addressee of cooperation is usually the occupying power and its representatives, but the law also refers to the aggressor state regardless of occupation. As a rule, the subject of collaboration is a citizen of Ukraine, while in the case of certain acts, it is any person (regardless of citizenship) or even only a foreigner or stateless person (in particular, Part 6 of Article 111-1 of the Criminal Code). The essential feature of collaborationism, i.e., cooperation under conditions of occupation of the territory (in the occupied territory), is characteristic of most collaborationist activities, but it is

ignored when describing certain types. For some acts, the voluntary nature of the commission is stipulated, while for others, it is not mentioned.

De lege ferenda collaborationist activity should consist of intentional cooperation (joint activity, interaction) of Ukrainian citizens with the occupier, as provided for by criminal law, committed under conditions of occupation of the territory (in the occupied territory), which harms the national security of the state whose territory is occupied.

Collaborationism acquires an independent and different meaning in criminal law from other crimes against the state if it is considered cooperation in the extreme conditions inherent in the occupied territories. Under this approach, the occupation conditions in which collaboration takes place determine the partially privileged position of a collaborator compared to an ordinary traitor.

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Competing interests: No competing interests were disclosed.

Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

ADDITIONAL INFORMATION

The research was supported by a grant from the National Research Foundation of Ukraine (NRFU) within the framework of the project "Collaborationism in the Temporarily Occupied Territories: Problems of Legal Assessment, Guaranteeing Human Rights and Freedoms and Reintegration of Territories" (project No. 2021.01/0106). The theses explained here represent the ideas of the authors and do not necessarily reflect the views of the NRFU.

ABOUT THIS ARTICLE

Cite this article

Rubashchenko M and Shulzhenko N, 'Reflections on the Legal Features of Collaborationist Activity: Theory and Practice in Terms of the Russian Occupation of Ukrainian Territory' (2024) 7(3) Access to Justice in Eastern Europe 10-40 <<https://doi.org/10.33327/AJEE-18-7.3-a000315>>

Submitted on 13 May 2024 / Revised 22 May 2024 / Approved 10 Jun 2024

Published: 05 Aug 2024

DOI <https://doi.org/10.33327/AJEE-18-7.3-a000315>

Managing editor – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Summary: 1. Introduction. – 2. Is collaboration an interaction? With whom? – 3. Who can be a collaborator? (Question about the subject of the collaborationist activity). – 4. Occupied territory as the place of collaboration. – 5. Voluntary or forced character? – 6. The aim of harming the national security of the state. – 7. Conclusions.

Keywords: *collaborationism, collaborationist activities, high treason, occupation, criminal law.*

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АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

РОЗДУМИ ПРО ЮРИДИЧНІ ОЗНАКИ КОЛАБОРАЦІОНІСТСЬКОЇ ДІЯЛЬНОСТІ: ТЕОРІЯ І ПРАКТИКА У КОНТЕКСТІ РОСІЙСЬКОЇ ОКУПАЦІЇ УКРАЇНСЬКОЇ ТЕРИТОРІЇ

Микола Рубашченко* та Надія Шульженко

АНОТАЦІЯ

Вступ. У цій статті співавтори роблять внесок у розвиток кримінальної політики України щодо юридичної оцінки колаборації з окупантом. Її реалізація пов'язана з окупацією частин території України Російською Федерацією, що триває і досі.

Дослідження певною мірою продовжує науковий дискурс, який розпочався після доповнення Кримінального кодексу України статтею 111-1. Ця робота спрямована на встановлення родових юридичних ознак колабораціоністської діяльності, відповідальність за яку була передбачена в КК України у березні 2022 року. Шляхом критичного аналізу типових ознак колаборації з окупантом, відображених на цей час у теорії та практиці, формулюється узагальнене бачення колабораціоністської діяльності як феномену, відмінного від державної зради та інших суміжних концептів.

Методи. В основі методології знаходиться поєднання загальнонаукових методів пізнання (індукція, дедукція, аналіз, синтез, абстрагування), історичних, лінгвістичних та системно-структурних методів дослідження. Дослідницька стратегія сфокусована на визначенні ознак колаборації з окупантом шляхом добору найбільш типових й істотних характеристик, які відображають сутність колабораціонізму та відмежовують його від суміжних явищ.

Структурно стаття складається з двох частин. У першій автори демонструють, як у науковій літературі прийнято визначати колаборацію, і виділяють п'ять найбільш згадуваних ознак. Друга частина є аналізом кожної із зазначених ознак з метою встановлення їх придатності для характеристики колаборації та для відмежування від суміжних понять. При цьому ознаки, встановлені в чинному кримінальному законі України (*lex lata*), розглядаються також із позиції ідеальної моделі (*lex ferenda*).

Результати та висновки. Феномен колаборації з окупантом уже давно є предметом досліджень істориків. Юридична наука натомість традиційно розглядає це явище в межах концепту державної зради. Проте виокремлення колабораціонізму як самостійного злочину в кримінальному законі поряд із державною зрадою вимагає його концептуалізації. Це дослідження демонструє неможливість автоматичного перенесення масиву результативних історичних розвідок в юридичну площину. Кримінальне право вимагає чіткості, однозначності та логічності. Водночас *de lege lata* кримінальне законодавство України передбачає казуїстичний та еkleктичний набір ознак колабораціоністської діяльності. Тож у цій статті проаналізовано кожну з ознак, якими прийнято характеризувати колабораціонізм, та здійснено їх добір з метою вдосконалення нормативного матеріалу та формулювання зрозумілого концепту, що заслуговує на самостійне існування поряд із концептом державної зради.

Ключові слова: колабораціонізм, колабораціоністська діяльність, державна зрада, окупація, кримінальне право.