

Note from the Field

Access to Justice Amid War in Ukraine Gateway

ADMINISTRATION OF JUSTICE DURING MILITARY AGGRESSION AGAINST UKRAINE: THE 'JUDICIAL FRONT'

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Abstract This article is devoted to the study of the peculiarities of the administration of justice in the context of the large-scale military aggression of the Russian Federation against Ukraine. Within this framework, the authors carried out a detailed analysis of the recommendations on the work of courts in martial law provided by the Council of Judges of Ukraine and the Chairman of the Supreme Court. Taking into account the recommendations adopted during the conditions of martial law and the current jurisprudence formed at that time, the peculiarities of civil proceedings in martial law were singled out and analysed in detail, focusing on a specific procedural institution.

Keywords: justice amid war; judiciary; civil litigation; martial law; Ukraine

1 INTRODUCTION

One of the conceptual frameworks that characterises a state as one governed by the rule of law is the existence and operation of an independent branch of government that ensures objective, efficient, timely, and reasonable administration of justice within the state.

The announcement on 24 February 2022 at about 04.00 of the so-called 'special operation' in the territory of Ukraine by the Russian Federation was a turning point not only for the Ukrainian State and its citizens in general but also for the judicial system of Ukraine. Within its competence, it stands guard over the sovereignty, independence, democracy, and territorial integrity of the Ukrainian State.

By attacking and inflicting massive missile strikes on the territory of Ukraine, the Russian Federation not only violated the sovereignty and territorial integrity of our state but also attempted to discredit and undermine the authority of state bodies of Ukraine and the judiciary.

On the same day, the decree of the President of Ukraine Volodymyr Zelensky³ imposed martial law in Ukraine for a period of 30 days in connection with the military aggression of the Russian Federation against Ukraine, which was further extended.⁴ The imposition of martial law in Ukraine was a challenge for the judiciary and ministers, as it dictated new realities for action and required a rapid response in the new environment.

We suggest that the activity of the judiciary in martial law is a kind of test of strength, as the activity of courts has not been suspended, except in appropriate circumstances. The courts in this case also acquire the functions of the so-called 'judicial front'.

This is the focus of the present article.

2 DEVELOPMENT OF A UNIFIED CONCEPT OF JUDICIAL ACTIVITY AND ADMINISTRATION OF JUSTICE IN MARTIAL LAW

As a state with over more than 30 years of independence, Ukraine has formed an efficient and broad system of justice, which at the time of the illegal invasion of Russian troops consisted of more than 600 local courts of general jurisdiction, 26 appellate courts established in the respective appellate districts for civil and criminal cases, and the Supreme Court as a court of cassation.⁵

3 Decree of the President of Ukraine No 64 / 2022 of 24 February 2022 'On the Imposition of Martial Law in Ukraine' <<https://www.president.gov.ua/documents/642022-41397>> accessed 06 April 2022.

4 Decree of the President of Ukraine No 133 / 2022 of 14 March 2022 'On the Extension of Martial Law in Ukraine' <<https://www.president.gov.ua/documents/1332022-41737>> accessed 06 April 2022.

5 N Halka, 'It is Dangerous for Judges to Travel through Humanitarian Corridors – Justice in Ukraine during the War: Interview with the Chairman of the Supreme Court Vsevolod Kniازهv, 2022' (Suspilne Novyny, 29 March 2022) <<https://suspilne.media/222932-suddam-nebezpecno-viizdzatigumanitarnimi-koridorami-pravosudda-v-ukraini-pid-cas-vijni/>> accessed 6 April 2022.

As of 2022, the judiciary in Ukraine consisted of 5,600 judges in local courts, 1,439 judges in appellate courts, and 196 judges in the Supreme Court.⁶ It should be noted that in the conditions of armed aggression, judges did not avoid the country's defence and therefore also participated in national resistance – they serve in the voluntary formation of the Territorial Defense Forces of the Armed Forces of Ukraine and are members of voluntary formations of the territorial community. Thus, for the period from 24 February to 4 April 2022, 35 judges were mobilised, and 27 representatives of the judiciary joined the ranks of territorial defence of their cities.⁷

According to information provided by a representative of the Office of the President,⁸ as of 29 March, 137 appellate and local courts, or 21 per cent of the total, do not administer justice in Ukraine. There is a total of 777 judicial premises in the country. Five percent are now damaged or completely destroyed. Thirty-two premises of judicial institutions suffered critical damage – broken windows, loss of electricity, loss of heat supply, damaged ceilings, damaged interior doors, etc. Three court premises were completely destroyed – the Borodyanka District Court of the Kyiv Region, the Izyum City District Court of the Kharkiv Region, and the Kharkiv Court of Appeal, the building of which is an architectural monument. There are 49 courts in the territories temporarily not under the control of the Ukrainian authorities, which is seven per cent of the total number of courts, and the territorial jurisdiction of these institutions has been changed. On 29 March 2022, the building of the Economic Court of the Nikolaev Oblast was destroyed by a rocket strike.

The peculiarities of the activity of courts and the administration of justice in martial law are due to the fact that, unlike in peacetime, the capabilities of courts and court staff are limited and dictated by the realities of wartime. In particular, in accordance with the provisions of the national legislation of Ukraine, in the legal regime of martial law, courts, bodies, and institutions of justice operate exclusively on the basis, within the powers, and in the manner prescribed by the Constitution of Ukraine and Laws of Ukraine. The powers of courts, bodies, and institutions of the justice system provided by the Constitution of Ukraine may not be limited under martial law (Art. 12-2 of the Law of Ukraine 'On the Martial Law').

The imposition of martial law in Ukraine, large-scale hostilities in large areas of Ukraine, and all further actions caused by these circumstances necessitated the development of a unified concept of the judiciary and the administration of justice in martial law imposed in connection with the armed aggression of the Russian Federation.

On 24 February 2022, the Council of Judges of Ukraine adopted a decision 'On Taking Urgent Measures to Ensure the Sustainable Functioning of the Judiciary in Ukraine in the Event of Termination of the High Council of Justice and Martial Law in Connection with Armed Aggression by the Russian Federation'.⁹ According to this decision, the Council of Judges of Ukraine decided:

6 The Judiciary of Ukraine, 'Report of the Secretariat of the High Qualification Commission of Judges of Ukraine' (2021) (22 January 2022) <<https://adm.lv.court.gov.ua/archive/1244429/>> accessed 6 April 2022.

7 'Peculiarities of Administering Justice in Ukraine during the War: Interview with Bohdan Monich, Chairman of the Council of Judges of Ukraine' (7 April 2022) <<https://kievskiyud.od.ua/press-department/all-news/11860-bogdan-monich-pro-zdijsnennya-pravosuddyia-v-ukrajini-pid-chas-vijni>> accessed 7 April 2022.

8 'How the Judicial System of Ukraine Works in the Conditions of War: Interview with Andriy Smirnov, the Deputy Head of the Office of the President' (29 March 2022) <<https://www.dw.com/uk/yak-pratsiuie-sudova-systema-ukrainy-v-umovakh-viiny/a-61294651/>> accessed 6 April 2022.

9 Council of Judges of Ukraine, Decision 'On Taking Urgent Measures to Ensure the Sustainable Functioning of the Judiciary in Ukraine in the Event of Termination of the High Council of Justice and Martial Law in Connection with Armed Aggression by the Russian Federation' (2022) (24 February 2022) <https://jurliga.ligazakon.net/ru/news/209874_robota-sudv-ukrani-v-umovakh-vonnogo-stanu/> accessed 6 April 2022.

to draw the attention of all courts of Ukraine that even in conditions of martial law or state of emergency, the work of courts cannot be suspended; in the event of a threat to the health, life and safety of visitors and employees of the court, the conduct of proceedings by a certain court may be suspended until the circumstances that caused the danger have been eliminated; develop recommendations to the courts on the procedure for evacuation and transfer of cases; to resolve urgent issues to create an operational headquarters consisting of members of the Council of Judges, the Chairman of the Supreme Court, the Head of the State Judicial Administration, the Chairman of the Judicial Protection Service.

In order to develop uniform judicial practice, organise the work of courts, and ensure the administration of justice in wartime, on 2 March 2022, the Council of Judges of Ukraine issued recommendations on the work of courts in martial law.¹⁰ According to the recommendations, the courts of Ukraine were to be guided by the current situation in the region when determining the working conditions of the court in wartime. In particular, it was recommended:

- If possible, postpone cases (except for urgent court proceedings) and withdraw them from consideration, given that a large number of litigants are not always able to apply for adjournment due to involvement in the operation of critical infrastructure, joining the Armed Forces of Ukraine, territorial defence, voluntary military formations and other forms of counteraction to armed aggression against Ukraine, or may not appear in court due to danger to life. Cases that are not urgent should be considered only with the written consent of all participants in the proceedings.
- It is prudent to approach issues related to the return of various procedural documents, leaving them without motion, setting various deadlines, if possible, to postpone them at least until the end of martial law.
- Focus exclusively on conducting urgent court proceedings (detention, extension of detention). At the same time, it should be considered impossible to postpone court hearings, at which the issue of choosing or continuing a measure of restraint in the form of detention should be considered. In these cases, the court (investigating judge) acts on the basis of the provisions of current criminal procedure legislation.
- Draw the attention of investigating judges that in cases where the territorial jurisdiction of criminal offenses at the stage of pre-trial investigation has changed, and the materials of criminal proceedings due to hostilities have not been transferred or transferred in full, it is advisable to guide courts on uniform application of Art. 199 of the CPC of Ukraine, according to which the investigating judge is primarily obliged to verify the circumstances that indicate that the stated risk provided for in Art. 177 of the CPC of Ukraine has not decreased, or new risks have emerged that justify the detention of a person. These circumstances (risks) certainly include military aggression against Ukraine, which significantly limits the ability of the authorities to exercise their powers in certain territories and qualitatively worsens the criminogenic situation.
- Draw the attention of investigating judges to the fact that in conditions when all other circumstances are taken into account in deciding the relevant motions, the court has already given an assessment when choosing a measure of restraint, the formalised approach of some courts on the obligation to provide copies of proceedings which obviously cannot be provided to the court due to military actions, or, for example, the impossibility of using court decisions in the form in which they are entered in the Unified Register of Judgments (printouts from the Register) is unjustified and does not meet the requirements, in particular, Arts. 2, 7 of the CPC of Ukraine.

¹⁰ Council of Judges of Ukraine, 'Recommendations on the Work of Courts in Martial Law' (2022) (2 March 2022) <<http://rsu.gov.ua/ua/news/usim-sudam-ukraini-rsu-opublikovala-rekomendacii-sodo-rooti-sudiv-v-umovah-voennogo-stanu/>> accessed 6 April 2022.

- On the basis of Part 6 of Art. 9, Art. 7, item 4, part 1 of Art. 34 of the CPC of Ukraine, to inform law enforcement agencies that in case of suspension of the court that conducted the proceedings, as well as in case of inability to administer justice by the relevant court due to martial law, they must apply to the relevant courts of appeal or, if justified, to the Supreme Court, on change of jurisdiction of criminal proceedings (cases).
- If, under objective circumstances, a party to the proceedings is unable to participate in a court hearing by videoconference using technical means specified by the CPC, as an exception to allow such a participant to participate in video conferencing by any other technical means, including their own technical means. If the proceedings are considered collectively, and the panel of judges cannot meet in one room, it is permissible to consider cases from different rooms of the courts, including with the use of their own technical means.

The order of the Chairman of the Supreme Court of 13 March 2022 approved recommendations to the courts in case of seizure of the settlement and/or court or imminent threat of its seizure.¹¹ In particular, Ukrainian courts were recommended to do the following:

- If appropriate, it is necessary to remove court cases, especially those pending before judges, or at least to remove the most important (high-profile) cases: materials of criminal proceedings in which a person is detained; proceedings against minors; proceedings for particularly serious crimes; other cases, the consideration of which may be essential for the rights of the participants in the process. If this is not possible, ensure that such cases are kept in safes in the courtroom. However, if there is a risk to life or health associated with the removal of lawsuits, such cases should be left in court.
- Documents that contain a state secret are subject to destruction with the simultaneous execution of relevant acts and in compliance with the requirements of regulations governing this. Materials of other court cases do not need to be destroyed, providing for the possibility of returning the settlement under the control of the authorities of Ukraine or further transfer of these cases with the assistance of the authorities of Ukraine. The contents of the servers must be copied to removable media in advance and must be removed as soon as possible. Before leaving the court premises, it is necessary to prevent access to the Unified Register of Court Decisions from the court's technical means.
- For the courts located in the immediate vicinity of areas of hostilities, chiefs of staff should take the necessary preparatory measures to implement these recommendations in the event of a possible seizure of the settlement and/or court. Also, in these courts, it is necessary to take measures for the immediate entry of all court decisions adopted by the court in the Unified Register of Judgments. In addition, it is necessary to digitise court materials according to priority, as well as to prepare for transportation servers with personnel and accounting information or other removable media with relevant information. Portable media with copies of court cases, as well as personnel and accounting information, should be removed as soon as possible.

It should be emphasised that the organisation of work and ensuring the continuity of justice by courts deprived of the opportunity to administer justice for objective reasons during martial law has been the subject not only of relevant recommendations of the Council of Judges of Ukraine and the Supreme Court but also legislative initiatives and enshrined legislation.

¹¹ Chairman of the Supreme Court, 'Recommendations to the Courts of First and Appellate Instance in Case of Seizure of a Settlement and / or Court or Imminent Threat of Its Seizure' (13 March 2022) <<http://rsu.gov.ua/ua/news/rekomendacii-sudam-perso-ta-apelacijnoi-instancii-na-vipadok-zahoplenna-naselenogo-punktu-taabo-sudu/>> accessed 6 April 2022.

In particular, the Verkhovna Rada of Ukraine promptly responded and adopted the Law regulating the issue of determining the territorial jurisdiction of court cases.¹² This legislative act introduced a number of changes that regulate the possibility and mechanism of changing the territorial jurisdiction of cases, given that before these changes, the legislative model did not provide for such a possibility. In particular, the amendments provided a mechanism to change the territorial jurisdiction of cases in case of impossibility to administer justice by the court for objective reasons during martial law or state of emergency, due to natural disasters, hostilities, counter-terrorism measures, or other emergency circumstances. The territorial jurisdiction of court cases heard in such a court may be changed by order of the President of the Supreme Court. This decision is the basis for the transfer of all cases pending before a court whose territorial jurisdiction is changing.

Since 6 March 2022, to comply with the requirements of the national legislation of Ukraine, the President of the Supreme Court, Mr Vsevolod Knyazev, adopted orders (12 in total as of 6 April 2022 2) changing the rules of territorial jurisdiction (Part 7 of Art. 147 of the Law of Ukraine ‘On Judiciary and the Status of Judges’) due to the impossibility of performing justice in the relevant territory of Ukraine during martial law (for reasons such as complete or partial destruction of the court building, temporary occupation of the territory where the court is located, the troops of the Russian Federation, etc.), according to which the territorial jurisdiction of the relevant courts of general jurisdiction of the Donetsk, Zhytomyr, Zaporizhzhia, Kyiv, Mykolaiv, Luhansk, Kherson, Kharkiv, Sumy, and Chernihiv regions were changed. In total, the territorial jurisdiction of 126 courts, both first instance and appellate, has been changed.¹³

3 COURT CONSIDERATION OF CIVIL CASES IN WARTIME: MAIN CHALLENGES AND WAYS TO SOLVE THEM

Taking into account the explanations provided by the Council of Judges of Ukraine and the Supreme Court and the circumstances in the region, and guided by the general provisions of the Civil Procedure Code of Ukraine on civil proceedings, the observance of legal rights and freedoms, the consideration of cases by each court of general jurisdiction at its level (i.e., the relevant court of first and appellate instance), including making a decision by a meeting of judges or issuing an order by the Chairman of the court, determined the features of the court and the procedure of martial law.

In particular, the peculiarities of the implementation of civil proceedings by the courts of Ukraine under martial law are as follows:

- *Rules of territorial jurisdiction (jurisdiction)*. In courts that have not suffered from armed aggression of the Russian Federation, cases are heard in compliance with the general rules of territorial jurisdiction (jurisdiction) enshrined in Arts. 26-32 of the CPC of Ukraine. In case of impossibility of administration of justice by the court in the relevant territory of Ukraine for objective reasons during martial law (complete or partial destruction of the court building, temporary occupation of the territory where the court is located, by the troops of the Russian Federation, etc.) rules of territorial jurisdiction cases by such courts are determined on the basis of the relevant order of

12 Law of Ukraine No 2112-IX of 3 March 2022 ‘On Amendments to Part 7 of Article 147 of the Law of Ukraine “On the Judiciary and the Status of Judges” Concerning the Determination of Territorial Jurisdiction of Judicial Cases’ <<https://zakon.rada.gov.ua/laws/card/2112-20>> accessed 6 April 2022.

13 ‘Order to Change the Territorial Jurisdiction of Martial Law Cases’ (Chairman of the Supreme Court, 2022) <https://supreme.court.gov.ua/supreme/gromadyanam/terutor_pidsudnist/> accessed 06 April 2022.

the Chairman of the Supreme Court adopted in pursuance of the requirements of Part 7 of Art. 147 of the Law of Ukraine 'On the Judiciary and the Status of Judges'.

- *Procedural deadlines.* Given the situation surrounding the armed aggression of the Russian Federation against the Ukrainian state and analysing the relevant case law, it can be argued that the courts have chosen a balanced approach to issues related to the return of various procedural documents, leaving them motionless and establishing a different kind of terms. If possible, the extension is carried out at least until the end of martial law.
- *Litigation and notices.* Given the situation in a particular region, in order to ensure the safety of lives of citizens, as well as to follow the principle of procedural economy, courts prefer to inform the parties to the case about the date, time, and place of the hearing using mobile communications by sending SMS-messages to the relevant telephone number of the party to the case, as well as by sending court summons and, if necessary, the relevant documents to the official e-mail address of the relevant party to the case. In addition, sending SMS messages and information to the e-mail address of the party to the case is a more effective means of communication because sending and receiving court summons, messages, and documents by mail takes more time due to the schedule and mode of operation of the postal service. Only when there is no information in the case file that the relevant party has a mobile phone number or official e-mail address does the court send the relevant court summons and documents by mail, and only in areas where there are no active hostilities, and therefore the delivery of relevant postal correspondence is not limited or unavailable. In addition, the participant can obtain information about the date and time of the case, the state and progress of the case, and the procedural documents in the case by registering in the Unified Judicial Information and Telecommunication System subsystem 'Electronic Court'. Through the e-Court subsystem, the party to the case can communicate with the court and send the relevant court documents for inclusion in the case file without using the post, saving time and money.
- *Trial.* If possible, the hearing of cases is postponed (except for urgent court proceedings, as well as proceedings that require immediate and urgent judicial protection of violated, unrecognised, or disputed rights of citizens) and their withdrawal from consideration. At the same time, it is taken into account that a large number of participants in court proceedings do not always have the opportunity to apply for adjournment due to critical infrastructure, joining the Armed Forces of Ukraine, territorial defence, volunteer military formations, and other forms of countering armed aggression against Ukraine or cannot come to court due to danger to life. Cases that are not urgent are considered only with the written consent of all participants in the proceedings. The parties will be additionally informed about the date and time of court hearings in cases that have been withdrawn, which is often stated on the official websites of the relevant courts.
- *Participation in the court session by videoconference.* In cases of significant distance from the participant's place of residence to the place of consideration of the case, as well as to ensure the safety of life of citizens, the court ensures the participation of such a party in the court session by videoconference outside the court, including the use in accordance with the provisions of Art. 212 of the CPC of Ukraine of their own technical means and electronic signature in accordance with the Regulations on the Unified Judicial Information and Communication System and/or provisions defining the order of operation of its individual subsystems (modules).
- In addition, on 23 March 2022, the State Judicial Administration of Ukraine announced the introduction of a new video conferencing subsystem, which allows automatic broadcasting of court hearings on YouTube on the channel of the judiciary web portal 'Judicial Power of Ukraine'. The introduction of the new video conferencing

subsystem, which relates to online broadcasts of court hearings, significantly simplifies the procedure. In particular, it is no longer necessary to contact the administrator in advance whenever a court hearing needs to be broadcasted. It is also not necessary for the court staff and administrator to spend their time on preliminary communication and organisation of the video broadcast. This can now be done with a single mark in the video conferencing subsystem.

- Taking into account the provisions of Part 7 of Art. 147 of the Law of Ukraine ‘On the Judiciary and the Status of Judges’ in case of impossibility of administering justice by the court for objective reasons during martial law, the territorial jurisdiction of cases heard in such court may be changed by its transfer to a court that is most territorially close to a court that cannot administer justice, or another designated court. This corresponds to the provisions of Part 3 of Art. 1 of the Law of Ukraine ‘On the Administration of Justice and Criminal Proceedings in Connection with the Anti-terrorist Operation.’
- In accordance with the explanations provided by the Council of Judges of Ukraine and the Chairman of the Supreme Court, the courts of Ukraine, especially those located in the immediate vicinity of the war zones, and the chiefs of staff of these courts were recommended to take the necessary preparatory measures. Cases pending before judges, or at least the most important (resonant) cases, should be transferred to the relevant courts or at least to the territorial administration of the State Judicial Administration of Ukraine. These courts are also recommended to take measures to immediately enter all court decisions in the Unified Register of Judgments, if possible. Documents that contain a state secret are subject to destruction with the simultaneous execution of relevant acts and in compliance with the requirements of regulations governing this. In addition, it is necessary to digitise court materials in order of priority, and the contents of the servers should be copied in advance on removable media and be taken out as soon as possible. However, in cases where it is impossible to transfer the case materials (relevant paper version) in accordance with the territorial jurisdiction established by order of the President of the Supreme Court, the necessary procedural actions shall be performed by the court determined by jurisdiction according to the documents, access to which is suspended for the period of martial law, according to the digitised court case, according to information copied from the servers of the court from which the case is transferred on removable media, and in the absence of such documents and materials submitted by litigants, provided that such documents and materials are available to the party to the case and, in addition, are sufficient for the relevant court decision.
- *Taking evidence.* The institute of recovery of evidence shall be applied on the basis of reasonable grounds of a particular case, the content of the evidence required, and the territory from which such evidence must be demanded. If evidence needs to be collected from an area where no active hostilities are taking place, the said procedural institution shall be applicable. At the same time, the courts are taking measures to postpone the consideration of the issue of obtaining evidence from the territory where active hostilities are taking place or are temporarily occupied by Russian troops and therefore the activities of state bodies of the Ukrainian state in such territories are temporarily suspended.

4 CONCLUDING REMARKS

Since the start of Russia’s full-scale war against Ukraine, our main task has been to preserve our country as a sovereign, independent, democratic state, where European values are professed and international legal norms are observed. Therefore, for this purpose, even in martial law, justice is administered on a regular basis, courts work, cases are considered, and citizens seek the protection of their rights.

The war has been a crucial problem for judges, as well as for all citizens. None of us planned our lives for war. Russia went to war with us for the sole purpose of destroying Ukrainian statehood, destroying the people, imposing their punitive laws, and completely subordinating the largest European state to its own system. Therefore, war and only war is the main problem for Ukraine at this time. Ukraine is obliged to ensure the administration of justice during the war. We firmly believe that Ukrainian courts will also try all war criminals, from the soldier who raped women and girls and looted property to the top military and political leadership of the aggressor state. Evil must be punished because unpunished evil returns and returns ten times stronger, bloodier, and crueller.

The world, Europe, and Ukraine must punish evil by all means available to the civilised society. The heroic struggle of the entire Ukrainian people against the Russian occupation forces proves their European identity. Ukraine will definitely win. Glory to Ukraine! Glory to heroes!

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