

TYPES OF MILITARY FORMATIONS AS PART OF A CRIMINAL OFFENSE UNDER ART. 114-1 OF THE CRIMINAL CODE OF UKRAINE

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Annotation. In the context of constantly changing geopolitical realities and expanding terrorist threats, the problem of military formations in the context of a criminal offense is becoming more relevant than ever. This article will examine the current state of this problem, determine its relevance and suggest possible ways to protect against this type of threat. The purpose of the work is to define the types of “military formation” and to establish their typical features. The methodological basis of the study is a combination of theoretical and practical approaches, within which general scientific and special legal methods are applied. The author analyzes the concept of “military formation” and identifies its types at the regulatory, legal and theoretical and legal levels. The article focuses on the issues related to the types of military formations and their inherent features, and their place in the criminal offense under Article 114-1 of the Criminal Code of Ukraine. The author concludes that legislative regulation of military formations in the area of criminal offenses requires immediate attention and effective measures. This issue is global, and therefore international cooperation and development of special forces are key factors for protection against crime. Our research allows us to distinguish the types of military formations: The Armed Forces of Ukraine and their structural subdivisions, characterized by the presence of all mandatory features of such formations as military; the National Guard of Ukraine and the Foreign Intelligence Service; military formations of the Security Service of Ukraine, the State Border Guard Service of Ukraine, the State Special Transport Service; other military formations, which include the State Service for Special Communications and Information Protection of Ukraine, the State Protection Department of Ukraine, etc.

Key words: national security, military formation, law enforcement agency, military personnel, security and defense sector.

1. Introduction.

In today’s world, where globalization and transnational conflicts are becoming commonplace, the consideration of military formations in the context of criminal offenses is becoming a critical task. This study offers a discussion of different types of military formations, their role in the modern criminal environment and ways to overcome them.

Military formations in the context of a criminal offense can be defined as organized groups aimed at committing crimes related to military aspects. These can be terrorist organizations, guerrilla or insurgent groups that use military tactics in their crimes.

2. The purpose of the article is to define the types of “military formation” and to establish their typical features.

3. Research methods.

The methodological basis of the study is a combination of theoretical and practical approaches, within which general scientific and special legal methods are applied. The analysis of the concept of “military formation” and the establishment of its types is carried out at the regulatory and legal and theoretical and legal levels.

Statement of the problem. In connection with the events which took place on the territory of Ukraine, the Law of Ukraine “On Amendments to the Criminal Code of Ukraine” of April 8, 2014 introduced criminal liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations during a special period (Article 114-1 of the Criminal Code of Ukraine). In order to respect the legitimate rights and freedoms of persons suspected or accused of committing such a criminal offense, it is necessary to correctly qualify the act committed by the person, namely to establish whether certain formations belong to the military [1].

4. Analysis of scientific publications.

The author analyzes a number of legislative and other regulatory acts on military formations, the Armed Forces of Ukraine, the National Guard of Ukraine, and the National Police of Ukraine and identifies a set of all inherent features of military formations and the types of military formations.

5. Review and discussion.

The legal literature expresses ambiguous opinions regarding the content of the concept of “military formation”. For example, some researchers present the following features of a military formation: they are created in accordance with the laws of Ukraine; they are staffed by military personnel; they participate in the defense of the sovereignty and integrity of the State by directly conducting military (combat) operations; the personnel are covered by social and legal protection, pension conditions established by law for military personnel (decision of the Constitutional Court of Ukraine of July 06, 1998, No. 10-rp) [2].

The systemic and structural analysis of the above position reveals, on the one hand, a significant limitation of the proposed list of features, since there is no connection between military formations and the overall system of security and defense in the State, there is no purpose of creation and operation of such formations, the issue of management is ignored, etc. On the other hand, its unjustified expansion is evident, which is manifested in the recognition of “extension of social and legal protection to military personnel, conditions of pension provision established by law for military personnel” as an independent feature. Such a qualitative characteristic is not a feature of a military formation, but of a serviceman, and it is inherent in his status (position) in society and the state.

In addition, some scholars express other opinions, for example, believing that reference to the relevant legal acts allows for a full explanation of such terms as “the Armed Forces of Ukraine” and “other military formations” [3].

Indeed, military formations are mentioned in a number of legislative and other legal acts. Article 17 of the Constitution of Ukraine states that “ensuring state security and protection of the state border of Ukraine is entrusted to the relevant military formations and law enforcement agencies of the state, the organization and procedure of which is determined by law” (part 3). In addition, a constitutional provision of direct effect (part 4 of the said article of the Constitution of Ukraine) establishes restrictions on the use of military formations and their activities - “The Armed Forces of Ukraine and other military formations may not be used by anyone to restrict the rights and freedoms of citizens or to overthrow the constitutional order, remove the authorities or obstruct their activities”.

The content of the term “military formations” is revealed by the inherent mandatory features of such formations, namely: (1) legislative provision for the creation of military formations, i.e. they

are created in accordance with the legislation of Ukraine; (2) the presence of command and control bodies of military formations and units; (3) the subject composition (staffing) of such formations (military formations and units and their command and control bodies) is composed of military personnel; (4) the purpose of their creation and activity is for the defense of Ukraine, protection of its sovereignty, state independence and territorial integrity.

The term "military formation" is used in several provisions of the Criminal Code of Ukraine that establish criminal liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations during a special period (Article 114-1 of the Criminal Code of Ukraine), and define the subject of a war crime (Article 401(2) of the Criminal Code of Ukraine).

In the first case, the phrase "the Armed Forces of Ukraine and other military formations" refers to a limited list of such formations, and in the second case, a more extensive list. It follows from the text of Part 2 of Article 401 of the Criminal Code of Ukraine that military formations include both the Armed Forces of Ukraine and the Security Service of Ukraine, the State Border Guard Service of Ukraine, the National Guard of Ukraine, as well as other military formations. The Criminal Code of Ukraine does not contain an exhaustive list of such formations.

Based on the characteristics of military formations, they can be classified according to different criteria: (a) by the purpose of their creation and activity; (b) by their place in the totality of military formations, units and command and control bodies; (c) by their governing body, as well as other characteristics.

As stated in Part 1 of Art. 114-1 of the Criminal Code of Ukraine, the legislator recognizes the AFU as a type of military formation, the purpose of which and their activities are defined by the Law "On the Armed Forces of Ukraine" of December 6, 1991, as amended [4]. Thus, Art. 1 of the Law establishes that the AFU is a military formation, which, in accordance with the Constitution of Ukraine, is responsible for the defense of Ukraine, protection of its sovereignty, territorial integrity and inviolability. The AFU ensures deterrence of armed aggression against Ukraine, repulsion of it, protection of the airspace of the state and underwater space within the territorial sea of Ukraine in cases determined by law, and participates in measures aimed at combating terrorism.

As envisaged by the aforementioned Article, formations, military units and subdivisions of the AFU may, in accordance with the law, be involved in the implementation of measures of the legal regime of martial law and the state of emergency, organization and support of the resistance movement, conduct of military information and psychological operations, fight against terrorism and piracy, measures to protect the life, health of citizens and state property outside Ukraine, ensure their safety and evacuation (return). They can be involved in strengthening the protection of the state border, protecting Ukraine's sovereign rights in its exclusive (maritime) economic zone and on the continental shelf and their legalization, ensuring the safety of Ukraine's national maritime navigation on the high seas or anywhere outside the jurisdiction of any state.

Article 1 of the Law "On the Armed Forces of Ukraine" also provides for the possibility of using them to take measures to prevent the proliferation of weapons of mass destruction, to counter illegal transportation of weapons and narcotic drugs, psychotropic substances, their analogues or precursors on the high seas, to eliminate natural and man-made emergencies, to provide military assistance to other states, as well as to participate in international military cooperation, international anti-terrorist, anti-piracy and other activities.

The military command and control bodies are obliged to ensure strict compliance with the requirements of the Constitution of Ukraine that the Armed Forces cannot be used to restrict the rights and freedoms of citizens or to overthrow the constitutional order, remove state authorities or obstruct their activities.

The limits of the AFU's activities are set out in para. 7 of the Article in question, which states that no emergency circumstances, orders or instructions of commanders or superiors may be the basis for any unlawful actions against the civilian population, their property and the environment.

The National Guard of Ukraine is a type of military formation. This is enshrined in part 1 of Article 1 of the Law of Ukraine "On the National Guard of Ukraine" of March 13, 2014. This provision stipulates

that the National Guard of Ukraine is a military formation with law enforcement functions, which is part of the system of the Ministry of Internal Affairs of Ukraine and is intended to perform tasks of protection and defense of life, rights, freedoms and legitimate interests of citizens, society and the state from criminal and other unlawful attacks, protection of public order and public safety, as well as in cooperation with law enforcement agencies - to ensure state security and protection of the state border, suppression of terrorist activities, illegal activities [5].

Part 2 of this Article stipulates that the National Guard of Ukraine participates, in accordance with the law, in cooperation with the Armed Forces of Ukraine in repelling armed aggression against Ukraine and eliminating armed conflict by conducting military (combat) operations, as well as in performing territorial defense tasks. It is composed of: (1) the main military command and control body of the National Guard of Ukraine; (2) operational and territorial units of the National Guard of Ukraine; (3) formations, military units, higher military educational institutions, training military units (centers), bases, healthcare institutions and institutions that are not part of operational and territorial units of the National Guard of Ukraine.

As defined in part 2 of Article 5 of the above Law, the National Guard of Ukraine organizationally consists of military command and control bodies (the main military command and control body of the National Guard of Ukraine and military command and control bodies of operational and territorial units of the National Guard of Ukraine), formations, military units (subunits), higher military educational institutions, training military units (centers), bases, healthcare facilities and institutions. Its formations may include brigades, regiments, battalions, detachments, companies, etc., and military units may include subdivisions (battalions, squadrons, detachments, companies, etc.), special commandant's offices (commandant's offices), communication centers, centers, groups, platoons (part 3 of Article 5 of the Law).

The range of military formations includes the SSU. As noted by V.I. Shakun and O.M. Hruszur, it follows from the current legislation that military formations include, in particular, the SSU [6].

Thus, according to Article 1 of the Law of Ukraine "On the Security Service of Ukraine" of March 25, 1992 [7]. The SSU is a special-purpose state law enforcement agency that ensures state security of Ukraine. Within the limits of its competence defined by law, the SSU is responsible for protecting state sovereignty, constitutional order, territorial integrity, economic, scientific, technical and defense potential of Ukraine, legitimate interests of the state and citizens' rights from intelligence and subversive activities of foreign special services, encroachments by individual organizations, groups and individuals, as well as ensuring the protection of state secrets (part 1 of Article 2). The SSU is also tasked with preventing, detecting, suppressing and solving crimes against peace and security of mankind, terrorism, corruption and organized criminal activity in the sphere of governance and economy, as well as other illegal actions that directly threaten the vital interests of Ukraine (Article 2(2)).

The SSU system consists of the SSU Central Directorate, its subordinate regional bodies, military counterintelligence agencies, military formations, as well as educational, research and other SSU institutions. Thus, military formations are separated from other elements in the overall system of the Service.

Article 19 of the above-mentioned Law states that the SSU staff consists of military personnel, employees who have concluded an employment contract with the SSU, and military personnel in regular service.

Thus, we can confirm that the SSU is not a military formation, except for its units with this status. Such a mandatory feature of military formations as manning by military personnel is not inherent in all structural units of the Service. Therefore, only military formations of the SSU should be recognized as military formations in the context of Art 114-1 of the Criminal Code of Ukraine, i.e. those manned by military personnel and defined as such by the Law.

At the same time, Art. 4 of the Law "On the Fundamentals of National Security of Ukraine" contains provisions according to which "the Armed Forces of Ukraine, the Security Service of Ukraine, the Foreign Intelligence Service of Ukraine, the State Border Guard Service of Ukraine and other military

formations established in accordance with the laws of Ukraine” are recognized as subjects of national security. Thus, this Law calls the SSU a military formation, which, in turn, creates a conflict with the provisions of the Law on this service, which only refers to its incomplete (in terms of total personnel) staffing with military personnel. In our opinion, there is a general need to resolve this inconsistency by amending Article 5 of this Law.

The above legislative conflict created by the Law also applies to the State Border Guard Service of Ukraine.

The State Border Guard Service of Ukraine is a special purpose law enforcement agency. This is defined in Article 1 of the Law of Ukraine “On the State Border Guard Service of Ukraine”. Its task is to ensure the inviolability of the state border and protection of Ukraine’s sovereign rights in its exclusive (maritime) economic zone (Article 6 of this law). The law does not provide for military formations in the structure of the Service. At the same time, its main functions include coordination of the activities of military formations and relevant law enforcement agencies related to the protection of the state border of Ukraine, access to and from the temporarily occupied territory, etc. (Article 2 of the Law).

The personnel of the State Border Guard Service of Ukraine includes military personnel and employees of the State Border Guard Service of Ukraine (Article 7 of the said Law), i.e., this Service is partially militarized (manned by military personnel).

In the Scientific and Practical Commentary to the Criminal Code of Ukraine, researchers also refer to the Foreign Intelligence Service of Ukraine as military formations. According to Art. 1 of the Law “On the Foreign Intelligence Service of Ukraine” of December 1, 2005, this Service is a state body that carries out intelligence activities in the political, economic, military, technical, scientific, informational and environmental spheres. It is subordinated to the President of Ukraine and controlled by the President and the Verkhovna Rada of Ukraine.

In contrast, for example, to the State Border Guard Service of Ukraine, the legislator clarifies the status of the Foreign Intelligence Service of Ukraine in part 3 of Article 1 of the Law, stating that the employees of this Service as a military formation include servicemen, officers and employees of the Foreign Intelligence Service of Ukraine. The Regulation on military service of the SZRU is approved by the President of Ukraine.

Thus, this law (as well as the Law on the Fundamentals of National Security of Ukraine) recognizes the Service as a military formation, which is in line with its mission.

The recognition of the State Special Transport Service as a military formation is quite problematic. Thus, Article 1 of the Law stipulates that the State Special Transport Service is a specialized state transport body in the system of the central executive body that ensures the formation and implementation of state policy in the areas of transport, road economy, tourism and infrastructure, which is intended to ensure the stable functioning of transport in peacetime and in martial law and a state of emergency (hereinafter - in a special period).

The staff of the State Special Transport Service includes employees and military personnel. The list of positions to be filled by them is approved by the CMU upon submission of the head of the central executive body in the field of transport, road economy, tourism and infrastructure, agreed with the General Staff of the Armed Forces of Ukraine. Servicemen of the State Special Transport Service are subject to the military regulations of the Armed Forces of Ukraine.

With regard to the State Service for Special Communications and Information Protection of Ukraine, there are also discussions in criminal law about the recognition of this Service as a military formation. Some scholars recognize it as a military formation, while others do not include it in the list of military formations.

The State Service for Special Communications and Information Protection of Ukraine is recognized by a special law as a state body designed to ensure the functioning and development of the state system of governmental communications, the National System of Confidential Communications, the formation and implementation of state policy in the areas of cryptographic and technical protection

of information, telecommunications, use of the radio frequency resource of Ukraine, special-purpose postal communications, governmental paramedic communications, as well as other tasks in accordance with the law. The State Service for Special Communications and Information Protection of Ukraine is aimed at ensuring the national security of Ukraine against external and internal threats and is a component of the security and defense sector of Ukraine [7].

According to Art. 11 of the Law, the personnel of the State Service for Special Communications and Information Protection of Ukraine includes military personnel, civil servants and other employees. The Regulations on the military service (training) of servicemen of this Service are approved by the President of Ukraine. The staffing of the State Service for Special Communications and Information Protection of Ukraine with military personnel and their performance of military service are carried out in accordance with the Law of Ukraine "On Military Duty and Military Service".

In accordance with the Law of Ukraine "On State Protection of State Authorities of Ukraine and Officials", the staff of the State Protection Department of Ukraine consists of military personnel enrolled in military service in the State Protection Department of Ukraine under a contract, military personnel in regular service, as well as employees who have entered into an employment agreement (contract) with the State Protection Department of Ukraine. Servicemen and employees of the Department of State Protection of Ukraine may be citizens of Ukraine who, by their business and moral qualities, educational level, state of health, are able to perform official (job) duties, have passed the selection and examination in connection with the admission to military service (work).

Therefore, a distinction should be made between (1) certain state bodies with special purpose (special functions) as military formations (Armed Forces of Ukraine, National Guard of Ukraine, Foreign Intelligence Service of Ukraine) and (2) state bodies with special purpose (special functions) that include military formations (SSU, State Border Guard Service of Ukraine, State Special Transport Service, State Protection Service of Ukraine, State Service for Special Communications and Information Protection of Ukraine). The list of these state bodies may be supplemented by the legislator.

With regard to the composition of the National Police of Ukraine, part 2 of Article 401 of the Criminal Code of Ukraine provides that police officers of the Special Police of the National Police of Ukraine who are involved in direct participation in hostilities during martial law are liable under Articles 402, 403, 414-416, 422, 427, 429, 430, 432-435 of this section. That is, they are subject to military criminal offenses.

However, the legislation does not recognize this state body as a military formation and it does not include military personnel. In addition, in accordance with paragraph 9 of the Regulation on the Service of Rank and File of the Internal Affairs Bodies, approved by the Cabinet of Ministers of Ukraine Resolution № 114 of July 29, 1991, persons liable for military service who are enrolled in the staff of the Ministry of Internal Affairs for the positions of rank and file and senior staff of the internal affairs bodies (in particular, cadets and students of educational institutions of the Ministry of Internal Affairs) are duly removed from the military register and are registered in a special register of the Ministry of Internal Affairs". This provision implies that the MIA keeps special records of these persons.

6. Conclusions.

The above allows us to distinguish the types of military formations, which are: (1) the Armed Forces of Ukraine and their structural units, characterized by the presence of all mandatory features of such formations as military; (2) the National Guard of Ukraine and the Foreign Intelligence Service; (3) military formations of the Security Service of Ukraine, the State Border Guard Service of Ukraine, the State Special Transport Service; (4) other military formations, which include the State Service for Special Communications and Information Protection of Ukraine, the State Protection Department of Ukraine, etc.

It is also worth noting that the legislative regulation of military formations as part of the criminal offense under Article 114-1 of the Criminal Code of Ukraine requires immediate attention and

effective measures. Given the global nature of this problem, international cooperation and the development of special forces are key factors in protecting against crime.

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