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ANALYTICAL REPORT

COLLABORATIONISM AND ABETTING THE AGGRESSOR STATE:

practice of legislative application and prospects for improvement

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Collaborationism and abetting the aggressor state: practice of legislative application and prospects for improvement. Analytical report. - O. Syniuk, O. Lunova; Ed. D. Svyrydova Human Rights Centre ZMINA. — Kyiv, 2023.

This analytical report seeks to identify the main trends and problems in the application of Articles 111-1 ("Collaborationism") and 111-2 ("Abetting the aggressor state") of the Criminal Code of Ukraine through the analysis of judicial practice, as well as the results of in-depth interviews with representatives of law enforcement agencies (National Police of Ukraine, State Bureau of Investigation (SBI), Security Service of Ukraine (SSU), the prosecutor's office), the judiciary and defense lawyers with the aim of further improving the legislation on collaborationism and developing an effective strategy for the consideration of such cases to form a uniform and proper practice.

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CONTENTS

INTRODUCTION

Hundreds of thousands of collaborationism cases were considered in various countries after World War II. At the same time, it was always very difficult to clearly distinguish between the actions people took to survive under the occupation and collaboration with the enemy. «Collaborationism» included service in the occupying army, as well as, for example, economic collaboration with the enemy or membership in cultural or social organizations that collaborated with the enemy.

In Eastern Europe and the USSR, collaborationism was interpreted broadly – both those who actively served in the enemy army, prisoners of war who were considered traitors because they were captured, and civilian population who found themselves in the territory under German occupation were held to account. At the same time, it was written in the 1943 explanation of the Supreme Court of the USSR, that those who collaborated with the enemy but supported Soviet partisans or engaged in sabotage of the occupiers, would not be held liable for collaborationism. It was also planned not to prosecute employees in low-level administrative positions, specialists who were simply doing their job if they did not commit other crimes.

In France, the main aspect in cases over collaboration with the enemy was not the intention but the impact of the collaborator's actions on state interests. In the Philippines, the amnesty system was developed based on the following distinction: those who had trade relations with the enemy or collaborated in the bureaucratic sphere (administration) were subject to amnesty. These groups were singled out as they were often forced to agree to collaborate and help the local population survive the occupation and reduce the influence of the occupation administration on it.

A clear line was established between those who only collaborated with the occupying power and those who additionally committed other serious crimes.

The international armed conflict unleashed by the Russian Federation against Ukraine in 2014 led to the occupation of part of Ukraine's territory. In these territories, the local population, which found itself in the complete power of the Russian army, paramilitary formations, or simply individual paramilitary groups affiliated with the occupying power, was forced to collaborate. However, the definition of "collaborationism" did not appear in the national legislation of Ukraine until the beginning of the large-scale armed aggression against Ukraine in 2022.

Amendments to the Ukrainian criminal legislation, which expanded the list of articles providing prosecution for various forms of collaboration with the occupying power, namely the introduction of new types of crimes, such as "collaborationism"

(Article 111-1 of the CCU) and "abetting the aggressor state" (Article 111-2 of the CCU), were adopted in March-April 2022, immediately after the beginning of the Russian full-scale invasion of Ukraine.

The legislators justified the introduction of new types of crimes by the fact that the applicable legislation does not cover all types of collaboration between people and with representatives of the aggressor state, and by the need to establish clear boundaries between permitted and prohibited activities in the occupied territories.

However, almost a year and a half after the adoption of the amendments to the legislation, the wording of the new articles 111-1 and 111-2 raises questions among citizens living in the occupied territories regarding their interpretation. In the practice of applying these articles by law enforcement agencies, several problems are also observed: the difficulty of distinguishing them, choosing a proportionate punishment for crimes that overlap but provide for sanctions of different severity, and differences in the interpretation of the articles due to the vague wording.

The problem of inaccurate wording of Article 111-1 of the CCU, as well as the elements of the crime "collaborationism", overlapped with other elements of crimes against the foundations of national security, such as "high treason", "abetting the aggressor state", "justification, recognition as legitimate, denial of armed aggression of the Russian Federation against Ukraine, the glorification of its participants" has been considered more than once. A previous study of the applicable legislation on prosecution for collaborationism, investigative and judicial practice, as well as existing proposals for amendments to the legislation in this area, was conducted as of November 2022.[1]

The issue of criminal prosecution for collaboration with the occupying power remains very important both for those who live in the territory under the control of the Government of Ukraine and those who are still under occupation. The success of the reintegration of the liberated territories of Ukraine will depend on the well-thought-out legislation of Ukraine on the prosecution of persons involved in collaborationism and the practice of its application.

1 Analytical note "Criminal liability for collaborationism: analysis of current legislation, practice of its application, and proposals for amendments" / NGO "Human Rights Centre ZMINA", NGO "Civil holding "GROUP OF INFLUENCE", NGO "Donbas SOS", NGO "Crimea SOS", NGO "Vostok SOS", Charity organization "Charity Foundation Stabilization Support Services", NGO "Crimean Human Rights Group": https://zmina.ua/wp-content/uploads/sites/2/2022/12/zvit_zmina_eng-1.pdf

LIST OF ABBREVIATIONS

SBI – State Bureau of Investigation

CCU – Criminal Code of Ukraine

CPCU – Criminal Procedure Code of Ukraine

r.n. – registration number

SSU – Security Service of Ukraine

METHODOLOGY

A total of 691 judgments under various parts of Article 111-1 and seven judgments under Article 111-2 registered in the Unified State Register of Court Decisions, as well as orders on selecting a measure of restraint in the form of detention in at least 30 criminal proceedings under Articles 111-1 and 111-2 of the CCU, were examined as of September 2023 to carry out a comprehensive analysis and identify systemic problems.

To study the practice of applying Articles 111-1 and 111-2 of the CCU, in July–August 2023, the NGO "Kharkiv Institute for Social Research", on behalf of ZMINA, conducted 20 in-depth interviews with representatives from various law enforcement sectors (National Police, SBI and SSU), judiciary and defense lawyers who work with collaborationism cases, in particular: defense lawyers, including those working in the free legal aid system (five interviews); SSU representatives (three interviews); SBI representatives (one interview); National Police representatives (four interviews); representatives of the prosecutor's office (four interviews); representatives of the judiciary (three interviews).

During the analysis, the task was to examine the following questions:

- Current state of the legislation on prosecution for the crimes under Articles 111-1 and 111-2 of the CCU.
- Legislative initiatives to amend Articles 111-1 and 111-2 of the CCU.
- Practice of applying Articles 111-1 and 111-2 of the CCU during court proceedings, as well as pre-trial proceedings with a focus on the following aspects:
  - Differentiation between elements of crimes and qualifications of actions that may fall under collaborationism, abetting the aggressor state and adjacent elements
  - Prioritisation of proceedings within the scope of Article 111-1
  - Practice of applying detention as a measure of restraint at the stage of pre-trial investigation
  - Presence of accusatorial bias in collaborationism cases and standards of evidence
  - Proportionality of violation and punishment
  - Public pressure on the justice system in the context of collaborationism cases

SUMMARY

1. The applicable legislation on collaboration with the aggressor state, in particular Articles: 111-1 ("Collaborationism") and 111-2 ("Abetting the aggressor state") introduced into the CCU in March-April 2022, is imperfect, which led to the development of at least 11 draft amendments to these articles. At the same time, most of the proposed amendments are not based on a detailed analysis of the formulation and application of these articles and the developed draft laws are currently pending.

2. The current practice of applying Articles 111-1 and 111-2 of the CCU, as well as the different understanding and interpretation of the wording of these articles by persons who apply this legislation, demonstrates the complexity of distinguishing between the elements of crimes and the qualification of offenses under these articles, the broad interpretation of the dispositions that causes unequal application of criminal legislation, and excessive discretion of law enforcement agencies in its application. In particular, the concepts of "material resources" and "economic activity" are blurred, and they are interpreted extremely broadly and inconsistently. This category, according to practice, can include both food products and conducting any labor activity in the occupied territory, even in exchange for no financial reward. Opinions of representatives of law enforcement agencies also differ regarding the fact of paying taxes to the aggressor state as an act that may be subject to criminal liability.

3. The vague wording also leads to a complicated differentiation between Articles 111-1 and 111-2, as well as Article 436-2 of the CCU. The transfer of material resources to the occupying power, illegal armed or paramilitary formations created in the temporarily occupied territory of Ukraine, and/or armed or paramilitary formations of the aggressor state is criminalised both by Part 4 of Article 111-1 and by Article 111-2. Punishment for denying the aggression of the Russian Federation is outlined in Part 1 of Article 111-1 and Article 436-2. The lack of clear differentiation criteria is also reflected in practice – cases with similar substance are qualified under different articles which does not allow for proper practice to be formed. Cases were recorded in which the implementation of education standards by the aggressor state was qualified under Article 111-2, while Part 3 of Article 111-1 provides for exactly this violation; cases in which the collection of funds and their transfer to representatives by the aggressor state are qualified under Article 111-2, not Part 4 of Article 111-1.

Numerous cases regarding posts on social networks, despite the requirement of "publicity" in Part 1 of Article 111-1, and the absence of such a requirement in Article 436-2 are qualified under Article 436-2.

4. The duplication of crimes and the lack of clear differentiation between adjacent articles 111-1, 111-2, and 436-2 also leads to disproportionality and non-uniform application of punishment – law enforcement officers qualify similar actions in one case under the article which provides for liability of a misdemeanor and contains a milder punishment, and in the other – under an article that provides for liability of a crime and contains a heavier punishment, including long-term imprisonment.

5. The vast majority of cases reviewed under Article 111-1 concern parts that provide for liability for misdemeanors, in particular, parts 1 and 2. Such a ratio may indicate the absence of a strategy for prioritising cases for this category of crimes. At the same time, representatives of law enforcement agencies identify cases under parts 5, 6 and 7 of Article 111-1 of the CCU as a priority. At the same time, law enforcement officials note the system is overburdened. The lack of sufficient resources leads, among other things, to a decrease in the quality of the investigation. In particular, one of the interviewed representatives of the prosecutor's office noted that, being overburdened, investigators carry out minimal investigative actions and do not study the evidence more carefully, which affects the quality of the proceedings.

6. In the practice of consideration of Articles 111-1 and 111-2 of the CCU, an accusatorial bias is observed. In particular, there were only two acquittals under both articles, as well as only one consideration in the court of appeals, which was initiated by the defense and provided for a milder sentence than that passed by the court of the first instance. Furthermore, the defense notes in this category of cases that the use of detention as an almost exclusive measure of restraint did not take into account the risks or lack of competition between parties, and the acceptance of insufficient evidence. Given the existing state policy on the non-recognition of such documents, consideration needs to be given to the documents issued by the occupation authorities and taken as appropriate evidence in this category of proceedings. The single acquittal under Article 111-2 refers specifically to the insufficiency and inadequacy of such evidence. An important factor is also a significant percentage of court judgments (orders) that approve plea agreements in this category of cases because their adoption makes it impossible to further challenge a sentence and form proper judicial practice.

7. The consideration of collaborationism cases are also subject to public influence, as seen in public interest, pressure on law enforcement agencies, and judges considering this category of cases. The influence is also manifested in the form of public pressure on the defense equating a defender with a defendant, and pressure from law enforcement agencies. A separate factor is also personal beliefs of both the representatives of the prosecution and the defense on this issue.

1 OVERVIEW OF APPLICABLE LEGISLATION ON PROSECUTION FOR CRIMES UNDER ARTICLES 111-1 AND 111-2 OF THE CRIMINAL CODE OF UKRAINE

Article 111-1 of the CCU ("Collaborationism") appeared as a result of the adoption of the Law of Ukraine No. 2108-IX on March 3, 2022.[2] The article contains a list of activities that are considered collaborationism and subject to criminal liability.

In particular, Article 111-1 provides for seven separate elements of crime and one additional one, which provides for a heavier punishment within the limits of the elements provided for by Parts 5, 6 and 7 of the Article, if such persons committed actions or made decisions that led to the death people or other serious consequences.

Part 1 of the Article concerns liability for public denial by a citizen of Ukraine from the armed aggression against Ukraine, establishment and assertion of the temporary occupation of part of the territory of Ukraine, or public appeals by a citizen of Ukraine to support the decisions and/or actions of the aggressor state, armed formations and/or occupation administration of the aggressor state, to collaborate with the aggressor state, armed formations and/or occupation administration of the aggressor state, to not recognize the state sovereignty of Ukraine over the temporarily occupied territories of Ukraine.

Part 2 provides for liability for voluntarily holding positions that are not related to the performance of organisational-administrative or administrative-economic functions in illegal authorities in the occupied territory.

Part 3 concerns the sphere of education, namely, the propaganda by a citizen of Ukraine in educational institutions, regardless of the types and forms of ownership, to facilitate the armed aggression against Ukraine, establish and assert the temporary occupation of part of the territory of Ukraine, avoid responsibility for the armed aggression against Ukraine by the aggressor state, as well as the actions of citizens of Ukraine aimed at implementing education standards of the aggressor state in educational institutions.

2 Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Establishing Criminal Liability for Collaborationism" of March 3, 2022: https://zakon.rada.gov.ua/laws/show/2108-20#Text

Part 4 provides for liability for economic cooperation – the transfer of material resources to illegal armed or paramilitary formations created in the temporarily occupied territory, and/or armed or paramilitary formations of the aggressor state, and/or economic activities jointly with the aggressor state, illegal authorities created in the temporarily occupied territory, including by the occupation administration of the aggressor state.

In contrast to Part 2, which is a misdemeanor, Part 5 defines voluntarily holding positions related to the performance of organisational-administrative or administrative-economic functions in illegal authorities in the occupied territory, as well as being voluntarily elected to such authorities as a crime. Part 5 also provides for the liability for participation in organising and holding illegal elections and/or referenda in the temporarily occupied territory or public calls for holding such illegal elections and/or referenda in the temporarily occupied territory.

Part 6 provides for the liability of information activities – organizing and conducting events of a political nature, carrying out information activities jointly with the aggressor state and/or its occupation administration, aimed at supporting the aggressor state, its occupation administration or armed formations and/or avoiding their responsibility for armed aggression against Ukraine, in the absence of signs of high treason, and active participation in such activities.

Part 7 concerns voluntarily holding a position in illegal judicial or law enforcement bodies created in the temporarily occupied territory by a citizen of Ukraine, as well as voluntary participation by a citizen of Ukraine in illegal armed or paramilitary formations created in the temporarily occupied territory and/or in the armed formations of the aggressor state or providing such formations with assistance in conducting hostilities against the Armed Forces of Ukraine and other military formations formed in accordance with the laws of Ukraine, volunteer formations that were formed or self-organised to protect the independence, sovereignty, and territorial integrity of Ukraine.

The legislator explained the need to amend the Criminal Code by developing a new article pointing out that the applicable legislation did not fully cover all types of collaboration with the aggressor state which became possible as a result of the full-scale invasion. The new article had a preventive purpose: to prevent the cooperation of the local population in the occupied territories with representatives of the occupying power and to outline the limits of permitted and prohibited activities of citizens of Ukraine who stay in the temporarily occupied territory.

For the same purpose, on April 14, 2022, the Law of Ukraine “On Amendments to the Criminal and Criminal Procedure Codes of Ukraine Regarding the Improvement of Liability for Collaborationism and Specifics of the Application of Measures

of Restraint for Crimes Against the Foundations of National and Public Security"[3] was passed, which also supplemented the Criminal Code with Article 111-2 "Abetting the aggressor state." The danger of excessive criminalisation through the introduction of Article 111-2, which will lead to an artificial competition of criminal law norms, was highlighted by the Main Scientific and Expert Department[4] back at the stage of consideration of the draft law in the Committee. In particular, it was noted that the disposition of Article 111-2 replicates the elements of criminal offenses already outlined in Article 111-1 on collaborationism, as well as Article 111 on high treason.

In the future, the imperfection of articles 111-1 and 111-2 introduced into the Criminal Code of Ukraine; however, there is a need to continue work on clarifying them and make necessary changes.

According to the response from the Prosecutor General's Office (PGO), 6,426 proceedings under Article 111-1 and 853 proceedings under Article 111-2 were opened between January 2022 and August 2023. At the same time, there is no information of the number of proceedings opened under individual parts of Article 111-1 in the response, which is explained by the fact that the law does not provide for the analysis, calculation or separation of information, according to the requested criteria (by individual parts and regional distribution)[5]. Therefore, according to the PGO, such statistics are not kept.

The PGO provided a territorial distribution of proceedings opened under the articles, from which it follows that the largest number of proceedings under Article 111-1 were opened in Kharkiv (1,548), Luhansk (1,196), Kherson (1,188) and Donetsk (881) regions. The largest number of proceedings under Article 111-2 were opened in the Kherson (266), Kharkiv (174), and Zaporizhzhia (66) regions.[6]

In addition, the PGO provided the distribution of proceedings by categories: «misdemeanors» and «crimes» opened under Article 111-1 between January and September 2023. In particular, 678 proceedings were registered under parts 1 and 2 (misdemeanors) and 2,114 under parts 3 to 8 (crimes) during this period.[7]

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3 Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine Regarding the Improvement of Liability for Collaborationism and Specifics of the Application of Measures of Restraint for Crimes Against the Foundations of National and Public Security" of April 14, 2022: https://zakon.rada.gov.ua/laws/show/2198-20#Text

4 Conclusion of the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine on the draft Law of Ukraine "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine Regarding the Improvement of Liability for Collaborationism and Specifics of the Application of Measures of Restraint for Crimes Against the Foundations of National and Public Security" of March 21, 2022: https://itd.rada.gov.ua/billInfo/Bills/pubFile/1247684

5 Response from the Prosecutor General's Office No. 27/3-1871ref-23 of September 29, 2023

6 ibid

7 Response from the Prosecutor General's Office No. 27/3-1899ref-23 of October 5, 2023

According to the SBI's response, the agency investigated 327 criminal proceedings over collaborationism (111-1) and 25 criminal proceedings over abetting the aggressor state (111-2).[8]

The SSU provided approximate information: more than 6,600 proceedings under Article 111-1 and nearly 1,000 proceedings under Article 111-2.[9] Upon repeated inquiry, detailed information was provided: criminal proceedings were conducted in 6,610 cases under Article 111-1 and 946 cases under Article 111-2 between February 24, 2022 and September 27, 2023.[10]

The State Judicial Administration of Ukraine reported that 268 sentences had been passed under Article 111-1 and no verdicts under Article 111-2 in 2022.[11]

Pursuant to Article 216 of the CPCU, SSU investigators have competence over investigations under Articles 111-1 and 111-2. According to Part 4 of the same article, the investigators of SBI bodies carry out a pre-trial investigation into criminal offenses committed by a special subject, for example, a judge, or an employee of a law enforcement agency. Cases of this category are not subject to investigation by the National Police.

However, in practice, the pre-trial investigation into this category of cases is conducted by investigators of the SSU, SBI, and the National Police.

8 Response from the SBI to inquiry for information No. 175/09 of September 21, 2023)
9 Response from the SSU No. 10/3/P-170,171–p/1-23 of September 27, 2023
10 Response from the SSU No. 10/3/L-183-p/1-23 of October 13, 2023
11 Response from the State Judicial Administration of Ukraine inf/P990-23-inf/P999-23-957/23 of September 27, 2023 to inquiry for information No. 178/09 of September 21, 2023

2 LEGISLATIVE INITIATIVES AIMED AT AMENDING ARTICLES 111-1 AND 111-2 OF THE CRIMINAL CODE OF UKRAINE.

To solve the problems that arise in the practice of applying Article 111-1 of the CCU, several draft laws have been tabled in the Verkhovna Rada of Ukraine since March 2022, including:

1. Draft Law "*On Amendments to Article 111-1 of the Criminal Code of Ukraine on Expanding the List of Criminal Offenses for Collaborationism*" (No. 7223).[12]

The draft law suggests supplementing Article 111-1 of the CCU with a new Part 2, setting forth criminal liability in relation to persons, citizens of Ukraine, who are citizens of another state which carries out armed aggression against Ukraine.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement[13] and has not been put on the session agenda.

2. Draft Law "*On Amendments to the Criminal Code of Ukraine on Establishing Liability for Subordination of Ukrainian Subdivisions of International Companies to Regional Offices Located in the Territory of the Aggressor State*" (No. 7279).[14]

The draft law suggests establishing criminal liability for violation of restrictions on the activities of a legal entity or a representative office of a foreign business entity related to the aggressor state, committed by a person who, on legal grounds, has the right to act on behalf of such a legal entity.

By "violations of restrictions on the activities of a legal entity or a representative office of a foreign business entity related to the aggressor state," the authors of the draft law mean the economic activity of a legal entity created under the laws of Ukraine, a representative office of a foreign business entity, which and/or officials of which:

12 Draft Law "On Amendments to Article 111-1 of the Criminal Code of Ukraine on Expanding the List of Criminal Offenses for Collaborationism" (No. 7223) of March 28, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/39302

13 Information on the status of draft laws is indicated hereinafter as of September 20, 2023

14 Draft Law "On Amendments to the Criminal Code of Ukraine on Establishing Liability for Subordination of Ukrainian Subdivisions of International Companies to Regional Offices Located in the Territory of the Aggressor State" (No. 7279) of April 12, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/39419

1. fulfill orders, mandates, act in accordance with the instructions of citizens and/or legal entities (their officials), created under the legislation of the aggressor state, or persons held criminally liable or to whom criminal legal measures were applied for committing one or several crimes under Articles 109-111-1, 113, 114 of the CCU, or persons connected with them by control relations in the meaning of the legislation on the protection of economic competition.
2. act on behalf of or in the interests of citizens and/or legal entities (their officials) created under the legislation of the aggressor state, or persons held criminally liable or to whom criminal legal measures were applied for committing one or several crimes under Articles 109-111-1, 113, 114 of the CCU, or persons connected with them by control relations in the meaning of the legislation on the protection of economic competition.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and it has not been put on the session agenda.

3. Draft Law "*On Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving Liability for Collaborationism and Procedures for Pre-trial Investigation into Crimes Against the Foundations of National Security of Ukraine*" (No. 7329).[15]

The draft law suggests adding a fine as a sanction under parts 1 and 2 of Article 111-1 of the CCU, as well as expanding the investigative jurisdiction of a criminal offense committed by a member of the Parliament of Ukraine on the instructions of a prosecutor, allowing pre-trial investigation into such offenses by investigators of the Security Service of Ukraine.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and it was put on the agenda on May 3, 2022.

4. Draft Law "*On Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving Liability for Collaborationism and Adjacent Criminal Offenses*" (No. 7570).[16]

This draft law suggests eliminating shortcomings in terms of differentiation between the elements of crimes, in particular to:

15 Draft Law "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving Liability for Collaborationism and Procedures for Pre-trial Investigation into Crimes Against the Foundations of National Security of Ukraine" (No. 7329) of April 29, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/39519

16 Draft Law "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving Liability for Collaborationism and Adjacent Criminal Offenses" (No. 7570) of July 20, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/40023

- Determine the distinctive features of the crime of "collaborationism" (Article 111-1 of the CCU) to differentiate it from high treason (Article 111 of the CCU), justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants (Article 436 -2 of the CCU) and other adjacent criminal offenses.
- Exclude liability for public calls for non-recognition of the extension of the state sovereignty of Ukraine to the temporarily occupied territories of Ukraine from Article 111-1 of the CCU, since responsibility for such actions is provided for by Article 110 of the CCU "Encroachment on the territorial integrity and inviolability of Ukraine."
- Exclude Article 111-2 of the CCU "Abetting the aggressor state" as it provides for collaborationism in its separate forms which are already defined in Article 111-1 of the CCU, and to include its separate provisions in the wording of Article 111-1.

In addition, this draft law suggests singling out those types of activities that are directly prohibited and can be qualified as prohibited under Article 111-1 of the CCU, for example, public appeals to support the decisions or actions of the aggressor state or to collaborate with it, transferring material resources to the aggressor state or other assets, organizing or holding illegal elections or referenda, holding a position related to the performance of the functions of an official in an illegal judicial, law enforcement, state security or intelligence agency of the aggressor state, participating in an illegal armed or paramilitary formation of the aggressor state, or in an illegal armed or paramilitary formation, etc.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and it has not been put on the session agenda.

5. Draft Law "*On Amendments to the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine' Regarding Peculiarities of Activities in the Temporarily Occupied Territory of Ukraine*" (No. 7646).[17]

The draft law suggests making the following changes to the Law "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine," clarifying Part 4 of Article 9 and supplementing it with new Articles 9-1 and 9-2, to:

17 Draft Law "On Amendments to the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine' Regarding Peculiarities of Activities in the Temporarily Occupied Territory of Ukraine" (No. 7646) of August 8, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/40204

- Determine the list of types of activities and measures that can be carried out in the temporarily occupied territories, if at the same time, there is no assistance to the aggressor state, namely the activities of state bodies, authorities of the Autonomous Republic of Crimea, local self-government bodies (measures to ensure human rights and freedoms and citizen; operative investigative activity; pre-trial investigation; measures to ensure the provision of housing and communal services, etc.); activities of business entities (measures aimed at solving humanitarian problems; provision of housing and communal services; educational activities; activities in the field of agricultural production, etc.).
- Empower the Cabinet of Ministers of Ukraine, the National Bank of Ukraine, and independent regulators to determine specifics and establish restrictions on the implementation of a specified list of activities and measures by business entities.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and has not been put on the session agenda.

6. Draft Law "*On Amendments to the Criminal Code of Ukraine on Improving Liability for Collaborationism*" (No 7647).[18]

The draft law suggests introducing the following wording of Part 4 of Article 111-1 of the CCU:

> 4. The transfer of material resources to illegal armed or paramilitary formations created in the temporarily occupied territory, and/or armed or paramilitary formations of the aggressor state, and/or voluntary economic activity in collaboration with the aggressor state, illegal authorities created in the temporarily occupied territory, including by the occupation administration of the aggressor state, with the exception of cases specified by law – shall be punished by a fine of up to ten thousand non-taxable minimum incomes of citizens or imprisonment for a term of three to five years, with deprivation of the right to hold certain positions or engage in certain activities for a term from 10 to 15 years and with confiscation of property.

The legislator sees that this will remove the ban on part of the economic activity that must be carried out to ensure the livelihood of the territories even despite their actual occupation. Furthermore, such activity will not be punished if it was not voluntary but carried out under the pressure of the occupation authorities.

18 Draft Law "On Amendments to the Criminal Code of Ukraine on Improving Liability for Collaborationism" (No 7647) of August 8, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/40205

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and has not been put on the session agenda.

7. Draft Law "*On Amendments to Article 111-1 of the Criminal Code of Ukraine on Improving Liability for Collaborationism*" (No. 8077).[19]

The draft law suggests supplementing Article 111-1 of the CCU with a new Part 5, which provides for criminal liability for performing professional activities related to the provision of legal services, auditors, appraisers, experts, insolvency officers, private executors, independent mediators, labor arbitration members, arbitrators, as well as performing the powers of a notary or state registrar and/or subject to the state's registration of rights, or providing other public services by a citizen of Ukraine in the temporarily occupied territory of Ukraine and based on the legislation of the aggressor state.

In addition, it is proposed to amend Article 111-1 of the CCU in terms of bringing the provisions into line with Article 40 of the CCU by excluding the "voluntariness" of collaboration with the aggressor state as a necessary component for qualifying the act as collaborationism.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and has not been put on the session agenda.

8. Draft Law *"On Amendments to Article 111-1 of the Criminal Code of Ukraine on Improving Liability for Collaborationism"* (No. 8301).[20]

The draft law suggests:

- Providing additional types of punishment that a court can impose for the commission of collaborationism (in particular, fine and community service) in the sanctions of parts 1 and 2.
- Supplementing Part 3 with punishment for propaganda in cultural institutions
- Enshrining in Part 4 the possibility of exceptions to the conduct of types of economic activity permitted by law.
- Expanding Part 5 to cover such places of commission of crime as institutions, enterprises, and organisations.

19 Draft Law "On Amendments to Article 111-1 of the Criminal Code of Ukraine on Improving Liability for Collaborationism" (No. 8077) of September 26, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/40531

20 Draft Law "On Amendments to Article 111-1 of the Criminal Code of Ukraine on Improving Liability for Collaborationism" (No. 8301) of December 23, 2022: https://itd.rada.gov.ua/billInfo/Bills/Card/40894

- Setting forth Part 8 in new version, which provides for the criminal liability of a citizen of Ukraine for performing professional activities related to the provision of services of auditors, appraisers, experts, insolvency officers, private executors, independent mediators, labor arbitration members, arbitrators, who perform the powers of a notary or state registrar or subject of state registration of rights, or provide other public services by a citizen of Ukraine in the temporarily occupied territory of Ukraine based on legislation different from the legislation of Ukraine.
- Removing the «voluntariness» of collaboration with the aggressor state as a necessary component for qualifying collaborationism from the part of harmonizing the provisions with Article 40 of the CCU.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and has not been put on the session agenda.

9. Draft Law "*On Amendments to Article 1111 of the Criminal Code of Ukraine on Improving Liability for Collaborationism*" (No. 8301-1),[21] alternative to Draft Law No. 8301.

A significant difference between this draft law and the main one is the size of the fine: it is higher in the alternative draft— from 1,000 to 3,000 non-taxable minimum incomes of citizens in Part 1 and from 3,000 to 5,000 non-taxable minimum incomes of citizens in Part 2.

In addition, the alternative draft law does not support some of the initiatives of the main draft regarding the removal of voluntariness as a mandatory component of the crime of "collaborationism."

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and has not been put on the session agenda.

10. Draft Law "*On Amendments to the Criminal Code of Ukraine Regarding Specifying Liability for Certain Types of Criminal Offenses in Temporarily Occupied Territories*" (No. 8301-2).[22]

The draft law suggests:

- Supplementing Article 111 of the CCU with Part 4 which will refer to cases of responsibility of persons who were forcibly mobilised into the armed

21 Draft Law "On Amendments to Article 1111 of the Criminal Code of Ukraine on Improving Liability for Collaborationism" (No. 8301-1) of January 5, 2023: https://itd.rada.gov.ua/billInfo/Bills/Card/41119

22 Draft Law "On Amendments to the Criminal Code of Ukraine Regarding Specifying Liability for Certain Types of Criminal Offenses in Temporarily Occupied Territories" (No. 8301-2) of January 9, 2023: https://itd.rada.gov.ua/billInfo/Bills/Card/41131

forces of the occupying power and who, accordingly, are victims of a war crime under Article 438 of the CCU. Part 4 provides for the mechanism to exempt such citizens from criminal liability provided for in Article 111 of the CCU.

- Defining an official as a subject of the offense provided for in Part 1 of Article 111-1 of the CCU. This will contribute to the differentiation between offenses outlined in Part 1 of Article 111-1 of the CCU and Part 1 of Article 436-2 of the CCU which establishes liability for the same actions without singling out a special subject.
- Supporting the additions in the main draft law, regarding the sanctions of parts 1 and 2 of Article 111-1 of the CCU, such as fines and community service.
- Determining an alternative punishment for the offenses provided for in Part 1 of Article 436-2 "Justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants" in the form of a fine from 500 to 1,000 non-taxable minimum incomes of citizens and at the same time remove the punishment in the form of imprisonment for up to three years.
- Expanding the wording of Part 4 by adding a definition of actions that can be considered as the implementation of educational standards of the aggressor state. In particular, such implementations may consist of the distortion of historical and geographical facts in the interests of the aggressor state and/or curricula approving of the actions of armed formations and/or the occupation administration of the aggressor state, inciting enmity against Ukraine, citizens of Ukraine, the Armed Forces of Ukraine, as well as a separate indication in the disposition of Part 3 of Article 111-1 of the CCU of "campaigning, recruiting and other forms of involvement of children in child and youth movements and formations in the temporarily occupied territories for their further involvement in the ranks of the armed formations of the aggressor state, ensuring the activities of such movements and formations."
- Defining an exhaustive list of types of activities that fall under the definition of collaborationism during the conduct of the economic activity, pointing to the intention and direction of such activity: "to support and develop the facilities of the military infrastructure of the aggressor state", "to transport servicemen of the armed forces of the aggressor state and members of armed formations", etc.
- Not removing voluntariness as a mandatory component of the crime of collaborationism.
- Removing the words "by a citizen of Ukraine" from Article 111-2 of the CCU.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and has not been put on the session agenda.

In addition, at least ten draft laws already registered, the Draft Law "*On Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving Liability for Some Crimes Against the Foundations of National Security of Ukraine*" (No. 10136) was registered in the Verkhovna Rada of Ukraine on October 9, 2023.[23]

For its development, a working group based on the Verkhovna Rada Committee on Law Enforcement was created at the beginning of 2023, whose task was to develop another draft law on amendments to the legislation on collaborationism.[24]

The draft law, registered in the parliament, is generally imbued with the idea of stepping up liability for collaborationism. As one of the authors of the draft law notes, "the key goal is not just to inevitably punish the collaborators but to create conditions for building a strong Ukrainian government in the de-occupied territories."[25]

In addition to the changes to the special part of the CCU, which will be discussed below, the draft law provides for changes to the general part. In particular, it is proposed in Article 89 of the CCU to provide for an increase in the terms of cancellation of conviction for persons convicted of crimes against the foundations of national security of Ukraine, against peace, security of humanity and international legal order. This change will obviously entail consequences in the form of restrictions on the right to occupy positions in state authorities, to engage in independent professional activities (for example, to be lawyers, notaries), to participate in local elections, in some cases such people cannot be elected MPs of Ukraine. In addition, in the case of a court ban on engaging in a certain activity, they cannot be registered as entrepreneurs with the right to carry out a relevant activity before the end of the term established by the court verdict.

Furthermore, the draft law suggests supplementing the sanctions of parts 1 and 2 of Article 111-1 with a fine and providing for imprisonment for these violations.

Amendments to Part 3 of Article 111-1 are also foreseen, it is proposed to add health and recreation facilities, places used for educational, sports and cultural events as places where propaganda, which is subject to criminal liability, can be carried out. In the same part, it is proposed to add punishment in the form of a fine, to remove punishment in the form of community service or arrest. Instead, it is proposed to increase the term of imprisonment for this offense from three to four years.

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23 Draft Law "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine on Improving Liability for Some Crimes Against the Foundations of National Security of Ukraine" of October 9, 2023: https://itd.rada.gov.ua/billInfo/Bills/Card/42957

24 'MP: Rada develops draft law on improving liability for collaborationism'/ LB.ua, September 20, 2023: https://lb.ua/society/2023/09/20/575751_u_radi_napratsyuvali_zakonoproiekt_pro.html

25 MP from Holos faction Osadchuk: Extended terms of cancellation of conviction should be established for collaborators/ Censor.net, October 11, 23: https://censor.net/ua/n3448886

In Part 4 of Article 111-1, following the example of parts 2, 5 and 7, it is proposed to add the criterion of "voluntariness" in the transfer of material assets to representatives of the aggressor state. In the same part, it is pending to add a ban on independent professional activities in cooperation with the occupation administration of the aggressor state, for example, the activities of a lawyer, private notary, auditor, etc. Changes are also proposed to the sanction of the article, MPs propose an increase in the fine amount and the term of imprisonment.

Part 5, which deals with holding illegal elections and/or referenda in the temporarily occupied territory, proposes to add a prohibition of coercion to organise, hold or participate in such elections or referenda.

It is proposed to specify Part 6 and narrow the subject of the crime to only "a citizen of Ukraine," and it is also proposed to reduce the term of imprisonment as a punishment for this violation.

In Part 7, it is proposed to add "assistance to paramilitary or armed formations in the conduct of hostilities against law enforcement agencies" to the objective side of the offense, as well as the clarification "in the absence of signs of high treason."

In addition, it is proposed to add clarification in the footnote to the article of what exactly falls under the "standard of education of the aggressor state" (in particular, defined by the aggressor state, its occupation administration, and formalised in the form of educational literature, curricula, plans, lists, instructions, assignments, recommendations, requirements for the content of education, the amount of educational workload, other components of the educational process), and "performance of independent professional activity" (in particular, provision of services of a lawyer, auditor, appraiser, expert, insolvency officer, private executor, independent mediator, member of labor arbitration, arbitrator, as well as the performance of the powers of a notary or state registrar or subject of state registration of rights) and "economic activity" (activity defined by the Tax Code of Ukraine).

The draft law contains proposals for amendments to Article 111-2, in particular, the wording "damage to Ukraine" is proposed to be worded as follows: "causing damage to the sovereignty, territorial integrity and inviolability, defense capability, state, economic or information security of Ukraine." It is also proposed to add a ban on "coercion to cooperate with armed or paramilitary formations of the aggressor state and/or occupation administration," as well as a ban on "transferring information about citizens of Ukraine to the aggressor state, its armed or paramilitary formations, illegal paramilitary or armed formations created on temporarily occupied territories of Ukraine, and/or the occupation administration of the aggressor state, in the absence of signs of high treason or espionage." The amendments do not specify what exactly falls under such information, which in practice will lead to broad discretion by law enforcement officials.

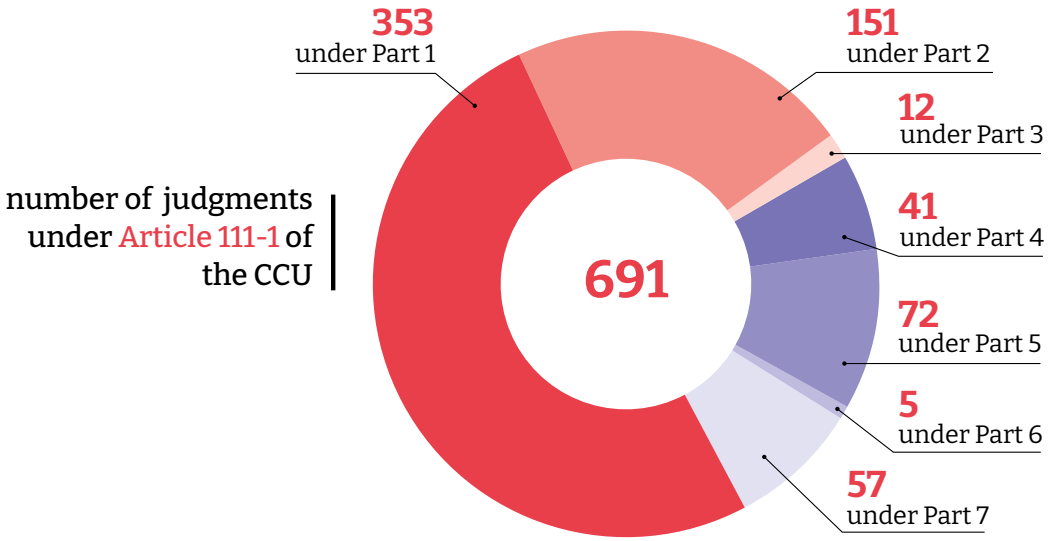
The amendments to the CPCU also propose to refer cases only under parts 4 to 8 of Article 111-1 to the jurisdiction of investigative security agencies (currently, criminal proceedings under all parts of Article 111-1 of the CCU are referred to the SSU by jurisdiction). Therefore, pre-trial investigations of criminal offenses under Parts 1 and 3 of Article 111-1 of the CCU will be carried out by investigative bodies of the National Police.

The draft law is **under consideration** by the Verkhovna Rada Committee on Law Enforcement and has not been put on the session agenda.

Thus, after the start of large-scale armed aggression against Ukraine, new articles 111-1 ("Collaborationism") and 111-2 ("Abetting the aggressor states") appeared in the CCU. These articles were to become an effective measure to prevent the collaboration of citizens of Ukraine with the occupation authorities. At the same time, after the amendments to the CCU entered into force, at least ten draft laws were registered in the Verkhovna Rada of Ukraine during the year to amend the wording of Article 111-1 of the CCU. Despite the ongoing discussions in parliament on the issue of prosecution for collaborationism, currently none of the registered bills have significant support from the Verkhovna Rada, which may indicate that none of the registered draft laws will be submitted for consideration by the parliament.

3 ANALYSIS OF PRACTICE OF APPLYING ARTICLES 111-1 AND 111-2 OF THE CRIMINAL CODE OF UKRAINE: ANALYSIS OF JUDGMENTS AND IN-DEPTH INTERVIEWS WITH CRIMINAL JUSTICE SPECIALISTS

As of September 20, 2023, 788[26] decisions in cases under Article 111-1 were registered in the Unified State Register of Court Decisions.



Seven judgments under Article 111-2 of the CCU were found in the Unified State Register of Court Decisions.[27]

At least one sentence under Part 7 of Article 111-1 of the CCU was passed in the case against minor citizen of Ukraine.[28]

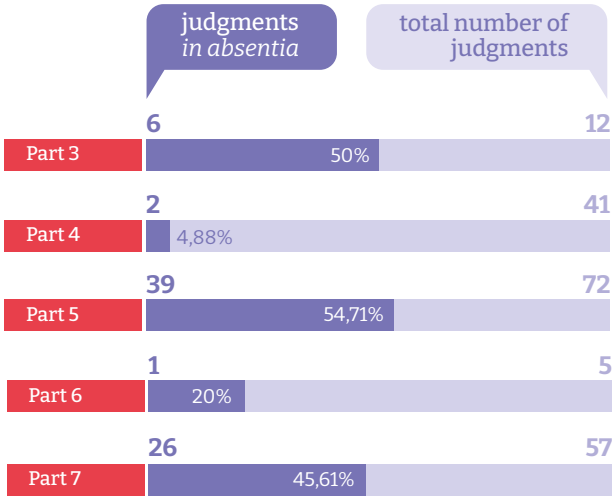
26 The Unified State Register of Court Decisions shows 788 judgments in cases under Article 111-1, while 691 judgments were considered within the scope of this analysis. The difference is explained by several reasons: individual judgments are prohibited for publication in accordance with Paragraph 4 of Part 1 of Article 7 of the Law of Ukraine "On Access to Court Decisions"; individual sentences are duplicated in the system; when searching for judgments under a specific article, judgments under adjacent articles are included in the sample; the general list of judgments in the system also includes the judgments of the courts of appeals. The number of 691 judgments is exclusively judgments delivered under Article 111-1 by courts of the first instance which are not prohibited for publication.

27 When searching for cases under this article, the Unified Register system shows cases under Article 114-2 "Unauthorized dissemination of information on sending, transferring weapons, armaments and military supplies to Ukraine, the movement, redeployment or deployment of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine, committed under conditions of war or state of emergency," the specified judgments under Article 111-2 were found when manually searching

28 https://reyestr.court.gov.ua/Review/110961639

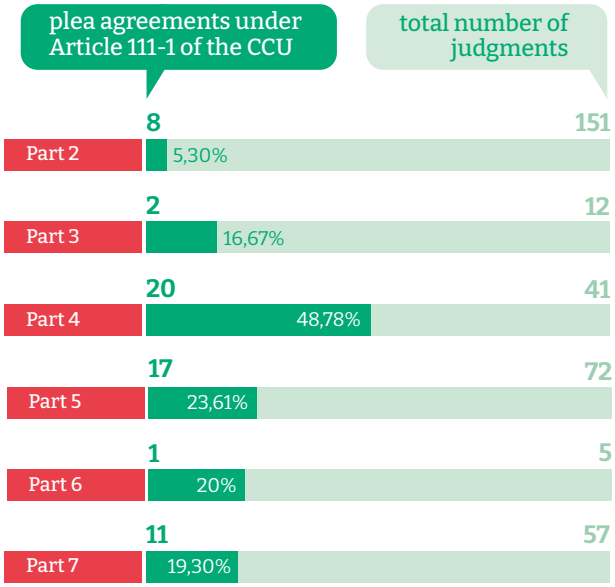
At the moment, it is possible to establish only six judgments of the courts of appeal delivered in collaborationism cases. Five cases were considered on appeals filed by the prosecutor's office, and only one was initiated by the defense.

Cases under all parts of Article 111-1, except Part 1 and Part 2, are considered *in absentia*. More than 50% of judgments *in absentia* were delivered in cases under Part 3 and Part 5 of Article 111-1.



Under Article 111-2, three judgments were delivered in absentia (out of the analyzed seven).

In a significant number of cases under Article 111-1 of the CCU, the defendants make plea agreements with the investigation. Such agreements are present in cases under all parts of Article 111-1, in particular:



No plea agreements under Article 111-2 were found.

It is also worth noting that making such an agreement, as well as considering a case in absentia, makes it impossible to further challenge a judgment in the second and third instance, which can also explain the low number of judgments of courts of appeal.

Analysis of court decisions in the above-mentioned cases, as well as in-depth interviews with experts in the field of law (employees of law enforcement agencies, judges, defense lawyers), make it possible to highlight the following features of the proceedings in cases on collaborationism and abetting the aggressor state:

- Vague wording in Articles 111-1 and 111-2 allows for a broad interpretation of the qualifying features of crimes.
- Unclear differentiation between elements and qualifications of actions that may fall under collaborationism or abetting the aggressor state and other elements of crimes
- Lack of prioritisation of cases.
- Preferred choice of detention as a measure of restraint for a suspect at the stage of pre-trial investigation.
- Accusatorial bias in collaborationism cases and the corresponding standards of evidence.
- Issue of proportionality of violation and punishment.
- Public pressure on the justice system.

It is appropriate to consider all these features through the prism of judicial practice analysis and interview data.

3.1 Failure to observe principle of legal certainty in Articles 111-1 and 111-2 of CCU

Articles 111-1 and 111-2 of the CCU contain many wordings that are not explained by the legislator and can be interpreted broadly, which leads to significant discretion of law enforcement agencies that apply these provisions. Such wordings include, for example, the concepts of “material resources” and “interaction with the aggressor state” in Part 4 of Article 111-1, as well as “intentional actions aimed at abetting the aggressor state” in Article 111-2.

Judicial practice

Difficulties arise in the context of the interpretation of concepts introduced into the legislation because of the development of Article 111-1 and the definition which is not provided by the legislator.

In particular, the concepts of "material resources" and "economic activity" are blurred, being broadly and inconsistently interpreted. This category, according to practice, can include both food products and the conduct of any labor activity in the occupied territory.

Thus, the actions of an electrician from the town of Lyman, who was appointed to the position of the so-called head of the "Electric Networks of Krasnyi Lyman District" of the State Unitary Enterprise of the Donetsk People's Republic "Regional Power Supply Company" of the Technical Unit "Central Electric Networks" of the Ministry of Coal and Energy of the DPR" were qualified under Part 4 of Article 111-1.[29] According to the indictment, the convict committed the following actions: recruiting personnel for the positions in "RPSC"; conducting briefings for "RPSC" employees; reporting on the completed work to the so-called "Krasnyi Lyman town administration"; carrying out general control of the work of the personnel of the entrusted enterprise; organizing works or provision of services of a value character which have a price determination; conducting organisational and economic relations between the so-called "State Unitary Enterprise of the DPR Regional Energy Supply Company of Horlivka Town" and "Electric Networks of Krasnyi Lyman District of the State Unitary Enterprise of the Donetsk People's Republic Regional Power Supply Company" of the Technical Unit "Central Electric Networks" of the "Ministry of Coal and Energy of the DPR." In addition, according to the judgment, the person is accused of ensuring the restoration of power lines damaged as a result of military operations, with the aim of further providing electricity services to users of Lyman and nearby settlements in the Donetsk region, including illegal authorities created in the temporarily occupied territory, by "RPSC" during the occupation. According to the testimonies of both the defendant and witnesses, the electricity supply was not restored.[30]

For these actions, the court of first instance sentenced him to three years in prison with deprivation of the right to hold positions related to the performance of organisational-management and administrative-economic functions at enterprises, institutions, organisations of all forms of ownership, and to engage in activities related to maintenance and operation of electric networks for 10 years and the confiscation of property.

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29 Judgment in case No. 202/1677/23 of May 1, 2023: https://reyestr.court.gov.ua/Review/110555891

30 "Working under voltage. 'Pricking Cutting' podcast about the trial of electrician who restored networks in occupied Lyman"/ Graty, August 11, 2023: https://graty.me/podcast/robota-pid-naprugoyu-podkast-kolyuchi-rizhuchi-pro-sud-nad-elektrikom-yakij-vidnovlyuvav-merezhi-v-okupovanomu-limani/

The court of appeal, however, revised the past sentence based on several reasons:

- The court of first instance imposed two additional punishments at once.
- Deprivation of the right to engage in activities related to the maintenance and operation of electric networks would lead to the loss of income and sources of livelihood, thereby limiting the defendant and their family's access to sufficient food, clothing, and housing.
- The court of first instance did not consider the fact that the defendant had been in custody since December 5, 202231 and had already been deprived of his liberty for almost five months at the time when the court of first instance passed its sentence.
- Positive characteristics of the defendant, his family members and newborn child being dependent on him, his attitude towards the crime committed, and the circumstances under which the criminal offense was committed.
- In view of the principle of individualization and appropriateness (proportionality) of the punishment, in this case, the actual serving of the punishment in the form of three years in prison will be disproportionate to the crime committed by him, and the purpose of the punishment can be achieved without isolation from society, but under conditions of control over his behavior by state bodies.

Taking these factors into account, in August 2023, the Dnipro Court of Appeal changed the sentence of the court of first instance in terms of punishment and imposed a sentence of imprisonment for a term of three years with deprivation of the right to hold positions related to the performance of organizational, administrative and administrative-economic functions at enterprises, institutions, organisations of all forms of ownership for a period of 10 years without confiscation of property and exempted from serving the main punishment in the form of imprisonment with probation, setting a probationary period of two years.

In another case, the actions of a person who agreed to provide a service, the protection of civilian objects in the territory of Balaklia, that is, to work as a guard for a pharmacy and the main building of the Balaklia market with the adjacent territory, and, in the opinion investigation, ensured "safekeeping medicines and property of the pharmacy premises, which, among other things, contained medicines of Russian origin intended for distribution among the population in the occupied territories of Balaklia town on behalf of the occupation administration"[32] were qualified under Part

31 Order in case No. 201/9982/22 of December 7, 2022: https://reyestr.court.gov.ua/Review/107746779

32 Judgement in case No. 953/2847/23 of August 30, 2023: https://reyestr.court.gov.ua/Review/113110133

4 of Article 111-1. The person did that in exchange for food and basic necessities. For such economic activity in collaboration with the aggressor state, the person was sentenced to imprisonment for a term of four years with deprivation of the right to hold positions in state and local self-government bodies and to engage in activities related to the provision of public services for a term of ten years and with the confiscation of all his personal property.

According to the latest practice, Part 2 of Article 111-1 of the CCU has become a universal article for punishing those who did not hold senior positions in the occupation administrations but agreed to continue working in the occupied territory. At the same time, the harm from such activities to the local population and the national security of Ukraine is doubtful. For example, these are persons who continued or agreed to work as a school security guard,[33] a social worker,[34] as well as a "head of street" (a person who represents residents of a certain street in relations to local self-government bodies).

In one of the cases, the position of "head of microdistrict" which is elected by a residents' vote, and similar to the "head of street" position, received no financial remuneration and was defined as a managerial position; the actions of the defendant were therefore qualified under Part 5 of Article 111-1,[35] punishment for which provides imprisonment for a period of five to 10 years with deprivation of the right to hold certain positions or engage in certain activities for a period of 10 to 15 years with or without confiscation of property. A defendant, whose guilt was proved by the acts on the presence of stove heating in the homes of district residents which had the signature of the defendant as the "head of microdistrict," and who, according to the witnesses during the trial, did not hold meetings and did not issue orders,[36] was sentenced to five years in prison with deprivation of the right to hold positions in the state and local self-government bodies for a term of 15 years without confiscation of property.

Interview

Although the majority of respondents noted that there were no problems with differentiation between Articles 111-1 and 111-2 of the CCU, different experts interpret

33 Judgement in case No. 485/480/23 of June 26, 2023: https://reyestr.court.gov.ua/Review/111767016

34 Judgement in case No. 766/4291/23 of August 28, 2023: https://reyestr.court.gov.ua/Review/113289416

35 Judgement in case No. 202/3884/23 of August 15, 2023: https://reyestr.court.gov.ua/Review/112856417

36 'They made me an enemy of the people, but I gave the people my soul.' Trial of two civic activists from Donetsk region, who became "heads of microdistricts" during occupation of Lyman / Graty, September 11, 2023: https://graty.me/zrobili-mene-vorogom-narodu-a-ya-lyudyam-dushu-viddala-yak-sudyat-dvoh-gromadskih-diyachok-z-doneczkoï-oblasti-yaki-pid-chas-okupacziï-limanu-stali-golovami-mikrorajoniv/

these articles differently. This indicates a lack of legal certainty and wide discretion of investigative bodies and courts when considering such cases.

One example of such a difference in interpretation is the understanding of what is considered a transfer of material resources, in particular, whether the payment of taxes in the temporarily occupied territories of Ukraine is such. One of the respondents noted that if there was documentary evidence that a person paid taxes to the treasury of quasi-entities or the aggressor state, then he/she could already be prosecuted for committing a criminal offense under Part 4 of Article 111-1.

> *As an example, I can say that if we have documents showing that a person pays taxes to the treasury of quasi-entities or the aggressor state, then he/she can already be prosecuted under Part 4* (from an interview with a representative of the SBI).

At the same time, another respondent noted that he and his colleagues did not interpret this norm broadly in law enforcement, unlike the practice in other regions:

> *Some regions qualify cases when a person simply pays taxes to the occupying power, I know there was a situation, and we do not qualify it under Part 4 because, in my opinion, first of all, it is not an economic activity, paying taxes is administrative payments. They are paid even from inherited property. And, second, given that our territory of Crimea has been under occupation for the tenth year, then in fact the entire population is subject to criminal liability, but this is wrong... Because if a person there is simply engaged in economic activity, simply does not interact, does not engage in supplying something to internal affairs bodies in the occupied territory, or to some military units, then what kind of collaborationism can be there? A person... people have to somehow live in the occupied territory* (from an interview with a representative of the prosecutor's office)

Another aspect that complicates the application of Part 4 of Article 111-1 is its unclear wording. In particular, one of the respondents singled out the wording "interaction with the aggressor state" as something that is not prescribed in the legislation, and there is no certainty in the interpretation.

> *... the legislator wrote about interaction but did not spell out what exactly is meant by the term 'interaction', how to understand the interaction and whether it is simply the conduct of the economic activity, that is, which form of activity has to be considered in the subjective side, what action of a person should be considered as interaction. There is a problem* (from an interview with a representative of the prosecutor's office).

Another respondent, as a chief, also highlighted that the vague wording of Article 111-2, in particular, the lack of specifics as to which intentional actions were aimed at abetting the aggressor state and subject to criminal liability under this article, which in addition to those mentioned in the disposition, creates difficulties in its application by investigators.

> *Abetting the aggressor state is a slightly more complicated article because you can see how it is spelled out, here deliberate actions are formed to help the aggressor state, armed formations, that is, there are no specifics here, what are these deliberate actions, whether it is support for the actions of the aggressor state and occupation administrations or voluntary collection, preparation and transfer of material resources. It is somewhat more difficult for investigators, I, as a chief, see that it is more difficult* (from an interview with a representative of the SSU).

One of the respondents also pointed to the overly broad wording of the article, under which employees of critical infrastructure facilities and healthcare institutions may also fall.

> *As for the qualification itself, ... it is spelled out too broadly. Sometimes, even such articles as the same collaborationism or Article 111-2 adjacent to it – aiding, abetting the aggressor state – may be applied against employees of critical infrastructure objects, healthcare institutions, that is, those who, according to humanitarian law, cannot be prosecuted as they must ensure the livelihood of the occupied territory, the population of the occupied territory. Therefore, some clarifications, perhaps, should be introduced... well, again, to Part 4 or 111-2 or to write some notes, well, in general, to narrow the circle of persons that may be prosecuted... so that, you know, now many emotional acts are committed during the war and ... law enforcement officers are also people. And sometimes there is such a slight overreacting, a certain abuse.* (from an interview with a representative of the prosecutor's office).

The defense lawyer also noted that the wording of new articles was incomprehensible to the population that found themselves in the occupied territory. In practice, defenders face the fact that people did not understand the limits of activities permitted and prohibited in the occupied territories.

> *Because in the regions with which I work, this is Kharkiv region, sometimes I see that they did not understand what they were doing. They did not understand that they should not have received a salary. No one explained to them their rights, no one explained them the responsibility, what would happen if you do something,*

no one held explanatory talks, although our country has been suffering from war and from the aggressor since 2014, and it has been necessary to carry out awareness-raising activities and explain our citizens the limits of what could be done since 2014. Where is the limit of your protection by the convention and where you already cross this line. (from an interview with a defense lawyer).

3.2 Unclear differentiation between the elements and qualification of actions that may fall under collaborationism or abetting the aggressor state and other elements of crimes

Articles 111-1 and 111-2 of the CCU were introduced into the Criminal Code with a difference of one month at the beginning of the full-scale invasion without sufficient coordination and differentiation both between themselves and other articles under which collaboration with the aggressor state may fall. In addition, the articles differ in their writing technique, which further complicates their differentiation. Article 111-2 of the CCU is general and includes all actions aimed at supporting (abetting) the aggressor state by implementing or supporting the decisions and/or actions of the aggressor state, which may include any activity in the occupied territory.

In turn, Article 111-1 of the CCU contains a list of types of activities that are considered collaborationism – public support, occupation of senior and lower positions in occupation administrations, implementation of education standards of the aggressor state, etc. All these actions may also fall under the definition of actions aimed at supporting (abetting) the aggressor state.

Moreover, Article 111-2 of the CCU also includes the voluntary collection, preparation and/or transfer of material resources or other assets to representatives of the aggressor state, and directly overlaps with Part 4 of Article 111-1 which criminalises the transfer of material resources and/or economic activity in interaction with the aggressor state.

Judicial practice

The complexity of differentiation is reflected in the practice of qualifying actions under these articles.

For example, the actions of a person who, holding the position of head of the education department of the Tokmak Town Council, supported the decisions and ac-

tions of the aggressor state in the implementation of educational standards of the Russian Federation in the temporarily occupied territory of Tokmak town, Polohy district, Zaporizhzhia region, and were qualified under Article 111-2,[37] although Part 3 of Article 111-1 provides for a separate element of the crime – actions of citizens of Ukraine aimed at implementing education standards of the aggressor state in educational institutions.

In another case, the actions of a person who organised a fundraising campaign on a bank card for the subsequent transfer of funds for use by representatives of the armed forces of the aggressor state were qualified under Article 111-2,[38] while such actions also fall under Part 4 of Article 111-1.

The differentiation between Part 1 of Article 111-1 and Article 436-2 is also complicated. Although the wording of Part 1 of Article 111-1 clearly outlines the criterion of publicity denied aggression and support for the actions of the aggressor state, which, according to practice, includes all methods of spreading such statements on social networks, the same actions in practice are also qualified within the scope of Article 436-2. One of the differentiation methods by the Supreme Court is through the object of encroachment, in particular, actions within the limits of Part 1 of Article 111-1 encroach on national security. While within the limits of Article 436-2, the object of the crime is peace, security of humanity, and international law and order; at the same time, the concept of "security of humanity" is broader and includes "national security."[39]

In practice, however, such a differentiation is very difficult to make. As a result, similar actions in some cases are qualified under Part 1 of Article 111-1, which provides for deprivation of the right to hold certain positions or engage in certain activities for a period of 10 to 15 years, and in others, under Article 436-2, the punishment is more severe: from community service for a term of up to two years to imprisonment for up to five years, with or without confiscation of property, or imprisonment for a term of five to eight years with or without confiscation of property for official persons.

In particular, the actions of a person who shared publications aimed at supporting the aggressor state on his page in the Odnoklassniki social network, publicly, through the social network, denied the armed aggression of the Russian Federation against Ukraine and publicly called for supporting the decisions and actions of the aggressor state were qualified under Part 1 of Article 111-1. In particular, a person reposted a publication depicting Russian military personnel with the text "They are

37 Judgment in case No. 337/414/23 of May 30, 2023: https://reyestr.court.gov.ua/Review/111172842

38 Judgment in case No. 496/350/23 of May 25, 2023: https://reyestr.court.gov.ua/Review/111089967

39 'How to differentiate between collaborationism and related criminal offenses' / Judicial power of Ukraine, Supreme Court, July 26, 2022:https://supreme.court.gov.ua/supreme/pres-centr/news/1299973/

ELITE OF THE NATION, not golden children of rich parents" from the page "Donbas with Russia" and reposted a publication depicting Russian military personnel with the text "Russia bows to you, soldier" from the page "Polite people. Rus United national liberation movement."[40] The person was sentenced to deprivation of the right to hold positions related to the performance of state and local self-government functions for a period of 10 years.

In another case, the actions of a person who shared a publication with the text "WORK, GUYS Z STAY ALIVE Z GOD BLESS YOU Z" and a publication with the text "FRIENDS, WE WILL WIN ONLY TOGETHER!!!!! Let's attract even more people to our group to fight against fake Ua media. If you are for PERSON_8 and Russia, then join the group and invite LET'S SUPPORT OUR GUYS WHO ARE NOW MAKING HISTORY, PROTECTING THE PEACEFUL POPULATION OF DONBASS AND UKRAINE FROM THE NAZIS, GOD SAVE YOU GUYS" on his page in the Odnoklassniki social network were qualified under Part 2 of Article 436-2.[41] The person was sentenced to five years in prison without confiscation of property but was released from serving the sentence with probation and was set a one-year probationary period under Article 75 of the CCU.

Interview

Five of the 12 interviewed representatives from law enforcement agencies noted that they faced problems with differentiation in the context of the qualification of actions that constitute various forms of collaboration with the aggressor state.

Several respondents, mainly representatives of the prosecutor's office, pointed out the difficulty in distinguishing between Part 4 of Article 111-1 and Article 111-2. In addition to the difficulty in determining under which article the acts that fall under Part 4 of Article 111-1 and Article 111-2 should be qualified, the differentiation between the sanctions of these articles was highlighted as a problem because the punishment provided for in Article 111-2 is more severe. The differentiation, accordingly, is a problem not only for the reasons of legal certainty, but also for the reasons of assigning an appropriate and proportionate punishment.

Another example of the difference in interpretation is the differentiation between Part 7 of Article 111-1 and Article 111. In particular, one of the respondents noted that Part 7 of Article 111-1 covers the actions of persons who did not perform the functions of employees from law enforcement agencies or judicial bodies before the

40 Judgment in case No. 295/4824/22 of June 3, 2022: https://reyestr.court.gov.ua/Review/104594351

41 Judgment in case No. 755/8830/23 of August 29, 2023: https://reyestr.court.gov.ua/Review/113171159

occupation, but took positions under the occupation. However, if a person exercised the relevant powers and continued to exercise them under the occupation, this is already siding with the enemy, and such actions fall under Article 111 of the CCU ("High treason"). At the same time, the respondent noted that some judges considered that voluntarily taking up a post in illegal law enforcement bodies should be qualified under Part 7 of Article 111-1 of the CCU and the subsequent activity of a person in this post should be additionally qualified under Article 111 of the CCU.

> *As for the differentiation between actions, the judicial practice currently sees the main differentiation as follows: if a person, who did not perform the functions of an official of law enforcement or judicial authorities, performs them in the temporarily occupied territory, then these actions are qualified under Part 7 of Article 111. But if a person held such positions, exercised such powers, and then, when the given territory was temporarily occupied, sided with the enemy by taking up these posts already in the temporarily occupied territory in the enemy administration, then high treason was committed. Also, some judges believe that voluntarily taking up a post in illegal law enforcement bodies should be qualified under Part 7 of Article 111-1 of the CCU, and the subsequent activity of a person in this post should be additionally qualified under Part 2 of Article 111 'High treason'.* (from an interview with a representative of the prosecutor's office).

The respondents also pointed out the difficulty in distinguishing between Part 1 of Article 111-1 and Article 436-2. The articles overlap in terms of denying the armed aggression and the main difference is publicity of the statement. It is worth noting that according to a preliminary analysis of the practice of applying the articles, this criterion is not sufficient for differentiation and public denial of armed aggression and is qualified under Article 436-2 of the CCU.[42] One of the respondents also noted that Article 436-2 mostly qualifies posts on social networks.

> *Part 1 provides for public denial. That is, a person did not think something to themselves and wrote some tweets, something like that. A person should say it, well, roughly speaking, to someone. And as for Article 436, indeed, there is such a coincidence in the objective aspects of these crimes. Usually, we have a lot of such cases under Article 436 which are related specifically to persons who post some of their thoughts on social networks.* (from an interview with a representative of the SSU).

42 ibid. 1, p.8-9

At the same time, respondents also note that, considering the similar wording of the articles, the problem is that Part 1 of Article 111-1 concerns a misdemeanor, and Article 436-2 concerns a crime which is also reflected in the punishments provided for by these articles. This again leads to a non-uniform application of criminal legislation, violation of the principle of legal certainty, and raises the issue of proportionality of punishment.

Therefore, the vague wording of Articles 111-1 and 111-2 of the CCU leads to difficulty in differentiating between them when qualifying certain actions, understanding which actions are subject to criminal liability under these articles, and causes a non-uniform application of legislation and the imposition of punishments disproportionate to the offense committed.

3.3 Lack of prioritization of cases

The actual lack of prioritisation of cases under various parts of Article 111-1 from the CCU leads to overburdening both the law enforcement and judicial systems with cases related to actions that constitute the least public danger within the limits of Article 111-1. Another consequence can be the additional financial costs associated with both investigating cases at the stage of pre-trial proceedings and considering cases in court.

Judicial practice

Based on the analysis of judicial practice, as of September 15, 2023, the vast majority of sentences passed under Article 111-1 of the CCU are sentences passed under Part 1 which refers to the public denial by a citizen of Ukraine of the armed aggression against Ukraine, the establishment and approval of the temporary occupation of part of the territory of Ukraine, or public appeals by citizens of Ukraine to support the decisions and/or actions of the aggressor state, armed formations and/or occupation administration of the aggressor state, to cooperate with the aggressor state, armed formations and/or occupation administration of the aggressor state, and to not recognise the extension of state sovereignty of Ukraine to temporarily occupied territories of Ukraine – there are 353 of them in the register.

These are cases related to posts on social networks (mainly banned Russian social networks: Odnoklassniki and Vkontakte) – 148 cases, or regarding expressions near a private residence, or in public places such as a local market, a transport stop, etc. The resource of law enforcement agencies in the most numerous category of cas-

es is spent on the analysis of posts that the defendant published independently or that were shared or liked, and in the opinion of the prosecution, shared.

> *To realize his/her criminal intent aimed at public denial of the armed aggression against Ukraine, 'Person_4' shared several posts on his/her page on Odnoklassniki social network, including using the «like» function (thinks it's cool), which led to the algorithm programmed in this social network – 'PERSON_4 thinks it's cool» and the corresponding pinning of certain publications on her account page.*[43]

These cases also include the examination of such posts, it was conducted in at least 53 cases and the total cost was UAH 396,081,88. The most expensive examination among the analysed cases concerned analysis of posts on the Odnoklassniki network: its cost was UAH 24,853,92.[44]

> *Person_5 shared text and photo materials containing appeals to support the decisions and actions of the aggressor state, the armed formations of the aggressor state, to not recognize the extension of the state sovereignty of Ukraine to the temporarily occupied territories of Ukraine by placing them on the specified account on the Internet. According to the conclusion of the experts of the National Scientific Center «Institute of Forensic Expertise named after professor emeritus M. S. Bokarius» No. 9279/9625/11337-11342 of March 23, 2023, the above-mentioned text and photo materials contain information regarding the support for the armed aggression of the Russian Federation against Ukraine, the illegal annexation of the territory of Ukraine by the Russian Federation, the justification, approval of the temporary occupation of part of the territory of Ukraine, the representation of armed aggression of the Russian Federation against Ukraine as an internal civil conflict, the support for the activities of PERSON_6, the approval of and support for the Russian army's aggression and armed invasion of the territory of Ukraine, as well as the glorification of persons who carry out the armed aggression of the Russian Federation against Ukraine, namely the glorification of V. Putin, Y. Stalin, Russia, Russian people and Russian servicemen. The established information is expressed in the form of factual statements and evaluative judgments and has a public nature.»*

The materials themselves and their scope, however, are not cited in the text of the judgment.

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43 Judgment in case No. 727/8913/23 of August 22, 2023: https://reyestr.court.gov.ua/Review/113007941

44 Judgment in case No. 643/5811/23 of July 3, 2023: https://reyestr.court.gov.ua/Review/111931863

Although the procedural costs are borne by a convict, the probability that the state will be able to return these funds to the budget is doubtful as most of the defendants in this category are elderly, unemployed, etc.

Interview

Both representatives of law enforcement agencies, defense lawyers, and the judiciary point out that the justice system is overburdened. As of September 20, 2023, there were 6,426 proceedings under Article 111-1 and 853 proceedings under Article 111-2.[45] In addition to these proceedings, the system processes proceedings over violations of the laws and customs of war, of which more than 100,000 are currently registered, and continues to work with other general criminal offenses.

The lack of sufficient resources leads, among other things, to a decrease in the quality of the investigation. One of the respondents noted:

> *Well, due to the fact that the investigators are overburdened ... they don't have time to carry out all the necessary investigative actions, well, in turn, they try, you know, to limit themselves to a sufficient number of identifications and a minimum evidence base to send a case to court and not to investigate in more detail and carefully all the evidence that may be collected.* (from an interview with an employee of the prosecutor's office).

While some of the interviewed representatives from law enforcement agencies noted that there was no hierarchy of criminal offenses, prioritisation could therefore not be established and all cases must be investigated as they are recorded. Another part is convinced that the wording of the legislation already provides for a certain prioritization. In particular, the respondents indicated the misdemeanor-crime gradation within the various parts of Article 111-1 of the CCU and the difference in sanctions which also indicate the severity and public danger of certain violations compared to others. In particular, representatives of law enforcement agencies from the National Police, the SSU, and the prosecutor's office singled out cases concerning the heads of occupation administrations and senior officials in such administrations. The actions of which fall under Part 5 of Article 111-1 of the CCU, and concerning participants in illegal paramilitary formations, occupation "law enforcement agencies," whose actions fall under Part 7 of Article 111-1, were considered a priority.

> *In the de-occupied territories, first of all, attention should be paid to persons who held key positions in the administrations. For example, the temporary ad-*

45 ibid. 6

ministration of some settlement – head, mayor, etc., and primarily, of course, the people involved in illegal paramilitary formation – the illegally created police. It is necessary, first of all, to work on these people since they terrorized the local population and used torture and everything else there. Measures concerning people who simply supported the aggressor, provided them with food, water, or something else, repaired cars should be taken secondarily. (from an interview with an employee of the National Police).

> *... here you need to look at the sanctions of these articles and the sanctions of each part, it is not for nothing that the legislator put them in such a way that there are minor sanctions for some offenses, let's say under Part 1, Part 2, even Part 1 does not provide for deprivation of liberty. Meanwhile, for example, Part 6, Part 7 – these are serious crimes. Part 6 provides from 10 to 12 years in prison, Part 7 – from 12 to 15. Since the sanction of these articles provides for a heavier punishment, what does it mean? This crime is more socially dangerous, therefore, I would prioritize the investigation into more serious crimes, for which the sanction is heavier because they are more socially dangerous. This criminal also poses a greater social danger while being at large: this is a ready-made subject for recruitment, for further transmission of information about the movement of equipment, the location of our units. If they collaborated, contacts with the occupying forces remained.* (from an interview with a representative of the SSU).

At the same time, as noted above, the largest share of cases considered in court are cases opened under parts 1 and 2 of Article 111-1 of the CCU. The systemic problem of jurisdiction and low coordination of efforts between various law enforcement agencies was also highlighted separately. In particular, pre-trial investigations into crimes against the foundations of national security are currently carried out by representatives of the SSU, the SBI, and the National Police.

> *Currently, the pre-trial investigation in this category of criminal proceedings is carried out by investigators of security agencies, investigators of the State Bureau of Investigation, investigators of the National Police. And there is no centralized base... I start a pre-trial investigation against a certain person. I can't check if there are other criminal proceedings against this person or if someone is already documenting. That is, we will find out about it already after the start of the pre-trial investigation at the documentation stage. This can lead to the performance of double work by different bodies of pre-trial investigation.* (from an interview with a representative of the National Police).

Internal understanding of the possible prioritisation of cases by representatives of law enforcement agencies, however, will not have a practical reflection with-

out systemic solutions. To effectively use the limited resources of law enforcement agencies, it is worth noting the possibility of prioritising cases within the framework of Article 111-1 of the CCU at the system level, as well as a clear distribution of their jurisdiction and interaction between various agencies responsible for pre-trial investigation.

3.4 Preferential choice of detention as a measure of restraint for suspects at the stage of pre-trial investigation

If the prosecution files a motion to select a measure of restraint in the form of detention, the court grants such a motion without conducting a detailed study of the risks which determine the selection of such an exceptional measure of restraint.

Judicial practice

Pursuant to Part 6 of Article 176 of the CCU, during the period of martial law, a measure of restraint in the form of detention is applied to persons who are suspected or accused of committing crimes; in particular, under Articles 111-1 and 111-2 of the CCU, in the presence of risks specified in Article 177 of the CCU. The risks to be assessed by the court when determining a measure of restraint include: 1) hiding from pre-trial investigation bodies and/or court; 2) destroying, concealing, or distorting any of the things or documents that are essential for establishing the circumstances of a criminal offence; 3) exercising illegal influence on a victim, witness, other suspects, defendant, expert, and/or specialists in the same criminal proceedings; 4) obstructing criminal proceedings in other ways; 5) committing another criminal offense and/or continuing to commit a criminal offense of which a person is suspected or accused.

Therefore, the court should assess the presence and realism of risks when setting a measure of restraint. However, having analysed orders on the selection of a measure of restraint, a conclusion can be made that the risk assessment is often formal, the residence (origin) of a defendant from the territory that is temporarily occupied, and the gravity of the incriminated crimes are decisive when choosing a measure of restraint in the form of detention.

Among the analyzed orders on the selected measure of restraint in the form of detention for persons suspected of committing crimes under Articles 111-1 and 111-2 of the CCU, the following arguments can be singled out, on which the court relies when deciding:

- Gravity of the incriminated act.

> *...the existence of a risk of hiding from pre-trial investigation bodies and court to avoid criminal liability is confirmed by the fact that PERSON_5 is suspected of committing a particularly serious crime punishable by imprisonment for a term of up to 12 years, committed in collaboration with the occupation authorities of the Russian Federation and its representatives, who may contribute to the suspect's escape or illegal crossing the border.*[46]

- Reasonableness of suspicion.

> *The suspicion of PERSON_3 is fully confirmed by the evidence gathered in the criminal proceedings: the protocol of the interrogation of the witness PERSON_7 dated October 26, 2022; the protocol of the interrogation of the suspect PERSON_3 dated January 4, 2023; document review protocol dated January 3, 2023...*[47]

- Possibility of influencing witnesses, especially if a defendant and witnesses live in the same settlement.

> *The testimonies of witnesses in this criminal proceeding are of significant importance for establishing the circumstances of the criminal proceeding and can significantly affect the position of PERSON_3 as a suspect, and therefore there are reasonable grounds to believe that the latter has the potential to influence, including remotely, through other persons on witnesses in criminal proceedings who are residents of the territorial community where the suspect lives, to dissuade them from giving truthful, consistent statements during the pre-trial investigation and/or changing their statements later in court, to avoid or minimize criminal liability.*[48]

Judges quite often refer to the practice of the European Court of Human Rights, for example, judgments in the cases: *Fox Campbell and Hartley v. United Kingdom*, *Labita v. Italy*, *Murray v. United Kingdom*, *Ilgar Mammadov v. Azerbaijan*, *Nechiporuk and Yonkalo v. Ukraine*, *Idalov v. Russia*, *Garycki v. Poland*, *Chraidi v. Germany*, *Ilijkov v. Bulgaria* etc. However, such references are often formal. The phrases with the reference are duplicated from decision to decision, so it is difficult to assess whether the court really analysed the relevant practice of the ECHR, or whether the reference to the ECHR practice is an attempt to demonstrate formal compliance with European standards without actually applying them.

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46 Order in case No. 487/4067/23 of August 1, 2023: https://reyestr.court.gov.ua/Review/112633475
47 Order in case No. 953/105/23 of January 6, 2023: https://reyestr.court.gov.ua/Review/108392039
48 ibid. 42

Usually, when selecting a measure of restraint in the form of detention, the term of detention is extended until the end of the criminal proceedings. Furthermore, the use of bail as an alternative measure of restraint is not widespread; however, for a person suspected of committing a criminal offense under Part 4 of Article 111-1 of the CCU, the court set a measure of restraint in the form of bail in the amount of 20 times the subsistence minimum for able-bodied persons, which is UAH 53,680.[49]

Interview

Interviewed defense lawyers characterised the actual absence of an alternative to a measure of restraint in the form of detention as a problem.

> *This is a formally provided alternative, but it is so ghostly. The alternative is to apply no measure of restraint, but to really believe that no measure of restraint will be applied under SSU article is ridiculous.* (from an interview with a defense lawyer).

Detention in custody, according to the practice of defense lawyers, is also applied regardless of the crime's gravity, and/or the presence of children or persons with disabilities in the care of the accused.

> *In Kharkiv region, detention in custody is the only option. We had two exceptional cases when bail was set, the judges then were searched, a court of appeal canceled all this. We cannot have* [Article] *111 applied without detention. Even considering articles with minor offenses, it does not matter at all, the system is biased to such an extent that it is impossible. I have had many clients who have children, whose parents are bedridden disabled, and whose elements of crimes are not severe and they are held in a pre-trial detention center. Whatever you try to do, you won't do anything.* (from an interview with a defense lawyer).

3.5 Accusatorial bias in collaborationism cases and standards of evidence

An accusatorial bias is observed in collaborationism cases. It is manifested both in the number of acquittals, which are almost absent, and in the judgments delivered during the proceedings, which concern the selection of a measure of re-

49 Order in case No. 646/4400/23 of September 6, 2023: https://reyestr.court.gov.ua/Review/113278894

straint, which is almost exclusively a detention without taking into account the real circumstances and dangers, the recognition of sufficient evidence, or the reliability of which is doubtful, etc.

Judicial practice

Only two acquittals have been established: under Part 1 of Article 111-1[50] and Article 111-2,[51] both of which are based on the insufficiency and inappropriateness of the evidence collected during the pre-trial investigation.

In addition, as mentioned, in only one of the six established sentences from the court of appeals did the court impose a more lenient sentence than the court of the first instance, taking into account the circumstances that were known at the time of consideration in the first instance.

Interview

Among the problems identified by the interviewed defense lawyers, the main one is accusatorial bias in collaborationism cases. In particular, having analysed court judgments, it was possible to establish only two acquittals under Articles 111-1 and 111-2 of the CCU.

Defense lawyers also point out:

1) Lack of ensuring contestation in proceedings over collaborationism:

> *It is necessary to return the principle of contestation of these criminal proceedings, we should provide an opportunity; a person should be established in the order of contestation... and not by the principle of expediency that we have martial law and everyone, whom the security service does not like, receive such suspicions.* (from an interview with a defense lawyer).

It is also worth noting that in at least two cases that were covered by journalists,[52] a judge gave the trial participants the full printed text of the judgment after staying in a deliberation room for an hour or less which may indicate that it was written before the court debates.

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50 Judgment in case No. 279/1883/22 of February 10, 2023: https://reyestr.court.gov.ua/Review/108894798

51 Judgment in case No. 529/1660/22 of September 1, 2023: https://reyestr.court.gov.ua/Review/113253801

52 *ibid. 31*

2) The existence of a presumption of voluntariness of committing acts subject to criminal liability in the occupied territories:

> *...the burden of proof here will still be placed on a person who held such a position that was not taken up voluntarily, i.e., there is a presumption that a position was taken up voluntarily if a person worked. If a person signed documents, was identified as a school principal, then the presumption is made that he/she voluntarily took up a position and accordingly carried out activities in this position. If a person signed any documents, this is also proof of collaborationism.* (from an interview with a defense lawyer).

3) The low standard of evidence and inadmissibility of evidence, in particular, taking into account evidence that does not actually testify to the commission of an act (for example, testimony of witnesses from the words of third parties).

> *This is the inadmissibility of evidence. This is the absence of standards of evidence. This is evidence that does not actually testify to the commission of an act. These are testimonies of witnesses from the words of third parties. This is a Soviet-era phrase: 'I have not read it, but I condemn it.' This is what I encounter in 70% of cases.* (from an interview with a defense lawyer).

According to representatives of law enforcement agencies, the main evidence used in such cases are documents of occupation administrations, publications in Russian media, and social networks.

> *First of all, documents signed by a person are collected. For example, there is an acquaintance with some orders on appointment or order, where a person gives instruction by signing something, with public speeches of such persons, where persons sign documents, according to the position, videos where you can see specific actions that can be qualified as collaborationism. In addition, we interrogate witnesses who testify that they directly saw, what they saw from third parties, we establish third parties from whom the witnesses learned it, we reach directly the witnesses of collaborationism.* (from an interview with a representative of the National Police).

> *Quite a lot of evidence is obtained from the Internet through some manipulations with VPN-services, operational officers manage to hack into some sites and extract information from there: these are appointment orders, some other documents that testify to the appointment of this person to a certain position.* (from an interview with a representative of the prosecutor's office).

Many court judgments also refer to statements or orders of appointment as evidence of guilt. However, the question of the admissibility of such evidence arises given the difficulty of establishing authenticity. According to Part 3 of Article 9 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine", any act (decision, document) issued by bodies, their officials and employees in the temporarily occupied territory, is invalid and does not entail legal consequences except for documents confirming the fact of birth, death, registration of marriage, or divorce of a person in the temporarily occupied territory which are attached to the application for state registration of the corresponding act of civil status. Even in the case of documents confirming birth, death, registration of marriage, divorce of a person in the temporarily occupied territory, the procedure for recognising such documents has not yet been approved, including due to the difficulty of establishing the authenticity of such documents issued in the occupied territory. At the same time, documents on acceptance to a position or other documents are issued by the occupying power and their officials are unconditionally used as proper evidence for the prosecution.

3.6 Disproportion between violation and punishment.

The difficulties in differentiating between articles 111-1 and 111-2 of the CCU, as well as vague wording, resulted in wide discretion from investigative bodies, and entailed the imposition of punishments disproportionate to the established violation. In particular, in the context of differentiating the elements of crimes under Articles 111-1 and 111-2 of the CCU, it is worth highlighting a significant difference between the sanctions of these articles. In the cases under Article 111-2 of the CCU considered above, there were qualified actions that fall under parts 3 and 4 of Article 111-1. At the same time, Part 3 of Article 111-1 provides for punishment in the form of community service for a term of up to two years, or arrest for a term of up to six months, or deprivation of liberty for a term of up to three years with deprivation of the right to hold certain positions or engage in certain activities for a term from 10 to 15 years. Part 4 of Article 111-1 provides for punishment in the form of a fine of up to 10,000 non-taxable minimum incomes of citizens or deprivation of liberty for a period of three to five years with deprivation of the right to hold certain positions or engage in certain activities for a period of 10 to 15 years and with confiscation of property.

Article 111-2 of the CCU, under which the acts were qualified, in turn, provides for punishment in the form of imprisonment for a term of 10 to 12 years with deprivation of the right to hold certain positions or engage in certain activities for a term of 10 to 15 years and with or without confiscation of property.

Non-uniform application of sanctions and disproportionality of punishment are also observed in cases qualified under the same part of Article 111-1 of the CCU. In particular, a person who voluntarily slaughtered two rams and personally handed over "material resources" to the representatives of the aggressor state: two slaughtered rams, "thus ensuring their occupation activities in the territory of the Boromlia united territorial community",[53] was sentenced to one year and three months in prison with deprivation of the right to hold positions in state authorities and local self-government bodies for 10 years and with confiscation of property.

At the same time, a person who "provided material resources at the disposal of servicemen of the occupying forces of the Russian Federation free of charge," namely, cooked food, washed clothes, and gave instructions to local residents of the Boromlia village so that the latter slaughtered rams, from which she prepared food for the military of the Russian Armed Forces, also gave the ram carcasses to other servicemen of the Russian Armed Forces free of charge. The defendant was therefore sentenced a fine in the amount of 1,050 non-taxable minimum income, which is 17,850 hryvnias, and deprivation of the right to hold elected positions in government and local self-government bodies for 10 years and the confiscation of all available property.[54]

In both cases, the defendants entered into plea agreements.

A person who repeatedly, voluntarily and free of charge, provided material resources at the disposal of servicemen from each rotation of the occupying forces of the Russian Federation; namely, food products, alcoholic beverages, and prepared food, etc., was sentenced to three years in prison with deprivation of the right to hold positions of government agencies, state administration, local self-government, or bodies of provision of public services for 10 years with confiscation of 1/2 of personal property.[55]

A person who provided "material resources" to unidentified servicemen of the Russian Federation free of charge, namely, food in the form of two plastic bags with pork meat, with a total weight of about 20 kg, was sentenced to four years in prison with deprivation of the right to hold positions of government agencies and local self-government for 12 years.[56]

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53 Judgment in case No. 588/713/22 of August 18, 2022: https://reyestr.court.gov.ua/Review/105808995

54 Judgment in case No. 588/672/22 of September 6, 2022: https://reyestr.court.gov.ua/Review/106096380

55 Judgment in case No. 545/5177/22 of November 10, 2022: https://reyestr.court.gov.ua/Review/107246755

56 Judgment in case No. 577/3465/22 of November 15, 2022: https://reyestr.court.gov.ua/Review/107375149

3.7 Public pressure on justice system

The interviewed representatives of law enforcement agencies noted that they had not faced threats or pressure in connection with their work on collaboration cases. This is explained by the fact that law enforcement agencies represent the side of the prosecution, and accordingly, there are no grounds for identifying them with a defendant. One of the respondents also noted that the internal beliefs of the judiciary representatives may lead to the selection of a punishment higher than was proposed by the prosecution.

> *I know cases of the opposite. When the court chooses greater punishment than the prosecution asks. And this is primarily because, unfortunately, judges are also people, and this is primarily due to a subjective attitude since we know that a judge passes a sentence based on internal conviction, evaluating the circumstances of the case quite subjectively and, unfortunately, we have, as I said from the very beginning, relevant judicial errors*. (from an interview with a defense lawyer).

Accusatorial bias in collaborationism cases is explained not only by public pressure on the system but also by the beliefs of representatives from law enforcement agencies and the judiciary. The experience of the defense in this matter is different. Defense lawyers are exposed to public pressure as representatives of defendants with whom they are identified in the absence of a full understanding of the role of the defense in litigation. Respondents noted that the pressure was expressed both in threats on social networks and in insults during personal communication.

> *[Answer to the question "Have you faced pressure or threats against defense lawyers in connection with working with this category of cases?"] Constantly. First, it is directly from the so-called, I would classify them as activists. That is, when they start sending you certain threats on social networks, when sometimes they insult you in courts, there is swearing, there are curses against defense lawyers and all that. Unfortunately, this is again because our society sometimes does not understand the role of the legal profession in the rule of law and that the institution of the legal profession is not a way to justify a crime. This is a tool for the protection of human rights during litigation so that the rights are respected and a person is punished if he/she committed a corresponding crime for the crime committed and not another one that would worsen his situation. And that all mitigating circumstances be applied to a person charged with a crime*. (from an interview with a defense lawyer).

> *...you always start working with a case with fear, you understand that there are some patriots, volunteers, they call themselves whatever they want. Citizens with a conscious position, and some people who believe that God gave them a right to accuse you of treason because you defend a traitor and you are probably also a traitor and you must answer.* (from an interview with a defense lawyer).

Two respondents also mentioned pressure from law enforcement agencies.

> *In addition, [there is pressure] from the law enforcement agencies, since a defense lawyer who provides legal assistance in such cases immediately receives increased attention, sometimes searches may be conducted and the guarantees of the defense lawyer's activity may be violated in other ways, such as wiretapping, conducting investigative actions. Although it is illegal, it does happen.* (from an interview with a defense lawyer).

The defense side, however, also faces a certain "internal pressure" due to their own beliefs. One of the respondents noted that he refused to work with cases opened under parts 6, 7 and 8 of Article 111-1 and does not work with cases opened under Article 111-2.

> *I also refuse to work [with cases opened] under parts 6, 7, 8, I do not work [with cases opened] under Article 111-2, this is my personal attitude. I choose my clients when I see the innocence of a person, I take them. I protect the citizens of Ukraine who remained loyal to the country and whose position is patriotic. Being under constant shelling and air raid alerts in Kharkiv region, I invest my time, my many years of work experience, I have been working for 18 years, only in people who found themselves in difficult circumstances, were forced to do during the occupation or accept something from the occupier. Or somehow to collaborate in order to survive, I can't say that I only take good ones, but I choose people. I don't take people who collaborated on purpose, who have an unclear position. I don't take people for whom 'everything is not so clear', this is not my category. Many defense lawyers in Kharkiv region... refuse to work with cases under these articles.*» (from an interview with a defense lawyer)

In addition to the difficulty of applying Articles 111-1 and 111-2 of the CCU due to their vague and broad wording, work with them is also complicated by the fact that the issue of collaboration with representatives of the aggressor state is a socially significant and acute topic. Moreover, the limited understanding of the role of defense lawyers in litigation leads to the identification of a defense lawyer with a defendant, which, while working with collaborationism cases in conditions of prolonged armed aggression, puts defense lawyers at risk of increased public pressure.

CONCLUSIONS

1. The presence of at least ten draft laws that propose amendments to the legislation on collaborationism, as well as the fact that none of the registered draft laws were adopted, indicate both the imperfection of the legislation and the need for its revision, as well as the lack of a unified understanding of amendments that should be adopted for the effective and proper application of Articles 111-1 and 111-2 of the CCU. Considering the legislator's stated goal of introducing new articles 111-1 and 111-2 as prevention of collaborationism to the detriment of national interests, none of the proposed amendments are based on the assessment of the achievement of this goal due to the introduction of new offenses and the implementation of this legislation.

2. The analysis of judicial practice shows the difficulty in differentiating the qualification of actions that may fall under collaborationism or abetting the aggressor state. Although Articles 111-1 and 111-2 were introduced into criminal law more than a year ago, their broad wording and overlapping dispositions do not allow for developing a proper practice of differentiation in their application. The survey of representatives of law enforcement agencies also showed differences in the interpretation of the articles by different performers, resulting in different applications in practice.

3. The practice of applying Articles 111-1 and 111-2 also shows the disproportionality between violation and punishment, in particular, both in the context of differentiating the acts falling under Articles 111-1 and 111-2, the sanctions of which differ significantly, and in the context of the application of punishments within the scope of Article 111-1. In addition, a non-uniform application of sanctions for the same acts is observed.

4. One of the biggest identified problems is the broad interpretation of Articles 111-1 and 111-2 due to the vagueness of their wording at the drafting stage. The articles contain concepts whose limits are not established by the legislator, such as "material resources", "economic activity", "interaction" which are applied within the discretion of law enforcement agencies thus violating the principle of legal certainty. Persons, who stay in the occupied territories, do not have a clear understanding of which actions are permitted and which may entail criminal liability. Such misunderstanding creates additional pressure and intimidates the population in the occupied territories, and the wide dis-

cretion of individual actors also carries corruption risks. The lack of a clear definition endangers reintegration processes and the people's trust in justice.

5. In conditions of an overburdened law enforcement system, there is no prioritisation of cases within the scope of Article 111-1, which entails spending resources mainly on cases opened under parts 1 and 2 of Article 111-1, which are misdemeanors, in contrast to parts 5, 6 and 7, which are crimes, and the priority of which is noted by representatives of law enforcement agencies.

6. Accusatorial bias in the consideration of cases under articles 111-1 and 111-2 leads to a lack of contestation between the parties, a low threshold of evidence, and consideration of insufficient evidence for prosecution, as well as the use of detention as a measure of restraint without alternative. The practice of consideration for proceedings on collaborationism also shows that documents issued by occupation authorities are considered contrary to the state policy of not recognising them.

7. The duration of the armed aggression against Ukraine, the high public interest in collaborationism cases, the beliefs of representatives of law enforcement agencies and the judiciary, as well as the misunderstanding of the role of the defense lawyers in litigation, result in significant public pressure for the consideration of cases under articles 111-1 and 111-2, therefore complicating the work of the defense.

RECOMMENDATIONS

1. To develop draft amendments to collaborationism legislation to clarify the broad wording and clearly differentiate between the elements of crimes, in particular, under Articles 111-1 "Collaborationism", 111-2 "Abetting the aggressor state", and 436-2 "Justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, glorification of its participants") of the CCU. These amendments should include a specific list of actions leading to criminal liability; these acts should include not only performing certain work or taking up a post in the occupation administration, but also the consequences of such actions for the Ukrainian state security, as well as the life, health, and security of people. These consequences should be systematically examined by the court.

2. To consider the public danger and the consequences of an act provided for in Articles 111-1 and 111-2 of the CCU and provide for proportionate and fair punishments for such violations. Among them, it is worth considering the possibility of removing the least serious category of violations from the sphere of criminal justice, ensuring lustration measures, and consider the possibility of developing amnesty legislation. Such steps will even out the gap between the public danger of an act and the punishment for it, but also contribute to the relief of the law enforcement system and the justice system, as well as aid the reintegration of the de-occupied territories of Ukraine and the citizens of Ukraine who live there.

3. For effective investigation into cases related to the commission of crimes under Articles 111-1, 111-2 of the CCU, it is necessary to develop a unified approach (strategy) for law enforcement agencies working with this category of cases. Such a strategy should provide a framework for cooperation between different agencies to prevent the duplication of actions, clearly differentiate between different articles, interpret broad concepts to reduce the discretion of a specific actor (investigator, prosecutor), and the non-uniform application of legislation. It should also contain criteria for proving voluntariness and determining which evidence does not meet the criterion of propriety and sufficiency, as well as for prioritising cases within the scope of Article 111-1.

4. The approaches to criminal liability of Ukrainian citizens living in occupied territories for cooperation with occupation administrations, the reintegration of liberated territories, and the goal to fully return the population of these territories into the legal and cultural field of Ukraine should be taken into account.

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