

SECTION 3. INTERNATIONAL AND NATIONAL LAW IN RESPONSE TO AGGRESSION AND WAR CRIMES

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COMBAT IMMUNITY: SPECIFIC CHALLENGES OF REGULATORY CONSOLIDATION IN NATIONAL LAWS AND INTERNATIONAL PRACTICES

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A complex issue related to emergency legislation and its effective application during martial law and active combat involves defining and setting the limits of combat immunity. This immunity provides exemption from liability, including criminal liability, for the loss of personnel, combat equipment, military property, and the use of armed and other force.

The Law of Ukraine "On Amendments to the Criminal Code of Ukraine and Other Legislative Acts of Ukraine Regarding the Determination of Circumstances That Exclude Criminal Illegality of an Act and Provide Combat Immunity Under Martial Law" dated March 15, 2022, No. 2124-IX, included the definition of the term "combat immunity" into legislation in Article 1 of the Law of Ukraine "On the Defense of Ukraine" [1].

Combat immunity provides for the exemption of military commanders, military personnel, special police officers of the National Police of Ukraine, volunteers of the Territorial Defense Forces (TrO) of the Armed Forces of Ukraine, law enforcement officers who, in accordance with their powers, participate in the defense of Ukraine, persons specified by the Law of Ukraine "On Ensuring the Participation of Civilians in the Defense of Ukraine" from liability, including criminal liability, for the loss of personnel, combat equipment or other military property, the consequences of the use of armed and other force during the repulsion of armed aggression against Ukraine or the elimination (neutralization) of armed conflict, the performance of different tasks for the defense of Ukraine with the use of any type of weapon (armament), the occurrence of which, taking into account reasonable caution, could not have been foreseen when planning and carrying out such actions (tasks) or which are covered by justified risk, except in cases of violation of the laws and customs of war or the use of armed force as defined by

international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine [2, P. 194].

Article 2.9.11 of the draft Criminal Code of Ukraine, which the Working Group is currently developing, introduces the concept of "combat immunity," defined as the legality of causing harm resulting from the actions of a combatant who, based on the received information, made the decision to carry out a military operation (combat operations) or executed such an operation (combat operations) necessary to repel armed aggression against Ukraine or to eliminate (neutralize) an armed conflict:

- 1) During martial law, armed aggression, and the elimination (neutralization) of an armed conflict.

- 2) When planning, authorizing, or conducting military operations (combat operations).

- 3) Within their authorities.

Paragraph 2 of Article 2.9.11 of the draft Criminal Code of Ukraine states that combat immunity does not apply in cases of crimes against humanity, genocide, or war crimes. It is important to note that combat immunity applies not only to military personnel but also to any combatant. These provisions were included to align with Article 43 of Additional Protocol I to the Geneva Conventions, following the recommendation of experts from the European Union Advisory Mission [3].

Studying the characteristics of combat immunity, A. Begunts distinguishes between its types: "civilian combat immunity" and "medical immunity" [4, P. 22-23], which provide legitimacy for the actions of combat medics and civilians involved in resisting Russia's armed aggression. A. Begunts suggests that this distinction aligns with Ukraine's obligations under international humanitarian law.

Despite the normative definition of combat immunity, its practical application indicates the need for further clarification and expansion of this concept, considering the specific needs and requirements of military law and military affairs. For example, on January 20, 2025, the former commander of the Kharkiv operational-tactical group, Y. Galushkin, the former commander of the 125th Brigade of the TrO, A. Gorbenko, former commander of the 125th Brigade of the Troops of Operational-Tactical Grouping, A. Gorbenko, and I. Lapin, the former commander of the 415th Battalion of the 23rd Mechanized Brigade, were arrested on charges of "failing to provide adequate protection for the Kharkiv region during the enemy offensive in May 2024" [5].

Combat immunity, as a legal safeguard that allows for the justified exemption of military personnel – especially representatives of the military command – from criminal liability for acts committed under martial law, does not apply automatically. Instead, it requires proof of the relevant circumstances in a court of law. This situation inevitably has negative

consequences for the exercise of military command and the country's defense capability. During intense combat operations, and without adequate and timely legal assessment of all events, the mere possibility of accountability can influence decision-making, impacting the effectiveness of actions. We believe that combat immunity should be absolute during martial law, and its limits in each specific case should only be determined based on an objective assessment of all circumstances.

The enshrinement of combat immunity principles in legislation aligns well with international standards and practices. For example, in the United States, "Section 2680 (J) of Title 28 (Judicial Power and Procedure) establishes the immunity of the Government of the United States from any claims related to the combat operations of the Army, Navy, and Coast Guard during wartime". American courts have determined that "the immunity of military personnel during combat operations should free military commanders from doubts and hesitations that they will have to appear as defendants in court." The core principles and interpretations concerning "the responsibility (or lack thereof) of commanders and military personnel in the United States are outlined in the Law of Armed Conflict Deskbook, Operational Law, and court decisions." These sources emphasize "flexibility and the need for a detailed analysis and study of all the circumstances in which the commander acted and the conditions that guided him" [6, P. 9].

UK legislation states that "the Minister of Defence may establish immunity for the Armed Forces of the Crown in cases where there is a threat to national security and military operations outside the United Kingdom, specifically when it concerns the abolition of military personnel's liability for death, injury, or harm caused to others during combat duties and during combat." The principle of combat immunity is that "military personnel actively engaged in military operations (combat) cannot be held liable for negligence, acts, or omissions, as confirmed by court rulings, and thus, it is part of the United Kingdom's national legislation". For example, in *Richard Mulcahy v Ministry of Defence*, the Court of Appeal ruled that during combat missions and operations, the Armed Forces are not required to exercise excessive caution regarding potential losses and injuries among military personnel [6, P. 9-10].

Article 16 of the French General Military Statute (*Le statut général des militaires français*) states that "military personnel shall not be held criminally liable under Article 121-3 of the French Criminal Code for unintentional acts committed in the performance of their duties, in view of the difficulties that may arise in the performance of the complex tasks assigned to them by law". In this case, "French law considers the complex and unpredictable circumstances that may arise during combat missions and provides for a flexible approach to determining when liability arises or may not arise,

considering individual cases that may occur during combat operations" [6, P. 8-10].

In our view, international experience with applying absolute combat immunity in wartime should be considered to improve Ukrainian legislation, including emergency laws. Additionally, complex, significant, and socially impactful cases involving military personnel should be handled by military courts. It should be noted that Ukraine's ratification of the Rome Statute of the International Criminal Court and its acknowledgment of this court's jurisdiction raise questions about the application of combat immunity in national criminal law to officials and participants in proceedings before the International Criminal Court. These issues require further investigation, and we hope they will be properly addressed in future legislation.

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