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### **CRIMINAL POLICY CHALLENGES UNDER CONDITIONS OF HYBRID WAR: SOME ISSUES AND SOLUTIONS FROM UKRAINE**

**Yevhen Pysmenskyy**

**Associate Professor; Dr.**

**Luhansk State University of Internal Affairs named after E.O. Didorenko  
(Ukraine)**

**Contact information**

Address: 5 Lagerne Pole, Mykolaiv (Ukraine), 54030

Phone: +380 506 817 621

E-mail address: ye.pysmenskyy@i.ua

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#### **ABSTRACT**

This article studies the specifics of national criminal policy implementation under the influence of extraordinary geopolitical factors on it. Such policy will be reviewed with Ukraine serving as an appropriate example. This country has been recently forced to adjust its own ways of implementation of the state policy against crime based on atypical modern challenges and threats. This refers to the special nature of a hybrid war, which has been actively fought on the territory of Ukraine since 2014. The author examines two key areas of criminal policy (definition of the limits of criminal behavior and establishing criminal law consequences of the committed offenses), implemented under the extraordinary circumstances of hybrid war. Symptomatic features of the hybrid form of foreign aggression are defined in the piece. At the same time, options of criminal law in combating and preventing such aggression are researched.

Special focus is placed on new acts that have been criminalized as well as those that might need further criminalization. Attention is paid to the issues of criminal law protection of national and historical memory, and to the concept of journalism related crimes. The

importance of amnesty as an effective tool to resolve conflicts between individual and state is also emphasized in the article.

**KEYWORDS**

Ukraine, hybrid war, criminal policy, criminalization, collaboration, amnesty

## INTRODUCTION

The concept of hybrid war has been increasingly used in the scholarly research of a specific phenomenon that is gradually becoming more widespread in the twenty-first century. Research on this phenomenon, the study of the history of its origin, analysis of current technologies of hybrid war to further their successful combating and prevention, as well as forecasting possible trends in this area, are crucial tasks for the legal science. The relevant experience of countries that have faced diverse manifestations of hybrid war might be helpful in the search for solutions to these challenges. Unfortunately, many examples have accumulated with regards to the hybrid war phenomenon: e.g. the war in Karabakh, the Lebanese-Israeli war of 2006, the Russian-Georgian war in 2008, etc. There is no doubt that the current Russian-Ukrainian war which began in 2014 deserves special attention as well.

According to experts, a hybrid war covers the use of classical techniques of warfare, exercise of military aggression (involving both regular and irregular military groups) in conjunction with public denial of involvement of a certain state to a certain conflict. Among the mandatory components of such type of war that mostly reveals the hybrid character of today's war, are the realization of powerful informational influence on the enemy (information warfare<sup>1</sup>) and the use of modern computer technologies in order to achieve specific political goals (cyber war<sup>2</sup>). As correctly put by one author, though each individual element of the hybrid war scenario is not new and in fact has been used in almost all such wars in the past, its uniqueness in this case is in the consistency and correlation of these elements, dynamism and flexibility of their application, and the increased input of the informational component. Moreover, the information factor in some cases becomes an independent component and is no less important than the military one.<sup>3</sup> Informational counteraction is carried out continuously throughout the hybrid war.

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<sup>1</sup> Using and managing information as a way of preparing for military action and their support have found their clearest manifestation under the circumstances of current hybrid war in Ukraine. For more details see: Maria Snegovaya, "Putin's information warfare in Ukraine. Soviet origins of Russia's hybrid warfare, Russia Report 1," Institute for the Study of War, Washington, DC (2015) // <http://understandingwar.org/sites/default/files/Russian%20Report%201%20Putin's%20Information%20Warfare%20in%20Ukraine-%20Soviet%20Origins%20of%20Russias%20Hybrid%20Warfare.pdf>.

<sup>2</sup> For example, Russian hackers are using Twitter as an ultra-stealthy way of concealing their intrusions into sensitive Western government computer systems — a new surveillance technique that blends cutting edge digital engineering with old-fashioned spy tradecraft (Sam Jones, "Russia's Cyberwarriors Use Twitter to Hide Intrusion," *Financial Times* (July 29, 2015) // <http://www.ft.com/intl/cms/s/0/74d964a2-3606-11e5-b05b-b01debd57852.html#ixzz3hPLzdvvz>).

<sup>3</sup> Volodymyr Horbulin, "Hibrydna viina' yak kliuchovy instrument rosiiskoi heostrategii revanshu" ('Hybrid War' As the Key Instrument of Russian Revenge Geostrategy), *Stratehichni priorytety* 4 (2014): 5.

It usually starts long before the first armed actions and is deliberately aimed at the destruction of the spiritual world of "enemy" nations and peoples.<sup>4</sup>

Today the need for understanding the importance of the informational component of a hybrid war is increasingly reflected in the actions of many governments and interstate organizations. Even more powerful is the desire to learn how to resist unusual (sometimes subtle) manifestations of hybrid war and be able to prevent their occurrence. The following are just some of the recent examples.

In 2013 the Tallinn Manual – an academic study on how international law applies to cyber conflicts and cyber warfare – was published. It sets out ninety-five 'black-letter rules' governing such conflicts and also addresses topics including sovereignty, state responsibility, international humanitarian law, and the law of neutrality.<sup>5</sup>

The resolution on the "EU strategic communication", which was voted on recently by foreign affairs MEPs, stresses that the EU is under growing pressure to counter disinformation campaigns and propaganda from countries, such as Russia, and non-state actors, like ISIS/Daesh, Al-Qaeda or other violent jihadi terrorist groups. Hostile propaganda against the EU and its member states seeks to distort the truth, provoke doubt, divide the EU and its North American partners, paralyze the official decision-making process, discredit the EU institutions and incite fear and uncertainty among EU citizens, according to the text of the resolution.<sup>6</sup>

US officials have accused Russia of attempting to influence the 2016 election by hacking the Democratic National Committee and other political organizations.<sup>7</sup>

Finnish analysts prepared and published a report, in which they extrapolated the current events in Ukraine on the prospects of Finland participating in a similar hybrid confrontation. Among other things, this report views hybrid warfare as a quasi-theory of Russia's foreign policy.<sup>8</sup>

One should take into account that nowadays there are a set of countries which can be the perfect battlefield for the hybrid war conflict. Ukraine is not an exception. Yevhen Mahda correctly emphasizes this, by defining the following prerequisites of the hybrid war in Ukraine at the beginning of the confrontation: the

<sup>4</sup> Mykhailo Trebin, "'Hibrydna' viina yak nova ukrainska realnist" ('Hybrid' War as New Ukrainian Reality), *Ukrainskyi sotsium* 3 (2014): 120.

<sup>5</sup> Michael N Schmitt, ed., *Tallinn Manual on the International Law Applicable to Cyber Warfare* (New York, United States of America: Cambridge University Press, 2013).

<sup>6</sup> "Be aware of Russian and ISIS propaganda, warn Foreign affairs MEPs," [www.europarl.europa.eu](http://www.europarl.europa.eu/news/en/news-room/20161010IPR46530/be-aware-of-russian-and-isis-propaganda-warn-foreign-affairs-meps) (October 2016) // <http://www.europarl.europa.eu/news/en/news-room/20161010IPR46530/be-aware-of-russian-and-isis-propaganda-warn-foreign-affairs-meps>.

<sup>7</sup> "US government officially blames Russia for hacking political campaigns to interfere with elections," [www.independent.co.uk](http://www.independent.co.uk/news/world/americas/russia-hacking-us-government-official-blame-dnc-us-election-2016-a7351331.html) (October 2016): // <http://www.independent.co.uk/news/world/americas/russia-hacking-us-government-official-blame-dnc-us-election-2016-a7351331.html>

<sup>8</sup> Bettina Renz and Hanna Smith, "Russia and Hybrid Warfare – Going Beyond the Label," *Aleksanteri papers* 1 (2016); [www.stratcomcoe.org](http://www.stratcomcoe.org/bettina-renz-and-hanna-smith-russia-and-hybrid-warfare-going-beyond-label) // <http://www.stratcomcoe.org/bettina-renz-and-hanna-smith-russia-and-hybrid-warfare-going-beyond-label>.

presence of a significant political class in Russia which is interested in implementing its own imperial ambitions; Russia's desire to bring the world back from multipolar to bipolar status; dependence of a significant part of the EU territory on Russia's energy supplies; the obvious desire of Russia, by means of conquering Ukraine, to break the will to resist not only within the CIS countries but in the Baltic republics and Poland as well.<sup>9</sup>

Indication of hybrid features in the definition of such a war is rather arbitrary since, in fact, its traditional components, such as the external use of armed bands, groups, irregulars forces or mercenaries, which carry out acts of armed forces against another state, remain one of the typical manifestations of aggression (Article 3 (g) of the Convention of the UN General Assembly "Definition of aggression"<sup>10</sup>) and thus should entail the same legal consequences as open aggression or even more severe consequences.<sup>11</sup> Today the hybrid aspect of the Ukrainian-Russian confrontation is described in detail in Ukrainian as well as in foreign literature, with appropriate analysis of the informational warfare specifics provided.<sup>12</sup>

Among other things, hybrid war requires serious consideration as a factor that has a damaging impact on all spheres of social and political life. Of course, its impact on the implementation of legal policy in general and the policy of combating crime in particular deserves special attention.

During the modern period of developments in any given state, the policy of combating crime (as part of criminal policy) can become subject to regular changes related to the fast transformation of social relations.<sup>13</sup> Deterioration of social,

<sup>9</sup> Yevhen Mahda, "Vykylyky hibrydnoi viiny: informatsiyni vymir" (The Challenges of Hybrid War: Information Aspect), *Naukovi zapysky Instytutu zakonodavstva Verkhovnoi Rady Ukrainy* 5 (2014): 139.

<sup>10</sup> *Resolution 3314 (XXIX) on 'Definition of Aggression'*, United Nations General Assembly (December 14, 1974) // [https://documents-dds-](https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement)

[ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement](https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/739/16/IMG/NR073916.pdf?OpenElement).

<sup>11</sup> "In light of the challenges presented by Russia's hybrid approach to international conflict, the international community clearly needs a new lexicon. The concept of Russian hybrid warfare has gone mainstream over the past two-and-a-half years, but has yet to translate into the kind of unambiguous terminology capable of accurately portraying what Russia is doing in east Ukraine. One new way of describing the military units in east Ukraine could be 'hybrid Russian forces': this would highlight Russia's overall responsibility, while acknowledging that the forces in question are mixed in composition and differ from conventional armed forces. Likewise, what is variously called 'the Ukraine crisis' or 'the Ukraine conflict' would be more accurately described as a 'Russian hybrid war'" (Peter Dickinson, "How the International Media Enables Russian Aggression in Ukraine," *Atlantic Council* (August 3, 2016) // <http://www.atlanticcouncil.org/blogs/new-atlanticist/how-the-international-media-enables-russian-aggression-in-ukraine>).

<sup>12</sup> Michael Kofman and Matthew Rojansky, "A closer look at Russia's 'hybrid war'," *Kennan Cable* 7 (April 2015) // <https://www.wilsoncenter.org/sites/default/files/7-KENNAN%20CABLE-ROJANSKY%20KOFMAN.pdf>.

<sup>13</sup> As correctly mentioned in legal literature, "It should be pointed out that the objectives, tasks and priorities determined and achieved by the state authority are not once and forever established. They are established, modified and corrected based on social development, intention to realize various interests and needs of state, situations occurring in the areas of foreign and domestic policy areas. They also can be modified either in the case of achievement of previous objectives and tasks or determination of impossibility of their implementation due to different reasons or social circumstances" (R.E. Dzhanarayeva, L. Bissengali, A.A. Bazilova, M.E. Akbolatova and M.K. Bissenova, "Problems of

economic and political issues against the background of hybrid war is one of the factors that directly influences such developments. As we know, criminal policy is implemented using a set of inter-related methods, by prescribing limits of criminal behavior and defining optimal measures to influencing it. The effectiveness of combating offenses against all groups of human relations depends on how reasonable, consistent with legal principles, and unmistakable the criminal policy is.

Social and political changes in Ukraine that took place in 2014 and are still underway, require rejection of the established negative trends in the implementation of state policies in all areas, including the field of criminal law. Due to a number of circumstances this sector is particularly sensitive today. The need for reforming it requires, among other things, moderation and caution in the usage of various criminal policy methods, careful and thorough analysis of the criminalization and decriminalization grounds, and compliance with specific conditions.

In recent years, Ukrainian lawmakers have mostly used the above-mentioned instruments to respond to new threats for the state security. Among them are especially aggressive actions of the Russian Federation in the Autonomous Republic of Crimea, that have led to the annexation of this Ukrainian territory, and also the beginning of the military conflict in the Donetsk and Luhansk regions, which has resulted in the temporary loss of Ukrainian sovereignty in some parts of these regions. The intervention by the Russian Federation leadership into Ukrainian politics, as well as its aggressive actions in Ukraine have received proper legal response both on the top level of Ukrainian government and on foreign as well as international levels. Moving Russian military forces to the territory of Ukraine in violation of national and international legal acts has been correctly recognized as partial occupation of the sovereign territory of Ukraine.

As an example, on April 15, 2014, the Parliament of Ukraine adopted the Law, which defined the status of the territory of Ukraine that has been temporarily occupied because of the military aggression by the Russian Federation and has established special legal regime on this territory.<sup>14</sup> In its resolution from January 27, 2015, the Parliament of Ukraine has declared the Russian Federation the aggressor state and urged international partners of Ukraine to prevent the impunity of those responsible for crimes against humanity committed since the beginning of

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Formation of the Concept of Criminal Policy of State in the Theory of Criminal Law," *Middle-East Journal of Scientific Research* Vol. 14 No 4 (2013): 508 // DOI: 10.5829/idosi.mejsr.2013.14.4.2120).

<sup>14</sup> *Law of Ukraine on Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine*, Parliament of Ukraine (April 2014) // <http://zakon3.rada.gov.ua/laws/show/1207-18> [in Ukrainian].

such aggression.<sup>15</sup> On March 27, 2014, the UN General Assembly adopted Resolution on the territorial integrity of Ukraine № 68/262, confirming recognition of Ukraine's territorial integrity in its internationally recognized borders.<sup>16</sup> The authors of this document were Germany, Canada, Costa Rica, Lithuania, Poland and Ukraine.

European institutions provided adequate response to the events in Ukraine. As a recent example, the Resolution of the Parliamentary Assembly of the Council of Europe 2132 (2016) once again condemned the illegal annexation of Crimea and its continuing integration into the Russian Federation, in breach of international law and the Statute of the Council of Europe (ETS No. 1).<sup>17</sup> In its Resolution 2133 (2016) the Assembly also expressed concern over the Russian military intervention in Eastern Ukraine, which directly violates international law and the principles upheld by the Council of Europe.<sup>18</sup>

The Russian Federation has justly suffered sanctions imposed by the European Union, the United States, and other countries and international organizations for committing aggressive actions in violation of the territorial integrity of Ukraine. Although, as history has often proven, sanctions imposed in order to cease military actions and force a specific country to withdraw its troops from the border clashes are not likely to succeed.<sup>19</sup> Nevertheless, they remain a clear testimony to the civilized community that awards exceptional value to the inviolability of territorial integrity as an important legal and political principle of the twenty-first century.<sup>20</sup>

The Ukrainian experience in hybrid war and its implementation of criminal policy in this situation is the exploratory foundation that should enable jurists to

<sup>15</sup> *Act on Appeal of the Supreme Council of Ukraine to the United Nations, European Parliament, Parliamentary Assembly of the Council of Europe, NATO Parliamentary Assembly, OSCE Parliamentary Assembly, Parliamentary Assembly of GUAM, National Parliaments of the World on the Recognition of the Russian Federation as Aggressor State*, Parliament of Ukraine (January 2015) // <http://zakon0.rada.gov.ua/laws/show/129-19> [in Ukrainian].

<sup>16</sup> "General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region," 68th Session of the UN General Assembly (March 2014) // <http://www.un.org/press/en/2014/ga11493.doc.htm>.

<sup>17</sup> *Resolution 2132 (2016) on Political consequences of the Russian aggression in Ukraine*, Parliamentary Assembly of the Council of Europe (October 12, 2016).

<sup>18</sup> *Resolution 2133 (2016) on Legal remedies for human rights violations on the Ukrainian territories outside the control of the Ukrainian authorities*, Parliamentary Assembly of the Council of Europe (October 12, 2016).

<sup>19</sup> Viljar Veebel and Raul Markus, "Lessons From the EU-Russia Sanctions 2014-2015," *Baltic Journal of Law & Politics* 8:1 (2015): 188 // DOI: 10.1515/bjlp-2015-0015.

<sup>20</sup> Russia's official leadership has denied any involvement in the crimes committed and still being committed in Ukraine, while trying its best to mask illegal activities in Ukraine. Unfortunately, the Russian government has been using its high status of the permanent UN Security Council member, by blocking adoption of any decision on Ukraine aimed at resolving the conflict, since the party to such conflict is Russia itself. This situation raises a feasibility of reforming the system of decision-making in the UN Security Council that could prevent and/or slow down the adoption of important decisions on the security of any state ("The Veto. Research Report," [www.securitycouncilreport.org](http://www.securitycouncilreport.org) (October 2015): // [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research\\_report\\_3\\_the\\_veto\\_2015.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf); Anna Spain, "The U.N. Security Council's Duty to Decide," *Harvard National Security Journal* Vol. 4 (2013): 383-384; Richard Butler, "Reform of the United Nations Security Council," *Penn State Journal of Law & International Affairs* Vol. 1, No 1 (2012): 32-33).



develop appropriate theoretical and law policy base for combating crime under atypical circumstances. For the first time in its history, Ukraine has faced the need to adjust its public policy based on the impact of external factors on it. Such factors combine displays of both open and concealed aggression, which greatly complicates the goals of the state in its fight against crime. The conditions for development of the criminal policy of Ukraine are anything but ordinary for many other countries. Thus, errors, mistakes, and flawed lawmaking decisions that characterize this process to some extent, are subject to scientific study, and, taken together, they should create a solid foundation for their prevention in future.

In taking into account the specific area of criminal regulation, which primarily consists of establishing criminality/non-criminality of an act and legal consequences of committed crimes, one can distinguish two key areas of the state's criminal policy: 1) defining the limits of criminal behavior by criminalizing and decriminalizing acts; 2) defining criminal consequences of crimes, which are usually carried out by penalization and depenalization.

During the implementation of such areas of criminal policy under hybrid war conditions, there are several issues that should be addressed by legal scholarship. Such issues are waiting for their perspective solution and are still relevant for countries that are not safe from the impact of hybrid war.

The first issue is the search for the right balance between strengthening the repressive component of criminal policy (particularly by consolidating the role of criminal law to ensure protection of the principles of national security, information relations, the military field etc.) and enabling a sensible compromise, while at the same time preventing violation of basic rights and freedoms.

The second concerns the emergence of new socially dangerous acts as a result of hybrid war environment and finding optimal ways to criminalize them without violating the established principles of criminal law.

The third issue covers the need for removal by legal means of conditions for further escalation of hybrid war and for its transformation. This is especially true for the area of national information security.

From the legal perspective, it is very important to examine issues of ensuring effectiveness of criminal policy that may experience flexible transformation during contemporary (external) threats. Here the need to develop public doctrine of criminal policy that would take into account the discussed factors comes to the foreground. There is no doubt that, just like any other policy, criminal policy should include the availability of a strategic political vision.<sup>21</sup> The effectiveness of criminal

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<sup>21</sup> V'iacheslav Borysov and Pavlo Fris, "Poniattia kryminalno-pravovoi polityky" (The Definition of Criminal Policy), *Visnyk Asotsiatsii kryminalnoho prava Ukrainy* 1 (2013): 20.



policy will be greatly improved when such activity is well planned, thoroughly designed, justified and consistent. When implementation of criminal policy becomes unpredictable, its effectiveness is reduced greatly.<sup>22</sup>

## 1. DEFINITION OF CRIMINAL OFFENSES AS THE MOST IMPORTANT DIRECTION OF THE CRIMINAL POLICY

The main methods of the state criminal policy implementation are the definition of acts classified as criminal (criminalization) and the exclusion of act from the group of already existing crimes (decriminalization).<sup>23</sup>

With the adoption of the Criminal Code of Ukraine (CC of Ukraine) in 2001, some streamlining of the processes of criminalization of socially dangerous acts and decriminalization of acts that lost the required level of social danger has happened. However, the permanency of issues in almost all areas of social life, the perception of the criminal law as the only successful tool to address them, the absence of stability in political processes, and other factors, prompted widespread use of such methods by the state. Unfortunately, one had to often admit the wrongness of criminalization, untimely and unjustified decriminalization, non-systematic approach to these processes, and absence of the adequate level of scientific support of the legislative process and so on.

Ukraine's status under the conditions of hybrid warfare significantly affects the processes of criminalization/decriminalization of behavior. With that, the criminalization method obtains its clear priority, since appropriate environment helps to identify new socially dangerous types of human behavior.

For example, aggressive actions of the Russian Federation in Crimea, which resulted in the annexation of this territory of Ukraine and the beginning of the military conflict in Donetsk and Luhansk regions, have led to the adoption of a number of laws that established criminal liability for acts with public danger elements directly connected to those events. Such criminalization covers the following offenses:

1) Interference with the legitimate activities of the Armed Forces of Ukraine and other military formations during the special period (according to Article 114-1 of the CC of Ukraine). Causing harm to the defense capacity of Ukraine in the form of obstructing activities of Ukrainian military units (their blocking, etc.) has been one of the earliest manifestations of hybrid war and became a serious challenge at

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<sup>22</sup> Yurii Baulin, Mykhailo Buromenskyi, Volodymyr Holina, *et al.*, *Suchasna kryminalno-pravova systema v Ukraini: realii ta perspektyvy* (Modern Criminal Law System in Ukraine: Realities and Prospects) (Kyiv: BAITE, 2005), 187.

<sup>23</sup> Pavlo Fris, "Kryminalizatsiia i dekriminalizatsiia u kryminalno-pravovii politytsii" (Criminalization and Decriminalization in the Criminal Policy), *Visnyk Asotsiatsii kryminalnoho prava Ukrainy* 1 (2014): 20.

the beginning of the active phase of Ukrainian-Russian confrontation in spring of 2014. It is no accident that the enhancement of legal protection of the defense capability was the primary step by Ukrainian legislator through the criminalization of actions described in Art. 114-1 of the CC of Ukraine. International legal acts concerning protection of state security (e.g., the Final Act of the Conference on Security and Cooperation in Europe, the UN, Helsinki, August 1, 1975) emphasize the need for countries to use measures necessary to ensure a sufficient level of both internal and external security of the state, which is the key to "common" security in the world. Therefore, according to the reasonable voices of academics, establishing criminal liability for obstructing legitimate activities of the Armed Forces of Ukraine and other military units fully meets the requirements of the international community to safeguard state security.<sup>24</sup>

One of the current examples of the application of the relevant criminal law provision is as follows. A group of people was found guilty of committing the abovementioned crime. They have created a barricade on the railway track not far from the railway station platform by using sleepers stacked near the track as well as other available dimensional objects (branches, boxes, etc.). Thus, they have obstructed the exercise of the official duties by the Armed Forces of Ukraine and obstructed the movement of the train with military equipment and personnel of the Armed Forces of Ukraine on it.<sup>25</sup>

2) Violation of rules for entry to and departure from the temporarily occupied territory for the purpose of causing harm to the State interests (according to Article 332-1 of the CC of Ukraine). Social danger of such offenses is reflected in the need to ensure compliance with the regulations for entry to the temporarily occupied territory and exit from it. As an example, the court found a person guilty of committing this crime, when he illegally crossed the river Siverskyi Donets on boat from the settlement Lobacheve (Novoaidarskyi district, Luhansk region) in the direction of the city Alchevsk and illegally transferred food and other goods to the representatives of illegal armed groups, who were stationed on the temporary uncontrolled Ukrainian government territory. By acting in this manner, he has violated the rules for entry to and departure from the temporarily occupied territory, thus causing harm to State interests.<sup>26</sup>

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<sup>24</sup> Yevhen Pylypenko, "Shchodo obgruntovanosti kryminalizatsii pereshkodzhannia zakonnoi diialnosti Zbroinykh Syl Ukrainy ta inshykh viiskovykh formuvan" (On the Reasonableness of Criminalization of Obstructing Legal Activity of the Armed Forces of Ukraine and Other Military Formations), *Naukovyi visnyk Lvivskoho derzhavnoho universytetu vnutrishnikh sprav* 1 (2016): 270.

<sup>25</sup> Case № 425/2713/14-к, Rubizhne city court of Luhansk region (June 25, 2015), The Unified State Register of Court Decisions // <http://www.reyestr.court.gov.ua/Review/45630411>.

<sup>26</sup> Case № 419/1215/16-к, Novoaidarskyi district court of Luhansk region (April 8, 2016), The Unified State Register of Court Decisions // <http://www.reyestr.court.gov.ua/Review/57087439>.

This criminal law provision has a temporary nature, since the legal regime stipulated by the Law "On Securing the Rights and Freedoms of Citizens and Legal Regime on the Temporarily Occupied Territory of Ukraine" operates until the full restoration of the constitutional order of Ukraine on the temporarily occupied territory.

3) Failure to serve in civil defense units during the special period (excluding the recovery period) or during target mobilization (according to Article 336-1 of the CC of Ukraine) and evasion of the draft to military service by officers (according to Article 335 of the CC of Ukraine as amended on January 15, 2015). The creation of serious threats to the ways of staffing the Armed Forces of Ukraine that are designed to perform a number of key tasks of the state to counter foreign aggression was yet another insidious manifestation of hybrid military actions in Ukraine. This process was accompanied by the informational means of influence by attempting to mislead the citizens of Ukraine and prevent the staffing of Ukrainian Army according to its needs. In this regard, the need has emerged to expand the boundaries of criminal liability for committing any acts related to evasion of military service and civil defence.

The availability of reasons for adopting appropriate legislative decisions (the need to ensure implementation of certain legislative provisions, public opinion) generally does not raise any concern. However, the legislator in its predictable effort to respond to new challenges sometimes forgets legal efficiency, which may cause some issues for the law enforcement. Thus, the quality of the approved amendments to the CC of Ukraine has been criticized already. According to the principle of legal clarity any legal act has to be clear, consistent, and provide complete regulation of social relations, preventing the existence of any regulatory gaps. For example, according to Article 332-1 of the CC of Ukraine, violation of entry to the temporarily occupied territory of Ukraine and departure from it is recognized as a criminal offense only if committed with the purpose for causing harm to state interests. The definition of "state interests" is not normative; its interpretation can be extremely complex, which provides, among other things, significant corruption related risk for the enforcement of Article 332-1 of the CC of Ukraine.

Today one can reach the conclusion that the existing criminal law resources are generally enough to adequately respond to the diverse manifestations of hybrid confrontation. Ukrainian Parliament as the key actor in the implementation of state criminal policy was able to gradually take control of the situation, accompanied by new threats with high levels of social danger. However, lawyers continue discussions on the presence of possible gaps in the criminal law regulation,

including a number of acts that should deserve criminalization, but remain (or may become) not punishable.

The issue of establishing criminal liability for collaboration may serve as a good example here. The question becomes especially relevant since part of the Ukrainian territory remains under occupation.

In this context it is necessary to point out that Article 120 of the Criminal Code of the Republic of Lithuania provides for the liability of Lithuanian citizens who, under the conditions of occupation or annexation, help bodies of the illegitimate government to further occupation or annexation, suppress resistance of the Lithuanian population or otherwise assist the illegitimate government in carrying out activities against the Republic of Lithuania.<sup>27</sup> This provision is not a unique phenomenon and has numerous historical roots.

During the legislative drafting stage in Ukraine it was originally expected that amendments would be made that would allow criminal charges to be brought against a person for collaboration activities. Such activities should be defined as intentional, voluntary cooperation with the occupation state or its representatives in any form on the temporarily occupied territory against the national interests of Ukraine.<sup>28</sup> However, the proposed legislative ideas have not gained support by the end of the day, and the aforementioned changes have been excluded from the final version of the Law.

It seems that the issues of criminalizing collaboration remain relevant, since criminal law analyses of the aforementioned actions are usually given under Article 109 ("Actions aimed at violent change or overthrow of the constitutional order or at the seizure of state power"), Article 110 ("Violation of the territorial integrity and inviolability of Ukraine"),<sup>29</sup> Article 111 ("Treason")<sup>30</sup> or Article 258-3 ("Participation in a terrorist group or terrorist organization") of the CC of Ukraine.<sup>31</sup> There are serious reasons to believe that the aforementioned criminal law provisions do not always fully cover the features of collaborative acts. Some of them may remain

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<sup>27</sup> *Lietuvos Respublikos baudžiamasis kodeksas* (The Criminal Code of the Republic of Lithuania), Patvirtintas 2000 m. rugsėjo 26 d. įstatymu Nr. VIII-1968 // [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_l?p\\_id=111555](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=111555) [in Lithuanian].

<sup>28</sup> *Draft Law On Securing the Rights and Freedoms of Citizens on the Temporarily Occupied Territory of Ukraine*, Parliament of Ukraine (April 2014) // [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?id=&pf3516=4473-1&skl=8](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?id=&pf3516=4473-1&skl=8) [in Ukrainian].

<sup>29</sup> "During the Course of Special Pretrial Investigation the Prosecutor's Office of Lugansk Region Sent Indictments Against Two Ministers of So-Called 'Council of Ministers' of the Terrorist Organization 'LPR' to Court," the Prosecutor General's Office of Ukraine (August 2016) // [http://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=190011](http://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=190011) [in Ukrainian].

<sup>30</sup> "The Prosecutor's Office of the Autonomous Republic of Crimea Launched Criminal Proceedings Based on the Fact of Treason Committed by a Former Member of the National Academy of Legal Sciences of Ukraine," the Prosecutor General's Office of Ukraine (October 2015) // [http://ark.gp.gov.ua/ua/news.html?\\_m=publications&\\_t=rec&id=164722&fp=50](http://ark.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=164722&fp=50) [in Ukrainian].

<sup>31</sup> "Two of the So-Called 'People Deputies' of the Terrorist Organization 'DPR' Will Be Distantly Prosecuted in Donetsk Region," the Prosecutor General's Office of Ukraine (August 2016) // [http://www.gp.gov.ua/ua/news.html?\\_m=publications&\\_c=view&\\_t=rec&id=190013](http://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=190013) [in Ukrainian].

beyond the scope of criminal law. Thus, the special purpose connected with causing damage to the national security of Ukraine is mandatory for the crimes mentioned above. However, cooperation with occupation authorities, as practice tells, is not always caused by such criminal intent.

In addition, collaboration should be viewed as a phenomenon, which is less socially dangerous than treason or participation in activities of a terrorist organization, and therefore deserves a less severe punishment. After all, thousands of people cooperate with the occupation authorities in a certain way today by helping to carry out subversive activities against Ukraine. Legal assessment of such actions as particularly serious crimes, regardless of the nature of cooperation, is not fair and does not allow the proper individualization of criminal liability.

Special attention in the context of the driving forces behind the hybrid war should be brought to the 2015 imposition of criminal liability for propaganda of the communist and the national socialist (Nazi) totalitarian regimes, as well as attacks committed against journalists in connection with their professional activities.

## **2. DECOMMUNIZATION AND CRIMINAL LAW**

In 2015 the Ukrainian parliament passed a series of laws aimed at the decommunization of all areas of public life.<sup>32</sup> Identifying the Communist ideology with the Nazi and fascist ones poses a particular interest in the context of these legislative acts. Such approach is justified by its proponents by the fact that the Russian Communist leaders of the twentieth century used absurd ideas of Marxism in a terrible way: the idea of total equality for continuously stealing from the peoples of the former Soviet Union, and the idea of a brutal dictatorship of the proletariat for the genocide and starvation of Ukrainians and other nations.

For over twenty years, since the declaration of independence of Ukraine in 1991, the decommunization process has been irregular, slow and chaotical. Finally, failure to break off from Soviet (and therefore Russian) past has cost Ukraine dearly by significantly affecting the course of hybrid war. The joint past, reflected in modern life, has become the basis that allowed to direct aggression in a given direction by using various means and to put it into desired concealed forms.

Modern Ukraine is going through its most difficult times since independence, accompanied by the activation of nation-building processes, and the long-awaited formation of national consciousness and national identity. It is encouraging that one of the elements of such processes is the restoration of national and historical

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<sup>32</sup> These are the Laws of Ukraine 'On the Condemnation of the Communist and the National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols'; 'On the Legal Status and Honor the Memory of Fighters for Ukraine's Independence in the Twentieth Century'; 'On Immortalization of Victory Over Nazism in the Second World War of 1939 – 1945'.

memory, and the application of objective analyses of the most significant events of the past with the goal of strengthening national unity. According to research, historical memory as part of the spiritual life of society is a spiritual and practical phenomenon that forms the historical consciousness, and is included in the latter as one of its important components. However, historical memory is the core upon which language, culture, and the spirituality of the nation, as well as its national consciousness, are formed.<sup>33</sup>

Fast changes in the social and political life of Ukraine require the rethinking of common approaches to some of the most controversial historical events as well as their reflection in the field of law.

The decommunization process required ensuring its legal protection, including criminal law resources. Thus, it is not surprising that Article 436-1 of the CC of Ukraine appeared simultaneously with decommunization laws. It has established liability for propaganda of the communist and the national socialist (Nazi) totalitarian regimes: manufacture, distribution and public use of the symbols of the communist, the national socialist (Nazi) totalitarian regimes, including circulation of souvenirs, public performance of anthems of the USSR, the Ukrainian SSR, other Soviet republics or performance of anthems fragments throughout Ukraine (except in cases specified by law).

Of course, changes in the criminal law can be evaluated as more or less designed and qualitative, though they have some flaws in violation of the principle of legal certainty. It is particularly about understanding the concepts of "nationalist ideology" or "totalitarian ideology", an exhaustive list of which is not provided, and criminalization redundancy.

A key challenge for Ukraine is that the attitude to the communist regime as the one being on the same criminal level with the Nazi regime has not yet emerged in general public consciousness due to a set of objective and subjective factors. It should be borne in mind that the vast majority of Ukrainian citizens do not remember or do not know the whole truth about the events of the Leninism-Stalinism period (1917–1953 years), but the period of 1953–1991 years is quite fresh in their memory, which is characterized by less repressiveness and comparatively better standards of life. Accordingly, when moving in this direction, it is advisable to more powerfully use cultural and educational events, while employing criminal law resources in a gradual and very careful manner.

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<sup>33</sup> Valentyna Karlova, "Osoblyvosti vidnovlennia istorychnoi pam'iaty ukrainskoho narodu v konteksti analizu dosvidu postsotsialistychnykh krain" (Peculiarities of Historical Memory Renewal of Ukrainian People in the Context of Analyzing Experience of Post-Soviet Countries), *Efektivnist derzhavnoho upravlinnia* 14/15 (2008): 205.

When talking about the current international practice, experts determine two ways of combating modern recurrences of the totalitarian past: criminal (repressive) and cultural (educational). The particular state may give priority to one of these ways, but both are used to some extent. However, in most countries focus is still put on educational activities and propaganda. Criminal liability for the denial or justification of crimes against humanity, especially for the denial of genocides, including the Holocaust, exists in only about twenty states. Together with genocide, it is sometimes legally prohibited to deny crimes of totalitarian regimes.<sup>34</sup>

For example, in Austria, under § 3 of the Constitutional "Law on Prohibiting 1947" (*Verbotsgesetz 1947*), criminal liability is established for public denial, belittling, approval or justification of national socialism related crimes.<sup>35</sup> On February 22, 2010, the Law providing for criminal liability for denying the Holocaust was adopted in Hungary. In addition, in June of 2010 its legislative provisions were changed, by expanding the boundaries of criminal behavior. As a result, both denial of the genocide committed by the national socialist system and the one committed by the communist regime became punishable by law.<sup>36</sup>

According to Mykola Khavroniuk, more than twenty people in various countries have been sentenced for such crimes just in the past few years, including politician Jean-Marie Le Pen in France and Germany (for justification of the Gestapo and the denial of crimes against humanity), French writer Robert Farisson –in France (denial of the fact that the Nazis in Auschwitz killed people in gas chambers), British bishop Richard Williamson (for denying the Holocaust in his interview for the Swedish television), and Austrian author Gerd Hrnzyk in Austria (for denying the Holocaust and the Nazi propaganda).<sup>37</sup>

The reasonableness of establishing such criminal law prohibitions (especially on the part of identifying communist crimes with the Nazi crimes) is not agreed upon by all lawyers. At the same time, their presence in the criminal law of a number of European countries (especially in the Eastern European countries that suffered most from the totalitarian past) serves as evidence of the implementation

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<sup>34</sup> Ihor Usenko ta Yevhen Rominskyi, "Vysnovok shchodo Zakonu Ukrainy 'Pro vnesennia zminy do Kryminalnoho kodeksu Ukrainy shchodo vidpovidalnosti za zaperechennia chy vypravdannia zlochyniv fashyzmu' vid 16 sichnia 2014 roku № 729-VII" (Opinion on the Law of Ukraine 'On Amendments to the Criminal Code of Ukraine Regarding Liability for Denial or Justification of Fascism Crimes' From January 16, 2014 № 729-VII), [www.khpg.org](http://www.khpg.org) (January 27, 2014) // <http://www.khpg.org/index.php?id=1390831618>.

<sup>35</sup> "Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP (Verbotsgesetz 1947) in der Fassung der Verbotsgesetznovelle 1992," [www.nachkriegsjustiz.at](http://www.nachkriegsjustiz.at) (1992) // [http://www.nachkriegsjustiz.at/service/gesetze/gv\\_vg\\_3\\_1992.php](http://www.nachkriegsjustiz.at/service/gesetze/gv_vg_3_1992.php).

<sup>36</sup> "Jacqueline Lechtholtz-Zey, The Laws Banning Holocaust Denial – revised from GPN Issue 3," [www.genocidepreventionnow.org](http://www.genocidepreventionnow.org) (2012) // <http://www.genocidepreventionnow.org/Home/GPNISSUES/GPNBulletinLAWSAGAINSTDENIALSpecialSection9/tabid/164/ctl/DisplayArticle/mid/971/aid/470/Default.aspx>.

<sup>37</sup> Oleksandr Dudorov and Mykola Khavroniuk, *Kryminalne pravo: navchalnyi posibnyk* (Textbook on Criminal Law) (Kyiv: BAITE, 2014), 888.



of common European political trends. Such trends demonstrate the same level of public opposition to Stalinism and Nazism, as well as to their shameful consequences. For example, one should mention the Vilnius Declaration of the OSCE Assembly and the Resolution based on it (2009), which refers to the condemnation of Stalinism on the same level with Nazism and refers to the common position for all totalitarian regimes, regardless of their ideological background. Notably, representatives of the Russian authorities have sharply criticized this approach<sup>38</sup> as symptomatic in light of current events in Ukraine.

### 3. JOURNALISTIC CRIMES

Attacks on the legitimate professional activities of journalists violate the fundamental principles of information relations: guaranteed right to information; openness, accessibility of information and freedom of its exchange; information objectivity; completeness and accuracy, legitimacy of receipt, usage, distribution and storage of information. Therefore, it is quite natural that the lawful work of journalists requires adequate legal protection, including the application of criminal law means. Thus, in 2015 there was introduction of a new category of crimes to the CC of Ukraine, such as crimes against journalists (threat or violence against journalists, wilful destruction or damaging journalist's property, attempted murder of a journalist, taking journalist as a hostage).

However, crimes in the field of professional journalism activities can be committed in two ways: crimes that harm such activities and crimes that are committed by journalists in the course of their professional activities. If, on the one hand, the condition of criminal law protection of journalistic activities in Ukraine remains mostly satisfactory, then on the other, some of the actions by journalists in the course of such activities might require criminalization.<sup>39</sup> Journalistic activities that are undertaken contrary to the requirements of law, by going beyond the rights granted to journalists and with violation of their duties, should lead to severe legal consequences. It is possible that appropriate actions require criminal-law response since the key human rights and freedoms are usually violated due to their commission, substantial harm is caused to national informational security, etc.

The implementation of criminal policy in this area, effective regulation of the relevant relations, have to take place, taking into account dynamic and continuous evaluation by the state of compliance or non-compliance of certain conduct with the

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<sup>38</sup> "OSCE resolution equating Stalinism with Nazism," *www.security.sk.cx* (October 20, 2009) // <http://security.sk.cx/?q=node/2740>.

<sup>39</sup> Yevhen Pysmenskyi, "Zlochyny u sferi profesiinoi diialnosti zhurnalistiv u konteksti zabezpechennia potreb ukrainskoho suspilstva na suchasnomu etapi yoho rozvytku" (Crimes in the Area of Professional Journalistic Activities in the Context of Guaranteeing the Needs of Ukrainian Society at the Present Stage of Its Development), *Visnyk Kryminolohichnoi asotsiatsii Ukrainy* 1 (2016): 99.

interests and the needs of society at a particular stage of its development.<sup>40</sup> The above-mentioned becomes especially up-to-date with the researched conditions of hybrid war, since the accumulated experience of countering it in Ukraine shows that information (as a kind of weapon in the hands of a journalist) can seriously harm the interests of national security. Due to the powerful and aggressive information supply, a proper foundation was created in spring of 2014. It has greatly facilitated the commission of further military actions in Ukraine.<sup>41</sup>

The dissemination of deliberately false information, carried out by a journalist using media resources, is characterized by the level of danger to society required for imposing criminal liability. However, this conclusion is not enough for the general statement about the need to establish criminal liability for the commission of said acts. Legal recognition of it as an offense is possible only when considering a combination of factors, including not only establishment of grounds for criminalization, but also reasons and conditions for its implementation. Carrying out scientifically based researches that can at least demonstrate low efficiency of other methods of combating offenses by journalists should precede the final solution of this issue.

Generally, there are interesting studies in the theory of criminal law that prove that misrepresentation of facts deserves recognition as a crime. For example, British experts, standing firmly against the spread of false information, write about the need for introduction of a new category of offenses. They refer to it as "blatant lie, which causes serious harm." They correctly point out that if the function of criminal law is to prevent harm by deterring people from certain forms of behavior, the law in such case cannot ignore some signs (cases) of spreading false information and is called upon to punish guilty persons with criminal sanctions.<sup>42</sup>

#### 4. CRIMINAL LAW INFLUENCE UNDER CONDITIONS OF HYBRID WAR

Hybrid war has affected the state's rethinking of its position concerning the criminality of certain categories of crimes. Surely, nothing can be said of mitigating punishment (depenalization) in a situation where the threat of spreading a number of typical forms of socially dangerous behavior is or was implemented. Thus, it is not surprising that the earlier-discussed direction of criminal policy was implemented in recent years in Ukraine by increasing the severity of punishment

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<sup>40</sup> V'iacheslav Borysov, Vasyl Tatsii, Volodymyr Tiutiuhin, *et al.*, *Kryminalne pravo Ukrainy. Zahalna chastyna: pidruchnyk* (Textbook on the General Part of Criminal Law of Ukraine) (Kharkiv: Pravo, 2015), 68.

<sup>41</sup> Karen Dawisha, "Putin's Press Propagandists," *The Wall Street Journal* (July 5, 2016) // <http://www.wsj.com/articles/putins-press-propagandists-1467761144>.

<sup>42</sup> Bryan Druzin and Jessica Li, "The criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?" *Journal of Criminal Law & Criminology* Vol. 101 No. 2 (2011): 529, 572–573.

for crimes that have spread out due to the beginning of the Russian aggression. As conceived by the legislators, such moves aim to create a proper regulatory framework for more effective combating and preventing crimes against national security and public safety.

It is illustrated in the following examples. According to the Parliament decision from April 8, 2014, penalties for a number of crimes against national security (Articles 110, 111, 113, 114 of the CC of Ukraine) were enhanced, and it was also stipulated that in case of committing crimes against the national security of Ukraine (provided for in Articles 109 – 114-1 of the CC of Ukraine) the statute of limitations does not apply.<sup>43</sup> The Law from October 7, 2014, allowed applying additional punishment of property confiscation to persons who have committed crimes against national security and public safety of Ukraine. Previously such penalty has been applied to property crimes only. However, in order to stimulate positive behavior of persons who have committed terrorist act with the goal of preventing threats to human life or health or other values, the Law expanded possibilities for exempting perpetrators from criminal liability.<sup>44</sup> The law from February 12, 2015, amended the CC of Ukraine by increasing liability for some military offenses. A much more severe liability for committing these crimes under the conditions of special period (except martial law) and under martial law or in a battle situation has been established.<sup>45</sup>

## 5. AMNESTY AS A TOOL OF CRIMINAL POLICY

Amnesty remains among the most difficult issues in terms of determining criminal consequences of committed crimes as one of the directions of implementing criminal policy in Ukraine – namely, approaches to understanding amnesty, reasons and conditions of its application, legal principles that prevent its application, and others.

Amnesty is traditionally considered an act of forgiveness, the manifestation of humanism and mercy to the person guilty of committing a crime, by exempting such person from restrictions and deprivations associated with criminal liability.

Forgiveness is in fact the specific function of the government, which means stopping criminal law relations at its discretion or modifying their intensity. The

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<sup>43</sup> *Law of Ukraine on Making Amendments in the Criminal Code of Ukraine*, Parliament of Ukraine (April 2014) // <http://zakon3.rada.gov.ua/laws/show/1183-18> [in Ukrainian].

<sup>44</sup> *Law of Ukraine on Making Amendments to the Criminal and Criminal Procedure Codes of Ukraine about the Inevitability of Punishment for Certain Crimes Against National Security, Public Safety and Corruption Offenses*, Parliament of Ukraine (October 2014) // <http://zakon3.rada.gov.ua/laws/show/1689-18/para6#n6> [in Ukrainian].

<sup>45</sup> *Law of Ukraine on Making Amendments to the Criminal Code of Ukraine about Increasing Liability for Some Military Crimes*, Parliament of Ukraine (February 2015) // <http://zakon3.rada.gov.ua/laws/show/194-19> [in Ukrainian].

social nature of this function is the mercy of government, which means forgiveness for the offender. Its political aspect, on the one hand, is related to refusal by the state to use its repressive power to the perpetrator based on certain socio-political grounds, while on the other it means strengthening the government itself.

Today amnesty, being one of the privileged measures of criminal law influence, remains in the current agenda of the Ukrainian state especially in the context of the events related to the commission of hybrid attacks on its constitutional order and territorial integrity. By taking control over part of the Ukrainian territory, the Russian Federation has actually created conditions in which a significant number of local residents, who have not been able to leave their places of residence for various reasons, have been forced to join the government bodies created by it, including law enforcement agencies. Others did it by their own choice and desire, while expecting certain preferences from Russian authorities. Thus, application of amnesty under hybrid warfare conditions requires serious research analysis in order to eventually achieve proper socio-political balance. Forgiving a particular group of people should be both humane and fair; it should prevent the avoidance of criminal liability by individuals who have been deliberately, persistently, and actively destroying Ukrainian sovereignty.

It should be noted that in terms of social and political changes from 2013 and 2016 Ukrainian authorities have repeatedly appealed to this option of solving the most complex issues related to forgiving crime perpetrators. Such forgiveness took the form of not only the established legal concept of amnesty, but also of the so-called quasi-amnesty.

On November 21, 2013, mass protests started in Ukraine, caused by the refusal from signing the Association Agreement with the European Union. Among the first legal means to resolve the conflict was the Law of Ukraine "On Elimination of Negative Effects and Prevention of Prosecution and Punishment of People Based on the Events that Occurred during Peaceful Assemblies", adopted on December 19, 2013. Common Ukrainians and journalists dubbed it the Law of amnesty for participants of peaceful gatherings, though *de jure* this law had nothing in common with amnesty. The adopted legal act established the grounds and conditions for exemption from criminal liability and exemption from punishment that were not consistent with the CC of Ukraine.

There is no doubt that this document has been motivated by socio-political issues. It can be viewed as a ridiculous attempt to solve the problems that likely would not have arisen if the state had provided a timely realization of the constitutional right to peaceful assembly.

Later there were other legislative pieces of similar content, with uncertain quality and doubtful consistency with the CC of Ukraine. At the same time, they have been to some extent justified by the need to immediately address the conflict situation that was sharpening, by relieving public tension caused by the inability of the state to effectively solve the complexity of accumulated problems.

Reflections on the legal nature and contents of these legislative acts forced researchers to raise the question of whether their essence, which I dare to call quasi-amnesty here, is the manifestation of genuine amnesty. This approach is quite reasonable, and the further direction of improving amnesty provisions could be narrowing down the scope of the law on amnesty by applying it to persons convicted of committing specific crimes (especially against the state) and in connection with extraordinary events in the socio-political life of the country, with establishing possibility of releasing them from punishment or replacing penalties with more lenient ones.<sup>46</sup>

In the context of the above-mentioned, an interesting analysis by Petr Skoblikov warrants attention. He writes that amnesty is an exceptional act that requires very strong reasons for adoption. If amnesty is announced frequently, based on the principle of randomness or on flimsy reasons, then this is a sign of an unstable political situation, imperfect legal system, or unjust social order. When would amnesty be fair and appropriate under modern conditions? Suppose that unwise actions by the government provoked the crime situation and some of the citizens started committing crimes that they had previously stayed away from. Such change in behavior does not exempt them from criminal liability, but there is a reason for forgiveness. These citizens remain guilty but they can be freed from punishment or it can be mitigated.<sup>47</sup>

Work on the appropriate bill, which can be also attributed to the quasi-amnesty regulation, has started with the beginning of the aggressive actions by the Russian Federation on the territory of Ukraine in the spring of 2014 and with the first public disobedience conflicts inspired by the neighboring state. This initiative (as well as other similar legislative initiatives) has remained unimplemented for numerous reasons. Later the need to address ways out of the crisis by amnesty or quasi-amnesty has disappeared in some regions of Ukraine, while in others (some territories of Donetsk and Luhansk regions) it remains relevant. For example, according to the latest Minsk agreements that were reached between Ukraine and

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<sup>46</sup> Oleksandr Dudorov and Yevhen Pysmenskyi, "Pro mistse amnistii v suchasnykh umovakh derzhavotvorennya" (On the Place of Amnesty Under Modern Conditions of State Building): 59; in: *Zabezpechennia yednosti sudovoi praktyky u kryminalnykh spravakh v konteksti podii 2013 – 2014 rokiv v Ukraini: materialy Mizhnarodnoho sympoziumu, 24 – 25 zhovtnia 2014 roku* (Kyiv: BAITE, 2014).

<sup>47</sup> Petr Skoblykov, "Do y posle amnystyy" (Before and After Amnesty), *Yuryst speshyt na pomoshch* 3 (2014): 7.

Russia in February of 2015, Ukraine has the obligation to provide amnesty and pardon by adopting a law that prohibits prosecution and punishment of persons in connection with the events that took place in some areas of Donetsk and Luhansk regions.

There is no doubt that hardly anything can be done without application of certain criminal law measures under the current circumstances. Amnesty *inter alia* will allow the removal of the accumulated tension in the society, restoring the broken system of social relations in Ukraine, and demonstrating the humanistic potential of Ukrainian criminal legislation to the whole world, etc. This issue is extremely complex, and it requires professional discussion in order to prevent amnesty from being applied contrary to the principles of adequacy of criminal law regulation and not causing greater harm than the one it is designed to prevent. It seems that the implementation of this direction in national criminal policy during the current period should take place in the following directions.

First, it is required to urgently develop and adopt a law on amnesty for persons who have committed crimes on the territory of the annexed Crimea and in the uncontrolled by Ukrainian authorities parts of Donetsk and Luhansk regions of any severity that are not associated with violence (other options of the category of crimes are possible) with the possibility of exemption from punishment. Performing one or a set of the following actions may serve as grounds for such exemption: voluntary reporting of the crime committed; assistance during investigation of other crimes and (or) prevention of their commission; voluntary surrender of weapons, ammunition, explosives or explosive devices. This approach involves creating motivation for people to cease criminal activity, and creating a proper basis for the identification and detection of crimes committed by others, while taking into account limited government resources to identify them.

Second, with the restoration of Ukrainian authorities on the mentioned territory, it is appropriate to develop the next law on amnesty with directing its action to a narrower circle of persons (as an option, only those who have committed crimes of small and moderate severity, not associated with violence).

Third, it makes sense to learn from foreign experience on amnesty in such situations, drawing attention to the issues that have arisen previously in other countries.<sup>48</sup>

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<sup>48</sup> For example, "Uganda's Amnesty Act was enacted in 2000 as a tool to end rebellions in Uganda by encouraging rebels to lay down their arms without the fear of prosecution for crimes committed during the fight against the government. The promise of amnesty and reintegration has played a vital role in motivating fighters to escape or defect from the Lord's Resistance Army" (Kasper Agger, "The End of Amnesty in Uganda: Implications for LRA Defections," [www.enoughproject.org](http://www.enoughproject.org) (August 2012) // <http://www.enoughproject.org/files/GuluDispatch.pdf>).

## **CONCLUSION**

Since 2014, the criminal policy of Ukraine has been implemented under unique conditions would be unusual for most countries in the world. The phenomenon of hybrid war has affected all areas of social life; including relations connected with ensuring protection of the most important social values – in other words, connected with the realm of criminal law. Thus, there is a need for deep research about the relevant issues due to their relevance for the international community and also in order to prevent the recurrence or to minimize the negative effects of such hybrid warfare scenarios in the future.

While remaining under conditions of hybrid war, the government is obliged to respond to new, sometimes nonconventional challenges that have the ability to quickly transform and adjust, acquiring new forms and being exercised with new tools. However, since fighting episodes actually have secondary importance for hybrid warfare, and other means of third party influence (especially in the information sector) move to the foreground, skillful employment of criminal law resources in this situation will be able to protect the citizens of the state, and avoiding intimidation and demoralization. Successful implementation of criminal policy heavily depends on the correct balance between repressive and humanistic elements of criminal law influence. The most sensitive objects under the conditions of hybrid war are information security and cyber security. When these objects are under attack, framework for the use of traditional tools of aggressive war is created.

I have established that during the current period (starting from 2014), the criminal policy of Ukraine has been carried out in two typical directions: defining the limits of criminal behavior and defining criminal consequences of committing crimes. Both have their own specific features. Such specificity has at first been expressed in the criminalization of a number of acts with their public danger expressed in terms of hybrid war. Instead, the issues of imposing criminal liability for collaboration activities have remained largely unsolved. Legislative implementation of this proposal would at least allow for the proper differentiation of criminal liability for committing subversive activities against Ukraine. Second, during a specified period of time Ukrainian legislators have adopted decisions to enhance criminal penalties for a separate category of crimes, namely crimes against national security and public safety that generally are able to empower criminal law with stronger preventive effect. The potential of amnesty as a generally effective means of conflict resolution remains unrealized to its full extent. Amnesty would allow excluding prosecution of certain persons who have committed crimes against



national security or public safety, while fulfilling certain conditions. Such amnesty would allow the creation of a proper evidentiary basis for prosecuting persons suspected of committing more serious crimes, e.g. organizers of terrorist groups and others.

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