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Military law: current state and prospects of development

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Oleg Gushchyn *
Anastasiia Ostapenko **
Petro Korniienko ***
Oleksandr Kotliarenko ****

Abstract

The aim of the article was to analyze the current state and prospects of development of military law. The methodological basis of the study was the use of empirical research methods, theoretical knowledge and logical research techniques. The research was based on several certainties: The first systemic certainty is the limited or conditional commitment of some states to international law. The second systemic certainty is the state perspective of international security. The third is the structural deficiencies of the United Nations. The fourth systemic certainty is that horror in the context of armed conflict is present and that war is always a humanitarian catastrophe. Finally, the fifth systemic certainty is the defensibility of a state in possession of nuclear weapons or other weapons of mass destruction. It is concluded that it is necessary to create a military justice system for modern police practice, i.e., to enact military law directly. Based on the idea that military justice is a system of organs, it should include: an organ that conducts pre-trial investigation or ensures law and order and an organ that monitors the rule of law; military courts.

Keywords: military law; military justice; military courts; military courts; armed aggression; military police.

* Ph.D. Professor Taras Shevchenko National University of Kyiv, Military Institute, Military Law Department 60 Volodymyrska Street, City of Kyiv, Ukraine. ORCID ID: <https://orcid.org/0000-0003-2901-9605>

** PhD student (adjunct) National Defence University of Ukraine named after Ivan Chernyakhovsky, 28 Povitroflotskyi Avenue, Kyiv. ORCID ID: <https://orcid.org/0000-0002-3545-3283>

*** Dr. hab in Law, Professor of the Department of Philosophy, Law and Social-Humanitarian Disciplines Department of Philosophy, Law and Social-Humanitarian Disciplines the Faculty of Finance and Economics, National Academy of Statistics, Accounting and Audit, Kyiv, Ukraine. ORCID ID: <https://orcid.org/0000-0002-1473-6698>

**** Ph.D in Law, Deputy Head Military Law Department of the National Defence University of Ukraine named after Ivan Cherniakhovsky, Ukraine. ORCID ID: <https://orcid.org/0000-0001-8776-2515>

Derecho militar: estado actual y perspectivas de desarrollo

Resumen

El objetivo del artículo fue analizar el estado actual y las perspectivas de desarrollo del derecho militar. La base metodológica del estudio ha sido el uso de métodos de investigación empírica, conocimientos teóricos y técnicas de investigación lógica. La investigación se sustentó en varias certezas: La primera certeza sistémica es el compromiso limitado o condicional de algunos Estados con el derecho internacional. La segunda certeza sistémica es la perspectiva estatal de la seguridad internacional. La tercera son las deficiencias estructurales de las Naciones Unidas. La cuarta certeza sistémica es que el horror en el contexto de los conflictos armados está presente y que la guerra es siempre una catástrofe humanitaria. Por último, la quinta certeza sistémica es la defensibilidad que alcanza un Estado que posee armas nucleares u otras armas de destrucción masiva. Se concluye que es necesario crear un sistema de justicia militar para la práctica policial moderna, es decir, promulgar directamente el derecho militar. Partiendo de la idea de que la justicia militar es un sistema de órganos, debería incluir: un órgano que lleve a cabo la investigación previa al juicio o que garantice el orden público y un órgano que vigile el estado de derecho; tribunales militares.

Palabras clave: derecho militar; justicia militar; tribunales militares; agresión armada; policía militar.

Introduction

The relevance of the article is to develop appropriate approaches to develop an effective mechanism for the functioning of military law in our time.

The invasion of Ukraine initiated by the Russian Federation on the morning of 24 February 2022 will undoubtedly be a turning point in the deconstruction of the current international order and in the emergence of a new era of world geopolitics, perhaps even more uncertain and dangerous than the existing one.

First of all, a problem for Ukraine and for Europe, and for Europeans, which make it prevail over other interstate and internal conflicts taking place in many other places on the planet, and which generate and will lead to unpredictable consequences in international relations and international systems.

Apart from the absolute humanitarian catastrophe in terms of human lives and civilian suffering that it entails - as, moreover, is the case in all armed conflicts - its consequences of all kinds - political, economic, military, social, energy, agricultural, and food - undoubtedly also deserve - as do the legal and international implications. In the conditions of armed aggression in the territories that were shelled and where hostilities were conducted, the work of many state institutions, including judicial bodies and institutions, was paralyzed.

The statistics of committed war crimes supplemented the traditional statistics of cases to be considered by Ukrainian courts. In addition, law enforcement agencies did not stop conducting pre-trial investigations, which require judicial control over the observance of the rights and legitimate interests of persons involved in criminal proceedings, to comply with reasonable time limits, or to obtain admissible evidence during investigative (search) or covert investigative (search) actions.

When considering proposals for the establishment of a pre-trial investigation body to investigate criminal offences committed by military personnel or other persons belonging to armed formations, it is necessary to take into account the existing risks, which, in particular, include their subordination, which should not affect the independence and impartiality of the investigation.

Despite some turbulence in the legislative regulation of the military prosecutor's office in Ukraine, this body with different names, structure, subordination, and staffing has been carrying out a pre-trial investigation of war crimes, supervision over the legality of the activities of pre-trial investigation bodies and procedural guidance of the investigation for a long time in accordance with the system of law. Particular attention is paid to the arguments in support of the idea of creating a system of military courts and military justice.

In the context of the armed aggression in Ukraine, the issue of completing the creation of the military justice system, which has been significantly updated, is relevant, and it has ceased to be controversial and has turned into a direction for concrete actions.

There have been attempts to build a coherent and effective military justice structure since 2014. However, the reforms were not completed, which significantly affected the maintenance of the rule of law in the state after February 24, 2022, in the territories where hostilities were conducted or close to them.

After the full-scale invasion of Ukraine by the Russian army on February 24, 2022, Ukraine faced unprecedented challenges for the national justice system and the need to involve international justice in bringing Russian military, government, political and military leaders to justice. Military

security of the state is seen as the protection of state sovereignty, territorial integrity, and democratic constitutional order.

Throughout the war, ukrainians witnessed murders and grievous bodily harm of civilians, torture, deportations, hostage-taking, attacks on civilians, looting, rape, and starvation. Individual criminal responsibility for war crimes extends beyond those who committed them or ordered them to those military commanders who know or should have known that such crimes would be committed and failed to take necessary and reasonable measures to prevent them. The individual criminal responsibility for the crime of aggression lies not with ordinary soldiers, but with the Russian political and military leaders who planned, prepared, initiated, or carried out the invasion, occupation, bombing, and blockade of Ukraine, as well as the sending of armed forces and mercenaries to commit armed acts.

Under the current provisions of its statute, the International Criminal Court cannot exercise jurisdiction over criminal aggression committed in Ukraine without Russia's consent - which Russia will not give - or referral to the Security Council, which Russia will veto. Accordingly, the States Parties to the Rome Statute should amend it to allow the Court to exercise jurisdiction over the crime of aggression if the General Assembly, acting under Uniting for Peace, refers to the Prosecutor a situation in which aggression appears to have been committed. This could be done by amending Articles 13 and 15ter of the Charter or by introducing a new article.

This proposal is both more principled and more pragmatic than the alternative proposal to establish an ad hoc tribunal for aggression. It would avoid comparable accusations of selectivity. Its legitimacy would be in line with that of the Uniting for Peace program, which was strongly reaffirmed by the resolution deploring Russia's act of aggression.

It would be based on an existing institution with relatively modest increases in costs and staff. Nor could Russian leaders claim personal immunity if the General Assembly were to refer to the situation, knowing full well that the Court rejects the application of such immunities against the Court or against States Parties that comply with the Court's request for the arrest and surrender of a sitting head of state.

In turn, the purpose of the article is to analyze the problems and prospects for the development of military law in today's realities, as well as to consider the international protection against Russia's military actions against Ukraine, and the activities of world human rights organizations and the effect of military law.

1. Literature Review

Military law is of great importance, because it regulates the relations related to the activities of the military organization of society, which aims to ensure the protection of the state, state sovereignty, and territorial integrity.

In Ukrainian military time, scientists from all over the world began to search for an effective mechanism to overcome the global problem, namely war, as civilians suffer.

The study revealed that the Constitution of Ukraine is at the center of the system of legal sources of military law in Ukraine. Organic, normal laws, by-laws, and even local regulations are based on constitutional provisions, their mutual dependence is determined by legal force. Military law, having its own system of legal sources, is formed as a complex branch of law through the peculiarities of the legal regime with the constant influence of public branches of law.

The development of military law as a complex branch of the system of Ukrainian law is carried out through the doctrinal definition of the peculiarities, systemic features of intra-branch institutional formations - sub-branches, institutes; through the implementation of systematic scientific developments of military-legal matter, creating conditions for the formation of military law as a science.

In turn, Ihnatieva (2021) in her work made one of the newest studies of the system of military law in Ukraine and Great Britain in modern international law, her position was taken into account in the formation of the author's position based on the results of the study of the chosen topic.

Pons Rafols (2022) reveals the issues of the international legal system that have come to the fore in connection with the current crisis, highlighting its weaknesses, risks, and contradictions. The author points out that Russia's military aggression against Ukraine has further weakened the system of international relations and the entire international legal order, built, at least in its most familiar parameters, since the end of World War II and revitalized with the end of the Cold War. He analyses the situation in terms of the weaknesses of the current international legal system.

Haque (2022) in his work points out that the legal consequences of an immoral act such as war are not all directly specified in the texts of treaties or UN resolutions. Their identification requires a reasonable application of legal principles, guided by the axiom that international law is a holistic legal system, not just a set of rules. Pointed out that the rules governing the conduct of hostilities and the treatment of prisoners should be applied equally on both sides for the sake of their common humanity.

Kaluzhna *et al.* (2022) in their work analyzes such a component of military law as a trial in terms of the Nuremberg process after the Second World War - the International Tribunal. In his work, he points out that the international tribunal is to ensure the impartiality of the court. Analyzes the current state of the international legal order and points out that in order to ensure access to justice in cases of aggression and war crimes of Russia, cases against Russia should be considered not only by Ukrainian courts.

Niebytov *et al.* (2022), in turn, explore the mechanisms of accountability for war crimes committed as a result of Russia's invasion of Ukraine in February 2022. They emphasize that when building a military justice system, we proceed from paradigmatic provisions. Based on the idea of military justice as a system of bodies, it should include: a body that carries out the pre-trial investigation and/or ensures law and order; a body that supervises the rule of law; military courts, in addition, it is pointed out that Ukraine's victory over the aggressor, the success of protecting Ukraine's national interests, and the achievement of peace largely depends on stability on the European continent, and therefore it can be noted that military law is currently variable.

Analysis of the above scientific literature fully or partially analyzes modern aspects of military law, which gives reason to believe that a comprehensive study among scientists has not been conducted, which indicates the relevance of this study.

2. Methods

To ensure objectivity, comprehensiveness, and completeness of the study, as well as to obtain scientifically sound and reliable results, the article used a system of general scientific and specific scientific methods of cognition, in particular the method of philosophical hermeneutics, which integrates knowledge of military law - legal, logical, linguistic, psychological, historical, socio-political, etc.; dialectical method, the manifestation of which is a comprehensive study of the effectiveness of the mechanism of legal regulation, its relationship with other legal phenomena: expediency, efficiency; targeted method, which clarified the purpose and objectives of military law.

The method of documentary analysis made it possible to outline the directions of improving the theoretical foundations and practice of improving the effectiveness of military law in today's conditions. The method of generalization was used to formulate the final provisions of the study.

The historical method was another method used to analyze the foundations of military law, according to the development of which such phenomena are manifested as problems that in turn need to be solved, that is, the development of prospects for the development of military law. This method was used to consider the genesis of military law in the context of its development after the Second World War and in current time. The research methodology of the article is also based on the principles of dialectics, empirical and comparative law.

To achieve the goal set in the article, other methods were also used in this study:

- content analysis to study large volumes of legal and scientific texts and determine their relevance to the problems of military law;
- doctrinal approach to the study of military norms as normative constructions that establish responsibility for war crimes.

In general, the objectives of the study were fully met due to the methods, techniques, and approaches used in this study.

3. Results

Military law is aimed at determining the means of achieving the military security of society as an indispensable component of national security, subject to the implementation of human rights mechanisms of the status of servicemen and other categories of citizens who are subjects of military and civil-military relations. The problem of military law is the lack of a military justice system. There are many definitions of “system” in science.

Despite the difference in wording, all of them, in one way or another, are based on the translation of the Greek word “systema” - a whole consisting of parts, a set of elements that are in certain relations with each other, interact (function) with each other, form certain integrity, interact with the environment as a whole and acquire new properties that these objects do not have if they exist separately (Niebytov, 2022).

Speaking about the construction of the military justice system, it is necessary to proceed from the paradigmatic position that it is connected by relations of subordination and coordination of law enforcement and judicial bodies, subject competence arising from the activities of the Armed Forces of Ukraine and other paramilitary formations, as well as other persons who have the status of military personnel.

Based on the idea of military justice as a system of bodies should include:

1. a body that carries out the pre-trial investigation and/or ensures law and order;

2. law enforcement agency;
3. military courts.

Figure 1. Military justice (author's own development).

The Military Law Enforcement Service in Ukraine as part of the Armed Forces of Ukraine was established in 2002 and operates based on the Law of Ukraine of the same name (Verkhovna Rada of Ukraine, 2002).

According to Article 1 of the mentioned Law of Ukraine, the military law enforcement service is a special law enforcement formation within the Armed Forces of Ukraine, designed to ensure law and order and military discipline among the servicemen of the Armed Forces of Ukraine in the places of deployment of military units, in military educational institutions, establishments and organizations, military camps, on the streets and in public places; to prevent crimes and other offences in the Armed Forces of Ukraine, to bring them to justice; to protect the life, health, rights and legitimate interests of servicemen, persons liable for military service during their training, employees of the Armed Forces of Ukraine, as well as to protect the property of the Armed Forces of Ukraine from theft and other illegal encroachments, as well as to participate in counteracting sabotage and terrorist acts at military facilities (Verkhovna Rada of Ukraine, 2002).

The Military Service of Law and Order in the Armed Forces of Ukraine is entrusted with the following tasks: a) identifying the causes, preconditions and circumstances of criminal and other offences in military units and at military facilities; searching for persons who have left military units (places of service) without permission; b) prevention and suppression of criminal and other offences in the Armed Forces of Ukraine; c) participating in the protection of military objects and ensuring public order and military discipline among servicemen in the places of deployment of military units, military camps, on the streets and in public places; d) executing, in cases provided for by law, decisions on the detention of servicemen in the guardhouse; e) ensuring the enforcement of criminal punishments against servicemen who have been sentenced to detention in a disciplinary battalion; f) participation in countering sabotage and terrorist acts at military facilities, etc. (Verkhovna Rada Of Ukraine, 2002).

The Military Law Enforcement Service is not empowered to carry out a pre-trial investigation of military criminal offenses. For a long time, a proposal was discussed to create military police on its basis, which would have these powers or another pre-trial investigation body. At the same time, on September 17, 2021, the Decree of the President of Ukraine No. 473/2021 "On the Strategic Defence Bulletin of Ukraine" (On commission decision of the National Security and Defense Council of Ukraine, 2022) entered into force.

For this purpose, it was planned to develop the capabilities of the investigative and operational search units of the military police; to develop the capabilities of the military police to manage law enforcement and anti-terrorist support at potentially dangerous facilities in the system of the Ministry of Defense of Ukraine; to achieve compatibility of the military police with the relevant structures of NATO member states.

As a result, the current system of pre-trial investigation bodies does not ensure the effective and prompt investigation of mass war crimes in combat conditions, during the performance of tasks in the area of combat operations, which negatively affects the state of combat readiness of military units.

As of today, Ukraine has not created a system of military courts, which is another problem of military law. However, proposals about the need for its implementation are constantly heard. Opinions in support of the creation of a military justice system are voiced at the highest level, emphasizing the erroneousness of the decision to abolish military courts.

Some states, such as Australia and Ukraine, are in the process of reforming the military justice system, discussing these issues, and learning from the experience of other states (Denton, 2019).

Speaking about the prospects for the development of military law in the international arena, it should be noted that the democratic and human rights foundations of the Council of Europe make it incompatible for states that do not adhere to the values of the UN, or, for example, which have started an aggressive war, as is happening nowadays. This led to the fact that on February 25, 2022, the Committee of Ministers activated the procedure provided for in Article 8 of the Statute of the Council of Europe and agreed to suspend the Russian Federation - its representation rights in the Council.

Subsequently, on 16 March 2022, after consultations with the Parliamentary Assembly on the possible additional application of Article 8, the Committee of Ministers decided that it could no longer be a member state and, after 26 years of membership, agreed to the expulsion of Russia, although the day before this state had announced its voluntary withdrawal from the Council of Europe and its intention to denounce the European Convention on Human Rights (Resolution CM/Res, 2022).

In practice, a narrower approach to the investigation of war crimes is more often used: Criminal prosecution in another country is initiated if a national of one's own country is alleged to have committed an international crime; if the crime is committed against a national of that country; or if the suspect is present in the territory of that country (Chubinidze and Oleksandra, 2019).

The investigation can be initiated at any time, as war crimes, crimes against humanity and genocide are serious threat to global security. Therefore, the statute of limitations does not apply in this case. At the same time, the principle of universal jurisdiction is an additional mechanism for prosecuting war criminals.

In a time of war, states may take measures derogating from their obligations under the Convention. However, no derogation from the Convention is permitted in respect of the right to life, except in cases of death resulting from “lawful acts of war”, i.e., acts that are regulated but not prohibited by international humanitarian law. In other words, no derogation is allowed for unlawful acts of war that violate international humanitarian law.

Such unlawful acts of war violate both international humanitarian law and the human rights of those they kill (Haque, 2022). Military necessity does not justify violations of the laws of armed conflict and, conversely, the use of force that is not necessary is illegal (Pictet, 2019; Ponomarenko, 2022).

To address the problems of military law, it is necessary to implement a military justice system, which should consist of two main elements: a disciplinary system that ensures the investigation and prosecution of disciplinary and criminal offenses, and an administrative system that aims to improve processes, such as complaints (Denton, 2019).

The role of international organizations and the UN became clear during the Russian aggression against Ukraine in attempting to stop, counteract and control these aggressive actions and preserve international peace and security. Since the beginning of the Russian invasion of Ukraine, the UN Secretary-General has called the Russian aggression and related actions “the moment of the grave” and stated that the Russian resolution to declare the independence of Donetsk and Luhansk is a violation of the territorial unity and sovereignty of Ukraine, contrary to the principles of the UN Charter.

Therefore, the UN has repeatedly called for a ceasefire to protect civilians and invited the parties concerned to engage in political dialogue to reach a peaceful settlement, which, unfortunately, has not yet happened. Many civilians are still on the bloody battlefields, hundreds of people are trapped in conflicts, war crimes are being committed from the latest reports (Khater, 2022).

It should be noted that military law is also about providing weapons, and therefore, given that Western powers are providing our country with weapons to help defend against Russia’s ongoing armed attack, as our country has an individual right to self-defense against Russia, our country has the right to demand that other states act in its collective self-defense.

One of the forms of collective self-defense is the provision of material support.

Providing Ukraine with weapons cannot be considered an internationally wrongful act - this conclusion is confirmed by the fact that the responsibility of the state provides that “the unlawfulness of a state action is excluded if the action is a lawful measure of self-defense taken in accordance with the Charter of the United Nations” (Heller and Trabucco, 2022).

Undoubtedly, the Russian attack on Ukraine is a clear violation of the principles and norms of international law, as provided for in the UN Charter and customary international law, as the Russian forces violated a set of norms of international law, especially those relating to respect for the equality in national sovereignty of States, the principle of peaceful settlement of disputes, the principle of non-use of force or threat in mutual relations between States which may endanger the maintenance of international peace and security, the principle of non-intervention in matters which are essentially within the internal jurisdiction of States, the principle of non-interference in the internal affairs of States, the principle of the right to self-determination, and the principle of the sovereignty of States (Khater, 2022; Gorinov & Mereniuk, 2022).

4. Discussion

The results of this study indicate that the purpose of military law is to contribute to the maintenance of order and discipline in the military forces, to increase the effectiveness of military law, and thus strengthen national security.

It has been found that throughout history, legislation has often had to catch up with technological and scientific progress, including the technical development of weapons. A consistent theme throughout the centuries has indeed been the tension inherent in establishing rules aimed at regulating the ever-evolving ability to inflict harm and suffering on the “enemy”. In this respect, the countless resources invested in technological advances for the development of warfare far outweigh those invested in the continued (Guido, 2022; Bozhkova & Halytsia, 2022).

It was found that international criminal law in the field of war crimes has developed dramatically over the past three decades and can be broadly defined as the judicial enforcement of criminal offenses, certain international regulations (Guido, 2022).

Scholars have long debated the basis of people’s moral responsibility based on their decision-making mechanisms that lead to action. These reflections, however ancient, are important because our criminal systems

are essentially a reflection of the generally accepted moral social system, and such responsibility is linked to criminal proceedings and punishment, in the area of war crimes.

This was emphasized by Guido (2022) and pointed out that modern criminal law theory tends to consider punishment justified only when individuals can be blamed for the acts or omissions attributed to them because the individuals concerned can understand the consequences of their behavior, and it can be said that such behavior occurred under their rational control.

Researchers emphasize that, in particular, the International Criminal Court was established in 1998 as a permanent institution with universal jurisdiction. This should be understood as a strategy for investigating and prosecuting those most responsible for the most serious crimes (Ba, 2020). In the context of this article in terms of the levels of combating war crimes, about two separate systems of combating war crimes: national (domestic) and international.

Considering the problem of military justice emphasized by Neibot (2022), it is worth agreeing that the main difference between the military police and the existing military law enforcement service is the expansion of its competence to investigate crimes committed by military personnel and/or war crimes.

Empowering the military police to conduct pre-trial investigations is associated with certain risks, which in turn is a problem. First, it should be borne in mind that the jurisdiction of the military police may create a conflict with the competence of the State Bureau of Investigation and the Security Service of Ukraine.

Of course, the investigation of crimes committed by military personnel will be more effective if conducted by the military police. However, the impartiality of the investigation conducted by the military police may be at risk, as the military police and the objects of its activity belong to the sphere of management of the Ministry of Defense of Ukraine.

The second problem that may arise with the introduction of the military police as a pre-trial investigation body into the military justice system is that the creation of this body may not be in line with the doctrinal concept of ensuring the impartiality of the exercise of its powers as a judicial investigation body. The conducted research allowed to achieve the set goal and objectives and, in turn, to draw conceptual conclusions.

The study found that the problem of military law is not the functioning and implementation of the military justice system, which should include subordinate and coordinated law enforcement and judicial bodies, whose subject matter competence arises in relation to the activities of the Armed

Forces of Ukraine and other paramilitary formations, as well as other persons who have the status of a serviceman.

Conclusion

So, it was established that military law is aimed at determining the means to achieve military security of society. It is an important component of national security, provided that human rights mechanisms are implemented. The Russian-Ukrainian war as a whole influenced the transformation of military law not only in Ukraine, but also in the international legal organizations of the world.

The weakness of international organizations, which forms the central axis of the entire international system and is the fundamental basis for achieving the long-awaited peaceful, just, and favorable international society, with the effective functioning of which there will be no need to develop the functioning of military justice.

The United Nations continues to be an indisputable reference point and an important and necessary organization, as it is the structure that the current international society has provided for itself, and there is currently no other alternative structure. Our time testifies to a crisis that is in its most acute phase, which is also sad in humanitarian terms, which has a very difficult and difficult outcome with deadly consequences for all. In this sense, the war in Ukraine clearly showed the existence of weaknesses or structural problems in the international legal system and military law. This study gives impetus to the further development of military law, an overview of its problems and solutions in the context of current changes around the world.

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