

THE CRIME OF UNJUSTIFIED ABSENCE IN THE ROMANIAN CRIMINAL CODE

Mirela GORUNESCU*

Abstract

The new Criminal Code of Romania regulates in Title XI of its Special Part the crimes against the combat capability of the military forces. Under this title, Chapter I is dedicated to the crimes committed by the military and defines the crime of unjustified absence. In this study, the author analysed the specific elements of this crime, including: the specific legal object - military discipline, the field of the active subject and the essential requirements imposed by its objective side.

Keywords: *criminal law, new Romanian Criminal Code, unjustified absence, crimes against the combat capability.*

1. Introduction

The new Romanian Criminal Code (which came into force on February 1, 2014), under Title XI of its Special Part, regulates the crimes against the combat capability of the military forces. In this way, they maintained the solution adopted by the previous Criminal Code by which was expressly repealed the Military Justice Code which has been active since 1937 being preferred the creation of a unitary regulation framework. In this way, with some isolated exceptions, all the incrimination norms which regard deeds committed by the military are kept in the Criminal Code, being avoided the instances of incoherence and inconsistencies found in relation to the previous regulation. As compared to the regulation from the previous Criminal Code, the simplification and modernization of the regulations from this category is remarked, so that such regulations should comply with the requirements to which the field is subject, particularly with reference to the double status held by Romania, of a Member State of the European Union (involved in the implementation of the common security policy), respectively of Member State of NATO (involved in the peace maintenance actions managed by this organization). The crimes from Title IX of the Special Part of the Criminal Code are grouped in two chapters, according to the criterion of the qualification of the active subject: crimes committed by the military, respectively crimes committed by the military or by the civilians.

All the crimes from this title impair the social relationships whose existence and development would not be possible without the maintenance of the combat capability of the military forces. The speciality doctrine indicates that the combat power represents the capacity, the possibility of a force at any time to obtain results in the development of a specific mission against

a certain enemy, in a specific combat environment¹. In the same opinion, it is observed that “the maximum combat power of operative land forces is realized by means of the integration of all the types of composing forces, into a unitary whole, within inter-arms, inter-categories. force or multinational groups. The forces envisaged are: a) *combat forces*, of which the following are part: armoured divisions (mechanized, tanks, army rangers); divisions without armoured vehicles (infantry, army rangers, paratroopers (airborne) and special forces; b) *support combat forces* (artillery units; artillery and anti-tank missile units; artillery and anti-aircraft missile units; corps of engineers; electronic war units; nuclear, biological and chemical defence units – NBC; research units; communications and information units; military police units). c) *logistic support forces* (supply and transport units, maintenance units, medical units, sanitary-veterinarian units, traffic control and guidance units, campaign banking units)”.

2. The analysis of the crime

The crimes which can be perpetrated only by the military, as provided in Art. 413 of the Criminal Code, include also the crime of unjustified absence. According to the incrimination wording, “the unjustified absence of any military from his unit or from his service, which exceeded 4 hours, but not more than 24 hours, in time of war, during the state of siege or the state of emergency, shall be punished by imprisonment from one to 3 years or by a fine”.

The unjustified absence is incriminated in a wording that is noticeably different in the new Criminal Code as compared to the former regulation. Thus, the deed is construed as a crime if perpetrated by any military, but only in time of war, during the state of siege or the state of emergency, not in time of peace, as in the previous Criminal Code.

* Associate Professor PhD, Faculty of Law, “Nicolae Titulescu” University of Bucharest (e-mail: mire_gor@yahoo.com).

¹ F. Ianoși, Manevra – element al puterii de luptă, in Revista forțelor terestre, available at http://www.rft.forter.ro/2007_4/02-tgl/01.htm.

The special *legal object* in case of the crime of unjustified absence, as it is regulated under Art. 413 of the Criminal Code in force, consists in the social relationships regarding the observance of military order and discipline. On the strength of Art. 2, para. (1) of the Regulation of Military Discipline², military discipline consists in the observance by the military of the legal provisions, of the norms of order and conduct, which are mandatory for the maintenance of a functional state, fulfilment of specific missions and proper performance of the military activities. At the same time, fulfilment of the military service requires the strict observance of the military discipline rules specific to the Romanian Army because it represents one of the decisive factors of the *operational capacity of the army* and is based both on the conscious acceptance of the established norms of conduct, and on the granting of rewards and application of disciplinary sanctions.

The operational capability to which the military regulation refers is the very combat capability of the military forces, so that a very clear connection is established between the imperative of observing the military discipline, and the capability to fight back or to defend of the military forces of which the respective military man is part.

The active subject of the crime is qualified, the crime of unjustified absence being a crime on its own. The qualification of the active subject implies that, beyond the general conditions which should be ascertained in case of this subject, for the particular situation of unjustified absence, the fulfilment of an additional condition is mandatory – that the author should be *any* military.

The scope of the direct active subject of the crime of unjustified absence results from the very Art. 1 para. (2) of the Regulation of Military Discipline, which expressly indicates the fact that its provisions apply to active military men, professional soldiers and officers, reservists during concentration or mobilization, pupils and students of military education and training institutes for active military men.

Criminal participation is not possible in the form of co-authorship. This is because the crime is one that is committed *in propria persona*, since each military man has the individual obligation to observe the norms of military discipline. Even in the assumption that several military men would agree to have unjustified absences from their service during a period relevant for the existence of the crime of unjustified absence, there shall be no co-authorship in the crime of unjustified absence, but each military man shall be charged with a distinct crime.

There can be participation in the form of *instigation or complicity*. Both the instigator and its accomplice may be any person meeting the general conditions of the criminal liability.

The primary passive subject in case of this crime is always the State, because the State is the one that is vulnerable because of the endangerment of the combat capability of its military forces. The secondary passive subject is always the unit of which the military man responsible for breaching the norms of military discipline is part.

The material element of the crime consists in the *unjustified absence* of the military man from his unit or service for a term ranging from 4 to 24 hours. It is not relevant for the existence of the crime whether he left the unit with or without the approval of his commanding officers, nor is it relevant whether he returned willingly or he was captured and delivered by the authorities. Undoubtedly, however, these elements will be important in the process of individualizing the punishment to be applied.

Unit shall mean any military formation, regardless of the number of military men composing it and regardless of its permanent or temporary nature. *Service* shall mean the place where the military man is effectively carrying out a certain activity. For the crime to exist, it is mandatory that the military man should have actually left the premises where he was supposed to carry out his activity, his mere absence from the call being unable to realize the contents of the crime³.

For the existence of the material element of the crime, it is necessary that *three essential requirements* are met.

A first requirement is that the absence from the unit or service should be *unjustified*, as expressly required by the incrimination wording. The term should be understood, however, as “unmotivated”, as there is otherwise the risk to generate the confusion borne by the reference only to the justifying causes provided by Arts. 18-22 of the Criminal Code. The marginal name and, implicitly, *verbum regens* in case of this crime were maintained with the names provided in the previous Criminal Code, without consideration to the fact that the new Criminal Code defines justifying causes, as well as the causes for non-imputability. Under these conditions, the unmotivated absence from the unit or service of the military man should be both unjustified, and non-imputable (imputability being, otherwise, one of the essential features of any crime)⁴. In other words, if, for instance, the military man happens to be immobilized by a person and confined to a room, which prevents him from returning from a leave in time, his deed shall not constitute the crime of unjustified absence, as it is not

² Approved by Order No. 64/2013 issued by the Minister of National Defence, published in The Official Gazette of Romania, Part I, No. 399 bis of July 3, 2013

³ The Bucharest Military Tribunal, Criminal Decision No. 366/1972, quoted in V. Dobrinoiu, I. Pascu, M.A. Hotca, I. Chiș, M. Gorunescu, C. Păun, M. Dobrinoiu, N. Neagu, M.C. Sinescu, Noul Cod penal comentat, 2nd Edition, Universul Juridic Publishing House, Bucharest, 2014, p. 1036.

⁴ M. Gorunescu, I.A. Barbu, M. Rotaru, Drept penal, partea generală, Universul Juridic Publishing House, Bucharest, 2014, p. 71.

imputable to him. The cause for non-imputability is that defined by Art. 24 of the Criminal Code – the physical constraint and, although the absence from service is not unjustified, but only non-imputable, the contents of the deed provided by Art. 413 of the Criminal Code are not realized.

A *second requirement* takes into account the fact that the unmotivated absence should last for more than 4 hours, but should not exceed 24 hours.

If the unjustified absence from the unit or service lasts less than 4 hours, the deed shall not constitute a crime, but the disciplinary deviation regulated by Art. 49 letter c) of the Regulation of Military Discipline. When the duration exceeds the interval of 24 hours, the crime that is committed is not the unjustified absence, but that of desertion, as defined by Art. 414 of the Criminal Code.

The third essential requirement refers to the condition of time for the deed to be committed in time of war, during the state of siege or the state of emergency⁵.

In the legal definition, Art. 185 of the Criminal Code states that *time of war* means the duration of the state of mobilization of the military forces or the duration of the state of war.

The state of mobilization represents the entirety of the extraordinary measures that can be instituted, primarily, in the political, economic, social, administrative, diplomatic, legal and military fields, planned and prepared in time of peace, as well as of the actions performed for their application, according to law, upon the appearance or imminence of a severe threat that may affect the sovereignty, independence and unity of the State, the territorial integrity of the country and the constitutional democracy.

The state of war represents the entirety of the extraordinary measures that may be instituted, primarily, in the political, economic, social, administrative, diplomatic, legal and military fields, in view of exercising the inherent right of the State to individual or collective self-defence⁶.

The state of siege and the state of emergency are defined in Emergency Government Ordinance No. 1/1999 regarding the regime of the state of siege and of the state of emergency⁷.

The state of siege represents the ensemble of exceptional measures of political, military, economic, social and other nature, applicable on the entire territory of the country or in certain territorial-administrative units, instituted for the adaptation of the country's capability of defence against current or imminent grave dangers, threatening the sovereignty, independence, unity or territorial integrity of the State. In case the state of siege is instituted, exceptional

measures can be taken, which are applicable throughout the entire territory of the country or in certain administrative-territorial units.

The state of emergency represents the ensemble of exceptional measures of political, economic, and public order nature, applicable on the entire territory of the country or in certain territorial-administrative units which are instituted in the following situations: a) the existence of current or imminent grave dangers regarding the national security or the functioning of the constitutional democracy; b) the imminence of the occurrence or the production of calamities which render necessary the prevention, limitation or removal, as applicable, of the consequences of certain disasters.

For the unjustified absence from the unit or service to have the criminal significance given by Art. 413 of the Criminal Code, it is mandatory that all these requirements should be met.

The immediate consequence consists in the creation of a state of danger for the combat capability of the military forces, deriving from the ignorance of the military order and discipline in a military unit or service, and the causality relation results from the mere perpetration of the material element, the crime being one of danger.

The subjective element in case of the crime of unjustified absence is the intention in the methods of direct or indirect intention⁸. The mobile and purpose in case of this crime do not have any relevance for the existence *per se* of the crime, they only influence the individualization process of the punishment.

Essential requirements. The subjective element in the crime of unjustified absence necessarily implies that the active subject, having the capacity of a military man, knows precisely the unmotivated character of his absence from the unit or from service. If, for instance, out of an error of the records department, in the service or travel order of the military man there appears an erroneous date of returning to the unit, one day beyond the real interval of travel, and the military observes such date, he shall not be liable for an unjustified absence, being in error with regard to the date of appearance. The error represents, otherwise, a cause for non-imputability, as provided by Art. 30, para. (1) of the Criminal Code.

The preparatory acts for the crime of unjustified absence are not incriminated by the lawmaker, and the attempt is not possible.

The consummation of the crime occurs immediately after the lapse of the 4 hours since the military man has been absent without any justification from his unit or service. Furthermore, the crime of unjustified absence is liable to extend in time. When the absence continues after the lapse of the 4 hour-

⁵ The state of war, the state of mobilization, the state of siege and the state of emergency are mentioned in the Constitution, as well, under Arts. 63, 65, 89, 92, 93 or 152.

⁶ These two notions are regulated by Law No. 355/2009 published in Official Gazette No. 805 of November 25, 2009.

⁷ EGO No. 1/1999 regarding the regime of the state of siege and the regime of the state of emergency, published in Official Gazette No. 22 of January 21, 1999, approved by Law No. 453/2004, published in Official Gazette No. 1052 of November 12, 2004.

⁸ T. Vasiliu, D. Pavel ș.a., *op. cit.*, vol. II, p. 487; D. Cojocaru, *Infrațiunile contra capacității de apărare a României* Științifică și Enciclopedică Publishing House, Bucharest, 1975, p. 46.

term, the crime becomes continuous. Termination occurs in this hypothesis when the military man returns to his unit or service, but only if this event occurs within the 24-hour interval referred to in Art. 413 of the Criminal Code. As soon as the 24-hour interval is exceeded, the typical nature of the crime of unjustified absence is no longer met; it becomes the crime of desertion, provided in Art. 414, para. (1) of the Criminal Code.

It does not exist in case of the crime of unjustified absence, because the excess of the 24-hour interval referred to in the incrimination norm transforms unjustified absence into desertion, even under the conditions of the aggravated version from Art. 414, para. (3) of the Criminal Code, as it occurs in time of war, during the state of siege or emergency.

Unjustified absence is punished by imprisonment from one to 3 years or by a fine. According to the provisions of Art. 67, para. (1) of the Criminal Code, should the Court deem it necessary, the complementary punishment of the prohibition of exerting certain rights can also be applied to the perpetrator.

Between the crime of unjustified absence and other crimes, there are certain elements of closeness. Most such elements exist between the crime of unjustified absence and the crime of desertion (Art. 414 of the Criminal Code). This is because the material element of the two crimes is common (the unjustified absence), being in certain normative methods even a continuous conduct that only the premise-situation causes it to be differently classified. Thus, if the unjustified absence from the unit or service of the military man occurs in time of war, during the term for which the state of siege or the state of emergency is declared, up to a duration of 4 hours, the deed represents a disciplinary misconduct, more than 4 hours, but no more than 24 hours represent unjustified absence, and a period exceeding 24 hours is already realizing the contents of the crime of desertion, even in its aggravated version [Art. 414 para. 3) of the Criminal Code].

If, from the point of view of the fulfilment of the premise-situation for declaring either of the exceptional states indicated by Art. 413 of the Criminal Code, the fulfilment of the requirement is not ascertained, the deed shall have a criminal significance

only after the lapse of 3 days of unjustified absence. This is because the state opposite to those previously indicated is the state of peace, of normality, and the unjustified absence of the military man from service in this context becomes desertion only after it exceed three days.

By reporting to the qualification of the active subject of the crime, if the requirement regarding the quality of *any military man* is not met (for instance, the person is a policeman) to which the incrimination norm refers, such a deed may constitute eventually an abuse in service, if all the conditions for the existence of such crime exist.

Also in terms of the trial the unjustified absence presents certain specific aspects. In this way, the criminal action is initiated only when the commanding officer is notified (Art. 431 of the Criminal Code). The competence of judgment on the merits belongs to the military tribunal, if the military who is absent without justification has the rank of colonel, inclusively. When the unjustified absence is committed by a general, the competence of trial in the first instance belongs to the military court of appeal. The same court is competent also if the military man is a judge from the military tribunal or a military prosecutor from the military prosecutor's offices attached to these courts. The competence belongs to the ordinary courts of appeal if the military man who perpetrates the deed is a judge with the Military Court of Appeal or a prosecutor with the prosecutor's office attached to it.

3. Conclusions

The crime of unjustified absence is a low-key version of the crime of desertion, both being crimes directed particularly against the norms of military order and discipline. As the other crimes from this category, the crimes against the combat capability of the military forces were changed and adapted to the specific nature of the social realities which should be covered by the new regulation in the criminal field. In this study, we chose to analyze the constitutive elements of the crime of unjustified absence, because only by means of a proper understanding of such elements can the incrimination wording benefit from a thorough and correct application.

References

- F. Ianoşiu, Manevra – element al puterii de luptă, in Revista forţelor terestre, available at http://www.rft.forter.ro/2007_4/02-tgl/01.htm.
- V. Dobrinou, I. Pascu, M.A. Hotca, I. Chiş, M. Gorunescu, C. Păun, M. Dobrinou, N. Neagu, M.C. Sinescu, Noul Cod penal comentat, 2nd Edition, Universul Juridic Publishing House, Bucharest, 2014.
- M. Gorunescu, I.A. Barbu, M. Rotaru, Drept penal, partea generală, Universul Juridic Publishing House, Bucharest, 2014.
- D. Cojocaru, Infraţiunile contra capacităţii de apărare a României Ştiinţifică şi Enciclopedică Publishing House, Bucharest, 1975, p. 46.