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The Criminal Law Counteraction to Obstruction of Mobilization in Ukraine: Current Challenges and Solutions in the Context of the Russian-Ukrainian War²

Abstract: The intensification of the mobilisation process taking place in Ukraine, given the new phase of the Russian-Ukrainian war, which began on 24 February 2022 with Russian troops' full-scale invasion of the territory of Ukraine, requires criminal law regulation. One of the negative influences on this process is the behaviour of those who obstruct mobilisation. Based on the study of the current law enforcement practice, such behaviour is charged under Article 114–1 of the Criminal Code of Ukraine and is considered one of the ways of obstructing the lawful activities of military formations. This article attempts to determine the specificities of such a criminal law response to cases of obstruction of mobilisation by analysing the practice of applying Article 114–1 of the Criminal Code of Ukraine, as this provision is used to counteract the obstruction of mobilisation. Research has revealed some positives and flaws concerning the description of the formulation and content of the charge; the determination of the motives for the criminal offence; the characterization of the person accused; the results of the case based on the charge; and the correctness of qualifying the actions of persons

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who obstruct mobilisation or otherwise facilitate evasion of military duty under Article 114–1 of the Criminal Code of Ukraine. It is concluded that the current approach to developing effective practices for counteracting obstruction of mobilisation requires change. Eliminating the identified flaws and amending criminal legislation is necessary for its more effective application.

Keywords: criminal law counteraction, criminal law qualification, Criminal Code of Ukraine, obstruction of military formation activity, obstruction of mobilisation

Introduction

Mobilisation was launched and is being carried out on the territory of Ukraine due to the need to defend the state following the Russian Federation's military aggression against Ukraine. As of today, the aggression is still ongoing. Therefore, the mobilisation process has not stopped, and the period of general mobilisation is extended every three months.

In the context of the high-intensity war characterising the current stage of the Russian-Ukrainian confrontation,³ policymakers are seeking to reform the legal mobilisation procedure in Ukraine, limit the number of persons who are not subject to mobilisation, introduce more effective measures to deal with persons who avoid military registration, etc.⁴ The implementation of the mobilisation process is with reason considered to be the key to successfully countering the more powerful enemy in the war. Therefore, social relations in the field of mobilisation

3 Ionita Craisor-Constantin, "Conventional and Hybrid Actions in the Russia's Invasion of Ukraine," *Security and Defence Quarterly* 44, no. 4(2023): 5–20, <https://doi.org/10.35467/sdq/168870>; Hal Brands, ed., *War in Ukraine: Conflict, Strategy, and the Return of a Fractured World* (Johns Hopkins University Press, 2024).

4 Julia Kazdobina and Jakob Hedenskog, *Challenges of the Ukrainian Mobilization* (Stockholm Centre for Eastern European Studies, 2024), <https://sceeus.se/en/publications/challenges-of-the-ukrainian-mobilization/>; Yuliia Dysa, "Explainer: Ukraine Considers Changing Mobilisation Rules as War with Russia Drags On," *Reuters*, published January 5, 2024, <https://www.reuters.com/world/europe/ukraine-considers-changing-mobilisation-rules-war-with-russia-drags-2024-01-04/>.

are subject to legal protection, in particular, using the resources of criminal law, given the significant nature of the impact of these relations on national security.

Criminal law protection of mobilisation is provided in Ukraine based on Chapter XIV of the Special Part of the Criminal Code of Ukraine, “Criminal offences in the field of protection of state secrets, inviolability of national borders, conscription, and mobilization,” which contains a set of prohibitions in this area (Articles 335–337).⁵ In general, these prohibitions apply to persons who evade military service in one way or another. Instead, the actions of persons who take measures aimed at obstructing the normal implementation of mobilisation as a whole, assisting all those who want to avoid military service during mobilisation, are not covered by these criminal law provisions. On the one hand, the escalation of the military situation and the increase in the number of war victims, along with other factors, make such avoidance actions relatively common in Ukraine due to the fear of being mobilised, and on the other hand, they cause outrage, given the long-lasting confrontation with the aggressor and the regular need to recruit.

What is the way to counteract acts which obstruct mobilisation? Today, other criminal law means are used for this purpose, namely Article 114–1 of the Criminal Code of Ukraine, which provides for liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations during a special period (see the table below). It is important to note that the legislator has classified this crime as an offence against the foundations of national security, and it is covered by the relevant section of the Special Part of the Criminal Code of Ukraine (Section I).⁶

⁵ The Criminal Code of Ukraine, <https://zakon.rada.gov.ua/laws/show/2341-14?lang=en>.

⁶ In addition to providing for some of the most severe sanctions for the relevant crimes, which are mostly punishable by imprisonment, these crimes lead to some other negative criminal law consequences related to restricting opportunities for applying for release from criminal liability, release from punishment, etc.

The object of a criminal offence		
The direct object	The foundations of Ukraine’s national security in the field of military security	
The objective side of a criminal offence		
Socially dangerous act	Obstruction of lawful activity of the Armed Forces of Ukraine and other military groups	
Time of the act	A special period (covers the time of mobilization, wartime and partially the recovery period after the end of hostilities)	
The subject of a criminal offence		
an individual	a person of sound mind	aged 16 or over at the time of committing an offence
The subjective side of a criminal offence		
guilt		intent

Table. Obstruction of lawful activity of the Armed Forces of Ukraine and other military groups (Article 114-1 of the Criminal Code of Ukraine)

This study is aimed at identifying trends in the implementation of Ukraine’s criminal law policy to counter the obstruction of mobilisation. The criminal law policy of the state at war is changing under the influence of new factors to effectively counteract the relevant challenges and threats (the desired state). The real situation shows that these changes do not always demonstrate the proper level of efficiency. Given this, the main research issue is to establish how criminal law reacts to cases of obstruction of mobilisation in the current phase of the Russian-Ukrainian war (after a full-scale invasion).

Given the aforesaid, the subject of this research is the practice of applying Article 114–1 of the Criminal Code of Ukraine, the tool for counteracting obstruction of mobilisation.

The issue is discussed using the following methods: dogmatic (establishing the content of the criminal law provision on obstruction of the lawful activities of military formations and identifying the mechanisms of its application using the rules of legal logic); observation (studying the materials of law enforce-

ment practice and court proceedings; processing criminal statistics); comparison (comparing different approaches to criminal law reaction to the obstruction of mobilisation); abstraction (imaginary removal of insignificant features, connections that affect the process of criminal counteraction and obstruction of mobilisation, while emphasising the most important features that characterise it).

In 2015, when the prohibition on obstructing the lawful activities of military formations was introduced, 11 people were convicted of this crime, and in 2016–2022, a total of 10 people were convicted, with 1 to 2 sentences delivered annually.⁷ A review of the available court decisions shows that in the majority of cases such obstruction did not relate to mobilization activities. In particular, actions related to blocking the movement of a column of military equipment of the Armed Forces of Ukraine,⁸ causing bodily harm to military personnel of a military formation,⁹ and launching a small unmanned aerial vehicle in the direction of a military unit¹⁰ were qualified under Article 114–1 of the Criminal Code. Such a state of law enforcement is not random, since it was actions seeking to obstruct combat operations or preparations for their implementation (such as blocking the movement of military equipment columns, military units, etc.) that primarily led to the enactment of the criminal law provision provided for in Article 114–1 of the Criminal Code of Ukraine. This statement is confirmed by referring to the transcript of the session of the Ukrainian parliament when the relevant draft law was considered,¹¹ among other factors.

7 Mykola Karchevskyy, “Infographics: Interactive Guide *Countering Crime in Ukraine* Version 3.0. (2023),” Karchevskyy.com, <https://karchevskiy.com/i-dovidnyk/> (in Ukrainian).

8 Case no. 425/3250/14-к, Rubizhne city court of Luhansk region (June 12, 2017), The Unified State Register of Court Decisions, <https://bit.ly/4hXUHNA> (in Ukrainian).

9 Case no. 723/341/19, Storozhynets District Court of Chernivtsi Region (May 17, 2019), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/81837770> (in Ukrainian).

10 Case no. 552/2404/20, Kyiv District Court of Poltava (June 2, 2020), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/89566708> (in Ukrainian).

11 The transcript of meeting no. 21 of the fourth session of the Verkhovna Rada of Ukraine of the VII convocation dated April 8, 2014, <https://www.rada.gov.ua/meeting/stenogr/show/5227.html>.

According to the court statistics, the application of Article 114–1 of the Criminal Code of Ukraine significantly intensified after 2022, thus the next full calendar year (2023) was chosen for this study. According to the Unified National Register of Court Decisions of Ukraine, it was established that twelve verdicts were delivered in 2023 and entered into force during the same period.¹² Analysing them made it possible to identify the specificities of criminal cases under Art. 114–1 of the Criminal Code of Ukraine that may be of interest from the standpoint of substantive criminal law, according to the following criteria: (1) description of the formulation of the charge; (2) content of the charge; (3) motives for the criminal offence of which the person is accused; (4) circumstances mitigating or aggravating the punishment and the characteristics of the accused; (5) results of the discussion of the charges (punishment imposed, exoneration from serving it, conclusion of an agreement, etc.); (6) correct qualification of actions of persons who obstruct mobilisation or otherwise contribute to evasion of military duty under Article 114–1 of the Criminal Code of Ukraine.

Description of the Formulation of the Charge

Without going into the procedural details, which are not the subject of this study, attention should be drawn to the issues identified in the description of the charge under Art. 114–1 of the Criminal Code of Ukraine in the verdicts. It is established that the majority of court verdicts under Art. 114–1 of the Criminal Code of Ukraine (seven out of twelve) start with an excessively detailed presentation of the legal material in the context of the incriminated act, with an over-emphasis on many aspects of the political and military situation in Ukraine. It is notable that this part of the verdict, covering a considerable part of it, is in some cases characterised by a formulaic content.¹³

¹² Although according to court statistics in 2023, 14 such verdicts were delivered, only those that became final in 2023 were used for the analysis.

¹³ A similar conclusion is drawn by V. Myslyvyi based on the results of his study of the practice of collaborative activity, although he also notes a gradual shift away from such

The so-called “preamble” in the motivational part of the verdict, which mainly describes the preconditions for martial law and the normative components of national security policy, ultimately has no particular criminal law relevance. Only in two of these seven verdicts does the court, in explaining the reasons for its decision, refer to “committing a crime under martial law” as an aggravating circumstance (the correctness of this decision will be discussed separately below). As for the compulsory element of the criminal offence under Art. 114–1 of the Criminal Code of Ukraine in the form of a special period,¹⁴ its establishment and justification do not require such extensive explanations (it is sufficient to state that the special period is directly related to the introduction of martial law in Ukraine).

Moreover, there are certain regional specificities in the formulation of the charge, such as the use of the same arguments and verbal constructions to substantiate the corpus delicti established in the actions of the persons charged. As an example, one may consider two verdicts delivered by judges from the Cherkasy region in this regard. In particular, when describing the behaviour of the individuals in both cases, the judges stated that the incriminating actions led to socially dangerous consequences in the form of a failure with regard to: fully implementing mobilisation measures; establishing the state’s mobilisation resource in due time; conscription and staffing of the Armed Forces of Ukraine and other military formations under martial law; keeping military records of conscripts, persons liable for military service, and reservists; and maintaining the Unified State Register of Conscripts, Persons liable for mili-

a material presentation. See: V. Myslyvyi, “‘Latent’ Characteristics of Subjective Features of Collaborative Activity in Court Judgments,” in *Collaborationism in Temporarily Occupied Territories: Issues of Legal Assessment, Human Rights Guarantees, and Reintegration of Territories* (Odesa, 2023), 18 (in Ukrainian).

14 According to the Law of Ukraine “On Defense,” a special period is the period beginning from the moment the decision on mobilisation (except for targeted mobilisation) is announced or brought to the attention of the executors regarding hidden mobilisation or from the moment martial law is introduced in Ukraine or certain areas of Ukraine and covers the time of mobilisation, wartime, and partially the reconstruction period after the end of hostilities.

tary service, and reservists. A similar trend can be observed in the practice of judges from the Ivano-Frankivsk region (three out of twelve verdicts), who also use the same formulations and language patterns.

The ostentatious templating, which can be observed on a regional basis in certain court decisions, is primarily due to the lack of experience in counter-acting obstruction of mobilisation in the face of high-intensity war challenges. That is why the practice is beginning to be shaped by reference to previous court judgements. However, in this way, incorrect arguments or even openly inappropriate methods of structuring verdicts may be repeated.

Content of the Charge

The analysis of all verdicts shows that in eleven out of twelve verdicts, obstruction of the lawful activities of the Armed Forces of Ukraine or other military formations was reduced to the same type of behaviour, namely the creation and/or administration of channels (chats) in Internet messengers, which disseminated information about the places where military personnel were conducting mobilisation campaigns.

For instance, under one of the verdicts, the convict's actions were qualified as obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations during a special period under Part 1 of Article 114–1 of the Criminal Code of Ukraine, given that he administered a channel on the Telegram messenger that disseminated information on the forms and methods of mobilisation activities in the city of Kyiv to an indefinite number of persons. In this way, the convict assisted persons evading military registration or otherwise violating the rules of military registration in avoiding receiving the relevant summonses. The court stated that the publication of the places where the military personnel of the recruitment centre¹⁵ performed their tasks impedes the process

¹⁵ Territorial recruitment and social support centres in Ukraine, or in other words, recruitment centres, ensure the implementation of mobilisation training and mobilisation activities. See more details: Roman Khardel et al., “Opportunities to Improve the Efficiency of Mobiliza-

of notifying persons liable for military service and reservists and creates conditions for evasion of mobilisation measures during martial law. This reduces the mobilisation resources of persons eligible for military service.¹⁶

In another case, the creation and administration of a channel on the Internet messenger Telegram for posting information on the handing out of summonses by recruitment centre officers, which received a similar criminal law assessment, is described from the point of view of developing a mechanism for obstructing the lawful activities of military formations in the form of systematic posting of information that obstructs these activities.¹⁷

In only one verdict were actions to promote unjustified evasion of military service by a person liable for military service and a serviceman (for a reward) deemed to constitute obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations. The convict provided him with a temporary certificate of a person liable for military service and a medical certificate confirming deregistration and therefore allowing him to be discharged from military service, in fact, without standing before the military medical commission.¹⁸ Such a qualification appears extremely doubtful because there are all the necessary objective signs of obstruction of the lawful activities of military formations. This is an example when the inaccurate legislative wording, which formally established liability for obstructing almost any activity, is used for a broad interpretation of Article 114–1 of the Criminal Code of Ukraine (without taking into account its specifics and without clari-

tion Activities for Human Resources,” *Topical Issues in Modern Science. Series: Public Administration* 3, no. 3(2024), [https://doi.org/10.52058/2786-6300-2024-3\(21\)-462-474](https://doi.org/10.52058/2786-6300-2024-3(21)-462-474) (in Ukrainian).

16 Case no. 753/6889/23, Darnytskyi District Court of Kyiv (June 5, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/111344469> (in Ukrainian).

17 Case no. 346/3338/23, Kolomyia City District Court of Ivano-Frankivsk region (September 14, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/113471837> (in Ukrainian).

18 Case no. 175/556/23, Dnipropetrovs’k District Court of Dnipropetrovs’k Region (June 7, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/111368762> (in Ukrainian).

fying its true meaning). In general, it seems that this qualification conceals another crime, but this is the subject of a separate research study.

The use of the same approach by judges in different regions of Ukraine when defining the concept of obstructing the lawful activities of the Armed Forces of Ukraine and other military formations is of interest. Some verdicts (four out of twelve) do include such a concept and formulate it in the same way, verbatim, reproducing the definition proposed by the scholar D. Oleinikov in one of his articles from 2014.¹⁹ On the one hand, we should welcome judges' use of criminal law doctrine in arguing their position, and on the other hand, such use should be disclosed by the source (in this case, the academic paper by D. Oleinikov). Unfortunately, not all judges do so, although there are generally some contrasting examples (in cases of other criminal offences).

However, this is not the core issue. The problem is that this concept, which also has certain drawbacks, is applied without consideration of the context of the actual circumstances established in a particular case, etc.

Thus, obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations is defined as commission of an act (actions or inaction), which is expressed in interference with these activities, or the creation of obstacles or barriers *aimed at preventing, stopping, or prohibiting certain actions* (italics mine) or manoeuvres of the Armed Forces of Ukraine and other military formations, and the and the making tactical or strategic decisions by the leadership or personnel of these units to complicate or make impossible the legitimate activities of the Armed Forces of Ukraine and other military formations or to significantly reduce their effectiveness.

Given that each of the four verdicts that use this concept to substantiate the fact of a socially dangerous act under Art. 114–1 of the Criminal Code of Ukraine involve the actions undertaken by the accused, such as the creation and/or administration of a channel in the Internet messenger Telegram

19 D. Oleinikov, "Criminal-Legal Characteristics of the Crime Provided by Article 114–1 of the Criminal Code of Ukraine," *Scientific Bulletin of Uzhhorod National University. Series: Law* 3, no. 27(2014): 56 (in Ukrainian).

(Viber), which consolidates and broadcasts messages with information about the place and time of mobilisation efforts, it is unlikely that such behaviour is intended to: (1) prevent, (2) stop, or (3) prohibit certain actions by military formations, which include recruitment centres. Actions to create or administer such channels only complicate the activities of military formations, since the posting of relevant information could not in fact cause the prevention, stopping, or prohibition of mobilisation activities. Despite the behaviour of the individuals charged, such activities continued but did not have the expected effectiveness (potentially, the number of men who could receive summonses was decreasing).

Moreover, some guilty verdicts contain provisions that essentially disprove the charge. For example, in some verdicts, it is clearly stated that the obstruction by the accused constitutes purposeful activity, which consists in illegal interference, creating obstacles and barriers *to prevent or stop the relevant lawful activities of military formations (italics mine)*.²⁰ Alongside this, the individuals charged in the case are accused of creating and administering an Internet channel and using it to collect, consolidate and disseminate messages with information about the places and times of mobilisation campaigns on the territory of a territorial community (thus creating obstacles to the establishment of the mobilisation resource of the Ukrainian state). This means that there is no question of preventing or stopping the activities of military formations. The impediments created reduced the effectiveness and productivity of such activities and complicated them, but could not lead to the cessation of the activities on the part of military formations.

It is also worth noting that one of these verdicts reveals the focus of the accused's intent in such a way: the intent of the accused directly covered actions

²⁰ Case no. 343/2557/23, Dolyna District Court of Ivano-Frankivsk Region (October 20, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/114304551> (in Ukrainian); Case no. 344/9926/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (July 26, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/112424960> (in Ukrainian).

aimed at disrupting the activities of recruitment centres as military formations. This is even though the criminal offence under Art. 114–1 of the Criminal Code of Ukraine is classified as an offence against the foundations of national security and should be associated with the nature of the damage caused by obstructing the lawful activities of the Armed Forces of Ukraine and other military formations.

Motives for the Criminal Offence of Which the Person Is Accused

The motive is not a compulsory element of a criminal offence under Article 114–1 of the Criminal Code of Ukraine and therefore does not directly affect its qualification. At the same time, under the provisions of Article 374 of the Criminal Procedure Code (hereinafter referred to as the CPC) of Ukraine,²¹ the court is obliged to indicate the motives for the criminal offence in the motivational part of the verdict.

Out of the twelve verdicts analysed, eight do not even mention the motive for the criminal offence that is being charged, that is, despite the law's requirements, internal reasons for committing an offence against the foundations of Ukraine's national security are not analysed at all.

In three verdicts, the courts concluded that the person had committed obstruction of the lawful activities of the Armed Forces of Ukraine and other military formations, guided by a mercenary motive (no mention was made of the other motives that would be associated with the direct object of the offence). In two of these three verdicts, it was established that the mercenary motive underlying the convict's actions was to make a profit by placing advertising messages for interested parties on thematic information channels.²²

²¹ The Criminal Procedural Code of Ukraine, <https://zakon.rada.gov.ua/laws/show/4651-17?lang=en#Text>.

²² Case no. 344/9926/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (July 26, 2023); Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region

In another verdict, the court stated that the convict had *an imaginary (italics mine)* goal of helping fellow villagers and residents of Kamen-Kashirsky district to avoid military duty and military service, mobilisation training and mobilisation, and acted on *false (italics mine)* motives of saving their lives and health in this way, contrasting his insignificant ideas of ensuring the allegedly legitimate interests of people with the interests of national security and defence.²³ It should be noted that the court calls the motives of the person's behaviour false, and this raises certain doubts. It is unclear on what basis this falsity is based. It seems that such motives may be quite genuine and accurately reflect the motivation for activities related to the creation and administration of Viber chat and its use for collecting, consolidating, and disseminating messages with information about the places and times of mobilisation campaigns. It follows from the content of the verdict that it was the desire to prevent the mobilisation of other persons that led to the defendant's actions. Therefore, while such a motive can be considered base, it is characterised by a certain degree of altruism.

Circumstances Mitigating or Aggravating the Punishment and Characteristics of the Person Accused

The need to determine the circumstances mitigating or aggravating the punishment in the motivational part of the verdict follows from the provisions of Article 374 of the CPC of Ukraine. At the same time, five of the twelve verdicts reviewed in the course of the study do not contain any mention of these circumstances. The rest of the verdicts contain such mentions, some of which are noteworthy.

(October 16, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/114193605> (in Ukrainian).

²³ Case no. 157/1546/23, Kamen-Kashyrskyi District Court of the Volyn Region (October 2, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/113902758> (in Ukrainian).

Seven verdicts include provisions on sincere remorse as a mitigating circumstance. Eight verdicts state that the offender had actively contributed to the disclosure of the criminal offence. Thus, these circumstances can be considered typical of the majority of the cases studied, and they are prevalent. As the most informative example, in one of the verdicts, the court described these circumstances as follows: (1) sincere remorse, which is expressed in the fact that the suspect admits his guilt, expresses regret for the deed, and wishes to rectify the situation (in particular, he stopped the administration and activities of the Viber group); (2) active assistance in investigating the crime, which means that the suspect gave detailed testimony about the activities and technical functioning of the Viber group and reported circumstances that were not known to the pre-trial investigation body.²⁴

Some verdicts recognised as mitigating circumstances the fact that the accused transferred charitable assistance for 30,000 UAH to the needs of the Ukrainian army²⁵; the accused did not cause material damage, transferred charitable assistance for 10,000 UAH to the account of the Armed Forces of Ukraine, and has a young child²⁶; the accused transferred funds for 20,000 UAH to support the Ukrainian army, has no previous convictions, is described positively at his place of residence, takes care of his father-in-law, who has a disability, and has a young daughter.²⁷ It should be noted in this context that the fact of transferring funds for the purposes of the Armed Forces of Ukraine is considered a circumstance that presents the accused in a positive light. However, this circumstance, given the nature of the acts committed, was recorded in only three cases out of twelve researched.

It is also worth noting that in 100% of cases, the persons prosecuted fully admitted their guilt. As stated in one of the verdicts, the accused pleaded guilty to

24 Case no. 343/2557/23, Dolyna District Court of Ivano-Frankivsk Region (October 20, 2023).

25 Case no. 344/9926/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (July 26, 2023).

26 Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (October 16, 2023).

27 Case no. 724/2179/23, Khotyn District Court of Chernivtsi Region (October 18, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/114244290> (in Ukrainian).

the criminal offence in court in full and unconditionally.²⁸ Such an attitude on the part of these persons towards the offence correlates with the means of criminal legal sanctions applied to them, the specifics of which will be analysed below.

As for the aggravating circumstances, they are not established in the five verdicts, and it is clearly stated in their motivational parts. Instead, two verdicts contain provisions stating that an aggravating circumstance is “committing a crime under martial law.”²⁹ This refers to the aggravating circumstance of “committing a crime *using the conditions of martial law or a state of emergency (italics mine)*, other emergency events,” as provided for in paragraph 11 of Part 1 of Article 67 of the Criminal Code of Ukraine.

The fact that this circumstance is met means that the crime is committed under martial law or a state of emergency, as well as in the context of other emergencies, and the perpetrator intentionally uses the situation to achieve his or her goal.³⁰ It should also be noted that at the beginning of the full-scale invasion of Ukraine by Russian troops, the Supreme Court addressed all citizens, explaining that committing a crime using martial law conditions encompasses cases where a person uses the most unfavourable time for society, difficult circumstances, and conditions in which society finds itself, which indicates an increased degree of public danger of crimes, to facilitate the commission of a criminal offence. That is why the court will sentence persons found of criminal offences during the *period (italics mine)* of martial law with due regard to this aggravating circumstance, i.e., the type and scope of the sentence will be close to the maximum limit provided for by the Criminal Code of Ukraine.³¹

28 Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (October 16, 2023).

29 Case no. 344/14510/23, Ivano-Frankivsk City Court of Ivano-Frankivsk Region (October 16, 2023); Case no. 343/2557/23, Dolyna District Court of Ivano-Frankivsk Region (October 20, 2023).

30 M. Melnyk and M. Khavroniuk, eds., *Academic and Practical Commentary on the Criminal Code of Ukraine* (Yurydychna dumka, 2018), 193 (in Ukrainian).

31 The penalty for committing a criminal offence under martial law will be close to the maximum limit provided by the Criminal Code of Ukraine, Supreme Court (March 4, 2022), <https://supreme.court.gov.ua/supreme/pres-centr/news/1261723/> (in Ukrainian).

With this clarification, the Supreme Court of Ukraine has effectively equated committing a criminal offence under martial law with its being committed during the period of martial law.³²

Returning to the verdicts in which judges recognised the commission of a crime under martial law as an aggravating circumstance, it is important to point out that the establishment of this circumstance did not affect the punishment imposed. The appropriateness of including martial law conditions in such a category of circumstances in the cases under consideration is a separate issue and is questionable, as discussed below. Thus, in one verdict, a person convicted of a crime under Part 1 of Article 114–1 of the Criminal Code of Ukraine was sentenced to a fine of 6,000 tax-free minimum income, equivalent to UAH 102,000, with the application of Article 69 of the Criminal Code of Ukraine.³³ In other words, this is even a milder punishment than that provided for in the sanction of Part 1 of Article 114–1 of the Criminal Code of Ukraine. In another verdict for committing a similar crime, the court sentenced the person to the minimum of all possible punishments in the form of imprisonment for a term of 5 years and released him from serving his sentence with probation. Thus, how did the established circumstance, which should have been an aggravating factor, have an impact on the decision? It is difficult to explain.³⁴

32 It seems that the approach outlined above cannot be viewed as unambiguous. It rightly raises some questions. Since during martial law and in its conditions, the circumstances of a criminal offence are not identical. The time of martial law is more universal and applies to any act committed during the relevant period. The use of martial law conditions does not characterise any act, but only where this situation affects or determines the behaviour of a person, facilitates the commission of a criminal offence, etc.

33 This provision makes it possible, as an exception, to impose a sentence that is less severe than the sanction of the article of the Criminal Code of Ukraine under which the act is qualified.

34 Significantly, in both of these cases, much attention is paid to the so-called martial law preamble, which begins the motivational part of the verdicts. However, why overload the prosecution's statement with the history of martial law if the relevant feature does not ultimately have any criminal legal consequences? Why, among other points, is it necessary to state, in support of the charge, that the aggressor carried out fire strikes on objects protected by international humanitarian law and that these actions led to grave consequences in the form of deaths, bodily injuries of varying severity, and material damage in the form of the destruction of buildings, property, and infrastructure? How does this ultimately correlate with the imposition of a minimum sentence?

As for the question of whether the relevant circumstance should have been indicated as an aggravating factor, in my opinion, the answer should be negative. That is why those judges—the absolute majority of them—who did not specify such a circumstance in their verdicts acted correctly and legally. This position is substantiated by the fact that a mandatory constitutional feature of the crime under Article 114–1 of the Criminal Code of Ukraine is the time of its commission, which is a special period covering the time that begins from the moment the decision on mobilisation is announced.³⁵

The Results of Considering the Case (Conviction, Punishment, Release from Serving It, Concluding an Agreement, etc.)

All of the verdicts delivered during the period under review were guilty verdicts, which means that in each of them the persons accused of committing the crime under Part 1 of Art. 114–1 of the Criminal Code of Ukraine were convicted. At the same time, the absolute majority of verdicts (eleven out of twelve) were passed with the approval of plea agreements, and the punishment was imposed by Part 5 of Art. 65 of the Criminal Code of Ukraine, i.e., the punishment agreed by the parties to the agreement.

In eight cases, the minimum punishment established in the sanction of Part 1 of Article 114–1 of the Criminal Code of Ukraine, namely imprisonment for a term of five years, was imposed. Along with that, the individuals convicted were released from serving this punishment on probation under Art. 75 of the Criminal Code of Ukraine with different probationary periods, the most common of which is two years (in seven cases).

A similar release from serving a punishment was applied in two more verdicts (i.e., in total, in ten out of twelve), with the only difference being that in

³⁵ On Mobilization Preparation and Mobilization: The Law of Ukraine, <https://zakon.rada.gov.ua/laws/show/3543-12#Text>.

these cases the individuals convicted were sentenced to a less severe punishment of three years imprisonment and released from serving it. In at least one of the cases, doubts arise as to the legality and validity of the imposition of a sentence less severe than that provided for by law, in terms of establishing several circumstances that mitigate the punishment and *significantly (italics mine)* reduce the severity of the criminal offence. It is extremely doubtful whether the fact that the accused has no previous convictions, is not registered with a psychoneurological or narcological clinic, is single, has no children, is officially employed, and exhibits a positive character is considered to be one of these circumstances.³⁶ Thus, given the above, it appears that the court had no right to approve such an agreement and, guided by paragraph 1 of part 7 of Article 471 of the CPC of Ukraine, should have refused to approve it.

Attention should also be drawn to the fact that, in general, five out of twelve verdicts imposed a punishment that was less severe than that provided for by law. At the same time, in the remaining three, the court moved to another, milder type of basic punishment not covered by the sanction of Part 1 of Article 114–1 of the Criminal Code of Ukraine. This is a fine that is not reasonably provided for for crimes against the foundations of national security,³⁷ given the typical nature of the public danger of the relevant offences and their general object.

The situation when the vast majority of verdicts under Art. 114–1 of the Criminal Code of Ukraine are passed with the conclusion of plea agreements and, at the same time, the imposition of the punishment that is the least severe under the sanction or even more lenient makes it possible to express the following considerations. Firstly, the total widespread use of plea agreements in the practice of applying Article 114–1 of the Criminal Code of Ukraine limits

³⁶ Case no. 645/3550/23, Frunzensky District Court of Kharkiv (October 26, 2023), The Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/114467250> (in Ukrainian).

³⁷ The only exception is Part 4 of Article 111–1 of the Criminal Code of Ukraine, which provides for liability for so-called economic collaborative activity.

the possibilities for appealing against them. This, in turn, results in a lack of effective judicial control in such cases. This study demonstrates that some verdicts under Art. 114–1 of the Criminal Code of Ukraine most likely contain misapplications of both substantive and procedural criminal laws. As a result, a line of law enforcement practice is formed, which is gradually established and, despite the identified flaws that are not being corrected, becomes a guideline for similar cases. Secondly, the application of such a lenient punishment to persons who commit acts related to obstruction of mobilisation in all the cases studied indicates that the relevant behaviour may be wrongly qualified, as will be discussed in the next section of the article (application of an improper criminal law provision).

**Correctness of Qualification of the Actions Performed
by Persons Who Obstruct Mobilisation or Otherwise
Contribute to Evasion of Military Duty Under
Article 114–1 of the Criminal Code of Ukraine**

The study of all verdicts delivered under Article 114–1 of the Criminal Code of Ukraine demonstrates the tendency to give a legal assessment of the same type of behaviour, which is manifested in the form of obstructing the actions of military personnel in carrying out mobilisation activities. These actions are primarily limited to the creation and/or administration of special channels (chats) in Internet messengers to inform about the place and time of such events. Such behaviour does not seem to come under Art. 114–1 of the Criminal Code of Ukraine, and the subjects of qualification make a mistake, namely, they admit the corpus delicti in the committed act, which does not contain some objective features of the corpus delicti under Art. 114–1 of the Criminal Code of Ukraine.

This conclusion can be drawn by comparing the features (factual circumstances) of the acts of behaviour described in the verdicts studied with the features of the offence under Article 114–1 of the Criminal Code of Ukraine. In particular, it seems that the legal position reflected in the verdicts indicates

an attempt to interpret literally the criminal law provision on liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations, and this is not justified for this provision, as otherwise its true meaning is distorted. Such content should be consistent with the purpose of this prohibition, which is to ensure the protection of national security. Given that not all actions that involve obstructing the lawful activities of military formations can be considered as threatening the national security of Ukraine, Article 114–1 of the Criminal Code of Ukraine should be interpreted in this part not literally but restrictively. This means that liability should not be imposed for obstruction of any lawful activity, including, in particular, economic or recruitment activities, but only for such activities that are directly related to ensuring the national security of Ukraine, including preparation for and conduct of combat operations. In the literature, there are reasonable proposals to define in Article 114–1 of the Criminal Code of Ukraine the forms of obstruction and types of “lawful activity” of the Armed Forces of Ukraine or other military formations, since such activity has a rather broad interpretation.³⁸

The conclusion drawn based on the analysis of the actual data indicates that the criminal legislation of Ukraine is erroneously applied to persons who obstruct mobilisation and necessitates amendments to it by establishing separate grounds of liability for obstructing mobilisation or contributing to its avoidance with the establishment of a sanction that would proportionally reflect the level of social harmfulness of this behaviour.³⁹ This approach is consistent with the position that Ukraine needs to introduce evidence-based policy

38 A. Politova, “Issues of the Objective Side of Hindering the Lawful Activities of the Armed Forces of Ukraine and Other Military Formations,” in *Current Issues of Theory and Practice in Law, Education, Social, and Behavioral Sciences – 2020*, ed. O. Tohochynskyy (Chernihiv, 2020), 218 (in Ukrainian).

39 This refers to the idea of introducing Article 337–1 to the Criminal Code of Ukraine, which would establish liability for obstructing mobilization or other actions that contribute to the avoidance of mobilization by a third person during a special period (see more: Yevhen Oleksandrovych Pysmenskyy, “Criminal-Legal Qualification of Hindering Mobilization (Current Law Enforcement Practice and Legislative Improvement Prospects),” *Legal Journal of Donbas*, no. 1(86) (2024), <https://doi.org/10.32782/2523-4269-2024-86-65-71> (in Ukrainian).

making (EBPM)⁴⁰ as soon as possible, which will allow criminal law policy to be formed not on the basis of prognostications and assumptions but the actual results of law enforcement activities and generalised data on them.

Conclusions

The research on the practice of applying Article 114–1 of the Criminal Code of Ukraine on liability for obstructing the lawful activities of the Armed Forces of Ukraine and other military formations during a special period, in the context of the full-scale invasion of Ukraine by Russian troops showed that this provision was used as a tool to respond to the behaviour of persons who obstruct the mobilisation of the population.

The study of the relevant court verdicts also revealed several other peculiarities of the implementation of the criminal law policy on countering obstruction of mobilisation. Firstly, there are signs of templating in the description of the formulation of the charges, and they may also differ by region. This situation occurs primarily because until 2023, there were no cases of behaviour to obstruct mobilisation committed in a manner that became widespread in the context of a high-intensity war. Consequently, the practice is only just beginning to form its own trajectory. Secondly, the application of 114–1 of the Criminal Code of Ukraine in the vast majority of cases was limited to responding to the same type of behaviour of obstructing mobilisation, namely, the creation and/or administration of channels (chats) in Internet messengers that disseminated information about the places where military personnel were conducting mobilisation campaigns. Thirdly, a significant flaw in most of the verdicts studied is the missing motive for obstructing mobilisation, even though this subjective feature is key to

40 Vladislav Rashkovan, “To Avoid What Happened with the Blacksmith and the Tractor Driver: What’s Wrong with Ukrainian Politics?,” Liga.net, published January 3, 2024, <https://www.liga.net/ua/all/opinion/dvi-osnovni-problemy-ukrainskoi-polityky> (in Ukrainian); Paul Cairney, *The Politics of Evidence-Based Policy Making* (Palgrave Pivot London, 2016), https://doi.org/10.1057/978-1-137-51781-4_2.

understanding the full nature of the act. Fourthly, in some verdicts, the transfer of funds for the purposes of the Ukrainian army was recognised as a mitigating circumstance, which, in the context of the ongoing war and due to the kind of act committed, can be recognised as a positive law enforcement practice. In contrast, the rare practice of recognising the commission of a crime under martial law as an aggravating circumstance should be acknowledged as negative, given that the relevant element is reflected as a compulsory crime-forming element under Article 114–1 of the Criminal Code of Ukraine. Fifth. The vast majority of verdicts are delivered after approval of plea agreements, and the punishment is imposed by agreement of its parties, which are the prosecutor and the accused. The punishments imposed by the court are the mildest of those provided for by the sanction of Article 114–1 of the Criminal Code of Ukraine (simultaneously, the release from serving the sentence is applied), or in some cases, the punishment is even more lenient. Hence, the sanction of Article 114–1 of the Criminal Code of Ukraine does not apply to persons who obstruct mobilisation. Sixthly, the situation revealed with punishment points to the fact that an inappropriate criminal law provision is used for counteracting obstruction of mobilisation, which has a different (more serious) focus, directly related to the damage to the national security of Ukraine. As a result, it is proposed that separate grounds of criminal liability for obstructing mobilisation or promoting its avoidance should be introduced, with a sanction commensurate to the level of harmfulness of this act.

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