



Centre for  
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NATIONAL  
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Project: Strengthening Legislative  
Framework and Preventing Impunity for  
Human Rights Violations

# Features of commanders' responsibility.

"Combat immunity" as one of the guarantees  
of protection of the rights of servicemen

Readout of the round table

Kyiv, 2021

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# SUMMARY

On December 14, 2021, a roundtable on the topic: "Features of the responsibility of commanders. "Combat immunity" as one of the guarantees of protection of the rights of servicemen was held at the initiative of the Centre for Defence Strategies NGO, with the support and assistance of the National Endowment for Democracy (NED).

The relevance of the issue is determined by the Russian Federation's aggression against Ukraine lasting more than 7 years and the duty of the servicemen of the Armed Forces of Ukraine to protect the territorial integrity in conditions of constant armed confrontation with the enemy.

The Ukrainian legislation does not fully provide an answer to the question of protecting commanders and subordinate personnel from possible unjustified criminal prosecution for decisions and tasks performed during combat operations.

In addition, there is an essential issue of strict observance by the military of the norms and principles of international humanitarian law, rules of use of force to protect the population, cultural property, civilian objects, and infrastructure from possible damage during military operations in response to armed aggression against Ukraine.

The round table was attended by foreign partners, academicians, human rights activists, representatives of the Armed Forces of Ukraine, the Office of the Prosecutor General, and Ukrainian experts.

In general, the round table participants agreed that the proposed topic is highly relevant and requires due attention. Recommendations to implement "combat immunity" in Ukrainian legislation were welcomed.

The majority of the participants expressed the need to improve Ukrainian legislation, particularly the Criminal Code, in part of Chapter XIX War Crimes.

Experts stressed the importance of reforming and creating a full-fledged military justice system, consisting of the legal service of the Armed Forces of Ukraine, the military prosecutor's office, military police, courts with relevant military chambers, colleges and/or specializations, and the military bar.

The participants were presented with the draft legislative proposals developed by the Centre for Defence Strategies. As a result, the Centre experts were invited to join a working group (chaired by Mr Mykola Havronyuk) on a new Criminal Code development in part of implementing the "combat immunity" principle and improving other provisions on Criminal Offenses in the Military Sphere.



# SPEECHES. RECOMMENDATIONS. CONCLUSIONS

During the opening remarks,

## **Andriy Zagorodnyuk, Chairman of the Board of the Centre for Defence Strategies,**

stressed the importance of the roundtable in times of continuous Russia's aggressive hybrid actions against Ukraine and welcomed attendees to join the professional discussion of the implementation of the new principles into the Ukrainian legislation.

Foremost, he emphasized the need to regulate the military personnel's responsibility/liability for decision-making in hostilities when the possibility of negative consequences is inevitable in wartime.

Many cases have had a very negative impact on military morale. As a result, military personnel was demotivated and did not show the necessary initiative during combat missions.

The practice of Euro-Atlantic partners, NATO, and leading countries with combat experience proves that their legal systems delineate the limits of responsibility/liability in civilian life and during military operations, considering the possible risks in combat.

Substantive discussion of these issues in the professional academic and expert environment is necessary to understand and find optimal resolutions and ways to improve Ukrainian legislation.

Ukrainian members of Parliament are ready to support such initiatives. Still, the success of considering the relevant bill depends directly on the quality of the working materials and discussion.

## **Viktor Nazarov, Adviser to the Commander-in-Chief of the Armed Forces of Ukraine on Political Affairs, Major General, First Deputy Chief of the Main Operational Directorate of the General Staff of the Armed Forces of Ukraine (until 2019),**

detailed the specificity of planning and conduct of military operations, based on the experience of the military component of the anti-terrorist operation and the Joint Forces Operation in the east of Ukraine.

The speaker emphasized the importance of the round table topic, which for many years remains crucial for commanders at all levels, including NCOs.

He expressed his view on the imperfection of criminal law, which objectively does not take into account the specifics of military performance of combat missions on his own example of the criminal proceedings and courts rulings against him in connection with the death of 49 servicemen on June 14, 2014, during the anti-terrorist operation (as a result of the downing of IL-76 aircraft by Russian-controlled illegal armed groups with a portable anti-aircraft missile system.)

Article 42 of the Criminal Code of Ukraine (concerning an act related to risk) stipulates that risk is not considered justified if it is known to pose a threat to the lives of others.

This prescription is irrelevant for military personnel in a combat situation because the execution of every combat task and commander's decision is always a risk: the likelihood of fire damage by the enemy, loss of personnel, etc. However, these tasks aim to achieve a fundamental socially beneficial goal of defending our nation from the enemy.

In addition, the definition of "combat situation" in Chapter XIX "Criminal offences against the established order of military service (military criminal offences) does not reflect the realities of the troops in combat, modern short-term combat and does not take into account the high probability of a particular situation due to many external factors that objectively could not be predicted.

He cited examples of military operations by the world's leading armies that were unsuccessful despite the availability of modern weapons and military equipment, the ability to obtain intelligence quickly, etc., which differs significantly from the state of technical equipment of the Armed Forces of Ukraine. Moreover, despite careful planning of the combat mission, it resulted in the loss of personnel military equipment, the death of civilians, or the damage to civilian objects protected by international humanitarian law.

According to the investigation results, all military commanders who made mistakes during such operations' planning and direct conduct were brought to justice but not under criminal responsibility.

According to the experience of the Armed Forces of Ukraine in combat missions, com-

manders' perception of the available information in real-time, taking into account the existing threat, specific situation, and intelligence received, may lead to erroneous decisions about the method or procedure of combat missions.

There are also cases where the military command objectively understands the inevitability of loss of personnel or military equipment due to the overwhelming enemy forces and the possibility of enemy fire from places inaccessible to the firing range of own weapons. However, the probable development of combat in such cases cannot give the commander the right to stop carrying out the combat order.

The anti-terrorist operation (ATO) experience indicates that the enemy, in gross violation of the norms and principles of international humanitarian law, fired from civilian objects or vehicles, which does not allow the commander to assess objectively the combat situation and identify the enemy.

Another negative example is the local civilian population, due to the informational influence and propaganda of the Russian Federation, committed illegal actions against military formations that took part in the ATO. As the Armed Forces of Ukraine don't have law enforcement functions, it is impossible to use force against civilians in these circumstances. The blocking of military units by civilians and the impossibility of continuing the movement to certain areas led to the disruption of combat missions, loss of readiness, etc.

The speaker additionally pointed out the outdated post-Soviet principles used in the commander's decision to carry out a combat mission. NATO's doctrinal documents on the planning of combat operations contain significant differences and do not provide for the commander to determine how he will perform the task. This approach allows the commander to make his own decisions based on available forces and means, their state of readiness, the actual combat situation, and other essential factors that may be unavailable to senior command.

The introduction of effective mechanisms and fundamentally new command and control decisions certainly positively impact the decision-making process of commanders. This approach later found practical application during the ATO.

**Denis Osmolovsky, a human rights activist and director of the informational agency United Legal Aid,** drew attention to the harmful practice of poorly investigated criminal proceedings against servicemen, which do not consider many factors influencing military behaviour or commanders' decisions.

Soldiers serving in the military in hostilities areas are in a challenging situation, under constant stress and the influence of factors that negatively affect their moral and psychological condition.

In the case of accusations of committing a military criminal offence, such a serviceman, among other things, is under the pressure of the investigation and fear of being punished by his commander. Under such conditions, it is very easy to convict a serviceman because the serviceman, agreeing with the arguments of the investigation case, is not fully aware of the need to protect his rights. Therefore, only the provision of quality legal aid to a serviceman during the trial can be a guarantee of avoiding cases of unjustified criminal prosecution.

This state of affairs is difficult to correct without proper understanding by law enforcement investigators, heads of procedural institutions, and public prosecution of the tasks performed by the Armed Forces of Ukraine in the context of armed aggression against Ukraine.

The so-called excessive procedural activity in criminal proceedings threatens the ability of the Armed Forces of Ukraine to perform their tasks and functions.

**Mykola Khavronyuk, Doctor of Law, Professor of Criminal and Criminal Procedure Law at the National University of Kyiv-Mohyla Academy,** expressed his position on legal uncertainty in Ukrainian legislation and the lack of shared understanding of criminal law in cases against military service.

First of all, this is the problem of objectively establishing an actual causal link between the actions of a serviceman and the end result of such behaviour.

In the example of the case of General Viktor Nazarov, he noted the lack of a causal link between the decision and the consequences of its implementation, as there was the influence of external factors that could not be predicted and prevented.

In addition, there is the problem of the lack of proper interpretation of the relevant legal constructs, bringing such clarifications to the investigating authorities and the prosecution in order to form a uniform practice of their application.

The speaker is currently engaged in the working group on drafting a new version of the Criminal Code of Ukraine. Furthermore, he announced the development of an improved version of the Criminal Code article, which proposes criminalizing negligence in military service to avoid legal conflicts. In addition, the updated version of the criminal law provides for the development of relevant legal norms, which should be a safeguard for unjustified criminal prosecution of servicemen.

He informed about the results of the study of the ability of the judicial system to provide

justice in the context of the armed conflict in eastern Ukraine conducted in 2016-2017 in the framework of the Human Rights and Justice Program Initiative of the International Renaissance Foundation.

The results came as a great surprise to the expert community. In the context of armed aggression against Ukraine, the Ukrainian own law enforcement system prosecutes thousands of our servicemen performing combat missions in eastern Ukraine (about 7 percent of personnel were suspected of committing crimes). At the same time, the facts of the commission of war crimes and crimes against humanity by the enemy were not properly qualified, and there was no common position of the state on such criminal acts for a long time.

The lack of specialists who can properly investigate and ensure public prosecution in the courts through the disbandment of the military justice system exacerbates the problem of the proper application of criminal law. Training of the military prosecutors' offices staff provided for the military education by prosecution officers and the acquisition of special knowledge in the military field. However, investigators from the State Bureau of Investigation, which investigates war crimes, do not have the necessary expertise in this area and do not understand the tasks performed by servicemen in combat.

The introduction of military specialization into the justice system is critical. Despite some judges with military service experience, this issue is not considered at the state level. Therefore, it is necessary to introduce an appropriate system of training judges by conducting military courses at the National School of Judges.

The same applies to the introduction of an appropriate training system for prosecutors.

Another critical issue is the existence of several law enforcement agencies authorized to investigate criminal offences committed by a serviceman. Such competition of the state law enforcement system is inefficient. The investigation authority should be concentrated in one law enforcement agency. Only in this case the professional level of investigators will increase, as well as responsibility for the results of investigations.

He stressed the need to reform the Military Law Enforcement Service of the Armed Forces of Ukraine, creating the Military Police, providing additional powers to detect war crimes.

The current State Bureau of Investigation locations system does not meet the requirements due to the considerable distance from the actual location of military units. This also applies to the prosecutor's offices. Therefore, legislative changes are needed to bring the relevant units of law enforcement agencies closer to military garrisons, places of deployment of troops (forces), and areas of combat missions.

**Martin Molloy, United Kingdom Special Defence Adviser,** confirmed that the UK also faces many of the problems raised by previous speakers, including applying the principle of combat immunity.

He stressed that the most crucial thing in resolving the issue of applying combat immunity to a serviceman is the obligation to comply with international humanitarian law during military operations.

There are key principles that form the basis of combat immunity. First of all, it is a matter of finding out the causes of the military conflict at the highest strategic level. The following important factor is objectively assessing the military commander's decision and determine the circumstances. It is important not to have an investigation based on facts or information that became known after the event under investigation. The commander may be responsible for the decisions made only in the light of the specific situation, the relevant conditions, and based on the information from which he operated at the time of the decision.

The UK legal framework provides a separate legal liability system for military personnel. However, the legal responsibility of servicemen is part of the common legal system of Great Britain. In the event of a crime committed by a serviceman, the military justice authorities shall conduct the relevant investigation.

Emphasis should also be placed on the guidelines applied in the commander's decision-making, which is mission command. The higher command determines the general plan of the operation and the limits of permitted and prohibited actions. In addition, commanders must act solely in accordance with their authorities. Every serviceman can refuse to perform a task when he understands that the given order of the high command is clearly criminal.

NATO's command has legal and political advisers to support decision-making. Such advisers are not subordinate to commanders, are independent experts, and provide professional advice. If the commander makes a decision beyond his authority, the advisers are obliged to notify the commander. However, the final decision is made solely by the commander, as it is his responsibility, and advisers may not have intelligence, the development of a specific combat situation, etc.

The professional training of personnel is critical. Training programs are mandatory for all servicemen categories to study international humanitarian law for 18 months. Relevant training is organized and conducted by representatives of the International Committee of the Red Cross.

NATO standards provide for mandatory screening by relevant organizations of training activities in international humanitarian and human rights law and require the necessary legal and political advice and support for commanders to make appropriate decisions.



Key advice was provided on the need to understand the concept of the extraterritorial deployment of troops compared to domestic military operations.

Proposed legislative initiatives to introduce the principle of combat immunity primarily relate to the implementation of combat missions by Ukrainian armed forces in Ukraine. The United Kingdom has not yet been able to legislate on military service in the country, including due to the internal conflict in Northern Ireland.

The representative of the United Kingdom assured the support for introducing the principle of combat immunity in Ukraine and, if necessary, is ready to provide further advisory support in this matter.

At the beginning of his speech,  
**Pavlo Bogutsky, Doctor of Law,**  
 stressed the unconditional relevance of the round table.

Currently, the liability of servicemen, particularly military officials, goes beyond the departmental problem in terms of the activities of a single law enforcement agency or the context of criminal liability.

As the distinguished participants of this event already mentioned, when it comes to the issue of combat immunity, it is necessary to discuss the problems of the law enforcement system.

The speaker drew attention to specific articles of the General Part of the Criminal Code, the content and practice of which was not in doubt in peacetime. Still, these provisions of criminal law do not reflect the realities of today when it comes to military action, planning, and conducting combat operations.

Part three of the article "Acts related to risk" (Article 42 of the Criminal Code of Ukraine), which determines when the risk is not justified, loses its meaning in the presence of the relevant legal construct in part two of this article, which determines when the risk is justified.

The same applies to the issue of urgency.

Soldiers in combat conditions are always in a state of emergency.

The norms of international humanitarian law are an absolute safeguard against the planning and conduct of combat operations.

Until 2014, the state was quite sceptical about the norms of international humanitarian law, as it was sceptical of the possible armed conflict in Ukraine.

Later, the training of servicemen on the knowledge and application of international humanitarian law has been introduced more actively. The norms of international law are the limit where military force cannot be used.

The constructs of norms "Official negligence" and "Inaction" in the special part of the Criminal Code are not specific. Therefore, the speaker questions the existence of such articles in the law. Law enforcement of such norms reveals a number of problems and shortcomings of the law enforcement system.

At this stage, there is a need to restore the military justice system of Ukraine, as law enforcement agencies lack an understanding of the tasks performed by the components of the security and defence sector.

It is necessary to return to the previously existing model of military prosecutor's offices, more actively reform the Military Law Enforcement Service of the Armed Forces of Ukraine into the Military Police, and restore the military courts.

At the end of his speech, he summed up the position on the need to stipulate the issue of military risk in the legislation and resolve the issue of restoring military justice in Ukraine.

**Serhiy Lychyk, deputy head of the special prosecutor's office in the military and defence spheres,**  
 noted the real existence of a problem related to the combat immunity of servicemen, which needs to be studied and clearly defined at the legislative level.

Despite the provisions of Article 42 of the Criminal Code of Ukraine on acts related to risk, since 2014, there has been no established case law on the application of this article in specific criminal proceedings against military commanders.

The lack of a properly formed legal position of the Supreme Court on the application of Article 42 leads to its ambiguous understanding given the relevant articles of Chapter XIX (Criminal offences against the established order of military service (military criminal offences)) such special qualifying circumstances as acts committed in conditions of a special period, martial law or in a combat situation, which provide for more severe criminal sanctions for the commission of certain criminal acts by servicemen.

This issue should be resolved and taken into account in the draft of the new Criminal Code by better defining war crimes, providing the concept of combat immunity with clear criteria by which it is possible to distinguish criminal acts from acts involving risk.

Another problem is the ambiguity of criminal law on the example of certain articles of the Criminal Procedure Code of Ukraine, which are ambiguous to understand, as the competence to initiate a pre-trial investigation in each case of direct detection of crimi-

nal offences under Article 25 and the obligation to accept and register any application or reports of criminal offences and the initiation of pre-trial investigations, as required by Article 214, are contradictory.

The practice of applying these articles shows that even when law enforcement agencies do not see signs of a criminal offence under Article 25 and refuse to enter information in the Unified Register of Pre-Trial Investigations, the courts of the first instance are obliged to initiate a pre-trial investigation under Article 214. Such inconsistency of legislative norms gives an impression of the prosecutor's office work on the so-called principle of implementation of the plan and indicators on the number of initiated criminal proceedings.

The speaker emphasized the need to concentrate the power to conduct pre-trial investigations of all crimes against servicemen in one law enforcement agency. At present, given the number of bodies conducting pre-trial investigations, there are often disputes over jurisdiction.

He stressed the outcomes of the reform of the prosecutor's office as a consequence of changes made in 2019 to the legislation of Ukraine, according to which the military prosecutor's office was abolished in the context of armed aggression of the Russian Federation against Ukraine.

At the end of the speech, the speaker informed about the ongoing work on reforming the military justice system by developing its concept, creating a new specialized law enforcement body - the State Bureau of Military Justice, and the need to resume military prosecutors.

### **Anatoliy Markevich, a lawyer and veteran of the Prosecutor's Office of Ukraine,**

**pointed out that a critical issue was raised at the round table, given that the rights of servicemen are not protected at the legislative level.**

The concept of risk defined in the Criminal Code of Ukraine does not meet today's requirements. It remains virtually unchanged since the previous version of criminal law, including the Soviet period, relates to peacetime and does not consider possible risks of military activity. The speaker's team working on a new version of the Criminal Code of Ukraine must close this gap.

The concept of combat immunity must be introduced, first and foremost, at the theoretical level, for its proper enforcement.

He paid particular attention to the issue of conducting forensic examinations related to the military sphere, appointed in the framework of the relevant criminal proceedings. Due to the lack of special knowledge, law enforcement investigators and judges cannot

objectively assess the results of such examinations. As a result, the issue of guilt of servicemen is resolved on the basis of examination.

The lack of trained personnel of the law enforcement and judicial system, who would have basic knowledge in the military sphere and understand the specifics of military activity, is critical. Therefore, it is necessary to resume the activities of the military prosecutor's office and military justice bodies.

At the end of the speech, the speaker drew attention to the need to raise the level of legal awareness of servicemen, the need to study international humanitarian law, which is directly related to the rules of engagement during hostilities.

### **Oleksandr Musienko, a lawyer expert of the NGO "Centre for Defence Strategies",**

**thanked everyone for the professional and substantive discussion, which confirmed the need to amend the Ukrainian legislation.**

To this end, the Centre's project team has prepared legislative initiatives to resolve the issue of military responsibility/liability and the introduction of the principle of combat immunity in the legislation of Ukraine.

The urgency of the issues raised is due to the ongoing Russian aggression against our state, under which commanders give orders related to combat missions.

The protection of the territorial integrity of Ukraine directly depends on the decisions made by commanders in combat conditions, as provided by the Constitution and laws of Ukraine. However, the consequences of such orders in wartime cannot be fully predicted.

In order to ensure strict compliance with the norms and principles of international humanitarian law and the rules of engagement, we propose to provide for such a duty at the legislative level for all military personnel.

In order to ensure strict compliance with the norms and principles of international humanitarian law and the rules of engagement, we propose to provide for such a duty at the legislative level for all military personnel.

However, we stress that the facts of making or executing clearly illegal criminal orders cannot be grounds for exemption from criminal liability of servicemen who perform combat missions.

Given the experience of foreign partners, NATO member states in the implementation and application of the principle of combat immunity, and the Ukrainian national defence reality, we believe that there is a need to regulate these issues at the legislative level.







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