

Military Justice in Ukraine

GREEN PAPER



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CONTENTS

List of Abbreviations	5
Introduction	6
Section 1. Military Justice System in the World and Ukraine	10
1.1. Functions, Principles, and Values of Military Justice Bodies	10
1.2. Military Justice System in the World	15
1.3. Military Justice System in Ukraine: Genesis	26
1.4. Current Military Justice System in Ukraine: Overview	32
Section 2. Structure and Authority of Individual Bodies of the Military Justice System. Courts Considering Cases of Military Offences	34
2.1. Courts Considering Cases of Military Offences	34
2.2. Specialised Prosecutor's Office in the Field of Defence	36
2.3. Pre-Trial Investigation Bodies for Military Criminal Offences	39
2.4. Military Counterintelligence	44
2.5. Military Law Enforcement Service of the Armed Forces of Ukraine	45
Section 3. Problems of Establishing New Bodies of the Military Justice System and Military Courts	48
3.1. Military Police	48
3.2. Pre-Trial Investigation Body of a Special-Purpose State Authority with Law Enforcement Functions That Ensures State Security of Ukraine	55
3.3. Military Prosecutor's Office	58
3.4. Military Bar	62
3.5. Military Courts	64
Conclusions	69
Annex. Decaux Principles	72

List of Abbreviations

- ESBU – Economic Security Bureau of Ukraine
- HACC – High Anti-Corruption Court of Ukraine
- HQCJ – High Qualification Commission of Judges of Ukraine
- H CJ – High Council of Justice
- MLES – Military Law Enforcement Service of the Armed Forces of Ukraine
- CSEO – Central Scientific Experts Office of the Secretariat of the Verkhovna Rada of Ukraine
- SBMJ – State Bureau for Military Justice
- SBI – State Bureau of Investigation
- SPS – State Penitentiary Service of Ukraine
- ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms
- EU – European Union
- ECtHR – European Court of Human Rights
- Media – Mass media
- AFU – Armed Forces of Ukraine
- QDCP – Qualification and Disciplinary Commission of Public Prosecutors
- CEC – Criminal Executive Code of Ukraine
- CCC – Criminal Court of Cassation
- CrCU – Criminal Code of Ukraine
- CPCU – Criminal Procedure Code of Ukraine
- CCU – Constitutional Court of Ukraine
- CUAO – Code of Ukraine on Administrative Offences
- MIA – Ministry of Internal Affairs of Ukraine
- MoD – Ministry of Defence
- ICCPR – International Covenant on Civil and Political Rights
- NABU – National Anti-Corruption Bureau of Ukraine
- NACP – National Agency on Corruption Prevention
- NGU – National Guard of Ukraine
- NPU – National Police of Ukraine
- IAB – Internal Affairs Bodies
- SAPO – Specialised Anti-Corruption Prosecutor’s Office
- SSU – Security Service of Ukraine
- CEA – Central Executive Authority

Introduction

The current but not enacted Law of Ukraine “On Law-Making Activity” defines a *green paper* among public policy documents as an analytical paper developed to determine the existence and detailed description of a problem in public relations and possible ways to solve it, as well as to enable parties concerned to submit their proposals on how to solve such a problem.

One of the societal problems is the functioning of *military justice* in Ukraine – a legal mechanism for performing law enforcement function in military formations and justice function for servicepersons, which institutionally consists of:

- › Specialised law enforcement agencies
- › Prosecutor’s Office, penitentiary and probation services
- › Attorneys who protect servicepersons against criminal charges and represent them in court
- › Courts of general jurisdiction that consider cases of criminal and administrative offences committed by servicepersons
- › The relevant infrastructure of personnel, financial, information, scientific and methodological, forensic, military and other support.

This legal mechanism is part of the general criminal justice system but is institutionally autonomous due to specialisation.

This specialisation may be more or less pronounced depending on the social and political conditions.

In a peaceful country with a relatively small number of servicepersons and no military threat, establishing and maintaining military courts, military prosecutor’s offices, etc., is usually no issue and military police exist as part of the state police agency (for example, in Germany, the Bundeswehr Military Police is a federal police agency).

That is why the Concept for Reforming the Criminal Justice System of Ukraine approved by Decree of the President No. 311/2008 of 8 April 2008 did not mention military courts and military prosecutor’s office but only the transformation of the MLES into military police that had to prevent, detect, solve crimes and carry out pre-trial investigations of crimes against the established procedure of military service. At the time, the number of servicepersons in Ukraine had decreased from 780,000 in 1992 to 150,000, and the number of convicted military persons was only 390 in 2008.

At the same time, this issue became extremely relevant as the full-scale war started in Ukraine.

First, the number of military formations increased from 166,000 in 2013¹ to 880,000 in February 2024 (700,000 were in the AFU, 90,000 in the NGU, 60,000 in the Border Guard, and 30,000 in the SSU)².

Second, the number of offences in the armed forces has increased drastically.

Compared to 2013, the number of recorded criminal offences increased from 369 to 28,666 (78 times), and the number of convicted servicepersons increased from 184 to 2,585 (14 times) in 2023. Military administrative offences should also be taken into account. In 2013, they did not exist as such. In 2015, when Articles 172-10–172-20, which provided for such offences, appeared in the CUAO, the number of servicepersons against whom the relevant cases were considered and penalties were imposed amounted to 13,991, and their number increased by 6.5 times to 89,922³ in 2023.

Third, the new military realities have created a need for investigators, prosecutors, judges, and attorneys with in-depth knowledge of military regulations and other military administrative and criminal laws, issues of warfare, usage of weapons, etc.

It is clear that relevant state resources must be enhanced and optimised under such conditions. How to make them appropriate for the situation? It is obviously necessary to consider the state's previous experience and gains during the war and to be guided by the standards of the European Union and NATO. Key stakeholders have repeatedly drawn attention to this in recent years.

On 6 June 2017, a round table on “Military Justice in Ukraine: Current Problems of Organisation and Implementation” was held. The event was initiated by the Verkhovna Rada Committee on National Security and Defence, the Verkhovna Rada Committee on Legal Policy and Justice, the General Staff of the Armed Forces of Ukraine and V. M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine. The round table participants discussed theoretical, methodological, and applied aspects of the military justice problem and adopted relevant recommendations for its functioning, including the reinstatement of military courts⁴.

¹ How the Number of the AFU and Defence Spending Has Changed since 2013. URL: <https://www.slovoidilo.ua/2021/06/30/infografika/bezpeka/yak-zminyuvalsysya-chyselnist-zsu-ta-vytraty-oboronu2013-roku>

² What Is the Number of the AFU in 2024: How Many Troops Are at the Frontline? URL: <https://fakty.com.ua/ua/ukraine/20240223-yaka-chyselnist-zsu-u-2024-roczni-skilky-vijskovykh-perebuvaye-na-fronti/>; A Million of Ukrainians in Uniform Defend Ukraine from Russians. URL: <https://www.ukrmilitary.com/2022/07/milion-ukrainciv.html>

³ The Prosecutor General's Office. Statistics. URL: <https://new.gp.gov.ua/ua/posts/statistika>; Judiciary of Ukraine. Judicial Statistics. URL: https://court.gov.ua/inshe/sudova_statystyka/

⁴ On the results of the round table on “Military Justice in Ukraine: Current Problems of Organisation and Implementation.” URL: <https://komnbor.rada.gov.ua/print/72843.html>

On 29 October 2019, the International Scientific and Practical Conference “The Military Justice System in Ensuring the National Security of Ukraine” organised by the Ministry of Defence of Ukraine, Section of National Security and Military Law of the National Academy of Legal Sciences of Ukraine and the Research Institute of Informatics and Law of the National Academy of Legal Sciences of Ukraine together with the Military Institute of Taras Shevchenko National University of Kyiv and the Institute of Military Law of Yaroslav Mudryi National Law University, recommended that, in accordance with provisions of the Constitution of Ukraine, the main components of the national military justice system include as follows:

- ▶ Specialised military courts
- ▶ Specialised Military Prosecutor’s Office
- ▶ A state law enforcement agency with a special status in the military sphere (the Military Police of Ukraine or the State Service of Military Justice)
- ▶ Legal services of military formations
- ▶ The above military and legal educational units, and the scientific and educational specialisation “National Security and Military Law,” which was restored in 2018, and which they should develop and implement together with the National Defence University of Ukraine.

More than 30 conference participants expressed their opinions and proposals in writing, which were published in the proceedings⁵.

In August 2023, Pryncyp Non-Governmental Organisation presented analytical research on the state of military justice in Ukraine and current challenges in protecting the rights of military personnel⁶ where it recommended that the Verkhovna Rada of Ukraine establish a separate pre-trial investigation body – the Military Police. The Centre for Defence Strategies prepared analytical reports “Problematic Issues of Servicepersons’ Liability”⁷ (January 2023) and “Effectiveness of Legislative Changes to Strengthen the Liability of Servicepersons”⁸ (October 2023), which highlighted the feasibility of establishing the Military Police as a military law enforcement agency.

⁵ The military justice system in ensuring the national security of Ukraine. Proceedings of the international scientific and practical conference (compilers V. H. Pylypchuk, V. P. Koval, P. P. Bohutskyi, M. V. Belaniuk, S. O. Dorohykh, I. M. Doronin, O. H. Radziievska), Kyiv: ArtEc, 2019, pp. 6–9.

⁶ A. Volodenkova, L. Halan, D. Hatseniuk, A. Zavaloka, A. Krykun-Trush, A. Pashkina (2023). Military Justice and Protection of Military Rights. Review of International Experience and Trends in Ukraine. A. Krykun-Trush, L. Halan (Eds.). Kyiv, 2023. URL: <https://drive.google.com/file/d/1wgHqRj28zo-bTGL0CjQmPeJivnXuop6c/view>

⁷ Centre for Defence Strategies (January 2023). Problematic issues of servicepersons’ liability. Analytical Report. URL: <https://defence.org.ua/problemni-pytannya-vidpovidalnosti-vijskovosluzhbovcziv/>

⁸ Centre for Defence Strategies (October 2023). Effectiveness of legislative changes to strengthen the liability of servicepersons. Analytical Report. URL: <https://defence.org.ua/rezultatvvnist-zastosuvannya-zakonodavchyh-zmin-shhodo-posylennya-vidpovidalnosti-vijskovosluzhbovcziv/>

The Ukrainian Bar Association, in collaboration with the Main Military Justice Directorate of the Ministry of Defence of Ukraine, organised a professional discussion, “Revival of Military Justice in Ukraine”, on 26 September 2023. Participants of the discussion acknowledged the need to immediately establish the Military Police based on the Military Law Enforcement Service preserving the latter’s leadership and personnel; establish a military justice system, including the military police and military bar; and establish military courts or specify a clear specialisation for civilian judges to consider cases of military crimes under certain conditions⁹.

Can we expect that the war with the Russian Federation will soon end and that the military justice system will no longer be needed?

Of course, we can. As the military personnel prepare for the worst-case scenario in all difficult situations, everyone else in conditions of a full-scale war that lasts for three years should not rule out the possibility of other regional wars which Ukraine could be dragged into, or a new world war. Military justice is an element of ensuring the combat capability of the state’s armed forces, and therefore, it must exist in Ukraine.

⁹ Ukrainian Bar Association (27 September 2023). Military personnel, judges, and scholars joined the discussion on the revival of military justice in Ukraine. URL: <https://uba.ua/ukr/news/vjjskov-sudd-ta-naukovc-doluchilisja-do-diskusi-vdrozhennja-vjjskovoi-justici-v-ukrain>

Section 1

Military Justice System in the World and Ukraine

1.1. Functions, Principles, and Values of Military Justice Bodies

Military justice is a separate legal subsystem within the national legal system. It applies to servicepersons and other persons performing military service, and civilians in some cases. The military justice system operates to administer justice, ensure military law and order and discipline, and strengthen the armed forces' combat (operational) capability in a manner and following procedures that may differ from those of the national legal system. The Geneva Centre for Security Sector Governance (DCAF) proposes this understanding of the military justice system¹⁰.

The purpose of the military justice system has traditionally been to ensure discipline and order in the state's armed forces so that they can achieve a high level of defence capability. Accordingly, the military justice system performs a law enforcement function and, at different times and in some countries, a justice function.

Under law enforcement function as the main one, several other more special functions include as follows:

- ▶ Preventive – this refers to the prevention, detection, and stopping of criminal, administrative and disciplinary offences among servicepersons
- ▶ Investigation of such offences
- ▶ Search and detention of servicepersons who have voluntarily left the place of service or convicts who evade execution of the criminal penalty
- ▶ Execution of criminal penalties and administrative fines against servicepersons

Bodies such as the Military Police and the Military Prosecutor's Office usually perform these functions together with the command.

¹⁰ Pavlo Bohutskyi, Iryna Nazarchuk (23 January 2024). Will Ukraine succeed in establishing a full-fledged system of military justice?. Yurydychna Gazeta online. URL: <https://jur-gazeta.com/interview/chi-vdastsya-ukrayini-rozbuduvati-povnocinnu-sistemu-viyskovoyi-yusticiyi.html>

Today, courts consider cases of administrative offences committed by servicepersons, persons subject to military service and reservists during the training session in Ukraine, while authorised officials of MLES management bodies, as well as commanders (chiefs) of military units (institutions, establishments) and subunit commanders authorised by commanders (chiefs) of military units (institutions, establishments), are entitled to draw up protocols on such offences.

When defining the objectives of the law enforcement and justice functions, one should proceed from the options under which **military jurisdiction** arises:

1. from the status – it applies only to military personnel who commit any criminal offence;
2. from the specifics of the service – it applies to any criminal offences related to defence.

According to this approach, the subjects of military justice are:

- › Military personnel
- › Persons subject to military service and reservists during the training session
- › Employees of military units, relevant institutions, organisations and enterprises, if criminal offences are committed in their location or in connection with the performance of official duties by such employees, regardless of the place of criminal offence.

In Ukraine, police officers of the Special Police Forces of the National Police of Ukraine are also equated with military personnel in the context of liability for military criminal and administrative offences (part 4 of Article 401 of the CrCU and part 5 of Article 15 of the CUAO).

* * *

In recent years, civilised states have recognised that the most effective way to obtain good order and discipline is through fair and just procedures for determining guilt and apportioning punishment. Hence, the primary function of modern military justice systems is the achievement of justice, not simply the attainment of good order and discipline. While it is difficult to imagine effective armed forces without a justice system that acknowledges the unique nature of military service, the military justice system is a component of the rule of law and an integral part of the general judicial system of any law-governed state¹¹.

Fair trial right is a fundamental guarantee that protects persons from arbitrary and illegal restrictions on their freedom. Fair trial right should be guaranteed in military courts as well. However, in some military justice systems, there is still a problem of effectively ensuring equality of arms. In particular, the defence counsel's access to evidence is restricted due to military secrecy or other national security grounds. Such restrictions must remain proportionate and necessary in a democratic society. Any evidence collected unlawfully is inadmissible¹².

Following this approach, the UN Human Rights Council formulated the “Principles Governing the Administration of Justice Through Military Tribunals”, known as the **Decaux Principles** (after the Special Rapporteur who led their development) in 2006. These principles cover the

¹¹ Rachel E. VanLandingham, Dr. Grazvydas Jasutis, Kristina Cernejute. Military Justice. URL: <https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf>

¹² M. Vashakmadze (2018). Specific aspects of military justice: Guidance note. Geneva: DCAF. URL: https://www.dcaf.ch/sites/default/files/publications/documents/DCAF_Military-Justice_Practice-Note_UKR_Final.pdf

establishment of military courts, their jurisdiction, judicial proceedings, respect for human rights, the revision of military codes and other aspects of military justice.

The Yale Draft of the Decaux Principles, updated in 2018 by an international group of experts from Yale Law School in the United States, contains 20 updated principles of military justice (Annex 1). These principles reaffirm the limited authority of military courts, emphasise compliance with fair trial guarantees, clarify the scope of criminal offences that may be subject to military jurisdiction, and, in particular, state that the purpose of military justice is to contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice.

Many of these principles satisfy current requirements of Ukrainian legislation, such as the procedural rights guaranteed by Articles 62 and 63 of the Constitution of Ukraine. Others reflect the modern understanding of international human rights law developed under the ECHR and ICCPR. The principles sometimes overlap (e.g., Nos. 2 and 14)¹³.

Drawing on the Yale Draft of the Decaux Principles, international experts highlight **seven important values** that help govern military justice in addition to, or supporting the articulated principles:

1. **Respect for Human Rights and International Humanitarian Law (IHL).** All persons subject to military justice must be treated fairly and humanely, and their rights respected. Military tribunals should always adhere to internationally accepted standards and procedures that ensure due process and a fair trial. Military prisons must abide by international standards (such as the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment) and should be open to inspection by both domestic and international bodies. Military police and military prosecution agencies must abide by laws, applied without bias and in compliance with international human rights principles.
2. **Independence.** Military justice should be free from undue influence from political or higher military leadership, so decision-making is transparent and evidence-based. This norm includes the appointment of judges who are independent of any political or military bias. There is no political or higher military command interference during proceedings, including the initiation of proceedings.
3. **Accountability** includes legal accountability, which requires that all individuals in the security sector are held to the same standard of law and that any violations of the law are punished accordingly; moral and ethical responsibility, which requires that the highest ethical standards are upheld; financial accountability, which involves ensuring that all funds used within the security sector are properly tracked and accounted for; and all decisions of the military justice system should be transparent and open to scrutiny.
4. **Professionalism** – in the sense of training, experience, competence, codes of ethics and rigorous standards of behaviour and accountability for breaches.
5. **Efficiency.** Military justice actors ought to strive to efficiently and effectively use public and financial resources to ensure fair justice. This includes gathering data on the outcomes of cases, tracking trends, evaluating the effectiveness of their work, and making information about activities transparent.

¹³ Rachel E. VanLandingham, Dr. Grazvydas Jasutis, Kristina Cernejute. Military Justice. URL: <https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf>

6. **Reasonable military secrecy.** Military justice should be conducted with reasonable procedures to protect information that could harm national security.
7. **Delineation of power and jurisdiction.** Competence should be clearly defined and should not unnecessarily overlap with the competence of other investigative bodies; otherwise, clear guidelines should be established to accord logical primacy. Military justice has limited jurisdiction over the conduct of servicepersons and, only in exceptional circumstances, civilians. Military courts:
 - › Can administer justice to servicepersons when there are good reasons not to apply to civil courts: in case of military personnel's deployment abroad¹⁴ or during the armed conflict when military necessity makes it impossible to apply to ordinary courts;
 - › Should not have jurisdiction over persons under the age of 18 (except as permitted by Article 38 of the Convention on the Rights of the Child); should strictly comply with guarantees provided in the Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);
 - › Ought not to be involved in the trial of serious human rights violations, except as permitted by international humanitarian law¹⁵.

Experts name the following **military justice benefits**:

1. A healthy military justice system that accords due process and guarantees of fair trial rights can strengthen obedience to orders – hence **good order and discipline** within a State's armed forces. The most effective military justice systems are complemented by a **parallel administrative disciplinary system** that includes summary proceedings for acts of minor misconduct. The synergy between the two systems helps ensure a well-ordered military organisation, one that maintains compliance with international humanitarian law and the rule of law overall.
2. Military justice, done correctly, provides just accountability mechanisms for substantive offences unique to armed forces, as well as for other offences committed by service members that have a substantial connection to military service or for which an ordinary civil court is not feasible due to deployment of hostilities or war. An effective military justice system therefore contributes to the **operational effectiveness of the armed forces** by strengthening the critical dynamic of obedience to orders. This is particularly true when ordinary civil courts are not able to provide such accountability.
3. Military justice provides for the adjudication, by military triers of fact, of **uniquely military crimes** (such as insubordination, dereliction of duty, malingering, etc.). Those judging the factual guilt or innocence of a serviceperson typically are other servicepersons. Military members are likely to better understand the context and seriousness of military-unique crimes, as well as of ordinary crimes committed within a military context (such as theft in a military barracks).

¹⁴ Units of the armed forces are often stationed abroad to maintain international peace and security and combat terrorism.

¹⁵ Rachel E. VanLandingham, Dr. Grazvydas Jasutis, Kristina Cernejute. Military Justice. URL: <https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf>

4. Non-judicial summary proceedings – a disciplinary system that supplements military justice systems – include swift procedures for minor offences. These offences are disposed of quickly, thus keeping good order and discipline in a unit.
5. In many countries, investigative bodies carry a tremendous workload, which only increases during an armed conflict. Hence, creating a new military investigative body would relieve some of that workload.
6. provided that its independence is ensured, the military justice system guarantees servicepersons a more competent consideration of their administrative appeals¹⁶.

Furthermore, the existence of the military justice system means that untrained civilians will not hold positions where they perform duties with constant risk to life that is inherent in servicepersons and will not flee at the first sign of danger for which they have not been properly trained.

At the same time, there are certain risks:

1. It may be **extremely difficult to ensure the full independence** of all military justice decision-making from the military command. In contrast, judges from the ordinary courts and regular prosecutors are not subordinate to the military hierarchy. It is important to ensure budgetary independence as well.

UK troops were allegedly involved in human rights abuses in Iraq in 2003 and later. In cases where it has been decided there was to be no prosecution, the army/military police/government have been accused of politically motivated cover-ups.

Another example is found in Romanian law, which gives police officers accountable to the Military prosecutor a military-like status, thus escaping civilian control. The lack of impartiality of prosecuting authorities regarding police officers' accountability has been criticised on various occasions.

2. The creation and establishment of any new state body envisages **significant costs** such as organising selection procedures, training, purchasing equipment, new premises, etc.
3. There is always a risk that shortened **procedures** can be **abused** and used as an excuse for noncompliance with all the necessary procedural rules. It is important to cite Article 14 of the International Covenant on Civil and Political Rights, which envisages the right to equality before courts and to a fair trial.
4. If multiple agencies have investigative functions, it is crucial to establish a clear **delineation of tasks and competencies**. This takes some time and may require legislative amendments.
5. Establishing the clear scope and **limits of military justice jurisdiction**, namely who can be prosecuted for what offences, is of the utmost importance. The most controversial question is whether civilians can fall under the jurisdiction of military justice. There is no universally accepted approach here and no direct prohibition in any international legislation. Their international human rights law increasingly supports the exclusion of civilians from military jurisdiction, even in emergencies.

¹⁶ Rachel E. VanLandingham, Dr. Grazvydas Jasutis, Kristina Cernejute. Military Justice. URL: <https://www.dcaf.ch/sites/default/files/publications/documents/MilitaryJusticeFundamentals.pdf>

6. The creation of separate institutions with special status and internal procedures may negatively impact public opinion and create doubts regarding their transparency and independence¹⁷.

1.2. Military Justice System in the World

The global trend over the last century is the “civilisation” of the military justice system. First, military justice becomes an integral part of the general justice system and takes care of its own independence, primarily from political power and the command of the armed forces; second, it does not interfere with other jurisdictions, except for criminal ones; third, it practically does not carry out proceedings against civilians, but only against servicepersons; and fourth, it adheres to general procedural rules that guarantee full respect for human rights.

Today, there are no instruments of international legislation defining standards for establishing a military justice system. Each country has a right to decide in what format to establish such a system and what specific aspects it will have. There are many examples of different military justice systems that exist in more than 60 countries, including many NATO states.

For example, *Bulgaria* has military courts, military prosecutor’s offices and military police. The High Council of Justice, in coordination with the Minister of Defence, determines the number and locations of military courts. There are three military local courts and one military court of appeal. Military courts consider criminal cases for offences committed by military personnel in the line of duty or in cases related to their official duties. The Criminal Procedure Code defines the jurisdiction of military courts. There are also three military district prosecutor’s offices and a military appellate prosecutor’s office. Military prosecutors and investigators do not depend on military authorities in the line of duty. Military personnel of military courts and military prosecutor’s offices are financed by the budget allocated to the judiciary. They contracted for and were dismissed from military service following a decision of the High Council of Justice on their appointment and dismissal from a court or prosecutor’s office. The executive head of the relevant court or prosecutor’s office awards the military rank, and higher military ranks are awarded by decree of the President of the Republic upon submission of the Council of Ministers. Military police conduct criminal intelligence activities, activities to prevent, investigate, and detect general offences, police records of individuals, and investigations of aviation accidents and military aircraft incidents¹⁸.

In *Poland*, the military justice system also includes the military prosecutor’s office, military police and military courts, which are expressly provided for in Article 175 of the Constitution of the Republic of Poland.

¹⁷ Ibid.

¹⁸ Mykola Lutsiv (16 June 2021). Military justice: Bulgaria and Ukraine. Ukrainian Right. URL: https://vpzhr.gp.gov.ua/ua/guidance_vpzhr.html?_m=publications&_c=view&_t=rec&id=298078

According to the Law of the Republic of Poland “On the System of Military Courts” of 1997, the Minister of National Defence, in consultation with the Minister of Justice, after consulting the National Council of the Judiciary, by way of an ordinance, establishes and abolishes military courts and defines their seats and areas of competence, bearing in mind the need to ensure rational organisation of the military judiciary by adjusting the number of courts, their size, and areas of competence for the deployment of the Armed Forces, to guarantee the exercise of the right to have a case heard within a reasonable time, and taking into account the needs of the Armed Forces in the event of mobilisation and in times of war. The Supreme Court supervises the activities of military courts in the administration of justice, the Minister of Justice – in terms of organisation and administration, and the Minister of National Defence – in terms of military service of servicepersons in these courts. The Law provides for a two-tier system of military courts – military garrison courts and military district courts (courts of appeal). The Supreme Court of the Republic of Poland carries out cassation review of cases considered by military courts. According to Chapter 15 of the Criminal Procedure Code of the Republic of Poland, military courts have jurisdiction over criminal cases of war crimes and some other offences.

The Law of the Republic of Poland “On the Prosecutor’s Office” of 2016 stipulates that one of the Deputy Prosecutor General is the Deputy Prosecutor General for Military Affairs. The Prosecutor General approves the candidate for this position with the Minister of National Defence and dismisses him or her. In cases falling under the jurisdiction of military courts, tasks assigned to the prosecutor’s office are performed by prosecutors of general organisational units of the prosecutor’s office operating in the Military Affairs Department of the Prosecutor General’s Office, in the district prosecutor’s offices and the military affairs departments of district prosecutor’s offices. Prosecutors for military affairs are servicepersons. They perform official tasks when the Armed Forces of the Republic of Poland are used or deployed outside the country in the event of mobilisation, martial law and in times of war. In a raion prosecutor’s office where a military affairs department has been established, the prosecutor in charge of this department is the deputy raion prosecutor for military affairs, who is appointed and dismissed in the same manner as in raion prosecutor’s offices. Within the system of prosecutorial authorities in the Republic of Poland, there are four military affairs departments in raion prosecutor’s offices and twelve military affairs departments in raion prosecutor’s offices. Although formally integrated into the territorial prosecution bodies, units of the prosecutor’s offices for military affairs operate on an extraterritorial basis and are actually an independent structure with its own hierarchy.

The Military Gendarmerie (Żandarmeria Wojskowa), a separate specialised law enforcement agency within the Armed Forces of the Republic of Poland, operates in the Republic of Poland based on the Law “On Military Police and Military Law Enforcement Agencies” of 2001. In particular, it is responsible for exposing and investigating crimes and other offences among military and civilian personnel of the Armed Forces, including fiscal offences¹⁹.

¹⁹ V. Vdovytchenko (27 April 2021). Organisation of law enforcement activities in the defence sector: the experience of the Republic of Poland for Ukraine. Army-Inform. URL: <https://armyinform.com.ua/2021/04/27/organizacziya-pravoohoronoyni-diyalnosti-u-sferi-oborony-dosvid-respubliky-polshha-dlya-ukrayiny/>

There are five types of military courts in the *Canadian* Armed Forces: general, disciplinary, special, ordinary, and appellate. All these courts are instantly subordinate to the Supreme Court of Canada. The Canadian Armed Forces have military police and the Canadian Military Prosecution Service (CMPS). The CMPS has lawyers who review cases referred to the military court by pre-trial investigation bodies to establish whether there is a reasonable prospect of conviction and a public interest in continuing the investigation, provide legal advice to the National Investigation Service, approve charges, etc.²⁰

Military Courts

According to the Council of Europe standards, the organisation, and operation of military courts, where they exist, should fully ensure the right of everyone to an independent, impartial and competent tribunal.

Both the accused and the prosecutor shall have the right to appeal against decisions of military courts of the first instance to courts of appeal and (civilian) supreme courts. In many countries, military courts of appeal are civilian courts. A civilian court of appeal may be established to provide an independent and fair review of first-instance decisions. In some cases, courts of appeal are hybrid, comprising both civilian and military judges. In any case, the right to unimpeded access to independent appeal procedures should be effectively guaranteed despite the prevailing models of appeal.

In some cases, high courts making final decisions have specialised military chambers

e.g., the Military Chamber of the Federal Administrative Court of Germany – for the consideration of relevant administrative cases involving military personnel. Military courts as special administrative courts bear responsibility for military disciplinary proceedings and consideration of appeals in the first instance, while the First or Second Military Senates of the Federal Administrative Court acts as cassation instance.

However, most often the judges involved in court proceedings are civilians.

Military courts operate in many developed countries, including 25 European ones. According to the Council of Europe's Steering Committee for Human Rights, they include the United Kingdom, Switzerland, Spain, Italy, Ireland, Türkiye, Slovakia, France, the Netherlands, Croatia, Norway, Finland, Hungary, Bulgaria, Belgium, Austria, Germany, Portugal, Czechia, and Denmark.

²⁰ S. Melnyk (2019). The military justice system in NATO member states: theoretical and practical aspects. The system of military justice in ensuring the national security of Ukraine: Proceedings of the international scientific and practical conference (compilers V. H. Pylypchuk, V. P. Koval, P. P. Bohutskyi, M. V. Belaniuk, S. O. Dorohykh, I. M. Doronin, O. H. Radziievskia), Kyiv: ArtEc, pp. 57–64.

Türkiye has military disciplinary courts and military criminal courts. *Georgia* has no military courts, but its Constitution allows for the establishment of military tribunals in wartime. In *Uzbekistan*, military courts consider all criminal and civil offences, including in places where courts of general jurisdiction do not operate due to exceptional circumstances, and in cases related to state secrets²¹.

There are three forms of military courts and they operate:

1. As an autonomous system in peacetime and wartime both on the territory of the country and military bases abroad (USA, UK, Spain, Switzerland, Italy, Canada, China, Ireland, Türkiye, Slovakia, Poland, most countries of the former USSR, and countries of Latin America).

An autonomous system of military justice has existed in *the United States* since 1806. It is staffed by officers with special military and legal education, integrated into the hierarchical system of military command and includes:

- ▶ The military judicial system established as a separate branch of the judiciary and consisting of military courts of first instance (disciplinary military courts, special military courts and military courts established by commanders to consider a specific case), military courts of appeal, and the Supreme Court;
- ▶ Military prosecutor's offices, which are independent investigative bodies and do not belong to the federal prosecutor's office;
- ▶ Military police, which performs the task of maintaining discipline and investigates war crimes;
- ▶ Military attorneys who provide professional advice and protect the rights and legitimate interests of accused (suspected) US military personnel, reservists and military retirees;
- ▶ A permanent independent commission that examines the problems of military justice and compliance of the Uniform Code of Military Justice (1951), which regulates criminal and disciplinary liability of military personnel, with the needs of the military service in terms of effectively ensuring good order and discipline in the Armed Forces;
- ▶ Military Ombudsman²².

2. In the system of general courts. The courts are formed out of legal officers or have a mixed composition (France, the Netherlands, Norway, Finland, Hungary, Bulgaria, Belgium, and Croatia).

²¹ M. Vashakmadze (2018). Specific aspects of military justice: Guidance note. Geneva: DCAF. URL: https://www.dcaf.ch/sites/default/files/publications/documents/DCAF_Military-Justice_Practice-Note_UKR_Final.pdf

²² Ibid.

For example, in **France**, military justice operates within the general judicial and law enforcement system as a manifestation of their specialisation. Although military courts are not distinguished as separate judicial bodies, military specialisation is provided for in general courts. Military collegia are established in criminal courts, and military courts acting permanently (even in peacetime) are maintained abroad. The highest instance for them is the Armed Forces Tribunal in Paris²³.

3. Only on the territory of military bases outside the state or exclusively in wartime (Austria, Germany, Czechia, Denmark, Georgia)²⁴.

Germany has no military criminal courts. However, according to²⁵ part 2 of Article 96 of the Basic Law for the Federal Republic of Germany, the Federation may establish federal military criminal courts for the Armed Forces. They may exercise criminal jurisdiction during a state of defence and over members of the Armed Forces serving abroad or on board warships.

One certainly should not idealise the activities of military courts in the countries of the European continent. There are several lawsuits against the Netherlands, Romania, Türkiye, and the United Kingdom. The European Court of Human Rights has considered such cases. The Ukrainian legislator should take this experience into account and avoid mistakes when establishing legislation on military courts.

For example, in the cases of *Engel and Others v. the Netherlands*, 08/06/76, §57; *De Jong, Baljet and Van den Brink v. the Netherlands*, 22/05/84, §49; *Morris v. the United Kingdom*, 26/02/2002, §59; *Findlay v. the United Kingdom*, 25/02/97, §§75–78; *Brumarescu v. Romania*, 12/10/99, §§61–62; *Incal v. Turkey*, 09/06/98, §68; *Şahiner v. Turkey*, 25/09/01, §41; *Çıraklar v. Turkey*, 28/10/98, §38. The ECtHR's claims concerned the combination of prosecution and litigation functions in Dutch military courts, the existence in UK military courts of an officer who convened a tribunal and then affirmed its judgements, the procedure for appointing military judges in Türkiye by the military command and their accountability to it²⁶.

Military Attorneys

In some countries, specialised military lawyers – attorneys – represent and conduct cases in courts. Many NATO countries, including Canada, the United Kingdom, Italy, Greece, Poland, Romania, Bulgaria, etc., have military attorneys.

²³ Ibid.

²⁴ V. V. Topchii (2016). Models of military court systems in the European Union: comparative and legal analysis. *Actual Problems of Native Jurisprudence*, vol. 2, pp. 170–174.

²⁵ URL: https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/grundgesetz/gg_09-245142

²⁶ Ibid.

One of the bodies of *Israeli* military justice is the Military Advocate General Corps (MAG Corps) consisting of several units, one of which is the Military Defence headed by the Military Advocate General²⁷.

According to the MAG Corps website, the Military Defence:

1. provides legal advice and representation to any IDF (Israel Defence Forces) soldier and officer under criminal investigation or standing trial in the military justice system, upon request;
2. is responsible for the defence of soldiers and officers before military tribunals and in appeals to the Military Court of Appeal;
3. represents military personnel, provides legal advice during investigations, and assists them not only in cases related to military service but also in everyday legal matters.

The Military Defence consists of dozens of enlisted defence lawyers working in each district of the Military Courts, as well as numerous lawyers serving in reserve duty. While remaining part of the MAG Corps, the Military Defence enjoys full professional independence²⁸.

The *US* military justice system includes the Judge Advocate General Corps (JAG Corps)²⁹. It employs almost 2000 enlisted civilian and military lawyers. Each military branch (navy, army, air force, marines) has its own Judge Advocate General Corps with certain specifics. Attorneys, legal administrators, and military paralegals are also deployed in US military forces abroad, including Japan, South Korea, Germany, Kosovo, Iraq, Kuwait, and Qatar. They provide legal assistance to soldiers and officers, resolve claims against the army, advise commanders and assist them in the administration of military justice. A JAG Corps lawyer advises and represents military personnel in all areas of law, even, at the request of the serviceperson, in divorce proceedings and disputes on the minor's place of residence. So, the US military bar can be considered not only as a means of maintaining order and justice in the military but also as one of the benefits for servicepersons³⁰.

Other countries have no specialised military lawyers. Civilian attorneys represent and defend the defendant's interests in military courts. However, the absence of military attorneys in the justice system does not mean that the defendant's right to freely choose their legal representative can be limited. The defendant should be granted the opportunity to choose a civilian attorney to represent and defend their interests in military courts wherever they exist. In such cases,

²⁷ Head of the Main Military Justice Directorate of the Ministry of Defence of Ukraine Oleksii Muravyov: the Military Police and the Military Law Enforcement Service will be at a dead end without the requisite authority. Interview from Ukraine, 23 September 2023. URL: <https://rozmova.wordpress.com/2023/09/23/oleksiy-muravyov/>

²⁸ About the MAG Corps. URL: <https://www.idf.il/en/mini-sites/militaryadvocate-general-s-corps/about-the-mag-corps/>

²⁹ Organisation of JAG Corps. URL: <https://www.jag.navy.mil/organization.htm>

³⁰ O. Khotynska-Nor, R. Denysiuk. Specialisation of lawyers of Ukraine in the conditions of war: state and prospects of development. Bulletin of Taras Shevchenko National University of Kyiv, Legal Studies, 5(124)/2022, pp. 97-101.

civilian attorneys should be aware of military life and have sufficient knowledge of the relevant military legislation³¹.

It is important to remember that military legislation includes provisions of various areas and sub-areas of law (including administrative, criminal, civil, information, financial, land, and water) and defines diverse and specific relations on the administration of military service, military service and its termination, the legal status of servicepersons, their social and legal protection, etc.

Military Prosecutor's Offices

It is important to guarantee the independence of military prosecutors. They should not be subject to the chain of command and be part of the military hierarchy. To this end, military prosecutors may be subordinate to the Prosecutor General.

In some cases, the chief military prosecutor is one of the deputy prosecutors general (this is common in some Eastern European states), which formally **ensures civilian control over the armed forces, but is not a guarantee of independence**. The military prosecutor may also be subordinate to the Minister of Justice or the Minister of Defence. They are subordinate to both of them in some systems (Poland). However, **the legislative framework should be clear to eliminate any doubts about the independence of prosecution from the military command**.

There is a tendency to transfer the functions of military prosecutors to civilian ones. Indeed, **some countries have abolished military prosecutor's offices**³².

Conversely, **Azerbaijan**, which does not have military courts, has a military prosecutor's office. Military prosecutor's offices continue to operate in Armenia, Denmark, Cyprus, Moldova, Serbia, Switzerland, etc.³³

Military Police

There are military police, in particular, in NATO member states such as Canada, Italy, Lithuania, Portugal, and the Netherlands. In France, the National Gendarmerie with a dual subordination to the Minister of Defence of France (as part of the Armed Forces) and the Minister of the Interior (as part of the police system) performs its functions. In Italy, the Carabinieri has similar dual subordination³⁴.

³¹ M. Vashakmadze (2018). Specific aspects of military justice: Guidance note. Geneva: DCAF. URL: https://www.dcaf.ch/sites/default/files/publications/documents/DCAF_Military-Justice_Practice-Note_UKR_Final.pdf

³² Ibid.

³³ Explanatory Note to the Draft Law of Ukraine "On Amendments to the Law of Ukraine 'On Prosecutor's Office' on the Establishment of Military Prosecutor's Offices." URL: https://w1.cl.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=4446%D0%B0&skl=8

³⁴ S. Melnyk (2019). The military justice system in NATO member states: theoretical and practical aspects. The system of military justice in ensuring the national security of Ukraine: Proceedings of the international scientific and practical conference (compilers V. H. Pylypchuk, V. P. Koval, P. P. Bohutskyi, M. V. Belaniuk, S. O. Dorohykh, I. M. Doronin, O. H. Radziivska), Kyiv: ArtEc, 2019. pp. 57–64.

The main tasks of the military police usually include:

- › Investigation of criminal offences in the Armed Forces
- › Control over compliance with the law
- › Prevention of disciplinary offences
- › Control and regulation of the movement of military transport
- › Ensuring the safety of military personnel
- › Protection of military facilities, etc.

The Military Police of *Canada* that makes up 2% of the total number of military personnel³⁵ ensures the maintenance of law and order in the Armed Forces of Canada and investigates offences committed by military personnel. The military police bodies operate separately from the military command and are subordinate to the Military Police Chief of the Canadian Armed Forces.

In many military justice systems, military commanders are empowered to conduct initial investigations and collect evidence. It is important to ensure that such investigations are independent and effective. The national law should explain how the commander cooperates with the military police and under what circumstances and at what stage the case file should be transferred to the military police or prosecutor's office, how the functions of the command and the military police are divided, and how the independence of the military police from the command is ensured, in particular during pre-trial investigations.

For example, in *Lithuania*, the military police that operates within the MoD system investigates misconduct. If the military commander concludes signs of a crime during the investigation, they must immediately inform the military police and pass all the materials necessary for the pre-trial investigation. The military police then conduct a pre-trial investigation³⁶.

The investigation process must be independent and fair. A lack of objectivity and impartiality can undermine the integrity of the entire military justice system.

Differences between legal systems should be taken into account when developing and implementing military justice reforms. In common law systems, commanders participate in the justice system during the investigation, bringing charges, and trial and post-trial stages. In the United States, commanders can have a significant impact on the proceedings. In other systems, the commander's role usually ends after the initial investigation is completed. The commander shall refer the case to the military police or prosecutor for further investigation and a decision on charges.

It is important to clearly define the competence of the command at the investigation stage and clarify the relationship between civilian and military authorities.

³⁵ With such a proportion, the military police in Ukraine would have to consist of 15,000–20,000 servicepersons.

³⁶ M. Vashakmadze (2018). Specific aspects of military justice: Guidance note. Geneva: DCAF. URL: https://www.dcaf.ch/sites/default/files/publications/documents/DCAF_Military-Justice_Practice-Note_UKR_Final.pdf

Article 68 of the *Slovenian* Law on Defence states, “Should the military police catch a civilian in a criminal act on a facility or surroundings which are of special importance to defence, or in the camp area, they must immediately notify the police. In such a case, the military police shall have the power to use only absolutely necessary measures and means of restraint to detain him/her until the arrival of the police and to successfully deter any attack on persons or facilities and property that they protect³⁷.”

Military Ombudsman/Inspector General

In some countries, the military ombudsman or inspector general is close to the military justice system. In their oversight of the armed forces, they operate separately from, but in cooperation with, the military justice system. A military ombudsman usually deals with individual grievances submitted by members of the armed forces, investigates possible human rights violations by the military, and issues recommendations to prevent further violations. In some jurisdictions, the ombudsman has the right to legislative initiative and can use it to influence the functioning of military justice.

Australia has a unique mechanism for administrative supervision of the military justice system, which is carried out by the Inspector General of the Defence Forces. Although they operate within the defence system, their position is independent of the chain of command. The Inspector General is empowered to consider individual complaints and conduct a performance audit of the defence forces.

There are two models around the world:

1. A military ombudsman (Sweden, Norway, Austria, Germany, Canada, Ireland, Czechia, and Belgium);
2. A specialised unit or a representative of the armed forces in the Ombudsman’s Office³⁸.

The Ombudsman’s Office has a specialised department that deals with the problems of veterans, servicepersons, war prisoners and their families, and the Ombudsman’s annual report on the state of observance and protection of human and civil rights and freedoms in Ukraine includes a section on human rights in the security and defence fields.

At the same time, taking into account positive foreign experience, in April 2024, the Ministry of Defence of Ukraine established the Central Office for the Protection of Servicemember’s Rights, which will be responsible for considering appeals and complaints from servicepersons, providing primary legal aid, conducting inspections and investigating violations of the rights of servicepersons and their families. A focus of the Central Office will be spent on the following violations:

- › Support of servicepersons
- › The right to a leave

³⁷ Ibid.

³⁸ Ibid.

- › Prevention of abuse of rights by commanders
- › Failure to provide/insufficient provision of medical care
- › Social guarantees
- › Violation of gender equality³⁹

Indicators and Options

Trying to propose the most effective military justice system for Ukraine, researchers identified a number of *indicators* (including the general profile of the country, classification of service offences, the existence of specialised military justice bodies, powers of commanding officers to consider military offences, division of jurisdiction between civilian and military justice bodies), which were used to compare five military justice systems, four of which belong to NATO⁴⁰. Among them, only Lithuania does not have a specific military justice system.

In 2020–2021, the armed forces consisted of 355,000 permanent personnel and 380,000 reservists in Türkiye, 194,000 permanent personnel and reservists in the UK, 173,000 permanent personnel and 465,000 reservists in Israel, almost 98,000 permanent personnel in Canada, and 15,000 permanent personnel and 100,000 reservists in Lithuania.

The following conclusions were drawn from the research of these countries:

1. Military offences are stipulated by special legal acts which either relate to the organisation of the military justice system (Israel) or the organisation of the armed forces (the United Kingdom, Canada) or constitute a separate set of rules (Türkiye). There is a characteristic of service offences by seriousness, which affects (1) the classification of the offence as a crime, misdemeanour (Lithuania and Israel) or other service disciplinary offence (Canada), as well as (2) the severity of the punishment and (3) the specifics of the trial.
2. Investigation and prosecution of the most minor (and most common) disciplinary offences is as quick as possible, without being burdened by complex legal procedures as those required in criminal proceedings.
3. The system of military courts is designed to deal primarily with service offences committed by members of the armed forces. In some countries, military courts are allowed to hear cases related to military service (Türkiye) or non-military offences committed by military personnel (Canada and the United Kingdom).

³⁹ The Ministry of Defence is Launching a New Initiative to Protect the Rights of Servicepersons. URL: <https://www.mil.gov.ua/news/2024/04/03/minoboroni-zapochatkovue-novu-inicziativu-z-zahistu-prav-vijskovosluzhbovcziv/>

⁴⁰ A. Volodenkova, L. Halan, D. Hatseniuk, A. Zavoloka, A. Krykun-Trush, A. Pashkina (2023). Military Justice and Protection of Military Rights. Review of International Experience and Trends in Ukraine. A. Krykun-Trush, L. Halan (Eds.). Kyiv. URL: https://www.pryncyp.com/wp-content/uploads/2023/12/prynczyp_yurydychnyj-analiz_online.pdf

4. The countries differ fundamentally in their establishment models. The Israeli model provides for the establishment of regional military courts as courts of first instance, while the United Kingdom and Canada consider the military court as a single institution with jurisdiction over the entire territory of respective countries and territories of other countries where their armed forces operate, as well as all military personnel and, in certain cases, civilians associated with the armed forces. Military courts in Türkiye are established based on a military unit (corps level and above) and extend their jurisdiction to it.
5. Military courts are usually composed not only of professional judges, but also of lay officers: as members of a panel that acts similarly to a jury and determines the guilt of the accused under the general legal guidance of a professional judge (Canada and the United Kingdom), or as almost equal members of the court (Türkiye and Israel). It is believed that taking into account the military expertise of people who serve in the same structure allows for a fairer decision.
6. The military justice system in each country has a specialised military prosecution body. In Türkiye, the prosecutor's office is the main investigating authority, with law enforcement agencies only supporting this function, while in other jurisdictions, the prosecutor mainly supervises the pre-trial investigation, makes recommendations to the pre-trial investigation authority, but generally refrains from influencing the latter. The functions and role of the military prosecutor – namely to represent the prosecution in a military court – are generally the same as those of civilian prosecutors.
7. The investigative role is carried out by the military police, which generally have similar powers to the civilian police, but have greater access to sensitive facilities and fewer restrictions on arrest and search, including for military personnel of any rank or grade title.
8. Summary hearings of commander review of misconduct cases are an important element of military justice. The advantage of this form is that relatively minor misconduct at the unit level can be investigated more quickly and specific deterrent sanctions can be imposed.

According to the Disciplinary Statute of the *Lithuanian* Armed Forces, the following penalties are possible for disciplinary offences: prohibition to leave the territory of military premises, reduction of official salary or scholarship, demotion in rank, dismissal from military service, and expulsion from a military educational institution.

In *Canada*, penalties which may be imposed by presiding officers following summary include reduction in rank, severe reprimand, reprimand, and deprivation of pay for a period not exceeding 18 days.

In the *UK*, the responsible commanding officer can consider cases (e.g., absence without official leave, misconduct towards a superior officer, theft, possession of controlled drugs, etc.) in a summary hearing and has the right to impose a sentence of up to 28 days' imprisonment, which can be extended to up to 90 days' imprisonment with the approval of a higher authority. In any case, the accused retains the right to request a trial by the military court instead of the commander.

9. In Lithuania, military crimes and infractions are dealt with by the civilian justice system, while in other countries, the civilian and military systems compete for jurisdiction. The link between the crime committed and military service is a key factor in justifying the jurisdiction of military justice bodies.

This issue is best addressed in *Turkish* law. The committed act refers to the jurisdiction of a military court if (i) a member of the armed forces commits a military offence; (ii) a member of the armed forces commits an offence against another member of the armed forces; (iii) a member of the armed forces commits an offence on the territory of the military unit; or (iv) the offence committed is a consequence of the performance of a task or duty by the member of the armed forces.

In *Canada* and *the United Kingdom*, there is a deliberate overlap between the civil and military jurisdictions for non-military offences committed by members of the armed forces, leaving it to the competent authorities to decide on a case-by-case basis, depending on the circumstances.

We consider the Canadian experience of involving an assisting officer in the consideration of a military offence as the defence counsel of the accused, who assists, advises, makes statements and otherwise represents the accused throughout the trial and any review, if the accused so wishes, to be negative. The assisting officer may cease to assist the accused at any time, after which the presiding officer must appoint another assisting officer. A professional lawyer would provide a more reliable defence.

1.3. Military Justice System in Ukraine: Genesis

Ukraine inherited a system of military prosecutor's offices and military tribunals from the Soviet Union in 1991.

Military Prosecutor's Offices

The Law "On the Prosecutor's Office" of 5 November 1991 did not provide for the presence of military prosecutor's offices in the system of prosecutorial authorities. However, it was amended in November 1993, and based on it:

- ▶ Military prosecutor's offices were introduced into the system of prosecutorial authorities;
- ▶ Regional military prosecutor's offices and the military prosecutor's office of the Black Sea Fleet and the Ukrainian Navy (as oblast prosecutor's offices), and military prosecutor's offices of garrisons (as city prosecutor's offices) were included in the system of military prosecutorial authorities;
- ▶ Citizens of Ukraine from among officers who served or were in the reserve and had a higher legal education were appointed as military prosecutors and investigators;
- ▶ Military personnel of the military prosecutor's offices served in accordance with the Law "On General Military Duty and Military Service" and the MoD of Ukraine provided financial support for prosecutors, investigators, officers and other employees of the military prosecutor's offices and provided the military prosecutor's offices with office premises, security, transport, communication means and other necessary equipment, and military personnel of these prosecutor's offices with uniforms.

On 13 April 2012, Ukrainian MPs V. Oliinyk and V. Malyshev (members of the Party of Regions, the former is currently hiding in Russia and the latter disappeared from the media after 2014) registered Draft Law “On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Criminal Procedure Code of Ukraine” (registration No. 9700-2), which the Verkhovna Rada immediately adopted as a law. This draft law did not include the CSEO opinion or even a traditional explanatory note⁴¹. It can be reasonably assumed that military prosecutor’s offices were abolished so suddenly at the request of Moscow in the general context of Ukraine’s military weakening and “demilitarisation.”

Shortly after the start of Russian military aggression, according to the Law “On Amendments to the Law of Ukraine ‘On Prosecutor’s Office’ on the Establishment of Military Prosecutor’s Offices” of 14 August 2014, military prosecutors were returned to the prosecution system.

The Explanatory Note to the relevant Draft Law No. 4446a of 8 August 2014 justified it as follows:

“Military prosecution system, unlike territorial ones, should be established on the extraterritorial principle, which will ensure maximum proximity to the structure and deployment locations of military formations and their command and control bodies... which are characterised by high mobility and readiness to mobilise reserves in case of a special period. According to combat deployment plans and the involvement of each level of military command and control bodies, the staff of military prosecutors will be provided for both in peacetime and wartime.

If necessary, military prosecutors will move flexibly with the troops during a special period...

The establishment of military prosecutor’s offices is also conditioned by the need to supervise the observance of laws in the operational units of certain military formations...

The state military formations are required to have an appropriate level of combat readiness and combat capability. Their specificity will require from the prosecutors and investigators of military prosecutor’s offices special knowledge in military administration, tactics, and combat use of troops, knowledge of special techniques... and detection and investigation of crimes...”

The Law “On the Prosecutor’s Office” of 14 October 2014 preserved military prosecutor’s offices. The prosecution system of Ukraine included the Main Military Prosecutor’s Office (as a structural unit of the Prosecutor General’s Office of Ukraine), regional military prosecutor’s offices (as regional ones), military prosecutor’s offices of garrisons and other military prosecutor’s offices (as local ones), the list of which was defined in the Annex thereto. It was assumed that if, due to exceptional circumstances, prosecutor’s offices of Ukraine did not operate in certain administrative and territorial units, military prosecutor’s offices could perform their functions by the decision of the Prosecutor General of Ukraine.

⁴¹ Draft Law “On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Criminal Procedure Code of Ukraine.” URL: https://w1.cl.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=9700-2&skl=7

However, the military prosecutor's offices once again ceased to exist in accordance with the Law "On Amendments to Certain Legislative Acts of Ukraine in Connection with Priority Measures for the Reform of the Prosecution" of 19 September 2019 initiated by President V. Zelenskyi and the following orders issued by the Prosecutor General in pursuance of it, "On Certain Issues of Bringing the Specialised Prosecutor's Offices into Operation in the Military and Defence Fields (as Oblast Prosecutor's Offices), No. 66 of 5 February 2020 and "On Special Considerations Relating to the Organisation of Work at the Specialised Prosecutor's Offices in the Military and Defence Fields" No. 370 of 22 November 2021.

Previously, on 4 September 2019, veterans of military justice sent the President of Ukraine, the Chair of the Verkhovna Rada of Ukraine, and the Prosecutor General, an open letter "Stop the abolishment of military prosecutor's offices," where they explained in detail all the negative consequences of this step⁴², but were not heard.

On 1 April 2022, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to Certain Laws of Ukraine on Improving the Work of Prosecutor's Offices in the Conditions of Armed Aggression Against Ukraine" which reinstated the military prosecutor's office. The President of Ukraine did not sign it but returned it for rejection.

Military Courts

Soviet military tribunals were transformed into military courts by the Resolution of the Verkhovna Rada of Ukraine No. 2979-XII of 3 February 1993 "On Renaming Military Tribunals of Ukraine into Military Courts of Ukraine and Extending Their Judges' Terms of Office."

According to the Law "On Judicial System of Ukraine," adopted on 5 June 1981, military garrison courts acted as local courts, and military courts of regions and the Navy acted as courts of appeal. They considered, in particular:

- › Cases of all offences committed by military personnel and persons subject to military service during the training session
- › Cases of administrative offences committed by servicepersons
- › Cases of servicepersons' complaints against misconduct of military officials and military command and control bodies
- › Other cases related to the protection of the rights and freedoms of servicepersons

Judges of military courts were military personnel and counted to the AFU personnel strength. The majority of military judges were specialists who received special military and legal education and had extensive work experience in military formations and a thorough knowledge of military legislation⁴³.

According to the CPCU of 1960 (Article 36), military garrison courts as courts of first instance had jurisdiction over all offences committed by persons with the military rank of lieutenant colonel and captain of the second rank inclusive, except for those cases over which superior military

⁴² URL: https://ukrainepravo.com/news/ukraine/zupynyty-likvidatsiyu-viyskovykh-prokuratur/?fbclid=IwAR17Ec-HVGlzBFPbBC3OnLbmvmns9mm56JiB0XISlx_xqICKk5xGn85820Y

⁴³ I. Levchenko. The third year of war. Who are the judges? URL: <https://glavcom.ua/publications/tretiy-rik-viyni-a-suddi-hto-372817.html>

courts had jurisdiction. Military courts of regions and the Navy as courts of first instance had jurisdiction over offences committed by persons with the military rank of colonel, captain of the first rank and above or holding a position of regiment commander, ship commander of the first rank and above, as well as persons holding an equal position; for which in peacetime the law provides for the possibility of imposing a sentence of life imprisonment.

The Law “On Judicial System of Ukraine” of 7 February 2002 established that military courts are part of the general courts and administer justice in military formations of Ukraine. The system of military courts includes military garrison courts, regional military courts of appeal, the court of appeal of the Ukrainian Navy, and the Military Judicial Collegium of the Supreme Court of Ukraine.

In 2004, the gradual abolishment of military courts began. On 19 October, upon the proposal of the then Minister of Justice Oleksandr Lavrynovych, Decree of the President of Ukraine No. 1262/2004 “On the Abolishment of Certain Military Local Courts and Amendments to the Network and Number of Judges of Military Courts of Appeal and Military Local Courts” was signed, according to which two military courts in the Autonomous Republic of Crimea, the military court of Luhansk garrison and four another courts were abolished and the number of judges in military courts was reduced from 157 to 132.

According to the Law “On Judiciary and the Status of Judges” of 7 July 2010, all military courts were abolished. The Law stipulates that courts of general jurisdiction shall consider cases previously considered by military garrison courts and military courts of appeal.

According to the then President of Ukraine V. Yanukovych, the abolishment of military courts in 2010 was due to the economic inexpediency of their maintenance, as the reduction in the number of the Armed Forces significantly reduced the number of cases under their jurisdiction, as well as the desire to bring the Ukrainian justice system closer to the European one, which requires independence of judges from the military command. However, many democratic countries, including European ones, have military courts. So, there were probably other reasons for the abolishment of military courts that should be mentioned in the general context of the then state leaders’ actions to destroy Ukraine’s defence. Former Chief of the AFU General Staff, retired Colonel-General Anatolii Lopata, sharply expressed his opinion, “Military courts were abolished because they were a prerequisite for the abolishment of the Armed Forces. To abolish them and steal all their property, it was necessary first to abolish military courts and military prosecutor’s offices⁴⁴.”

Presidential Decree No. 900/2010 of 14 September 2010 “On the Abolishment of Military Courts of Appeal and Military Local Courts” abolished 15 military courts – two courts of appeal and 13 local courts.

The CSEO strongly opposed the abolishment of military courts. In their opinion to Draft Law No. 6450 of 31 May 2010 submitted by the President of Ukraine, the office’s experts noted that this approach to military courts was unbalanced and biased and that their abolishment was premature and inappropriate. They justified their position by the following:

1. If such a decision is made, the personnel strength of military formations, officers of military departments, persons subject to military service during the training session and legal entities in the field of relevant legal relations will be deprived of proper and qualified judicial

⁴⁴ The establishment of military courts is an urgent need to maintain discipline and good order in the army at war. Ukrinform, 19 June 2017. URL: <https://www.ukrinform.ua/rubric-polytics/2249939-vijskova-usticia-vidrodzenna-na-popelisi.htm>

protection on issues of military service, compliance with the terms of the contract, social and legal protection, protection of honour and dignity.

2. The system of military courts established in the state is consistent with the requirements of the Constitution of Ukraine for their construction on the principles of territoriality and specialisation, and the prohibition of the establishment of extraordinary and special courts. Military units, institutions (military formations), etc. are deployed in Ukraine taking into account the requirements of military doctrine for the protection of the state, its sovereignty and population, and military courts are mainly “tied” to the deployment location of military formations (garrisons, regions, etc.) and the relevant places of residence of military personnel.
3. In June 2003 in Strasbourg, the Permanent Committee for Human Rights of the Council of Europe considered the issue of activities of military courts in European countries and concluded that the military courts in the states parties to the Convention do not contradict these states’ obligations⁴⁵.

One should remember the Opinion on the Law of Ukraine “On Judiciary and the Status of Judges” No. 588 of 15–16 October 2010 by the Venice Commission, where the Commission welcomed the abolishment of military courts: “123. According to the transitional provisions, the military courts should be disbanded from 15 September 2010 (Article 4). This is a positive change. Existing military courts represent a certain atavistic tendency of the Soviet judicial system⁴⁶.”

In connection with the abolishment of military courts:

- ▶ The system of training military judges with a certain level of knowledge of military legislation and military specifics (armament and combat equipment, the procedure for using military equipment, the chain of command, the strategy and tactics of warfare, etc.) is being destroyed, which may lead to impairing the quality of court decisions and the level of judicial protection of the rights and freedoms of military personnel, as well as state and public interests in the field of state defence. A military lawyer-judge is better prepared to administer justice in the military field.
- ▶ Judicial protection of the rights, freedoms and legitimate interests of servicepersons performing duties as part of peacekeeping contingents is deteriorating. Most states with military formations abroad have military courts there to have jurisdiction over their citizens.
- ▶ There is a problem of providing local courts with regulatory acts of the military department (each local military court receives more than 2,000 regulatory acts of the military administration, most of which are secret, which means the need to establish properly equipped secret offices).

⁴⁵ Draft Law “On Judiciary and the Status of Judges.” Opinion of the Central Scientific Experts Office, 3 June 2010. URL: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=6450&skl=7

⁴⁶ URL: https://supreme.court.gov.ua/userfiles/CDL_AD_2010_026_2010_10_18.pdf?fbclid=IwAR3PqveHYnryJvO6Da4MtGcVGteYZzX1egzBG2oSTVOCHRETf9iQgs3TF8

► **Mobilisation deployment of courts staffed by serving officers is impossible in wartime⁴⁷.**

Future events have shown that these arguments are generally correct.

According to experts in 2018, the annexation of Crimea, the emergence of a significant number of illegal armed groups on the territory of Ukraine, the armed conflict in eastern Ukraine, the ATO that led to the announcement of mobilisation in the country, attempts by Russian special services to undermine the state defence capability, corruption in the AFU, and treason caused a significant increase in the number of military offences in 2014–2018. One of the factors that contributed to this was the tendency of courts of general jurisdiction to be unable to effectively consider cases against military personnel for military crimes due to the lack of proper experience and knowledge of the AFU operation. Most judges have not even served⁴⁸.

While the duration of consideration that sometimes equals several years may not be critical for civilian cases and even criminal cases, for war crimes, especially those committed in combat, the combat effectiveness of a military unit and the morale of its personnel strength directly depend on the period during which a serviceperson is on trial. So, the judge's task is to consider them as soon as possible, which, unfortunately, is impossible to achieve in the system of courts of general jurisdiction^{49,50}.

This problem has been particularly exacerbated due to the staff shortage in the courts. According to the HQCJ, as of 11 March 2024, local courts lacked 1483 judges and the number of vacancies has a steady upward trend⁵¹. The total shortage of judges across the country is more than 30%, and it is even higher in some courts. The courts of appeal have more vacancies than employed judges. The courts of all instances lack more than 2,200 judges, as the HQCJ has been shut down since 2019 and there was no selection of judges⁵².

As a result, in 2023, 9,087 criminal proceedings in cases of military criminal offences were pending in the courts, of which only 3,952 were considered, and 5,135 proceedings remained pending⁵³.

⁴⁷ Draft Law "On Judiciary and the Status of Judges." Opinion of the Central Scientific Experts Office, 3 June 2010. URL: https://w1.cl.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=6450&skl=7

⁴⁸ O. I. Shkuropatskyi, M. O. Andriiets (2018). Problematic issues of military justice in Ukraine. The Journal of V. N. Karazin Kharkiv National University, LAW Series, vol. 26, pp. 144–147.

⁴⁹ Y. Sydorov (27 September 2016). The required level of efficiency of justice in military formations cannot be achieved without military courts. Yurydychna Gazeta online. URL: <https://yur-gazeta.com/interview/-bez-viyskovih-sudiv-potribnogo-rivnya-efektivnosti-pravosuddya-u-viyskovih-formuvannyah-ne-dosyagti.html>

⁵⁰ V. V. Pakhomov, R. O. Dehtiar (2016). Military courts. Legal horizons, pp. 182–186.

⁵¹ High Qualification Commission of Judges of Ukraine. Accounting of judges' positions. URL: <https://vkksu.gov.ua/oblik>

⁵² Judiciary of Ukraine. Media review. How does the HQCJ plan to overcome one of the most serious judiciary challenges? 10 January 2024. URL: <https://court.gov.ua/press/publications/1538067/>

⁵³ Judiciary of Ukraine. Court statistics. URL: https://court.gov.ua/inshe/sudova_statystyka/zvit_dsau_2023

As for pre-trial investigation bodies, according to the CPCU of 1960 (Articles 101 and 112),

- › **Inquiries** were carried out by commanders (chiefs) of military units and formations, heads of military institutions, and ship commanders if there were signs of a crime that was not a serious one; in cases of crimes committed by military personnel of the AFU, persons subject to military service during the training session and the AFU employees in the line of duty or on the premises of a military unit, and heads of the MLES management bodies and their deputies on inquiry after the establishment of the MLES.
- › **Pre-trial investigation** was carried out by investigators of military prosecutor's offices in cases of most military offences, except for those that are not serious, and offences under Article 422 of the CrCU, and by SSU investigators in cases of a crime under Article 422 of the CrCU.

1.4. Current Military Justice System in Ukraine: Overview

It is noteworthy that in June 2019, recalling the anniversary of the death of 49 servicemen in an IL-76 aircraft shot down by Russian mercenaries while landing in Luhansk, President of Ukraine V. Zelenskyi said, "Of course, I am aware of trial bureaucracy over this tragedy. This indicates big problems in the architecture of military justice. Establishing its effective functioning is one of my priorities." Unfortunately, the awareness of the need to establish a military justice system has not pushed the authorities to take real action even in the third year of Russian active military aggression against Ukraine.

Currently, there is no system of military justice in Ukraine as such in terms of an autonomous or separate system. After all, the concept of the "*system*" implies the existence of interconnected elements that form one whole and interact consistently with the external environment and each other according to certain algorithms to achieve a common goal.

It is possible to define only a conditional set of bodies that perform the law enforcement function in the armed forces and provide organisational, legal, personnel and other support for the activities of other relevant bodies to ensure law and order. These include:

1. MLES.
2. Pre-trial investigation units of the SBI, NPU and NABU.
3. Specialised Prosecutor's Office in the Field of Defence.
4. Operational units of the NPU, SBU, SBI, ESBUS, NABU, bodies of the State Border Guard Service of Ukraine, penitentiary bodies and institutions and pre-trial detention centres of the State Penitentiary Service bodies, which carry out covert investigative (intelligence) procedures.
5. Military counterintelligence units of the SSU that carry out operational and investigative activities to verify information about military criminal offences that are being prepared, persons who are preparing to commit them or persons who are hiding from pre-trial investigation bodies, the investigating judge, or the court or are evading service of their criminal sentences.

6. Penitentiary bodies and institutions for administrative penalties. The CEC of Ukraine (Articles 14, 17, 71, 163, etc.) defines military units, guardhouses and disciplinary battalion as separate penitentiary bodies and institutions. The former executes sentences of deprivation of military rank, service restrictions for servicepersons and arrest with detention in the guardhouse, and controls the behaviour of convicted servicepersons released from serving the sentence with probation during the probation period, and the disciplinary battalion executes sentences involving the detention of convicted servicepersons.
7. The AFU legal services and other military formations (in particular, assistants to brigade commanders responsible for legal work).
8. Military and legal higher education institutions – the Institute of Military Law of Yaroslav Mudryi National Law University, the Military Institute of Taras Shevchenko National University of Kyiv and the National Defence University of Ukraine.

See more about some of these bodies in **Chapter 2** of the Paper.

Each of these bodies operates separately in the military field due to their subordination to different state authorities and differences in their functions, and this separate nature of activities does not allow us to speak of a systemic approach. Although in wartime, the needs of defence capability are recognised as crucial for the existence of Ukraine, this understanding has not yet affected such a component as military justice.

Finally, let us mention some measures in the military legislative and scientific and educational area that create a conditional “motherboard” for all elements of the criminal justice system, and the implementation of which is urgent. These include:

- › Development and legislative authorisation of the Military Law Concept; systematisation of military legislation
- › Coordination of military legal research
- › Changing the Classifier of Legislation of Ukraine approved by Order of the Ministry of Justice No. 43/5 of 2 June 2004 due to its inconsistency with the modern system of the state’s military organisation and public relations in the military field
- › Competitive and effective training for the military justice system⁵⁴

⁵⁴ V. Shulhin (2019). Military justice in Ukraine: Genesis of implementation of the military legal concept. The system of military justice in ensuring the national security of Ukraine: Proceedings of the international scientific and practical conference (compilers V. H. Pylypchuk, V. P. Koval, P. P. Bohutskyi, M. V. Belaniuk, S. O. Dorohykh, I. M. Doronin, O. H. Radziivska), Kyiv: ArtEc, 2019, pp. 117–128.

Section 2

Structure and Authority of Individual Bodies of the Military Justice System. Courts Considering Cases of Military Offences

2.1. Courts Considering Cases of Military Offences

As already mentioned, there are no specialised military courts in Ukraine.

According to the Law “On Judiciary and the Status of Judges,” all criminal proceedings and cases on administrative offences committed by servicepersons, persons subject to military service and reservists during the training session, the AFU employees and other military formations in the line of duty, are considered by the following courts of general jurisdiction:

1. **Local general courts** – district courts established in one or more raions, districts in cities, a city or a raion (districts) and a city (cities).

According to Article 125 of the Constitution of Ukraine and Article 17 of the Law “On Judiciary and the Status of Judges,” the judiciary in Ukraine is based, inter alia, on the principle of territoriality.

The CPCU (Articles 32 and 34) stipulates that criminal proceedings are conducted by the court within whose territorial jurisdiction the criminal offence was committed, and it is referred to another court only in exceptional cases determined by law.

Cases of administrative offences are considered at the place of their commission (part 1 of Article 276 of the CUAO) as well.

Thus, the law does not provide for the consideration by courts of cases (proceedings) at the place of deployment of military units (subunits) of military formations against servicepersons who have committed offences in the combat zone. These cases (proceedings) should be considered by courts at the place of offence commission even if military units (subunits) have been redeployed, servicepersons are on rotation or on training abroad, etc.

2. **Courts of appeal** established in appellate districts.

3. **HACC** as a court of first instance and appeal.

According to the Law “On the High Anti-Corruption Court of Ukraine” (Article 4), this court administers justice in:

- ▶ Criminal proceedings on criminal offences referred to its jurisdiction by the procedural law, as well as by exercising judicial control over compliance with the rights, freedoms, and interests of persons in such criminal proceedings in cases and in accordance with the procedure established by the procedural law. According to Article 33-1 of the CPCU, the HACC has jurisdiction over criminal proceedings on corruption-related criminal offences under the footnote to Article 45 of the CrCU (in particular, Article 410 on the theft of military property), Articles 206-2, 209, 211, 366-2 and 366-3 of the CrCU, if there is at least one of the conditions provided for in clauses 1–3, part 5 of Article 216 of the CPCU (this refers to the subject, such as a senior officer of the AFU, SSU, the State Border Guard Service of Ukraine, the State Special Transportation Service, NGU and other military formations established under the laws of Ukraine, and the size of the subject of the criminal offence).
 - ▶ Cases on the recognition of assets as unfounded and their recovery into state revenue in civil proceedings.
 - ▶ Cases on imposing sanctions provided for in clause 1-1, part 1 of Article 4 of the Law “On Sanctions” in administrative proceedings (this refers to the recovery of assets into state revenue).
4. **The Supreme Court**, which includes, in particular, the Criminal Court of Cassation and the Grand Chamber of the Supreme Court.

There is no specialisation of judges in the consideration of military criminal offences or other military cases.

However, the general provision of part 3 of Article 35 of the CPCU “Appointment of a judge (substitute judge, investigating judge) or a panel of judges for a specific court hearing shall be supported by the Unified Judicial Information and Telecommunication System and/or its separate subsystem (module) in the course of registration of respective files, complaint, motion, application or any other procedural document, based on the principles of credibility and in chronological order which **take into account the specialisation** and equal workload of each judge...” applies.

So, a meeting of judges of a particular local, appellate court or Criminal Court of Cassation can determine the specialisation of judges (for example, a meeting of judges in commercial courts). This can be done in courts with a relatively large number of judges and occupied positions. Unfortunately, today there is a problem of staff shortage in the courts, which makes it impossible to take into account the specialisation of judges in most cases.

2.2. Specialised Prosecutor's Office in the Field of Defence

The prosecution system of Ukraine consists of: the Prosecutor General's Office; oblast prosecutor's offices; district prosecutor's offices; Specialised Anti-Corruption Prosecutor's Office (Article 7(1) of the Law "On the Prosecution Service").

If necessary, the Prosecutor General may create specialised prosecutor's offices with the status of a structural unit of the Prosecutor General's Office, oblast prosecutor's office, unit of the oblast prosecutor's office, district prosecutor's offices, or unit of the district prosecutor's office. The Prosecutor General shall list, establish, reorganise, and liquidate specialised prosecutor's offices, determine their status, competence, structure, and staffing schedules (Article 7(2) of the Law "On the Prosecution Service").

Based on the Structure of the Prosecutor General's Office, two such specialised prosecutor's offices (with the exception of the SAPO) have been established by now: 1) Specialised Environmental Prosecutor's Office (established with the status of a PGO Department) and 2) Specialised Prosecutor's Office in the Field of Defence (established with the status of a PGO Department, oblast and district prosecutor's offices)⁵⁵ which was called "the Specialised Prosecutor's Office in the Military and Defence Fields" until 2023.

In accordance with the principle of the unity of the prosecution service system, which includes the uniform status of prosecutors (Article 7(5) of the Law "On the Prosecution Service"), prosecutors holding positions in the Specialised Prosecutor's Office in the Field of Defence are public servants. Their status does not differ from the status of other prosecutors, they are merely specialised in a certain field.

Structure and tasks of the Specialised Prosecutor's Office in the Field of Defence are determined by the respective Regulation⁵⁶. The Specialised Prosecutor's Office (with the status of a PGO Department) organises its work in cooperation with specialised prosecutor's offices in the field of defence which have the status of oblast and district prosecutor's offices (clause 1.3 of the Regulation).

The procedure for interaction between them is determined in detail by the respective order of the Prosecutor General⁵⁷, according to which the structure of the Specialised Prosecutor's Office in the Field of Defence reflects the principles of multi-tiered and territorially limited jurisdiction.

The principle of territorially limited jurisdiction is reflected in the existence of such prosecutor's offices in four regions (clause 3 of the Regulation) – Central, South, West and East. However, law and order in the military organisation may be properly maintained only if military justice bodies are located extra-territorially, i.e., the way military formations are deployed⁵⁸.

⁵⁵ Structure of the Prosecutor General's Office (approved by Order of the Prosecutor General No. 99-шч of 21 December 2019 as amended by the orders of the Prosecutor General No. 1шч of 8 January 2020 through No. 11шч of 21 March 2024). URL: <https://gp.gov.ua/ua/posts/struktura-struktura-ofisu-generalnogo-prokurora-zatverdzhena-nakazom-generalnogo-prokurora-vid-21-12-2019-no-99-shc>

⁵⁶ Order of the Prosecutor General No. 144 of 30 May 2023 "On the Approval of the Regulation on the Specialised Prosecutor's Office in the Field of Defence (with the Status of a Department) of the Prosecutor General's Office." URL: <https://ips.ligazakon.net/document/GP23037>

⁵⁷ Order of the Prosecutor General No. 130 of 17 May 2023 "On Special Considerations Relating to the Organisation of Work at the Specialised Prosecutor's Offices in the Field of Defence." URL: <https://zakon.rada.gov.ua/laws/show/v0130905-23#Text>

⁵⁸ Polianskyi Y. Military justice in Ukraine: problematic issues. Yurydychnyi Visnyk. 2019. No. 3. Pp. 5-11.

The main task of the Specialised Prosecutor's Office in the Field of Defence is the organisation and procedural management of pre-trial investigations, participation in court proceedings and public prosecution in the following cases:

1. concerning military criminal offences;
2. concerning criminal offences committed by servicepersons; by persons subject to military service and reservists during training sessions, volunteer soldiers of territorial community volunteer military formations; committed during the performance of official duties by employees of military units, enterprises, institutions and organisations managed by the MoD of Ukraine, the AFU, other military formations, the defence-industrial complex of Ukraine and public authorities that are staffed by servicepersons (subject criterion);
3. concerning criminal offences committed on the premises of military units, institutions, organisations of the MoD of Ukraine, the AFU, the SSU, the State Border Service of Ukraine, the NGU, the State Special Communications and Information Protection Service of Ukraine, other military formations established in accordance with the laws of Ukraine, the State Space Agency of Ukraine and enterprises of the defence-industrial complex of Ukraine (territorial criterion);
4. official misconduct offences and offences against property the object of which is military property and (or) defence funds, in particular those intended for military administrations implementing measures prescribed by the legal regime of martial law (official status criterion);
5. other criminal offences in accordance with the procedure established by the CPCU, in particular if at least one of the accomplices or at least one offence in the criminal proceeding meets the above criteria.

Also, the Specialised Prosecutor's Office in the Field of Defence:

- › organises and carries out supervision of compliance with the laws during criminal intelligence activities by operational units;
- › organises and carries out supervision of compliance with the laws during the execution of court decisions in criminal cases, the application of other coercive measures involving restrictions of personal freedom of citizens, and concerning the organisation of escorting detainees, arrested persons and convicts;
- › organises and carries out public prosecution in court in such criminal proceedings;
- › supervises compliance with the laws during the application of other coercive measures involving restrictions of personal freedom of citizens outside criminal proceedings;
- › evaluates actions or inaction of officials in terms of the presence of elements of administrative offences provided for by Chapter 13-B of the CUAO ("Military Administrative Offences");
- › prevents and counters military administrative offences and corruption-related offences.

In its Decision No. 4-p(II)/2019 of 5 June 2019, the CCU, commenting on the representation of the state's interests in court by the prosecution service, pointed out that the Basic Law of Ukraine contains a provision limiting such representation to "exceptional cases and the manner specified by law." Such cases are referred to, in particular, in Art. 23(3) of Law No. 1697, according to which "the prosecutor shall represent the legal interests of the state in court in case of violation or threat

of violation of the interests of the state, if these interests are not protected or are protected improperly... by another authority which is empowered to do so, as well as in the absence of such an authority. In such cases, the prosecution service is duty-bound to substantiate the need for such intervention⁵⁹.”

The representation of the state's interests in court by prosecutors of the Specialised Prosecutor's Office in the Field of Defence mostly takes the form of prosecutors filing lawsuits to invalidate, in whole or in part, commercial contracts concluded between military units or sub-units and suppliers of goods, works or services. However, taking into account the duration and intensity of hostilities, prosecutors of the Specialised Prosecutor's Office in the Field of Defence participate not only in commercial law cases, but also in cases of involuntary hospitalisation of servicepersons in a psychiatric hospital for examination and treatment without their consent, as they did, for example, in case no. 297/2512/23⁶⁰.

The function of supervising compliance with laws in the execution of court decisions in criminal cases, as well as in the application of other coercive measures involving restrictions of the personal freedom of citizens, is aimed at achieving several tasks at once. In particular, in carrying out this function, prosecutors monitor the procedure for the execution of a court decision not only for the purpose of recording violations of the rights of the person being brought to justice, but also for the purpose of establishing any violations of the legislation by the institution which executes court decisions.

In its subclause 9.3, Order of the Prosecutor General No. 400 of 29 December 2021 “On the Organisation of Prosecutor Work To Counter Human Rights Violations in Law Enforcement and Penitentiary Fields”⁶¹ specifies that the Specialised Prosecutor's Office in the Military and Defence Fields shall provide supervision within the scope of its competence at guardhouses, in the rooms (cells) for temporarily detained servicepersons of the MLES units and special wards of health care facilities of the AFU, in the disciplinary battalion of the AFU, and in military units – regarding service restrictions for servicepersons, demotion or deprivation of qualification class, deprivation of the right to hold certain positions or engage in certain activities, probation sentences, as well as regarding persons released from criminal liability in connection with being vouched for by a military unit; the Specialised Prosecutor's Office in the Military and Defence Fields shall also provide supervision in the military units of the NGU concerning the organisation of escorting detainees, arrested persons and convicts.

⁵⁹ Decision of the Constitutional Court of Ukraine No. 4-p(II)/2019 of 5 June 2019 in case No. 3-234/2018(3058/18) / Constitutional Court of Ukraine. URL: http://www.ccu.gov.ua/sites/default/files/docs/4_p2_2019.pdf

⁶⁰ Decision of the Berehove Raion Court of Zakarpattia Oblast dated July 28, 2023 in case No. 297/2512/23/ Berehove Raion Court of Zakarpattia Oblast. Unified State Register of Court Decisions. URL: <https://reyestr.court.gov.ua/Review/112531267>.

⁶¹ Order of the Prosecutor General No. 400 of 29 December 2021 “On the Organisation of Prosecutor Work To Counter Human Rights Violations in Law Enforcement and Penitentiary Fields.” URL: <https://zakon.rada.gov.ua/laws/show/v0400905-21#top>

2.3. Pre-Trial Investigation Bodies for Military Criminal Offences

According to Art. 216 of the CPCU of 2012, and the laws “On the State Bureau of Investigation,” “On the National Police,” “On the National Anti-Corruption Bureau of Ukraine,” “On the Security Service of Ukraine,” the following officials are currently charged with investigating criminal offences:

- › military service offences (military criminal offences), except for crimes provided for in Art. 422 of the CrCU, – **SBI investigators** (their number is limited to 1,600 people).

SBI investigators investigate the bulk of military criminal offences. Thus, the total number of criminal offences recorded as started to be investigated by the SBI was: 21,399 in 2022, 37,823 in 2023, and 10,910 in January – February 2024. From this total number, the number of military criminal offences registered as started to be investigated by the SBI was as follows: 13,583 (83%) in 2022, 28,285 (74%) in 2023, and 8,914 (82%) in January – February 2024⁶².

- › offences provided for in Art. 422 (“Unauthorised disclosure of military information that constitutes a state secret, or loss of documents or materials containing such information”) and Art. 435-1 (“Insulting the honour and dignity of a serviceperson, threatening a serviceperson”) of the CrCU – **SSU investigators**.

The SSU started to investigate the largest number of military criminal offences in 2023, when it stood at 101, which is almost twice as much as in 2022 (62). In January – February 2024, the SSU started to investigate 15 such offences⁶³

- › offences provided for by Art. 410 of the CrCU (“Theft, appropriation, or extortion of military property by a serviceperson, as well as taking possession of it by fraud or abuse of official position”), if at least one of the following conditions is present: the criminal offence was committed by a serviceperson of the military formations of Ukraine; the amount of the damage is two thousand or more times greater than the subsistence minimum for able-bodied persons – **NABU detectives**.

The NABU started investigating just 4 military criminal offences, all in 2022, and no notice of suspicion has been served in any case and, accordingly, no proceedings have been sent to court⁶⁴

- › any other criminal offences committed by servicepersons, except for those under the jurisdiction of the SBI, NABU and SSU, – **ESBU or NPU investigators**.

⁶² The Prosecutor General’s Office. Statistics. URL: <https://new.gp.gov.ua/ua/posts/statistika>

⁶³ Ibid.

⁶⁴ Ibid.

The NPU started investigating 279 military criminal offences and sent to court 59 criminal proceedings in 2023 (114 and 12, respectively, in 2022). The NPU started investigating 20 such offences and sent to court 2 criminal proceedings in January – February 2024⁶⁵

The SBI consists of a headquarters, seven territorial directorates (the law specifies that they are located in the cities of Lviv, Khmelnytskyi, Mykolaiv, Melitopol, Poltava, Kramatorsk, and Kyiv) and special divisions tasked with physical protection, internal monitoring, etc.

The law envisages no specialisation in investigating military criminal offences for SBI investigative and operational units, both in its headquarters and in the territorial directorates, and no corresponding independent divisions have been created. However, such specialisation has nonetheless been implemented in investigative units of SBI headquarters and territorial directorates under their internal orders⁶⁶.

Investigators, in particular those investigating military criminal offences, are not posted in or near locations where military units and institutions are deployed.

Covert investigative (intelligence) procedures in relevant criminal proceedings are carried out on written instructions of an investigator, detective, inquiry officer or prosecutor by the operational units of the NPU, the SSU, the SBI, the ESBU or the NABU, and in some cases also by bodies of the State Border Service of Ukraine, penitentiary bodies and institutions and pre-trial detention centres of the State Penitentiary Service.

At the same time, other units that carry out criminal intelligence activities as specified in Art. 5 of the Law “On Criminal Intelligence Activities,” including military counterintelligence units of the SSU, are also authorised to carry out **operational and investigative activities** to verify information about criminal offences that are being prepared, persons who are preparing to commit them or persons who are hiding from pre-trial investigation bodies, the investigating judge, or the court or are evading service of their criminal sentences.

Thus, prerequisites for assuming jurisdiction over military criminal offences (as well as all others) depends on the perpetrator, object and other circumstances and are confusing. In practice, the determination of jurisdiction runs into difficulties and threatens to delay the investigation and reduce its quality.

For example, the misappropriation of military property by a serviceperson, depending on the extent of the damage, may be investigated by the SBI investigators or NABU detectives, while the embezzlement of military property, which is not provided for in Art. 410 of the CrCU, should be assessed under Art. 191 of the CrCU and may be investigated, depending on the extent of the damage and the perpetrator, by the SBI or National Police investigators or detectives of the NABU or ESBU.

⁶⁵ Ibid.

⁶⁶ The information was provided by the State Bureau of Investigation at the request of the Committee of the Verkhovna Rada of Ukraine on Law Enforcement Issues.

When committed by military servicepersons, abuse of authority, dereliction of official duty, or negligence in military service are military criminal offences and shall be investigated by SBI investigators, while abuse of official position shall be investigated by NABU and ESBU detectives or National Police investigators.

In cases involving servicepersons violating traffic rules, investigators of both the SBI and the National Police have to go to the scene, and only after conducting urgent investigative actions they determine whether a criminal offence which has been committed is provided for by Articles 286 or 286-1 or Art. 415 of the CrCU, and, accordingly, determine who has jurisdiction.

Professionals note a number of **problems** in this area:

- › there is a broad space for subjectivism and abuses because NPU bodies investigate general criminal offences committed by servicepersons, while SBI units investigate military criminal offences;
- › police investigators, overburdened as they are with other cases, do not pay due attention to investigating general criminal offences committed by servicepersons and do not ascertain their causes. The quality of their investigations is low, and punishment is neither swift nor inevitable;
- › police operational units encounter limitations, and often outright impenetrable obstacles for their work among the troops, because military unit accommodations are closed facilities;
- › the duty to investigate military crimes was unnaturally included in the powers of the SBI immediately before the final adoption of the Law “On the State Bureau of Investigation,” and therefore the SBI has been given neither organisational nor functional resources needed to really influence military discipline, law and order, and the state of crime among the troops;
- › SBI units that investigate crimes in the troops do not have a clear management hierarchy, as they are subordinated not to SBI headquarters, but to heads of territorial directorates;
- › locations of SBI territorial offices do not take into account the military-administrative structure. Therefore, respective SBI units are physically unable to ensure prompt arrival on the scene, even though it is precisely working on “hot leads” that provides the best opportunities for solving a crime. For example, the distance from Poltava Territorial Directorate of the SBI to Kharkiv is 150 km, to Sumy – 180 km, to the important transport hub of Konotop – 260 km, and to other distant sections of the state border – more than 300 km;
- › SBI investigators drowned in an avalanche of criminal offences even while the war was a fixed-front affair. According to the SBI, today the average workload per investigator is about 200 criminal proceedings, and it was about 120 back in 2022. The workload per investigator in territorial directorates of the SBI which are located in Poltava, Kramatorsk, Melitopol, and Mykolaiv, is 400 proceedings⁶⁷;
- › there are no trained professionals who would be able to carry out professional and high-quality investigation of offences among the troops. SBI investigators were recruited to relevant units from among persons who had not studied military law and methods of

⁶⁷ Ibid.

investigating military crimes and had no military service background. Often, they are helpless at the scene of a crime, they are not trained in elementary techniques, and the most important thing is that no SBI employee can teach them;

To counter such a thesis, the SBI emphasises that all SBI investigators are familiar with the specific procedures for bringing servicepersons to justice in accordance with criminal and administrative legislation, as well as the tactical and technical characteristics of weapons and the specifics of their use, the specifics of military service, regulation-prescribed relationships and other areas of military affairs they need to know during the pre-trial investigation of criminal offences where a serviceperson is the perpetrator.

The SBI carries out ongoing efforts to train and improve the qualifications and professional skills of employees (including with the assistance of international partners), develops and implements in practice research-based methodological recommendations, holds seminars, etc.⁶⁸

- ▶ at the same time, a paradoxical situation has emerged. Depriving prosecutors who worked in the military field of the status of servicepersons has led to a **deterioration in the quality of personnel** of the Specialised Prosecutor's Office in the Field of Defence. Military field professionals who have not just legal knowledge, but also specialised military knowledge and skills, first of all regarding the basics of tactics and combat use of troops and the organisational structure of troops, are trained at the public expense by specialised educational institutions – the Institute of Military Law of Yaroslav Mudryi National Law University, the Military Institute of Taras Shevchenko National University of Kyiv and the National Defence University of Ukraine. However, they produce officers who may not be released from military service during wartime and therefore may not join the civil state service neither at the because Specialised Prosecutor's Office in the Field of Defence nor at the SBI, NABU, or NPU. Therefore, **specialised military-legal education has become detached from law enforcement agencies in the military field**, which are in great need of such specialists, but are forced to replenish their ranks exclusively with civilians holding merely a general legal education⁶⁹.

In contrast to problematic aspects indicated by professionals, the SBI singles out certain procedural problems during the exercise by its employees of powers to investigate military offences, namely:

1. authorised servicepersons of the AFU sometimes fail to provide in full the files of criminal offences committed by servicepersons, as well as data characterising a person, etc., which are required for a swift, complete, and impartial pre-trial investigation to be performed in reasonable time;

⁶⁸ Ibid.

⁶⁹ A. Markevych Problematic issues of the organisation of the military criminal justice system of Ukraine under current conditions // Military justice system's role in ensuring the national security of Ukraine: Proceedings of the international research and practical conference. Editors: V. H. Pylypchuk, V. P. Koval, P. P. Bohutskyi, M. V. Belaniuk, S. O. Dorohykh, I. M. Doronin, O. H. Radziievska. Kyiv: Publishing House ArtEc, 2019. Pp. 35–40.

2. there are not enough personnel for searching for persons who evade pre-trial investigation bodies and the courts;
3. imperfection of existing legal mechanisms:
 - ▶ lack of procedural means to compel servicepersons to undergo a military medical examination;
 - ▶ failure to conduct a military medical examination during the pre-trial investigation may be the cause for an acquittal of a serviceperson in case of confirmation during the trial of his/her unfitness for military service;
 - ▶ excessive duration of military forensic examinations, which makes it impossible to notify persons of suspicion in a timely manner, complete the pre-trial investigation in the shortest possible time and send an indictment to the court, which negatively affects the national defence capability, leads to a decrease in military discipline and good order among servicepersons due to a false perception of impunity, prevents the preservation of the potential for the successful conduct of military operations aimed at repelling and deterring armed aggression against Ukraine by the AFU and other military formations, undermines the authority of law enforcement agencies and public trust;
 - ▶ lack of sufficient grounds for notifying a person who is evading military service of suspicion, which prevents them from being declared a wanted person and subsequently detained;
 - ▶ servicepersons staying in other oblasts outside the jurisdiction of the pre-trial investigation body;
 - ▶ crediting the period of suspended military service to the years of service used for the payment of a bonus for years of service and the allocation of a pension, as well as years of service used for promotion to the next military rank, renewal of benefits and social guarantees established by law for servicepersons, payment of unpaid money and delivery of undelivered food, material and other types of supplies to servicepersons in respect of whom criminal proceedings have been closed in accordance with clauses 1–3 of Art. 284(1) of the CPCU for the entire period of groundless suspension of military service;
4. SBI employees have problems accessing locations of military units (sub-units), because a military unit or its sub-unit is a limited-access facility during the operation of the martial law regime in the country, especially when located on the line of contact or close to it. Where it is necessary to conduct investigative procedures at such a facility, all matters concerning access to it, the scope and terms of conducting investigative actions are pre-agreed by investigative units with immediate commanders of military units, and operational units of the SBI, the Department of Military Counterintelligence of the SSU, the MLES of the respective region are also involved in the procedures;

5. a somewhat limited character of interaction between the SBI and the MLES, which is primarily caused by flaws in the current legislation which regulates the procedure for detaining and delivering servicepersons from other regions of Ukraine to the pre-trial investigation body or court by units of the MLES of the respective oblast⁷⁰.

Regarding jurisdiction, the optimal approach would involve all criminal offences (both military and others), if they were committed by servicepersons and employees of military formations, being under jurisdiction of a single body, which is currently the SBI, and in the future the Military Police as a CEA not subordinate to the leadership of any military formation of Ukraine.

A similar approach was envisaged, for example, in the Order of the Prosecutor General's Office No. 23 dated 30 March 2009 (expired in 2011). Investigators of the military prosecutor's offices had jurisdiction over crimes committed by:

1. servicepersons serving in military formations, as well as seconded to government bodies and civil institutions;
2. foreign servicepersons on the territory of Ukraine in cases where, in accordance with international treaties or the legislation of Ukraine, they are subject to criminal liability on the territory of Ukraine;
3. employees (workers and white-collar employees who are not servicepersons and work in military units and institutions as well as at state enterprises under military direction) of military formations, if the crimes were committed on the premises of a military unit, institution, at an enterprise or a military facility or in connection with the performance of official duties by them, regardless of the place of commission of the crime;
4. persons subject to military service during their training sessions.

2.4. Military Counterintelligence

The Law "On Counterintelligence Activities" provides (Article 6) that one of the reasons for conducting them is the presence of sufficient information in need of verification with the use of special forms, methods and means about possible encroachments on state sovereignty, the constitutional order and territorial integrity of Ukraine, terrorist encroachments or terrorist activity, criminal offences against peace, security of humankind and international legal order. Since such encroachments and offences can also be committed by servicepersons, military counterintelligence can be treated to a certain extent as a component of the military justice system.

Military counterintelligence bodies are part of the SSU Headquarters and are created for the counterintelligence support of the AFU and other military formations stationed on the territory of Ukraine (Articles 9, 12 of the Law "On the Security Service of Ukraine").

⁷⁰ The information was provided by the State Bureau of Investigation at the request of the Committee of the Verkhovna Rada of Ukraine on Law Enforcement Issues.

The head of military counterintelligence is appointed to the position at the submission of the Head of the Security Service of Ukraine and dismissed by the President of Ukraine, and military counterintelligence personnel include, in particular, servicepersons (Articles 15, 19 of the Law “On the Security Service of Ukraine”).

In its current organisational and legal form, the Department of Military Counterintelligence of the SSU was established in October 2020 by a Decree of the President of Ukraine (before that, it was known as the Main Directorate of Military Counterintelligence under the Counterintelligence Department of the SSU)⁷¹. Military counterintelligence, as an independent unit of the Headquarters of the SSU, performs the entire range of tasks assigned to the SSU, and its presence in the structure of the national special service enables fruitful interaction with other units of the SSU.

The organizational structure of the Department of Military Counterintelligence of the SSU is rational, reflects the latest challenges in the field of security and defence and fully corresponds to the organisational structure of the MoD of Ukraine and the AFU as well as other military formations, while cooperation with law enforcement agencies and other structures of the security and defence sector contributes to efficiency in its work⁷².

2.5. Military Law Enforcement Service of the Armed Forces of Ukraine

The MLES is a special law enforcement formation within the AFU which has been operating since April 2002 and is tasked, in particular, with:

1. ensuring good order and military discipline among servicepersons of the AFU in deployment locations of military units, in military educational institutions, cantonments and public places;
2. preventing and stopping offences in the AFU;
3. protecting life, health, rights and legitimate interests of servicepersons and persons subject to military service during their training sessions, employees of the AFU, countering other illegal encroachments.

The tasks of the MLES as defined in Art. 3 of the Law “On the Military Law Enforcement Service in the Armed Forces of Ukraine” include: search for persons who took unauthorised leave from the place of service; execution of decisions on keeping servicepersons at military jails; executing criminal sentences involving detention in disciplinary battalion.

The strength of the MLES command bodies and units as well as their deployment are determined by the MoD of Ukraine based on the conditions of deployment of troops (forces). The number of servicepersons and employees of the MLES may not exceed 1.5% of the total personnel strength of the AFU.

⁷¹ Decree of the President of Ukraine No. 431/2020 “On Amendments to Decrees of the President of Ukraine No. 1860 of 27 December 2005 and No. 166 of 5 May 2020 ‘On the Creation of the Military Counterintelligence Department.’” URL: <https://www.president.gov.ua/documents/4312020-35285>;

⁷² Levchenko S. Formation of the military counterintelligence of the Security Service of Ukraine: on occasion of the 30th anniversary of its creation / *Military Historical Bulletin* 4(42)/2021. P. 152.

The MLES includes, apart from its command bodies, security units, the patrol and traffic safety service, the Training Centre, the Special Purpose Centre, the Disciplinary Battalion and the Main Directorate. The MLES has four territorial directorates – Central, South, East and West. Dozens of zonal divisions (subdivisions) operate within the directorates reflecting the administrative-territorial structure of oblasts and the city of Kyiv.

Although the MLES operates as part of the AFU, in accordance with the Law “On the Military Law Enforcement Service in the Armed Forces of Ukraine” (Art. 7), it extends some of its powers to servicepersons of other military formations, as well as persons subject to military service and reservists during their training sessions; in particular, it shall demand compliance with public order regulations, cessation of offences and, in case of non-compliance with such demands, apply coercive measures.

The procedure for the exercise of certain powers by MLES servicepersons is determined by the Instruction on the Organisation of Patrol and Post Service by the Military Law Enforcement Service in the Armed Forces⁷³. In it, the provisions on using administrative coercion against servicepersons are formulated similarly to the police measures applied by the police to citizens in accordance with the Law “On the National Police.”

Therefore, MLES is an analogue of the public security police, but its powers are limited to ensuring discipline among servicepersons. MLES does not perform the function of pre-trial investigation as well as criminal intelligence and counterintelligence functions.

MLES officials have broad authority under the CUAO:

1. try cases of offences committed by drivers of military vehicles during the performance of official duties which are provided for in Article 121(1), 121(4), 121(5), Art. 121-1, Art. 122(1-4), Art. 123(1), Arts 124-1 to 126, Art. 132-1 (Article 235-1 of the CUAO);
2. draw up reports in cases of administrative offences committed by servicepersons, persons subject to military service and reservists during their training sessions and by employees of the AFU during the performance of their official duties, which are provided for in Article 44, parts Article 123(2) and 123(3), Articles 172-10 to 172-20, 173, 174, 178, 182, 184-1, 185 and 185-7, as well as Art. 122(5), Art. 122-2, Art. 123(3), Art. 124, and in all cases of violations of traffic rules committed by persons driving vehicles of military formations (Art. 255 of the CUAO);
3. deliver and detain offenders who are servicepersons, persons subject to military service and reservists during their training sessions and employees of the AFU during the performance of their official duties, carry out their personal inspection, inspection of belongings, inspection for the state of intoxication (Articles 259, 262, 264, 266-1 of the CUAO);
4. execute sentences of detention in military jail in respect of servicepersons, persons subject to military service and reservists during their training sessions (Article 327-1 of the CUAO).

⁷³ Order of the Ministry of Defence of Ukraine No. 515 of 10 October 2016 “On Approval of the Instruction on the Organisation of Patrol and Post Service by the Military Law Enforcement Service in the Armed Forces of Ukraine.” URL: <https://zakon.rada.gov.ua/laws/show/z1429-16#Text>

Professionals reasonably point out that currently:

1. the existence of a special law enforcement formation within the AFU leads to the AFU being tasked with law enforcement functions which are inappropriate for them;
2. MLES is subordinate to the military command, financed at the expense of the AFU, and MLES officials are appointed by the military command – **this creates the dependence of MLES on such a command**, which violates one of the basic principles of military justice;
3. most of the tasks and functions of MLES are not law enforcement by their nature, but are aimed at supporting the activities of the AFU.

In the case of military police setup based on the MLES, it is proposed to ensure:

- › its independence from the military command, in particular financial independence. MLES should be detached from the AFU and taken out of the administrative subordination of the MoD of Ukraine, and given the status of a specialised law enforcement agency subordinate to the Cabinet of Ministers of Ukraine. The MoD of Ukraine can direct the military police activities in some fields, but it should be legally limited in its attempts to influence military police activities;
- › an architecture of its bodies and units which would take into account the military-administrative structure of Ukraine, so as to ensure their maximum proximity to the deployment locations of security and defence forces;
- › entrusting the military police with the function of pre-trial investigation of military criminal offences⁷⁴.

⁷⁴ Zaitsev M. Institutional and competence aspects of creating a military police // Military justice system's role in ensuring the national security of Ukraine: Proceedings of the international research and practical conference / Editors: V. H. Pylypchuk, V. P. Koval, P. P. Bohutskyi, M. V. Belaniuk, S. O. Dorohykh, I. M. Doronin, O. H. Radziievskia. Kyiv: Publishing House ArtEc, 2019. Pp. 129–136.

Section 3

Problems of Establishing New Bodies of the Military Justice System and Military Courts

3.1. Military Police

During 2015–2018, the Verkhovna Rada of Ukraine made repeated attempts to create a separate body for the prevention and investigation of military offences in the AFU. In different years, the legislature considered draft laws “On the Military Police,” “On the State Bureau for Military Justice” and alternative draft laws. At the same time, it worked on the idea of expanding the powers of the MLES through granting it the right to conduct pre-trial investigations and carry out operational and investigative activities. However, none of these initiatives found support.

By Decree No. 473/2021 of 17 September 2021, the President of Ukraine approved the Strategic Defence Bulletin of Ukraine, which has as its task 5.7 reforming the MLES into a Military Police capable of performing law enforcement tasks in the system of the MoD of Ukraine. Judging by measures envisaged in that document, it is planned to create investigative and criminal intelligence units in the Military Police, to develop the capabilities of the Military Police management bodies to enforce the law and provide anti-terrorist support at potentially dangerous facilities of the MoD of Ukraine system, and to achieve the compatibility of the Military Police with the relevant structures of NATO member states, all by the end of 2025.

Currently, the Verkhovna Rada is working on new draft laws on the setup of a separate law enforcement body partially or fully based on the MLES, which would deal with military offences and other offences committed by servicepersons, namely:

Draft Laws Nos. 6569⁷⁵ and 6570⁷⁶

They were submitted to the parliament in January 2022, that is, before the full-scale invasion of the Russian Federation into the territory of Ukraine.

At that time, the draft law author justified the urgency of introducing new approaches to the regulation of relations in the field of proper organisation of pre-trial investigation of military criminal offences by the lack of proper control over the law and order situation in the AFU.

Draft laws have become more urgent in connection with the fact that after 24 February 2022, the number of servicepersons increased, which provoked a significant increase in military offences. At the same time, the emergence of new types of criminal offences (for example, collaboration with the enemy or war crimes) caused a shift in the attention of law enforcement agencies from the investigation of military criminal offences to other actions that have a higher profile or attest to the crimes of the enemy.

The initiator of draft laws Nos. 6569 and 6570 states that they aim to ensure:

1. setting up of the SBMJ as a central law enforcement executive body with a special status, which is entrusted with the prevention, detection, stopping and solving criminal offences within its competence (military crimes and crimes committed by servicepersons or on the premises of military units);
2. making appropriate amendments to the CPCU and the CUAO to create conditions for the full exercise of its tasks by such a body.

The need to adopt these draft laws has appeared due to the ineffectiveness and slowness of the investigation of numerous military criminal offences, which negatively affects combat readiness of military formations, as well as the fact that the investigators of the SBI, which has been responsible since November 2018 (when this body began its operations, taking over investigative functions of the prosecution service) for the pre-trial investigation of military criminal offences, fail to fulfil all the tasks assigned to them due to limited powers and lack of proper specialisation.

According to the Prosecutor General's Office, in 2021, the SBI started investigating 2,980 criminal proceedings in this category of cases, which grew to 13,583 in 2022, and to 28,666 in 2023 (of which 24,507 or 85.5% were related to evasion of military service).

In 2022–2023, the personnel strength of the AFU increased markedly. In addition, in the conditions of a full-scale war, the issue of discipline in the AFU is a matter of state security and cannot be compared with the level of threats that existed previously due to insufficiently coordinated work of the military justice system.

⁷⁵ Draft Law No. 6569 of 28 January 2022 "On the State Bureau for Military Justice." URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/38892>

⁷⁶ Draft Law "On Amendments to the Code of Ukraine on Administrative Offences and the Criminal Procedure Code of Ukraine in Connection with the Adoption of the Law of Ukraine 'On the State Bureau for Military Justice.'" URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/38893>

Therefore, it is not surprising that at the end of the reporting period (December 2023), out of 28,666 military criminal offences registered by the SBI, notices of suspicion were served only in 3,207 cases, 2,719 cases were sent to court, and 1,806 proceedings were closed. That is, in the vast majority of cases (25,626 or 89.4%), the SBI made no decision to end or stop proceedings in cases related to military criminal offences.

The SBI workload is clearly quite heavy, as it is currently empowered to investigate both the aforementioned offences and criminal offences not related to the military field. In 2022, the SBI, which may have no more than 1,600 employees in its headquarters and territorial directorates, conducted investigations in almost 50,000 criminal proceedings, and in 2023, the number was almost 72,000.

Draft laws determine the legal and organisational basis of the SBMJ activities, namely: the special status of the SBMJ, a special procedure for determining its general structure, funding, personnel and organisational support; tasks, functions and the procedure for exercising powers.

Draft laws provide for changes in the investigation of military administrative and criminal offences and offences committed by servicepersons in the following areas:

- › bringing under the jurisdiction of the SBMJ criminal offences the pre-trial investigation of which is currently carried out by investigative bodies of the SBI, the SSU, and the NPU;
- › empowering employees of the SBMJ to carry out procedural actions during the pre-trial investigation of criminal offences;
- › empowering officials of the SBMJ and the SBMJ Military Police (an independent structural unit) to file reports of administrative offences, carry out administrative arrests, deliver offenders, carry out personal inspection and inspection of the belongings of such persons, etc.

In accordance with the draft law, the SBMJ shall be created by the Cabinet of Ministers of Ukraine, be supervised by the committee of the Verkhovna Rada of Ukraine dealing with the activities of law enforcement agencies, and be accountable to the President of Ukraine, the said committee and the Cabinet.

The draft law envisages the transfer of some functions from law enforcement agencies and other public authorities to the SBMJ. For instance, it is planned to transfer it the SBI' functions of preventing, exposing, stopping, solving and investigating war crimes apart from those covered by the provisions of Art. 422 of the CrCU. This class of cases makes up more than a third of the total number of criminal proceedings in respect of which the SBI conducts pre-trial investigations. Other pre-trial investigation bodies – the SSU and the NPU – may lose their authority to investigate certain criminal offences against peace, security of humankind and international legal order.

The proposed SBMJ looks like a combination of the SBI and the MLES with a very wide range of functions (preventive, law enforcement, control, military, educational, inquiry and investigation functions). The SBMJ will effectively perform both control functions of the President of Ukraine as the Supreme Commander-in-Chief of the Armed Forces of Ukraine and the supervisory functions of the Verkhovna Rada of Ukraine, the MoD of Ukraine, etc., which is unacceptable from the point of view of the general principles of building a government system. No military police have ever been entrusted with such expansive functions in any nation. Therefore, there is a high probability of creating a body with high corruption risks in its activities, which may become uncontrollable while citing its independence.

Draft Laws Nos. 6569-1⁷⁷ and 6570-1⁷⁸

The initiators of draft laws note that the purpose of their adoption is the formation of the Military Police as a CEA with a special status to maintain military discipline, combat and mobilisation readiness of the AFU and other military formations.

Initiators of draft laws propose to start first of all with the first level of the military justice system – the Military Police as a body that is not only engaged in exposing, terminating, investigating military offences and preventing them, but should also ensure general compliance by servicepersons with law and order in the troops.

In terms of procedural matters, they call for bringing under the jurisdiction of the Military Police criminal offences the pre-trial investigation of which is currently carried out by the investigative bodies of the SBI, the SSU, and the National Police. Derived from this is the granting of the Military Police officers with procedural powers to conduct criminal intelligence activities. It is also proposed to establish the MLES' right to draw up administrative offence reports.

The activities of the military police will be directed and coordinated by the Cabinet of Ministers of Ukraine, as well as the MoD of Ukraine within the limits set by law. **This model does not correspond to the systemic principles of building and functioning of military law enforcement bodies of NATO member states⁷⁹**, in which such bodies operate within the system of defence departments.

Analysts emphasise that in this case, there will be reasons for a conflict of interests in the MoD of Ukraine, since the military police is called upon to ensure law and order in the department subordinate to it⁸⁰.

To prove the unacceptability of the position taken by the MoD of Ukraine, experts cite the decision of the CCU No. 3-r/2018 of 24 April 2018⁸¹, which states that the investigation of mistreatment by state-authorized persons will be considered effective if the following general principle is observed: persons conducting the investigation must be independent hierarchically and institutionally from anyone involved in the events of the case, that is, **investigators must be independent in practice**. Such issues can be avoided only if **the activities of the Military Police are directed and coordinated by the Cabinet of Ministers of Ukraine** not through the MoD of Ukraine, but **directly** (by analogy with the SBI, NABU, and the ESBU).

⁷⁷ Draft Law No. 6569-1 of 15 February 2022 “On the Military Police.” URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/39001>

⁷⁸ Draft Law “On Amendments to the Code of Ukraine on Administrative Offences, the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine in Connection with the Adoption of the Law of Ukraine ‘On the Military Police.’” URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/39009>

⁷⁹ Centre for Defence Strategies. Public Expectations Regarding the Military Police//Ukrainska Pravda, 11 June 2023. URL: <https://www.pravda.com.ua/columns/2023/06/11/7406365/>

⁸⁰ O. S. Pronevych. National Legal Tradition of Institutionalising Military Police Formations. URL: <http://baltijapublishing.lv/omp/index.php/bp/catalog/download/322/8780/18381-1?inline=1>

⁸¹ Decision of the Constitutional Court of Ukraine No. 3-p/2018 of 24 April 2018. URL: <https://zakon.rada.gov.ua/laws/show/v003p710-18#Text>

Draft Law No. 10042⁸²

In this draft law, MP L.A. Buimister proposes to determine the main directions of the national policy and the organisational and legal foundations of the architecture and functioning of the Military Justice system of Ukraine as a whole, which also includes, in her opinion, *the military police*.

The “*Military Justice system*” means a set of government bodies built according to NATO norms, principles and standards, within the framework of the reform in the security and defence sector and justice, as well as the legal system reform, which has normative, specialised institutional components defined by legislation and operates, using legal means, in accordance with procedures established by law in the security and defence sector to ensure the administration of justice and protection from military threats to state sovereignty, territorial integrity and democratic constitutional order, other vital national interests.

The Military Justice system includes:

1. Military Police;
2. Military counterintelligence and the Pre-Trial Investigation Body of a Special-Purpose State Authority with Law Enforcement Functions That Ensures State Security of Ukraine;
3. Military Prosecutor’s Office;
4. Military Bar;
5. Military Judiciary.

According to Art. 5 of the draft Law, the military police is a CEA with a special status, which ensures the interests of the state in the military sphere in the implementation of law enforcement activities for preventing, exposing, terminating, investigating, and disclosing crimes and criminal misdemeanours assigned to its jurisdiction, as well as implementing preventive measures, with the aim of ensuring law and order in the AFU, other military formations, in the Ministry of Defence of Ukraine, management bodies of forces and means involved in the performance of territorial defence tasks, in accordance with the procedure determined by the Law “On the Military Police.” The latter law is to be adopted subsequently.

The activities of the Military Police are directed and coordinated by the Cabinet of Ministers of Ukraine, as well as the MoD of Ukraine within the limits set by law.

The personnel of the Military Police consist of servicepersons, and its strength is approved by the Supreme Commander-in-Chief of the AFU upon the proposal of the head of the Military Police.

To fill vacant positions in the Military Police, persons subject to military service and holding officer positions who are in the unorganised reserve and are not in occupations reserved under the established procedure for the period of mobilisation may be called up for military service during mobilisation or for a special period.

⁸² Draft Law No. 10042 of 13 September 2023 “On the Organisational and Legal Foundations of the Architecture and Functioning of the Military Justice System of Ukraine.” URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/42777>

Options for creating the Military Police

The analysis of legislative initiatives allows concluding that the urgent problem is the unburdening of the SBI and the transfer of jurisdiction over military criminal offences (as well as those committed by servicepersons and currently investigated by the NPU and SSU) to a new body in the military justice system.

Therefore, possible options for creating the Military Police are:

1. maintaining the jurisdiction of the SBI and strengthening the MLES coupled with its renaming to the Military Police.

In view of the great workload of the SBI, in particular due to the increase in the number of military criminal offences, the following measures ought to be taken:

- › revise the maximum number of the SBI employees towards an increase by hiring professional servicepersons who are well-versed in investigating the relevant category of cases⁸³;
 - › to ensure the continuous in-service training of SBI employees for the purpose of effective investigation of military criminal offences. Investigators must understand the specifics of military service, rules of subordination, giving and executing orders, protecting military secrets, handling weapons and military equipment, etc. This especially applies to the combat zone;
 - › to establish consistent interaction with the MLES, since achieving a decrease in military criminal offences directly depends on the effectiveness of identifying the causes, prerequisites and circumstances of criminal and other offences committed in military units and on military facilities, prevention of committing and termination of criminal and other offences in the AFU;
2. transfer of a part of the jurisdiction to the MLES, while keeping complex cases⁸⁴ of military criminal offences under the jurisdiction of the SBI.

By amending the CPCU, it is possible to bring some military criminal offences under the jurisdiction of the MLES, which will to some extent relieve the SBI, or to grant the MLES the right to carry out criminal intelligence activities. If one of these options is implemented, it will be possible to significantly strengthen the institutional capacity of the SBI and MLES and significantly save on financial resources. It is not difficult to implement them, since the MLES is already empowered to draw up administrative offence reports against servicepersons, which will contribute to the rapid mastering of pre-trial investigation methods by MLES specialists;

3. creating the Military Police as a CEA with a special status.

⁸³ In July 2021, the Verkhovna Rada of Ukraine adopted in principle the Draft Law of Ukraine “On Amendments to Certain Laws of Ukraine on Improving the Legal Basis of the State Bureau of Investigation Activities” (reg. No. 5305 of 26 March 2021), which proposed to increase the maximum personnel strength of SBI to 2,000 people. At the same time, during the preparation of the draft law for the second reading, the Law Enforcement Committee of the Verkhovna Rada of Ukraine recommended increasing the maximum number of employees of the headquarters and territorial directorates of the SBI to 2,500 people.

⁸⁴ The complexity of cases is determined by the severity of the criminal offence, the level of the perpetrator (for example, mid-ranking commanders and above), other criteria that will be established by legislation as a condition for assuming jurisdiction.

In the event of the adoption of the Law “On the Military Police,” which will establish it as a CEA, its investigators and inquiry officers will be empowered to investigate all criminal offences committed by servicepersons. The relevant jurisdiction of the SBS, SSU and NPU will be transferred to the newly created body.

A separate structural unit will be formed within the Military Police – the Military Law Enforcement Service, which will be staffed by servicepersons. It will perform the function of preventing offences among servicepersons and apply administrative measures – draw up administrative offence reports, carry out administrative arrests, etc.

Such law enforcement functions will be aimed at servicepersons and employees of the AFU and other military formations.

It is the third option that is optimal, as it will allow to preserve the institutional experience of the MLES and combine it with the special knowledge of investigators and operatives who investigate military criminal offences within the limits of one body. Its status as a CEA will allow the new body to be given appropriate guarantees of independence, support, financing, etc., and to ensure parliamentary and public control over its activities.

During the implementation of the third option, certain challenges and risks should be taken into account:

- › the NABU’s responsibility in the military sphere should be left to the NABU, since budget funding amounting to hundreds of billions of hryvnias takes place under the MoD of Ukraine in wartime conditions. At the same time, the NABU has well-developed methods of investigation of official corruption crimes and experienced staff compared to the newly created pre-trial investigation body.
In addition, the transfer of corruption-related criminal offences committed by servicepersons to the jurisdiction of the Military Police (or other specialised pre-trial investigation body) may actually aim to prevent detection of these criminal offences – by analogy with the proposal to equate corruption with treason in August 2023 (which would entail a change of responsibility from the NABU to the SSU);
- › it is necessary to provide in the law all guarantees of independence of the new pre-trial investigation body, in particular from the military command, which will naturally try to bring it under its control;
- › the method of recruiting personnel of the new pre-trial investigation body should be thought through, namely the composition of the competition commissions for the appointment of its head and deputy heads. If, in addition to representatives of, for example, the Parliament, the Ombudsman, volunteer and other non-government organisations, they will also include representatives from the General Staff of the AFU, the MoD of Ukraine or the command of other military formations of Ukraine, then this may lead to the emergence of certain informal obligations of individual officials from the number of newly recruited personnel (and, for example, lenient treatment during the subsequent investigation of crimes committed by military leadership);
- › there will be a need to review the personnel strength of the SBI (it should be reduced, since military criminal offences occupy a prominent place in the criminal proceedings of the SBI);
- › the creation of a new pre-trial investigation body will naturally require from six months to a year to set up its work (in particular, the recruitment of a professional staff of investigators and inquiry officers who must be trained in the specifics of investigating military criminal

offences), which implies a certain decrease in the effectiveness of the investigation. Optimally, a part of SBI investigators will transfer to the new pre-trial investigation body (and for this, conditions of their financial and other support, the prestige of the service, etc. should be attractive);

- › it is possible that there will be a need for a certain transitional period, when some criminal proceedings regarding military criminal offences (probably the most complex of them) will still be investigated by SBI investigators, and others by investigators of the new pre-trial investigation body.

3.2. Pre-Trial Investigation Body of a Special-Purpose State Authority with Law Enforcement Functions That Ensures State Security of Ukraine

The events of 2022 became a strong challenge for military counterintelligence, since the subject of this body's efforts expanded significantly in connection with the full-scale invasion of Russian troops: the personnel strength of the AFU increased from approximately 250 to 700 thousand, and funding from UAH 118.8 billion to UAH 857.5 billion; new units were actively formed, in particular in the Territorial Defence Forces, and existing units of the AFU were recruiting more people; the risks of intelligence and sabotage activities targeting the command of the AFU and secret information increased.

The current situation in the military counterintelligence in the internal configuration of the SSU indicates that its situation must be improved during a full-fledged reform of the SSU—its transformation from a special purpose government body with law enforcement functions into a special service under parliamentary oversight. Military counterintelligence is a self-sufficient field of counterintelligence work in view of the integrity and closed nature of its subject (the AFU, paramilitary formations, defence-industrial complex) and its character, which requires its own structure, work approaches and competence in the military field⁸⁵. Therefore, it is proposed to detach military counterintelligence from the SSU system and reestablish it as an independent authority in the military justice system.

State policy currently has no answer to the question of when and how the SSU will be reformed. The model involving its transformation into a classical counterintelligence body (probably by depriving the SSU of the pre-trial investigation function and changing its status) was proposed and even adopted in the first reading in 2021⁸⁶, but with the introduction of martial law it was

⁸⁵ V. Tsokur Future of Military Counterintelligence: Success or Disappearance // -Ukrainska Pravda, 26 April 2023. URL: <https://www.pravda.com.ua/columns/2023/04/26/7399499/>

⁸⁶ Draft Law No. 3562-IX of 6 February 2024 "On Amendments to the Law of Ukraine 'On the Security Service of Ukraine' Regarding the Improvement of the Organisational and Legal Foundations of the Security Service of Ukraine's Work." URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/4441>

postponed indefinitely. Even with this approach, the fate of military counterintelligence was not specified, because it was perceived as an integral part of the SSU counterintelligence.

The already mentioned Draft Law No. 10042 proposes another model – the preservation of military counterintelligence in the system of a special-purpose state authority with law enforcement functions that ensures state security of Ukraine.

According to Art. 6 of the Draft Law, *military counterintelligence* provides counterintelligence support for the activities of the AFU and other military formations and preventive measures to ensure legality and good order for state customers in the field of defence, individual executors of the state defence procurement contracts, protection of state interests in the field of defence and national security.

The system, specifics of the organisation and activities of military counterintelligence and the pre-trial investigation body of the special-purpose state authority with law enforcement functions that ensures state security of Ukraine are determined by the laws “On the Security Service of Ukraine,” “On Counterintelligence Activities,” “On National Security of Ukraine,” and the CPCU.

At the same time, the pre-trial investigation body of the special-purpose state authority with law enforcement functions that ensures state security of Ukraine carries out work to investigate and solve crimes and criminal misdemeanours in the military field which are assigned to its jurisdiction.

In other words, the Draft Law No. 10042 proposes to preserve the current model under which we have military counterintelligence operating as part of the SSU (after the reform, the pre-trial investigation body of the special-purpose state authority with law enforcement functions).

Such approach aligns with the state policy in this area.

Thus, Clause 1.1 of the Comprehensive Strategic Plan for the Reform of Law Enforcement Bodies as Part of the Security and Defence Sector of Ukraine⁸⁷ (CSP) provides for “the unification of legal principles of the system of law enforcement bodies with the establishment of criteria for distinguishing areas of activity carried out by law enforcement bodies and other government bodies based on an exclusive functional orientation.” Clause 1.1.2 of the draft CSP Action Plan⁸⁸ envisages “developing and submitting to the National Security and Defence Council of Ukraine the concept of reforming military law enforcement bodies in the post-war period,” while clause 1.1.3 envisages “implementation of a set of measures aimed at developing (drafting necessary legislative changes for it) the SSU as the special-purpose state authority that ensures state security and strengthening its capabilities in the field of counterintelligence activities.” That is, it is about strengthening counterintelligence functions (including military counterintelligence).

⁸⁷ Decree of the President of Ukraine No. 273/2023 of 11 May 2023 “On the Comprehensive Strategic Plan for the Reform of Law Enforcement Bodies as Part of the Security and Defence Sector of Ukraine for 2023–2027.” URL: <https://zakon.rada.gov.ua/laws/show/273/2023#Text>

⁸⁸ Unpublished, sent to the Cabinet of Ministers of Ukraine on March 18 by the Interdepartmental Working Group at the Prosecutor General’s Office. Details: “The Interagency Working Group at the Prosecutor General’s Office approved the Action Plan for the Development of the Law Enforcement System”. Centre of Policy and Legal Reform, 20 March 2024. URL: <https://pravo.org.ua/analytical-materials/shhotyzhnevyy-analiz-13-19-berezhnya-2024-roku/#link2>

In April 2022, MPs F. Venislavskiy, M. Bezuhla and others registered a Draft Law (reg. No. 7267)⁸⁹ which envisaged entrusting the intelligence body of the MoD of Ukraine with the provision of counterintelligence support to the AFU and other military formations during the period of martial law.

As noted by experts of the CRED (Chief Research and Expert Directorate), the division of counterintelligence activities into several fields may lead to a result opposite to that intended by this draft law, namely, to the low efficiency of military counterintelligence work. Considering the fact that the AFU are subordinate to the MoD of Ukraine, carrying out military counterintelligence work by the intelligence body of the MoD of Ukraine may create a conflict of interests, which will negatively affect the performance of assigned tasks. Moreover, it is impossible to provide funding for such a counterintelligence body as part of the MoD of Ukraine in a short period of time.

Subsequently S. Ionushas and M. Bezuhla registered an alternative draft law (reg. No. 7267-1)⁹⁰. Considering the views of the initiators in their respective committees⁹¹, it can be concluded that this draft law is a refined vision of how military counterintelligence should be reformed. The draft law is aimed at strengthening the ability of counterintelligence units to counteract the intelligence, subversive and terrorist activities of the security services of the aggressor state and its satellites, which is carried out during the state of war using hybrid forms, methods and forces (collaborators, traitors, etc.), as well as to search for persons who went missing under special circumstances.

Therefore, **military counterintelligence is an integral part of the counterintelligence function in general. Therefore, it is necessary to concentrate counterintelligence functions in one body, and not to distribute them among multiple bodies which would undermine their effectiveness.** The transformation of the SSU into a classical counterintelligence body, which will include military counterintelligence as an element of military justice, is justified. Creating the Military Counterintelligence Service is less realistic under war conditions, given the absence of an acute need for this and the lack of resources.

A problematic issue is the SSU retaining the function of pre-trial investigation of criminal offences against the foundations of national security, terrorism, and international crimes. As already mentioned above, if perpetrators of such criminal offences are servicepersons, they should be under the jurisdiction of a specialised body – the Military Police. Meanwhile, the SSU jurisdiction, established in the current version of Art. 216 of the CPCU, should be transferred to the SBI and accompanied by strengthening of guarantees of the latter agency's effective work, conducting an internal audit and increasing the number of employees (in particular, by enabling unhindered and comfortable transfer of SSU investigators to similar positions of SBI investigators).

⁸⁹ Draft Law No. 7267 of 8 April 2022 "On Amendments to Certain Legislative Acts of Ukraine on Improving the Organisational and Legal Principles of Counterintelligence Support of the Armed Forces of Ukraine and Other Military Formations Created Pursuant to the Laws of Ukraine." URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/39389>

⁹⁰ Draft Law No. 7267-1 of 25 April 2022 "On Amendments to Certain Legislative Acts of Ukraine on Improving the Legal Principles of Organisation and Conduct of Counterintelligence Activities in Ukraine." URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/39498>

⁹¹ S. Ionushas – Chair of the Law Enforcement Committee of the Verkhovna Rada of Ukraine; M. Bezuhla – Deputy Chair of the Committee of the Verkhovna Rada of Ukraine on National Security, Defence and Intelligence.

As a result, the pre-trial investigation body will be in a separate CEA with a special status, and military counterintelligence work will be done by a special-purpose state authority (counterintelligence authority).

3.3. Military Prosecutor's Office

As far back as 2009, the Venice Commission criticised the Ukrainian comprehensive structure of the military prosecutor's office because of its functioning according to a typical Soviet approach⁹², and in 2012, it supported the abolition of the military prosecutor's office in order to simplify the prosecution service system as a whole⁹³. The Directorate General Human Rights and Rule of Law of the Council of Europe in its comments on the Law of Ukraine "On the Public Prosecution Service" of 14 October 2014 specifically emphasised that the implied subordination of military prosecutors to the overall military hierarchy and chain of command would considerably undermine the appearance of their independence and impartiality⁹⁴.

As already mentioned, military prosecutor's offices were abolished twice – in 2012 and 2019. The last time, they were replaced in accordance with Law No. 113-IX with the currently active Specialised Prosecutor's Office in the Military and Defence Fields (the name was then revised as "in the Field of Defence"), but it is merely specialised in this type of crimes. This unit does not have any special powers or additional guarantees of independence due to the uniform status of all prosecutors. The key principle is that these prosecutors are not servicepersons seconded to respective prosecution positions. It was this aspect that was criticised by the Council of Europe, as it undermines the basic principle of prosecution work, which is independence.

The issue of re-establishing military prosecutor's offices has been repeatedly raised since, but it gained special relevance after 24 February 2022.

Despite all the reasoning used for previous reforms, which deemed the status of a prosecutor as a serviceperson to be inappropriate, in April 2022, MPs tried to restore the possibility of appointing AFU servicepersons as prosecutors by adopting the Law "On Improving the Work of Prosecutor's Offices in the Conditions of Armed Aggression Against Ukraine" (Reg. No. 7058 of 16 December 2022)⁹⁵. The President of Ukraine vetoed the Law because, in his opinion, it did not take into account the tasks assigned to the AFU by the Constitution of Ukraine, the nature and essence of military service.

⁹² Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, Adopted on 12–13 June 2009. European Commission for Democracy through Law. URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)048-ukr](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)048-ukr)

⁹³ CDL-AD(2012)019-e. Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine (prepared by the Ukrainian Commission on Strengthening Democracy and the Rule of Law), adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12–13 October 2012). URL: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)019-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)019-e)

⁹⁴ Comments on the Law of Ukraine on the Public Prosecution Service of 11–12 October 2014. Directorate General Human Rights and Rule of Law. URL: <https://rm.coe.int/1680245ffb>

⁹⁵ Proposals of the President of Ukraine to the Law "On Amendments to Certain Laws of Ukraine on Improving the Work of Prosecutor's Offices in the Conditions of Armed Aggression against Ukraine." Draft Law No. 7058 of 16 February 2022. URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/39003>

As of today, the Verkhovna Rada of Ukraine is considering two draft laws that are almost identical in content (Reg. No. 7576⁹⁶ of 21 July 2022 and No. 7576-1⁹⁷ of 5 August 2022), the main purpose of which is to regulate the possibility of filling certain positions in the prosecutor's offices by AFU servicepersons.

These two draft laws differ from the first one in that “prosecutors of specialised prosecutor's offices in the military and defence fields can temporarily occupy administrative and prosecutorial positions, but for no longer than 6 months.” In addition, it envisages powers of the Specialised Prosecutor's Office in the Field of Defence which take into account specialisation and the extra-territorial principle of its work.

As the President of Ukraine notes in his veto message⁹⁸ on the Law No. 7058, “The presence of ‘prosecutors-servicepersons’ in the ranks of the prosecution service (which functions as part of the justice system)... does not comply with the constitutional principles of the functioning of the prosecution service... and is also inconsistent with the status of the prosecutor as defined by the Law ‘On the Prosecution Service.’” According to the approach proposed by the Law, the same functions in the prosecution service system will be performed by prosecutors and ‘prosecutors-servicepersons,’ who will be appointed and serve according to different procedures. This does not align with the implemented international standard of the uniform status of prosecutors, which is defined as one of the principles that ensures the unity of the prosecution service system (Article 7(5) of the Law ‘On the Prosecution Service’).”

In the event of re-establishment of the positions of “prosecutors-servicepersons,” military prosecutors would have to adhere to the requirements of two oaths (as a prosecutor and as an AFU servicepersons) and will have two superiors – in the prosecution administrative chain of command and the military chain of command.

From the standpoint of procedural independence, this will not affect the performance of functions in criminal proceedings, because the status of the prosecutor, and, accordingly, their procedural independence, are not affected: no one can give the prosecutor an order to open or close criminal proceedings, to conduct or not to conduct an investigative procedure, etc. The CPCU is a specific law for a prosecutor-serviceperson, therefore, no one may influence their decisions in matters of investigation of criminal offences in view of the guarantees of non-interference in their activities granted to them by the Code.

Subordination to two superiors (commanders) does not undermine the prosecutor's independence. In fact, military prosecutors have never been and never will be under military leadership: the powers of the superior military commander do not affect the procedural, administrative,

⁹⁶ Draft Law No. 7576 of 21 July 2022 “On Amendments to the Law of Ukraine ‘On the Prosecution Service’ To Support the Work of Specialised Military Prosecutor's Offices.” URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/40074>

⁹⁷ Draft Law No. 7576-1 of 5 August 2022 “On Amendments to the Law of Ukraine ‘On the Prosecution Service’ To Support the Work of Specialised Military Prosecutor's Offices” / URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/40199>

⁹⁸ Proposals to the Law “On Amendments to Certain Laws of Ukraine on Improving the Work of Prosecutor's Offices in the Conditions of Armed Aggression against Ukraine.” URL: <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1271965>

or financial independence of the military prosecutor, because he/she is, first and foremost, a prosecutor.

But informally, superiors of “prosecutors-servicepersons” may be able to give specific instructions regarding criminal proceedings or obstruct the investigation by other organisational means. In addition, a “prosecutor-serviceperson,” being interested in promotion to a higher position, receiving a new rank, etc., will take into account their military superiors’ opinion of them. So, even though they will be procedurally independent, the effectiveness of their work will be undermined by their direct connection with the AFU⁹⁹.

In arguing against the idea of “civilian” prosecutors, its critics cite their doubts regarding unhindered access to the scene of a criminal offence committed by a serviceperson.

Proponents of the idea of re-establishing military prosecutor’s offices point out that in a special period, only military prosecutors can, being directly in the army, ensure the professional investigation of military crimes. There is a clear subordination in the AFU and they do not accept “civilian” persons, even if they are prosecutors. Only a person in uniform and with rank insignia can be perceived as an equal and will be assisted in the investigation of crimes.

In fact, the legislation provides for the access of any investigators and prosecutors to the premises of military units and formations, military facilities, etc., in order to perform their duties. Therefore, the real issue is establishing effective cooperation between various branches of the military justice system rather than presence of uniforms and rank insignia.

In practice, access procedures applicable near the contact line are established by the military command. This is due to the need to make it as difficult as possible for any person to conduct reconnaissance of the positions and deployment locations of our soldiers. Even local residents are allowed to move about only in specific times and places. During the anti-terrorist operation/joint forces operation, an instruction of the Chief of the AFU General Staff was even in effect for some time, according to which servicepersons of the military prosecutor’s offices had to obtain the advance permission of the relevant commander if they wished to enter deployment locations of combat military units.

Another criticism of the idea of “civilian” military prosecutors concerns their special expertise.

Its proponents note that only servicepersons should be appointed to positions of military prosecutors, since only they know from the inside how the norms of military law operate and understand the specifics of military service, including in the combat zones. A prosecutor of a regular prosecutor’s office cannot investigate criminal offences related to the violation of flight rules during aircraft operations, ship navigation rules, and regulations for special types of military service¹⁰⁰.

It is difficult to agree with this, because there is such a thing as in-service training. Finally, Art. 71 of the CPCU provides for the possibility of engaging a specialist – a person who possesses special knowledge and skills and can provide advice, explanations, background references and conclusions during pre-trial investigation and trial on matters requiring relevant special knowledge and

⁹⁹ Editorial: vMilitary Prosecutors: Pro et Contra//JustTalk, 2 August 2022. URL: <https://justtalk.com.ua/post/editorial-vijskovi-prokurori-pro-et-contra>

¹⁰⁰ Y. O. Zahorodnii. Specialised Prosecutor’S Office in the Field of Defence: Legal Status, Role in the System of Law Enforcement Agencies, Functions and Tasks under Martial Law / Scientific Bulletin of Uzhhorod National University, 2023. Legal Science series. Vol. 80: Part 2. P. 140.

skills. Currently, the Prosecutor General's Office is actively recruiting military specialists precisely for the investigation of war and military criminal offences¹⁰¹.

Another argument is the life-threatening working conditions caused by the state of war. Its proponents believe that in such conditions, only prosecutors who belong to military personnel can exercise their powers.

The experience of 2014, when the offensive of Russian mercenaries in eastern Ukraine began, showed that a significant number of civilian employees of the prosecution service, including its specialised prosecutor's offices, and police officers with special ranks submitted their resignation requests in the very first days, which were granted in accordance with labour legislation. Meanwhile, the remaining employees refused to go to the incident scenes which were close to the line of contact, citing the danger to their lives and health. The law enforcement system was effectively paralysed in certain areas. There are no coercive measures to be used against such employees: according to Art. 43 of the Constitution of Ukraine, "The use of forced labour is prohibited. *Military* or alternative (non-military) service, and also work or service carried out by a person in compliance with a verdict or other court decision, or in accordance with the laws on martial law or on a state of emergency, are not considered to be forced labour."

Thus, the status of a law enforcement officer as a serviceperson prevents them from refusing to perform their duties in the event of a threat to life or health, since such refusal entails disciplinary and criminal liability.

But this problem can be solved, at least partially, if social safeguards are provided for prosecutors who exercise powers in criminal proceedings regarding offences committed in areas close to the front line.

For example: 1) to establish an allowance in the amount of up to 50 percent of the basic salary, but not less than 20 percent of it, for the actual time spent in these areas; 2) to ensure the right to payment of a lump-sum cash benefit in case of death, disability or partial loss of working capacity without disability confirmation; 3) to include civilian prosecutors in the list of persons who are granted the status of a war participant in accordance with the Law "On the Status of War Veterans and Guarantees of Their Social Protection"; 4) to provide them with transport, special means of communication, and personal protection equipment; 5) to determine the authority responsible for payment of lump-sum cash benefit to former servicepersons who served in the prosecutor's office and after discharge acquired the right to a disability payment.

Therefore, the current model of the Specialised Prosecutor's Office in the Field of Defence as a part of the Prosecutor General's Office generally meets the requirements facing the prosecutor's office which carries out procedural management and public prosecution in cases of military criminal offences. This is the only element of the military justice system that does not require reform, but only the establishment of proper coordination mechanisms with regard to the Military Police (authorities that currently perform its function).

¹⁰¹ Iryna Venediktova: Military experts and Technical Advisers Help Investigate War Crimes of the Russian Federation//Prosecutor General's Office, 1 July 2022. URL: <https://gp.gov.ua/ua/posts/iryna-venediktova-viiskovi-eksperti-ta-texnicni-radniki-dopomagayut-rozsliduvati-vojenni-zlocini-rf-2>

3.4. Military Bar

There is no doubt that the specific nature of the military fields requires lawyers to have special knowledge. However, countries of Eastern and Central Europe have no military bar like that described above using the examples of the USA and Israel, so the interests of the defendant in military courts, where they exist, are represented and protected by civilian lawyers.

Meanwhile, in Ukraine, as evidenced by the monitoring of Internet resources, lawyers implement the idea of military bar through responding quickly and flexibly to changing market conditions and focusing on the actual needs of potential clients.

For instance, when we entered the query “military bar” in Ukrainian in Google search bar, 9 out of 10 results on the first page were advertisements of Ukrainian lawyers with the tags “military lawyer,” “military case lawyer,” and the remaining 1 was a link to the Facebook group “Military lawyers and legal professionals.” Some Ukrainian lawyers already position themselves as “military lawyers,” filling this notion with quite diverse content depending on their own preferences, ideas, knowledge, skills and imagination. This once again shows the persistent trend of informal (existing outside the scope of legal regulation) development of the specialisation in the practice of law in Ukraine. However, such positioning of lawyers in the information space has both its advantages and disadvantages. The latter include lack of enforcement of proper qualifications, provision of poor quality services, professional deception, etc.¹⁰².

Some scholars emphasise the need to have dedicated “military” lawyers – professionals with knowledge of military law and military affairs, who will specialise in providing professional legal assistance to servicepersons, persons subject to military service, reservists and their family members. Of course, such lawyers cannot be in the military service or be part of the military chain of command. Their additional specialisation and qualifications should only be confirmed by the bar self-government bodies with the involvement of experts in military law in the process of such confirmation¹⁰³.

Other supporters of this position point out that the absence of the military bar does not negate the fact that there is an urgent need for it. Servicepersons, persons subject to military service, reservists, and employees of the AFU need a military lawyer to help them solve problems related to:

- representation of interests and protection of rights in court;
- draft, conclusion of a contract, mobilisation, military service or dismissal from it, insurance, obtaining social benefits and housing;
- reinstatement in military service in case of illegal dismissal;

¹⁰² O. Khotynska-Nor, R. Denysiuk. Specialisation of lawyers of Ukraine in the conditions of war: state and prospects of development. Bulletin of Taras Shevchenko National University of Kyiv, Legal Studies, 5(124)/2022. pp. 97–101.

¹⁰³ Y. Irkha “Military” bar as a component of the military justice system in Ukraine // Military justice system’s role in ensuring the national security of Ukraine: Proceedings of the international research and practical conference. Kyiv: Publishing House ArtEc, 2019. Pp. 137–142.

- › challenging illegal orders of commanders (superiors) in court;
- › legal defence of veterans¹⁰⁴.

Regardless of what model of military bar exists in the given state, the principal determinant of its development is the influence on the bar of specialisation which is based on requirements for high professionalism and quality of services, as well as the response of the bar as an open social system to the changing conditions of the environment in which it functions and whose needs it must meet¹⁰⁵.

The aforementioned Draft Law No. 10042 of 13 September 2023 “On the Organisational and Legal Foundations of the Architecture and Functioning of the Military Justice System of Ukraine” proposes, without going into detail, to create a military bar. Military lawyers will carry out professional activities related to defence, representation and provision of other types of legal assistance to clients from among servicepersons and employees of the defence-industrial complex.

However, the creation of a military bar in Ukraine is hardly advisable and possible in the near future. First of all, getting a specialisation in the practice of law is not an obligation, and provided that the principle of competence is observed, any lawyer has the right to represent the interests of their client in any field of legal relations. Secondly, the Law “On the Bar and the Practice of Law” provides for the incompatibility of the practice of law with military service. Thirdly, although Ukrainian servicepersons currently does not have the right to legal aid as such, they may benefit from it if they belong to other categories of persons defined in Art. 14 of the Law “On Legal Aid.” In addition, the volunteer movement “AFU Lawyers”¹⁰⁶ was created on the initiative of the Commander-in-Chief of the Armed Forces of Ukraine in 2022, the purpose of which is to provide legal support to defenders of Ukraine. This is indicative and shows that the military community creates a demand for such specialised legal services.

Analysts recommend that the Verkhovna Rada of Ukraine expand the rights of lawyers who defend servicepersons, namely, grant a lawyer who defends a serviceperson in criminal proceedings the right to:

- › have unimpeded access to them at any time on the premises of the military unit;
- › participate in investigative procedures (examination of the incident scene, crime re-enactment, etc.), which are carried out in the combat zone and at military facilities, as well as the duty of the investigator and the prosecutor to ensure such participation of the defence lawyer;
- › obtain, at the request of a lawyer, limited-access information, if it concerns a client who is a serviceperson¹⁰⁷.

¹⁰⁴ R.O. Dehtiar (2018). Introduction of the Concept of “Military Justice” in Ukraine in the Context of Foreign Experience. Odesa. 34 p. URL: <http://dspace.onua.edu.ua/handle/11300/9734>

¹⁰⁵ O. Khotynska-Nor, R. Denysiuk. Specialisation of lawyers of Ukraine in the conditions of war: State and prospects of development. Bulletin of Taras Shevchenko National University of Kyiv, Legal Studies, 5(124)/2022. pp. 97–101.

¹⁰⁶ Volunteer movement “AFU Lawyers.” URL: <https://pravo-ua.com/>

¹⁰⁷ A. Volodenkova, L. Halan, D. Hatseniuk, A. Zavoloka, A. Krykun-Trush, A. Pashkina (2023). Military Justice and Protection of Soldiers’ Rights. Review of International Experience and Trends in Ukraine. A. Krykun-Trush, L. Halan (Eds.). Kyiv. URL: https://www.pryncyp.com/wp-content/uploads/2023/12/prynczyp_yurydychnyj-analiz_online.pdf

3.5. Military Courts

The issue of re-establishing military courts in the judicial system of Ukraine became relevant immediately after the invasion of the army of the Russian Federation into Ukraine in 2014.

On 6 April 2015, the Draft Law “On Amendments to Certain Legislative Acts of Ukraine (Regarding the Establishment of Military Courts and Certain Organisational Matters)” was registered in the Verkhovna Rada of Ukraine at the initiative of several MPs under No. 2557. Its authors included employees of the Presidential Administration of Ukraine¹⁰⁸. However, it was withdrawn from consideration on 21 February 2017.

In 2018, two more draft laws were registered in the Verkhovna Rada of Ukraine: No. 8392 of 22 May 2018 “On Amendments to the Law of Ukraine ‘On Judiciary and Status of Judges’ Regarding Military Courts” and another draft law which was alternative to it – No. 8392-1 of 1 June 2018 “On Amendments to the Law of Ukraine ‘On Amendments to the Law of Ukraine ‘On Judiciary and Status of Judges’ Regarding the Establishment of Military Courts,” both submitted by MPs.

The first of these draft laws proposed to stipulate the functioning of military courts in the judicial system with the following organisation: a) garrison courts as local courts of first instance are military courts of garrisons; b) the Military Court of Appeal in the city of Kyiv as the court of second instance; c) the military chamber of the Criminal Court of Cassation in the Supreme Court as the cassation instance. Redeployment of troops or reorganisation of the AFU and other military formations are added to the grounds for the establishment or dissolution of a court. A candidate for the position of a military court judge must be in military service (organised reserve) or in unorganised reserve and hold an officer’s commission. Judges of military courts must be in military service and be counted to the AFU authorised personnel strength¹⁰⁹.

Draft Law No. 8392-1 of 1 June 2018¹¹⁰ proposed similar changes, with the following exceptions: a) military courts as local courts of first instance; b) the High Military Court as the court of second instance.

¹⁰⁸ Draft Law “On Amendments to Certain Legislative Acts of Ukraine (Regarding the Establishment of Military Courts and Certain Organisational Matters).” URL: https://w1.cl.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54668

¹⁰⁹ Draft Law “On Amendments to the Law of Ukraine ‘On Judiciary and Status of Judges’ Regarding Military Courts.” URL: https://w1.cl.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64070

¹¹⁰ Draft Law “On Amendments to the Law of Ukraine “On Amendments to the Law of Ukraine ‘On Judiciary and Status of Judges’ Regarding the Establishment of Military Courts.” URL: https://w1.cl.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64138

On 29 August 2019, both drafts were withdrawn due to early dissolution of the parliament, and no similar draft laws have been submitted for its consideration since. According to O. Zavitnevych, Chair of the Committee of the Verkhovna Rada of Ukraine on National Security, Defence and Intelligence, we should take into account the peculiar character of the work of judges in the conditions of military action, which leads to the increased caseload. However, “creating a separate branch of the judiciary will be a difficult, expensive and prolonged endeavour for now.”¹¹¹

Some experts insist on the need to re-activate military courts, citing as reasons: 1) an increase in both the personnel strength and the role in society’s life of the AFU and other military formations; 2) the existence of a zone of active combat, which objectively hinders the organisational support for the administration justice in certain areas; 3) functioning of other military justice bodies. At the same time: the appointment/election of military judges should not depend on the legislative or executive bodies; the subject matter jurisdiction of military courts should extend only to servicepersons and civilian personnel of military formations; decisions of military courts should be appealable in courts of general jurisdiction under an appellate and, in certain cases, cassation procedure¹¹².

Some experts are of the opinion that military courts should be created as a type of courts of general jurisdiction, and not as specialised courts, since their difference lies only in the fact that they try cases with a special type of perpetrators and are territorially linked to military garrisons¹¹³.

Draft Law No. 10042 of 13 September 2023 “On the Organisational and Legal Foundations of the Architecture and Functioning of the Military Justice System of Ukraine,” the content of which was presented above, proposes, without going into detail, to create military courts with judges having the status of servicepersons. If this Law is adopted, the Committee on Legal Policy of the Verkhovna Rada of Ukraine will have to develop a draft law on amendments to the CPCU and the Law “On Judiciary and the Status of Judges” within three months.

However, there are strong counter-arguments.

According to the Constitution of Ukraine, the system of courts in Ukraine shall be formed in accordance with the territorial principle and the principle of specialisation and determined by law; courts shall be established, reorganised and dissolved by law, the draft of which shall be submitted to the Verkhovna Rada of Ukraine by the President of Ukraine after consultations with the High Council of Justice; higher specialised courts may operate in accordance with the law; the creation of extraordinary and special courts shall not be permitted (Article 125); additional requirements regarding education and professional experience may be established for judges of specialised courts in accordance with the law (Article 127). Listed provisions do not preclude in principle establishment of military courts as a type of specialised courts.

¹¹¹ The case of General Viktor Nazarov sparked a broad discussion about the need to re-establish military courts – Oleksandr Zavitnevych//Armiia inform, 14 January 2021. URL: <https://armyinform.com.ua/2021/01/14/sprava-general-a-viktora-nazarova-vyklykala-shyroku-dyskusiyu-shhodo-neobhidnosti-povernennya-vijskovykh-sudiv-oleksandr-zavitnevych/>

¹¹² A. V. Borovyk (2023). Administrative and Legal Foundations of the Development of the Justice System Incorporating the Best International Standards and Practices: A monograph / A. V. Borovyk, P. I. Mandzyk. Odesa: Yurydyka Publishers, 2023. Pp. 153–154.

¹¹³ Y. Bobrov. The Relevance of Creating Military Courts in Ukraine: An Overview of the Study Results. *Publichne pravo* No. 3 (35) (2019). Pp. 99–105.

Provisions of Articles 126 and 129 of the Constitution of Ukraine, according to which the independence and immunity of judges are guaranteed by the Constitution and laws of Ukraine, influencing judges in any manner is prohibited, and judges shall be independent and subject only to the law while administering justice, as well as provisions of Art. 127, according to which all judges have a uniform status, and additional requirements may be established for judges of specialised courts by law only concerning their education and professional experience, preclude appointing to positions of judges servicepersons who are subject to military regulations and other acts of military legislation, and whose status implies subordination, which means lack of independence.

Thus, **two ways** out of this situation are available:

1. to establish military courts with the status of specialised courts, namely military garrison courts and the High Specialised Military Court with the powers of an appellate court. Still, only civilians may serve as judges of these courts, for whom the legislator can establish additional requirements regarding the presence, in addition to a higher legal education, of a military education, and they may be appointed only from among persons who are subject to military service or are reservists;
2. to introduce into the practice of Ukrainian courts the specialisation of judges (similar to the specialisation of juvenile court judges, which is carried out on the basis of Art. 18 of the Law “On Judiciary and the Status of Judges”), who have a military education and/or military service experience and would have undergone special training organised by the National School of Judges of Ukraine together with military institutions of higher education based on a specially developed military-legal training program. Such judges could be limited to trying cases of:
 - › criminal offences committed by servicepersons, persons subject to military service and reservists (while undergoing their training sessions) and employees of military formations, if these criminal offences were committed by them on the premises of a military unit, institution, at an enterprise or a military facility or in connection with the performance of official duties by them, regardless of the place of commission of the criminal offence;
 - › administrative offences committed by servicepersons, persons subject to military service and reservists (while undergoing their training sessions);
 - › administrative cases in which a serviceperson or a military administration body is a party.

It may be advisable to empower these judges to try criminal cases concerning crimes committed by members of illegal military formations (combatants) in the temporarily occupied territories¹¹⁴.

The second option is possibly considered as a priority and less financially costly.

¹¹⁴ Y. Bobrova. Ensuring compliance with the territorial principle in trying criminal and administrative cases against servicepersons of the Armed Forces of Ukraine // Military justice system's role in ensuring the national security of Ukraine: Proceedings of the international research and practical conference / Editors: V. H. Pylypchuk, V. P. Koval, P. P. Bohutskyi, M. V. Belaniuk, S. O. Dorohykh, I. M. Doronin, O. H. Radziievska. Kyiv: Publishing House ArtEc, 2019. Pp. 102-107.

In para. 9 of its Opinion (2012) No. 15 of 5–6 November 2012 on the Specialisation of Judges, the Consultative Council of European Judges (CCJE) noted¹¹⁵ the following advantages of the specialisation of judges:

- ▶ specialisation of judges can ensure that they have the requisite knowledge and experience in their field of jurisdiction;
- ▶ an in-depth knowledge of the legal field in question can improve the quality of decisions taken by a judge; specialist judges can acquire greater expertise in their specific fields, which can thereby enhance their courts' authority;
- ▶ concentrating case-files in the hands of a select group of specialist judges can be conducive to consistency in judicial decisions and consequently can promote legal certainty;
- ▶ specialisation can help judges, by repeatedly dealing with similar cases, to gain a better understanding of the realities concerning cases submitted to them, whether at the technical, social or economic levels, and therefore to identify solutions better suited to those realities;
- ▶ specialist judges who provide knowledge of a science other than law can foster a multidisciplinary approach to the problems under discussion;
- ▶ specialisation through greater expertise in a certain legal field may help improve the court's efficiency and case management, taking into account the ever growing number of cases.

On 29 November 2023, Draft Law No. 10301¹¹⁶ was registered in the Verkhovna Rada of Ukraine. It proposes the introduction of this specialisation of judges in local general jurisdiction courts and appellate courts. In the explanatory note, the usage of this form is justified by the fact that, “unlike the specialisation of courts, it raises no issues from the point of view of compliance with the Constitution of Ukraine, and is also less costly with regard to economic, organisational, technical and time resources, which is very important for a state that is already resisting large-scale military aggression.”

Unfortunately, the solution proposed in the draft law, which has already obtained support of the CRED, is a half-measure: there are no requirements for the relevant judges regarding military education and/or military service experience and special training, and it is also stated that judges who are authorised to conduct relevant criminal proceedings are not exempted from performing other duties of a judge. In addition, the explanatory note to the draft law makes the emphasis not on carrying out criminal proceedings in military criminal offence cases, but rather on crimes against peace, security of the humankind and international legal order, and it cites in support of specialisation only statistical data on the number of criminal proceedings in cases of crimes of

¹¹⁵ Opinion (2012) No. 15 of the Consultative Council of European Judges on the Specialisation of Judges. Adopted at the 13th plenary meeting of the CCJE (Paris, 5–6 November 2012). URL: https://court.gov.ua/userfiles/visn_15.doc

¹¹⁶ Draft Law “On Amendments to the Law of Ukraine ‘On Judiciary and the Status of Judges’ regarding the Introduction of the Specialisation of Judges in Trying Cases of Military Criminal Offences, Criminal Offences against Peace, Security of the Humankind and International Legal Order.” URL: <https://itd.rada.gov.ua/billInfo/Bills/Card/43315>

aggression and war crimes, and notes that trying such categories of cases requires additional special training of judges.

Independent analysts also recommend that the Verkhovna Rada of Ukraine introduce military specialisation of judges, justifying it as follows:

- › we already have a specialised prosecutor's office in the field of defence, which is potentially able to provide highly specialised and effective procedural management and public prosecution in cases of war crimes, but there are no judges who have sufficient experience, knowledge and qualifications as well as understand the specifics and special character of military service;
- › the establishment of military courts is problematic since its judges would be subject to two oaths, as in the case of military prosecutors, and the real independence of military judges would be at risk;
- › establishment of a specialised High Military Court, which would have exclusive jurisdiction over cases of military crimes, is inadvisable, since judicial proceedings in cases of military crimes should be as territorially accessible as possible for participants in criminal proceedings.

The bulk of military crimes are currently committed in the combat zone in the east and south of Ukraine. It is there that we need to establish within regular local courts – through amendments to the Law “On Judiciary and the Status of Judges” – positions of judges specialised in the military field which must be filled according to a special selection procedure. The latter may involve as a special requirement for candidates' mandatory military service experience, including combat experience. Such a requirement would increase servicepersons' trust in judges¹¹⁷.

With the current shortage of judges, as about 25% of positions are vacant, the specialisation of judges is the only option. Taking into account the court staffing procedures, it is not possible to replenish judicial corps with graduates of educational institutions where lawyers are additionally provided with military legal education.

¹¹⁷ A. Volodenkova, L. Halan, D. Hatseniuk, A. Zavoloka, A. Krykun-Trush, A. Pashkina (2023). Military Justice and Protection of Military Rights. Review of International Experience and Trends in Ukraine. A. Krykun-Trush, L. Halan (Eds.). Kyiv. URL: https://www.pryncyp.com/wp-content/uploads/2023/12/prynczyp_yurydychnyj-analiz_online.pdf

Conclusions

1. The absence of an effective military justice system in Ukraine while it is at war, is not only nonsensical, but also a standing threat to national security and defence.
2. Theoretically, one of the following three systems may exist in Ukraine:
 - 1) the currently existing one, under which criminal cases against servicepersons are investigated and tried by civil justice bodies; the MLES does not have powers to investigate criminal offences;
 - 2) a hybrid system, in which the SBI (and/or military police) under the procedural management of the military prosecutor's office investigate criminal offences, but they are tried by civil courts upon introduction of specialised judges trying military criminal and administrative offences;
 - 3) an autonomous military justice system, which includes the military police, the military prosecutor's office and specialised military courts (local courts, appellate courts, and the military chamber of the criminal court of cassation) and is compatible with international human rights standards.

In the conditions of martial law and taking into account the financial and organisational capacity of Ukraine, we need to choose *the second option*. First of all, this is so because no amendments may be introduced to the Constitution of Ukraine at the moment. Secondly, establishing military courts would take a lot of time – a year or two, as we would need to draft amendments to the Law “On Judiciary and the Status of Judges,” adopt them, and conduct competitive selection for these courts... The legal status of military court judges may not be altered under any circumstances, they may not be servicepersons, but judges of such courts may be appointed from among persons who are subject to military service or reservists; they may be required to have, in addition to higher legal education, military education and military service experience.

Meanwhile, if the military aggression of the Russian Federation against Ukraine lasts for a long time and remains a high-intensity conflict which will end with merely a temporary truce, the third option may come to be implemented; in particular, military courts may be created to ensure easy and quick access to justice in areas close to the line of contact. The budget of military courts may be part of the budget of the judicial system as a whole; at the same time, military formations of Ukraine may be required to provide local and appellate military courts with premises, transport, security details, and a legal framework.

3. Of course, it is difficult to balance such important issues as ensuring justice and ensuring the combat effectiveness of the armed forces and the security of the state. Still, certain risks inherent in the existence of a military justice system in a democratic state governed by the rule of law can be eliminated or mitigated. For example, doubts about its transparency and independence can be dispelled by strengthening civil control over the military justice system, and the delineation of tasks and competences and the clarity of jurisdictional boundaries can be ensured by law.

4. Currently, the following measures should be taken as soon as possible:
- › to ensure the proper specialisation of prosecutors of specialised prosecutor's offices in the defence field, appointment to these positions of prosecutors with experience in military service in officer positions, in-service training for them, the establishment of district specialised prosecutor's offices in front-line areas and individual garrisons, their proper support with transportation services and military protection, as well as payment of compensation for risk to life and health;
 - › to transform the SSU into a classic counterintelligence body, which will include military counterintelligence as an element of military justice;
 - › to remove from the list of SSU's responsibilities the responsibility for pre-trial investigation of crimes against the foundations of national security and other crimes that are currently being investigated by SSU investigators;
 - › to transfer respective crimes to the jurisdiction of the SSU (and possibly the Military Police) while ensuring the unhindered transfer of SSU investigators, at their request, to similar positions in the SBI;
 - › to adopt the Law "On the Military Police" as a military formation with law enforcement functions aimed at servicepersons and employees of the AFU and all other military formations [the SSU, the NGU, the State Special Communications and Information Protection Service of Ukraine, the Foreign Intelligence Service, the State Border Service, the State Special Transportation Service, the State Protection Directorate of Ukraine];
 - › to empower the military police, established as a CEA, to investigate all criminal offences committed by servicepersons (primarily those related to evasion of military service and violations of the subordination and military honour regulations). For a certain transitional period, to leave in the jurisdiction of the SBI only the most serious military crimes, the investigation of which requires high qualifications typical of SBI investigators, but at the same time, does not require these investigators, who are not servicepersons, to work in combat zones;
 - › to make provisions in the Law "On the State Bureau of Investigation" for the establishment of territorial divisions of the SBI near combat zones and in the relevant military garrisons – they must exist until the military police investigative units are set up and they take over the entire jurisdiction of the SBI;
 - › to ensure the training of investigator officers and inquiry officers of the military police at the Institute of Military Law of Yaroslav Mudryi National Law University and the Military Institute of Taras Shevchenko National University of Kyiv;
 - › to repeal Articles 172-10 to 172-20 of the CUAO. At the same time, to include offences specified in them in the Disciplinary Regulations of the Armed Forces of Ukraine as disciplinary misdemeanours, and those of them that may be punished with arrest, in the CrCU as criminal misdemeanours. In doing so, it should be taken into account that according to court statistics¹¹⁸, only 3 to 5% of servicepersons who were subject to administrative penalties were sentenced to administrative arrest in 2021–2023. One option is adopting the Estonian approach, where under the Military Service Act, a commander may

¹¹⁸ Judicial Statistics. URL: https://court.gov.ua/inshe/sudova_statystyka/

impose on a serviceperson disciplinary arrest of up to 14 days for committing “serious or repeated violations of military discipline,” but the commander shall immediately notify the administrative court of the location of the military unit of the imposition of the disciplinary arrest, submitting, among other things, an approved copy of a directive on the imposition of the disciplinary arrest on a serviceperson and the summary of the disciplinary investigation, while the judge may declare the imposition of the disciplinary arrest lawful or unlawful (paragraphs 171, 173)¹¹⁹;

- › to divide all disciplinary offences of servicepersons into simple and grave ones according to the degree of severity;
- › to preserve powers of military commanders (chiefs) of military formations to apply penalties for simple disciplinary offences by their sole authority; to empower certain military commanders (chiefs) to investigate grave offences and, upon the proposal of military disciplinary courts, to apply various sanctions, including fines and service restrictions;
- › to establish military disciplinary courts at the brigade level and provide for a simple and quick procedure for them to try cases of grave disciplinary offences;
- › to determine that where a serviceperson is in danger of the most severe penalties (in particular, in the form of demotion, reduction in military rank or dismissal from military service due to incompetence), he/she shall have the right to use the services of a lawyer;
- › to introduce the military specialisation of lawyers in the Ukrainian bar system and take organisational and other necessary measures to ensure their high qualification level;
- › to create a legal aid centre under the command of each military formation; to provide in the Law “On Legal Aid” certain categories of servicepersons (in particular conscripts and cadets of military institutions of higher education) with the right to receive secondary legal aid; to grant to lawyers defending servicepersons in criminal proceedings the right to: unimpeded access to the client at any time; participation in investigative procedures carried out in the combat zone and at military facilities, as well as the duty of the investigator and prosecutor to ensure such participation of the defence lawyer; obtain, at the request of a lawyer, limited-access information, if it concerns a client who is a serviceperson;
- › to delete from the CrCU articles 410, 415, 416, and 425, which do not provide for specific military criminal offences, but only duplicate provisions of other articles of the CrCU – in the event of their deletion, criminal sanctions for the relevant offences will be imposed under articles 185–191, 262, 286, 286-1, 281, and 367 of the CrCU.

¹¹⁹ M. Vashakmadze (2018). Specific aspects of military justice: Guidance note. Geneva: DCAF. URL: https://www.dcaf.ch/sites/default/files/publications/documents/DCAF_Military-Justice_Practice-Note_UKR_Final.pdf

Annex

Decaux Principles

These principles would be instructive if the Government and the Parliament of Ukraine were inclined to re-establish military courts to prosecute Ukrainian military personnel within the framework of the national judicial system. They include:

Principle No. 1: Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.

Principle No. 2: Military tribunals must, in all circumstances, afford the fair trial rights guaranteed by the ICCPR, including Article 14. They must apply any other standards and procedures internationally recognised as guarantees of a fair trial, including the rules of international humanitarian law.

Principle No. 3: In a State that has separate civilian and military courts, the civilian court has primary jurisdiction over all criminal offences committed by persons subject to military jurisdiction. The purpose of military courts is to contribute to the maintenance of military discipline inside the rule of law through the fair administration of justice. Military courts should only try cases that have a direct and substantial connection with that purpose, unless the accused is deployed overseas. In that case it would not be appropriate to subject him or her to the jurisdiction of the ordinary courts of the sending or receiving States.

Principle No. 4: The organisation and operation of military courts should fully ensure the right of everyone to a competent, independent and impartial tribunal at every stage of legal proceedings from initial investigation to trial. Judges in military courts must display integrity and competence and show proof of the necessary legal training and qualifications. Such judges should have a status guaranteeing their independence and impartiality vis-à-vis the military hierarchy.

Principle No. 6: Conscientious objector status should be determined by a civil court.

Principle No. 7: In no case should minors be placed under the jurisdiction of military courts.

Principle No. 9: With the exception of circumstances permitted by international humanitarian law, the jurisdiction of military courts should be set aside in favour of the jurisdiction of ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture.

Principle No. 13: As in matters of ordinary law, public hearings must be the rule, and the holding of sessions in camera should be altogether exceptional and be authorised by a specific, well-grounded decision the legality of which is subject to review.

Principle No. 14: The exercise of the rights of the defence must be fully guaranteed in military courts under all circumstances. All judicial proceedings in military courts must offer the following guarantees:

- › Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law;
- › Every accused person must be informed promptly of the details of the offence with which he or she is charged and, before and during the trial, must be guaranteed all the rights and facilities necessary for his or her defence;
- › No one shall be punished for an offence except on the basis of individual criminal responsibility;
- › Everyone charged with a criminal offence shall have the right to be tried without undue delay and in his or her presence;
- › Everyone charged with a criminal offence shall have the right to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- › No one can be compelled to testify against himself or herself or to confess guilt;
- › Everyone charged with a criminal offence shall have the right to examine the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- › No statement or item of evidence which is established to have been obtained through torture, cruel, inhuman or degrading treatment or other serious violations of human rights or by illicit means may be invoked as evidence in the proceedings;
- › Every accused person must have access to all materials that the prosecution plans to offer in court against the accused or that are exculpatory;
- › Everyone convicted of a crime shall have the right to have his or her conviction and sentence reviewed by a higher tribunal according to law;
- › Every person found guilty shall be informed, at the time of conviction, of his or her rights to judicial and other remedies and of the time limits for the exercise of those rights.