

Persons Who Commit Military Property Theft: The Case of Ukraine

GANNA SOBKO^{*} , HANNA REZNICHENKO^{**}, RUSLAN MUKOIDA^{***}, ANDRII SVINTSYTSKYI^{****}, AND ANDRII PADALKA^{*****}

Abstract

This article aims to analyze the characteristics of individuals who commit military property theft while their country is at war. For nearly two years, Ukraine has been at war, and for nearly nine years, the country has been living under the regime of an antiterrorist operation, later transitioning to the operation of combined forces. However, some citizens' attitudes towards military property and its preservation have not changed.

This article examines key issues in characterizing the individual who commits military property theft and bears responsibility for their actions. Emphasis is placed on applied cognition methods and the Ukrainian researchers' attitudes towards analyzing the typical characteristics of an individual who appropriates military property during wartime. Additionally, the normative-legal framework regulating the actions of subjects (perpetrators) of military theft crime is explored.

It is argued that the specific norm under Ukraine's criminal responsibility law is applied based on the type of crime for which the person will subsequently be held accountable. According to the general rule, only a person who has reached the age of 18 can be considered a military 'entity'; however, the article challenges this position and suggests alternative possibilities for holding a person accountable based on age. The article also examines holding foreign military personnel accountable, which is particularly relevant for a country in a state of war.

The age and social status of individuals committing military property theft are examined using statistical indicators from the Office of the Prosecutor General from 2018 to 2021, which allowed the tracking of changes in the commissions of specific types of military property theft. These trends are also represented visually in diagrams. The article specifically delves into those individuals who commit administrative offenses involving the misappropriation or unlawful use of military property, which is the subject of special administrative liability under article 172-13 of Ukraine's *Administrative Offenses Code*. Following that, we present data from our survey of 1,273 respondents. Along with these aspects, the article discusses the matter of complicity between military personnel and civilians and provides court decisions as examples. Finally, the authors recommend expanding the accountability of individuals who misappropriate military property.

Keywords: Criminal Offense, Disposal of Property, Military Personnel, Military Property, Abuse

^{*} Department of Criminal Law, Criminology and Penalty Law, Odesa State University of Internal Affairs, 65000, 1 Uspenska Str., Odesa, Ukraine. E-mail address: g-sobko@edu.cn.ua.

^{**} Department of Criminal Law and Criminology, Odesa State University of Internal Affairs, 65000, 1 Uspenska Str., Odesa, Ukraine.

^{***} Faculty of Training Specialists for Criminal Police Units, Department of Tactical-Special and Special Physical Training, 65000, 1 Uspenska Str., Odesa, Ukraine.

^{****} Department of Criminal Procedure and Criminalistics, Educational and Scientific Institute of Humanities, National Academy of the Security Service of Ukraine, 03022, 22 Mykhailo Maksymovych Str., Kyiv, Ukraine.

^{*****} Ukrainian Scientific and Research Institute of Special Equipment and Forensic Expertise of the Security Service of Ukraine, 03113, 3 Mykola Vasylenko Str., Kyiv, Ukraine.

1. INTRODUCTION

A reform of the economic, political, and social systems has been actively occurring in Ukraine in recent years. This reform has inevitably affected the military environment, where corruption associated with power abuses and the embezzlement of military property has spread alongside positive changes. At the same time, the application of criminal legislation for protecting military property from unlawful encroachments is currently far from the level required to effectively ensure the country's security. This circumstance is also facilitated because any criminal offense a serviceperson commits that is unrelated to disrupting military service is classified as a general criminal offense rather than a military crime.

Given the above, special attention must be paid to the topics associated with legal relations in the military arena. Scholars who have studied this area have widely differing perspectives. Some authors classify this category as including, on the one hand, individuals performing military duties and, on the other, an undefined group of citizens who may suffer due to breaches in military service obligations. The country itself is also identified as a subject of these relations, represented by relevant bodies with a specific status, as well as individual citizens.

When considering the existing research on this topic, we acknowledge the position of V.V. Ustymenko, who noted in 1989 that the topic of the embezzlement of military property by official military personnel is a specific legal matter, which, along with the perpetrator's age and mental capacity, possesses a range of exceptional (facultative) characteristics.¹ However, the current scientific position on the concept of self-interested criminal activity involving military property is slightly different.

For example, P.A. Vorobey considers a serviceperson the perpetrator of a criminal offense under article 410 of Ukraine's *Criminal Code*. Further, depending on the nature of the criminal offense and the method of the property's acquisition, specific actions committed by conscripts during their participation in training or special exercises must be classified under articles 185–87, 189–91, 262, 289, 308, 312, 313, and 357 of the *Criminal Code*.² Meanwhile, M.I. Karpenko has stated that the perpetrators of self-interested encroachments on military property can only be military personnel, conscripts, or reservists during their participation in a specific activity.³

S.O. Kharitonov also believes that the criminal offender should be a serviceperson or conscript, including military service personnel.⁴ Nonetheless, he points out that, according to the Ukrainian *Criminal Code*, the subject of the investigated criminal offense under article 410 is solely a serviceperson. A conscript who commits actions specified in article 410 of the *Criminal Code* bears responsibility under articles 262, 185–91, 308, and 313.⁵ Finally, in his dissertation research on the term 'subject,' I.O. Khar focuses on the concept of the servicer.⁶ The term 'servicer' is defined in the Ukrainian language dictionary as any individual engaged in any form of service involving intellectual or physical labor related not to production but to the provision of a service to someone or something. This also includes individuals who fulfill their constitutional duty to defend the Ukrainian homeland, its independence, and territorial integrity. A servicer's service entails a specific duty related to a position, work, or occupation as a source of income.⁷

Analysis of the aforementioned viewpoints has allowed us to identify a general position, which entails considering both individuals and legal entities as legal subjects endowed with specific rights and responsibilities. On the other hand, including an undefined group of individuals as subjects of legal relations who may suffer as a result of

¹ V.V. Ustymenko, *Special Subject of the Crime* (Kharkiv: Higher School, Publishing House at Kharkiv University, 1989). (Ukrainian language).

² P.A. Vorobey and O.M. Grudzur, "Crimes Against the Established Order of Military Service (Military Crimes)," in *Scientific-Practical Commentary on the Criminal Code of Ukraine*, eds. D. S. Azarov, et al., 969–1016 (Kyiv: Yurinkom Inter, 2016). (Ukrainian language).

³ Ibid.

⁴ S.O. Kharitonov and M.I. Panov, "Crimes Against the Established Order of Military Service (Military Crimes)," in *Criminal Law of Ukraine. Special Part: Textbook*, 5th ed., eds. Yu. V. Baulin et al., 611–40 (Kharkiv: Pravo, 2015). (Ukrainian language).

⁵ Ibid.

⁶ I.O. Khar, "Subject of Crimes Against the Established Order of Military Service," *Legal Science* 12, no. 78 (2017): 120–60. (Ukrainian language).

⁷ V.T. Busel, ed. *Comprehensive Explanatory Dictionary of Modern Ukrainian Language: 170,000 Words* (Kyiv: Irpin: Perun, 2001). (Ukrainian language).

military servicepersons not fulfilling their duties is unjustified, given that social relations are intended to regulate interactions among a very specific group of individuals.

It is appropriate to comment here on the general attitude of workers in special military service units towards military personnel who confiscate military property. For example, John Strong, an FBI special agent in North Carolina (US), notes that former soldiers have used their positions as government officials to steal supplies and equipment for personal financial gain. Such violations not only deplete valuable army resources but also impact US taxpayers. The FBI will continue to work with its investigation partners to combat this type of corruption.⁸

The same viewpoint is shared by John F. Hinn, the Responsible Special Agent of the US's Defense Criminal Investigative Service (DCIS), who states that an officer who stole essential supplies and equipment from their unit for personal gain betrayed their unit's trust, the military code of conduct, and their military comrades. Corruption and theft on such a large scale undermines the US Department of Defense's integrity, wastes precious US taxpayer funds, and seriously impairs the soldiers' ability to perform military operations.⁹

The subject (perpetrator)¹⁰ of a criminal offense—the unlawful theft of military property committed by military personnel using their official position—is, according to the general rule, a mandatory component of the criminal offense. The prevailing view in the science of criminal law is that the subject of a criminal offense is always a person (a physical human) who possesses not only the mandatory (specified by law) characteristics but also qualities that may have specific criminal-legal significance. This includes biological and social characteristics, such as gender (which will likely lose its meaning soon), health status, marital status, level of education, official position, and others that determine a person's social status.

Alongside the concept of “the subject of a criminal offense” in criminal law and criminology, there exists the notion of “offender,” which connotes the individual characteristics of each subject of a criminal offense. Distinguishing these concepts, it is important to emphasize that while the characteristics of the subject of a criminal offense primarily determine whether a criminal offense has been committed, the data describing the offender is of significant value for the individualization of criminal responsibility, including the imposition of punishment.

According to criminal law, the subject of a criminal offense cannot be just any person but only one who has certain characteristics. These include the age established by law, which enables criminal liability, and a sound mind or sanity. Both attributes ensure the ability of an individual who has committed an action dangerous to society to be recognized as guilty of committing a criminal offense and to bear the legally established responsibility. These are the general features that identify a subject of a criminal offense.

The characteristic mentioned in the Ukrainian Constitution, in particular, indicates that a military serviceperson as a subject of a criminal offense is an individual who has committed a socially dangerous act against the order of performing military duties, specifically their presence in military service.

Following articles 1 and 2 of Ukraine's law “On Military Duty and Military Service,” military service in the Armed Forces of Ukraine and other military formations, as well as special purpose law enforcement agencies and the country's Special Transport Service that are filled by military personnel, constitutes a special type of State service. It entails a professional activity related to Ukraine's defense, suitable for Ukrainian citizens, foreigners, and persons without citizenship, in terms of health and age.

According to the Law of Ukraine “On Military Duty and Military Service,” these are the types of military service:

1. conscript military service;
2. conscript military service during mobilization or special periods;
3. contract military service for enlisted personnel;
4. contract military service for non-commissioned officers and warrant officers;
5. military service (training) for cadets from higher military educational institutions as well as higher education institutions with military institutes, faculties of military training, departments of military training, and military training divisions;

⁸ Military Justice Attorneys, “Military Larceny Defence,” accessed Jan. 15, 2024, <https://www.militaryjusticeattorneys.com/practice-areas/court-martial/larceny-defense/>.

⁹ V.M. Stratonov, ed., *Military Offenses and War Crimes: Background, Theory and Practice: Collective Monograph* (Riga, Latvia: Baltija Publishing, 2023).

¹⁰ Hereafter, the terms ‘subject’ and ‘perpetrator’ are used interchangeably.

6. contract military service for officer personnel; and
7. officers who are drafted into the military.¹¹

Under article 401 of the *Criminal Code*, being a military serviceperson is a mandatory element of criminal offenses specified in section XX, “Criminal Offenses against the Established Order of Military Service (Military Criminal Offenses).” In this regard, a conscript cannot be the subject of a criminal offense under article 410 of the *Criminal Code*, which states explicitly that only military service is included. A conscript who commits actions during training, as defined in article 410 of the *Criminal Code*, will be held accountable based on the nature of the criminal offense under articles 185–91, 262, 308, 313, etc. Therefore, the subject of the criminal offense specified in paragraphs 2–4 of article 410 of the *Criminal Code* only consists of military service personnel who abuse their official positions. The concept of military service personnel mentioned in paragraph 2 of article 410 of the *Criminal Code* is also included in paragraph 1 of the note to article 425 of the *Criminal Code*.

Military commanders; leaders of military formations, units, and establishments; commanders of subdivisions; heads of departments, directions, divisions, squads, and faculties; other analogous positions in the armed forces; and similar military members who permanently or temporarily hold positions related to the performance of organizational and administrative duties, are frequently found in the military. Further, the military includes military officers who are often prosecutors; military investigators who are not division heads; operational and investigative subdivision employees; and operative and some other armed forces subdivisions, etc. who perform organizational and administrative duties¹². It is also important to note that there is a category of military officials that includes military service personnel who hold positions related to administrative and managerial duties on a permanent or temporary basis.

Military property managers can be officers and warrant officers who deal with food, materials, and financial aspects of military units and similar roles. Property preservation positions are not always held by military personnel; for instance, quartermasters, storekeepers, and other individuals whose property management actions are factual rather than legal in character are not included. In instances of the unlawful appropriation of military property, their actions are classified as crimes committed not by official personnel under part 2 of article 410 of the *Criminal Code* but as illegal appropriation or misappropriation of military property or a violation of duties related to property protection under the general rule of part 1 of article 410 of the *Criminal Code*.

Individuals temporarily performing property management duties or engaging in organizational, administrative, and managerial functions are also considered military personnel. For example, there is no mention of military personnel holding positions solely related to specific duties within military units and establishments in note 1 to article 425 of the *Criminal Code*. Therefore, a serviceperson’s temporary assignment to another public authority should be interpreted as a special mandate from a competent command to carry out certain duties in the nation’s interest beyond the military establishment. Meanwhile, individuals serving in disciplinary battalions are not considered military personnel as they are rank-and-file. According to article 410 of the *Criminal Code*, the perpetrator of military property theft, through abuse of their military office, can only be a military official; however, co-perpetrators and other participants can include both military officials and servicemen as well as civilians with or without official status.¹³

Under article 19 of Ukraine’s *Criminal Code*, a person who was in a state of non-imputability or was unable to understand or control their actions (inaction) during the commission of a socially dangerous act stipulated by the code due to chronic mental illness, a temporary mental disorder, confusion, or other pathological mental condition, shall not be subject to criminal sanity.¹⁴ Thus, criminal sanity is an inherent characteristic of a subject of a criminal offense in any criminal violation and is especially required for any military official who is a specific subject under part 2 of article 18 of the *Criminal Code*. At the same time, the issue of non-imputability is rarely raised in instances of military property theft using an official position.

¹¹ Verkhovna Rada of Ukraine, Law of Ukraine dated Mar. 25, 1992, no. 2232-XII “On Military Duty and Military Service,” accessed Jan. 15, 2024, <https://zakon.rada.gov.ua/laws/show/2232-12#Text>. (Ukrainian language).

¹² M.I. Khavronyuk, ed., *Corruption Schemes: Their Criminal-Legal Qualification and Pre-Trial Investigation* (Kyiv: Moskalenko O. M., 2019). (Ukrainian language).

¹³ Ibid.

¹⁴ Verkhovna Rada of Ukraine, Criminal Code of Ukraine, *Official Gazette of the Verkhovna Rada of Ukraine*, 25–26, 2001. (Ukrainian language).

2. MATERIALS AND METHODS

The primary research methodology for this study included formal-logical and systematic approaches, which were used to analyze the standpoints of various Ukrainian scholars. These methods were also applied to the research of legislative regulation at the constitutional and other normative-legal levels. The comparative legal method was used to examine legislation in a range of areas of Ukrainian law, including constitutional, administrative, and criminal law. The main methods used in the article are statistical and empirical, with which crime indicators related to individuals who committed criminal offenses, including quantitative and qualitative aspects such as age, education, and position, were analyzed. The empirical method was used to survey special prosecutor's office employees as well as civilians regarding their attitudes towards military property embezzlement and the reasons for committing this type of criminal offense.

3. RESULTS

According to statistics, senior officer personnel committed more than 28.8% of military property thefts in 2021—that is, not regular military personnel but individuals with military ranks of ‘major’ or higher¹⁵.

Per the scheduled protocol for recruitment, and subsequently at intervals of every six months, officers must undergo a military medical assessment to ascertain their suitability for military duty, including their mental state. Consequently, it is necessary at this stage to identify individuals who exhibit characteristics associated with the illegal misappropriation and theft of military property.

Allowing individuals who are mentally and physically unfit for military service to perform military duties is contrary to the interests of both the country and its military forces¹⁶. To regulate this, the Ministry of Defense of Ukraine issued Order no. 402 on August 14, 2008, which approved the Regulations on Military Medical Examination in the Armed Forces of Ukraine. This document determines the suitability of military conscripts for various types of military service during specific time periods, whether in peace or wartime¹⁷. However, the listed measures do not solve the problem of theft of military property completely.

Responsibility for criminal offenses committed by military personnel, according to article 18 of the *Criminal Code*, begins at the age of 16. Part 2 of article 18, on the other hand, considers specific subjects and focuses on specific characteristics of military personnel, one of which is age: individuals can only serve in military formations once they reach the age of 18. Thus, while the general rule states that criminal responsibility begins at the age of 16, some scholars believe that subjects of certain criminal offenses (related to official duties) may only be individuals over 16.

As a result of the above, numerous questions emerge regarding the age at which criminal liability can arise under article 410 of Ukraine's *Criminal Code*. After all, liability for a corruption-related criminal offense can arise only if the individual has administrative and managerial functions that are unlikely to be entrusted to anyone under the age of 18, let alone someone under the age of 16. However, let's examine the following scenario: a cadet at a military academy is entrusted with responsibilities such as managing uniforms or having access to storage and then steals military items. The question of their criminal responsibility under part 1 of article 410 of the Ukrainian *Criminal Code* arises.

In general, citizens aged 18–27 are conscripted for compulsory military service under Law no. 2232-XII, “On Military Duty and Military Service,” enacted on March 25, 1992. Contract military service is available to Ukrainians, foreigners, and persons without citizenship aged 18–40. Individuals between the ages of 17 and 30 are admitted for military service to higher military educational institutions, including those who turn 17 during the year of enrollment.

¹⁵ G. Sobko et al., “Characteristics of Punishment for Property Embezzlement and Appropriation by Military Personnel through Abuse of Office,” *Legality* 31, no. 1 (2023): 157–80, <https://ejournal.umm.ac.id/index.php/legality/article/view/25933/12441>.

¹⁶ A. Rediger, *Formation and Organization of the Armed Forces: Course for Junior Military Administrative Officers*, 2nd ed., parts 1-2 (Saint Petersburg: Military Publishing House, 1892).

¹⁷ Ministry of Defense of Ukraine, Ministry of Defense of Ukraine Order dated August 14, 2008, No. 402 “On Approval of the Regulation on Military Medical Examination in the Armed Forces of Ukraine,” accessed Jan. 15, 2024, <https://zakon.rada.gov.ua/laws/show/z1109-08#Text>. (Ukrainian language).

Therefore, according to Ukrainian law, a person who is 16 years old and will turn 17 by December 31, can be a military serviceperson but only after enrolling, which can take place July 1–December 31. A 16-year-old is considered a serviceperson and can be subject to criminal liability in criminal offenses related to the theft of military property.

According to part 2 of article 22 of the *Criminal Code*, a person who commits theft (articles 185, 186, and 187) can be a 14-year-old. So, if a 17-year-old steals from inventory (military property) in secret, they should be held accountable under the *Criminal Code*, article 185. If, on the other hand, that person is a cadet at a military educational institution, then part 1 of article 410 of the *Criminal Code* should be applied.

Case 521/10256/22¹⁸, dated February 24, 2023, is an example of such an application. There, the Malinovsky District Court of Odesa heard the case of Individual_6 in an open court session for committing criminal offenses outlined in part 4 of article 410 and part 1 of article 263 of the *Criminal Code*. The accused, Individual_6, was a military lyceum cadet, a Ukrainian citizen with a secondary education; unmarried; a military serviceperson with the rank of ‘soldier’; and had no prior convictions. On April 10, 2022, at an unspecified time, Individual_6 appropriated a hand grenade RGD-5 and a hand grenade F-1, issued to him for military use, by concealing them in his personal belongings with the intent of further distribution. The court determined that he was acting purposefully, knew the socially dangerous nature of his actions, and anticipated the socially harmful consequences these actions could cause. Then, on April 16, 2022, Individual_6 unlawfully obtained a shrapnel grenade RGD-5 and an igniter UZRGM (UZGGN13371UZ4P), which is an explosive device. He acted purposefully, was aware of the socially dangerous nature of his actions, and anticipated their socially dangerous consequences.

Desiring the occurrence of these consequences, Individual_6 sold the stolen military property for 1,500 *hryvnias* (the national currency of Ukraine) to a fellow first-year cadet, Individual_8, despite the grenade being an explosive device, thereby selling an explosive device without the required legal permission. Individual_6 was found guilty of committing criminal offenses as outlined in part 4 of article 410 and part 1 of article 263 of the *Criminal Code*. The court imposed the following punishments: under part 4 of article 410 of the *Criminal Code*, applying the provisions of article 69 of the *Criminal Code*, two years’ imprisonment; under part 1 of article 263 of the *Criminal Code*, applying the provisions of article 69 of the *Criminal Code*, one year and six months’ imprisonment.

In accordance with the explanations provided in paragraph 8 of the Resolution of the Plenum of the Supreme Court of Ukraine, dated October 24, 2003, no. 7, “On the Practice of Imposing Criminal Penalties by Courts,” the application of a primary penalty less severe than the legally defined minimum for the specific crime; a shift towards an alternate, less stringent form of primary punishment; or the omission of obligatory supplementary penalties (stipulated in article 69 of the *Criminal Code*) is only admissible under the condition that there exist multiple (at minimum, two) factors, considering the perpetrator’s identity, which serve to mitigate the punishment and notably diminish the gravity of the committed crime. In each case, the court is required to specify in the verdict the circumstance or information about the defendant it considers to be factors that significantly reduce the severity of the committed crime and influence the mitigation of the punishment. The operative part should refer to part 1 of article 69 of the *Criminal Code*. It is critical to consider not only the person’s purpose and motives for committing the crime but also their role among co-perpetrators, behavior during and after the crime, etc.¹⁹

In the example considered above, based on article 70, part 1 of the *Criminal Code*, the final punishment for Individual_6 was determined for the aggregate of crimes by incorporating a less severe punishment into a more severe one, resulting in a two-year sentence²⁰. Thus, in this case, the court’s decision supports our position that the age of criminal responsibility arises not at 18 but during the swearing of the oath, which occurs between the ages of 16 and 17. Hence, the assertion that criminal responsibility for military criminal offenses begins at the age of 18 is incorrect.

¹⁸ Case no. 521/10256/22, accessed Jan. 15, 2024, <https://reyestr.court.gov.ua/Review/109165905>. (Ukrainian language).

¹⁹ Plenum of the Supreme Court of Ukraine, Resolution dated Oct. 24, 2003, no. 7 “On the Practice of Imposing Criminal Punishment by Courts.” With Amendments and Additions Introduced by the Resolutions of the Plenum of the Supreme Court of Ukraine, accessed Jan. 15, 2024, https://ips.ligazakon.net/document/view/vs04255?ed=2004_12_10&an=16. (Ukrainian language).

²⁰ Case no. 521/10256/22 (n 18).

In the previous situation, we believe there is a gap in the *Criminal Code* because article 410 encompasses all sections regarding corruption-related criminal offenses without exception. As a result, a 17-year-old who is not a military serviceperson may be released on probation or placed under court supervision. However, according to our legislation, a 17-year-old cadet cannot be released on probation or in any other way, as articles 45 and 75 of the *Criminal Code* prohibit the release on probation of individuals who have committed corruption-related criminal offenses. Nonetheless, despite this explicit prohibition, courts continue to release individuals on probation.

There has been at least one such instance—for example, in Case no. 725/1747/23 Category.²¹ In that case, on September 6, 2021, the commander of the howitzer artillery battery of Military Unit Number_1, Senior Lieutenant Individual_4, being a military serviceperson, clandestinely carried out an Acer laptop from the office of the commander of the howitzer artillery battery of barracks Number_3, located on the territory of Military Unit Number_1. He then stole this military property by taking it outside the premises of Military Unit Number_1. He committed this act with direct intent, against the interests of the armed forces, fully aware of the socially harmful nature of his actions, foreseeing their socially hazardous consequences while pursuing personal enrichment motives, intending to steal military property without the intent of returning it, and fully aware that the laptop was assigned to Military Unit Number_1. According to article 75 of the *Criminal Code*, this Individual_4 may be exempted from serving a sentence if, during a one-year probationary period, he does not commit a new crime, and per article 76 of the *Criminal Code*, he fulfills his duties that the court assigned, including not leaving the territory of Ukraine without the consent of the authorized body responsible for probation (during the period of military service of the commander of the military unit)²².

Our investigation into the age of the subject of criminal responsibility for military property theft will be incomplete if we focus solely on the minimum prescribed age and don't attempt to determine the maximum prescribed age.

In general, the maximum duration of military service varies depending on the category of service: 1) Conscripted servicemen must serve for twenty-eight years; 2) Enlisted personnel, sergeants, warrant officers, and junior officers must work for forty-five years; 3) Senior officers, majors (captains of the third rank), lieutenant colonels (captains of the second rank), fifty years, and colonels (captains of the first rank), fifty-five years; and 4) finally, senior officers of the highest rank must serve for sixty years²³.

In addition, military service members whose contracts have expired and who have reached a certain age of service can choose to remain until the conclusion of a new contract for a period of up to five years; however, officers of the Armed Forces of Ukraine and other military formations who have advanced professional training and practical work experience in their positions, and who have been deemed fit for military service by the military-medical commission, can remain in military service beyond the maximum age by five years by the Ministry of Defense of Ukraine and the higher command of other military formations upon their request. Therefore, individuals up to the age of 65 are predominantly, though not always, the subjects of military-legal relations²⁴.

Further, individuals who engage in the theft of military property using their military service position can also be citizens undergoing military training. On the other hand, recognizing foreign citizens serving in military units under international agreements as subjects of criminal offenses against military service is still debatable. It is known that foreigners and individuals without citizenship can be enlisted in the Ukrainian Armed Forces only if they have no prior convictions. Another limitation on this category of individuals is the controversial legality of their presence in Ukraine²⁵.

The age criterion discussed above for recognizing an individual as a subject of law relations in the military sphere in cases of unlawful military property theft by military service personnel using their official position, in our opinion, should be considered in conjunction with a range of other specific criteria (characteristics). These characteristics can be classified concerning military service and service with an official position. Therefore, to identify a

²¹ Case no. 725/1747/23 Category, accessed Jan. 15, 2024, <https://reyestr.court.gov.ua/Review/109928952>. (Ukrainian language).

²² Ibid.

²³ Verkhovna Rada of Ukraine, Law of Ukraine dated Mar. 25, 1992, no. 2232-XII (n 11).

²⁴ S.O. Kharitonov, *Criminal Liability for Military Crimes Under the Criminal Law of Ukraine: Monograph* (Kharkiv: Pravo, 2018). (Ukrainian language).

²⁵ Verkhovna Rada of Ukraine, Law of Ukraine dated Mar. 25, 1992, no. 2232-XII (n 11).

person as a suspect in a theft of military property by abusing their position, it is critical to determine if this person is in military service (i.e., they have the status of a military serviceperson).

According to the Judicial Authority of Ukraine's 2018–2021 statistics, a total of seventy-six individuals were convicted under article 410 within four years. All seventy-six were Ukrainian citizens, with twenty-nine being part of a group. Among them, there were twenty-four individuals aged 18–25, nineteen between the ages of 25 and 30, twenty-seven between 30 and 50, and six aged 50–65.

An analysis of statistical indicators regarding the occupations of the convicted individuals at the time of committing the criminal offense specified in article 410 of the *Criminal Code* was conducted. Seventy of the seventy-six convicted individuals were military servicepersons, one was a worker, one was a pensioner, and four individuals were able to work but were neither employed nor studying at the time of the crime. In terms of a characterization of the subject of the criminal offense, their education at the time of committing the criminal offense was as follows: higher education - nineteen individuals; basic higher education - three individuals; vocational-technical education - twenty-four individuals; completed secondary education - twenty-one individuals; and basic secondary education - nine individuals (Figure 1). In addition, the following statistics are available on prior convictions: At the time of the crime, two people had expunged or extinguished convictions, and three individuals had unextinguished convictions. All three of these individuals had prior convictions even earlier; in two cases, the convictions were for property crimes, and in one case, for drug trafficking. One person was exempted from punishment due to amnesty, and another committed a criminal offense under article 410 of Ukraine's *Criminal Code* while on probation²⁶. Diagrams depicting statistics longitudinally provide more detailed information.

Preliminary conclusions about the perpetrator of a military criminal offense can be drawn based on the statistics provided: 92% of all criminals were military servicemembers, 4% had a prior criminal record, with 2.6% involved in property-related crimes and 1.4% related to narcotic drugs, psychotropic substances, or analog trafficking.

When considering the number of individuals who engaged in the crime outlined in article 410 of the *Criminal Code*, the results are significantly unfavorable. Within the overall occurrences of criminal infractions under article 410—during 2018, 100% of the responsible parties were identified as military personnel; in 2019, 93.3%; in 2020, 93.75%; and in 2021, the figure was 100% (Figure 2).

The following are examples from judicial proceedings. On April 7, 2022, the Ordzhonikidzevsky District Court of Zaporizhzhia held an open court session to hear a criminal proceeding, Case no. 335/2010/22²⁷. The case involved the accusation of Individual_4, a Ukrainian citizen who possessed a higher education, was unmarried, was serving as the deputy commander of the first patrol squad for personnel management in the first patrol battalion of Military Unit Number_1 of the Ukrainian National Guard with the rank of senior lieutenant, and had no prior convictions. On March 2, 2022, Individual_4 committed the theft of a firearm—specifically, a Makarov 9mm pistol. This firearm had an assessed value of 349.00 *hryvnias* and had been allocated to a military member of Military Unit Number_1, belonging to the National Guard of Ukraine. This individual held the position of the first patrol squad's commander within the first patrol battalion of Unit Number_2, which operated under the Odesa Regional Directorate of the State Border Guard Service of Ukraine. In addition to the pistol, Individual_4 stole sixteen rounds of 9mm ammunition, amounting to a total value of 99.20 *hryvnias*. This ammunition was part of the inventory controlled by Military Unit Number_1 of the National Guard of Ukraine. After that, Individual_4 hid it in a desk located on the fourth floor of the Zaporizhzhia Regional State Administration, intending to use it at his discretion. Thus, Individual_4 committed a criminal offense as defined in part 4 of article 410 of the *Criminal Code*, namely the theft of weapons and ammunition by a military serviceperson while in a state of war. Individual_4 was found guilty of committing this criminal offense, according to the definition of part 4 of article 410 of the *Criminal Code*. Applying part 1 of article 69 of the *Criminal Code*, he was sentenced to five years in prison with probation under article 75 of the *Criminal Code*²⁸.

²⁶ Judicial Authority of Ukraine, "Report of First Instance Courts on the Examination of Cases on Administrative Offenses Compiled for the Years 2018–2021," accessed Jan. 15, 2024, https://court.gov.ua/inshe/sudova_statystyka/zvitnist_21. (Ukrainian language).

²⁷ Case no. 335/2010/22 Category, accessed Jan. 16, 2024, https://www.pryncyp.com/wp-content/uploads/2023/12/pryncyp_yurydychnyj-analiz_online.pdf. (Ukrainian language).

²⁸ Ibid.

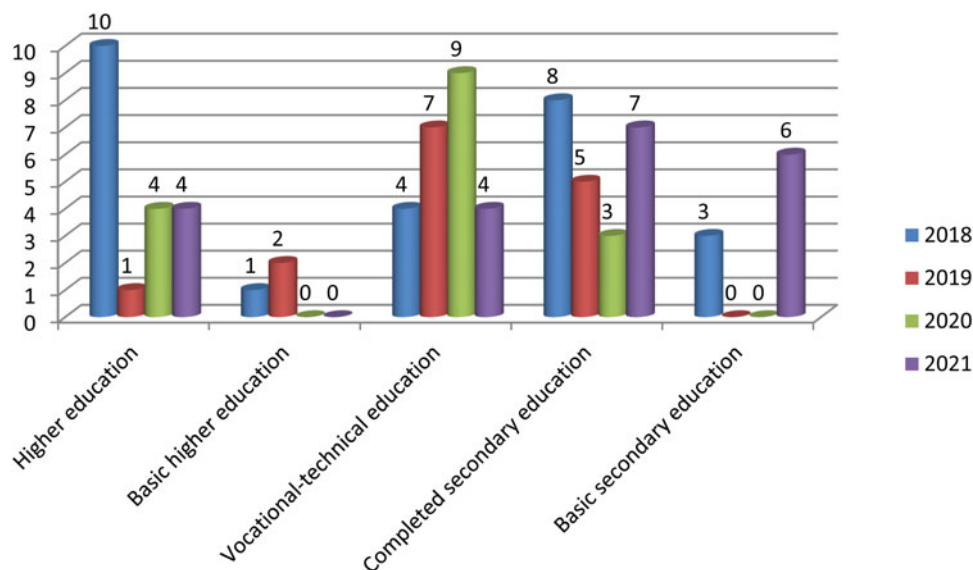


Figure 1. Data concerning the educational backgrounds of individuals who committed a military criminal offense as outlined in article 410 of the *Criminal Code of Ukraine* during the period spanning 2018–2021.

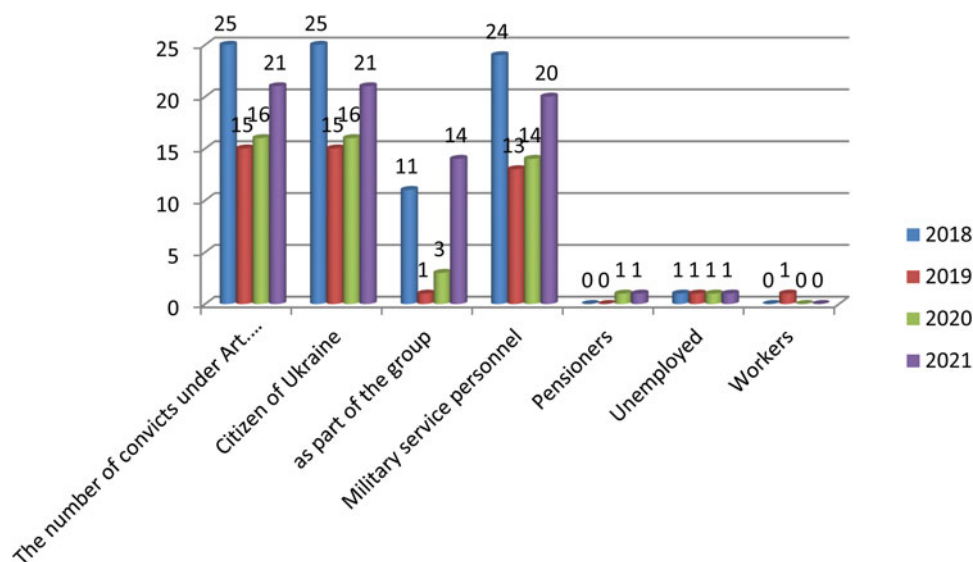


Figure 2. Information on the perpetrators of criminal offenses committed under article 410 of the *Criminal Code of Ukraine*, 2018–2021.

In another case, no. 607/1764/21²⁹, the subject of criminal responsibility for military property theft was a Lutsk native, a Ukrainian citizen with a secondary education, unmarried with one minor child, unemployed due to article 89 of the *Criminal Code*, and had no prior convictions. Having authoritative powers, being a military serviceperson, and serving in the military under a contract as the chief of communication in the military unit, realizing the socially harmful nature of his actions, and anticipating the socially harmful consequences these actions could cause, motivated by a selfish motive of enrichment through the use of another's property, and having unrestricted access to the communication platoon in the military unit during a specific period, in December 2019, took military property

²⁹ Case no. 607/1764/21 Category, accessed Jan. 15, 2024, <https://data-ua.com/doc/91739393/persons>. (Ukrainian language).

worth a total of 286,939.74 *hryvnias* outside the military unit. This collection of property encompassed a set of twelve specialized handheld radio devices, each marked with unique serial numbers. These radio units were assessed at a value of 17,572.80 *hryvnias* each. Moreover, he took three units of specialized portable radio stations, each identified by serial numbers. The value of these radio stations was 19,915.38 *hryvnias* per unit. Additionally, among the stolen property was a solitary unit of computer hardware, a Dell Vostro 3581 laptop equipped with software appraised at 16,320 *hryvnias*. Subsequently, the individual used these items at his own discretion.³⁰

During the hearing at the Ternopil City District Court, the accused Individual_4 refused to admit guilt to the criminal offense. The court was informed that in 2019, Individual_4 was serving in the military as the chief of communications and commander of the communication platoon in Military Unit Number_1. He was in charge of the unit's property, which included a laptop and radio stations provided for the unit's use. The mentioned items were kept in a room in the basement of the unit's headquarters, accessible through an entrance where the duty officer was stationed. Individual_4 was found guilty of the crime outlined in part 3 of article 410 of the *Criminal Code*, and he was sentenced to six years in prison.³¹

In all the above case examples, it was established that the perpetrator was a military serviceperson, where neither age nor education affected service duties—only material management instructions. However, cases of the specified criminal offense being committed by military service personnel who do not have material management functions are not excluded. The case considered by the Desnianskyi District Court of Chernihiv on April 24, 2023, Case no. 750/141/23 Category³², is an example of the latter. On July 9, 2022, Individual_4, with a completed general secondary education, while on duty as part of the shift guarding the object “Headquarters of the ‘Chernihiv’ Detachment” of Military Unit Number_1, being in the duty room where weapon and ammunition boxes were stored, and acting with direct intent and for-profit motives, and taking advantage of the absence of any observation of his actions, secretly opened one of the boxes for storing weapons and stole an AKS-74U automatic rifle with a magazine and thirty rounds of 5.45 mm caliber ammunition. On July 10, July 16, and August 16, 2022, he repeated the same actions. The accused fully admitted his guilt in committing the offense and confirmed the circumstances in the indictment during the court session, expressing genuine remorse. Individual_4 was found guilty under part 4 of article 410 of the *Criminal Code* and was sentenced to ten years in prison.³³

Thus, the primary characteristic of a military serviceperson as a subject of the investigated unlawful thefts of military property is their use of their position, which includes general, official, and specialized duties.³⁴

To prove the mentioned theory, let's also examine the subject of an administrative offense under article 172-13 of the *Code of Ukraine on Administrative Offenses* (CUAO): “Abuse of Power or Official Position by a Military Serviceman.” This provision addresses the “illegal use of vehicles, structures, or other military property by a military service personnel, employing a military service for tasks unrelated to military service, as well as other abuses of power or official position committed for personal gain or other personal interests or the interests of third parties.” The aforementioned article is very similar to article 410 of the *Criminal Code* (the distinguishing features will be discussed below in the third section). We are especially interested in analyzing the administrative offender who, according to the note to article 172-13, is a military serviceperson; specifically, they are military commanders and other military service personnel who hold permanent or temporary positions associated with the execution of organizational-administrative or administrative-economic duties or perform such duties by specific assignment of the authorized command.³⁵

According to the analyzed statistics, over a four-year period (2018–2021), forty-six individuals were held administratively liable under article 172-13 of the CUAO. Among them, forty-two were military personnel,

³⁰ S.M. Smokov, et al., “Rule of Law as a Principle of Criminal Procedure (on Materials of the European Court of Human Rights),” *Pakistan Journal of Criminology* 14, no. 3 (2022): 37–46.

³¹ Case no. 607/1764/21 Category (n 29).

³² Case no. 750/141/23 Category, accessed Jan. 15, 2024, <https://reyestr.court.gov.ua/Review/110386220#>. (Ukrainian language).

³³ Ibid.

³⁴ D. Golovin et al., “Electronic Evidence in Proving Crimes of Drugs and Psychotropic Substances Turnover,” *Access to Justice in Eastern Europe* 5, no. 2 (2022): 156–66, <https://doi.org/10.33327/ajee-18-5.2-n000217>.

³⁵ Verkhovna Rada of Ukraine, Code of Ukraine on Administrative Offenses (articles 1–212–24) (article 213–article 330), *Official Gazette of the Supreme Soviet of the Ukrainian SSR*, Appendix to no. 51, 1984, <https://zakon.rada.gov.ua/laws/show/80731-10#Text>. (Ukrainian language).

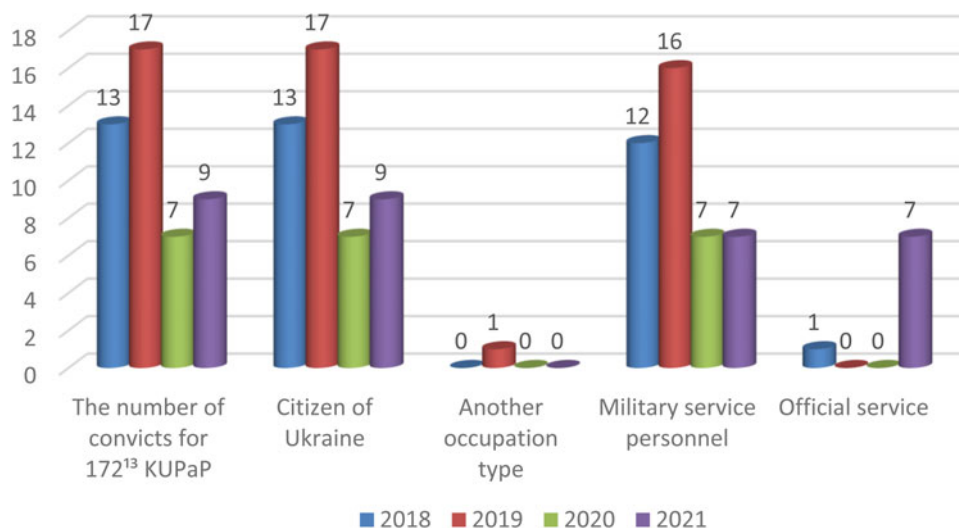


Figure 3. Information diagram for the subject of an administrative offense committed under article 172-13 of the CUAO, “Abuse of Power or Official Position by a Military Official,” 2018–2021.

constituting 91.3% of the total number subject to administrative liability. Only eight individuals were an officials, and one had another occupation³⁶ (Figure 3).

To clarify this feature, we propose defining characteristics inherent in the specialized subject of theft. First, this is an individual who is in military service and has an official position, which means the performance of specific functions according to the rights, authority, and duties assigned in the Armed Forces of Ukraine or other military units and formations³⁷. Second, this is an individual who is permanently, temporarily, or by special authorization in a service position, and therefore the corresponding establishment of this is through regulatory documents, namely the following: a) the subject’s status should be regulatory formalized (by appointment order, temporary performance of duties order, inclusion in the composition of the inspecting commission, etc.). It is necessary to ensure that the person appointed to the position follows the law and carries out duties based on an act issued by an authorized person; and b) the detailed determination of the subject’s specific powers and duties through regulatory acts defines both general and special duties (considering the specifics of the occupied position). They are regulated in detail by military statutes, guidelines, instructions, regulations, directives, and written orders of commanders (chiefs). Thirdly, the essence of the official position or duties concerning the discussed thefts, misappropriations, embezzlements, or frauds involving military property should be defined, and the limits when qualifying under the criterion of “person using an official position” should be set. This criterion is crucial for revealing the essence of the examined unlawful takings, their proper qualification, and distinguishing them from related forms of criminal offenses. Therefore, this area is discussed further in the third section of this study.

The characteristics of the specific subject of a criminal offense, as well as the military service personnel’s status listed above, we believe play a significant role in resolving issues of criminalization and differentiating the criminal liability of general and specific subjects of military property theft.

To illustrate the above, we present the results of our survey in which the following individuals participated: 200 employees of special prosecution authorities, 570 employees of territorial law enforcement agencies, 200 contract military servicemen, 186 civilian personnel of military units and institutions, and 117 citizens, totaling 1,273 individuals. Eighty-seven employees (43.5%) of special prosecution authorities, sixty-three law enforcement officers (11.05%), sixty-three contract military service personnel (31.5%), ninety-eight civilian personnel (51.61%), and fifty-seven citizens (48.72%) demonstrated a preference for legislative action, along with an elevation of the

³⁶ Judicial Authority of Ukraine, “Report on the Composition of Convicts,” accessed Jan. 15, 2024, https://court.gov.ua/inshe/sudova_statystyka/zvitnist_21. (Ukrainian language).

³⁷ M.V. Korniienko et al., “Negative Effects of Corruption Offenses for the Country’s Economy,” *International Journal of Management* 11, no. 5 (2020): 1072–83, <https://doi.org/10.34218/IJM.11.5.2020.098>.



Figure 4. Which category of service personnel, in your opinion, commits the most large-scale theft of military property the most often?

status of military servicepersons, and an increase in criminal liability for criminal offenses related to military property under article 410 of Ukraine's *Criminal Code*. Additionally, 88.2% of military personnel believed that contract civilian personnel of military units and institutions should bear equal criminal responsibility for military property theft.

In response to the question of whether criminal liability for the theft of military property should be differentiated and by what criteria, more than half of the employees (51.5%) of specialized prosecution authorities chose the criterion of differentiation based on the professional activity of the subject (i.e., the official position, financial responsibility, access to the property being stolen, etc.) out of the five proposed answer options. This criterion was also selected by over one-third (36.3%) of the surveyed law enforcement officers and by 39.4% of the citizens.

Based on the conducted research survey, it was established that over one-third (38.5%) of the surveyed employees of the Special Prosecutor's Office experienced difficulties in practice when qualifying theft of military property under the characteristic of "using their official position."³⁸

In response to the question of whether the use of one's official position should be interpreted in cases of article 410 of the *Criminal Code* regarding the military property in their jurisdiction, justified solely by the fact of their position, 69.5% of the surveyed employees of the special prosecution authorities responded positively. The same opinion was shared by 77% of law enforcement officers. According to 60.5% of surveyed employees of the specialized prosecution authorities (Figure 5) and 76.4% of employees of other law enforcement agencies, the actions of a person who, when committing a crime under article 410 of the *Criminal Code* by stealing military property who had access to it due to their service, necessitates additional legal qualifications.³⁹

During the survey, out of all 1,273 respondents, 62.6% selected establishing priority of criminal legal protection for military property by introducing special provisions; 69.4% supported actual increases in military personnel's income; 43% supported improving the effectiveness of supervisory bodies; and 16.3% chose implementing oversight by civil organizations.

Regarding the factors that contribute to military property theft by military personnel, 40.7% stated it was accessible; 29% referred to a culture of impunity in the army; 43.3% pointed to inadequate protection of military property; and 39.3% mentioned a lack of oversight by supervisory bodies. One of the reasons cited by 57.6% of all the respondents was an insufficient number of effective criminal legal norms to prevent violations of article 410 of the *Criminal Code*.

According to the survey data about the factors contributing to the commission of crimes defined in article 410 and protective measures for military property against unlawful encroachments, more than 60% of all respondents indicated the need for special legal norms aimed at the effective protection of military property from criminal

³⁸ V.M. Stratonov, ed., *Military Offenses and War Crimes* (n 9).

³⁹ O. Kovalova, O.M. Korniienko, and O. Postol, "Ensuring of Child's Dignity as a Principle of Modern Education: Administrative and Legal Aspects." *Asia Life Sciences Supplement* 21, no. 2 (2019): 341–59, <https://doi.org/10.34218/IJM.11.5.2020.098>.

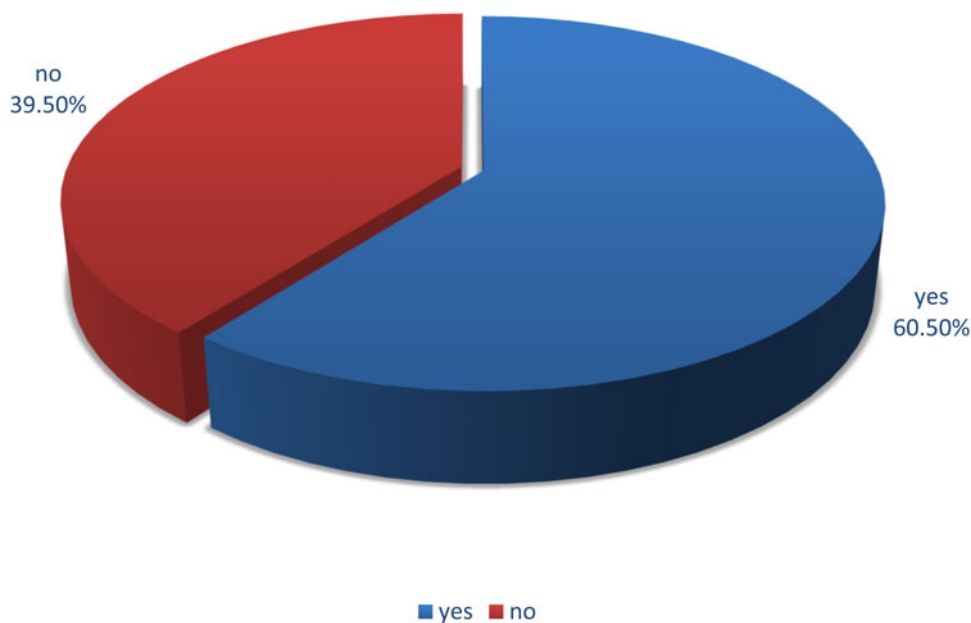


Figure 5. Do the actions of a person who commits the theft of military property under article 410 of the *Criminal Code of Ukraine* require additional qualifications if the person has access due to their position?

offenses. Overall, it is important to note that the data analysis from the conducted survey largely confirms the main findings of this study.

4. DISCUSSION

While conducting the survey, we were able to obtain the following information that confirms our suppositions. Thus, 68% of those polled believed that, in addition to raising military personnel's status, increased criminal liability for military criminal offenses, particularly theft of military property, is also needed. Similarly, 52% of civilian personnel of military units, 43.5% of employees of military prosecution authorities, 40.1% of personnel from other law enforcement agencies, and 21% of contract-based military service members shared the same opinion. It is worth noting that 88.2% of military personnel believed that civilian personnel employed by military units and establishments should bear the same criminal responsibility for the theft of military property.

In response to the question of whether criminal liability for the illegal theft of military property should be differentiated and by what criteria, more than half (51.5%) of the surveyed employees of the special prosecution authorities chose the criterion of differentiation based on the subject's professional activity (i.e., based on the official position, presence of financial responsibility, the subject's ability to access the stolen property) out of the proposed five answer options. Over one-third (36.3%) of the surveyed territorial law enforcement officers, and 39.4% of civilians agreed on this criterion.

Finally, there is the matter of co-perpetrators. In military criminal offenses involving individuals who are not specified in article 410 of the *Criminal Code*, they are held accountable under section XIX of the Special Part of the *Criminal Code*, according to part 3 of article 401. As a result of this provision, the legislator establishes the principle of accountability for co-perpetrators in criminal offenses involving a specific subject of a criminal offense. The perpetrator of the crime specified in article 410 of the *Criminal Code* can only be a military serviceperson, while all other co-perpetrators can be civilians. As a general rule, a civilian cannot be a co-perpetrator in military criminal offenses. In such cases, the military serviceperson is held responsible for the military offense, while the civilian is held accountable under general principles (criminal offenses against property). However, we disagree with this rule and believe that it leads to unjustified mitigation of responsibility, particularly in terms of the subjective aspect of the criminal offense when a person realizes they are a co-perpetrator in a military crime. Furthermore,

the element of “by prior conspiracy of a group of individuals” cannot be applied, as it does not conform to formal logic.

In the proceedings of the Desniansky District Court of Kyiv on July 14, 2017, concerning the accusation of Individual_1 under article 27, part 2, of article 410 of the *Criminal Code of Ukraine*, an individual was implicated as an accomplice in the illegal appropriation of military property by a military serviceperson through abuse of an official position by fraudulent means.⁴⁰ The case revolved around a military serviceperson, Individual_2, who held a position consistently associated with organizational, administrative, and economic responsibilities, and Individual_1, who organized the supply of beef to military units of the National Special Transport Service of Ukraine’s Ministry of Infrastructure. For the meat supply, Individual_1 and Individual_2 agreed on a price of 26.50 *hryvnias* per kilogram. Meanwhile, in a phone conversation, Individual_2 negotiated with Individual_1 to set an inflated price for the beef to profit from the price difference (illegally) to which Individual_1 agreed. Therefore, the court classified Individual_1’s actions as violating article 27, part 2, of article 410 of the *Criminal Code*, as Individual_1 became involved (as an accomplice) in the misappropriation of military property by a military serviceperson by fraudulent means, with abuse of an official position as part of an organized group of individuals.

However, we believe the actions should have been classified under part 2 of article 27 and article 410 of the *Criminal Code*, referencing co-perpetrators. We understand that this might refer to article 29, which states that the perpetrators’ actions are classified under the specific section of the *Criminal Code* that corresponds to the objective aspect of their actions. Thus, we propose amending article 29 of the *Criminal Code* to address the actions of a co-perpetrator.

Furthermore, we propose amending article 29, “Criminal Liability of Accomplices,” with the following wording: “1. The perpetrator (a co-perpetrator) shall be subject to criminal liability under the article of the Special Part of this Code that corresponds to the criminal offense committed by them. When the crime involves a specific individual and is related to corruption, the actions of a co-perpetrator involved in the corruption offense will be classified according to the section under which the specific individual responsible for the criminal offense is prosecuted. This classification is based on their participation in the crime as a co-perpetrator, as defined in part 2 of article 27 of the *Criminal Code*.” For example, the perpetrator is the specific subject under part 2 of article 410, whereby the co-perpetrator, who is not a specific subject (official) but a civilian, is held accountable under part 2 of article 27 and part 2 of article 410. As a result, the legislator will fill the gap concerning unjustified punishment mitigation.

The military serviceperson is aware that their actions are illegal, as they arbitrarily confiscate and/or take possession of someone else’s (military) property for their own or the benefit of others, foreseeing the inevitability of causing harm to the State (military unit) and intending to do so.

5. CONCLUSIONS

Following a study of the notion of a subject of legal relations and a comparison with the concept of a specific subject from article 410 of Ukraine’s *Criminal Code*, the following conclusions can be drawn:

Any military serviceperson, regardless of administrative or managerial responsibilities, can be the subject of part 1 of article 410 of the *Criminal Code*. Accordingly, they are not considered an official, and thus part 1 of article 420 of the *Criminal Code* does not apply to corruption-related criminal offenses. Therefore, the proposed changes to the note to article 45 of the *Criminal Code* are as follows:

“**Note.** Corruption-related criminal offenses under this Code are considered criminal offenses under articles 191, 262, 308, 312, 313, 320, 357, and parts 2, 3, and 4 of article 410, when committed through abuse of an official position as well as criminal offenses under articles 210, 354, 364, 364⁻¹, 365⁻², and 368–69⁻²;

A person who has reached the age of 16 is the subject of a criminal offense, but only if they are a cadet at a military academy and will reach the age of 17 by December 31 of the current year.

Age and education do not affect the commission of article 410 of the *Criminal Code*; only the presence of material and managerial functions matters.”

⁴⁰ Case no. 1-kp/754/23/17, Case No. 754/21244/14-k EDRSR 67768217, dated July 14, 2017, accessed Jan. 15, 2024, <http://reyestr.court.gov.ua/Review/55583347>. (Ukrainian language).

The conceptual framework is also problematic. Part 1 of article 401 of the *Criminal Code* lists the criminal offenses that fall under military service, namely those committed by military personnel, conscripts, and reservists during training sessions. In part 2 of article 410 of the *Criminal Code*, the term ‘military official’ is used to specifically refer to an individual in a position associated with administrative and managerial functions rather than a military serviceperson. However, the legislator does not provide clarification or definitions in article 401, making it understandable only theoretically. As a result, we believe it is necessary to define ‘military serviceperson’ or even an alternative legislative designation, such as ‘military official’ in the explanatory provision of part 5 of article 401, which would significantly distinguish it from terms that sound similar.

Part 5 of article 401 of the *Criminal Code* should be phrased as follows: “Military service personnel (military officials) are individuals who are military servicepersons and hold permanent or temporary positions associated with the execution of administrative and managerial duties,” instead of the note to article 425 of the *Criminal Code*.

We also propose changes to article 29, “Criminal Liability of Accomplices,” with the following wording: “1. The perpetrator (a co-perpetrator) shall be subject to criminal liability under the article of the Special Part of this Code that corresponds to the criminal offense committed by them. When the crime involves a specific individual and is related to corruption, the actions of a co-perpetrator involved in the corruption crime will be classified according to the section under which the specific individual responsible for the criminal offense is prosecuted. This classification is based on their participation in the crime as a co-perpetrator as defined in part 2 of article 27 of the *Criminal Code*.”

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