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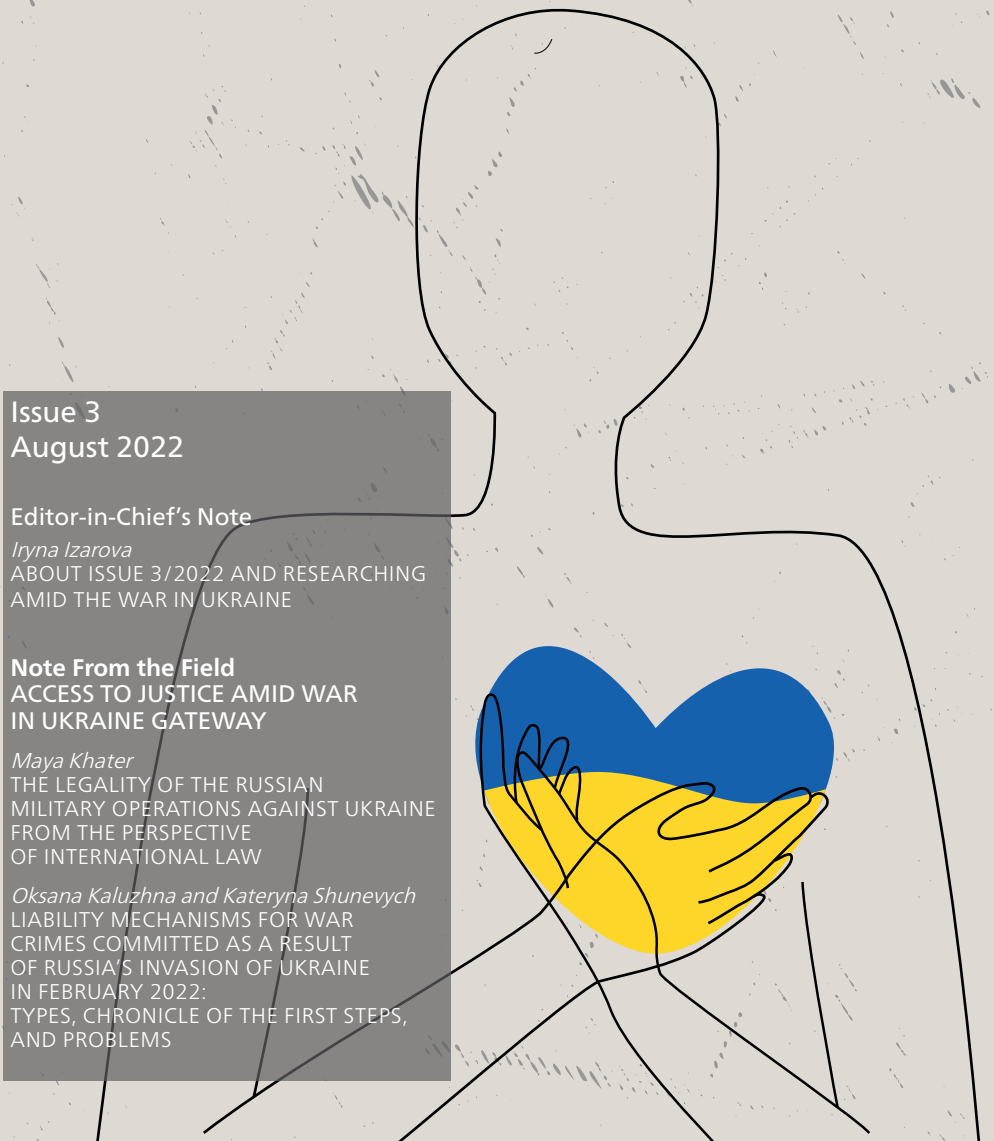
ACCESS TO JUSTICE IN EASTERN EUROPE



Issue 3
August 2022

ACCESS TO JUSTICE IN EASTERN EUROPE

Founded by the East European Law Research Center

AJEE is an English-language journal which covers issues related to access to justice and the right to a fair and impartial trial. AJEE focuses specifically on law in eastern European countries, such as Ukraine, Poland, Lithuania, and other countries of the region, sharing in the evolution of their legal traditions. While preserving the high academic standards of scholarly research, AJEE allows its contributing authors, especially young legal professionals, and practitioners, to present their articles on the most current issues.

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ISSN 2663-0575
EELRC
Publishing House VD 'Dakor'

Access to Justice in Eastern Europe

Issue 3 (15) August 2022

https://doi.org/10.33327/AJEE-18-5.3

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Journal homepage http://ajee-journal.com

Editor-in-Chief's Note

ABOUT ISSUE 3/2022 AND RESEARCHING AMID THE WAR IN UKRAINE

This issue appears after six months of war in Ukraine. Every day of this unjustified war, people die fighting for our independence and freedom, for the rule of law and human rights. The only thing we can do as scholars is to continue our research, disprove false ideas and support the truth, and develop institutions and mechanisms for the protection of rights. Justice must prevail without any grounds for exclusion, and scholars should contribute to this goal.

The AJEE Gateway 'Access to Justice Amid War' helps to share quality research results in a timely manner. As a founder of this initiative, I believe it contributes to continuing and developing the latest research in the area of law in wartime. In this issue, we collected ten notes related to legal developments in wartime. I am particularly glad to see an article from a Syrian scholar in our journal, with a particular focus on the idea of military operations against a sovereign state. I want to draw special attention to this essay, in which Maya Khater discovered and argued for the absence of any justified grounds legalising the russian war[1] against Ukraine, with particular attention to the efforts of the United Nations and the International Community toward ceasing this aggression. It is clear from this article and others that we must keep collecting evidence and arguments for the coming years and the next generation. The article also witnesses to the meaning of this initiative for the rest of the world – war is not only taking place in Ukraine, and we have to draw attention to all of these conflicts and hear voices from every country touched by conflict.

Law is one of the oldest institutions in human history and one of the most well-known. For example, most people in the developed world know about the phenomenon of Roman Law. Since the emergence of that legal system, the key areas of law, like civil law, property law, and contract law, have not undergone substantial changes, providing society with stability and clarity. Nevertheless, today, we are faced with a challenge to the very idea and essence of law. As a result of the world wars, society is divided into people united with the idea of the rule of law and human rights and those who prefer to consider law only a justification for their actions.

Conflicts are inevitable – they are the driving force of human evolution. But the behaviour of parties, the types of conflicts, and the consequences are very different. Law is generally considered to consist of beneficial rules for parties to follow, but these parties often use the

1 According to standard grammatical rules, titles of states, cities, etc. are capitalised as proper nouns to indicate respect and show importance. Due to the war in Ukraine, we refrain from granting the aggressor state this capital letter, subject to each author's discretion. Keeping in mind that the state is not a res *incorporales*, we intend to spread this to the citizens and nation (as stated in the constitution, Art. 1).

law in different ways for their own benefit. Accusations of violations of international law have been raised by one party of the conflict, and accusations of limitation and discrimination by the other.

During wartime, these rules no longer work, and the very idea of law must be rethought and reconsidered. This often leads to an increase of mistrust in legal institutions and state bodies and general disappointment in the process of fairness and justice. The war on law forces us to think about what is fair and what is unfair; it gives society and lawyers a chance to rethink the essence of law. And in this situation, silence is not an option.

Legal rules can sometimes provide people with ways of justifying illegal behaviour, misunderstanding and mistrusting the law. These are very practical problems, and we cannot consider them from a purely theoretical standpoint – we have the opportunity to undertake studies based on interviews, surveys, and other types of feedback and to include the experiences of ordinary people. What do people consider just and fair during a war, and why? How might it affect our everyday life today and in a post-war society? Policymakers cannot force people to follow the rules. Society gives life to legal norms and has done so since the days of the Twelve Tables. If the law is to continue to function, we must monitor how society interacts with it and react accordingly. The data we collect will help us rethink the traditional concepts of justice, a fair trial, and the essence of the rule of law.

Since wars are an unfortunate constant of human history, a balanced approach to the definition of law and mechanisms for preventing its violation and conflicts is necessary. The main goal of this approach should be the limitation and diminution of these conflicts, as well as the minimisation of the consequences and resources for their resolution.

With this in mind, the focus of our research project 'Access to Justice Amid War' will be to promote the voices and reflections of ordinary people suffering from war and convey their expectations about justice in cooperation with leading law scholars, sociologists, and economists tasked with finding ways to rethink justice based on the challenges of the wartime experiences and directed towards the sustainable development of the post-war period. *Justice should prevail – this is the most important thing, and is a strong base for rebuilding peace. The restoration of Ukraine should be the next important goal for our research focus.*

The AJEE Gateway 'Access to Justice Amid War' allows us to collect data and reports from various areas of law, covering the main types of illegal behaviour and people's expectations regarding legal remedies. We believe that our authors will also focus their attention on the particular issues of the further restoration of Ukraine.

The first notes from this initial research gateway have been published as Online First Articles during these months and are included in this issue.

On behalf of our team, I thank all the authors who joined us and answered the call for materials related to the war in Ukraine. For the following issues, we are also seeking research on further legal reform in the period of the restoration of Ukraine after the war.

Slava Ukraini!

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RESEARCH ARTICLE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

EUROPEAN INTEGRATION AS A CHALLENGE FOR THE IMPLEMENTATION OF ECONOMIC STATE SOVEREIGNTY

Ivan Yakoviyk,[1] Yevhen Bilousov[2] and Kateryna Yefremova[3]

Submitted on 3 Jun 2022 / Revised 20 Jun 2022 / Approved **15 Jul 2022**
Published: **15 Aug 2022**

Keywords: European integration, state economic sovereignty, sovereign rights of the state, European Union, limitation of state sovereignty

ABSTRACT

Background: *One of the most significant modern examples of political and economic integration for Ukraine is the EU, given the plan for European integration. In gaining membership in this integration entity, states face the issue of delegating their powers to the Union. The issue*

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Corresponding author, responsible for concept creation and writing, as well as supervising the article (Credit taxonomy). **Competing interests:** No competing interests were disclosed. **Disclaimer:** The three authors all declared that their opinion and views expressed in this manuscript are free of any impact of any organizations.
Funding: The authors received no financial support for the research, authorship, and/or publication of this article. Funding of this publication was provided by authors. **Translation:** Provided by authors.
Managing editor – Dr. Serhii Kravtsov. English Editor – Dr. Sarah White.

How to cite: I Yakoviyk, Ye Bilousov, K Yefremova 'European Integration as a Challenge for the Implementation of State Economic Sovereignty' 2022 No 3(15) Access to Justice in Eastern Europe 8–18. DOI: https://doi.org/10.33327/AJEE-18-5.2-a000330

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of modification of state sovereignty in the context of the EU's relations with member states and candidate countries for EU membership is acute, which raises concerns about the forced restrictions on their state economic sovereignty.

Methods: *The methodological basis of the study are such general-science and special methods as historical-legal, dialectical, comparative-legal, and others. The historical-legal method was used to study the genesis of the content of the legal categories of 'economic sovereignty', 'sovereign debt', and the stages of European integration. The usage of the dialectical method provided a comprehensive study of the process of forming EU economic policy, as well as defining the ratio between the categories of 'economic sovereignty restriction' and 'restriction of sovereign economic rights of the state'. By using the comparative-legal method, the paper reveals the specifics of the approaches of individual states to the legal regulation of relations to ensure economic sovereignty and economic security of the state.*

Results and Conclusions: *The study, based on the experience of the new EU member states, has shown that European integration as a whole contributes to changing the volume of sovereign powers of states during the implementation of economic state sovereignty. However, the authors conclude that such a process is twofold: on the one hand, factors that objectively reduce the economic sovereignty of countries through the delegation of their sovereign rights are increasing, and, on the other, most states voluntarily and consciously accept such restrictions to obtain economic, political, and social benefits.*

1 INTRODUCTION

The integration process, which has been taking place for seventy years, has significantly affected the state and legal development of European countries. After gaining EU membership, states face the need to delegate a number of their important authorities to the Union as a supranational power. This naturally raises fears among EU member states and candidate countries about the loss or at least significant limitation of their own sovereignty. The problem of saving national sovereignty, in turn, is often considered in the context of the process of forming a European identity[4] or the Europeanisation process.

Ukraine, like many other countries, faces the problem of saving its own economic sovereignty. This is because the processes of globalisation and European integration lead to the gradual disappearance of economic, legal, and even political barriers between states, which necessitates a rethinking of the established concept of sovereignty. There is a growing perception that state sovereignty has lost its significance for both individual states and the international community; that further strengthening of supranational features of integration associations and international organisations threatens the independence and autonomy of states. Besides its advantages, the process of interstate economic integration also imposes certain restrictions on the freedom of discretion of states, limiting their economic sovereignty. Each member state in the integration process, when agreeing to close cooperation, should answer the following question: are the benefits worth enough in comparison with the restrictions states would be forced to face in the exercise of their sovereignty?

Despite its tremendous importance, the relationship between national sovereignty and European integration, as well as what this means for the EU member states, has not yet

4 L Khorishko, N Horlo, 'National identity in the discourse of political elites of Poland and Hungary' (2021) 10 (40) Amazonia Investiga 9 DOI: https://doi.org/10.34069/AI/2021.40.04.1

been adequately studied. In fact, most integration theories do not provide a clear answer to whether sovereignty is a national or a European issue.[5]

The more the process of European integration advances, the more sovereignty competences are transferred from the national to the supranational level and the sovereignty of the member states is questioned. This evolving competitive relationship becomes more demanding and risks colliding with the framework of the EMU, as the latter poses unequivocal limits to the exercise of sovereign rights concerning the independent exercise of economic policy by the member states. Therefore, the determination of the optimal level of delegation of sovereignty in economic policy is one of the most fundamental questions we are obliged to answer. Thus, the beginning of the process of integration would seem to mean the beginning of the end for the exercise of sovereignty by nation-states, as the latter are undermined by the EU. The EU, then, appears to be the institution that directly questions national sovereignty's central role in economic policy.[6] But is this really the case? Under which conditions and rules has this relationship been formed, and how does it affect the very process of European integration and the role of the nation's economic sovereignty?

2 APPROACHES TO DETERMINING THE CONTENT OF ECONOMIC SOVEREIGNTY

The concept of economic security is closely related to the concept of economic sovereignty as a component of state sovereignty. If the categories of state, people's, and national sovereignty are established (on the content and ratio of which in legal science as a whole, a consensus has been reached), the content of such categories as 'economic' and 'financial' sovereignty and their ratio to state sovereignty remains uncertain. This is a significant drawback, as defining the content of the categories 'economic', 'financial',[7] and 'currency'[8] sovereignty has not only theoretical but also important practical significance. The answer to the question depends on whether Ukraine will have the right to make a final decision on issues related to the fate of the national economics, defining the priorities of its development, whether such decisions would be made by other actors, and whether Ukraine would become a kind of transnational economic space providing other states and multinational corporations with resources.

In determining the content of economic sovereignty, we follow the position by Baidyn on the main features of this phenomenon:

a) the sovereign right of the state to dispose of its resources – if the state lacks technological capacity or financial resources, it is forced to involve large foreign investors (usually transnational companies) in their development;

b) the ability of public authorities to determine the principles of their economic policy, including the free discretion and conduct of financial and trade policy, regulation of foreign companies' activity, and the right to nationalise foreign property;

c) the sovereign right to join interstate associations (for example, the EU) and international economic organizations (IMF, IBRD, WTO, and others);

d) the equality of states in international economic relations, respect for national

5 C Bickerton, European Integration: from Nation States to Member States (Oxford University Press 2012).

6 M Georgios, 'National Sovereignty, European Integration and Domination in the Eurozone' (2020) 28 (2) European Review 225 DOI: https://doi.org/10.1017/S1062798719000437

7 Z Kramer, 'Fiscal Sovereignty under EU Crisis Management: A Comparison of Greece and Hungary' (2019) 69 (4) Acta Oeconomica Periodical of the Hungarian Academy of Sciences 595.

8 A Aniodoh, 'Host States' Monetary Sovereignty Within the Construct of Bilateral Investment Treaties' (2021) 65 (1) Journal of African Law 1 DOI: https://doi.org/10.1017/S0021855320000339

economic interests, and the right of each state to participate in solving international economic problems.[9]

Thus, economic sovereignty provides the ability of the state to independently exercise sovereign rights in the economic sphere and make decisions on the development of national economics. Only a sovereign state can effectively protect the economic interests of its citizens both inside and outside the country, be a successful intermediary between national and world economics, and create favourable conditions for increasing the competitiveness of the national economics in global and regional markets.

The need to rethink the concept of state sovereignty is determined by the formation of a supranational level of power within the EU, to which national governments have delegated the right to exercise a wide range of sovereign rights and authorities. Member states, as sovereign actors, are consciously and voluntarily pooling their sovereignties within the EU in order to enhance their role and importance in the international arena. They must take such a step because, after the Second World War, even such leading European states as Germany, France, and Italy were unable to compete on an equal footing with the United States, Russia (formerly the USSR), and China.

3 STATE SOVEREIGNTY WITHIN THE EU

The problem of state sovereignty within the EU is solved in such a way that the member states 'pool' certain important aspects of their sovereignty. The term 'unification of sovereignties' means the formation of a supranational decision-making system in the process of interstate cooperation. If the principle of consensus (unanimous decision-making based on the consent of all participants) used in international organisations leaves the sovereignty of states intact, giving each member state the right to unilaterally veto any decision, the unification of sovereignties within the EU provides for a departure from this system.

In the EU, the practice of decision-making by a qualified majority is used in the areas defined by the Founding Treaties. It means that the position of individual member states may not be taken into account. The main reason why member states agree to such restrictions is that in some areas of EU activity, maintaining the possibility for the state to block decisions may lead to consequences that would nullify the meaning of the integration process. For states that are not prepared for their position to be ignored by a majority of member states, the solution is to opt out of certain joint actions and obligations. Thus, Denmark and Sweden are not parts of the eurozone, Ireland has not joined the Schengen agreement, and these countries do not participate in the common European policy on refugees and migrants.

The introduction of the voting mechanism by a qualified majority was determined by the need for the creation and effective functioning of the Common and, later, the Single Market. The creation of the Common Market was provided for in the Treaties establishing the ECSC and the EMU. The formation of the Common Market, both within a single integration association as well as worldwide, is impossible without the realisation of the four basic freedoms (movement of goods, persons, services, and capital). Even at the initial stage of the integration process, the governments of the member states delegated to the European Communities part of their sovereign powers in the customs, monetary, financial, and tax spheres, through which they had traditionally regulated trade with third countries. This was the first step towards real self-restraint by states in the exercise of certain sovereign rights

9 Yu Baidyn, *Economic sovereignty of the state: problems of determining the content* (Scientific Research Institute of State Building and Local Government of National Academy of Law Sciences of Ukraine, 2010).

in the process of integration. Such a restriction of the sovereignty of states was the result of internal and external unification of their territories, without which it was impossible to create a single internal market of a supranational organization. The internal unification of states meant the elimination of customs duties and quantitative restrictions on trade between EU member states, and the external unification meant the introduction of a common customs tariff for third countries, as well as the implementation of a common trade policy. The implementation of these steps led to the formation of the Customs Union of a united Europe, as a result of which the latter was able to act in the world as an economically integrated entity.

No less important an achievement in the process of free movement of goods within the EU is that, in exercising the freedom of movement of goods, the Court of Justice has extended the relevant prohibitions not only to barriers to trade between member states but also to internal national barriers since the latter are capable of destroying the unity of the customs territory of the Union.

The legal regulation of the provision of services in the EU is generally directed by the Founding Treaties. In addition, each type of service is regulated by a separate act of EU secondary law, in particular, Council Directives, which ensure the harmonisation of legal norms relating to consumer protection, including those with a view to removing certain barriers to fuller freedom of service provision.

In the context of the issue of freedom to provide services, the freedom of establishment and economic activity means the right of EU citizens and legal entities to conduct independent entrepreneurial activity and create and manage enterprises, including companies and firms, under the same conditions as for citizens of the country where the establishment is carried out. An important role was played in the realisation of this freedom by Art. 47 of the Treaty establishing the European Community, which empowered the Council to adopt directives to ensure the mutual recognition of diplomas in order to create favourable conditions for entrepreneurs. Thus, barriers that could impede the exercise of freedom of establishment and the provision of services have been removed.

The freedom of movement of capital was formally proclaimed from the beginning of the integration process but was implemented only after the proclamation of the creation of the economic and monetary union. As the Founding Treaties did not specify its content, the Court of Justice was forced to provide its interpretation in several cases, according to which this freedom is an opportunity to carry out financial transactions related to investment, invest in another state, and not return to the country of the initial stay within a reasonable time of the invested financial resources.

In addition to the implementation of these freedoms for the construction and effective functioning of the Common Market, it was necessary to introduce unified rules of the market game and create conditions for free and fair competition of enterprises regardless of their nationality. Legal regulation of competition is one of the important activities of the modern state. After the creation of the European Communities, this line of activity was moved to the supranational level to prevent obstacles to the movement of goods and services at both the public law and private law levels.

The competition rules of a united Europe were enshrined in the Treaty on Coal and Steel Community (Arts. 4, 5, 65, 66) and the Treaty establishing the European Economic Community (Arts. 85-94), and subsequently, they were almost without amendments. These agreements oblige the European Commission to monitor compliance with established competition rules in all member states, as well as to eliminate the types of infringements which are set. Given the importance of competition policy in building and developing a single internal market, it is not surprising that one of the Commission's main functions is to monitor compliance with competition rules and that almost all responsibility for the

anti-monopoly policy is placed on the supranational institutions of the Union (above all, the Commission), while the relevant national authorities only assist and participate in the exchange of information.

Evidence of achieving the highest degree of economic integration was the formation of the Economic and Monetary Union. It should be noted that none of the three initial Founding Treaties considered the creation of the Economic and Monetary Union as the goal of the integration process. The creation of a monetary union provided for: the introduction of full mutual turnover of currencies; ensuring the freedom of movement of capital; the creation of a currency cooperation fund to maintain currency parity and the monetary policy of member states coordination; fixing exchange rates and possibly moving to a single currency.[10]

The next steps towards the construction of the EMU were enshrined in the TEU, which defined the creation of an Economic and Monetary Union, which would include the introduction of a single currency as the main means of promoting economic and social progress. The fact is that the flows of goods, services, capital, and people that flow from country to country, as well as global communication and information systems and the activities of supranational economic and financial organisations, form a field of the regional economy in which European national economies are increasingly intertwined.[11] Accordingly, any destruction of this field has negative consequences. The creation of the Single Internal Market, within which the EMU operates, attempts to minimise negative trends and processes in the economic sphere.

Deep economic and political integration within the EU has resulted in increased activity in ensuring a high level of security for its citizens and their proper legal protection. At the same time, each subsequent stage of deepening European integration (based on amendments to the EU Founding Treaties by Maastricht, Amsterdam, Nice and Lisbon Treaties) requires the agreement by the Member States on issues that increasingly concern the sovereign rights of states.

4 RELATIVITY OF ECONOMIC SOVEREIGNTY OF EU MEMBER STATES

According to Yakovyuk and Shestopal,[12] the transfer of certain sovereign rights and powers by the state to supranational structures does not mean a narrowing of sovereign rights. The transferred right is compensated for by the acquisition of so-called common-system powers. However, according to others,[13] there are no states in the world that have absolute sovereignty, as their economic activities inevitably face various restrictions: international treaties; increasing economic interdependence of states in connection with globalisation; the introduction into the national economics of the capital of international corporations that influence on the economic decisions made at the state level; participation in integration groups. That is why they speak of relative sovereignty, the degree of which is not the same in different countries. Some have more independence in decision-making, others have less, and some countries have almost no independence, subjecting the foundations of their economic policy to the recommendations of international economic structures, as Ukraine has done.

10 C Scheinert, 'History of economic and monetary union' (2021) <https://www.europarl.europa.eu/factsheets/en/sheet/79/history-of-economic-and-monetary-nion> accessed 18 November 2021.

11 M Egan, 'EU Single Market(s) after Brexit' (2019) 7 (3) Politics and Governance 19 DOI: https://doi.org/10.17645/pag.v7i3.2059

12 I Yakovyuk, S Shestopal, 'The sovereign rights and sovereignty of the state: the problem of the correlation' (2017) 6 (4(21)) Azimuth of Research: Economics and Management 381.

13 R Bifulco, A Nato, *The concept of sovereignty in the EU – past, present and the future* (Fall edn, 2020) <http://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf> accessed 20 June 2022; W Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2012).

The economic sovereignty of the EU member states is also relative. It is limited due to the fact they have voluntarily transferred the right to make some important economic decisions to EU institutions. The sovereignty of the economically weak countries of the Union is even more limited. One of the reasons for this is, for example, their financial dependence on subsidies received from EU funds, which often forces them to adhere to Brussels' decisions under the threat of termination of funding, even when the decisions are unfavourable. The example of Greece is illustrative. Its state debt has grown significantly over the past ten years, in part because of EU recommendations to limit the development of the country's traditional sectors of economics – shipbuilding and agriculture.

At the same time, within the EU, the sovereignty of economically powerful countries such as Germany and France is significantly higher (compared to Greece or other member states of Eastern Europe), as they have more opportunities to defend their interests at the Union level. Economic sovereignty is objectively necessary for any country for one simple reason: it makes it possible, in the case of the right economic policy, to ensure national economic security. The latter means the protection of vital national economic interests.

In preparation for the expansion of the Union's membership via the Eastern European countries, the Copenhagen summit of the European Council changed the criteria for selecting EU candidate countries,[14] the main purpose of which was to select the worthiest candidates to join the Union. In order to meet these criteria, the candidate countries are obliged to amend principles of state policy, including economic policy, and their legislative regulation, which may influence the exercise of the sovereign economic rights of the state even before accession to the EU.

The practice of limiting sovereignty means two different processes: the process of voluntary transfer of sovereign powers in favour of supranational entities and external coercion. The factor of voluntariness in reducing the scope of authorities for the acquisition of additional benefits is one of the most important. There is another way to limit sovereignty – when a state voluntarily gives part of its rights and powers to another supranational association, and another one, in turn, provides support. The factor of voluntariness in the reduction of the authorities in order to acquire the prestige of participating in an integration association and the additional benefit of its membership is one of the most important and involves 'sacrificing a part of sovereignty'.

Sovereignty is the completeness of the legislative, executive, and judicial power of the state in its territory, which excludes any foreign power and can involve disobedience of the state to the power of foreign authorities, except in cases of explicit voluntary consent of the state to limit its sovereignty, usually on the basis of reciprocity. Sovereignty is still the criterion that distinguishes the state from other public entities and distinguishes the sphere of power of each state as a subject of sovereign power within its territory from the sphere of power of other states. Thus, when talking about the realisation of the economic sovereignty of member states and candidate states to the EU, it is necessary to use the concept of 'transfer' or 'self-limitation of sovereign rights of the state' rather than 'limiting the sovereignty' itself.

An analysis of the experience of the implementation of economic sovereignty by member states within the EU allows us to identify sovereignty restrictions that are common to all member states and others that are additional (personal). A common example of personal restrictions on economic sovereignty is the control of the financial system by foreign investors in exchange for international loans to repay sovereign debt or supersanctions.

The European debt crisis of 2008 caused a new wave of research in the sphere of sovereign debt financing and measures insisted on by foreign creditors and international institutions

14 Conclusions of the presidency (EC) Copenhagen, 21–22 June 1993. SN 180/1/93 REV 1.

to allow defaulting countries to return to international capital markets, which has striking historical precedents.[15] Let us consider the experience of the Balkan countries, in which the perceived limitation of sovereignty was implemented through financial controls took the form of debt administration councils whereby the creditors were given a measure of control over the financial revenues pledged to finance interest and amortization payments. Mitchener and Weidenmier explain that only defaulting sovereigns suffered from supersanctions, but as we will show in the following, on several occasions, countries accepted a sacrifice of economic sovereignty without default in order to contract new loans and/or improve their borrowing conditions. This was the case for Bulgaria, Serbia, and Greece.[16] To avoid bankruptcy, Bulgaria accessed new funds from the capital markets but was forced to say 'yes' to foreign intervention in its domestic affairs. Serbia agreed to supervision from creditors for almost every loan contracted on the international markets, while Greece encountered two episodes of supersanctions, with just one due to default.[17]

Having analysed the history and legal nature of sovereign debt, it should be noted that the conscious and voluntary restriction of economic sovereignty for international assistance is widely used as one way for these emerging markets to receive more favourable borrowing conditions and has deep historical roots. Thus, the restriction of economic sovereignty undoubtedly leads to social change in the state. 'Strong' states seek to strengthen their sovereignty by limiting the sovereignty of other states to obtain certain benefits, including economic, in favour of strong ones. Weaker states, in turn, seek to gain membership in integration associations and abandon the independent exercise of some sovereign rights in certain areas, including economic, in order to ensure their national security. Ukraine has chosen the latter path, as have most Eastern European countries.

5 UKRAINE'S STEPS TOWARDS EUROPEAN INTEGRATION

It is well-known that until 24 February 2022, the EU did not determine the prospects of membership for Ukraine. That is why Kyiv has chosen the 'transitological approach' as a method of rapprochement with the EU, according to which it seeks to expand cooperation with the EU and undertakes a wide range of unilateral commitments. Obviously, if Ukraine does not act in accordance with EU principles and regulations, it will not have a European perspective. In case of violation of EU requirements and regulatory norms, the assistance of the European Commission could be suspended or cancelled.

Despite some self-limitation of economic sovereignty, the formation of a common market with the EU is a strategic goal of Ukraine. Its creation involves the implementation of four freedoms within the common economic space – free movement of goods, services, capital, and labour – which will help to overcome non-tariff barriers to trade, develop services, increase the approximation to European rules in competition, improve corporate governance and market regulation, and improve conditions for attracting investment.[18] As for the potential possibility of making constitutional, legal, and political claims to Ukraine,

15 R Esteves, AC Tuncer, 'Feeling the blues Moral hazard and debt dilution in Eurobonds before 1914' (2016) 65 Journal of International Money and Finance 46 DOI:10.1016/j.jimonfin.2016.03.004

16 KJ Mitchener, MD Weidenmier, 'Supersanctions and sovereign debt repayment' (2010) 29 (1) Journal of International Money and Finance 19 DOI: https://doi.org/10.1016/j.jimonfin.2008.12.011

17 AA Maerean, M Pedersen, 'Sharp Sovereign debt and supersanctions in emerging markets: evidence from four Southeast European countries, 1878-1913' (2021) European Historical Economics Society Papers 0216 <https://ideas.repec.org/p/hes/wpaper/0216.html> accessed 20 June 2022.

18 Memorandum of Understanding between the EU as lender and Ukraine as borrower (2020) <https://ec.europa.eu/economy_finance/international/neighbourhood_policy/doc/mou_eu_ukraine_en.pdf> accessed 20 June 2022.

in this case, the Ukrainian government should be more actively involved in political and legal discussions, during which its own economic interests should be defended.

The reform process in Ukraine has been supported by commitments made with international partners and the conclusion of an Association Agreement and a Deep and Comprehensive Free Trade Area between Ukraine and the EU. Despite these improvements, the economic crisis of 2020 caused by the Covid-19 pandemic had a negative impact on the country's conditions and led to declining GDP, currency devaluation, and rising public debt.[19]

It is worth noting that the EU has signed a Memorandum of Understanding (MoU) on macroeconomic assistance of 1.2 billion. Macro-financial assistance would be available in the form of long-term loans. In the MoU, Ukraine and the EU have agreed on the policy actions to which Ukraine commits in order to receive the assistance. Specifically, the MoU includes eight policy conditions related to strengthening public finance management, governance and the rule of law, competition in the gas market, improving the business climate, and governance of state-owned enterprises. Aside from the specific policy measures laid down in the Memorandum, Ukraine will also have to keep its IMF programme on track. A clear commitment of Ukraine to central bank independence is an essential precondition for building up confidence and trust and for maintaining good cooperation between Ukraine and its international partners.[20]

However, if we consider legislative changes to improve the corporate governance of joint stock companies, the authorised capital of which includes corporate rights of the state, it is necessary to note the direct interference in the sovereign right of the state to manage its state property. It could be considered a restriction of economic sovereignty and a contradiction to the Constitution of Ukraine. The proportions of participation in supervisory boards on the basis of citizenship are not legally established, so there are usually more foreigners on the supervisory boards of Ukrainian joint-stock companies, and they are more often the heads of such boards due to a shortage of specialists with relevant global experience.

In Ukraine, there is a widespread idea that harming national interests is embodied under the slogan of compliance of corporate governance with the standards of OECD ideas. Interviewed experts believe that without analysing the performance of members of supervisory boards – citizens of other countries – it is inappropriate to talk about their incorrect influence on the activities of domestic JSCs and activities contrary to the interests of Ukraine.[21]

Thus, the problem of sovereignty in the relations between Ukraine and the EU acquires specific features due to the special nature of the relations defined by the current bilateral documents. The factor of national sovereignty of Ukraine is deliberately limited. This is partly due to the voluntary fulfilment by the Ukrainian state of several obligations, such as the unilateral abolition of the visa regime for EU citizens, the adaptation of Ukrainian legislation to many segments of the consolidated European law, the conclusion of agreements on security cooperation, etc. At the same time, the Ukrainian side largely complies with the requirements set by the EU, including constitutional reform, the adoption or correction of legislation on elections, public procurement, energy reforms, and so on. The expansion of the EU's monitoring of internal processes in Ukraine is enshrined in a number of bilateral

19 OECD, 'COVID-19 crisis response in Eastern Partner countries' (2020) <https://www.oecd.org/coronavirus/policy-responses/covid-19-crisis-response-in-eu-eastern-partner-countries-7759afa3/> accessed 20 June 2022.

20 European Commission, *Coronavirus: Macro-financial assistance agreement signed with Ukraine to limit fallout of pandemic* (2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1392> accessed 20 June 2022.

21 V Kovaleva 'Why is Ukraine losing assets?' (*Government Courier*, 16 July 2020) <https://ukurier.gov.ua/uk/articles/chomu-ukrayina-vtrachaye-aktivi/> accessed 20 June 2022.

documents and related agreements, which indicate that the foreign policy of the Ukrainian state is based on the conscientious implementation of international obligations, as well as the priority of universally recognised norms and principles of international law before the norms and principles of national law. In accordance with these principles, Ukraine has given the Venice Commission the opportunity to monitor and analyse national draft legislation.

EU support for Ukraine under the European Neighborhood Instrument is coordinated by the European Commission's Support Group for Ukraine (SGUA). Together with the EU Delegation to Ukraine, SGUA develops support programs for key areas of reform (e.g., decentralisation, the fight against corruption, and strengthening of the rule of law), which are often co-financed and implemented by EU member states.

Ukraine already has significant advantages in the field of energy from the integration processes and implementation of EU energy legislation. In this context, the following should be noted: (a) gas imports are stable under transparent market conditions; (b) the new relationship with the Russian gas monopoly is in line with Ukrainian and EU law and (most importantly) does not require political concessions or sacrifices of sovereignty; (c) participation in the EU market allows Ukraine to obtain protection against discriminatory monopoly actions of the Russian Federation; (d) there is an opportunity to insist together with the EU on the unblocking of gas sales operations on the Ukraine-Russia border and on its availability for European traders.

6 CONCLUSIONS

In the twenty-first century, in the conditions of deepening globalisation and regional integration processes, there are more and more reasons to claim that there is no absolute state sovereignty. Nation-states, especially the member states of the EU, are increasingly resorting to self-restraint in the exercise of many sovereign rights and delegating relevant powers to the EU institutions. State sovereignty is important for the legalisation and maintenance of national identity. The self-restriction of the state in the exercise of certain rights and powers is not evidence of the loss of sovereignty, nor does it indicate the destruction of the identity of the people who created the state. When discussing the problem of economic sovereignty, it is necessary to dwell on the reasons and purposes of its limitation. Of course, if sovereignty is limited, for example, by way of annexation or occupation, then such a restriction leads to the loss of sovereignty over a certain part of the state (occupied or annexed) and therefore requires adequate political and international legal assessment and an appropriate response by the world community, international organisations, and individual states. If states have resorted to self-limitation in exercising their sovereignty by concluding mutually beneficial international agreements and transferring sovereign rights, then such self-limitation should not be considered a loss of sovereignty. It should be remembered that in the second case, the self-limitation of sovereignty occurs to the extent that the state itself is interested in it.

The self-limitation of states always has specific reasons and goals, and therefore the degree of self-limitation in exercising sovereignty is also different. The most common grounds for self-limitation of nation-states in the exercising of their sovereignty are economic ones. Foreign economic and related financial factors are so important in today's world that they force even the world's leading states to resort to self-restraint in exercising sovereign rights and powers in the economic and financial spheres.

The problem of the self-limitation of Ukraine's sovereignty due to its integration into the EU can be discussed only in the context of ensuring economic sovereignty and economic security. The current activities of all branches of government in Ukraine are aimed at implementing the country's strategic course towards full membership in the EU and NATO.

This goal is enshrined in the Constitution and defined as the most important priority of national interests in the Strategy of National Security of Ukraine. There has always been a manipulative component to Ukraine-EU relations, but the situation completely changed after the military invasion of the Russian Federation. On 23 June 2022, the European Parliament adopted a resolution calling on the heads of state or government to grant EU candidate status to Ukraine 'without delay'.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

MODERN TRENDS IN THE FORMATION AND DEVELOPMENT OF THE HUMAN RIGHTS MECHANISM IN UKRAINE[1]

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Submitted on 23 Feb 2022 / Revised 12 May 2022 / Approved **14 Jun 2022**
Published online: **20 Jun 2022** // Last Published: **15 Aug 2022**

Keywords: *human rights mechanism; human rights institutions; justice system; determinants of formation; development trends; rule of law; international standards; 'quality of law'*

1 **This article was prepared as part of the scientific project 'Justice in the context of sustainable development' Project No. 22BF042-01 (2022-2024).**

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Corresponding author, solely responsible for the manuscript preparing. **Competing interests**: Although the author serves at the same institution as the Editor-in-Chief of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this article, including the choice of peer reviewers, were handled by the editor and the editorial board members, who are not affiliated with the same institution. **Disclaimer**: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.
Managing editor – Dr Olena Terekh. English Editor – Dr Sarah White.

How to cite: M Stefanchuk 'Modern Trends in the Formation and Development of the Human Rights Mechanism in Ukraine' 2022 3 (15) Access to Justice in Eastern Europe 19–40. DOI: 10.33327/AJEE-18-5.3-a000311

ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

ABSTRACT

The article highlights the modern determinants of the formation and function of institutions of the national human rights mechanism in Ukraine. Particular attention is paid to the institutions of the justice system as key elements of the national human rights mechanism, the formation and functioning of which, at the present stage, are determined by a number of factors, at both internal (national) and external (supranational) levels. It is established that external determinants determine the impact on the human rights mechanism in Ukraine through functional indicators of its effectiveness in the evaluation and reporting documents of the institutions of the supranational (international) human rights mechanism. Internal determinants dictate the impact on the national human rights mechanism through functional indicators of its effectiveness in the evaluation and reporting documents of national human rights institutions, the results of sociological research, and expert assessments and depend directly on the 'quality of law'. The current trends in the development of human rights mechanisms in Ukraine, which are enshrined in a number of corresponding strategies in the field of human rights due to the need to improve the state's activities to promote and ensure human rights and freedoms, create effective mechanisms for their implementation and protection in the field of development of the justice system as a whole, as well as its constituent institutions, such as the prosecutor's office and the bar. Emphasis is placed on the priority of reaching consensus among stakeholders in the implementation of these strategic documents as a normative component, which determines the development trends of the institutional and functional components of the national human rights mechanism.

1 INTRODUCTION

Currently, the formation of the system of human rights institutions and the definition of the directions of the function of the human rights mechanism in Ukraine are determined by a number of factors, both internal and external. The purpose of this process should first determine the desire of the state to fulfil its main constitutional duty, which is the establishment and protection of human rights and freedoms. At the same time, ensuring an adequate level of protection of the rights, freedoms, and interests of the individual is one of the most important tasks of any state seeking to be recognised as legal, as one of the fundamental features of such a state is a system of effective remedies providing people with legal security.

The possibility of successful implementation of the tasks of the state outlined here primarily depends on the effectiveness of a set of authorised institutions, regulated by law and aimed at eliminating shortcomings in the functioning of such components of the legal mechanism of human rights as their protection and implementation, including various forms of effective legal services for persons whose rights have been violated, or, in case of threat of violation of such rights, normative procedures to follow.

In order to ensure and guarantee real legal protection, the state must create a number of human rights institutions, the most important of which are the institutions of the justice system. At the same time, the constitutional provisions defining the institutional components of justice give grounds to claim that the effectiveness of courts in exercising their human rights activities is due, *inter alia*, to the effectiveness of related legal institutions that promote justice, namely, lawyers and prosecutors.

Given the permanent reform of key components of the national human rights mechanism, like the judiciary, the prosecutor's office, and the bar, the current determinants of their formation and development trends in the Ukrainian state need coverage and legal analysis.

2 DETERMINANTS OF THE FORMATION OF THE HUMAN RIGHTS MECHANISM IN UKRAINE

First of all, it should be noted that determinism is the doctrine of the general conditionality of objective phenomena, the initial categories of which are the concepts of connection and interaction. Based on this principle, the determinant is considered the reason that determines the occurrence of a certain phenomenon. In the context of this study, this is the reason that determines the need and direction of reforming the regulatory, institutional, and functional components of the national human rights mechanism.

Institutions of the justice system, as the key elements determining the directions of the formation and functioning of institutions of the national human rights mechanism in Ukraine, are currently provided for by a number of determinants, both internal (national) and external (supranational). External determinants dictate the impact on the human rights mechanism in Ukraine through the functional indicators of its effectiveness in the evaluation and reporting documents of the institutions of the supranational (international) human rights mechanism. Internal determinants dictate the impact on the national human rights mechanism through functional indicators of its effectiveness in the evaluation and reporting documents of national human rights institutions, the results of sociological research, and expert assessments and depend directly on the 'quality of law'.

2.1 External Determinants:

2.1.1. Rule of Law Index

An important determinant of external character, which can claim to be objective in assessing the effectiveness of the human rights mechanism in Ukraine, is the rating of states in accordance with the rule of law, efficiency of justice, and protection of rights and freedoms. This rating, in contrast to official assessments of authorised organisations, is based not on official reports of states and groups of experts but on the reports of individual experts whose activities are related to the rule of law in various segments of society, including justice and other forms of protection of human rights. As experts rightly point out, this allows the state of the rule of law in a particular state to be covered in the most balanced and comprehensive way.[3]

The index is based on the following criteria: absence of corruption, openness of government, limitation of powers of government institutions, protection of fundamental rights, regulatory support, law and order and security, civil justice, and criminal justice.

Thus, in 2021, Ukraine ranked 74th among 139 countries in the rule of law. The results of the rating were published on the website of the international non-governmental organisation World Justice Project.[4] In '7. Civil Justice', it took 64th position, and in '8. Criminal Justice', it is, unfortunately, only 91st out of 139 countries in the world in which such the study was conducted.

Thus, these indicators, on the one hand, determine the priority areas for reforming the regulatory, institutional, and functional components of the human rights mechanism in

3 'The Rule of Law Index 2020: inside view' <https://uba.ua/ukr/news/7292/> accessed 20 February 2022.

4 'WJP Rule of Law Index 2021' <https://worldjusticeproject.org/rule-of-law-index/global/2021/> accessed 20 February 2022.

Ukraine and, on the other, comparatively reflect the best international practices in this ranking.

2.1.2 The Case Law of the European Court of Human Rights

The key external determinant of determining the directions of the formation and function of institutions of the national human rights mechanism in Ukraine, as well as guarantees of improvement of the national human rights mechanism, is the functioning of institutions of the supranational (international) human rights mechanism. The most common and effective international human rights bodies for the citizens of Ukraine are the European Court of Human Rights (hereafter, the ECtHR) and the UN Human Rights Committee. However, if the number of appeals to the UN Human Rights Committee on violations of rights under the International Covenant on Civil and Political Rights is calculated in units, the citizens of Ukraine actively apply to the ECtHR for the protection of violated rights more frequently.[5]

In this context, it should be noted that for many years, Ukraine has been one of the leading member states of the Council of Europe in the number of cases pending before the ECtHR. As of 31 December 2020, Ukraine ranked third. In particular, in 2020, the ECtHR adopted 89 decisions in cases against Ukraine on 226 applications. Of these, 84 found violations of the Convention. The main problems that led the ECtHR to find violations of the provisions of the Convention in Ukraine were:

- excessive length of proceedings in civil, administrative, and criminal cases;
- torture or inhuman or degrading treatment or punishment, as well as ill-treatment of persons under state control (in pre-trial detention or penitentiary institutions);
- shortcomings in the legislation due to the fact that life imprisonment cannot be reduced;
- shortcomings in the legislation and administrative practice of state bodies, which lead to prolonged, illegal, and/or unjustified detention of a person without a proper legal basis;
- shortcomings of judicial practice that lead to violation of a person's right to a fair trial;
- shortcomings in the legislation that lead to interference with the right of applicants to respect for private and family life in connection with the manner of applying to them the prohibitions provided by the Law of Ukraine 'On Purification of Power', etc.[6]

As individuals have the right to apply for protection of their rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant only after using all national remedies of legal protection, the statistics on the number of cases under the consideration of the ECtHR against Ukraine is an objective indicator of the level of effectiveness of the national human rights mechanism and a determinant of the directions of its reform.

Thus, one of the recent decisions of the Constitutional Court of Ukraine (hereafter, the CCU) was adopted in the case of a review of the sentence of a person sentenced to life

5 M Antonovych, *Ukraine in the International System of Human Rights Protection: Theory and Practice* (Kyiv-Mohyla Academy 2007) 333.

6 'Annual report on the results of the activities of the Commissioner for the European Court of Human Rights in 2020' <https://minjust.gov.ua/m/zviti-pro-rezultati-diyalnosti-upovnovajenogo-u-spravah-evropeyskogo-sudu-z-prav-lyudini> accessed 20 February 2022.

imprisonment,[7] in which it found Part 1 of Art. 81, part 1 of Art. 82 of the Criminal Code of Ukraine is inconsistent with the Constitution of Ukraine (i.e., unconstitutional) in that it makes it impossible to apply for parole and replace the unserved part of the sentence with a more lenient one for persons sentenced to life imprisonment.

This decision of the CCU is based on several documents of international law, as well as the practice of the ECtHR, which in a number of its decisions against Ukraine stated that Ukraine violated Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the grounds that life imprisonment is a sentence without the prospect of release. In particular, in the judgment in the case of *Petukhov v. Ukraine* (No. 2) of 12 March 2019 (application No. 41216/13) of the ECtHR, in view of the number of allegations that it is impossible to change the sentence of life imprisonment and the likelihood of new allegations on the same issue, noted the existence of a systemic problem that would require the respondent state to reform the system of revision of life imprisonment.[8]

Given that the ECtHR has established the fact of violation of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms by Ukraine on the grounds that life imprisonment is a sentence without the prospect of release, and given that Part 2 of Art. 28 of the Constitution of Ukraine is identical to Art. 3 of the Convention, the CCU concluded that the sentence of life imprisonment imposed by the Criminal Code of Ukraine as a sentence without the prospect of release is incompatible with the requirements of the Constitution of Ukraine and obliged the Verkhovna Rada of Ukraine to immediately bring the regulations established by Arts. 81 and 82 of the Criminal Code Ukraine, in accordance with the Constitution of Ukraine and its Decision in this case.

It should be noted that the resolution of the Cabinet of Ministers of Ukraine of 1 April 2020[9] established the Commission for the Implementation of ECtHR Decisions, whose main tasks include developing mechanisms to address systemic and structural problems identified in ECtHR decisions against Ukraine and prevent such problems in the future; the preparation and submission to the Cabinet of Ministers of Ukraine of proposals on the implementation of the decisions of the ECtHR in cases against Ukraine, as well as relevant decisions of the Committee of Ministers of the Council of Europe on measures to implement them; directing the actions of central executive bodies and ensuring their interaction in order to fully and effectively implement the decisions of the ECtHR in cases against Ukraine; as well as improving the regulatory framework to implement ECtHR decisions.

Another step in the process of implementation of ECtHR decisions by Ukraine was the submission by the Cabinet of Ministers of Ukraine to the Verkhovna Rada of Ukraine of the draft Law No. 4049 of 3 September 2020 'On Amendments to the Code of Administrative Offenses, the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine on implementation of the decisions of the European Court of Human Rights',[10] which is designed to bring the provisions of these regulations into line with the case law of the

7 Decision of the Constitutional Court of Ukraine from 16 September 2021 No 6-p/2021 in case No 3-349/2018 (4800/18,1328/19, 3621/19, 6/20) <https://zakon.rada.gov.ua/laws/show/v006p710-21#Text> accessed 20 February 2022.

8 *Petukhov v Ukraine (No 2)* App no 41216/13 (ECtHR, 12 March 2019) §194 <http://hudoc.echr.coe.int/eng?i=001-191703> accessed 20 February 2022.

9 The resolution of the Cabinet of Ministers of Ukraine 'On the establishment of the Commission for the Implementation of Decisions of the European Court of Human Rights' of 1 April 2020 No 258 <https://zakon.rada.gov.ua/laws/show/258-2020-%D0%BF#Text> accessed 20 February 2022.

10 Draft Law 'On Amendments to the Code of Ukraine on Administrative Offenses, the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine on the Implementation of Decisions of the European Court of Human Rights' of 3 September 2020 No 4049 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=69827> accessed 20 February 2022.

ECtHR. Considerable attention is paid in this bill to the humanisation of certain provisions of criminal law as an attempt to reform the system of review of sentences in the form of life imprisonment to implement the ECtHR decision in the case of *Petukhov v. Ukraine*.

Other important legislative initiatives include draft legislation aimed at resolving issues related to ensuring effective appellate review of decisions on the imposition of administrative penalties in the form of administrative arrest; acquaintance with the materials of criminal proceedings after the entry of the court decision into force; strikes at transport enterprises and the procedure for resolving collective labour disputes (conflicts) aimed at resolving problematic aspects of national legislation set out in the ECtHR Judgments in the cases of *Shvydka v. Ukraine*,[11] *Vasyl Ivashchenko v. Ukraine*,[12] *Naydyon v. Ukraine*,[13] *Veniamin Tymoshenko and others v. Ukraine*,[14] and others.

2.1.3 Conclusions of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

One of the main problems that led the ECtHR to find violations of the provisions of the Convention by Ukraine is the established facts of torture or inhuman or degrading treatment or punishment, as well as ill-treatment of persons under state control (in pre-trial detention facilities or imprisonment or execution of sentences). An important indicator that objectively reflects the state of human rights in detention facilities, pre-trial detention, and imprisonment is the systematic inspections of these institutions by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter, the CPT) and assessment of the state's activities on this issue in periodic annual reports on compliance with the minimum standards of the CPT,[15] which are a summary of global best practices in ensuring the proper treatment of detainees and prisoners.[16]

According to the analysis of the implementation of the penitentiary system recommendations provided to Ukraine by the CPT since its first visit to Ukraine in 1998, experts conclude that Ukraine has long failed to comply with several CPC strategic recommendations, indicating a fundamental problem in Ukrainian treatment of its obligations in the field of protection of the rights of prisoners. This problem is steadily growing, along with the number of non-implemented recommendations, which is due to the lack of a binding mechanism for their implementation and the lack of a structure responsible for coordinating the implementation of CPC recommendations.[17]

11 *Shvydka* v Ukraine App no 17888/12 (ECtHR, 13 October 2014) <http://hudoc.echr.coe.int/rus?i=001-147445> accessed 20 February 2022.

12 *Vasiliy Ivashchenko v Ukraine* App no 760/03 (ECtHR, 26 July 2012) <http://hudoc.echr.coe.int/rus?i=001-112481> accessed 20 February 2022.

13 *Naydyon v Ukraine* App no 16474/03 (ECtHR, 14 October 2010) <http://hudoc.echr.coe.int/rus?i=001-100941> accessed 20 February 2022.

14 *Veniamin Tymoshenko and Others v Ukraine* App no 48408/12 (ECtHR, 2 October 2014) <http://hudoc.echr.coe.int/rus?i=001-146671> accessed 20 February 2022.

15 CPT standards (2002) 1 – Rev 2010 <https://www.refworld.org/docid/4d7882092.html> accessed 20 February 2022.

16 The CPT and Ukraine <https://www.coe.int/en/web/cpt/ukraine> accessed 20 February 2022.

17 V Chovhan, 'Analysis of the implementation of the recommendations on the penitentiary system provided to Ukraine by the European Committee for the Prevention of Torture since 1998' <https://khpg.org/1591169185> accessed 20 February 2022.

At the same time, it should be noted that the Action Plan for the implementation of the National Strategy for Human Rights for 2021-2023, approved by the Cabinet of Ministers of Ukraine of 23 June 2021 No. 756-r,[18] among the measures to implement this document, provides for the development and submission to the Cabinet of Ministers of Ukraine on draft laws on preventive and compensatory measures in connection with inadequate conditions of detention of convicts and persons in custody, regarding the following:

- the establishment of an institute of preventive complaint for persons detained in inappropriate conditions in places of detention, subjected to torture and other cruel, inhuman, or degrading treatment or punishment;
- take immediate and effective judicial precautionary measures against persons detained in inappropriate conditions or subjected to ill-treatment in order to prevent further detention in such conditions;
- creation of a double system of regular penitentiary inspections.

For the purpose of practical implementation of the last measure, the Verkhovna Rada of Ukraine registered a draft Law No. 5884 of 2 September 2021 'On the Establishment of a Dual System of Regular Penitentiary Inspections', which should limit the supervisory powers of the prosecutor's office in this area.

2.1.4 Conclusions of the Group of States against Corruption (GRECO)

In one of the recent GRECO evaluation documents on Ukraine – Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges, and prosecutors, Compliance Report, Ukraine, adopted by GRECO at its 84th Plenary Meeting (Strasbourg, 2-6 December 2019) – it was stated that although some legislative initiatives were taken by the previous legislature to address GRECO recommendations, most of them have apparently been abandoned.

The Compliance Report assesses the measures taken by the authorities of Ukraine to implement the recommendations issued in the Fourth Round Evaluation Report on Ukraine, which was adopted at GRECO's 76th Plenary Meeting (23 June 2017), following authorisation by Ukraine (GrecoEval4Rep (2016)9).[19] GRECO's Fourth Evaluation Round deals with 'Corruption prevention in respect of members of parliament, judges and prosecutors'.

With regard to judges, a Law reforming judicial self-governance was adopted in October 2019. It introduces a new institutional setup with reshaped responsibilities. At the start, GRECO notes that it regrets that such an important reform was not preceded by an assessment of the former system, which would justify its complete overhaul, and was not coupled with adequate involvement of all relevant stakeholders. Moreover, it will be crucial to ensure that the new institutional setup guarantees, at all times, the individual independence of judges (including dissenting voices) and shields them from undue political pressure. GRECO further regrets that no meaningful progress has been made to review the system of periodic performance evaluation of judges and review the definitions of disciplinary offences.[20]

18 Ruling of the Cabinet of Ministers of Ukraine of 23 June 2021 No 756-p 'On approval of the action plan for the implementation of the National Strategy in the field of human rights for 2021-2023' <https://zakon.rada.gov.ua/laws/show/756-2021-%D1%80#Text> accessed 20 February 2022.

19 GRECO, 'Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors: Evaluation Report Ukraine' GrecoEval4Rep (2016) 9 <https://rm.coe.int/grecoeval4rep-2016-9-fourth-evaluation-round-corruption-prevention-in-/1680737207> accessed 20 February 2022.

20 Ibid, 187.

With regard to prosecutors, a new Law on the reform of the prosecutor's office was adopted in October 2019. It entails a comprehensive restructuring and downsizing of the prosecution service. The reform provides for a revision of the system of selection, appointment, and disciplining of public prosecutors. A re-qualification procedure for all serving prosecutors has been launched reportedly for integrity purposes. This development requires close follow-up. The establishment of temporary personnel commissions, whose composition and rules of functioning are deferred to the Prosecutor General and which are entrusted with appointment and discipline powers, is a matter of concern. A system of random allocation of cases also is yet to be put in place. On a more encouraging note, qualification criteria have been introduced for the appointment of the Prosecutor General, and efforts are underway to introduce a new system for promotion and periodic evaluation of prosecutors, as well as to improve their awareness of integrity matters (p 188). In view of the above, GRECO notes that in the present absence of final achievements, further significant material progress is necessary to demonstrate that an acceptable level of compliance with the recommendations can be achieved.[21]

Thus, the GRECO conclusions outlined above state the lack of final achievements in striving for the appropriate level of compliance with the recommendations, as well as identify guidelines for further improvement of such components of the justice system in Ukraine as the judiciary and the prosecutor's office.

3 INTERNAL DETERMINANTS

3.1 Report of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine

One of the important internal determinants of determining the directions of formation and functioning of institutions of the national human rights mechanism for the institutions of the justice system in Ukraine is the data of the Annual Report of the Ukrainian Parliament Commissioner for Human Rights (hereafter, the Commissioner) 'On the state of observance and protection of human and civil rights and freedoms in Ukraine'. This document of the Commissioner for 2020 states that the number of reports of violations of human and civil rights and freedoms received by it during 2020 increased by 40% compared to last year (from 33,800 in 2019 to 48,400 in 2020). As a confirmation of the imperfection of the judicial protection system, this document mentions 10,426 reports of violations of procedural rights received by the Commissioner during 2020, including 5,744 on violations at all stages of criminal proceedings and during court proceedings, 807 on civil and administrative proceedings, 3,154 on violations of procedural rights in places of detention in Ukraine, and 721 abroad and in the temporarily occupied territories, as a result of which appropriate measures were taken to restore violated rights (reports – M. Stefanchuk).[22]

21 ibid.

22 Annual Report of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine 'On the State of Observance and Protection of Human and Civil Rights and Freedoms in Ukraine for 2020' <https://ombudsman.gov.ua/ua/page/secretariat/> accessed 20 February 2022.

3.2 Results of Sociological Research

Among the internal determinants of a subjective nature (those which reflect the thoughts or experiences of a particular subject[23]), the formation of components of the human rights mechanism in Ukraine currently includes the results of sociological research that reflect the assessment of civil society's level of trust in them.

Thus, when conducting a legal analysis of the results of research conducted by the Razumkov Centre's sociological service from September 2019 to March 2021 on citizens' assessment of government activities and the level of trust in social institutions, distrust was found to be increasing, most often in such components of the human rights mechanism of the state as the judiciary in general and the prosecutor's office: 72% and 61% respectively in 2019;[24] 77.5% and 73% in 2020;[25] 79% and 71% in 2021.[26] These statistics show that there are problems with the legitimacy of the judiciary and the justice system as a whole in Ukraine at present.

When examining the outlined determinant of reforming the institutions of the human rights mechanism in the Ukrainian state, it is necessary to express some concerns about its substantive validity. Thus, between February and March 2021, USAID's New Justice Program conducted national surveys on trust in the judiciary, other branches of government and public institutions, the independence and accountability of judges, perceptions of corruption in the judiciary, and willingness to report on its manifestations,[27] based on the results of which it was established that there is a negative trend in the issue of trust in the judiciary in Ukraine. At the same time, it is noteworthy that only 14% of the surveyed population reported that they had experience in participating in court proceedings at least once in the last 24 months. At the same time, their perception of the courts was more positive than that of the general population. Thus, 62% of users of judicial services admitted that they did not receive requests for bribes, informal payments, or gifts during their experience of interaction with the courts, 46% admitted that judges made legal and fair decisions, and 35% of respondents with experience in interaction with courts indicated that they trust the courts in which they participated in court proceedings. This gives grounds to conclude about the debatable objectivity of this determinant, which dictates the impact on the formation of the components of the national human rights mechanism.

23 V Busel (ed), *Large Explanatory Dictionary of the Modern Ukrainian Language* (Perun 2005) 1409.

24 'Citizens' assessment of the situation in the country and government activities' <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/otsinka-gromadianamy-sytuatsii-v-kraini-ta-diialnosti-vlady> 20 February 2022.

25 'The beginning of a new political year: trust in social institutions' (July 2020) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/pochatok-novogo-politychnogo-roku-dovira-do-sotsialnykh-instytutiv-lypen-2020r> accessed 20 February 2022.

26 'Assessment of the situation in the country, trust in the institutions of society and politicians, electoral orientations of citizens' (March 2021) <https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/otsinka-sytuatsii-v-kraini-dovira-do-instytutiv-suspilstva-ta-politykiv-elektoralni-oriientatsii-gromadian-berezen-2021r> accessed 20 February 2022.

27 'Results of national surveys of the population and lawyers involved in court proceedings on trust in the judiciary, judicial independence and accountability, perception of corruption and willingness to report its manifestations' <https://newjustice.org.ua/uk/novini/rezultati-natsionalnih-opituvan-naselennya-ta-pravnikiv-yaki-ye-uchasnikami-sudovih-provadzhen-shhodo-doviri-do-sudovoyi-gilki-vladi-suddivskoyi-nezalezhnosti-j-pidzvitnosti-sprijnyattya-koruptsiyi-ta>/ accessed 20 February 2022.

3.3 Expert Perspectives

The next important subjective determinant of reforming the components of the human rights mechanism in Ukraine is expert opinions and conclusions. Thus, one of the reasons for the next stage of judicial reform, marked by the provisions of the Law of Ukraine of 16 October 2019 No. 193-IX 'On Amendments to the Law of Ukraine' On Judiciary and Status of Judges' and some laws of Ukraine 'On Judicial Governance'[28] (hereafter, Law No. 193-IX), according to the explanatory note to the corresponding bill, is that *experts linked* (highlighted by the author – M. Stefanchuk) most of the problems that existed in the judiciary at the time of drafting with the activities of judicial governance bodies. For example, this included pointing to the *de facto* unlimited discretion of members of the High Qualifications Commission of Judges of Ukraine (hereafter, the HCJU of Ukraine) in conducting competitive procedures for the selection of judges and their qualification assessment or delaying consideration of disciplinary complaints by members of the Supreme Council of Justice about the actions of judges. As a result, the bill proposed to clarify the powers of the judiciary, including the principles of the SCJ, to change the procedure for forming the composition of the HCJU of Ukraine.

Similarly, in response to calls from a number of public expert organisations on the need to reset the SCJ in the judicial reform process by terminating the powers of some SCJ members following a public and international audit, as well as involving international experts and members of the public in the selection process of new members of SCJ,[29] the Verkhovna Rada of Ukraine adopted the Law of Ukraine of 14 July 2021 No. 1635-IX 'On Amendments to Certain Legislative Acts of Ukraine on the Procedure for Election (Appointment) to the Positions of Members of the Supreme Council of Justice and Disciplinary Inspectors of the Supreme Council of Justice' Law No. 1635-IX).[30]

This law provides for amendments to improve the quality of selection of SCJ candidates by conducting a preliminary examination of potential candidates and establishing their compliance with the criteria of professional ethics and integrity, as well as a one-time assessment of compliance with current SCJ members' criteria of professional ethics and integrity. The justification for the need to adopt this Law mentioned the commitments made by Ukraine in 2020 to the International Monetary Fund and the European Union, including the reform of the judiciary.

Thus, the Memorandum on Economic and Financial Policy of 2 June 2020 outlines the intentions of the Ukrainian state to amend the law defining the legal status of SCJ in order to strengthen the quality of selection so that SCJ members are people with impeccable reputation and integrity.[31] The Memorandum of Understanding between Ukraine as a Borrower and the European Union as a Lender and the Loan Agreement between Ukraine as a Borrower and the National Bank of Ukraine as a Borrower's Agent and the European

28 Law of Ukraine of 16 October 2019 No 193-IX 'On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" and some laws of Ukraine on the activities of judicial authorities' <https://zakon.rada.gov.ua/laws/show/193-20#Text> accessed 20 February 2022.

29 'Real judicial reform is impossible without a qualitative update of the Supreme Council of Justice' <https://ti-ukraine.org/news/spravzhnya-sudova-reforma-nemozhlyva-bez-yakisnogo-onovlennya-vyshhoyi-rady-pravosuddya-zayava/> accessed 20 February 2022.

30 Law of Ukraine No 1635-IX of 14 July 2021 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Procedure for Election (Appointment) to the Positions of Members of the Supreme Council of Justice and Activities of Disciplinary Inspectors of the Supreme Council of Justice' <https://zakon.rada.gov.ua/laws/show/1635-20#Text> accessed 20 February 2022.

31 Memorandum on Economic and Financial Policy of 2 June 2020 <https://mof.gov.ua/uk/memorandum_of_economic_and_financial_policies_by_the_authorities_of_ukraine-435> accessed 20 February 2022.

Union as a Lender (up to EUR 1 billion)[32] provided for a number of international commitments to reform the judiciary.

In this regard, the Annual Report for 2020 'On the state of ensuring the independence of judges in Ukraine', approved by the SCJ decision of 5 August 2021 No. 1797/0 / 15-21, noted that the adoption of international commitments to reform the judiciary not in the manner provided for in Art. 9 of the Constitution of Ukraine creates a state of legal uncertainty because the norms of international treaties are part of national law, but the norms of international treaties that contradict the Constitution of Ukraine cannot be included in the legal system through the direct ban of Art. 9 of the Constitution of Ukraine. Thus, a question arises as to the binding nature of such norms to the extent that the norms of the Constitution of Ukraine are norms of direct effect.[33]

In addition, the SCJ reacted to the adoption of Law No. 1635-IX by Decision of 12 August 2021 No. 1822/0 / 15-21 'On the appeal of the Supreme Council of Justice to the Supreme Court as a subject of the right to a constitutional petition on the constitutionality of certain provisions of law', noting that the legislation of Ukraine provided all the necessary mechanisms and procedures to verify the compliance of SCJ members with the criteria of professional ethics and integrity. At the same time, the creation of an entity (Ethical Council – M Stefanchuk), which has no constitutional basis and is endowed with functions and powers that, according to the Constitution of Ukraine, are within the competence of other entities, distorts the reform of the judiciary and threatens the independence of the judiciary guaranteed by the Constitution of Ukraine.[34]

This highlights the debatable objectivity of expert visions as determinants, which dictates the impact on the formation of components of the national human rights mechanism, given their controversial nature. In this context, the Venice Commission's Conclusion on Amendments to the Legislation of Ukraine Regulating the Status of the Supreme Court and Judicial Governments, adopted at its 121st Plenary Session (Venice, 6-7 December 2019),[35] aptly stated that trust in the judiciary could only grow within a stable system, as persistent institutional instability when reforms follow changes in political power can also be detrimental to public confidence in the judiciary as an independent and impartial institution (para. 13).

3.4 'Quality of Law'

The controversy of expert views on the directions of reforming the national human rights mechanism is expected to be embodied in its normative component. In this context, it should be noted that certain provisions of Law No. 193-IX have already been declared

32 Law of Ukraine No 825 – IX of 25 August 2020 'Ratification of the Memorandum of Understanding between Ukraine as a Borrower and the European Union as a Lender and the Credit Agreement between Ukraine as a Borrower and the National Bank of Ukraine as a Borrower's Agent and the European Union as a Lender' <https://zakon.rada.gov.ua/laws/show/825-20#Text> accessed 20 February 2022.

33 Annual Report for 2020 'On the state of ensuring the independence of judges in Ukraine' <https://hcj.gov.ua/sites/default/files/field/file/shchorichna_dopovid_za_2020_rik_0.pdf> accessed 20 February 2022.

34 Decision of the Supreme Council of Justice of 12 August 2021 No 1822/0/15-21 'On the appeal of the Supreme Council of Justice to the Supreme Court as a subject of the right to a constitutional petition on the constitutionality of certain provisions of laws' <https://hcj.gov.ua/doc/doc/8643> accessed 20 February 2022.

35 Opinion on the Legal framework in Ukraine governing the Supreme Court and judicial self-governing bodies, adopted by the Venice Commission at its 121st Plenary Session, Venice, 6-7 December 2019. CDL-AD (2019)027-e Ukraine <https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)027-e> accessed 20 February 2022.

unconstitutional by the Decision of the CCU of 11 March 2020 No. 4-r/2020.[36] In addition, the CCU provided a legal assessment of the shortcomings of the legislative technique in this Decision, due to which the change in the number and appointments of the HCJU of Ukraine without the introduction of a transitional period led to the suspension of constitutional functions for selection and evaluation of judges and the impossibility of the SCJ exercising its separate constitutional powers, as well as created significant obstacles to the functioning of effective justice and in some cases prevented the exercise of everyone's right of access to justice as a requirement of the rule of law.

Note that the peculiarities of the legislative regulation of the reform of another state institution of the human rights mechanism – the prosecutor's office – are regarded in the expert community as doubtfully constitutional. Thus, the priority measures for the reform of the prosecutor's office, introduced by the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecutor's Office' of 19 September 2019 No. 113-IX (hereafter, Law No. 113-IX) are subject of the constitutional petition on their compliance with the Constitution of Ukraine, in which the subject of the constitutional petition defends the position that the adoption of the disputed law led to a narrowing of the content and scope of existing rights of citizens and introduced the dualism of the legal principles of the organisation and activity of prosecutors.[37]

In the legal regulation of the status of the bar as a non-governmental self-governing institution that promotes the administration of justice, there is some legislative uncertainty in the issue of introducing the so-called 'bar monopoly'. Thus, the attempt to introduce a limited lawyer's monopoly in Ukraine to represent another person in court provoked a loud discourse about its expediency, timeliness, and demand. Moreover, its legal regulations can boast of two conclusions of the CCU in 2016[38] and 2019.[39]

It is noteworthy that in the Conclusion of 2016, the CCU set out the legal position according to which the amendment of the Constitution of Ukraine Arts. 131-2 regarding the representation of another person in court exclusively by a lawyer is consistent with the provisions of Art. 59 of the Basic Law of Ukraine on the right of everyone to professional legal assistance. At the same time, the CCU noted that it is based on the fact that a lawyer has the necessary professional level and the ability to ensure the realisation of the right of a person to represent his/her interests in court.

In the CCU Conclusion 2019 on the draft law amending the Constitution of Ukraine, which aimed to ensure the right of everyone to receive professional legal assistance through the abolition of the lawyer's monopoly on such assistance, the CCU concluded that the proposed

36 Decision of the Constitutional Court of Ukraine of 11 March 2020 No 4-r/2021 in case No 1-304/2019(7155/19) <https://zakon.rada.gov.ua/laws/show/v004p710-20#Text>> accessed 20 February 2022.

37 The Constitutional Court received a constitutional petition from 50 people's deputies of Ukraine on the compliance of the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office' <https://ccu.gov.ua/novyna/do-ksu-nadiyshlo-konstytuciyne-podannya-50-narodnyh-deputativ-ukrayiny-shchodo-vidpovidnosti> accessed 20 February 2022.

38 In the case of the request of the Verkhovna Rada of Ukraine to provide an opinion on the compliance of the draft law on amendments to the Constitution of Ukraine (on justice) with the requirements of Arts. 157 and 158 of the Constitution of Ukraine: Case No 1-15/2016 <https://zakon.rada.gov.ua/laws/show/v001v710-16#Text> accessed 20 February 2022.

39 In the case of the constitutional appeal of the Verkhovna Rada of Ukraine on providing an opinion on the compliance of the draft law on amendments to the Constitution of Ukraine (on the abolition of the lawyer's monopoly) (Reg. No 1013) with the requirements of Arts. 157 and 158 of the Constitution: Opinion of the Constitutional Court of Ukraine 4-v / 2019. Case No 2-248/2019(5580/19) <https://zakon.rada.gov.ua/laws/show/v004v710-19#Text> accessed 20 February 2022.

amendments to the Constitution expand the possibilities of representation in court and also noted that the analysis of Part 1 of Art. 131-2 of the Constitution of Ukraine in connection with its Art. 59 follows a positive obligation of the state, which is to ensure the participation of a lawyer in providing professional legal assistance to a person only at the expense of the state in cases provided by law.

Taking into account the CCU Conclusion of 2019 by Resolution of the Verkhovna Rada of Ukraine of 14 January 2020 No. 434-IX, the draft law was previously approved by a majority of the constitutional composition of the Verkhovna Rada of Ukraine, and the Legal Policy Committee recommended the Verkhovna Rada of Ukraine to the Constitution of Ukraine (concerning the abolition of the lawyer's monopoly), register No. 1013 of 29 August 2019, to be finally adopted as a law,[40] which indicates a steady current trend towards the abolition of the lawyer's monopoly on the representation of another person in court.

Due to the lack of consensus among stakeholders, the draft law in the field of reforming the free legal aid system can also be described as controversial. Currently, the subject of active expert discussion is the provisions of the draft Law of Ukraine 'On Amendments to Certain Legislative Acts on Facilitating Access to Free Legal Aid and Improving the Quality of Its Provision', which is designed to effectively implement the rights of persons, including children, incapacitated persons, and persons whose legal capacity is limited, to receive quality free legal aid by simplifying the mechanism of such assistance; resolving the issue of mandatory participation of a lawyer in court proceedings to limit the civil capacity of an individual; declaring an individual incapacitated and restoring the civil capacity of an individual; providing a person with compulsory psychiatric care; addressing involuntary hospitalisation in an anti-tuberculosis facility; improving the procedure for ensuring the quality of free secondary legal aid.

The Explanatory Note to this draft law states that the existing mechanism for monitoring the compliance of free secondary legal aid lawyers with the quality standards of free secondary legal aid needs to be improved, as evidenced by the conclusions and recommendations of the Council of Europe report according to the results of the 'Assessment of the Free Legal Aid System in Ukraine in the Light of Standards and Best Practices of the Council of Europe'.[41] This report notes the need for effective monitoring and compliance with the quality of attorneys who provide free secondary legal aid requires a professional evaluation of the client's case file in addition to existing quality assessment methods, such as court monitoring and interviews with clients conducted by employees of free secondary legal aid centres. On this basis, the authors of the bill concluded that it is necessary to introduce a new tool to ensure the quality of free legal aid by introducing a mechanism for independent evaluation of the quality of free secondary legal aid provided by lawyers using the peer review tool.[42]

Contrary to these proposals, the Bar Council of Ukraine presented the legal position of the bar association in this regard, which is that the introduction of a peer review tool for lawyers is not consistent with the basic guarantees of advocacy for professional independence and protection of legal secrecy and also poses a great threat to the destruction of the right to the protection guaranteed by the Constitution of Ukraine and violates the requirements of the Criminal Procedure Code of Ukraine on the inadmissibility of disclosure of the

40 Opinion of the Committee 05.02.2020. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66242> accessed 20 February 2022.

41 'Evaluation of the free legal aid system in Ukraine in the light of the standards and best practices of the Council of Europe' <https://rm.coe.int/16806ff4a9> accessed 20 February 2022.

42 Explanatory note to the draft Law of Ukraine 'On Amendments to Certain Legislative Acts on Facilitating Access to Free Legal Aid and Improving the Quality of its Provision' of 19 February 2021 No 5107. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71159> accessed 20 February 2022.

pre-trial investigation and the Law of Ukraine 'On Personal Data Protection'. Thus, the introduction of a peer review tool in the proposed model for lawyers will lead, *inter alia*, to the economic weakening of the bar through the devaluation of the results of the intellectual work of lawyers. The introduction of a peer review mechanism is possible in a model where professional lawyers of the commissions for assessing the quality, completeness, and timeliness of free legal aid provided by lawyers at regional bar councils will review lawyers of free secondary legal aid centres, and professional lawyers will be reviewed by equivalent lawyers-members of the Commission for assessing the quality, completeness, and timeliness of the provision of free legal aid by lawyers acting under the bar councils of the regions.[43]

This provides grounds for identifying another internal determinant of reforming the institutions of the human rights mechanism in Ukraine at the present stage – the 'quality of the law'. In this regard, a study by the European Commission 'For Democracy through Law' entitled 'Rule of Law Checklist' (developed and approved at the 106th plenary session on 11-12 March 2016)[44] concludes that the concept of 'quality of law' covers the following three components: the predictability, sustainability, and consistency of acts of law. In this case, 'predictability' means not only that the provisions of the act must be promulgated before their implementation but also that they must be predictable in their consequences: they must be formulated with sufficient clarity and certainty for the subjects of law to be able to organise their behaviour according to them.

Thus, the inconsistency of Law No. 193-IX with these criteria in the case under study led to the dysfunction of the judiciary, as due to shortcomings in the legislation on termination of powers of the entire HCJU of Ukraine stopped the selection of candidates for judges filling vacancies for judges in the courts, and thus prevented the courts from administering justice on the basis of the rule of law.

The shortcomings of the legislation regulating the procedure for attestation of prosecutors, particularly in determining the grounds for dismissal of prosecutors during the attestation defined by the provisions of Law No. 113-IX, formed a common practice of appealing the results of attestation in court by dismissed prosecutors. The lack of uniform jurisprudence in the field of research prompted the office of the general prosecutor to initiate the referral of the case to the Grand Chamber of the Supreme Court because the case contains an exclusive legal issue, and transfer is necessary to ensure law development and uniform law enforcement practice.

The non-compliance with these criteria of Law No. 1635-IX led to the fact that the SCJ stopped considering disciplinary complaints as of its entry into force, as the Law provides for the establishment of a separate unit, the Disciplinary Inspector Service, which operates on the basis of its independence. Therefore, since the entry into force of this Law, the disciplinary inspector is a mandatory participant in disciplinary proceedings, regardless of the stage at which it is. Given that Law 1635-IX does not contain transitional provisions that would allow the completion of disciplinary proceedings under the rules in force before its entry into force, nor does it contain provisions that would allow disciplinary proceedings to be conducted on complaints received after entry into force and until the formation of the Service of Disciplinary Inspectors, it is impossible to implement the powers of the

43 Decision of the Bar Council of Ukraine of 5 August 2020 No 54 regarding the draft Law of Ukraine 'On Amendments to Certain Legislative Acts on Facilitating Access to Free Legal Aid and Improving the Quality of Its Provision' <https://unba.org.ua/assets/uploads/legislation/rishennya/2020-08-05-r-shennya-rau-54_5f4638acd85fd.pdf> accessed 20 February 2022.

44 Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session CDL-AD (2016)007-e (Venice, 11-12 March 2016) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e> accessed 20 February 2022.

SCJ to consider disciplinary complaints. In addition, such circumstances violate both the legal rights of persons who apply to the SCJ with a disciplinary complaint and the rights of judges whose complaints against the decisions of the disciplinary chambers are not considered by the SCJ.[45]

Moreover, certain provisions of this Law are also subject to the constitutional submission of the Supreme Court[46] on the constitutionality of the provisions of the Law, which, according to the Supreme Court, threaten the principle of institutional continuity in public authorities established by the Basic Law of Ukraine; violate the principle of independence of the judiciary by re-evaluating judges who are members of the SCJ; or do not take into account established international standards, according to which the dismissal of persons from important public positions through the adoption of regulations is unacceptable.

Thus, the 'quality of the law', in terms of predictability, sustainability, and consistency of legal acts, is an important internal determinant of the formation and effective functioning of national human rights mechanisms, one indicator of which may be a consensus among stakeholders to implement regulatory measures to reform its institutional and functional components.

3 TRENDS IN THE DEVELOPMENT OF THE HUMAN RIGHTS MECHANISM IN UKRAINE

Current trends in the development of components of the human rights mechanism in Ukraine have found their normative consolidation in several corresponding strategies.

Thus, the Decree of the President of Ukraine in March 2021 approved the National Strategy for Human Rights,[47] prompted by the need to improve the state to promote and ensure human rights and freedoms and create effective mechanisms for their implementation and protection, thus solving systemic problems in this area.

One of the main goals of this Strategy is to ensure that everyone in Ukraine has access to a fair and efficient trial by an independent and impartial tribunal and effective mechanisms for enforcing court decisions. It is noteworthy that among the main factors that will indicate the achievement of this strategic goal and the level of public confidence in the court is the importance of indicators '7. Civil Justice' and '8. Criminal Justice' of the Rule of Law Index, which is evidence of the importance of the influence of these determinants on the formation and functioning of the components of the human rights mechanism in Ukraine.

45 S Shelest, 'SCJ implements law No 1635-IX, but some of its provisions, which have signs of unconstitutionality, may cause further problems with the administration of justice' <https://hcj.gov.ua/news/svitlana-shelest-vrp-vykonuye-zakon-no-1635-ix-odnak-okremi-yogo-polozhennya-shcho-mayut-oznaky> accessed 20 February 2022.

46 Regarding the constitutionality of the provisions of the thirteenth paragraph of paragraph 23-1 of Section III 'Final and Transitional Provisions' of the Law of Ukraine 'On the Supreme Council of Justice' of 21 December 2016 No 1798-VIII, paragraphs one, six, eleventh of item 4 of Section II 'Final and Transitional Provisions' of the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on the Procedure for Election (Appointment) to the Positions of Members of the Supreme Council of Justice and Activities of Disciplinary Inspectors of the Supreme Council of Justice' of 14 July 2021 No 1635-IX: Court of 13 October 2021 No 4/395(21) <https://ccu.gov.ua/sites/default/files/4_395_2021.pdf> accessed 20 February 2022.

47 Decree of the President of Ukraine of 24 March 2021 No 119/2021 'On the National Strategy in the Sphere of Human Rights' <https://zakon.rada.gov.ua/laws/show/119/2021#Text> accessed 20 February 2022.

Trends in the development of the justice system and constitutional justice for 2021-2023 are reflected in the relevant Strategy approved by the Decree of the President of Ukraine in June 2021.[48] This document outlines the main problems that necessitate further improvement of the organisation of the judiciary and the administration of justice, including:

- the imperfection of the existing system of local courts;
- the inefficiency of the system of financial, logistical, and social support of guarantees of the independence of the judiciary;
- the imperfection of the system of judicial authorities and organisation of their activities, including financial, logistical, and other support of courts of all levels;
- the functional imperfection of the system of judicial governance and self-government;
- the lack of judges in local and appellate courts and excessive workload on judges in courts of all levels;
- the excessively complicated procedures for conducting a competition for a vacant position of a judge, as well as the procedure for passing the qualifying examination and the methodology for assessing judges and candidates for the position of a judge;
- the ineffective mechanisms for bringing judges to disciplinary responsibility;
- the improper execution of court decisions and ineffective mechanisms of judicial control over the execution of court decisions;
- the lack of effective mechanisms of alternative (extrajudicial) and pre-trial dispute resolution;
- the barriers to access to justice;
- the insufficient level of implementation of digital technologies in the administration of justice;
- the excessive length of court proceedings, over-regulation of court proceedings, and unjustifiably widespread use of collegiality in courts of first and appellate instances;
- the lack of proper communication policy in the courts;
- the low level of public trust in the judiciary and the prosecutor's office.

It should be noted that key problems in the proper administration of justice in this Strategy are incomplete reform of the prosecutor's office, the inadequate legislative regulation of mechanisms for prosecutors to exercise their constitutional powers, the functional imperfections of the legal system, and difficult access to advocacy.

At the same time, the increase in the level of efficiency of the prosecutor's office, particularly in ensuring the performance of constitutional functions and powers, improving external and internal communications, implementing a modern human capital management system, and improving the resources of the prosecutor's office as one of the related legal institutions, is the goal of a separate Strategy for the Development of the Prosecutor's Office for 2021-2023, approved by order of the Prosecutor General of 16 October 2020 No. 489.[49] It is noteworthy that the most important guidelines in the activities of the prosecutor's office in this document are the desire to protect people, their lives and health, inviolability and security, and high levels of confidence in the work of prosecutors.

48 Decree of the President of Ukraine of 11 June 2021 No 231/2021 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <https://zakon.rada.gov.ua/laws/show/231/2021#Text> accessed 20 February 2022.

49 Order of the Prosecutor General of 16 October 2020 No 489 'On approval of the Prosecutor's Office Development Strategy for 2021-2023' <https://www.gp.gov.ua/ua/posts/strategiya-rozvitku-prokuraturi-na-2021-2023-roki> accessed 20 February 2022.

In addition, a decision of the Cabinet of Ministers of Ukraine approved the Strategy for Combating Torture in the Criminal Justice System.[50] Among the problems that led to the adoption of this document is the need to create a national system to combat torture committed by law enforcement officers and ensure the proper implementation by Ukraine of ECtHR decisions finding that Ukraine has violated Art. 3 (prohibition of torture) of the Convention for the Protection of Human Rights and Fundamental Freedoms by failing to conduct an effective investigation into cases of torture by law enforcement officials. In addition, this category of cases is under scrutiny by the Committee of Ministers of the Council of Europe and consists of more than 90 decisions, the number of which is growing due to the lack of proper and effective remedies.

The office of the general prosecutor announced the development of the Concept for the Development of Criminal Justice and Law Enforcement, which aims to create a balanced and coherent system that will help prevent and reduce crime, improve the quality and reduce the length of investigations and trials, and increase access to justice.[51]

In the development of the Strategy for the Development of the Justice System, the Bar Council of Ukraine adopted the Development Strategy of the National Bar Association of Ukraine for 2021-2025, which outlines the main objectives, goals, and priorities for this period.[52]

The new Strategy provides priority attention to such areas of advocacy as digitalisation, access to the profession and disciplinary procedures, and reform of the free legal aid system. In particular, the Strategy envisages the improvement of qualification procedures and access to the profession, as well as changes in disciplinary procedures. Other priorities of the strategy include reforming the free legal aid system so that it meets the goals of protecting the constitutional rights of citizens and ensuring the free choice of a lawyer.[53]

The strategic directions of reforming key institutions of the human rights mechanism in Ukraine mainly embody the desire to achieve a high functional performance of the national human rights mechanism in the evaluation and reporting documents of institutions of supranational (international) human rights mechanisms and national human rights institutions, as well as expert assessments. At present, the priority in the process of obtaining these results is to reach a consensus among stakeholders in the implementation of these strategic goals, which depends on the quality of legislation that will implement these strategic reform measures – sustainability agreements will directly affect the predictability and sustainability of this legislation.

50 Order of the Cabinet of Ministers of Ukraine of 28 October 2021 No 1344-p 'On approval of the Strategy for Combating Torture in the Criminal Justice System and approval of the action plan for its implementation' <https://zakon.rada.gov.ua/laws/show/1344-2021-%D1%80/conv#Text> accessed 20 February 2022.

51 'Ukraine is developing a Concept for the Development of Criminal Justice and the Law Enforcement System' <sud.ua/ru/news/ukraine/207051-v-ukrayini-rozroblyayut-kontseptsiyu-rozvitku-kriminalnoyi-yustitsiyi-ta-sistemi-organiv-pravoporyadku> accessed 20 February 2022.

52 'NAAU Strategy for 2021 – 2025' <https://zakon.rada.gov.ua/rada/show/vr038871-21#Text> accessed 20 February 2022.

53 'NAAU's new Strategy envisages changes in access to the profession and simplification of disciplinary procedures' <https://unba.org.ua/news/6780-nova-strategiya-naau-peredbachae-zmini-dostupu-do-profesii-ta-sproshennya-disciplinarnih-procedur.html> accessed 20 February 2022.

4 CONCLUSIONS

The effectiveness of the human rights mechanism as a process of functioning of the set of authorised human rights institutions is regulated by legal norms and aimed at eliminating shortcomings in the functioning of such components of the legal mechanism of protecting and implementing personal rights by providing various forms of effective legal services. When these rights are violated or threatened with violation, normative procedures to address this are one of the signs of a state seeking to be recognised as a state governed by the rule of law.

In order to ensure such efficiency and, consequently, the reality of legal protection, a number of human rights institutions are being created. In Ukraine, the judiciary is a key element of this, implementing its human rights activities primarily through the administration of justice. Based on the content of constitutional provisions that determine the institutional components of due justice, the effectiveness of the courts in implementing their human rights activities is due, *inter alia*, to the effectiveness of related legal institutions that promote justice, namely, the bar and prosecutor's office.

Institutions of the justice system, as its key elements in determining the directions of the formation and function of institutions of the national human rights mechanism in Ukraine, are subject to a number of determinants, on both internal (national) and external (supranational).

External determinants provide for the impact on the human rights mechanism in Ukraine through functional indicators of its effectiveness in the evaluation and reporting documents of the institutions of the supranational (international) human rights mechanism. Internal determinants determine the impact on the national human rights mechanism through functional indicators of its effectiveness in the evaluation and reporting documents of national human rights institutions, the results of sociological research and expert assessments and depend directly on the 'quality of law'.

An important external determinant of determining the directions of formation and functioning of institutions of the national human rights mechanism in Ukraine, as well as a guarantee of improvement, is the functioning of institutions of the supranational (international) human rights mechanism, in particular: the mechanism leading to the ECtHR's finding that Ukraine has violated the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms; the importance of the Rule of Law Index, which, on the one hand, determines the priority areas for reforming the regulatory, institutional, and functional components of the human rights mechanism in Ukraine, and on the other, comparatively reflects the best international practices in this ranking; reports and conclusions of specialised international organisations on the compliance of the normative, institutional, and functional components of the national human rights mechanism with the provisions of international standards.

The key internal determinants of the formation of the human rights mechanism in Ukraine include the following: indicators of observance and protection of human and civil rights and freedoms in Ukraine, which are published annually in the Report of the Commissioner; the results of sociological research that reflect the assessment of civil society representatives of human rights institutions in the country and the level of trust in them; expert opinions and conclusions on the main problems of the functioning of the institutions of the national human rights mechanism; obligations of the Ukrainian state to international partners; inconsistency of normative-legal regulation of relations in the sphere of formation and functioning of institutions of human rights mechanism of the 'quality of law' criterion, which contains requirements for predictability, consistency, and sustainability of legal acts.

Current trends in the development of human rights mechanisms in Ukraine are enshrined in several corresponding strategies in the field of human rights due to the need to improve the state's activities to promote and ensure human rights and freedoms, creating effective mechanisms for their implementation and protection in the field of development of the justice system as a whole, as well as in the prosecutor's office and the bar.

The strategic directions of reforming key institutions of the human rights mechanism in Ukraine identified in these documents mainly embody the desire of the Ukrainian state to achieve high functional indicators of the effectiveness of the national human rights mechanism in evaluation and reporting documents of supranational (international) human rights mechanisms, as well as national human rights institutions, in the results of sociological research and expert assessments.

At present, the priority in the process of obtaining these results is to reach a consensus among stakeholders on the implementation of these strategic goals, which depends on the quality of legislation that will implement these strategic reform measures – sustainability agreements will directly affect the predictability and sustainability of this legislation.

Thus, the strategic directions of reforming the key institutions of the human rights mechanism in Ukraine are aimed at solving certain problems and identifying promising areas for further research.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

THE CONCEPT OF HUMAN RIGHTS IN THE DIGITAL ERA: CHANGES AND CONSEQUENCES FOR JUDICIAL PRACTICE

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Submitted on 1 May 2022 / Revised 12 Jun 2022 / Approved **29 Jul 2022**
Published: **15 Aug 2022**

Keywords: *human rights; digital rights; digital technologies; artificial intelligence; judicial practice*

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Translation: The content of this article was translated by authors.
Funding: The authors received no financial support for the research, authorship, and/or publication of this article. The Journal provides funding for this article publication.
Managing editor – Dr. Tetiana Tsuvina. English Editor – Dr. Sarah White.

How to cite: Razmetaeva Yu, Barabash Yu, Lukianov D 'The Concept of Human Rights in the Digital Era: Changes and Consequences for Judicial Practice' 2022 3(15) Access to Justice in Eastern Europe 41–56. DOI: 10.33327/AJEE-18-5.3-a000327

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

ABSTRACT

Background: *The digital age has led to conceptual changes in human rights and their content, understanding, implementation, and protection. Discussions about expanding the range of both addressees and subjects of human rights are a consequence and, at the same time, a breeding ground for change. New challenges for rights related to technological development, the increasing influence of companies and organisations, the growing use of solutions based on artificial intelligence, and the habit of relying on such solutions have led to the need for a substantial revision of such aspects as the content of individual rights and their catalogue, the definition of the fourth generation of rights as bio-information, and the clarification of the concept of digital rights. Digitalisation, which in a broad sense represents the legal, political, economic, cultural, social, and political changes caused by the use of digital tools and technologies, covers the private and public spheres, revives our understanding of and research into human rights in a horizontal dimension, and influences the revision of their anthropological foundations.*

Methods: *The general philosophical framework of this research consisted of axiological and hermeneutic approaches, which allowed us to conduct a value analysis of fundamental human rights and changes in their perception, as well as to apply in-depth study and interpretation of legal texts. The study also relied on the comparative law method in terms of comparing legal regulation and law enforcement practice in different legal systems. The method of legal modelling was used to highlight the bio-information generation of human rights as the fourth generation of rights, as well as some scientific predictions in the field of human rights.*

Results and Conclusions: *The article argues that it is necessary to change our approach to human rights in the digital era, to widen the circle of addressees of human rights obligations to include companies and organisations, and to be ready potentially recognise artificial intelligence as a subject in public relations and fundamental rights. The term 'spectrum of algorithm-based digital technologies' is proposed, which can more accurately describe those phenomena that are covered by the synonymous terms 'artificial intelligence' and 'algorithm'. The article proposes to consider digital rights in three dimensions, as well as to take into account the subtle structural consequences of changing the concept of human rights in the digital era for judicial practice.*

1 INTRODUCTION

Digital technologies are increasingly defining our lives, including through the mixing of analogue space with cyberspace. While technologies are designed to improve people's lives and the well-being of communities and to promote the development of society, they also contain obvious and hidden risks and threats, creating challenges for all mankind. At the same time, human rights must be recognised and ensured in all areas and be protected both online and offline. In this context, it is becoming increasingly difficult to reconcile human rights and digital technologies.

The existence of threats to human rights due to rapid and unpredictable technological development determines the growing importance of certain fundamental rights, such as freedom of expression and privacy, which are particularly important for the exercise and protection of other types of rights, values, and legitimate interests. Privacy, as C. Nyst and T. Falchetta noted, is at the top of the agenda of regional and international human rights

mechanisms.[4] It seems to us that this stems not only from the extremely broad content of this right but also from efforts to preserve some areas free from interference by governments, companies, or individuals. Freedom of expression is gaining new tools for implementation, such as online platforms with extremely wide audiences, almost instantaneous dissemination of information in cyberspace, or eloquent works of digital art. At the same time, it is becoming increasingly clear that the exercise and protection of fundamental rights today cannot be approached with 'traditional', well-established measures, as rights face threats that are (1) unpredictable, (2) rapidly changing, and (3) may lead to extremely serious negative consequences.

The expanding content and catalogue of fundamental rights, the controversial status of new individual rights exercised in the digital environment or in connection with the use of digital technologies, and jurisdictional conflicts and the complex balance between rights and legitimate interests all have produced much debate and led to changes in the legislation and judicial practice of most states. The very concept of human rights in the digital era may need to be revised. Discussions about the inconsistency of the existing understanding and scope of rights and the prospects for the emergence of new or changes in fundamental rights and freedoms are reflected in the works of many scholars, including those whose work has become key to this study. In particular, T. Kerikmäe, O. Hamuľák, and A. Chochia focused on the expansive development of a doctrinal approach to the interpretation of human rights and the essence of their standards.[5] S. Eskens, N. Helberger, and J. Moeller developed a new theoretical basis for the right to information in the light of its personalisation.[6] I. Duy showed how the judiciary today sets new standards for hate speech and online expressions on social networks.[7] F. Fabbrini considered the judicial model to confirm and update the right to privacy in the digital age.[8] C. Padovani, F. Musiani, and E. Pavan proposed to consider human rights as a general system of rights and freedoms related to communication processes and related problems in societies around the world.[9] M. Horowitz, H. Nieminen, and A. Schejter pointed out the lack of consensus on what human rights are in the digital sphere and who should guide them in the increasingly complex media and communication landscape.[10] J. Tasioulas argued that international human rights law has departed from its goals of formation and emphasised the need to review approaches to rights.[11] The first part of our research is devoted to the question of what caused such conceptual changes, what they are, and how they have affected the justification of rights. We also address the concept of 'digital human rights' in the context of these conceptual changes, as well as the theory of generations of rights.

Technological digital tools affect every individual, including those who, for a number of reasons, do not use them. This impact occurs indirectly through individuals, corporations,

4 C Nyst, T Falchetta, 'The right to privacy in the digital age' (2017) 9(1) Journal of Human Rights Practice 104-118. doi: 10.1093/jhuman/huw026.

5 T Kerikmäe, O Hamuľák, A Chochia, 'A historical study of contemporary human rights: Deviation or extinction' (2016) 4(2) Acta Baltica Historiae et Philosophiae Scientiarum 98-115.

6 S Eskens, N Helberger, J Moeller, 'Challenged by news personalisation: Five perspectives on the right to receive information' (2017) 9(2) Journal of Media Law 259-284. doi: 10.1080/17577632.2017.1387353.

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10 M Horowitz, H Nieminen, A Schejter, 'Introduction: Communication rights in the digital age' (2020) 10(1) Journal of Information Policy 299-303. doi: 10.5325/jinfopoli.10.2020.0299.

11 J Tasioulas, 'Saving human rights from human rights law' (2019) 52(4) Vanderbilt Journal of Transnational Law 1167-1207.

and states that are creators, users, or beneficiaries of technology. This impact is also due to how digital technologies are transforming the world as such. In particular, the Internet has become not only a space for interaction and a tool for finding information but also an integral part of the lives of many. The Internet has simultaneously become a tool for governments and corporations. For today's states, it is a 'forum for geopolitical struggle', despite the fact that its infrastructure 'belongs and is operated by transnational technology companies'.[12] This raises a range of questions about whether the addressees of obligations stem from human rights implemented in the digital environment or are closely related to it, as well as the responsibility for their violation.

The new challenges are related to the activities of corporations, especially those that M. van Drunen calls platforms' control over the way users access content'.[13] Because data information and digital traces of any activity have increased astronomically, the problem of control has become particularly acute. At the same time, the proliferation of communications through business-related tools and networks has pushed companies to the forefront of control and given them unwarranted power. If corporations have a wide margin of appreciation as to which statements to block or which positions to make popular, then perhaps they should have responsibilities. The second part of our study is devoted to the horizontal concept of human rights, the potential expansion of the range of holders of rights, and joint control over their observance in the digital era.

Critical changes in human rights are leading to debate over who should be the subject of such rights in the digital age. In particular, the possibility of granting rights or imposing responsibilities on weak and strong artificial intelligence is discussed.[14] The third part of this study is devoted to this possibility, as well as to the legal and ethical issues that are constantly growing in the field of artificial intelligence, the use of human-like robots, automation of production, and the algorithmisation of decision-making.

Many advances in the doctrinal interpretation and realisation of human rights do not need to be reinvented. At the same time, there are a number of problems in interpreting the idea of rights or their individual manifestations, the proper application and observance of the requirements and values arising from the content of rights, and balancing some rights with others, as well as legitimate interests. The digital age is significantly changing the approaches used in judicial practice, and the use of some technologies leads to such changes that are sometimes difficult to track. The fourth part of our study is devoted to these issues.

Digitalisation, which can be broadly described as the legal, political, economic, cultural, social, and political changes brought about by the use of digital tools and technologies, covers both the private and public spheres and exacerbates all these problems. Such changes seem to require a substantial, paradigmatic review of human rights. Thus, the aim of this research is to show what conceptual changes human rights are under the influence of the digital age and what the prospects are for the range of addressees and holders of fundamental rights. As part of the aim of the study, we focus primarily on the challenges that technology poses to legal values and the practice of their implementations and justify the need for a paradigmatic revision of existing theoretical approaches to fundamental rights.

The general philosophical framework of this study consisted of axiological and hermeneutical approaches, which allowed us to conduct a value analysis of fundamental human rights and

12 M Mann, A Daly, 'Geopolitics, jurisdiction and surveillance' (2020) 9(3) Internet Policy Review. doi: 10.14763/2020.3.1501.

13 MZ van Drunen, 'The post-editorial control era: How EU media law matches platforms' organisational control with cooperative responsibility' (2020) 12(2) Journal of Media Law 180.

14 RD Brown, 'Property ownership and the legal personhood of artificial intelligence' (2021) 30(2) Information & Communications Technology Law 208-234. doi: 10.1080/13600834.2020.1861714.

changes in their perception, explore their normative axiological foundations, and apply in-depth study and interpretation of legal, philosophical, and ethical texts. The study also relied on a comparative legal method in comparing the legal regulation and law enforcement practices of different jurisdictions, as well as legal doctrines formed in legal systems, but showing significant convergence in this regard. The method of legal modelling allowed us to propose the allocation of the bio-information generation of human rights as the fourth generation of rights, as well as to make some scientific predictions in the field of human rights. The empirical and legal basis of the study was the practice of authoritative judicial institutions, especially the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union, as well as the leading courts of various national legal systems.

2 HUMAN RIGHTS UNDER THE INFLUENCE OF DIGITAL TECHNOLOGIES: FUNDAMENTAL CHANGES

In the digital era, the challenges that technology creates for fundamental legal values, democratic institutions and processes, the just life of societies, and the lives of everyone are growing exponentially. Firstly, the scope of recognised fundamental rights is changing in an unpredictable way, both because they are under attack and because they are crucial to protecting other rights. For example, mass surveillance and its threat to human rights have been the subject of ECtHR cases, which have since been referred to the Grand Chamber, such as the case of *Centrum för Rättvisa v. Sweden*, which raised the question of whether Swedish national law satisfies the privacy requirements outlined in Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention),[15] and the case of *Big Brother Watch and others v. the UK*, which referred to a violation of Arts. 8 and 10 of the Convention,[16] that is, privacy and freedom of expression. Both decisions have provoked serious discussions, both on the difficult balance of rights and interests and on the need to revise the criteria for assessing whether the Convention has been violated in light of significant technological developments and the emergence of tools for mass interception and data processing.

The weight and importance of certain fundamental rights are becoming extraordinary. For example, privacy grows from a human right to a synthetic concept of control over one's own life. On the UN level, privacy is recognised today as the right needed to allow individuals to enjoy other rights, such as the right to assemble and express their views.[17] The protection of privacy is of particular importance in light of data protection, which includes not only the proper handling of information but also a well-designed system of legal instruments that minimises risks.

Adverse effects on human rights may be the result of ill-conceived legislation on the storage and processing of data in the provision of communication services. As the Court of Justice points out in the landmark Digital Rights Ireland case, such data, taken as a whole, can allow very accurate conclusions to be drawn about individuals' private lives, such as daily life habits, permanent or temporary residence, daily or other movements, the social relations of

15 Judgement of the European Court of Human Rights No 35252/08 'Case of Centrum för Rättvisa v. Sweden' (May 2021) <https://hudoc.echr.coe.int/eng#{%22appno%22:[%2235252/08%22],%22itemid%22:[%22001-210078%22]> accessed 17 February 2022.

16 Judgement of the European Court of Human Rights Nos 58170/13, 62322/14, 24960/15 'Case of Big Brother Watch and others v. UK' (May 2021) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Big%20Brother%20Watch%20and%20others%20v.%20UK%22],%22itemid%22:[%22001-210077%22]> accessed 17 February 2022.

17 Report of the Human Rights Council No A/HRC/43/52 'Right to privacy' (March 2020) <https://undocs.org/A/HRC/43/52> accessed 16 January 2021.

these people, and the social environment they often visit.[18] This example illustrates a feature of the digital era, when technology is evolving much faster than it is being regulated and when information exchange is reaching a level that allows today to link data that seemed completely fragmented yesterday.

Secondly, the boundaries between actions in physical reality and digital space are gradually blurred, and, accordingly, the application of various criteria to such activities ceases. In connection with the punishment imposed by the Norwegian Supreme Court for hate speech online, I. Duy writes that the communication medium used did not matter here – a person is potentially responsible for the same statement that they make on social networks or in person in front of a large group of people.[19] In other words, it can be predicted that in further controversial cases, legal practice will be more inclined to a substantive assessment than a formal one because it is impossible to reproduce the conditions for traditional conflicts in the field of rights or to imagine in advance where the development of digital technologies will lead us. Moreover, in everyday life, it has become a habit to consider individuals as existing both in some real place and in the virtual world, successfully combining different acts of interaction. It is possible to obtain and successfully process information in such a parallel, both offline and online. Being in several information flows at the same time is of the characteristic states of the individual in the digital age.

Thirdly, human rights cease to be embedded in existing theoretical constructions and legal doctrines. Thus, it is rightly noted that the concept of human rights needs to be clarified, especially because more and more rights cannot be described by three generations.[20] Despite the fact that scientific discussions suggest the existence of the fourth generation of rights, there is no agreement on their content. In the most general terms, the fourth generation is referred to as related to scientific and technological progress, but this criterion is too vague to integrate the relevant rights into a logical structure. This criterion, moreover, is not one that allows us to put a prohibition on cloning, the right not to be subjected to automatic processing, the freedom to change sex, and the right to erase data all in one category.

Therefore, we propose to consider bio-information rights as the fourth generation of human rights because (1) each generation of rights was established at the turn of the era, in such socio-political and economic conditions that occurred at the bifurcation of social systems; (3) the time limits of the fourth generation of rights should be taken into account from the two scientific revolutions – biotechnology and the revolution in information technology; (2) from a strategic perspective, it is biotechnology and information technology that will determine the further development of mankind.

The discussion on understanding human rights in the digital era includes views that offer a review of the idea of human rights from different perspectives. In particular, it is proposed to consider them as a general structure that includes fundamental rights and freedoms related to communication processes and related problems in societies around the world.[21] If we define human rights as universal moral rights, then, as J. Tasioulas writes, they are constantly

18 Court of Justice of the European Union joined cases Nos C-293/12 and C-594/12 'Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others' (April 2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0293> accessed 11 January 2021.

19 IN Duy 'The limits to free speech on social media: On two recent decisions of the supreme court of Norway' (2020) 38(3) Nordic Journal of Human Rights 244.

20 S Domaradzki, M Khvostova, D Pupovac, 'Karel Vasak's generations of rights and the contemporary human rights discourse' (2019) 20 Human Rights Review 423-443. doi: 10.1007/s12142-019-00565-x.

21 C Padovani, F Musiani, E Pavan, 'Investigating evolving discourses on human rights in the digital age' (2010) 72(4-5) International Communication Gazette 359-378. doi: 10.1177/1748048510362618.

under pressure both in our understanding of them and in our success in upholding them.[22] Criticising the uncertainty of the very concept of human rights, J. Dwyer believes that it is necessary to dwell on the concept of rights 'that is optimal on normative grounds'.[23] Such revision attempts underscore the fact that human rights do not fit into the existing framework, neither in terms of theoretical understanding nor in terms of effective protection.

Many of the concepts discussed in the wake of the digital age can 'echo the age-old challenges of media democratization',[24] as aptly stated in the preface to the special issue of the *Journal on Information Policy*. Simultaneously, growing general uncertainty, the inability to assess the long-term and hidden effects of technological solutions, the lack of control over business, and the widening digital divide all suggest that change in human rights is staggering, and the challenges are fundamentally new.

Fourthly, one of the conceptual changes is the introduction and dissemination of the 'digital human rights' concept, which, at the same time, remains ambiguous. Digital rights are often associated with new rights. In this case, they include the right to be forgotten, the right to the Internet, and the right to anonymity. These new rights have formed unexpectedly quickly.[25] They are also seen as a potential new catalogue of human rights. In particular, B. Custers offered to discuss new digital rights, in particular the right to be offline, the right to internet access, the right not to know, the right to change your mind, the right to start over with a clean (digital) slate, the right to expiry dates for data, the right to know the value of your data, the right to a clean digital environment, and the right to a safe digital environment.[26]

To remove the ambiguity in the understanding of digital rights, it seems they should be considered in three dimensions. These three dimensions of understanding the relevant rights include: 1) the interpretation of them as special rights arising from fundamental and formed in the digital age (in that case, there may be disputes as to whether they belong to 'human rights' or to other rights, values, or interests); 2) identifying as 'digital' those fundamental rights that are especially important today in connection with the development of information and communication technologies; 3) human rights when they are realised in the digital environment. Therefore, privacy and freedom of expression, the right to be forgotten, the right not to be automatically processed, the right to information, and the right to the Internet could all be digital.

3 THE HORIZONTAL CONCEPT OF HUMAN RIGHTS AND NEW ADDRESSEES OF HUMAN RIGHTS OBLIGATIONS

Our understanding of human rights and their implementation and protection is based on the vertical and horizontal dimensions of relevant rights and freedoms. The first presupposes the addressing of rights to the state, which means that the state is the subject to which the requirements are made in case of disrespect for rights, obstacles to their implementation,

22 J Tasioulas, 'Saving human rights from human rights law' (2019) 52(4) Vanderbilt Journal of Transnational Law 1167.

23 JG Dwyer, 'Clarifying questions about the nature of rights' (2021) 12(1) Jurisprudence 47-68. doi: 10.1080/20403313.2020.1836905.

24 M Horowitz, H Nieminen, A Schejter, 'Introduction: Communication rights in the digital age' (2020) 10(1) Journal of Information Policy 302.

25 Y Razmetaeva, 'The right to be forgotten in the European perspective' (2020) 10(1) TalTech Journal of European Studies 61.

26 B Custers, 'New digital rights: Imagining additional fundamental rights for the digital era' (2022) 44(105636) Computer Law & Security Review. doi: 10.1016/j.clsr.2021.105636.

and violation. For instance, recourse to international courts often involves a lawsuit against the state, even if the violator is an individual and not always a representative of a government institution. This stems from the responsibility of the state to ensure appropriate minimum standards in the field of rights and the existence of positive and negative obligations. The horizontal dimension of human rights implies the existence of direct links between individuals – holders of rights, or between individuals and companies, organisations, or institutions. This means that the relevant responsibilities, in whole or in part, may be borne by all other parties to the relationship. It also means that not every conflict of rights requires the participation of the state as the guarantor of its just resolution and of those who monopolistically, legally, and legitimately use force and power when necessary.

Until recently, the human rights agenda mostly recognised the vertical dimension of the concept of human rights, while the horizontal dimension was the work of scholars, usually lawyers and philosophers. However, the dramatic changes that the digital era has ushered in have revived the idea that connections and responsibilities can be multilevel. First of all, it is about reducing the doubt that every right has the potential to have both effects. A right with vertical effect, as noted, 'applies only between citizens and the state, and not directly between citizens and private entities. A right with horizontal effect applies between private parties, such as between two citizens, or between a consumer and a company'.[27] The horizontal effect is intended more for the private sphere. However, a distinctive feature of the digital era is that it is becoming increasingly difficult to distinguish between the private and the public. For example, this could occur if we tried to define the status of the statement of a public figure in a private social network account, which in turn belongs to a private company that provides free opportunities to register such an account in order to promote public dialogue in society. The confusion is exacerbated by the fact that regulations do not keep pace with technological developments, and legal practice, especially court decisions, often uses a situational balance of rights and legitimate interests of the subjects of legal relations.

Second, the prospect is emerging that those who, like governments, concentrate power and influence in their hands are now responsible for human rights violations. Before the digital age, they could be considered international organisations and transnational corporations, that is, the owners of economic resources and political influence. Today, the range of human rights obligations addressees is expanding. The voices of those who support what G. Brenrert calls the 'revisionist view' are growing louder, that business is also responsible for human rights,[28] meaning business in the broadest sense – not just giant corporations, but any company. In fact, we are talking about the owners of 'digital resources', which today can be data, technology, tools for manipulating decisions, thoughts, behaviour, and so on. Although the main beneficiaries are still big tech companies such as Facebook, Google, or Amazon, other businesses are rapidly catching up with them and also becoming the beneficiaries.

The understanding of the state as the main addressee of human rights obligations, as noted, initially 'was owing to the fact that the state was seen as the main threat to human rights, and therefore it was the addressee to whom the requirement to respect human rights is addressed'.[29] Today the axiological paradigm may well have changed, and quite significantly. If, in the past, the struggle was centred on enshrining regulatory restrictions and protecting the private sphere from government interference, today, in many legal systems, the constitution

27 S Eskens, N Helberger, J Moeller, 'Challenged by news personalisation: Five perspectives on the right to receive information' (2017) 9(2) Journal of Media Law 262.

28 GG Brenrert, 'Business ethics and human rights: An overview' (2016) 1(2) Business and Human Rights Journal 278.

29 O Uvarova, 'Business and human rights in times of global emergencies: A comparative perspective' (2020) 26 Comparative Law Review 228.

is an 'axiological basis' that reflects or should reflect the values shared by society.[30] What has already been missed in many regulations and legal practices and is becoming increasingly important in the digital era is the need for rational restrictions on new influential players in society, especially companies.

Making businesses responsible for human rights is a challenge because existing doctrines and mechanisms are made for governments. In particular, as noted, 'all the basic international texts on human rights have been prepared taking into account the main human rights and freedoms within state jurisdiction'.[31] This is problematic also because the successful economic model in the digital age is largely based on vulnerabilities – whether gaps in regulation or irrational decision-making by individuals, as well as the lack of effective control over new areas or activities. Therefore, companies do not want to lose a favourable position and be exposed to additional burdens.

Another obstacle to making a business truly human rights-based is the choice of responsibility strategy. New approaches to the responsibilities of companies, especially Internet intermediaries, are proposed, with an emphasis on their voluntary action.[32] Alternatively, a mandatory mechanism is discussed, which will include a basic treaty or a series of agreements and will be implemented as a direct international or mediated by national legal systems. In particular, the mandatory model has recently come to the fore. Similarly, more and more researchers and experts are in favour of the international covenant on business and human rights (BHR). For instance, it is proposed to make this agreement a progressive model of accountability that combines the ambitious development of international law with realistic prospects for state support.[33]

As S. Ito asks, 'Does this mean that new challenges brought by corporations render traditional state-focused human rights treaties outdated and irrelevant in the context of BHR?'.[34] This may be partly the case, given the urgent need to include businesses in those who not only enjoy the protection of legal instruments but also ensure that they are properly applied. There is also the problem of free choice of jurisdiction by corporations, which usually optimise the tax burden and economic costs, but at the same time, can choose the least burdensome human rights order. This situation makes regulation of these issues by individual states ineffective unless they synchronise efforts with the international community.

Companies, and sometimes organisations, are in fact already active players in the legal field and those who often dictate the terms of the game. Given the dependence of modern life on algorithmic solutions and solutions based on open data, mobile applications, and synchronisation equipment, their impact will only increase. At the same time, individuals, as bearers of human rights, find themselves in a position of gradual loss of influence. For example, we may still refuse to use Internet platforms as part of an act of personal choice, but this will make it more difficult to access goods and services, participate in socially important decisions, interpersonal communication, and so on. If we continue to use them, the choice will be reduced. In the case of platforms, as noted, it happens 'because users must rely on the ways in which platforms organise content, simply informing them does not necessarily

30 Yu Barabash, H Berchenko, 'Freedom of speech militant democracy: The history of struggle against separatism and communism in Ukraine' (2019) 9(3) Baltic Journal of European Studies 18.

31 T Kerikmäe, O Hamuľák, A Chochia, 'A historical study of contemporary human rights: Deviation or extinction' (2016) 4(2) Acta Baltica Historiae et Philosophiae Scientiarum 111.

32 DM Síthigh, 'The road to responsibilities: New attitudes towards Internet intermediaries' (2020) 29(1) Information & Communications Technology Law 1-21. doi: 10.1080/13600834.2020.1677369.

33 N Bernaz, 'Conceptualizing corporate accountability in international law: Models for a business and human rights treaty' (2021) 22 Human Rights Review 45-64. doi: 10.1007/s12142-020-00606-w.

34 S Ito, 'Taking the Social rights covenant more seriously in business and human rights: A global governance perspective' (2020) 12(2) European Journal of Legal Studies 215.

enable them to access or avoid specific content on a platform'.[35] That is, organisational control exercised by companies and tuning algorithms regulate the behaviour of individuals, pushing some choices and complicating others.

An additional problem that reflects the deepening dependence on business is the closure of corporations that own digital tools or control part of the digital space. In particular, in the event of a hypothetical crash or the disappearance of Facebook or Google, the existing management framework is insufficient to address the risks of platform failure, especially for individuals' personal data.[36] Technology corporations seem so powerful that they can silence the president of a powerful state in 24 hours. At the same time, the growing interdependence and lack of elements of transparency and accountability inherent in traditional rights protection mechanisms can lead to negative global consequences. A small mistake in the algorithm can stop the automated transport system, a small data leak could put millions of users at risk, and a lack of attention to a single gap in the legal field could make democratic institutions vulnerable to large-scale voter manipulation.

4 ARTIFICIAL INTELLIGENCE AND EXPANDING THE RANGE OF FUNDAMENTAL RIGHTS HOLDERS

One of the challenges that needs to be the focus of attention and can seriously influence the human rights agenda is the growth of algorithmic solutions and activities based on artificial intelligence. Such decisions and activities today create complex legal conflicts, both at the level of general legal discussions on specific terms and theories, and in the industry, especially in the areas of civil, commercial, financial law, and intellectual property law. For example, as noted, software endowed with artificial intelligence is 'capable of producing poetry, articles, and musical compositions by analysing and collecting existing data. Such works are unique...'[37] Here, we potentially have a problem with copyright in those legal systems where the uniqueness rather than the presence of a human author is a key feature to protect the rights.

Complicating legal problems is the lack of legal and consistent definitions of such concepts as 'algorithm', 'artificial intelligence', 'robot', and 'human-like robot' in the actual use of relevant technologies. Artificial intelligence, for instance, is defined as 'an autonomous self-learning and adaptively predictive technology consisting of codes that can think or act in order to exercise legal rights or perform duties'.[38] Among the proposed legal definitions of artificial intelligence are gradually beginning to dominate those that may include a wide range of relevant technologies. In particular, the proposal for a new EU regulatory act on artificial intelligence defines the latter as a 'family of technologies' that is rapidly evolving and can bring a wide range of economic and social benefits across a range of industries and social activities.[39] It seems that the most accurate term that describes these assets will be the

35 MZ van Drunen, 'The post-editorial control era: How EU media law matches platforms' organisational control with cooperative responsibility' (2020) 12(2) Journal of Media Law 180.

36 C Öhman, N Aggarwal, 'What if Facebook goes down? Ethical and legal considerations for the demise of big tech' (2020) 9(3) Internet Policy Review. doi: 10.14763/2020.3.1488.

37 A Gribincea, 'Intellectual property rights to an artificial intelligence product' (2020) 27(4) Journal of the National Academy of Legal Sciences of Ukraine 234.

38 RD Brown, 'Property ownership and the legal personhood of artificial intelligence' (2021) 30(2) Information & Communications Technology Law 212.

39 EU Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) No. COM/2021/206 final (April 2021) <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=COM:2021:206:FIN> accessed 10 February 2022.

'spectrum of algorithm-based digital technologies'. However, the terms 'artificial intelligence' and 'algorithm' are commonly used and appear to be synonymous.

It is difficult to predict the pace of development of artificial intelligence and the gradation of technologies that will belong to the above concepts because, in the digital era, they all develop rapidly and unpredictably, and because qualitative leaps in development are not excluded computers, there is the ability to solve problems and calculations that are currently unattainable. From a legal point of view, algorithms are objects, but it should be noted that their subjectivity or individual elements of subjectivity are no longer merely the subject of academic debate. The use of artificial intelligence is extremely common, and the degree of its autonomy is growing, as well as the habit of relying on algorithmic solutions. This can have a positive effect. For example, the deep neural network extracts informative areas of chest X-rays to help clinicians interpret predictions.[40] At the same time, the effect can be negative. In particular, one of the most threatening challenges to humanity is the use of such intelligence in the military sphere as a means of destruction. Recently, for example, a surge of alarming media coverage sparked a UN Security Council report on the Libyan civil war in 2019-2021, which, among other things, contained information on the autonomous use of man-made drones with artificial intelligence[41] but did not contain direct indications that the lethal intervention was carried out in this way.

In the long run, artificial intelligence, algorithms, and robots may change the starting point for the concept of human rights – that they stem from belonging to the human race, based on dignity and the fact of being anthropocentric. We seem to be approaching a situation where 'the rights that still look like science fiction, such as, for instance, the right to be saved and stored as a digital representation after death, as well as the right to use technologies for improving oneself'[42] may form before our eyes. Equally close may be the acquisition of advanced algorithms of consciousness and even the 'uprising of machines' in the struggle for equality with the people in rights.

J. Chen and P. Burgess describe a not very far-fetched hypothetical situation in which intelligence develops spontaneously, without human design, on the Internet – the emergence of spontaneous artificial intelligence.[43] It is difficult to predict something like this today because most scenarios are based on the human mind and may not be able to comprehend a fundamentally new way of thinking. However, the digital era has already posed the question of the potential expansion of both addressees and human rights actors: the first through existing legal entities, companies, and organisations that have gained significant influence in the changed relationship, and the second, at the expense of artificial personality and artificial intelligence. Will we be the new slave owners if we refuse to grant human rights to such subjects? Will the category of 'human rights' as such make sense? These and other similar questions have yet to be answered in further research.

40 FE Shamout, et al, 'An artificial intelligence system for predicting the deterioration of COVID-19 patients in the emergency department' (2021) 4(1) Digital Medicine. doi: 10.1038/s41746-021-00453-0.

41 United Nations Security Council, Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to resolution 1973 (2011) addressed to the President of the Security Council. S/2021/229 <https://undocs.org/S/2021/229> accessed 21 February 2022.

42 Y Razmetaeva, 'The right to be forgotten in the European perspective' (2020) 10(1) TalTech Journal of European Studies 62.

43 J Chen, P Burgess, 'The boundaries of legal personhood: How spontaneous intelligence can problematise differences between humans, artificial intelligence, companies and animals' (2019) 27 Artificial Intelligence and Law 73-92. https://doi.org/ 10.1007/s10506-018-9229-x.

5 THE IMPLICATIONS FOR JUDICIAL PRACTICE

The changes brought about by the digital era, including for human rights, have implications for judicial practice, both direct and indirect, as well as those that can be described as mostly positive or mostly negative and those that appear to be neutral so far. In particular, the emergence of legal tech can not but affect the practice of lawyers. According to R. Whalen, 'legal technologies' implications are not deterministic. Rather, they are influenced by the affordances each technology might allow for, the choices made by users as they adopt (or ignore) each technology and the legal affordances of the jurisdictions within which they might be used.[44] Difficulties in determining the consequences complicate the task of scientific forecasting, including in the field of human rights.

A significant part of the discussion on the future of judicial practice is devoted to the topic of the participation of algorithmic-based technologies in the decision-making process. Judicial practice already includes the use of assistive algorithms, such as risk assessment in relation to defendants or the selection of precedents similar to the case under consideration. The next logical step might be to trust artificial intelligence to be the judge. The type of court case undoubtedly matters here. As G. Strikaitė-Latušinskaja highlighted, while easy cases 'will be the first ones assigned to artificial intelligence to resolve', hard cases 'would remain at the discretion of human judges rather than robot judges, at least until the development of technology reaches a certain level, when we can confidently delegate even cases of this scale to an AI'.[45] We have yet to understand whether it is right or wrong to trust artificial intelligence to handle even simple cases.

Another type of digital era and human rights implications for jurisprudence is the acceptance of digital evidence in the broad sense of the word. In particular, special Internet Courts in China 'accept the use of blockchain as a method of securing evidence, to overcome the risks that evidence stored on the Internet can be hacked or falsified'.[46] Despite the fact that such recognition is intended to reduce the risks of human rights violations, reliance on digital technologies can produce risks of a different kind. For instance, a study that examined the Office Horizon IT case showed that 'unquestioning belief in the veracity of software-generated evidence led to a decade of wrongful convictions'.[47] Remarkably, a mistake in technology in the digital era may magnify injustice many times over.

As K. Wodajo wrote, 'judicial bodies do not often adjudicate structural harms, supporting the hypothesis that the unique character of structural injustice sets barriers for victims of digitally replicated structural harms to pursue remedies through adjudicatory processes'.[48] Therefore 'alongside other efforts, it is necessary to rethink the adjudicative process for cases of digitally replicated structural injustices'.[49] The features of the digital age can be detrimental to human rights and, if enforced by bad jurisprudence, increase the negative impact. The digitalisation of judicial processes can make it almost impossible to exercise the right to access to justice for some individuals and social groups. Fixing an unfair or ineffective

44 R Whalen R, 'Defining legal technology and its implications' (2022) 30(1) International Journal of Law and Information Technology 59.

45 G Strikaitė-Latušinskaja 'Can We Make All Legal Norms into Legal Syllogisms and Why is That Important in Times of Artificial Intelligence?' 2022 1(13) Access to Justice in Eastern Europe 22.

46 H-Ch Sung, 'Can Online Courts Promote Access to Justice? A Case Study of the Internet Courts in China' (2020) 39(105461) Computer Law & Security Review.

47 K Renaud, I Bongiovanni, S Wilford, A Irons, 'PRECEPT-4-Justice: A bias-neutralising framework for digital forensics investigations' (2021) 61 Science & Justice 477.

48 K Wodajo, 'Mapping (in)visibility and structural injustice in the digital space' (2022) 9(100024) Journal of Responsible Technology. doi: 10.1016/j.jrt.2022.100024.

49 Ibid.

decision, in terms of protecting human rights in the digital space, in a binding precedent can literally reverse progress towards the rule of law.

One of the most significant implications of the digital era for both human rights and jurisprudence is the growing role of social media. From the fact that they can subtly shape opinions that, in turn, influence the opinions of judges, to how courts interpret the content of human rights in relation to the use of social media, such media have become firmly established in the everyday legal landscape. Here, it is important to take into account that social media in modern conditions can be considered in at least three projections. In the first place, from the point of view of democracy, these are public forums (in the interpretation of the US judiciary), where public figures can have a discussion, observing the requirements of public space. Secondly, it is a legal projection (which usually applies to the previous thesis) related to the special status of such entities endowed 'immunity' in the context of dissemination of inaccurate information under §230 Communication Decency Act: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'.[50] The third projection, economic, forces us to look at social networks as private players who use their own regulations in their internal activities and aim not so much to guarantee freedom of information as to make a profit. These points are of fundamental importance for modern legal discourse, and this was clearly evident in the consideration of two cases before the Supreme Court of the United States, which may eventually become classic, namely the cases of *Biden v. Knight First Amendment Institute at Columbia University*[51] and *Force v. Facebook, Inc.*[52] The final decision on the first case was made by the Supreme Court on the appeal of President Trump after the termination of his presidency, so it was reflected in the name under which it was officially classified.

The first case concerned the blocking of the current US president's accounts of individual contributors to his personal account @realDonaldTrump on Twitter (these contributors were the most active critics of the president). The plaintiffs, who are professional defenders of freedom of speech, raised before the US judiciary the issue of violation of such actions by the head of state of the First Amendment to the US Constitution, which guarantees freedom of speech. Federal courts sided with the plaintiffs, noting that although Twitter is a private platform, Trump nevertheless used it as a public forum, disseminating official (governmental) information under his account because it reflected his position as head of state and a public figure. Considering Trump's appeal after the inauguration of his successor, Joe Biden, the US Supreme Court has clearly demonstrated the impossibility of applying established doctrines related to the legal evaluation of private public service providers in the form of a public offer to the activities of modern Internet networks, such as social media. The Court also mentioned the almost monopolistic position of some companies that own such networks in the Internet communications market. The legal position of the Court is noteworthy. Interestingly, this preliminary issue was extremely problematic in that neither the appellate or first instance courts nor the plaintiffs were able to cite any acts that would limit Twitter's ability to block accounts, that is, acts that recognise this type of communication as 'government-controlled space'. Thus, the Court acknowledged the lack of sufficient legal grounds for the previous courts to take the ordered decisions and quashed them.

50 Communications Decency Act (1996) <https://uscode.house.gov/view.xhtml?req=(title:47%20section:230%20edition:prelim> accessed 17 January 2021.

51 Opinion of the US Supreme Court No 593 US ____ (2021) 'Biden v. Knight First Amendment Institute at Columbia University' (April 2021) <https://www.supremecourt.gov/opinions/20pdf/20-197_5ie6.pdf> accessed 3 March 2022.

52 Decision of the United States Court of Appeals No 934 F.3d 53 'Force v. Facebook, Inc.' (2019) <https://law.justia.com/cases/federal/appellate-courts/ca2/18-397/18-397-2019-07-31.html> accessed 1 March 2022.

The second, no less significant case concerned the plaintiffs' intentions to prosecute Facebook for helping militants from the banned terrorist organisation Hamas spread their ideas, which was one of the reasons for the deaths of their loved ones at the hands of terrorists. The accusation was that not only did the company allow the leader and Hamas spokesman to have their own accounts, but also they also allowed them to use network algorithms that allowed potential terrorists to get to know each other, thus contributing to the creation of global terrorist networks.[53] The Supreme Court disagreed with the plaintiffs' arguments, stating that automatically recommending to other users certain content with relevant information in which they (users) express an interest does not make Facebook responsible for disseminating such information.

For the sake of completeness, we should also mention one of the decisions of the German judiciary regarding the protection of digital rights on social networks. This is the decision of the Third Chamber of Civil Cases of the Supreme Court of Germany of 29 July 2021, by which the Court forbade Facebook to block users' accounts even if they use 'hate speech' in their posts without first notifying users and justifying the decision to block.[54] In the age of digital technology, as F. Fabbrini rightly noted, 'legal safeguards for privacy and personal data protection must be strengthened – not weakened – and that legal doctrines must evolve – rather than stagnate – in the face of new challenges'.[55] This call can be extrapolated to all human rights in today's world.

6 CONCLUSIONS

Digital technologies directly or indirectly affect almost all aspects of private and public life, including individual communities and the well-being of society as a whole. Human rights are undergoing new interventions and new threats, and their content, scope, and understanding are changing significantly in the digital age. Conceptual changes include the fact that the scope of recognised fundamental rights is changing in an unpredictable way, the boundaries between physical and digital actions are gradually blurring, and, consequently, the application of various criteria to such activities ceases, human rights cease to be embedded in existing theoretical structures and legal doctrines, and 'digital rights' are becoming increasingly important. Comprehensive digitalisation is expanding the range of rights addresses, primarily through companies, and raises the issue of expanding the range of rights holders, primarily through a range of algorithm-based digital technologies. Instead of trying to push rights into frameworks that no longer suit them, we need to re-evaluate the very foundations of what the concept of human rights consists of and explore the potential risks associated with technology and its owners.

Today, we are witnessing a situation in which it is no longer possible to apply established approaches to the implementation and protection of human rights in the digital space. At the same time, the judiciary is not always quick to take the position of judicial activism and fill gaps in the law with its decisions, referring to the lack of adequate regulations. New

53 W Davis, 'Victims want Supreme Court to revive lawsuit against Facebook' (2020) <https://www.mediapost.com/publications/article/345460/hamas-victims-want-supreme-court-to-revive-lawsuit.html> accessed 1 March 2022.

54 Judgements of the Federal Court of Germany No. III ZR 179/20 and III ZR 192/20 (July 2021). <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2021/2021149.html> accessed 17 February 2022.

55 F Fabbrini, 'Human rights in the digital age: The European court of justice ruling in the data retention case and its lessons for privacy and surveillance in the United States' (2015) 28 Harvard Human Rights Journal 92.

approaches need to be invented that should not turn the digital space into a state-controlled one and should allow social media and digital tool owners to demonstrate to society clear 'rules of the game' consistent with the established rules of liberal democracy. Similarly, approaches to the teaching of human rights theory in law schools need to change in the light of digital realities and the emergence of a new generation of digital rights, as well as awareness and understanding of the legal reality of the legal profession.

Ensuring human rights in the implementation and use of technology is not only a task of law – it is the legal view that may be of interest to all those involved in human rights discourse. This research contributes to the principles and values that should be adhered to in the field of human rights and that scholars and experts, governments, civil society, and businesses can use as guides. This study also suggests looking at significant changes in the concept of human rights and, despite the considerable uncertainty of the future of the digital age, convincing readers of the need to reconsider the paradigm itself. It is possible that the introduction of new technologies with a global impact should lead to a preliminary examination of 'digital risks', which would take into account the possibility of human rights violations and the availability of means to prevent and minimise harm.

Human rights, fundamental values and the rule of law must remain in the spotlight and, at the same time, have a realistic embodiment. Ultimately, this is the only way to achieve a just society and strengthen individuals' confidence in technology. The task for further research may be to discuss the new catalogue of human rights, the doctrinal definition of the content and scope of digital rights, and the development of proposals for regulations at the national and international levels that would take into account conceptual changes in human rights in the digital era.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

THE LEGAL REGULATION OF SPECIAL MEANS BY THE INTELLIGENCE AGENCY OF THE SLOVAK REPUBLIC WITHIN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Submitted on 07 Feb 2022 / Revised 11 Apr 2022 / Approved **14 Jun 2022**
Published online: **20 Jun 2022** // Last Published: **15 Aug 2022**

Keywords: *intelligence agency, intelligence activity, intelligence, special means, privacy protection*

ABSTRACT

Background: *The article is focused on the use of special rights or means by the intelligence agency of the Slovak Republic. The use of these statutory means in a democratic society is in the public interest, especially in the context of current security challenges (e.g., international organised crime, terrorism, etc.). At the same time, however, the use of special means by the intelligence agency represents a significant interference with guaranteed fundamental human rights and freedoms, in particular, the right to privacy. In this article, the author examines the admissibility of the use of special intelligence tools in the context of the case law of the*

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Corresponding author, solely responsible for writing, conceptualization, data curation, and methodology. Competing interests: No competing interests were disclosed. **Disclaimer**: The author declares that his opinion and views expressed in this article are free of any impact of any organizations.
Managing editor – Dr. Olena Terekh. **English Editor** – Dr. Sarah White.

How to cite: A Vaško 'The Legal Regulation of Special Means by the Intelligence Agency of the Slovak Republic within the Case Law of the European Court of Human Rights' 2022 3(15) Access to Justice in Eastern Europe 57–72. DOI: https://doi.org/10.33327/AJEE-18-5.3-a000309

European Court of Human Rights and presents de lege ferenda *recommendations for the regulation of the relevant legislation governing the activities of the intelligence agency of the Slovak Republic.*

Methods: *The scientific methods: legal comparison, content analysis of websites, functional analysis of legal acts, and analysis of the ECtHR decisions were used to process the research data.*

Results and Conclusions: *In the article, the author provides an overview of the current legal regulation on the use of special means by the intelligence services of the Slovak Republic, which he assesses from the point of view of compliance with the case law of the European Court of Human Rights. After a critical evaluation, the author states that the legal regulation is likely to require an amendment in the short term to ensure compliance with Art. 8 of the Convention: the right to respect for private and family life. Then, in the case of a complaint by a Slovak citizen regarding interference with the right to privacy using special means by the intelligence agencies of the Slovak Republic, it can be said that there was a violation of this right.*

1 INTRODUCTION

In the 21st century, as in the past, intelligence agencies are an important part of the apparatus of individual states. The validity of the existence and operation of intelligence agencies is not generally doubted. Current security challenges at the global level, such as international and transnational crimes, require the use of intelligence in preventing, restraining, and detecting those crimes. Intelligence agencies are generally entitled to use means, methods, and forms of intelligence activities. In the conditions of the Slovak Republic, these are called special means.[2]

The use of special means is necessary from the point of view of the protection of fundamental human rights and freedoms, protection of the constitutional order, internal order, state security, and protection of the state's foreign policy and economic interests in a democratic society. At the same time, intelligence agencies are also focusing on organised crime, terrorism, extremism, cybersecurity, and illegal international passenger transport and migration. In this context, the results of intelligence activities – intelligence information in compliance with the established legal limits – can also be used in criminal proceedings. If the criteria are met, the selected intelligence information can be accepted in criminal proceedings as evidence.[3] The use of special means also constitutes an interference with the right to respect for private and family life, guaranteed, *inter alia*, by the Convention for the Protection of Human Rights and Fundamental Freedoms.[4]

The European Court of Human Rights (hereafter, the ECtHR), based in Strasbourg, has already affected the field of intelligence agencies in its case law. We believe that it is useful to consider the legal regulation of special means of the intelligence agencies of the Slovak Republic from this point of view as well. In many ways, such an assessment can be inspiring for the future.

2 Act no. 46/1993 Coll. on the Slovak Information Service, as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1993/46/20160101> accessed 22 January 2022; Act no. 198/1994 Coll. on Military Intelligence, as amended <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/1994/198/20180401> accessed 22 January 2022.

3 A Vaško, 'Možnosti využitia spravodajských informácií v trestnom konaní' in *Bratislavské právnické fórum 2019: zákonnosť a prípustnosť dôkazov v trestnom konaní: zborník príspevkov z medzinárodnej vedeckej konferencie, Bratislava, 14. - 15. februára 2019* (Bratislava, Univerzita Komenského v Bratislave 2019) 88-99.

4 Convention on the Protection of Human Rights and Fundamental Freedoms <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 22 January 2022.

2 INTELLIGENCE ACTIVITY

In the Slovak legal order (as well as the Czech one), the characteristics of intelligence activity are not explicitly or declaratively defined. The characteristics of intelligence activity can be determined by an analogous interpretation of the provisions of legal norms, in accordance with which it can be purposefully implemented. Thus, it can be stated that for the purposes of examining and evaluating intelligence activity, it is appropriate to assess it pragmatically. From our point of view, although we respect the need for the theoretical knowledge we present, we refer to the system of intelligence activities as a system of secret, targeted processes implemented by competent state administration bodies when collecting, sorting, keeping, analytically processing, sharing, and interpreting relevant information in relation to the identified needs of the designated entities.[5]

Intelligence activity is primarily support (especially information) provided by its implementers (members and employees of intelligence agencies) to competent addressees.[6] These addressees need it for the active implementation of processes and operations and for setting priorities in ensuring the functionality of certain social positions, especially in securing tasks in the field of protection and defence of state sovereignty, democracy, freedom, and justice. This is mainly because the decisive precondition for the existence of every state, its political stability, economic prosperity, and peaceful social and cultural development is a rationally built and permanently functioning system of effective defence of its constitutional establishment, sovereignty, territorial integrity, security, internal order, economic and other legitimate interests, rights, and freedoms of all its citizens.

3 SUBJECTS OF INTELLIGENCE ACTIVITY

Reliable intelligence agencies are a specific attribute of state sovereignty. Therefore, their close interconnection with the structures of other states can be seen as a limitation of this sovereignty. The conspiratorial nature of the functioning of intelligence agencies and the exclusivity of the professional status of intelligence elites also create limits to the exercise of a transnational interest in the activities of intelligence agencies.[7]

The intelligence protection of the state is provided by special state bodies: intelligence agencies of various purposes, such as foreign intelligence (also referred to as the intelligence service), internal intelligence (incorrectly designated as counter-secret service, correctly designated defensive intelligence or counterintelligence), military intelligence, financial intelligence, criminal intelligence, radio and radio-electronic intelligence, and others according to the specific needs and interests of each state.

An intelligence agency is a government organisation whose main task is to obtain important, up-to-date, and publicly inaccessible information on acute and latent risks and other relevant facts through the use of special means and methods of work capable of endangering or influencing vital or other interests in any way.[8] Thus, it performs the function of a secret

5 M Lisoň, A Vaško, 'Teorie zpravodajské činnosti' in V Porada et al (eds) *Bezpečnostní vědy* (Plzeň, Aleš Čeněk s.r.o. 2019) 375 et seq.

6 Ibid.

7 R Laml, 'Národné a nadnárodné z hľadiska spravodajskej činnosti malej krajiny' in *Zborník z medzinárodného sympózia, ktorú zorganizovali Asociácia bývalých spravodajských dôstojníkov spolu s Fakultou práva Paneurópskej vysokej školy dňa 8. 12. 2010 na tému 'Národné versus nadnárodné záujmy v činnosti spravodajských služieb'*. (Bratislava: Eurokódex 2010) 3-9.

8 Lisoň, Vaško (n 5).

information service for the state's decisive sphere. It gathers the information obtained, systematically evaluates this information, and creates an autonomous, often very detailed, knowledge fund and conditions for sharing information. In a democratic state governed by the rule of law, strong control of the intelligence agencies is a necessity and a condition *sine qua non* for political stability and further peaceful democratic development of society.[9]

The intelligence community in the Slovak Republic currently consists of two main components: the Slovak Information Service and Military Intelligence. To a certain extent, a specialised unit of the Police Corps – the Office of Special Activities and Operations of the Presidium of the Police Corps, dealing with, among other things, criminal intelligence – can also be considered a part of the intelligence community. The Slovak Information Service (hereafter referred to as the SIS) was established by Act no. 46/1993 Coll. on the SIS of 21/01/1993. After the division of the Czech and Slovak Federal Republics, it was necessary to build a full-fledged system of security forces in the Slovak Republic.

At its inception, the SIS was defined by law as a state body of the Slovak Republic, performing tasks in matters of protection of the constitutional establishment, internal order, and security of the state to the extent defined by this Act. Its activities are governed by the Constitution, constitutional laws, and other generally binding legal regulations. Act no. 444/2015 Coll., amending the Act no. 300/2005 Coll. on the Criminal Code, as subsequently amended, defined the SIS in more detail with effect from 1 January 2016 as the General Security and Intelligence Service of the Slovak Republic.[10]

The Information Service provides information on criminal activity to the Police and Prosecutor's Office, in particular, on organised crime. It also provides the necessary information to other state authorities if they need it to prevent unconstitutional or otherwise illegal activity.

The information obtained is provided only for the purpose stated in the relevant paragraphs and provided that its provision does not jeopardize the fulfilment of the specific task of the information agency under this Act or the disclosure of the sources and means of the information agency or the disclosure of the identity of its members or persons acting in favour of the information agency. This does not apply if the consequence of not providing the information is demonstrably more serious than the consequence of providing it.

The SIS is entitled to use special means in accordance with the provisions of Section 10 of the SIS Act. In carrying out the tasks stipulated by this Act, the SIS is entitled to use the special means, which are:

a) Information and operational means
b) Information and technology means[11]

The SIS is obliged to ensure the protection of special means against disclosure and misuse. In the case of the SIS, according to the Act, the information and operational means are:

a) Tracking people and things
b) Legalising documents and legend
c) Using persons acting in the interest of the information service
d) Exchange of things
e) Fake transfer of things

9 M Grach, 'Spravodajské služby a ochrana štátu' in *Literárny týždenník* (Bratislava 1998) 5.

10 Act no. 46/1993 (n 2).

11 Act no. 166/2003 Coll. on the Privacy Protection against Unauthorized Use of Information and Technical Means and on the amendments and supplementation of some laws, as amended < https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2003/166/20160101> accessed 22 January 2022.

The SIS is to keep records of the use of information and operational resources. Details on the use and registration of information and operational resources shall be adjusted by the Director.[12] The SIS is entitled to use information technology in accordance with the provisions of the Act No. 166/2003 Coll. on the Privacy Protection against Unauthorized Use of Information Technology and on changes and amendments of certain laws (the Act on Protection against Eavesdropping), as subsequently amended.

Military Intelligence (hereafter referred to as MI) was established by Act no. 198/1994 Coll. on MI of 30/06/1994. At its inception, MI was defined by the law as a special service performing tasks of providing intelligence protection of the defence of the Slovak Republic within the competence of the Ministry of Defense of the Slovak Republic to the extent provided by law. MI consisted of two components: Military Defense Intelligence, which acted as a military 'counterintelligence', and Military Intelligence, which acted as a military 'intelligence'. As of 1 January 2013, the organisation of MI was changed by an amendment to the Act, and the services were merged into one within the competence of the Ministry of Defense.

In accordance with the current version of the Act, Military Intelligence is an intelligence service performing the tasks of providing intelligence, defence, and security of the Slovak Republic within the competence of the Ministry of Defense of the Slovak Republic.[13] The Minister of Defense of the Slovak Republic provides the National Council of the Slovak Republic, the President of the Slovak Republic, and the Government of the Slovak Republic with information obtained by Military Intelligence that is important for their decision-making and activities. The Minister will also provide necessary information to other state authorities if needed to prevent any illegal activity. The information obtained is provided only to fulfil the purpose stated in the law. MI is entitled in accordance with the provisions of S. 10 of the MI Act to use special means.

In carrying out the tasks stipulated by this Act, MI is entitled to use the special means, which are:

a) Information and operational means
b) Information and technical means[14]

MI is obliged to ensure the protection of special means against disclosure and misuse. In the case of MI, the information and operational means are according to the Act:

a) Tracking people and things
b) Legalizing documents
c) Persons acting on behalf of the MI,
d) Exchange of things
e) Fake transfer of things

The procedure for requesting, using, and registering information and operational resources is to be determined by the Director. MI is entitled to use information technology in accordance with the provisions of the Act No.166/2003 Coll. on the Privacy Protection against Unauthorized Use of Information Technology and on changes and amendments of certain laws (the Act on Protection against Eavesdropping), as subsequently amended.

12 Act no. 46/1993 (n 2).

13 Act no. 198/1994 (n 2).

14 Act no. 166/2003 (n 11).

4 RESOURCES IN INTELLIGENCE ACTIVITIES

Neither the law nor any other legal norm provides an exhaustive list of all the means and tactical procedures that can be used within intelligence activities when fulfilling tasks of intelligence agencies. The means used in the activities of intelligence agencies represent entities, tools, aids, equipment, or their sets, which can be used to achieve greater efficiency and effectiveness in the performance of specified tasks.

The theory of the activities of intelligence agencies classifies these resources into three groups (respecting the needs of their explanation and design). These are the so-called means of activities of intelligence agencies. The first group includes those of general applicability. These are also used when implementing other types of cognitive activities outside intelligence agencies. Using these means, it is possible, for example, to significantly influence the level of observation (monitoring), the detection of some quantitative properties of identified objects (means used in observing the object of intelligence interest at a greater distance, at night, or when examining micro-properties of objects, consumption, distance), etc.

The second group includes special means that are used in the implementation of intelligence activities. The starting point for their explanation is the common tasks the citizens delegate to the state authorities in the field of protection and defence. In accordance with the fulfilment of the tasks set, these are mainly the following means:

- Special technical (various means of computer technology, connecting and transport means, material-technical equipment, etc.)
- Firearms
- Information systems and records
- Various technical means, equipment and their assemblies, materials, procedures, methods and rules of their use, etc.

The third group consists of means that have been and are being created in accordance with the specific implementation requirements and needs of intelligence activities. In relation to its implementation, these means have a specific character. When using them, intelligence officers are required to respect several limiting factors resulting from:

- Their legal characteristics, in particular, the legal conditions for their use (*regulations, controls*)
- Objectives that can be achieved through their use (*performance*)
- Personnel and economic demands, etc.

In terms of theory, the means of intelligence activity can be classified as:

- Information and technical means (means of intelligence technology)
- Information and tactical means (means of intelligence tactics)
- Information and logistics means (means of intelligence support).

In accordance with and within the scope of the law, members of the intelligence agencies are entitled to use the information and technical means (hereafter referred to as ITM).[15] The basic condition to be successful when using them is that the presumed recognisable phenomenon (action) or condition causing their use still persists. Otherwise, it is possible to obtain information about the consequences of the known phenomenon using these means, thus making any further specific action more difficult.

Intelligence officers use the information and technical means within their intelligence activities for the purpose of obtaining and fixing information about ongoing proceedings

15 Act no. 166/2003 (n 11).

or the conditions that these proceedings caused. Their efficiency and effectiveness depend on the performance parameters of the technology (technological sources of information).

5 SELECTIONS FROM THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS IN RELATION TO INTELLIGENCE SERVICES

Intensive invasions of the right to privacy are caused by special means of intelligence. This right is guaranteed in our conditions by the constitutional law (Art. 6(1) of the Constitution of the Slovak Republic).

At present, in the decision-making activity of the ECtHR, it is possible to follow the shift from the principle of maintaining such absolute protection of human rights and freedoms to the need to maintain the protection of the public interest.

The criteria on the basis of which these guarantees can be assessed vary from case to case and are relative. The following evaluation criteria can be taken into account:

- The nature, extent, and duration of the means of secret surveillance
- The legal basis for the authorisation to use the means of secret surveillance
- The type of public authority that is authorised to approve the use of such a device and the control of the use of such a device
- The form of the remedies available to review the decision granting the given remedy.[16]

In the past, the ECtHR has dealt mainly with issues related to the course of justice and the right to privacy in this context.

The decision of the ECtHR in the case of *Szabó and Vissy v. Hungary*, App. No. 37138/14, Judgment of 12 January 2016, can be considered one of the ground-breaking decisions in relation to the activities of intelligence services.[17]

In the context of Art. 8 of the European Convention on Human Rights (hereafter referred to as the Convention), the ECtHR dealt with the safeguards against arbitrariness and abuse contained in the Hungarian legislation allowing covert surveillance. The Court took the opportunity to extend the general principles previously formulated in the context of criminal proceedings to the legal framework for the use of surveillance means for intelligence purposes. The ruling is particularly interesting as it provides a critical mirror for the domestic legal regulation of using intelligence technology to track individuals.[18]

The complaint was filed by two employees of an NGO criticizing government policy. Under Hungarian law, the fight against international terrorism has been entrusted to the police. In order to carry out these tasks properly, a special counter-terrorism unit was set up in 2011. The law granted extensive powers to this unit, including the conduct of secret house searches, wiretapping, detention, and opening of transported consignments, as well as monitoring the content of electronic correspondence. The use of these means was subject to prior authorisation. The law distinguished between two permitting regimes. The stricter regime,

16 M Tittlová, 'Teoretické a praktické problémy odpočúvania a záznamu telekomunikačnej prevádzky v trestnom konaní' in J Záhora (ed), *Teoretické a praktické problémy využívania informačno-technických prostriedkov v trestnom konaní* (Praha, Leges 2017) 288.

17 *Szabó and Vissy v Hungary,* App no 37138/14 <http://hudoc.echr.coe.int/eng?i=001-160020)> accessed 22 January 2022.

18 V Pysk, 'Z aktuální judikatury Evropského soudu pro lidská práva – ochrana utajovaných informácií' in *Správní právo,* Legislativní příloha č. II, ročník X (Praha, Ministerstvo vnitra České republiky 2018) XLII- XLIX.

where only a court could issue a permit, concerned the use of these means to investigate criminal offence categories defined by law. Conversely, their use for the proper performance of intelligence tasks in the interest of the protection of national security was subject only to a permit authorised by the Minister of Justice.

The applicants thought that they might have been subject to surveillance under the auspices of intelligence operations when they criticised the actions of government officials in fulfilling their work duties. As they had no other remedy, they sought protection through a constitutional complaint. In their submission, they argued that the legal regulation of the applicability of covert surveillance means did not provide sufficient guarantees capable of excluding arbitrariness in the activities of the relevant police department. The Constitutional Court rejected the applicants' allegations, stating that secret surveillance carried out for intelligence purposes was subject to external parliamentary scrutiny, in which the relevant Committee of members of the legislature ensured that the rights of the persons concerned were not violated. The government argued that the complaint was incompatible *ratione personae* with the provisions of the Convention and its Protocols, considering that the applicants could not be considered victims of the alleged violation within the meaning of Art. 34 of the Convention. The Court held the opposite view. In the beginning, the Court recalled that an individual may, in certain circumstances, be the victim of a violation of the Convention because of the simple existence of a law allowing covert surveillance without having to prove that the measure was actually applied to them.[19]

In a relatively recent judgment,[20] the Grand Chamber of the ECtHR further specified the criteria by which it is necessary to assess in the future whether a person can be considered a potential victim of covert surveillance. The Grand Chamber first clarified that the status of victim cannot be invoked by everyone, but only by those who have an increased likelihood of being subject to surveillance. Reasonable suspicion depends on the scope of applicability of the relevant legal provisions, i.e., whether the surveillance tools can only be used in relation to a certain group of persons or whether anyone can be subject to them. In the first case, only an individual belonging to the target group of persons can be considered a victim. However, this is not the case when the legislation allows almost anyone to be subject to covert surveillance. The second criterion to be taken into account is the existence and effectiveness of the remedies available at a national level.

The Hungarian legislation stated that almost anyone could fall victim to covert surveillance. In addition, it did not provide any procedural institute through which the alleged victims could turn to an independent body endowed with the power to deal with their objection of unlawful surveillance. In the light of these features of the legislation, the Court concluded that the applicants could legitimately feel that the measures in question might have been directed against them and must therefore be regarded as potential victims of the alleged violation of the Convention. The court of First Instance thus rejected the government's objection and declared the complaint admissible.

As to the merits of the complaint, the Court acknowledged that the means of covert surveillance to which the applicants could have been subject under the relevant legislation were undoubtedly capable of interfering with their right to respect for privacy, home, and correspondence. Any interference with those rights is permissible within Art. 8 of the Convention only if it has been established by law, pursued one of the legitimate objectives set out in the second paragraph of that provision, and provided that it was necessary to

19 *Klass and others v Germany*, App no 5029/71, Judgment of 6 September 1978 <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_5029-71> accessed 22 January 2022.

20 *R Zakharov v Russia*, App no 47143/06, Judgment of the Grand Chamber of 4 December 2015 <https://policehumanrightsresources.org/roman-zakharov-v-russia-47143-06> accessed 22 January 2022.

achieve that objective in a democratic society. There was no dispute between the parties that the intervention pursued a legitimate aim of protecting national security and, where appropriate, preventing riots and crime. However, their positions differed on the legality and necessity of the alleged intervention.

The requirement of legality is not exhausted by the fact that intervention must be based on provisions of national law, as it further requires that the relevant standards meet certain quality requirements in terms of availability, predictability, and compatibility with the rule of law, i.e., contain effective and sufficient safeguards against arbitrariness or abuse of power by covert surveillance authorities. Although covert surveillance means serve to protect national security, their borderless use can undermine the fundamental values of democracy that they are supposed to protect. The Court's role was therefore to ensure that the legal framework for covert surveillance was set up in such a way as to limit interference with the rights of the persons concerned only to the extent necessary in a democratic society.[21]

In particular, the applicants stated that the legislation was unpredictable and that sufficient and effective safeguards were lacking. The Court ruled in favour of the defendant government that the legislation was sufficiently predictable if it allowed the use of covert surveillance to prevent, detect, and deter terrorist acts or to obtain information needed to rescue its own citizens abroad. Although the relevant provisions may seem somewhat unclear, according to the Court, laws must necessarily be drafted with a degree of vagueness in order to provide scope for application to the various situations that may arise in the real world. The Court thus convinced the government that concepts such as 'threat of a terrorist attack' or 'carrying out rescue operations' were sufficiently specific and therefore foreseeable for the purposes of the requirement of legality.

However, the Court agreed with the applicants as to the existence of sufficiently effective safeguards. At first, the Court recalled its settled case law, according to which the legal framework governing the use of the various means of covert surveillance must contain at least the following minimum guarantees:

a) To define the nature of the criminal offences, the surveillance may be authorized for
b) To determine the circle of persons who may be the subjects of
c) To set limits on the longest duration of the measure
d) To adjust the authorization process, supervise the implementation of monitoring and set rules for keeping completed records and data
e) To include rules for secure transfer of data to third parties and, last but not least,
f) To specify the conditions under which the records must be erased or destroyed22

In examining these safeguards, the Court considers the various circumstances of the case, such as the nature, scope, and duration of the measure, the reasons for its application, the nature of the authority empowered to order, carry out, and supervise monitoring, and the availability of effective remedies.[23]

In measuring national rules through the prism of those principles, the Court first held that the legislature had allowed almost anyone to be subject to secret surveillance when it resigned to a narrower delineation of the persons concerned. The authorisation to use classified means was not conditional on the competent authorities proving a link between a particular individual or group of persons and a documented terrorist threat. The Court

21 Ibid.

22 *Amann v Switzerland*, App no 27798/95, Judgment of the Grand Chamber of 16 February 2000 <https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22Amann%20v.%20Switzerland%22],%22documentcollectionid2%22:[%22GR ANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58497%22]}> accessed 22 January 2022.

23 Ibid.

thus expressed concern that the legislation could have been deliberately set up to allow for widespread and strategic monitoring of the population.

The Court also saw insufficient safeguards against arbitrariness in the regime of authorising the use of intelligence technology by the Minister of Justice. In order for the consent to be granted, it was sufficient that the request was based on grounds in favour of the need to use those means. The Court, however, deemed that covert surveillance must be subject to the so-called 'strict necessity' of the intervention. Therefore, it must not be possible to achieve the objective pursued by other, less invasive means, given the fundamental rights of the persons concerned. In any event, it is not sufficient to simply state the reasons without providing the Minister with the evidence to give a specific suspicion that the individual in question may have been involved in terrorist activities. Otherwise, the Minister would not be able to carry out an appropriate adequacy test and assess whether the need to interfere with the rights of the person in question, given the circumstances of the case, is strictly necessary.

The fact that the consent to the covert surveillance was issued by the Minister of Justice did not escape the Court's objections. According to the Court, although it is possible for a permit to be issued by a body other than a judicial authority, in any event, it has to be a body sufficiently independent of the executive power, and a member of the government is definitely not independent.[24]

In an area that is as prone to political abuse as covert surveillance, effective decision-making should, in principle, be exercised – at least in the final instance – by an independent judiciary. This does not necessarily mean that there must be an *ex ante* judicial review, as the same purpose can be achieved by a subsequent judicial review, which can provide additional redress for illegal surveillance.[25] In many situations, typically in the face of current terrorist threats, the issuance of the prior authorisation will often not be appropriate, as this could lead to undesirable delays leading to loss of life.[26] However, subsequent judicial review is an absolute necessity if there is no loss of public confidence.

The Court further described the legislation on the maximum permissible duration of these measures as vague and arbitrary. Although it explicitly set a limit of 90 days with the possibility of extension, it left open whether the duration of the monitoring could be extended only once or repeatedly.

Finally, the Court also considered the remedies available to the persons concerned. The Court emphasised that the question of the effectiveness of any remedy was inextricably linked to the need for the individuals concerned to learn in addition that they had been under surveillance. The requirement of such *ex post* notification means that as soon as the reasons the surveillance was ordered for have ceased to exist and the person concerned can be notified, without jeopardising the purpose of the monitoring, they should be notified so that they are free to decide whether to request a review of the legality of a measure which infringed its fundamental rights and freedoms.

In the absence of a notification mechanism, the Court did not consider the other remedies referred to by the Hungarian government to be effective (e.g., a complaint to the Minister of the Interior). In addition, the Court explicitly denied that the Security Committee of the Parliament could provide sufficient redress. The Minister of Justice was obliged to submit a

24 *R Zakharov v Russia* (n 20).

25 *Kennedy v The United Kingdom*, App no 26839/05, Judgment of 15 May 2010 <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_26839-05> accessed 22 January 2022.

26 *Telegraaf Media Nederland Landelijke Media BV and others v The Netherlands*, App no 39315/06, Judgment of 22 November 2012 <https://www.stradalex.com/nl/sl_src_publ_jur_int/document/echr_39315-06_001-99089> accessed 22 January 2022.

report on the activities of the intelligence services to this Committee twice a year. However, the report was inaccessible to the public and thus did not provide the necessary degree of transparency and public scrutiny. However, beyond the content of this report, the Committee was not entitled to request any additional information. The Committee was also not able to deal in detail and provide redress in specific cases because they did not have access to individual files. In the light of these findings, the Court did not hesitate to conclude that the national legal framework allowing for the comprehensive surveillance of persons did not provide sufficient guarantees capable of precluding arbitrary interference with the rights of the persons concerned, not excluding the applicant. T a violation of Art. 8 of the Convention.

The present judgment is another of the Court's many contributions to the issue of covert surveillance. The Court does not, in principle, distinguish between the various methods of such monitoring. These general principles therefore apply, whether by telephone or[27] spatial interception,[28] interference with letter freedoms or electronic correspondence,[29] or even GPS tracking.[30] Until recently, the Court dealt with covert surveillance of persons, usually in the context of criminal investigations by law enforcement authorities. However, the present judgment is significant since the Court extends the scope of that case law to intelligence surveillance for intelligence purposes.[31] Its standards can therefore critically compare the relevant provisions of Slovak law governing the activities of intelligence services,[32] especially the legislation concerning the use of intelligence technology.[33]

Another important judgment of the ECtHR in relation to intelligence activities is the Judgment of 4 December 2015 in App. No. 47143/06 – *Roman Zakharov v. Russia.*[34] In that decision, the ECtHR states, *inter alia*, that supervision and control of means of covert surveillance of persons come into consideration in three stages:

a) At the time of their authorisation
b) In their implementation
c) After their deployment has been completed

In the first two cases, the examination of the nature of the case will take place without the knowledge of the persons concerned and must therefore be set up in such a way as to exclude any risk of abuse and arbitrariness. It is therefore desirable, in principle, that the judiciary is trusted, providing the best guarantee of independence, impartiality, and due process. As regards the follow-up, its effectiveness is necessarily conditional on the persons concerned subsequently becoming aware that they were the subjects of covert surveillance. Only then can they consider having the legality of the regulation or the implementation of these measures assessed by an independent court.

Scope of Covert Surveillance. The Court reiterated that national law must set clear limits on the applicability of these measures in order to make clear to the persons concerned the circumstances in which public authorities may have recourse to them. To that end, the nature of the offences for which covert surveillance may be authorised must be clearly

27 *Lambert v France*, App no 23618/94, Judgment of 24 August 1998 <https://www.stradalex.com/en/sl_src_publ_jur_int/document/cedh_23618-94_001-47619> accessed 22 January 2022.

28 *Savovi v Bulgaria*, App no 7222/05, Judgment of 27 November 2012 <https://www.stradalex.com/fr/sl_src_publ_jur_int/document/echr_7222-05> accessed 22 January 2022.

29 *Copland v The United Kingdom*, App no 62617/00, Judgment of 3 April 2007 <https://www.5rb.com/wp-content/uploads/2013/10/Copland-v-UK-ECHR-3-Apr-2007.pdf> accessed 22 January 2022.

30 *Uzun v Germany*, App no 35623/05, Judgment of 2 September 2010 <https://www.legislationline.org/download/id/7570/file/ECHR_case_Uzun_v_Germany_2010_en.pdf> accessed 22 January 2022.

31 *R Zakharov v Russia* (n 20).

32 Act no. 46/1993 (n 2).

33 V Pysk V (n 18).

34 *R Zakharov v Russia* (n 20).

defined, as must the range of persons whose telephone calls may be intercepted. However, the requirement of predictability does not necessarily require that the law contain an exhaustive list of the offences that may be grounds for ordering interception in the interests of national security. It is sufficient for their scope to be defined by the characteristics of socially harmful conduct.

The legislation under consideration allowed the use of covert surveillance means in the case of moderate, serious, and particularly serious criminal offences, i.e., those for which the maximum penalty was set at a minimum of three years. The Court considered such an arrangement to be sufficiently clear and definite. However, the Court was concerned that there was a significant number of other factors, including less serious forms of crime, such as pickpocketing. In addition, the legislation allowed the interception of not only suspects or accused persons but also other persons who may have information about the crime or other relevant information without further clarifying these concepts. Similarly, these measures were applicable following the receipt of the information on events or activities that threaten Russia's national, military, economic, or environmental security. However, even these concepts did not elaborate on the legal regulations, which left the executive body with an essentially unlimited power to expose the person concerned to the risk of arbitrariness. On the contrary, the Court recognised that this wide discretion in the interpretation of central concepts may be limited if prior judicial authorisation is required for the application of those measures. Independent *ex ante* judicial review is a key safeguard against arbitrary interference with the rights of data subjects.

Enabling Eavesdropping. The Court gradually examined the nature of the body that could authorise the monitoring, the scope of its review of powers, and the content of the authorisation issued by the body. According to the Court, the authorising body may also be an entity other than the court if it is sufficiently independent of the executive power.[35] The Russian legislation contains an important safeguard against arbitrariness in conducting wiretaps, as it requires that the interception of any communication be first authorized by the court.

The case law implies a requirement for the scope of the review powers of the Court. The licensing authority must be able to verify the existence of a reasonable suspicion of the person concerned and, thus, whether there are any circumstances justifying the suspicion that the person is committing any act based on which the eavesdropping may be ordered. In addition, it must be able to assess whether permission for eavesdropping is necessary in a democratic society, i.e., proportionate, to achieve the objective pursued, including whether the objective pursued cannot be achieved by other means which are less invasive in terms of the rights concerned.[36] The scope of judicial review was considered by the Court to be quite limited in this case, as judges are not in practice provided with all relevant information to assess whether there is sufficient factual evidence in a particular case to justify the suspicion that the person concerned is involved in activities for which the intervention in their communication may be allowed. In particular, the courts do not have access to information on secret agents, police informants, or the organisation and tactics of how the investigative procedures are used. The legislation does not require judges to examine the existence of a 'reasonable suspicion' against the person concerned, but the judges do not even apply a proportionality test. In practice, requests for a wiretapping permit are not usually accompanied by any background material, and the judges do not require such material.

35 *Dumitru Popescu v Romania* (No 2), App no 71525/01, Judgment of 26 April 2007 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-80352%22]}> accessed 22 January 2022.

36 *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria*, App no 62540/00, Judgment of 28 June 2007 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-81323%22]}> accessed 22 January 2022.

Interception Notices and Remedies Available. The Court recalled that the requirement that the individuals concerned subsequently find out that they were subject to surveillance is closely linked to the question of the effectiveness of the remedies. The Court is aware that practically, it is not always possible to inform an individual that their communication was eavesdropped upon, as this could jeopardise the long-term purpose of the surveillance. Therefore, even failure to notify such individuals of this fact cannot itself lead to the conclusion that such intervention was not necessary in a democratic society. However, as soon as the purpose of the surveillance cannot be interfered with, the persons concerned must be informed that they were subjected to such interception.[37]

The Court had previously declared the absence of such a mechanism incompatible with Art. 8 of the Convention, finding that it deprived the persons concerned of any effective possibility of seeking compensation for unlawful interference with their rights.[38] The Court took the opposite view, as, under the legislation, anyone who thought they might have been monitored could request an independent authority to review such circumstances.

Russian legislation does not require that the persons concerned be subsequently informed of the monitoring that was carried out. Thus, they have almost no opportunity to find out that their communication was intercepted unless it is used against them as evidence of guilt in subsequent criminal proceedings. Although persons who have learned in some way that they were watched may, by law, request information on the data thus obtained, such a request is subject to the condition that the person must be able to prove that means of covert surveillance have been deployed against them. Even if they bear the burden of proof, the legislation does not allow the persons concerned to become acquainted with classified information, including information on the means and procedures used in the surveillance, the identity of the persons who carried out the surveillance, and the findings. The Court thus concluded that the possibility for the persons concerned to obtain information on the monitoring carried out was ineffective in practice.[39]

In seeking a fair balance between the interests of the state in the protection of national security and the interests of the individuals concerned whose rights were affected, the state enjoys a degree of discretion. However, it is subject to European supervision by the Court, which must verify that the national legislation provided sufficient and effective safeguards against abuse. Although the covert surveillance system is designed to protect national security, it carries the risk of undermining or even destroying the democracy it is supposed to defend. The court must therefore verify whether the national mechanism for supervising the decision and carrying out covert surveillance is capable of maintaining interference with the rights of individuals only to the extent necessary in a democratic society.[40]

Finally, the Court recalled that the requirement of predictability of legislation has different content in the context of covert surveillance as in other areas. Naturally, the law cannot be defined in such a way that the individual realises under what circumstances they are likely to be intercepted and can thus adjust their actions. However, since the executive power is exercised in a secret manner in these cases, the risk of abuse is obvious. It is therefore essential that the law contains clear and detailed rules for covert surveillance. The law must be clear enough to provide individuals with adequate guidance as to the circumstances and conditions under which the competent authorities are entitled to take such a measure.[41]

37 *Weber and Saravia v Germany,* App no 54934/00 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-76586%22]}> accessed 22 January 2022.

38 *Dumitru Popescu v Romania* (n 35).

39 *R Zakharov v Russia* (n 20).

40 Ibid.

41 Ibid.

In the light of these facts, the Court concluded that the Russian legislation did not provide sufficient and effective safeguards against the arbitrariness and risk of abuse inherent in any covert surveillance system, especially when the police and intelligence services have direct access to all mobile communications using various technical equipment. Finally, the applicant provided the Court with examples showing that arbitrary interference with rights often occurred in practice. The legislation under assessment thus did not meet the requirements of the quality of the legal framework and was not able to limit interference to what is necessary in a democratic society. The Court thus concluded that there had been a violation of Art. 8 of the Convention.

6 CONCLUDING REMARKS

Taking into account what we have mentioned above, we believe that the current legislation on the use of special means by the intelligence agencies of the Slovak Republic can be assessed critically. The use of information and technical means by intelligence agencies in the Slovak Republic is governed by a separate legal regulation,[42] and therefore we will not deal in this paper with the compliance of its provisions with the case law of the ECtHR. We will focus our attention on information and operational means, with the exception of legalisation documents and legends. These are supportive in nature, and their use does not itself constitute an interference with fundamental human rights and freedoms.

From the point of view of the case law of the ECtHR, it seems the most problematic regulation on the monitoring of persons and things consists of issues related to the process of authorising the use of such means (in the case of the SIS, the Director), as well as issues of *ex post* notification of the use of such means against a person unless there are national security grounds for not doing so. However, even in these cases, there should be a mechanism to examine the justification of the interference with human rights and freedoms by the state authority.

The current legal regulation of using a mock transfer of things or controlled supply by intelligence agencies was introduced into intelligence laws by Act no. 444/2015 Coll., as subsequently amended, changing and amending the Act no. 300/2005 Coll. on the Criminal Code, amending certain laws (the so-called anti-terrorist package). Specifically, this is S. 11(1d) Exchange of things and letter e) fictitious transfer of property in Act no. 46/1993 Coll. on the Slovak Information Service (similarly in the Military Intelligence Act).

A condition is set for the lawful use of these information and operational resources based on the prior written consent of the judge of the court competent according to a special regulation (*ex ante*). This special regulation means the provision of S. 4a of the Act no. 166/2003 Coll. on the Protection of Privacy against Unauthorized Use of Information Technology and on changes and amendments of certain laws (the Eavesdropping Protection Act), as subsequently amended. The process of authorising the use of these means is, in our view, in line with the requirements set out in the case law of the ECtHR. The absence of a notification mechanism, or any other means, similar to tracking people and things, may be a problem.

Information-operational means – persons acting in favour of the intelligence service – in our opinion, do not represent a fundamental problem from the point of view of the case law of the ECtHR. In certain cases, the use of information obtained in criminal proceedings would involve a procedure under the applicable law. The process of obtaining intelligence

42 Act no. 166/2003 (n 11).

is classified, and, as a rule, its result – intelligence – is usually classified. Pursuant to the provisions of S. 10(2) of the Act no. 46/1993 Coll., the Slovak Information Service is obliged to ensure the protection of special means against disclosure and misuse (a similar provision is contained in the Military Intelligence Act).

In order to ensure the right to an effective defence, it is possible to find a solution in the Act no. 215/2004 Coll. on the Classified Information Protection and on changes and amendments to certain acts, the Institute of Another Authorized Person (S. 35(2)). For persons acting in favour of the information agency, we again refer to S. 23(2) of the Act no. 46/1993 Coll. on the Slovak Information Service, according to which the Director of the Slovak Information Service (and, by analogy, the Director of the Military Intelligence) may decide on the waiver of confidentiality. The Criminal Procedure Code also contains provisions on a witness whose identity is confidential, which, in our opinion, are also applicable to members and persons acting in favour of the intelligence agency after meeting the legal conditions.

Of course, the activities of persons acting in favour of intelligence services must comply with the requirements of the case law of the ECtHR in the context of the regulation of the use of a 'provocateur' agent. The agent's conduct must meet certain standards so that it does not deviate from the limits of legality. Clear limitations and guarantees distinguish the permissible procedure from guiding or provoking the commission of a criminal offence, which is in conflict with Art. 6 of the Convention. The public interest cannot justify the use of evidence obtained by provocation, so criminal proceedings would not be fair from the outset.[43] The ECtHR stated in its decision-making process that the use of special investigative methods does not itself lead to a violation of the right to a fair trial.[44]

In conclusion, we quote the provision of the Art. 8 of the Convention on the right to respect for private and family life:

1) Everyone has the right to respect for his private and family life, his home and his correspondence.
2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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43 *Teixeira de Castro v Portugal*, App no 25829/94, 9 June 1998 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58193%22]}> accessed 22 January 2022.

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19. *Uzun v Germany*, App no 35623/05, Judgment of 2 September 2010 <https://www.legislationline.org/download/id/7570/file/ECHR_case_Uzun_v_Germany_2010_en.pdf> accessed 22 January 2022.
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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

RESTRICTIONS ON HUMAN RIGHTS DUE TO THE COVID-19 OUTBREAK

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Submitted on 1 Feb 2022 / Revised 1st on 4 May 2022 / Revised 2nd on **7 Jun 2022**
Approved 14 Jun 2022 / Published: **15 Aug 2022**

Keywords: *human rights; Covid-19; freedom of movement; restrictions on property rights; free will*

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Competing interests: The authors declare no competing interests. **Disclaimer:** The authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.
Managing editor – Dr Tetiana Tsuvina. **English Editor** – Dr Sarah White.

How to cite: Savchenko V, Michurin Ie, Kozhevnykova V 'Restrictions on Human Rights Due to the Covid-19 Outbreak' 2022 3(15) Access to Justice in Eastern Europe 73–86. DOI: https://doi.org/10.33327/AJEE-18-5.3-a000313

ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

ABSTRACT

The need to prevent the rapid spread of Covid-19 has led to restrictive measures. Such trends require proper scientific and legal analysis, rethinking existing approaches to realising rights. At the same time, the legal nature and essence of such restrictions should be clarified. This is due to the nature of the Covid-19 pandemic, as such restrictions have a positive effect on curbing the spread of the viral disease. Currently, the vector of major human rights violations is related to compulsory vaccination. It is necessary to continue this research and follow the practice of the European Court of Human Rights. The study used general and special scientific methods of scientific research of legal phenomena, namely: comparative, formal-logical, system-structural, dialectical, and other methods. The dialectical method of cognition allowed us to study the national civil legislation, taking into account the international standards. The public interest in the form of preserving safety, health, and human life determines the establishment of restrictions in connection with the Covid-19 pandemic. Here, the goal of the state to ensure the security of the nation and the public interest are closely related. The comparative legal method was used to determine the common and distinctive features. The formal-logical method contributed to establishing the conceptual apparatus and content of current legislation, highlighting the contradictions in current legislation. The system of human rights was studied by system-structural analysis. The aim was to solve complex problems of restrictions on human rights due to Covid-19.

1 INTRODUCTION

The state authorities of Ukraine introduced an emergency regime on 25 March 2020 to prevent the spread of Covid-19.[4] The state established certain restrictions on human rights and, as a consequence, freedom of will. Special passes for the use of public transport have been introduced in the capital of Ukraine, Kyiv, and some other cities. The subway is completely suspended in all Ukrainian cities without exception. Regular intercity flights in Ukraine have been cancelled.[5] This situation actually has led to the restriction of citizens' rights to free movement. However, these restrictions are for the public good and to help stop the spread of deadly infections in individual countries and around the world. Restrictive measures have also been imposed in other states.

For example, on 17 March 2020, the French authorities imposed restrictions on the movement of persons within the territory of the state.[6] Mass gatherings of people, family, friends, or business meetings were prohibited, and offenders who disregarded state regulations were subject to legal sanctions. French President Emmanuel Macron recommended residents leave their homes only as a last resort. In particular, they were allowed to go for food and medical supplies or visit the workplace if the performance of official duties could not be performed remotely from the workplace. Distance between people was necessary to avoid the spread

4 'The government has introduced an emergency regime throughout Ukraine' (2020) <https://www.rada.gov.ua/> accessed 30 December 2021.

5 'In Ukraine, trains do not run, bus traffic is suspended: quarantine has been sharply tightened' (2020) https://www.rbc.ua/ accessed 1 February 2022.

6 'COVID-19: European Union suspends non-essential travel for non-EU citizens' (2020) <https://unric.org/en/covid-19-european-union-suspends-non-essential-travel-for-non-eu-citizens/> accessed 5 February 2022.

of Covid-19, and therefore restrictions that helped to avoid unnecessary contact between people were recognised as important. Such restrictions are legal, as Art. 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides for the exclusion from the right to freedom of movement. There are no restrictions on the exercise of these rights, except for those provided for health care.

As we can see, in addition to the right to free movement in France, certain restrictions limit the voting rights of citizens. To prevent the rapid spread of infection and localise the pandemic, most states are forced to take restrictive measures. Covid-19 has become a unique basis for restricting human rights. The world has never had global pandemics of this magnitude. For the sake of the public good, certain restrictions on human rights can be introduced.[7]

Human rights are essential to all countries. Fundamental rights of the EU are, in principle, applicable in relations of a vertical nature, in which individuals are confronted with the state.[8] Although international human rights law allows for the restriction of rights in the face of public health emergencies, such restrictions must be the minimum intrusion necessary to effectively address the public health concern.[9] Therefore, in order to achieve the public good, it is possible to restrict human rights in exceptional cases. Covid-19 has become an undeniable factor that, for the public good, makes it possible to impose restrictions on human rights. Such restrictions are aimed at the common good of preventing and localise the pandemic. Protecting the lives and health of many people are priorities that can lead to restrictions on rights. Restrictions like temporary isolation and restrictions on the right to free movement of people help to localise and stop the spread of Covid-19. This follows from Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In addition, Art. 15 of the same Convention indicates the possibility of derogation from the obligations of the state in exceptional circumstances. This is the possibility of a limited and controlled deviation from one's obligations to ensure certain rights and freedoms provided for in the Convention in the event of a public danger threatening the life of the nation. Given the case law of the European Court of Human Rights (ECtHR) on the violation of such rights in the context of Art. 15 of the Convention, whenever an applicant complains that his/her rights under the Convention have been violated during the derogation period, the Court first examines whether the measures taken can be justified under the main articles of the Convention; only when they cannot be justified in this way does the Court proceed to determine whether the waiver was lawful[10] (for example, *Lawless v. Ireland*[11]).

Covid-19 has created new restrictions on the rights of citizens that were not implemented until the pandemic. In this article, we will consider different situations of violation of human rights. For example, during Covid-19, it is prohibited in Ukraine to organise and participate in mass events in which more than ten people take part. Currently, this restriction has been tightened, and it is forbidden for more than two adults to appear together in public places. Regular transport connections throughout the country and abroad have been cancelled. This

7 Ye Michurin, *Restriction property rights of physical persons (the civil law aspect)* (Yursvit 2008).

8 W Lewandowski, 'The Implications of the Recent Jurisprudence of the Court of Justice of the European Union for the Protection of the Fundamental Rights of Athletes and the Regulatory Autonomy of Sporting Federations' (2020) 25 (1) Tilburg Law Review 55-66.

9 J Amon, K Wiltenburg Todrys, 'Fear of Foreigners: HIV-related restrictions on entry, stay, and residence. Journal of the International AIDS Society' (2008) 11 (8) Journal of the International AIDS Society <*https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2621119/?report=classic*> accessed 15 January 2022.

10 O Vasylchenko, 'COVID-19 - the latest challenge for the world and human rights: legitimate resistance to the spread of infection?' (2020) 3 (28) Legal Position 19-23.

11 *Lawless v. Ireland*, App no 332/57, Judgment of 14 November 1960 <*https://70.coe.int/pdf/lawless-v.-ireland.pdf* }> accessed 10 January 2022.

is aimed at reducing the possibility of direct contact between people in different cities of the country. Such measures make it possible to minimise the spread of the virus and prevent a total pandemic. The state applies balanced restrictive measures for individual human rights. Most of them are related to the common good and are justified by the general need to stop the increase in cases and the spread of Covid-19.

Studies show that the pandemic poses a threat to human rights. In this article, we want to study in detail the problem of human rights violations in different countries and determine acceptable measures for restrictions. The main objective of our study is to identify cases of human rights violations due to the pandemic and to give a legal assessment of these cases. The identified restrictions on human rights due to the pandemic are only a starting point. Now, in 2022, we can talk about a paradigm shift in the perception of the pandemic. There are new challenges today. Mankind is aware of the health crisis and understands that public interests have an advantage over the private.

For example, in Germany, the restriction of human rights due to a pandemic was justified by a decision of the German Federal Constitutional Court. The court imposed necessary restrictions, in particular, on holding mass events and protests. The court found that the temporary restrictions were lawful because they were imposed at a certain time and were effective in certain circumstances to prevent the spread of infectious diseases. The court stressed that the risks of spreading Covid-19 are higher than the need to ensure the right to express public dissatisfaction with the government's decision.[12] Here, the principle of proportionality is embodied in all its components, as restrictions have been introduced properly. The sign of the introduction of restrictions by law, the competent authority of the state, which had the authority to do so in these circumstances, was observed. The restrictions imposed proved to be effective in the circumstances of the pandemic, so there is a legitimate purpose to the restrictions.

Ukrainian legislation provides for the possibility of restricting certain human and civil rights and freedoms other than those specified in Art. 64, para. 2 of the Constitution of Ukraine (i.e., the rights and freedoms provided for in Arts. 24, 25, 27, 28, 29, 40, 47, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62, 63 of the Constitution in Ukraine). As we can see, according to Art. 33, 34, 39, 53 of the Constitution of Ukraine, the rights do not belong to them and therefore may be limited in case of quarantine and state of emergency.[13] Therefore, Ukrainian law explicitly prohibits the restriction of certain human rights under any circumstances. These are the right to life, the right to non-discrimination (on the grounds of race, colour, political, religious, and other beliefs, sex), and others mentioned in the Constitution of Ukraine. Restriction of these rights would not correspond to the legality of the restrictions, which is a component of the proportionality of the restrictions.

A new phase in the restriction of human rights involves the development of a vaccine and the mass vaccination of people. On the one hand, today, there are about ten vaccines that help people overcome Covid-19. On the other hand, a large number of people refuse vaccination. Therefore, the issue of human rights violations due to compulsory vaccination is the most acute. The adoption of norms according to which certain groups of the population must be vaccinated has become a global trend. They are not allowed to work without vaccinations.

For example, in France, 672 fire and rescue workers and volunteers asked the ECtHR to suspend certain provisions of the law that require rescuers to be vaccinated against Covid-19. Firefighters stressed that this violates their right to life and respect for private and family life

12 Bundesverfassungsgericht: Resolution of the 1st Chamber of the First Senate of 5 December 2020 – 1 BvQ 145/20 (2020) <https://www.bundesverfassungsgericht.de.> accessed 26 October 2021.

13 M Saenko, V Goloborodko, V Pleskacheva, 'Modern challenges in the field of human rights protection during the pandemic Covid-19' (2021) 64 Scientific Bulletin of Uzhgorod National University 61-64.

(Arts. 2 and 8 of the ECHR). But the ECtHR rejected the request to suspend the requirements for compulsory vaccination.[14]

This decision illustrates the global change in the ECtHR's views on compulsory vaccination and treatment. Back in 1978, in *X v. the Netherlands*[15], the European Commission of Human Rights (which existed before its merger with the ECtHR) stated that even minimal physical interference could raise the question of compliance with Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. One year later, in *X v. Austria*[16], the European Commission recognised that 'compulsory medical intervention, even if minor, must be regarded as an interference with the right guaranteed by Article 8 of the Convention'. In *Carl Boff v. San Marino*[17] in 1998, the European Commission of Human Rights rejected an application by parents who refused to consent to compulsory vaccination of children against hepatitis B, citing the broad scope of the state's vaccination activities as a system to prevent the spread of dangerous diseases.[18]

Ukraine has already published a list of professionals that must be vaccinated against Covid-19, and this list continues to expand. It includes employees of educational institutions and central executive bodies and their structural subdivisions, as well as employees of local state administrations. Therefore, workers can either undertake the vaccination voluntarily or be barred from work. The employee must take vacation without pay. It can be assumed that this is a direct violation of human rights. But the jurisprudence holds a contrary opinion. On 10 March 2021, the Supreme Court of Ukraine passed a decision on the legality of disqualification of a student who had not been vaccinated due to age.[19] At the same time, the decision of the educational institution, which suspended the student from classes, was appealed. The court found it lawful to suspend the student's education until the student received an appropriate certificate of vaccination or until the conclusion of a medical advisory committee of the relevant health care institution on the child's ability to attend school. It should be noted that there is a difference between vaccination of children against chronic diseases (diphtheria, pertussis, etc.) and vaccination against Covid-19, as the latter is temporary and situational. This is confirmed by the case-law of the ECtHR. There is a judgment of the ECtHR in the case of *Vavřička v. The Czech Republic* of 8 April 2021 [20] on this topic. Vaccination of children is mandatory against diseases that are well known in medical science (including diphtheria, pertussis, tetanus, polio, hepatitis, etc.) and not mandatory vaccination against Covid-19. This decision confirmed that compulsory vaccination is not absolute – exceptions are children who have contraindications to vaccination. But it has a reasonable ratio of proportionality to the legitimate goals pursued by the state. Certain

14 'Requests for interim measures from 672 members of the French fire service concerning the Law on the management of the public health crisis fall outside the scope of Rule 39 of the Rules of Court' <https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-7100478-9611768%22]}> accessed 6 January 2022.

15 *X v. the Netherlands,* App no 6852/74, Judgement of 5 December 1978 <*https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_6852-74*> accessed 12 January 2022.

16 X v. Austria, App no 5492/72, Judgement of 16 July 1973 <https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-3166%22]}> accessed 12 January 2022.

17 *Carlo Boffa and 13 others v. San Marino*, App no 26536/95, Judgment of 15 January 1998 <*https://hudoc.echr.coe.int/app/con version/pdf?library=ECHR&id=001-88051&filename=BOFFA%20AND%2013%20OTHERS%20v.%20SAN%20MARINO.pdf*> accessed 11 January 2022.

18 'Covid-19 vaccination: ECHR practice to be taken into account when vaccination is mandatory' <https://www.echr.com.ua/vakcinaciya-vid-covid-19-praktika-yespl-yaka-maye-buti-vraxovana-u-razi-zaprovadzhennya-obovyazkovosti-shheplen/.> accessed 8 January 2022.

19 Decision of the Supreme Court of Ukraine <https://reyestr.court.gov.ua/Review/95642825> accessed July 2021.

20 *Vavřička v the Czech Republic*, App no 47621/13, Judgement of The Grand Chamber of 8 April 2021 <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-12690%22]}> accessed 10 January 2022.

principles for this solution can also be applied to the Covid-19 vaccination. Individual contraindications to vaccination may be an exception against compulsory vaccination. The case of *Vavřička v. The Czech Republic* should also be mentioned. The court considered a situation in which the applicants refused to vaccinate their children. This led to a fine, and the children were denied enrolment in school. As a result, the ECtHR supported the Grand Chamber.[21]

At the same time, an electronic petition has already been submitted to the President of Ukraine on the introduction of criminal liability for forced vaccination. As of 10 September 2021, the petition received more than 26,000 votes out of the required 25,000. Now, this issue must be considered and decided by the President of Ukraine. The petition proposes to equate compulsory vaccination in the form of threats of dismissal or non-admission to work to the concept of forced vaccination. It proposes to introduce criminal liability in the form of imprisonment for a term of three to five years for forced vaccination.[22]All this suggests that in 2021 and 2022, the central issue of human rights violations due to Covid-19 will be the problem of compulsory vaccinations. It is unknown when the pandemic will end, so human rights may be subject to new restrictions.

2 RESTRICTIONS IMPOSED BY STATES DURING THE COVID-19 PANDEMIC

2.1 Restrictions on the right of movement: China, France, Germany, Ukraine

The Covid-19 pandemic is a health care crisis with serious human and social consequences and challenges for the courts.[23] The pandemic has affected the justice system and many human rights. For example, Covid-19 has affected the right of movement.

Restrictions on the right of movement in the context of Covid-19 are the most relevant. These restrictions relate to the right of free movement of people, both within and between countries. During Covid-19, some administrative-territorial units in Ukraine imposed entry restrictions and set up checkpoints. Only people who were returning to their place of permanent residence were allowed to enter. Individuals with Covid-19 symptoms were quarantined. Any person arriving on the territory of Ukraine from another state had to isolate for fourteen days.

Freedom of movement and freedom to choose a place of residence belong to everyone who is legally in the territory of Ukraine and include freedom of movement within the territory of Ukraine, free choice of permanent or temporary residence, both in Ukraine and in other states, and the right to leave the territory of Ukraine freely and return. However, persons permanently or temporarily residing in the territory of the state are restricted in the right to freedom of movement in connection with the introduction of an emergency regime. Similar restrictions are applied by most other countries, such as France, China, Germany, and others. We will consider this issue in detail below.

The constitutional legislation of many countries guarantees the right to free movement of people. So, in Art 33 of the Constitution of Ukraine, it is established that everyone who is legally in the territory of Ukraine is guaranteed freedom of movement, free choice of

21 Ibid.

22 'Official Internet Representation of the President of Ukraine' <https://petition.president.gov.ua/petition/121610> accessed 10 January 2022.

23 O Rozhnov, 'Towards Timely Justice in Civil Matters Amid the COVID-19 Pandemic' (2020) 2/3 (7) Access to Justice in Eastern Europe 100-114.

residence, and the right to leave the territory of Ukraine freely, except for restrictions established by law. A citizen of Ukraine cannot be deprived of the right to return to Ukraine at any time. However, the specifics of the pandemic, which is spread through close physical contact between people, have caused corresponding restrictions, in particular, regarding the free movement of people.

Given the difficult global situation caused by Covid-19, it is important to pay attention to aspects of the proportionality of the establishment of restrictions, including: 1) the suitability of means of influence on humans, the fundamental possibility of achieving this goal; 2) the minimal choice of alternative means that are the least burdensome for fundamental rights; 3) balance, finding a compromise between constantly conflicting individual and social values. Thus, the general purpose of establishing certain restrictions in law is considered in the certainty of their validity and appropriateness of existence.[24] Therefore, enshrining restrictions in the law is only a prerequisite for their application – human rights, in addition to the purpose of restrictions, must be their justification. The legitimacy of restrictions is not limited to their formal establishment in law. This is preceded by the possibility of achieving a social goal by means other than restricting human rights. Only if measures other than human rights restrictions are less effective should their indispensability (compared to other measures) in a democratic society be considered. Even after that and the establishment of restrictions by law, the proportionality of these restrictions is examined by the ECtHR in individual cases. This kind of multi-level test to restrict human rights in general and in individual cases is aimed at respecting human rights in a democratic society.

With regard to restrictions on human rights, it is worth talking about the proportionality of restrictions that allow the exercise of civil rights in accordance with their purpose in society. Taking into account the designation of rights in general, it should be assumed that the priority is usually to ensure the implementation of the right by the state. However, the exercise of the law cannot run counter to the important interests of society. Human health and life in society are important public interests, for the observance of which restrictions on individual human rights can be temporarily applied. Accordingly, proportionality in this aspect is manifested in the presence of a public factor that must be considered when satisfying the private interest. Substitution of private interest for public leads to state intervention in the exercise of human rights.[25] The observance of restrictions on the values and principles existing in a democratic society is obligatory. Even when human rights restrictions are imposed because they cannot be replaced by other means, such as quarantine restrictions, they are temporary. That is, they are removed immediately or shortly after the threat to the public interest has been reduced. This strikes a balance between rights and restrictions: the latter apply only in the 'acute stage', with exceptions (persons with individual contraindications may not be vaccinated). In some cases, permission was given to move despite quarantine. For example, you could visit the shops in masks to buy the necessary food. It was possible to visit parks to walk animals. That is, the application of restrictions should be strictly controlled, temporary, and should immediately cease after the reduction of public danger. Thus, the reduction in the number of patients with Covid-19 led to the easing of quarantine restrictions with the subsequent abolition in the event of elimination of public danger.

In Ukraine, restrictions on the free movement of people across the state border began to be introduced by the decision of the National Security and Defense Council of Ukraine of 13 March 2020.[26] In particular, checkpoints across the state border of Ukraine were closed to

24 K Möller, *Proportionality: Challenging the critics* (Oxford University Press 2012).

25 Ye Michurin, *Restrictions on property rights of individuals (general provisions)* (Yursvit 2007).

26 Decision of the National Security and Defense Council of March 13, 2020 'On urgent national security measures in the context of an outbreak of acute respiratory disease Covid-19 caused by the SARS-CoV-2 coronavirus' (2020) < https://www.rnbo.gov.ua/> accessed 12 January 2022.

regular passenger traffic from 17 March 2020 for the next two weeks.[27] Entry into Ukraine of foreigners and stateless persons was also suspended from 16 March 2020 for the next two weeks, except for persons with the right to permanent or temporary residence in Ukraine and employees of diplomatic missions, consular offices, and missions of international organisations.[28]

The particular focus in establishing restrictions on the right to movement of persons is placed on validity and exclusivity. When human rights are restricted, there is interference in everyone's personal life. However, the purpose of applying such restrictions and prohibitions is justified because the state protects the personal rights of all in general and, at the same time, of every person to life and health. In this context, French President Emmanuel Macron closed all borders to the EU, and the Schengen area suspended non-essential travel for non-EU citizens.[29]

In France, during the period of restrictive measures caused by Covid-19, residents were prohibited from leaving the premises in which they lived, with the exception of seeking medical care, visiting the workplace (in connection with the official activities the person is obliged by the state to perform despite the pandemic), visiting grocery stores or pharmacies, or walking with pets at a set distance of not more than 100 meters from the place of residence. When going outside, people had to keep a set distance from each other. The only exception to this rule was a taxi ride. Currently, there is a plan to implement a system that will control the movement of people and their compliance with the home regime. At the same time, the state authorities imposed sanctions on violators of the self-isolation regime via fines. However, Covid-19 restrictions at the French border were eased on 12 February 2022 for fully vaccinated travellers.[30]

In the unfavourable situation created by the rapid spread of Covid-19, the restrictions imposed by the state on certain human rights are admissible in society. In the past decade, academic and non-academic attention to human rights risks has increased.[31] Predictability is important even before human rights restrictions are established in law. Here the legislature must consider the exclusivity of restrictions. The idea of the validity of restrictions and their irreplaceability by other means should be applied in each case. It is important to understand the value of a law that protects the public interest in a case of human rights restrictions. Thus, vaccination, restrictions on the right to move, and other quarantine restrictions during Covid-19 were indispensable for the preservation of another value – the right to life of many people who were threatened by the pandemic. Quarantine restrictions in such circumstances are justified. This is a clear prediction of the social, political, economic, and other consequences of their establishment. Along with imposing restrictions, the state must minimise these consequences. Thus, in Ukraine, the possibility for an employer to instruct an employee to perform the work specified in the employment contract at home for a certain period is legislatively enshrined. Thus, the state protected a person's right to work during the quarantine period. Yet, even before the problems with the pandemic, the right to movement was restricted. This can be seen in the decisions of the ECtHR.[32]

27 Ibid.

28 Ibid.

29 'COVID-19: European Union suspends non-essential travel for non-EU citizens' (2020) <https://unric.org/en/covid-19-european-union-suspends-non-essential-travel-for-non-eu-citizens/> accessed 5 February 2022.

30 'Coming to France? Your Covid-19 questions answered' (2022) <https://www.diplomatie.gouv.fr/en/coming-to-france/coming-to-france-your-covid-19-questions-answered/> accessed 20 February 2022.

31 A Duval, D Heerdt, 'FIFA and Human Rights – A Research Agenda' (2020) 25 (1)Tilburg Law Review 1-11.

32 B von Rütte, 'Social Identity and the Right to Belong – The ECtHR's Judgment in *Hoti v. Croatia*' (2019) 24(2) Tilburg Law Review 147-155.

2.2 Restrictions on voting rights during Covid-19

There were numerous cases of temporary restrictions on citizens' voting rights during the pandemic. In particular, the second round of French municipal elections, which were to be held at the end of March, was postponed at least until mid-July, even though the first round of elections had already successfully passed before the pandemic. The suspension of suffrage in French law makes it temporarily impossible for a person to participate in elections. In this context, the period of suspension of the right depends on the degree of public danger caused by Covid-19. Currently, registration as candidates for election has been postponed, as provided by French suffrage. This restriction is temporary, given that it arises at the second stage of the election process and is established to protect the population from infection.

Several states decided to postpone elections and votes or introduced restrictive measures to prevent activities from taking place within the established time frame. These include Australia, Armenia, Bolivia, the United Kingdom, Russia, Iran, Italy, Canada, Cyprus, Kyrgyzstan, the Republic of Northern Macedonia, Serbia, Syria, the United States, France, Chile, Switzerland, Sri Lanka, and South Africa. Presidential elections are threatened in the United States and Poland. Due to the pandemic, primaries were indefinitely postponed in several US states. Another part of the US postponed the election procedure from spring to summer.[33] Art. 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to free elections. However, the ECtHR points out that while the right to free elections is essential, it is not unlimited. Restrictions must be imposed to achieve a legitimate aim by proportional means and must not prejudice the essence of the right to free elections and make it ineffective.[34] Such restrictions are justified during the spread of Covid-19 by the requirements of safety of life and health of the population. The state's concern for these social values causes these restrictions on suffrage, which are temporary and appropriate in such circumstances and meet the requirements of proportionality. The introduction of these restrictions is justified by the risk of Covid-19 in crowded places, like polling stations. However, due to restrictions, suffrage was subject to restriction, with some delay during the period of exacerbation of the pandemic. As soon as the state passed this stage of danger, citizens were provided with the opportunity to exercise their right to vote.

2.3 Restrictions on property rights

The imposition of restrictions on certain property rights due to the spread of Covid-19 is necessary and justified in cases where other measures are not effective. They are motivated by the desire of the state to develop human property rights and promote their effective implementation, except when this is contrary to the interests of society. This leads to restrictions and, conversely, when such factors are absent, there are no grounds for restricting property rights. These rights must be developed, and the individual must exercise them at his/her own discretion, as long as they do not become an obstacle to the interests of society.

Therefore, restrictions should be inferior to human rights, except where restrictions are justified by the priority of public interests. First of all, the ECtHR's practice of restricting property rights should be noted. Among the criteria for its restriction, the ECtHR uses a test that includes several questions: 1) was there property? 2) was there an interference with

33 N Bashlykova, 'A blow below the rating as Covid canceled elections in 18 countries of the world' <https://iz.ru/.> accessed 20 January 2022.

34 *Ahmed and Others v The United Kingdom*, App no. 22954/93, Judgement of 2 September 1998 <https://www.echr.coe.int/> accessed 17 April 2022.

the applicant's property rights? 3) was the interference lawful? 4) did the intervention have a legitimate aim? 5) was the interference proportionate to the aim pursued?[35]

The caution established in Art. 4 of the International Covenant on Economic, Social and Cultural Rights is important to justify the need to establish proportional restrictions on the property rights of individuals. It states that restrictions on such rights are likely if they are compatible with their nature. The state may restrict human rights to the extent required by the public interest and the rights of others. From this follows the need to proportionally limit the property rights of individuals. At the same time, the right of an individual must be respected as much as possible. It should not be unduly limited. An excess restriction of a right is when the restriction does not contribute in any way to the social purpose for which the restriction is established. This leads to a balanced, reasonable, and careful approach to restricting human rights. At the same time, the degree and type of restrictions should correspond to socially necessary goals for which this right is limited. Restrictions should contribute to the socially useful goal for which they are imposed. It is also necessary to follow the rules according to which the right of an individual, despite restrictions, must continue to exist. A person's right should be limited only to the extent required for the public interest or the rights of others. Restrictions on human rights are temporary and must cease when the socially useful purpose for which they were established has been achieved. Thus, the recovery of the majority of the population and the cessation of the spread of Covid-19 should be reasons for lifting the restrictions imposed in this regard.

During the Covid-19 pandemic in Ukraine and some other countries, there were some restrictions on entrepreneurship. Here, the restrictions were related to the legitimate expectations of entrepreneurs to make a profit, which they were deprived of to some extent during the introduction of restrictions. The ECtHR stated that the property also included so-called 'legitimate expectations'. For entrepreneurs in some industries, there were restrictions on carrying out activities required by law. If it were not for the quarantine restrictions, they could expect to make the profit they normally would receive from their activities in this area.

The Cabinet of Ministers of Ukraine temporarily banned some actions for the period of quarantine until 24 April 2020:

- Holding all mass events (cultural, entertainment, sports, social, religious, advertising, and other), except for events necessary to ensure the work of state and local authorities. Permitted events were possible only if participants were provided with personal protective equipment, including respirators or protective masks, as well as complied with appropriate sanitary and anti-epidemic measures.
- Work of business entities, which provides for the reception of visitors, including catering establishments (restaurants, cafes, etc.), shopping and entertainment centres, other entertainment establishments, fitness centres, cultural institutions, and trade and consumer services.[36] The exceptions were trade in food and other certain urgent necessities, which were allowed in compliance with quarantine measures. The inability to carry out such measures led to a restriction of the rights of providers of sports and other services and sellers of certain goods relevant to entrepreneurial activities. In addition, the state established control over the prices of medicines, medical supplies, and socially significant goods. This restricted the right of the entrepreneur to freely set prices for certain groups of goods.

35 B Karnaukh, 'Protection of property by the European Court and horizontal effect' (2021) 5 Law of Ukraine 149-166.

36 Resolution of the Cabinet of Ministers of Ukraine (2020) <https://www.rada.gov.ua/> accessed 10 February 2022.

At the international level, a circumstance like the Covid-19 pandemic could lead to restrictions on exports from certain countries. After all, more than thirty countries signed the General Agreement on Tariffs and Trade in 1947. Art. XI of this regulation establishes export restrictions that may be temporarily applied to prevent or mitigate a critical shortage of food or other goods of importance to the exporting party.[37] Such restrictions on the export of goods are due to the need to provide the population of each state with basic necessities, in particular, food products.

The specifics of the Covid-19 pandemic have caused a boom in demand for some products. Among them are food, medicine, and hygiene products. Based on this, there are cases of restrictions on the property rights of human beings to freely purchase certain goods. They consist of the fact that certain goods are sold in a certain quantity, which can be purchased by one person at a time (limiting the number of sales of goods). A prerequisite for such restrictions is the public interest, which is to provide the ability of everyone to purchase products that are in high demand during a pandemic. Such restrictions are necessary so that some people do not accumulate an excess and unnecessary amount of goods, while others will lack such goods due to increased demand.

The rationale for such restrictions is whether there were remedies other than restrictions on the sale of certain groups of goods to address the shortage of medical devices or food. Given the global trend of the pandemic, such tools were not available. After all, there was a shortage of the same goods, especially medical goods, all over the world, and the world economy had limited opportunities to replenish such goods due to the need for time to produce them. An example is the order of distribution of doses of vaccines for the prevention of Covid-19 in individual countries.

We can question the efficacy of state-centric legality in the enforcement of human rights.[38] For example, the right to private property was subject to certain restrictions during the pandemic. In particular, according to Ukrainian legislation aimed at combating the consequences of Covid-19, forced eviction from housing owned by private property was prohibited. This restriction provided tenants with housing regardless of their solvency for the duration of the virus.

3 PUBLIC INTEREST AS A BASIS FOR STATE RESTRICTIONS IN RELATION TO THE COVID-19 PANDEMIC

The protection of human rights must be people-centred.[39] The public interest, in the form of preserving safety, health, and human life, determined the establishment of restrictions in connection with the Covid-19 pandemic. Here, the goal of the state to ensure the security of the nation and the public interest are closely related. State security, environmental security, and public health are of public interest, which can serve as a basis for restricting human rights. The law allows the interests of a person to be realised, but the duties and prohibitions imposed on a person limit the realisation of his/her interest for the sake of the interests of others, determining the priority of the realisation of a legal interest. The objective of law is to ensure proper order.

37 General Agreement on Tariffs and Trade (1947) <https://www.rada.gov.ua/> accessed 10 February 2022.

38 An-Na'im AA, 'The Spirit of Laws is Not Universal: Alternatives to the Enforcement Paradigm for Human Rights' (2016) 21 Tilburg Law Review 255-274.

39 N Jägers, 'Human Rights Enforcement Towards a People-Centered Alternative? A Reaction to Professor Abdullahi An-na'im' (2016) 21 Tilburg Law Review 275-283.

State intervention in the sphere of the property interest of the owner should be minimised and motivated by public interests.[40] Only in extreme cases should the state impose such restrictions on human rights, even if they benefit the whole society and constitute the public good. Therefore, a state cannot unreasonably and arbitrarily impose such restrictions and must consider the public interest underlying such restrictions.

In order to protect the interests of the population, the state established and, in some cases, strengthened protection measures in connection with the difficult situation caused by Covid-19. Thus, to prevent Covid-19, the following restrictions were set:

- the presence of persons in public places without a mask or respirator;
- the movement of more than two persons as a group of persons, except for business necessities or the accompaniment of children;
- the presence of persons under the age of 16 in public places, unaccompanied by adults;
- visiting parks, squares, or recreation areas except in cases of extreme necessity (walking animals) or official necessity;
- visiting children's play areas and sports grounds;
- conducting cultural, sports, entertainment, social, religious, advertising, and other events except those necessary to ensure the work of state authorities and local governments.

These restrictions indicate the reconciliation of private interest with public interest. The rights of the individual in the establishment of restrictions gave way to public necessity for the sake of general security. Ensuring the life and health of the population during the spread of the Covid-19 pandemic proved to be in the public interest, which led to the necessary restriction of certain human rights. The state has justifiably created a system of proportional restrictions on human rights. An important condition for the introduction of such restrictions is that they must act to the extent necessary to meet the public good. At the same time, human rights that do not improve the situation regarding the spread of Covid-19 should not be restricted.

As we can see, the Covid-19 pandemic has forced governments around the world to adopt special measures to limit the spread of the contagion. In the field of the administration of justice, social distancing and other health safety measures have brought about alternatives to the normal management of judicial business.[41] All of this has an impact on human rights.

4 CONCLUSIONS

Public interest in the form of preserving safety, health, and human life determines the establishment of restrictions in connection with the Covid-19 pandemic. Here, the goal of the state to ensure the security of the nation and the public interest are closely related. The rights of the individual in the establishment of restrictions give way to public necessity for the sake of general security. Such restrictions benefit society as a whole and constitute a public good. The state must take into account the public interest that underlies such restrictions. Ensuring the life and health of the population during the spread of Covid-19 proved to be in the public interest and led to the necessary restriction of individual human rights. It must also be agreed that medical influence on a person (the list of which should be exhaustive)

40 V Samoilenko, *Civil and family law of Ukraine* (Yursvit 2007).

41 E Silvestri, 'Italy and COVID-19: Notes on the Impact of the Pandemic on the Administration of Justice' (2020) 2/3 (7) Access to Justice in Eastern Europe 148-155.

can be applied only in cases specified by the law and that are within administrative legal regulation. Other cases of medical services provision aimed to support, improve, or correct a person's health are carried out within the framework of civil law regulation.[42]

In general, the proportionality of human rights restrictions during the Covid-19 pandemic is justified by the following factors. The restrictions imposed were legitimate. They were imposed by public authorities in response to pandemic threats. These restrictions were not feasible by other means. An infectious disease that is rapidly transmitted between people in public places has led to the need to avoid crowds, wear masks, refrain from traveling, and so on. These restrictions were necessary to stop the onset of acute and rapid disease in a large number of people. These restrictions were temporary and were gradually lifted with the passing of the most dangerous stage of the pandemic. Therefore, the rule was followed that restrictions were inferior to human rights as soon as the risk of infection could be minimised by means other than restrictions. Thus, vaccinated people were given more opportunities to travel, in particular by public transport, than those who had not been vaccinated and were, therefore, more vulnerable.

In essence, the prohibitions imposed during Covid-19 are for the public good. They are meant to protect the rights of the population and prevent the rapid spread of the virus. The state has justifiably created a system of proportional restrictions on human rights. An important condition for the introduction of such restrictions is that they must act to the extent necessary to meet the public good. The need for public interest, namely, ensuring the health of the nation, makes these restrictions proportional. At the same time, human rights that do not improve the situation during the spread of Covid-19 should not be restricted.

The most typical restrictions on human rights are restrictions on the right to freedom of movement, restrictions on suffrage (in some countries), restrictions on property rights, and, as a result, restrictions on freedom of liberty. Due to the nature of the Covid-19 pandemic, such restrictions have a positive effect on curbing the spread of the disease. Currently, the vector of major human rights violations is related to compulsory vaccination. We expect that there will be many lawsuits regarding compulsory vaccination in the future. It is necessary to continue this research and follow the practice of the ECtHR.

Our results show that due to the pandemic, human rights are temporarily and reasonably limited. As soon as the danger is eliminated, human rights restrictions are abolished or mitigated. The same thing happens when the threat that caused the restriction can be eliminated in another way. At the same time, governments create conditions for the rapid correction of emerging problems.

The results of this article can be used for further research and development in the science of civil law. The provisions, conclusions, and proposals can be used in law enforcement practice, as well as in scientific and pedagogical activities. The results are aimed at use in law-making.

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42 V Savchenko, '*Dynamics of civil law relations in psychiatry*' (2020) 73(2) Wiadomości Lekarskie 390-395.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

IN SEARCH OF EFFECTIVE SCENARIOS FOR PEACEKEEPING OPERATIONS FOR THE UN AND NATO

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Submitted on 01 Feb 2022 / Revised 18 Feb 2022 / Approved **15 Jun 2022**
Published: **15 Aug 2022**

Keywords: *peacekeeping; peacekeeping operations; peacekeeping effectiveness; UN and NATO peacekeeping operation scenarios*

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The content of this article was translated with the participation of third parties under the authors' supervision.
Managing editor – Dr Serhii Kravtsov. **English Editor** – Dr Sarah White.

How to cite: Rzhevska, N, Moroz A 'In Search of Effective Scenarios for Peacekeeping Operations for the UN and NATO' 2022 3(15) Access to Justice in Eastern Europe 87–106. DOI: 10.33327/AJEE-18-5.3-n000319

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

ABSTRACT

Background: *Peacekeeping operations are considered one of the main tools for negotiating conflicts and are used by the international community to renew and keep international peace and security. The practice of peacekeeping activities has faced fundamental changes that have influenced its aims and principles. That is why the effectiveness of modern peacekeeping operations and operations for peace maintenance, as an answer to global challenges, need further assessment and explanations. The article aims to 1) characterise peacekeeping activities and principles and assess their effectiveness; 2) determine the main problems in the function of peacekeeping mechanisms; identify optimal methods for the future peacekeeping operations of the UN and NATO.*

Methods: *This study proposes a complex systematisation of present approaches, assessing the effectiveness of both peacekeeping operations and operations for the maintenance of peace. The key goal is to develop optimal scenarios for peacekeeping missions.*

Results and Conclusions: *The practical importance of the research is the frameworks and conclusions that can be used as methodical recommendations in the work of international organisations that regulate peacekeeping activities.*

1 INTRODUCTION

There are many cases in the history of humankind when it was possible to stop or predict war by means of third-party interventions. Yet Special Forces providing peacekeeping functions appeared only after the end of the Second World War. Nowadays, the vast majority of peacekeepers operate under the auspices of the UN and other bodies, including NATO. Peacekeeping operations are considered impartial actions for keeping and creating a peaceful environment, as a rule, without the use of weapons. These actions are conducted through the legislative norms of international law and the legislation of the mandate country, by agreement of two parties to the conflict or by its absence. The character of peacekeeping implementation has faced some changes, and together with these, there has appeared a need for a new assessment of peacekeeping with regard to the level of financial and resource expenses and the fulfilment of goals.

Peacekeeping operations are one of the main tools for negotiating conflicts and are used by the international community to renew and keep international peace and security. The first peacekeeping operation was conducted in 1948, after the ceasefire between Israel and its Arabic neighbours, when an unarmed military group of observers, controlled by the UN, started its work.[3] Since that moment, there have been over 70 peacekeeping missions all over the world, 14 of which are ongoing.[4] The practice of peacekeeping has faced fundamental changes that have influenced its principles, aims, and targets. The rising significance of effective peacekeeping calls for new methods and assessments.

Since the beginning of the 1990s, the theoretical and empirical perception of the peace problem and the characteristics and determination of criteria for successful peacekeeping operations has drawn the attention of researchers in the field of international relations.

The way international relations were conducted at the end of the Cold War led to profound

3 A J Bellamy, P D Williams, S Griffin, 'Understanding peacekeeping' (2015) 3 PP 75, 80.

4 United Nations Peacekeeping Official Website, 'Principles of Peacekeeping' <https://peacekeeping.un.org/en/principles-of-peacekeeping> accessed 2 February 2022.

changes in the nature and scope of peacekeeping operations. We can identify two types of changes: demand for and supply of peacekeeping operations. Demand for peacekeeping operations increased after the collapse of the bipolar system, the cessation of the mediation of superpowers in the wars on the African continent, and the outbreak of devastating civil wars after the collapse of communist regimes. Help in ending 'new wars',[5] which are characterised as internal (rather than interstate) and by decentralisation, was a new requirement for the international community. At the same time, after the end of the Cold War, the UN was given the opportunity to deploy peacekeeping operations in previously inaccessible territories (due to the USSR veto). Thus, peacekeeping operations were given a more complex context, resulting in the establishment of more ambitious mandates and active involvement not only in the process of 'freezing' conflicts but also in the transition to a peaceful state. They are conventionally called 'multidimensional' or 'second-generation peacekeeping operations'.[6]

In 1992, the UN General Assembly adopted Resolution A/47/277 'An Agenda for Peace'. The document establishes a typology of peacekeeping operations that is still valid today. Chapter VII mentions the possibility of conducting coercive peace operations that are different from peacekeeping operations. The list of tasks is also reflected in the Supplement to an Agenda for Peace. 'Second-generation' peacekeeping operations included the activities provided in Section VI. This means that the success of their implementation depends on the goodwill of the parties to the conflict, as well as on the levers of influence of the UN.[7] The transitional relief missions in Namibia (UNTAG) can be considered successful, as can those in Mozambique (UNOMOS) and El Salvador (UNUAS). However, the organisation's inability to prevent or limit genocide in Rwanda in 1994, its inefficiency in reaching political agreement combined with the relatively large military losses in Somalia, and its inability to protect Bosnian civilians in 1995 led to a profound rethinking of the UN peacekeeping system.[8]

Peacekeeping operations are carried out when a conflict poses a real threat to global or regional security.[9] As a result of strict adherence to the principles of inviolability of borders and sovereignty and restrictions on the use of force, the UN faced the problem of the 'horror of inaction', when the interests of the state prevailed over human rights. It was only after the 'three failures' that the protection of human rights during peacekeeping operations received special attention. In August 2000, Lakhdar Brahimi delivered a report providing 69 recommendations for improving UN peacekeeping operations in planning and developing a strategy, deploying and supporting peacekeeping operations, and information policy.[10]

For the first time, the issues of humanitarian intervention and the relationship between human rights and non-interference in the internal affairs of the state were brought up for wide discussion in the late 1990s. It was then that a new form of peacekeeping operations emerged, called 'humanitarian intervention', which gave priority to the protection of human rights. According to Chapter VIII of the UN Charter, coalitions with regional organisations were envisaged for coercive peace operations and humanitarian interventions.[11] The first third-generation peacekeeping operation was considered to be the actions of the North Atlantic Treaty Organization (NATO) against Yugoslavia in connection with the conflict

5 I N Sopilko, 'Formation of cybersafety policy (Ukrainian experience)' (2013) 27 WASJ 371, 374.

6 Bellamy, Williams, Griffin (n 3) 75-80.

7 An Agenda for Peace UN Documents Gathering a body of global agreements of 31 January 1992 <http://www.un-documents.net/a47-277.htm> accessed 2 February 2022.

8 L Weaver, UN Peacekeeping: Lessons Learned in Managing Recent Missions (DIANE Publishing 2014).

9 'Principles of Peacekeeping' (n 4).

10 United Nations Official Website, 'Brahimi Report' (2000) <http://www.un.org/en/events/pastevents / brahimi_report.shtm> accessed 2 February 2022.

11 An Agenda for Peace (n 8).

in Kosovo in 1999, as well as the presence of the Australian government-led international troops in East Timor in 1999. Such missions were characterised by the establishment of a temporary mandate to create a peaceful environment in which the UN could perform its civilian tasks.[12] Thus, UN-NATO cooperation was not established during the Cold War. However, with the development of third-generation UN peacekeeping operations, the range of tasks defined by the mandate of the operation was expanded, and the structure of the peacekeeping mission became more complex. NATO has undergone a significant metamorphosis: from the traditional use of member countries' military capabilities to police functions in peacekeeping missions, technical assistance in the post-war period, and overcoming man-made and other disasters (for example, the peacekeeping missions in the Balkans, anti-piracy, and modern operations in Iraq).

The fourth generation of peacekeeping operations was peace-building operations that are used to solve a wide range of civilian tasks. In the 'Agenda for Peace', Boutros Boutros-Ghali described peace-building as follows: support for structures that seek to strengthen peace and restore conflict; comprehensive efforts to identify and support institutions that promote peace, make agreements and organise interaction between former enemies, and strengthen a sense of confidence and well-being among the people.[13] The meaning embedded in the concept has changed many times. Initially, peace-building meant a set of measures for demobilisation, the reintegration of the subjects of confrontation, and the implementation of democratic transit, after which conflicts could be resolved not militarily but politically. By the end of the 1990s, the peace-building program had been significantly expanded.

The main goals of post-conflict peace-building are:

1) Preventing the resumption of open violence and maintaining a 'negative peace', in which violence has been stopped, but the root and structural causes of the conflict remain unresolved;

2) Creating conditions for the establishment of a 'positive' or 'sustainable' peace by promoting reconciliation between the parties to the conflict and eliminating the root causes of conflict.

The toughest measure of peace-building operations is the establishment of a temporary administration, in which the guarantee of sovereignty over a certain territory and executive, legislative, and judicial powers are temporarily transferred to the UN mission. To date, only two such administrations have been established: the United Nations Interim Administration Mission in Kosovo (UNMIK) and the United Nations Interim Administration in East Timor (UNTAET) in 1999. The United Nations Conflict Stabilization Mission in Haiti (MINUSTAH), although not a fourth-generation operation, has all these basic features as well.[14] The complexity of the structure and functional tasks has led to an expansion of the range of participants involved in the peace-building process. They include regional organisations such as NATO and the Organization for Security and Co-operation in Europe (OSCE), together with specialised UN agencies, international NGOs, and international financial institutions. As a result, there is the problem of coordinating the goals and efforts of participants in the peacekeeping process. Resolving this issue is still on the agenda for the UN.[15]

12 D J Durch, V K Holt, C R Earle, M K Shanahan, UN Peace Operations (The Henry L Stimson Centre 2017).

13 An Agenda for Peace (n 8).

14 J Koops, N MacQueen, T Tardy, P D Williams, Oxford Handbook of United Nations Peacekeeping Operations (OUP 2015).

15 'Principles of Peacekeeping' (n 4).

The fourth generation of peacekeeping operations has come under considerable criticism. Oliver Richmond, David Chandler, and Michael Ruff argue that peace-building as a paradigm is based on liberal values and aims to create a 'liberal world' based on democracy, a market economy, and other elements of 'modern statehood'. This concept of peace-building is in the interests of the countries of Northern and Western Europe, for which peace-building is a tool for the spread of neo-colonialism.[16]

Modern experience and an analysis of UN peacekeeping suggest the emergence of the fifth generation of peacekeeping – the so-called hybrid missions, which are characterised by the deployment of troops under the decentralised command of the UN and regional organisations. The emergence of such missions is a consequence of the redistribution of responsibilities for the implementation of tasks between the subjects of the global peacekeeping system and a change in the approach of Western states towards respecting sovereignty and determining the limits of non-interference in internal affairs. NATO member states and other Nordic and Western countries that internalise the concept of the use of force to protect civilians and human rights are conducting peaceful interventions, regardless of UN decisions (for example, the invasion of Iraq and the promotion of security in Afghanistan). The UN's response to this trend has been a call in the New Horizon Initiative's report to establish a coordinated global peacekeeping system that involves a wide range of peacekeepers (states, international and regional organisations).[17] A clear example of the transition to the fifth type of UN peacekeeping operations was the peacekeeping operation in Haiti (MINUSTAH), where the military contingents were, for the most part, the armed forces of South America.[18]

At present, there are a couple of main alternative ways to assess peacekeeping effectiveness, which are based on the priority of assessing its measurements and are as follows: the ability to prevent the occurrence or escalation of the conflict; the cessation of hostiles or decrease of violence rates in the active conflict;[19] geographical containment;[20] the presence of military contingents;[21] and budget level. Yet, in recent decades, many researchers have pointed out the shortcomings and negative consequences of UN PKOs.[22] There is still no common approach to determine an effective scenario of development for peacekeeping operations and operations for peace maintenance. Besides, the criteria for determination are vague. The conditions of economic, political, and social development are key factors for the conception of so-called positive peace. That is why the effectiveness of modern peacekeeping operations and operations for peace maintenance, as an answer to global challenges, needs assessment and further grounding.

The aim of the present research is to characterise the criteria for assessing the effectiveness of peacekeeping activities, as well as to identify the main problems of the peacekeeping mechanism, which will lead to the optimisation of scenarios for future UN and NATO peacekeeping operations.

16 O Richmond, 'The problem of peace: understanding the "liberal peace"' (2006) 6 JCSD 291, 314.

17 A L Roy, S Malcorra, The New Horizon Initiative: Progress Report No. 6. (United Nations Peacekeeping 2017).

18 Bellamy, Williams, Griffin (n 3) 75-80.

19 L Hultman, J Kathman, M Shannon, 'Beyond keeping peace: United Nations. Effectiveness in the midst of fighting' (2014) 108 APS Rev 737, 753; J D Salvatore, 'The effectiveness of peacekeeping operations' (2017) 4 OUP 36, 37; A Ruggeri, H Dorussen, T-I Gizelis, 'Winning the peace locally: UN peacekeeping and local conflict' (2017) 71 JCR 86, 87.

20 K Beardsley, K S Gledisch, 'Peacekeeping as conflict containment' (2021) 17 ISR 67, 89.

21 B Heldt, P Wallensteen, 'Peacekeeping operations: global patterns of intervention and success' (2006) 2 FBAP 32.

22 B Pouligny, *Peace Operations Seen from Below: UN Missions and Local People* (Kumarian Press 2006); S Autesserre, *The trouble with the Congo* (Cambridge University Press 2010) https://doi.org/10.1017/CBO9780511761034; S Autesserre, *Peaceland* (2014) https://doi.org/10.1017/CBO9781107280366; S Autesserre, *Frontlines of Peace* (Oxford University Press 2021).

2 CRITERIA FOR PEACEKEEPING

In the early 1990s, the theoretical and empirical understanding of the problem of peace, its characterisation, and the definition of criteria for the effectiveness of peacekeeping attracted the attention of researchers in the sphere of international relations. In 1988, Deal published the first work on assessing the effectiveness of peacekeeping, which went beyond the descriptive approach ('Territorial changes and militarized conflict '). According to his research, the main criteria for success in maintaining peace is the ability, within the mission, to limit armed conflicts and prevent their resumption. Other criteria are related to the ability of peacekeepers to facilitate a peaceful settlement of the situation. Counterfactual scenarios are considered those that contradict the actual trends (for example, the possible consequences of resolving the conflict without sending a peacekeeping mission). Deal outlined the range of tasks identified by peacekeepers for successful operation and then compared promising scenarios with basic expectations and real results.

For many years, the improvement of the concept of peacekeeping operation effectiveness was aimed at updating the improvement of only one aspect – ensuring long-term peace. However, there are obviously other aspects that determine success. The continuation of the peacekeeping operation depends on many factors, including progress. Therefore, an assessment designed to measure the level of progress can be an important element of any peacekeeping operation. In general, scientists have identified three universal dimensions for assessing the effectiveness of peacekeeping operations. The first is characterised by the ability to prevent the emergence or escalation of conflict. Maintaining peace in post-conflict conditions remains one of the main tasks of peacekeeping and is the most researched aspect of the effectiveness of peacekeeping.

Some scholars believe that the risk of escalating conflict is reduced by 75-85% or more in the presence of peacekeepers. Their work pointed to a noticeable difference in the importance of peacekeeping operations after the Second World War, when peacekeeping did not affect the duration of peace in a post-conflict situation, and after the Cold War, when the impact was significant.[23] However, a different conclusion was reached by Collier, Heufler, and Soderbom. They argue that despite economic recovery, the best way to achieve stable peace is for the peacekeeping mission to play a key role in ensuring a stable post-conflict situation. In a broader sense, considering the issue of third-party monitoring of peace agreements, the authors concluded that five years after the signing of the peace agreement, the share of victims is 68%, while in the absence of control over peace conditions, the figure reaches only 32%.[24]

The second universal measure of the effectiveness of peacekeeping operations is the cessation of hostilities or the reduction of violence in the current conflict. Hultman, Katmai, and Shannon concluded that the desire of peacekeepers to resolve the dispute affects the reduction of hostilities between opposing parties if the military potential of peacekeepers is greater than the parties alone.[25] According to a study by Baisley and Gredig, peacekeepers are reducing violence by geographically deterring conflict. Ruggeri, Dorussen. and Gizelis note that the presence of peacekeeping contingents reduces the duration of the conflict at the local level.[26]

23 Horbachova, Dudaryov, Zarosylo, Baranenko, Us (n 21) 1-6.

24 P Collier, A Hoefer, M Soderbom, 'Post-conflict risks' (2008) 45 JPR <https://core.ac.uk/download/pdf/6250412.pdf> accessed 2 February 2022.

25 Hultman, Kathman, Shannon (n 22) 737-753.

26 Ruggeri, Dorussen, Gizelis (n 24) 86-87.

Accordingly, Doyle and Sambanis also believe that UN missions, under a strong mandate, are effective in resolving conflict and ending violence against civilians. Geographical deterrence is another universal criterion for determining the effectiveness of peacekeeping. Baisley argues that the presence of peacekeepers reduces the risk of conflict in neighbouring countries. In another scientific study, Baisley and Gleditsch argue that peacekeeping activities curb the spread of violence during civil wars. Through the analysis of changes in conflict zones in different countries, they concluded that peacekeepers manage to contain and reduce conflict zones.[27]

A methodological problem for studying the consequences of peacekeeping is the bias in the choice of mission: the probability of successful implementation of the operation is higher when peacekeepers are sent to areas of small conflicts. However, today, the risk of this problem in determining the effectiveness of peacekeeping activities is quite low.[28]

The findings of these studies indicate a positive effect of peacekeeping on the establishment of lasting peace in post-conflict circumstances. However, not all operations are effective. Two key characteristics of peacekeeping and peacekeeping operations are the mandate (provided in accordance with Sections VI or VII of the UN Charter) and its scope (in terms of budget and military composition).[29] Abilova and Novosseloff believe that traditional peacekeeping operations, which are characterised by unarmed or low-armed forces with very limited mandates, do not affect the duration of peace. On the other hand, there is a significant link between the successful implementation of the peace-building process and the previous multifaceted peacekeeping operation with a 'broad mandate'. Distinguishing between hard and soft peace-building measures, researchers believe that multifaceted peacekeeping is 'effective in both cases', but UN missions in general have the most positive impact on preventing minor violence and encouraging democratisation and institution-building after a civil war, but they are ineffective in resolving or preventing the resumption of interstate conflicts and wars.[30]

Many studies consider the size of military contingents to be decisive in resolving the conflict. In particular, Hultman, Kathman, and Shannon concluded that the more armed personnel involved in UN missions, the faster the process of reducing violence between the parties to the conflict.[31] Some studies have shown that missions that use decisive peace-building measures promote cooperation between the parties to the conflict[32] and increase the likelihood of achieving long-lasting peace.[33] Moreover, the level of protection of the civilian population both during and after the conflict is much higher in the deployment of a 'decisive mission'.[34] The global trend also shows a high correlation between the increase in the number of UN military contingents involved in peacekeeping operations during the 1990s and the decrease in the number of internal armed conflicts.[35] In addition, assessing the determinants of post-

27 Beardsley, Gledisch (n 25) 67-89.

28 H Hegre, L Hultman, HM Nygard, 'Evaluating the conflict-reducing effect of UN peacekeeping' (2018) 81 JP 215, 232.

29 Charter of the United Nations: Chapter VII of 2018 <http://www.un.org/en/sections/un-charter/chapter-vii/index.html> accessed 2 February 2022.

30 O Abilova, A Novosseloff, Demystifying Intelligence in UN Peace Operations: Toward an Organizational Doctrine Novosseloff (International Peace Institute 2016).

31 Hultman, Kathman, Shannon (n 22) 737-753.

32 Ruggeri, Dorussen, Gizelis (n 24) 86-87.

33 S Kreps, Why does peacekeeping succeed or fail? Peacekeeping in the democratic republic of Congo and Sierra Leone. In modern war and the utility of force: challenges, methods, and strategy (Routledge 2010).

34 Hultman, Kathman, Shannon (n 22) 737-753.

35 Heldt, Wallensteen (n 26) 32.

conflict risk, Collier, Heufler, and Soderbom found that 'increasing the cost of peacekeeping operations halves the risk of failing to meet certain mandate targets from 40% to 31 %'. While some missions receive an annual budget of more than a billion US dollars, the budgets of other missions are usually a maximum of 50 million.[36]

3 THE INFLUENCE OF PEACEMAKING ON CONFLICT AND ITS EFFECTIVENESS

As the budget sets clear limits on the use of military contingents, its size affects the prospect of peace.

Table 1. The impact of peacekeeping aspects on the dynamics of conflict

Result	Mandate	Presence of peacekeepers	Size of military contingents	Police (UN)	Observers
Peace duration	✓	✓	✓	Minor	Minor
Conflict duration		Mixed			
The number of civilian deaths	✓		✓	✓	x
Genocide		✓ Long-term perspective X Short-term perspective			
Number of clashes with high levels of violence			✓	Minor	Minor
Peaceful settlement		Mixed			
Geographical deterrence of the conflict	✓	✓	✓	x	Minor
Duration of local conflict		✓	✓		
Duration of local peace		Mixed	Mixed		
Peacekeeping	✓	✓	Minor		

✓ – major influence, x – no influence

According to the results shown in Table 1, peacekeeping, regardless of the method and criteria for assessing its effectiveness, contributes to lasting peace, implements measures to protect civilians, promotes respect for human rights, and restrains the spread of violence beyond the conflict. Some missions contribute to the intensification of the peace process, but the nature of the impact on the development of this process depends on the type of mandate. There is reason to believe that peacekeeping operations potentially reduce the duration of local conflict but do not affect the duration of local peace. Finally, it is not possible to accurately assess the extent to which the presence of peacekeepers increases the chances of a peaceful settlement, as the expected positive outcome (compromise, negotiation, mediation, satisfaction of the parties) depends on the circumstances of the conflict and mandate conditions.[37]

36 Collier, Hoefer, Soderbom (n 37).

37 United Nations Archives, UNOG Registry, Records and Archives Unit, 1870- (Archive) History of the League of Nations (1919-1946) <https://unog.ch/80256EDD006B8954/(httpAssets)/36BC4F83BD9E4443C1257AF3004FC0AE/%24file/Historical_overview_of_the_League_of_Nations.pdf> accessed 2 February 2022.

All in all, it can be said that assessing the long-term impact of peacekeeping and finding optimal scenarios for peacekeeping operations is a new area of research that is only in the developmental stage. The effectiveness of a peacekeeping operation is related to the prevention of violence and the creation of peaceful societies (positive peace). Universal criteria for assessing the effectiveness of a peacekeeping operation are the cessation of hostilities or the reduction of violence, the geographical deterrence, the number of troops, the type of mandate, and the size of the budget. There is no single approach to determining an effective scenario for peacekeeping and peacekeeping operations. In addition, the criteria for determining success are unclear. The conditions for economic, political, and social development are a necessary part of the concept of positive peace. That is why the effectiveness of modern peacekeeping and peacekeeping operations needs to be evaluated and further substantiated in response to global challenges. Since the UN entered a new level of peacekeeping activities after the end of the Cold War, the global community has been concerned about the effectiveness of peacekeeping operations. Based on previous experience, the UN has pointed out the main factors that are crucial for providing successful peacekeeping operations.

The main indicators to provide an effective peacekeeping operation are the following:

- following principles of harmony, impartiality, and non-use of force, with the exception of self-dependence and protection of mandate cases;
- legitimacy and credibility of structure, particularly in the eyes of locals;
- promotion of responsibility of the host country for participation in the peace process on the local and international levels.[38]

According to the UN criteria, the peacekeeping operations of the Third, Fourth and Fifth generations (from the end of 1990 until now) can be considered effective. However, we think that information from official sources is not quite objective. Some operations are only partly successful because not all the main goals were reached by UN peacekeeping operations. To truly determine successful UN peacekeeping operations scenarios, it is necessary to examine how UN peacekeeping operations assess themselves. The organisation has a few mechanisms for assessing peacekeeping operations that are within the competence of management offices.

The subjects of peacekeeping effectiveness assessment are the United Nations Security Council, Special Political and Decolonization Committee (Fourth Committee), the Committee on Administrative and Budgetary Questions (Fifth Committee), the Special Committee on Peacekeeping Operations, the Advisory Committee on Administrative and Budgetary Questions, the Office of Internal Oversight Services, the Board of Auditors, the Committee on Program and Coordination, and the Joint Inspection Unit.[39]

Thus, the scheme shows how important it is to form a new conception of the collection and assessment of data, as well as to form complex assessment activities. The main weak point of the modern system of effectiveness is that it does not have specific criteria or guidance for values. Different tools are used for different purposes without a strict division of their accountability, information on their usage, or an organised basis for training. There is a gap between the budgeting system, which is aimed at results, and the reporting on mandate usage and their context analysis.

The start of NATO peacekeeping activities is considered to be the ratification of the Dayton Agreement on peace on 14 December 1995 as part of the UN peacekeeping mission in Bosnia and Herzegovina UNPROFOR (United Nations Protection Force). The Implementation

38 North Atlantic Treaty Organization, 'Brussels Summit Declaration' (2018) <https://www.nato.int/cps/en/natohq/official_texts_156624.htm> accessed 2 February 2022.

39 List of Peacekeeping Operations 1948-2018 <https://peacekeeping.un.org/sites/default/files/180413_unpeacekeeping-operationlist_2.pdf> accessed 2 February 2022.

Force (IFOR) formally came into power on the territory of Bosnia and Herzegovina (BIH) with the adoption of the resolution of Security Council 1031,[40] which confirmed the delegation of authority to NATO in order to conduct the UN peacekeeping operation. During the first stage of operations, the factors for assessment were the criteria of situation stability. After that, the indicators of effectiveness, the total number of which was 25, were divided into three groups according to the spheres of usage: security, quality of life, and democratisation level. The analytic group consisted of leading experts in exploitation studies, analysts, and experienced military staff.[41]

The necessary component for planning operations and conducting actions with further assessment was the understanding of the operating environment. System analysis is a formalised method that helps to shape this understanding.

The determination of the format for assessment and backing up of the planning process include: the formation of a methodology for operation assessment; the determination of results; the monitoring of effectiveness indexes; the monitoring of strategic and operational risks and activeness; the categorisation and determination of the types of effectiveness characteristics; measures of effectiveness development (MOE); measures of performance development (MOP); the determination of the implementation of the data and relevant objectives (Allied Joint Doctrine for Operational-level Planning: Allied Joint Publication-5 C-M).[42]

Also, in order to build up effective operations scenarios, NATO created the Military Decision-Making Process (MDMP) and NATO Crisis Response System (NCRS). The Military Decision-Making Process (MDMP) is the only established and checked analytic process. It adapts the analytic approach of NATO for task-solving, which helps the commander and personnel develop an assessment of a plan and order of completed actions. Although the main task of the MDMP is the approval of the mission itself, its analytic basis is used in the process of operational evaluation.[43]

According to the structure of the decision-making process, the first element is getting or waiting for a new mission. This can emerge from the current operation or can be foreseen in an order made by the leadership at headquarters. The next stage is the analysis of the mission, which is crucial for the MDMP. The result of mission analysis is the determination of the tactical problem and the beginning of the real decision-making process.[44] Thus, the interrelated element of the system of activities that helps to form effective scenarios for future missions is the NATO Crisis Response System, which conducts the necessary level of preparation and support for the prevention of crises and conflicts, and calms crisis situations during the mission. The NCRS is a multi-phase mechanism for coordinating the efforts of NATO member-states, the aim of which is in the complex set of variants and activities for preparation for crisis situations, their management, and reaction.[45]

40 UN Documents, Security Council – Veto List (in reverse chronological order) <http://research.un.org/en/docs/sc/quick/veto> accessed 2 February 2022.

41 A Williams, J Bexfield, F Fitzgerald, F Johannes de Nijs, NATO operations assessment handbook: recent developments in measuring results in conflict environments (NATO Communications and Information Agency 2015).

42 C Aksit (ed), Allied joint doctrine for operational level planning. The development, concept and doctrine centre (NATO standardization office 2002).

43 J Bercovitch, R Jackson, 'Conflict resolution in the twenty-first century: principles, methods, and approaches' (2014) 2 Univ M Pr 238.

44 NATO Strategic Planning for Contracting Operations. Office of the Under Secretary of Defense for Acquisition, Technology and Logistics <https://www.acq.osd.mil/dpap/ccap/cc/jcchb/Topical/A_files/guides/Guide_to_Strategic_Planning_Process> accessed 2 February 2022.

45 NATO/OTAN: NATO Supreme Headquarters Allied Powers Europe; An Introduction to Operations Planning of 11 September 2018 <https://shape.nato.int/page11283634/knowing-nato/episodes/the-nato-structure.aspx> accessed 2 February 2022; An Introduction to Operations Planning at the Operational Level NATO of 2016 <https://www.act.nato.int/images/stories/events/2016/sfpdpe/copd_v20_summary.pdf> accessed 2 February 2022.

The additional elements forming effective NATO operations are consultation and analytical reporting of the RAND Corporation, which have become a crucial point for adopting and changing strategies after the dissolution of the USSR in 1991. Most of the research done by the RAND Corporation is based on the use of system analysis, which is a vital part of the planning and strategic and operative assessment of any NATO mission.[46] NATO has a comprehensive system for creating effective mission scenarios and planning, assessing, and reacting to risks from the external environment, which includes the following mechanisms:

- NATO Crisis Response System Manual (NCRSM);
- Military Decision-Making Process (MDMP);
- NATO Crisis Response System (NCRS);
- Consultations and analytical reporting of the third side (RAND Corporation).

Even so, NATO assessment and planning are not comprehensive. For example, there is no assessment of the results of peacekeepers' activities themselves. Moreover, the geographical borders of influence and NATO political support levels are less than those of the UN. We consider the cooperation with the UN to be important for the fulfilment of the political and strategic interests of NATO. Enhancing the borders of cooperation in terms of conducting missions can increase the effectiveness level of attempts to solve conflict situations and reach peace.

4 OPEN DATABASES OF THE WORLD BANK, UN DEPARTMENT OF PEACEKEEPING – DATA AND EXAMPLES OF STATE SITUATIONS

According to the present research, we believe that peacekeeping and peacekeeping operations that succeed in reducing the intensity of conflict can be effective in increasing the duration of post-conflict peace and preventing the escalation of the crisis. To confirm these conclusions and identify effective scenarios for the UN and NATO peacekeeping and peacekeeping operations, we conducted a statistical analysis of the peacekeeping activities of certain organisations and the overall conflict situation in the world from 1990 to 2017. To provide a comprehensive description, the following indicators were identified: borders, timeframes, duration of past and current UN and NATO peacekeeping missions, number of peacekeeping contingents by type (experts, observers, individual and formed police units, staff officers, military contingents and servicemen, gender, country of provision and mission on which they were sent), the number of deaths as a result of armed conflict in the country by years, the number of incidents during peacekeeping missions by type (accident, illness, act of malice, suicide), the type of contingent affected by the incident by years and countries, and the change in GDP (%) by years and countries.

In our research, the sources of information are open databases of the World Bank, the United Nations Department of Peacekeeping, and the official NATO website.[47] Statistical analysis was performed using comprehensive software for analytical modelling and data visualisation via Microsoft Power BI. According to the results of the study, the number of deaths as a result of armed clashes since 2011 began to increase from 22,931 to 104,679 in 2016 and 68,969 in 2017. This is due to a large number of volatile conflict situations in sub-Saharan Africa (18), East Asia and the Pacific (7), and the Middle East and South Africa (6). Accordingly, these regions recorded the highest number of victims from 2011 to 2017:

46 North Atlantic Treaty Organization (NATO). RAND Corporation Official Website <https://www.rand.org/topics/north-atlantic-treaty-organization.html> accessed 2 February 2022.

47 North Atlantic Treaty Organization, NATO and Afghanistan <https://www.nato.int/cps/en/natohq/topics_8189.htm> accessed 2 February 2022.

- The Middle East and South Africa – 354,552;
- South Asia – 107,551;
- Sub-Saharan Africa – 51,472.

However, the largest number of peacekeepers was sent to the region of sub-Saharan Africa (406,639), which is almost ten times less than recorded in the Middle East and North Africa (36,872) or Latin America and the Caribbean (47,742). Thus, in order to reduce casualties and reduce violence, conflicts in South Asia, the Middle East, and South Africa, there was a need for peacekeeping organisations. The largest number of UN peacekeeping operations, in particular those currently active, is concentrated in sub-Saharan Africa. The highest numbers of casualties in armed conflict were recorded in Ethiopia (120,494), Eritrea (42,269), Sudan (41,301), Somalia (31,775), Angola (27,716), the Democratic Republic of the Congo (24,634), Nigeria (158,224), the Congo (1,419), and Sierra Leone (11470). The largest number of victims in sub-Saharan Africa was recorded during the development of conflict situations and the deployment of UN peacekeeping missions.

Most peacekeepers between 1990 and 2017 were sent to the Democratic Republic of the Congo (174,587), South Sudan (67,540), Côte d'Ivoire (66,456), Liberia (58,143), Mali (53,570), the Central African Republic (48,709), and Sudan (37,370). In 2015-2017, the largest number of victims was recorded in Sudan, South Sudan, Somalia, Chad, and the Democratic Republic of the Congo. Among the countries of sub-Saharan Africa, peacekeeping contingents are provided by Ethiopia, Rwanda, Ghana, Senegal, Tanzania, Chad, and Togo. A relatively significant share of peacekeepers are women (7%, 3,000 people).

Among the countries sending UN missions to sub-Saharan Africa are India (0.86 million), Bangladesh (0.86 million), and Pakistan (0.68 million). Conflicts are taking place in the territories of these states, and UN peacekeeping missions are underway. Among the deployed peacekeepers (8 million people), a small proportion is women (3.77%, 3,000 people). Seven million (83.99%) of those sent on missions are military contingents, 1 million (7.03%) are police units, 410,000 (5.02%) are individual police units, and 17,000 (2.2 %) are experts. The GDP is unstable and has been declining from 2011-2014 in Sudan, Namibia, Liberia, the Democratic Republic of the Congo, Burundi, the Central African Republic, Sierra Leone, Côte d'Ivoire, Chad, South Sudan, and Eritrea. Among the countries to which UN peacekeeping missions have been sent, only Ethiopia, Uganda, Mozambique, Rwanda, and the Democratic Republic of the Congo have a stable GDP, but they belong to the group of underdeveloped countries.

It should be noted that according to our findings, not all completed UN operations in the region can be considered successful. UNTAG and UNOMOZ are examples of successful 'multidimensional' UN operations, but experience has shown that the organisation's inability to prevent or limit genocide in Rwanda in 1994 and failure to reach a political agreement combined with relatively large military losses in Somalia means that second-generation UN operations cannot provide a decisive response to current conflict threats.

The largest number of victims as a result of armed conflict from 2011 to 2017 is in the geographical region of the Middle East and South Africa (354,552 people). The greatest casualties were recorded in the period 2012-2017, including 71,669 people in 2013 and 73,756 people in 2014. This is due to a large number of unstable conflict situations in Syria (281,612), Iraq (86,216), and Yemen (18,989). The largest number of peacekeepers was sent to Lebanon (31,553 in 2015-2017) and Syria (3,537 in 2014-2017). In 2017, peacekeepers were withdrawn from Iraq. Thus, to reduce the number of victims and the level of violence in the region, the conflicts in Yemen, Iraq, and Syria need the attention of the world community and peacekeeping organisations. NATO was involved in resolving the conflict in the Middle East. In particular, from 2004 to 2011, there was a NATO Training Mission conducted in

Iraq, but its main purpose of which was to conduct military training and, therefore, it cannot be considered a peaceful mission in response to modern threats to world peace and security.

Among the countries of the Middle East and North Africa, the most numerous peacekeeping contingents are Egypt (3,031), Morocco (2,143), and Jordan (863). A small proportion of peacekeepers are women (1.43%, 92 people). The countries that send the largest number of peacekeeping contingents to the region are mostly those with a stable peace situation: Indonesia (139,000), Italy (139,000), India (115,000), Nepal (109,000), France (104,000), Ghana (93,000), Malaysia (87,000), and Spain (8,100). Among the peacekeepers sent (1,230,000 people), a small share is women (3.93%, 5,000 people). 1,253,000 (97.5%) of the personnel sent on missions are military contingents, and 17,000 (1.3%) are experts. The GDP indicator is unstable and tends to decrease from 2016-2017 in Kuwait, Yemen, and Iran. Among the countries to which UN peacekeeping missions have been sent, only Lebanon and Iraq have a stable GDP ratio. However, Iraq is an agro-industrial country with a developed oil sector, thanks to which it has a stable GDP ratio. Of the seven completed UN peacekeeping missions, only the UN Iraq-Kuwait Observation Mission (1990)[48] is 'multidimensional', but it was unsuccessful. The UN Observer Mission in Syria (2012) also failed. Other UN operations were conducted before the collapse of the Soviet Union, and their purpose and mandate did not meet modern challenges and threats.

The Middle East and North Africa have areas with long-standing active conflicts. To ensure sustainable development and peace in the region, the UN should pay attention to the conflicts in Yemen, Syria, and Iraq in particular. The second region in terms of the number of victims of military confrontation from 2011-2017 is South Asia (107,551 people). The highest number of victims was in 2009, which was due to the development of conflict instability in Sri Lanka (10,165 victims), Pakistan (6,864), Afghanistan (6,341), and India (1,115). While no casualties have been reported in Sri Lanka since 2010, and the number has been declining in India and Pakistan, the death toll has risen in Afghanistan from 2009 to 2017. It should be noted that the UN sent a peacekeeping mission to Afghanistan from 1988-1990.

The purpose of the UN Mission in Afghanistan and Pakistan (UNMAP) was to assist in the implementation of the Afghanistan settlement agreements and to investigate and report possible violations of any statements of the agreements. The effectiveness of UNMAP's mandate has been hampered by a number of difficulties: climate conditions of the territory, the untimely reporting of incidents that have hampered the prompt response to them, and security conditions. A UN Political Mission in Afghanistan[49] has been operating since 2002 to assist in building the foundations for sustainable peace and development, supporting the government of Afghanistan, building regional cooperation and coordination and cooperation with NATO, and facilitating the delivery of humanitarian aid.[50] The current mission is political, and the number of peacekeepers in the region is insignificant: 15-20 people from 2009-2016. In 2017, no peacekeepers were sent to the country.

Another active mission in the region is the UN Military Observer Group in India and Pakistan (UNDOF), which has been operating since January 1949 to monitor the ceasefire between India and Pakistan in Jammu and Kashmir. The annual budget is $21,134,800. The mission staff consists of 41 observers from Crete (9), the Republic of Korea (7), Sweden (5), the Philippines (4), Thailand (4), Switzerland (3), Uruguay (3), Chile (2), Italy (2), and Romania (2). According to the results of empirical research, the presence of observers and

48 United Nations Iraq-Kuwait Observation Mission (UNMIK) of 2 August 1990 <https://peacekeeping.un.org/sites/default/files/past/unikom/background.html> accessed 2 February 2022.

49 Ibid.

50 D S Yost, NATO's balancing act united states institute of peace (United States Institute of Peace Press 2014).

experts in the conflict region has almost no effect on the duration of the established peace and does not contribute to resolving conflicts and reducing the number of casualties in military confrontations. There are 15 NATO operations carried out in South Asia, the vast majority of which (14) were conducted in Afghanistan. The NATO Training Mission in the Republic of Afghanistan has been underway since 2009 to support the establishment of a capable and self-sufficient Afghan National Security Force, the Afghan National Army (ANA), and the Afghan National Police (ANP). Since 2015, Operation Strong Support has been underway, providing training, advice, and assistance to Afghan forces and agencies. Among the troop-contributing states are the United States, Western Europe, Azerbaijan, and Ukraine. At the 2018 summit in Brussels, allies and partners agreed to extend their commitment to financial support for the Afghan security forces until 2024. Since 2017, the size of the US military presence has increased from 13,000 to 16,000.

Thus, there are two unstable conflicts in South Asia with a high number of victims in armed conflicts. Political and conflict monitoring missions do not promote a stable peace. Conducting military training and consultations without establishing a political dialogue is not effective in resolving the conflict. More decisive and coordinated action by the global community is needed to resolve the situation in the region. After the collapse of the Soviet Union, a number of armed conflicts took place in Eastern Europe and Central Asia: the Balkan Wars, the Abkhaz War, and the Civil War in Tajikistan. The global community responded to the threat to peace and security in the 1990s, and the UN sent ten missions to the conflict zone. Most of them were carried out jointly with NATO. It was during the period of regional conflicts that the largest number of casualties as a result of armed confrontations was counted: 12,718 in 1992, 11,944 in 1993, 8,785 in 1995, 8,794 in 1996, and 8,454 in 1999.

During the implementation of UN peacekeeping missions in the Balkans, a number of difficulties and problems affected the effectiveness of their implementation. To assess the UN peacekeeping activities and identify effective scenarios for peacekeeping operations, attention should be paid to aspects of UN-NATO cooperation in the field of peace and security. Recall that the UN has authorised NATO and led operations in the Balkans (IFOR, SFOR, and KFOR), Afghanistan (ISAF), and Libya (Operation Defender). In addition, NATO is conducting a training mission in Iraq (NTM-I), assisting in the consequences of the earthquake in Pakistan in 2005, escorting ships in the Gulf of Aden, and supporting the African Union in Darfur.

Also, to establish peace and security in Europe and Central Asia, the UN sent peacekeeping missions to the conflict zone in Tajikistan (UN Observer Mission in Tajikistan (UNMOT), 1994-2000)[51] and Georgia.[52] The latter can be considered a failure because the goals of the mandate were not achieved, and on 15 June 2009, the continuation of the mission was vetoed. This suggests a problem of abuse of the right of veto and the need for structural reform of the UN Security Council.

Among the countries providing peacekeeping contingents to the current mission in Kosovo are the Czech Republic (2 experts), Ukraine (2 experts), Hungary (2 police officers), and others. The total number of staff in 2018 was 18 people. Peacekeeping contingents remain in Crete to monitor ceasefire lines, support the buffer zone, conduct humanitarian operations, and support the Secretary-General's mission of good offices. In 2018, the mission staff included 50 experts and 752 servicemen from the United Kingdom (271 people), Slovakia (245 people), Argentina (244 people), and others. The GDP in countries where UN and

51 United Nations Observer Mission in Tajikistan (UNMOT) (1994-2000) <https://peacekeeping.un.org/sites/default/files/past/unmot/Unmot.htm> accessed 2 February 2022.

52 United Nations Observer Mission in Georgia (MINUSTAH) (1993-2009) <https://peacekeeping.un.org/mission/past/unomig/index.html> accessed 2 February 2022.

NATO peacekeeping missions have been conducted is stable. A sharp decline in 2009 and a gradual increase since 2010 have been observed in all countries in the region due to the economic crisis.

From 2001 to 2013, the number of casualties during the armed conflict was insignificant. The death toll rose sharply from 340 in 2013 to 4,567 in 2014 due to the development of the conflict in Ukraine and the volatile situation in Turkey. Thus, although the situation in Europe and Central Asia has stabilised since the crisis in the 1990s, there are conflicts and volatile situations that need the attention of the global community, particularly in Ukraine, Abkhazia, and Ossetia. Latin America and the Caribbean are regions with a low mortality rate as a result of armed conflict and crisis. There is a tendency toward a reduction in the number of deaths from 1990 (2,609 people) to 2017 (0 people). The most unstable conflict zone in the region was Colombia, where a civil war lasted from 1964 to 2016. During this period, there were more than 260,000 deaths, 82% of whom were civilians, 80,000 missing, 77,000 migrants, and 16,000 victims of sexual violence. According to HumanRightsWatch, gender-based violence is common in Colombia and, in most cases, does not qualify as a crime.[53]

Even though Colombia is the country with the most unstable crisis situation in the region, a UN mission was sent only after the end of the conflict. This is because Colombia is traditionally a sphere of US influence. The US had been involved in the conflict since the 1960s, and since 2012, a strategic political and economic partnership has been established between the states. In January 2016, at the request of the government, the UN Security Council set up a political mission under a tripartite mechanism of the UN, the government, and the Revolutionary Armed Forces of Colombia (FARC) to monitor and verify the final bilateral ceasefire.[54] In July 2017, the Security Council established a second mission to verify the reintegration of FARC guerrillas and support the peace process.

In Latin America and the Caribbean, the UN successfully completed one traditional mission in the Dominican Republic and two peacekeeping missions in Central America and El Salvador. However, recall that the mandate of traditional missions does not meet modern crisis challenges and threats, and observation missions have little impact on the development of conflict and the duration of post-conflict peace. The UN Office for the Support of the Law Enforcement Sector in Haiti (UNMISA) has also been ongoing in the region since October 2017. Since 1993, the UN has carried out five missions in Haiti, but their implementation has been accompanied by a number of problems and shortcomings, so the missions cannot be considered effective. Asia and Africa have provided the largest number of peacekeepers to the current UN mission in Haiti since its inception: India (3,887), Senegal (2,087), Jordan (2,078), Bangladesh (2,074), Rwanda (1,998), and Nepal (1,956), as well as Tunisia, Benin, Niger, and Côte d'Ivoire. Of these, 79.43% are formed police units, 20.57% are individual police units, and 6.88% of the staff are women. Haiti belongs to the group of countries with the lowest GDP per capita – $1,800.00 (213th place globally).[55]

Despite the organisation's active participation in the unstable military-political situation in Haiti, the country remains in the sphere of US influence. This is evidenced by Haiti's dependence on regular financial assistance from the US Agency for International Development, military support,[56] crisis support of situations (humanitarian aid of $100

53 North Atlantic Treaty Organization Official Website, Relations with Ukraine <https://www.nato.int/cps/en/natolive/topics_37750.htm> accessed 2 February 2022.

54 Yost (n 68).

55 League of Nations, Britannica Encyclopedia of 2021 <https://www.britannica.com/topic/League-of-Nations> accessed 2 February 2022.

56 Operation Democracy Support on 1995 of 16 May 2020 <https://amp.ru.autograndad.com/4006909/1/operatsiya-podderzhka-demokratii.html> accessed 2 February 2022.

million), etc. Thus, the US is an active crisis protector in Latin America and the Caribbean. To effectively resolve the current conflicts and improve the peaceful situation in the region, the UN should take a stronger stance and coordinate and establish a partnership dialogue with the US within the Security Council.[57]

Since the late 1960s, seven peacekeeping missions have been carried out in East Asia and the UN in the Pacific, Cambodia, and East Timor. Although problems and difficulties arose during the operations, lasting peace was established in Cambodia and East Timor. Since 2002, there have been no victims in East Timor and Cambodia. However, a significant number of deaths have been reported in the Philippines, Myanmar, and Thailand. This is due to the development of internal armed conflicts between the central government of the Philippines and armed separatist groups since 1969, the interfaith conflict with signs of genocide in Myanmar, and the armed conflict involving a number of radical Islamic organisations advocating independence from the provinces in 2004. Thus, the UN peacekeeping operations in Cambodia and East Timor can be considered successful, as stable peace, improved economic development, and the development of democratic institutions have been achieved. However, in the region of South Asia and the Pacific, there are countries with unstable conflicts and a large number of victims of military confrontation: the Philippines, Myanmar, and Thailand. To establish a stable peace in the region, it is necessary for the UN to join in resolving the current conflicts.[58]

According to statistical analysis, traditional and multidimensional NATO peacekeeping missions are more successful (UNTAG, UNOMOZ, UNMOT). Operations with a larger annual budget (Sudan, the Democratic Republic of the Congo, Egypt, East Timor), more staff, including women and men (from countries with a stable peace situation and conflict resolution experience) (Lebanon, the Balkans, sub-Saharan Africa), and those which promote political, military, and human rights reforms (Mozambique, Haiti) contribute to lasting peace, stabilising GDP, and reducing casualties as a result of armed conflict and the number of crises in the region. At the present stage, the UN is focusing on building democratic institutions and achieving lasting peace, directing political missions (Namibia, Israel, Cambodia, Afghanistan) and missions to stabilise the post-conflict situation and adhere to peace agreements (Kosovo, Cyprus, Burundi, Democratic Republic of Congo). However, in most parts of the world, there are unresolved conflicts and areas of unstable crisis situations that need the attention of peacekeeping institutions (Iraq, Yemen, Syria, Colombia, Afghanistan, the Philippines, Myanmar, Georgia).

5 REGULARITIES THAT INFLUENCED THE EFFECTIVENESS OF PEACEKEEPING AND POST-CONFLICT STABILISATION

After conducting a statistical analysis of conflicts and crises and identifying the role of peacekeeping in stabilising the post-conflict situation in the regions of the world, we identified the main patterns that affect the effectiveness of UN and NATO operations, as well as the problems of modern peacekeeping:

1. The increase in the number of victims as a result of crises and armed conflicts in the Middle East and South Africa, which indicates an increasing need for future multi-component transformation missions to conflict zones.

57 M Lipson, 'Performance under ambiguity: international organization performance in un peacekeeping' (2018) 13 RIO 630.

58 I H Daalder, *NATO, the UN, and the Use of Force* (Report Brookings Institution 1999) <https://www.brookings.edu/research/nato-the-un-and-the-use-of-force/> accessed 2 February 2022.

2. While some African countries are likely to be able to make progress in economic and democratic development and establish a stable peace situation by reducing their dependence on peacekeepers (Burundi, Mozambique, Namibia), the overall situation in the region is not improving, as evidenced by unstable situations, the death rate as a result of armed conflict, and unstable GDP, particularly in countries such as Ethiopia, Eritrea, Sudan, Somalia, Angola, Nigeria, and the Democratic Republic of the Congo.

3. Large-scale operations in Africa require a significant number of contingents (10-15 thousand per year), as they must be conducted in a large geographical area with underdeveloped infrastructure.

4. Among the countries that provide the largest number of peacekeepers to UN missions are many underdeveloped countries and countries in conflict (Ethiopia, Rwanda, Bangladesh, Nepal, India, Pakistan, Ghana, Tanzania). To improve the effectiveness of missions, the largest share should be personnel from countries with modernised armies. The need to send qualified military personnel to UN missions determines the urgency of finding ways to cooperate with NATO.

5. Given the negative experience of human rights violations, in particular, the practice of various forms of sexual violence in conflict zones and during peacekeeping operations (Haiti, Cambodia), strengthening the gender perspective will contribute to the effective implementation of measures to protect civilians.

6. The effectiveness of peace operations requires a flexible approach to their implementation, which, in turn, involves cooperation and interaction with regional organizations (EU, NATO, African Union, etc.) or countries interested in resolving the conflict. Coordination, especially with NATO, requires mediation in the non-stable zones of Afghanistan, Iraq, Haiti, and Colombia.

7. The UN cannot function as an effective international mechanism for resolving the conflict so long as the issue of Security Council reform remains unresolved. Involvement in the resolution of current conflicts and the beginning of the UN crisis stabilisation process was impossible due to the use of veto on resolutions on the situation in Syria (13 times in 2011-2018), Yemen (2018), Ukraine (2015), Georgia (2009), Myanmar (2007), etc.

8. NATO's failure to comply with Art. 54 of the UN Charter complicates the process of coordinating and monitoring the organisation's actions in crisis situations, especially when NATO is carrying out a mandate that provides for the use of force (Operation Defender in Libya in 2011). A comprehensive solution is to develop more specific guidelines for monitoring the implementation of delegated operations.[59]

9. The crisis of legitimacy of UN operations (reaching political consensus of the parties, establishing legal and moral authority) negatively affects the effectiveness of their implementation (missions in Uganda, Rwanda, Côte d'Ivoire, Ethiopia, Eritrea, Central African Republic, Chad, Somalia). The behaviour of personnel determines the moral authority of a peaceful operation. If the operation is perceived to lack moral authority, it may affect the decisions of countries on the deployment of personnel (missions in the Democratic Republic of the Congo, Somalia, and Darfur).

10. An increase in the mission budget ($100-800 million) will have a positive effect on reducing the number of armed conflicts and improving the efficiency of missions. The more the UN spends on maintaining peace, the stronger the mission's mandate. For example, an increase in contributions will allow the UN to send more qualified personnel to carry out the mission.

59 Charter of the United Nations: Chapter VIII of 2018 <http://www.un.org/en/sections/un-charter/chapter-vii/index.html> accessed 2 February 2022.

11. The UN needs to modernise its mechanisms for assessing the effectiveness of operational and long-term performance, as well as working with NATO to combine peacekeeping experience and systematic assessment practices, with a view to achieving greater success in establishing control over the conflict zone.[60]

Thus, according to the given numbers and statistics analysed here, our effective scenarios for future UN peacekeeping operations are as follows:

Scenario 1. Multi-component transformational missions

- Aim: solving and containing geographic conflicts with a high level of intensity (the number of victims over 400 people) and preventing their renewal (prevention of interstate conflicts and war).
- Size of conflict: large regional wars and conflicts, civil wars and revolutions, terrorist acts, and international crises with a high level of intensity (the number of victims over 400 people).
- Main principles: impartiality (equal attitude without discrimination) toward the conflict factions.
- Mandate: a wide range of authorities and tasks conferred by Sections VII and VIII of the UN Statute (section 1.2).
- Mission staff: 1,000-1,500, where 60% and military contingents, 30% are police units, and 10% are experts and observers.
- Interaction with actors: involvement of regional organisations and institutions for common resistance to violence and conflicts, according to Section VIII of the UN Statute.
- Budget: 600-800 million USD annually.
- Post-conflict peace-building: maintenance of stable peace, economic growth, reformation of political institutes and democracy development, support in holding of democratic elections, providing of human rights, social development, and humanitarian aid.
- Expected duration: conflict resolution – two years; peace-building process – five years.

Scenario 2. Restricted peace-building and monitoring missions

- Aim: border monitoring, checking demilitarised zones, creation of political space for negotiations, mediation, and the prevention of conflict escalation.
- Size of conflict: local conflicts that are not violating baseline consensus in society can be solved by means of compromise; conflicts of a low level of intensity (up to 300 people).
- Mandate: a restricted range of authorities and tasks conferred by Section VI of the UN Statute (section 1.2).
- Mission staff: 500-1,000, where 60% are military contingents, 30% are police units, and 10% are experts and observers.
- Interaction with actors: search for compromise and coordination of actions in solving the contradictions between the sides of the conflict.
- Budget: 100-600 million USD.
- Expected duration: peace settlement between the sides – up to two years; monitoring of commitments fulfilment – five years.
- Action in case of situation escalation (the increase of conflict intensity and victim numbers): implementation of Scenario 1.
- Post-conflict resolution: maintaining stable peace (control over disarmament, prevention of genocide, presence of military and police subdivisions for five years, prosecution of military criminals, assistance in solving the main international conflicts).

60 Security Council Report, 'Monthly Forecast' <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2021_05_forecast.pdf> accessed 2 February 2022.

Building scenarios for effective UN peacekeeping operations requires the formation of a system for assessing the effectiveness of UN peacekeeping missions. The analysis of the existing system showed that the main weakness of the modern UN performance assessment system is that it does not have standard criteria and values. Different tools serve different purposes without a clear distinction of their accountability, information on how to use them, or an organised basis for educational work. There is a gap between a results-based budgeting system, on the one hand, and reporting on the implementation of mandates and analysing their context, on the other.

6 CONCLUSIONS

In comparison with the UN, NATO has a comprehensive system of scenarios for effective missions and their planning, assessment, and response to environmental risks, which includes the following mechanisms: a system of operational and strategic planning and assessment of NATO; a military decision-making process (MDMP); the NATO Crisis Response System (NCRS); third-party consulting and analytical reporting (RAND Corporation). Nevertheless, NATO's assessment and planning are not comprehensive. For example, the performance of peacekeepers themselves is not assessed. In addition, NATO's geographical boundaries and level of political support are much lower than those of the UN. Thus, cooperation with the UN can be useful in meeting NATO's political and strategic interests. Expanding the boundaries of cooperation in the joint implementation of missions can increase the level of effectiveness in resolving conflict situations and achieving peace. This conclusion confirms the hypothesis that the effectiveness of the UN and NATO peacekeeping operations depends on their cooperation in the field of peacekeeping.

Currently, research on the possibilities of such cooperation is almost non-existent, which can probably be explained by the different status and strategic goals of the UN and NATO. The findings of researchers who study the effectiveness of UN and NATO peacekeeping separately are fully in line with our vision. The two optimal scenarios for peacekeeping operations provided in the current research have shown that the main actor in peacekeeping is the UN, as it is the only global organisation that aims to maintain world peace and security. NATO is a regional organisation, and its interests are limited. However, given the alliance's military capabilities and strategic and analytical resources, UN-NATO cooperation is a desirable part of multi-component transformation missions. Success in the implementation of certain scenarios can be achieved by taking into account the established patterns of peaceful operations, the problems that arise in their effective implementation, and recommendations for their solution. The creation of such recommendations is the aim of this research. Thus, in view of the above, it can be argued that, for the first time, we have raised the issue of the necessity of UN-NATO cooperation in order to succeed in peacekeeping operations and develop a beneficial strategy for such cooperation. We hope that the present study will work as a starting point for such peacekeeping investigations and make a fundamental contribution to the current peacekeeping mission analysis and effective peacekeeping model research.

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NOTE FROM THE FIELD

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

THE LEGALITY OF THE RUSSIAN MILITARY OPERATIONS AGAINST UKRAINE FROM THE PERSPECTIVE OF INTERNATIONAL LAW

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Submitted on 01 Jun 2022 / Revised on 10 Jun 2022 / Approved **29 Jun 2022**
Published online: 06 Jul 2022 // Last Published: **15 Aug 2022**

Keywords: *military operations against Ukraine, public international law, the Charter of the United Nations, International Court of Justice, crime of aggression*

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The content of this article was translated with the participation of third parties under the authors' responsibility.
Managing editor – Dr Oksana Uhrynovska. **English editor** – Dr. Sarah White.

How to cite: M Khater 'The Legality of the Russian Military Operations Against Ukraine from the Perspective of International Law' 2022 3(15) Access to Justice in Eastern Europe 107–119. DOI: https://doi.org/10.33327/AJEE-18-5.3-a000315

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Abstract *The current study seeks to discuss the grounds used by the Russian authorities to legalise their war against Ukraine, indicating the falseness of these grounds and considering the efforts of the United Nations and the International Community that aim to cease Russian aggression against Ukraine. It aims to demonstrate the falseness of Russian legality in its war against Ukraine by identifying the violations and crimes related to the Russian attack under international laws and norms, including the Charter of the United Nations, rules of international humanitarian law, and international human rights law, emphasising on the potential accountability mechanism for perpetrators of international crimes during the Russian war against Ukraine.*

Background: *Russia has used military force against Ukraine several times since 2014 and seized several Ukrainian critical and strategic locations, including them in the Russian territory, coinciding with escalating protests by Pro-Russian separatist groups, especially in Donetsk and Luhansk, where these groups declared their independence in February 2022. Furthermore, Russia has declared it started a special military operation aiming at peacekeeping in those two regions, in addition to claiming that its intent was to stop genocide crimes undertaken by Ukraine in the eastern region of Donbas. This research concentrated on the legality of the latest Russian military operations that started on 24 February 2022 from the perspective of contemporary international law.*

Methods: *The research uses the descriptive analysis method, which is based on the precise description and in-depth analysis of the topic through gathering detailed data related to the research problem, analysing and interpreting legal texts and relevant information, and proposing appropriate solutions and recommendations that expose the Russian violations of international law, attempt to stop these violations, and preserve the state unity and territorial integrity of Ukraine.*

Results and Conclusions: *The research concludes that the Russian military operations against Ukraine represent a blatant violation of international law and an undermining of universal security. As a consequence, this negatively affects the friendly relationships among the members of the international community, in accordance with the provisions and principles of contemporary international law and the resolutions of international legitimacy.*

1 INTRODUCTION

Russian forces have conducted special military operations against Ukraine since February 2022, putting the regulations of international law at stake despite the global criticism of the Russian invasion.

This research tackles the study of how permissible the use of the Russian military forces is against Ukraine from the perspective of international law and its peremptory norms. It also clarifies the role of the United Nations (UN) and the international community in attempts to stop the Russian military actions against Ukraine.

The present research tackles the justifications Russia gave regarding its use of force against Ukraine and how sound they are. It pays special attention to the violations committed by Russia from the perspective of international law. Furthermore, it sheds light on the mechanisms of potential accountability for those who committed international crimes in the Russian war against Ukraine, and in conclusion, it suggests some recommendations for limiting the Russian violations and abuses of international safety and security.

2 THE RUSSIAN GROUNDS FOR THE USE OF ITS MILITARY FORCES AGAINST UKRAINE

Russia has frequently attempted to justify its aggression against Ukraine by linking its acts to the violations of international law by some of the western states in their illegal war against Iraq, Libya, and Syria, under the guise of self-defence and protection of human rights in the states they attacked. Certainly, this repressive silencing of states allying with Ukraine and condemning the Russian aggression against Ukraine is objectionable and cannot confer legality and morality to the Russian military intervention against Ukraine. In other words, any previous violations and breaches cannot nullify or justify the present violations.[2]

Since the start of the military action, Russia has argued that its attack is justified and legal under the right of individual or collective self-defence set out in Art. 51 of the UN Charter, stipulating that the Charter contains nothing that prejudices the inherent right of individual or collective self-defence in case of an armed attack against one of the UN members. Therefore, the UN member states have the right to defend themselves against an armed attack threatening their territorial integrity.[3]

Putin has stated that one of the most fundamental grounds for the invasion of Ukraine is individual self-defence in response to the various Ukrainian threats made against Russia. In an attempt to emphasise the Russian right to individual self-defence, he claimed that Ukraine sought to possess and develop biological and nuclear weapons; thus implying that the attack against Ukraine was meant to prevent the country from possessing weapons of mass destruction, even though Ukraine has strongly denied these allegations and highlighted the absence of the infrastructure required for weapon production of this kind.[4]

It is not inconceivable that a slip of the tongue made by the former US President, George W. Bush, in his speech about the Russian war against Ukraine, when he said 'the invasion of Iraq by Russia' and then corrected it with '... of Ukraine', was a result of the link between Russia and the US. And indeed, Russia used the same grounds as the USA in its war against Iraq. Russia wanted to imply that the scenario is the same, regardless of the extent to which this comparison is real and valid.

Besides the Russian justification of its military invasion in Ukraine as a legal right of individual self-defence, it argued that there were also grounds for collective self-defence and that its invasion of Ukraine was meant to defend Ukraine's two eastern separatist regions, Donetsk and Luhansk, which Russia depicted as sovereign independent states facing grave violations of human rights, humiliation, and genocide by the Ukrainian government.

According to the Convention on the Prevention and Punishment of the Crime of Genocide 1948, genocide means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical

2 I Wuerth, 'International Law and the Russian Invasion of Ukraine' (*Lawfare*, 25 February 2022) <https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine> accessed 10 June 2022; JA Green, C Henderson, T Ruys, 'Russia's attack on Ukraine and the *jus ad bellum*' (2022) 9 (1) Journal on the Use of Force and International Law 4-30.

3 Charter of the United Nations, signed 26 June 1945 in San Francisco at the conclusion of the United Nations Conference on International Organization, and which came into force on 24 October 1945.

4 DE Sanger, 'Putin Spins a Conspiracy Theory That Ukraine Is on a Path to Nuclear Weapons' (*New York Times*, 23 February 2022) <https://www.nytimes.com/2022/02/23/us/politics/putin-ukraine-nuclear-weapons.html) accessed 10 June 2022; Green, Henderson, Ruys (n 2).

destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.[5]

It could therefore be said that the Russian allegations are consistent with neither law nor reality since no evidence has been found stating that Ukraine violated human rights in Donetsk and Luhansk, committed acts classified as genocide, or aimed to destroy any national, ethnic, racial, or religious group. On the other hand, the right to self-defence cannot be an excuse since neither Donetsk nor Luhansk are declared independent states under international law, despite Russia's claims. Therefore, they have no right to require any state to defend them. Even if Donetsk and Luhansk were independent states, the response would have to be necessary and proportionate under international law provisions in order to be legal. However, the Russian use of power was violent and intense throughout Ukraine, which was not necessary and proportionate, as will be clarified below.

3 EFFORTS OF THE UNITED NATIONS IN CEASING RUSSIAN MILITARY ACTIONS AGAINST UKRAINE

The international organisations and the UN's roles have become clear during the Russian aggression against Ukraine regarding the attempts to cease, address, and control these aggressive actions and to preserve international peace and security.

Since the beginning of the Russian invasion of Ukraine, the Secretary-General of the UN has described the Russian aggression and the relevant actions as 'a moment of the grave' and said that the Russian resolution to declare the independence of Donetsk and Luhansk is a violation of the territorial unity and Ukrainian sovereignty that contradicts the principles of UN Charter. Therefore, the UN has frequently called for a ceasefire for the protection of civilians and invited the relevant parties to engage in political dialogue to reach a peaceful settlement, which unfortunately has not happened yet. Many civilians are still on the bloody battlefields, hundreds of people are trapped due to conflicts, and war crimes are being committed, as we know from recent reports.[6]

3.1 The Role of the United Nations Security Council in Attempts to Cease Russian War Against Ukraine

The UN Security Council bears the primary responsibility for the maintenance of international peace and security. In case of any threat to peace or act of aggression, under the Charter, the Council is entitled to impose sanctions or use military force to preserve and restore peace and security. In case the Council fails to decide on imposing sanctions or any countermeasure due to the relationship between the resolution and one of the permanent members of the Council, UN General Assembly is entitled to hold an emergency meeting to discuss the issue.[7]

Regarding the Ukrainian crisis, the Security Council has failed to decide to call for Russian military operations against Ukraine to cease due to using the Russian veto power.

5 Art 1 of the Convention on the Prevention and Punishment of the Crime of Genocide by General Assembly resolution 260 A (III) of 9 December 1948.

6 United Nations Secretary-General, 'Secretary-General's Remarks to the General Assembly on Ukraine' (23 February 2022) <https://www.un.org/sg/en/content/sg/statement/2022-02-23/secretary-generals-remarks-the-general-assembly-ukraine> accessed 10 June 2022.

7 Charter of the United Nations (n 3).

Consequently, the Council has called for the Eleventh Emergency Special Session of the General Assembly to discuss the issue of the Russian invasion of Ukraine in an attempt to submit the recommendations required to maintain international peace and security and cease acts of aggression. Given that this resolution was procedural, the Council managed to make it despite the Russian protest against this action.[8] In this regard, the UN Secretary-General welcomed the unity of the Security Council in achieving a peaceful solution in Ukraine and said in a statement that 'Today, for the first time, the Security Council is speaking with one voice for peace in Ukraine'.[9]

The way in which the Security Council tried to prevent the Russian invasion of Ukraine recalls the urgent and imperative need for a reconsideration of the composition of the Security Council and the powers and immunity of the member states, and a separate reconsideration of veto power for each permeant member state, which is a fundamental reason for the disruption and failure of the Council in issuing a resolution regarding any international dispute directly or indirectly involving one of these states or any of their allies.

3.2 The Role of the United Nations General Assembly in Attempts to Cease Russian War Against Ukraine

On 2 March 2022, the General Assembly endorsed a resolution by a majority of 141 states, with 35 states abstaining from the vote and five states voting against the resolution, namely: Russia, Belarus, North Korea, Syria, and Eritrea. The resolution condemns and denounces the Russian military action, calls for Russia to cease its aggression, and demands immediate, complete, and unconditional withdrawal of all its military forces from Ukrainian territory. Furthermore, it urges Russia to reverse its decision to declare Donetsk and Luhansk as independent states and adhere to the international law and rules of the UN Charter. It also emphasises the commitment of the international community to Ukraine's sovereignty, independence, and territorial unity.[10]

The UN General Assembly also adopted a resolution on 7 April 2022 calling for Russia to be suspended from the Human Rights Council. The resolution received a two-thirds majority of those voting, minus abstentions, in the 193-member Assembly, with 93 nations voting in favour and 24 against.[11] Although the resolutions of the UN General Assembly are legally non-mandatory, these resolutions have moral and political power, especially when these resolutions are overwhelmingly issued, and the Security Council is unable to act due to one of the permeant member states using its veto power. Thus, it can be argued that the General Assembly's approval of the resolution means the overwhelming rejection of most states regarding the illegal and unjustified attacks against Ukraine, which increased the imposition of political isolation on Russia.[12]

8 Resolution 2623, adopted by the United Nations Security Council on 27 February 2022.

9 United Nations Secretary-General, 'Security Council Speaks with One Voice for Peace in Ukraine' (6 May 2022) <https://news.un.org/en/story/2022/05/1117742> accessed 10 June 2022.

10 Resolution ES-11/1, adopted by the Eleventh Emergency Special Session of the United Nations General Assembly on 2 March 2022.

11 'UN General Assembly votes to suspend Russia from the Human Rights Council' (*UN News*, 7 April 2022) <https://news.un.org/en/story/2022/04/1115782> accessed 10 June 2022.

12 V Romo, 'Russia vetoes UN Security Council resolution that Denounces its Invasion of Ukraine' (*NPR*, 25 February 2022) <https://www.npr.org/2022/02/25/1083252456/russia-vetoes-un-security-council-resolution-that-denounces-its-invasion-of-ukra> accessed 10 June 2022.

3.3 The Role of the International Justice Court in Attempts to Cease Russian War Against Ukraine

The International Court of Justice (ICJ) in The Hague considers disputes between states, although it is not entitled to interfere by the agreement of the relevant states. The Ukrainian government has filed a case against Russia before the ICJ according to the Convention on the Prevention and Punishment of the Crime of Genocide 1948, demanding that Russia cease its military operations, which started on 24 February 2022. Ukraine has asked the Court to consider Russia's allegations that Ukraine has committed genocide in the Donbas region as grounds for the Russian invasion. Moreover, Ukraine has asked the Court to take temporary measures via an immediate suspension of military operations until the final judgment of the case is issued.[13]

The ICJ Resolution was issued on 16 March 2022, with 13 votes in favour and two votes against the resolution (Russia and China). The Court declared in its resolution that no genocide acts had been committed in Luhansk and Donetsk, in contrast to the Russian claim that its invasion of Ukraine was grounded on the prevention and punishment of the crime of genocide. Therefore, the Court has demanded that Russia and other forces that support or control it immediately cease military operations on Ukrainian territory, as the Russian grounds for the attack have been proved false. The Court emphasised in its final and binding resolution that Russian military forces are the perpetrators of intentional homicide, causing serious injuries to Ukrainian nationals during its invasion of Ukraine. But unfortunately, the Court's judgments lack the traditional execution procedures that make them efficient.[14]

After all, in its attempts to reach a peaceful solution and cease Russian aggression over Ukraine, the UN still pursues its efforts to support the Ukrainian people through its work in the human rights protection field, providing humanitarian assistance and safe passages to evacuate civilians from hazardous areas and allowing them free movement. The UN Human Rights Council investigates facts regarding human rights in Ukraine, works on recording numbers of civilian causalities, and reports violations of human rights and international humanitarian law, such as arbitrary arrests, ill-treatment, and public humiliation of Ukrainian civilians and war captives. All these actions have a critical role in putting an end to the Russian violation of international law and ceasing further bloodshed.[15]

4 STATES' RESPONSE TO RUSSIAN INVASION OF UKRAINE

Most states have denounced the Russian attack on Ukraine due to the absence of legal grounds and the losses and atrocities for Ukrainian civilians and their devastated cities. These states have called for a peaceful settlement of the conflict in compliance with the UN Charter by ending the military action and returning to negotiations and diplomacy.[16]

13 International Court of Justice, 'Press Release, Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures, No. 2022/4' (27 February 2022 <https://web.archive.org/web/20220228120743/https://www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf> accessed 10 June 2022.

14 International Court of Justice, 'Order, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide, Ukraine vs Russian Federation' (16 March 2022) <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> accessed 10 June 2022.

15 United Nations Secretary-General (n 6).

16 A Osborn, P Nikolskaya, 'Russia's Putin Authorises "Special Military Operation" against Ukraine' (*Reuters*, 24 February 2022) <https://www.reuters.com/world/europe/russias-putin-authorises-military-operations-donbass-domestic-media-2022-02-24/> accessed 10 June 2022; J Mackenzie, 'Ukraine Claims Control over Kyiv Region as Russia Looks East' (*Reuters*, 3 April 2022) <https://www.reuters.com/world/europe/red-cross-heads-again-mariupol-russia-shifts-ukraine-focus-2022-04-02/> accessed 10 June 2022.

Many governments have submitted military, defence, and logistical aid for Ukraine, purchasing and supplying weapons, ammunition, defence systems, and others support and enhance the military capacities of the Ukrainian Army without engagement in actual military actions to deter Russian aggression. The anti-Ukrainian invasion states have applied a set of non-military procedures against Russia, including the imposition of various economic, commercial, and financial sanctions that aim at crippling the Russian economy, targeting individuals, banks, and Russian companies, as well as political sanctions, prohibition of aviation, banning some Russian press media, and other sanctions and large scale boycotts in various fields such as commerce, sports, and entertainment, given that these sanctions do not represent a violation of international human rights law as long as they are meant to urge the state violating the international law to stop its breaches.[17]

5 RUSSIAN WAR AGAINST UKRAINE AND VIOLATION OF INTERNATIONAL LAW RULES

Undoubtedly, the Russian attack against Ukraine is an explicit breach of international law principles and rules as stipulated in the UN Charter and customary international law since Russian forces have violated a combination of international law rules, especially those regarding respect for the equality in national sovereignty of states, the principle of peaceful settlement of disputes, the principle of non-use of power or threat within mutual relationships among states that may threaten the maintenance of international peace and security, the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any state, and the principle of good faith in international obligations.[18]

5.1 Russian War against Ukraine and the Principle of Non-use of Power or Threat within Mutual Relationships among States

First, the Russian military operations violate the principle of prohibiting the use of power stipulated by the UN Charter. The preamble prohibits the use of power except in the mutual interest of all members, as stipulated in para. 4 Art. 2, which notes that states must refrain from using power or threat against the territorial integrity or political independence of any state.[19]

5.2 Russian War against Ukraine and the Principle of Non-intervention in Internal Matters of States

Russia has violated the international law and legitimacy regarding its international obligation to respect the principle of non-intervention in internal matters of states and to respect its sovereignty. Russia has intervened in matters that are considered within states'

17 M Quinn, 'What to Know About New U.S. Sanctions Targeting Russia over Ukraine' (*CBS News*, 23 February 2022) <https://web.archive.org/web/20220224034030/https://www.cbsnews.com/news/russia-sanctions-ukraine-us-biden/> accessed 10 June 2022; J Neal, 'The War in Ukraine and International Law' (*Harvard Law Today*, 2 March 2022) <https://today.law.harvard.edu/the-ukraine-conflict-and-international-law/> accessed 10 June 2022.

18 Green, Henderson, Ruys (n 2).

19 Charter of the United Nations (n 3).

domestic jurisdiction, which is a violation of the general principles and a *jus cogens* rule of international law, as stipulated in para. 7 Art. 2 of the Charter.[20]

5.3 Russian War against Ukraine and the Rules of International Humanitarian Law

Russian behaviour has exceeded the rules and principles of international humanitarian law, approved by the Geneva and Hague Conventions and others, which aims to protect individuals suffering from the ravages of armed conflicts, and objects that are not directly related to hostilities since they used internationally banned weapons like cluster bombs and do not discriminate between the civil and military objectives. Military air strikes hit civilian areas, not just military ones, which has led to the killing of a large number of innocent civilians and captives. Russian aviation has launched random airstrikes on infrastructure, targeting residential areas, including shelling gas lines, sewage, drinking water, and electricity systems, medical services such as civil hospitals, food stores, plants, civilian airports, governmental administrative buildings, religious and cultural sites, and other similar places and buildings, and destroying scientific and cultural property, which has led to thousands of civil causalities, and the displacement of about four million Ukrainians looking for safety, protection, and humanitarian assistance.[21]

Various reports issued by international organisations have indicated that Russia, in addition to its aggression, has committed a combination of violations of international humanitarian law provisions, which are considered war crimes and crimes against humanity. During the war operations in Ukraine, many actions of random shelling of civilians have taken place. The infrastructure has been targeted and destroyed with no justification. Russian forces have deemed all Ukrainian territories permissible and turned them into a battlefield, with non-discrimination between civil and military buildings. The Russian shelling has reached schools, universities, hospitals, stores, and libraries, as well as targeting places of worship, shopping places, and all state facilities and governmental buildings and institutions with their infrastructure. Since Russian forces launched their attacks, at least one thousand Ukrainian civilians have been killed, and about two thousand have been injured. Russian forces used airstrikes and heavy artillery and missiles, targeting overpopulated areas, which led to endangering civilians and unnecessary and disproportionate destruction of their property. For example, the Russian attacks targeted the Zaporizhzhia nuclear power plant, which severely damaged the building and injured two people. The report issued on 25 March 2022 by the Office of the High Commissioner for Human Rights stated that 47 civilians were killed on 3 March when the Russian airstrikes attacked two schools and many residential compounds in Chernihiv. In addition, Russian shelling destroyed the Mariupol hospital, which resulted in the injury of 17 civilians, including children and pregnant women.[22]

The Russian military operations violating Ukraine's sovereignty on the grounds of fighting genocide in Donbas are considered an aggression crime, according to Art. 1 of Resolution No. 3314, which identified aggression as the use of the armed force of one state against another state's sovereignty, territorial integrity, or political independence, or any other way that violates UN Charter. These violations consist of invading or attacking any region of

20 Ibid.

21 Office of the High Commissioner for Human Rights, 'Situation in Ukraine' (25 March 2022) <https://www.ohchr.org/en/statements/2022/03/situation-ukraine> accessed 10 June 2022.

22 Ibid; N Roth, 'What Happened at Ukraine's Zaporizhzhia Nuclear Power Plant and What Are the Implications?' (*The Nuclear Threat Initiative,* 9 March 2022) <https://www.nti.org/atomic-pulse/what-happened-at-ukraines-zaporizhzhia-nuclear-power-plant-and-what-are-the-implications/> accessed 10 June 2022.

other countries, the military occupation or inclusion of any other country's region or part of it by force, shelling sites of any country by dropping bombs or any other weapons, the blockade of any ports and beaches of a country, attacking the air, land, or maritime armed forces of one state by the armed forces of another state, one state using its armed forces in a region of another state with the consent of the hosting state, one state allowing its region to be under the control of another state to commit an act of aggression against a third state, or aggression by sending armed gangs, irregular forces, or mercenaries by or on behalf of any state.[23]

According to this definition, the Russian war against Ukraine can be described as aggression. The core of aggression is the use of military power, i.e., when violence prevails in the relationships among states, which leads to ending any cordial relationship among such states, given that the mere threat of resorting to military force is not sufficient on its own to achieve the act of aggression. The aggression may consist of an actual war, whether it is a clash between the military forces of two states or a one-sided abuse. The attempt to ascertain whether military force has been used against Ukraine does not require much effort; the Russian forces have clearly attacked Ukraine, which contradicts the maintenance of national sovereignty respect values and promotes international peace and cooperation.[24]

On the other hand, resorting to military force has to be illegal, i.e., in violation of the UN Charter or international law principles, to be considered aggression. The Russian war against Ukraine does not have legal grounds and is not based on any of the exceptions by which the UN Charter allows the resort to force. Hence, launching a unilateral war is a substantial encroachment on the UN as an organisation, the Security Council as a governing body that has the right of delegation by force against any state threatening international peace and security, and an encroachment on the provisions and rules of the UN and the different resolutions issued regarding collective security systems. Therefore, it is not only aggression against Ukraine but also the global order as a whole, which constitutes an eradication of the roles of the authorities and organisations responsible for the maintenance of international peace and security.[25]

6 THE POTENTIAL INTERNATIONAL MECHANISMS TO HOLD RUSSIA ACCOUNTABLE FOR ITS ATTACK ON UKRAINE

The International Criminal Court is a permanent criminal judicial body with jurisdiction over the prosecution of individuals accused of committing the most serious crimes under international law. These crimes are war crimes, military aggression, genocide, and crimes against humanity. The International Criminal Court has the right to practice its powers concerning a crime under its jurisdiction, according to Arts. 13 and 14 of the Statute of the court, if the case is referred to the prosecutor of the Court by a state party to the Statute or by the Security Council (SC) under Chapter VII of the UN Charter. Furthermore, any state party or person may file a case with the prosecutor of the Court, who may decide to commence the investigation if he or she considers that there is a reasonable basis to do so.[26]

23 United Nations General Assembly Resolution 3314 (XXIX) (Definition of Aggression), adopted by the General Assembly on 14 December 1974.

24 Wuerth (n 2).

25 J Trahan, 'A Reminder of the Importance of the Crime of Aggression: Considering the Situation of Russia and Ukraine' (*Opinio Juris*, 4 February 2022) <http://opiniojuris.org/2022/02/04/a-reminder-of-the-importance-of-the-crime-of-aggression-considering-the-situation-of-russia-and-ukraine/> accessed 10 June 2022.

26 The Rome Statute of the International Criminal Court, adopted in Rome, Italy on 17 July 1998 and entered into force on 1 July 2002.

The Court shall not have the right to practice its jurisdiction over the crime of aggression committed by states that are not parties to the Rome Statute. Therefore, the crime of aggression committed by Russia in the territory of Ukraine shall not be subject to the jurisdiction of the Court, considering that both Russia and Ukraine have not acceded to the Rome Statute, and accordingly, the Russian citizens are excluded from the jurisdiction concerning the referral of the case to the Court either by Ukraine or by the prosecutor. Simultaneously, the referral of the case to the Court by the SC is excluded because Russia is a permanent member of the Council.[27]

Nonetheless, the previous obstacle can be overcome by prosecuting Russia in one of the states that recognise universal jurisdiction in cases of aggression since no laws prevent any state whose laws apply the principle of universal jurisdiction from prosecuting the perpetrators of crimes of aggression, regardless of their nationality or the place where they committed their crimes. In this case, the national court entrusted with the resolution of the dispute in trials *in absentia* can ensure that Russian political and military leaders need not be removed from their positions in order to be arrested and punished for their crimes, given the judicial immunity that these leaders possess.[28]

The pre-trial proceedings concerning universal jurisdiction for serious war crimes committed during the Russian invasion of Ukraine have already begun in several states as of 5 April 2022. The pre-trial proceedings have involved Ukraine, Germany, Poland, Lithuania, Spain, and Sweden in preparation for the initiation of investigation proceedings and prosecution against the suspected perpetrators of these crimes before the national courts of these states, thereby enhancing the possibilities of effective accountability for those responsible for these crimes.[29]

7 CONCLUSIONS

The Russian military operation in Ukraine is clearly an attempt to manipulate international law and align it with its interests and objectives. This is done by disrupting the established principles of international law, particularly the principle of the equality of the national sovereignty, independence, and territorial integrity of all states. This will result in the spread of chaos in the international system and a return to the era of world wars, especially with the lack of credibility in the allegations and real motives behind Russia's military invasion of Ukraine. The present research has discussed the lack of a legal basis for Russia's justification of its aggression against Ukraine. Furthermore, the arguments presented by Russia to justify its aggression against Ukraine and its claim of acting in self-defence or as a humanitarian intervention are unsubstantiated allegations and therefore cannot be accepted. Ukraine has not committed or threatened to commit an armed attack against Russia, and therefore no evidence supports Russia's allegations of genocide in the Donetsk and Luhansk regions.

27 Trahan (n 25).

28 T Dannenbaum, 'Mechanisms for Criminal Prosecution of Russia's Aggression Against Ukraine', Just Security, New York University School of Law (10 March 2022) <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> accessed 10 June 2022; H Siddique, 'Could the International Criminal Court Bring Putin to Justice over Ukraine?' (*The Guardian*, 2 March 2022, <https://www.theguardian.com/world/2022/mar/02/could-international-criminal-court-bring-putin-to-justice-over-ukraine> accessed 10 June 2022.

29 H Stephenson, T Dannenbaum, 'What are War Crimes—and Will Putin Be Tried for Them?' The Fletcher School of Law and Diplomacy (5 April 2022) <https://web.archive.org/web/20220405183346/https://sites.tufts.edu/fletcherrussia/what-are-war-crimes-and-will-putin-be-tried-for-them/> accessed 10 June 2022.

Moreover, the Russian protest that other states do not respect international law is merely a failed attempt to distract global attention.

Hence, the Russian war against Ukraine is an unlawful use of force, an act of aggression, and a blatant violation of the peremptory norms of international law. Russia's large-scale destruction of administrative buildings, educational and medical facilities, and water and power plants is an internationally prohibited form of aggression, a serious violation of the laws and customs applicable in international armed conflict within the scope of international law, and thus is subject to international responsibility.

Notwithstanding the importance of the efforts of the UN and the international community, they are unfortunately still not sufficient to defend Ukraine. The UN must implement the right of collective self-defence, according to the provisions of Art. 51 of the UN Charter, obliging the members of the UN to defend it and sending military forces to support it, on par with what happened when Iraq invaded Kuwait in 1990. At that time, the UN came to help Kuwait defend itself and began to use military force against Iraq. Furthermore, the Allied Coalition Forces were then able to evacuate Iraqi forces from Kuwait. In contrast, the international assistance to Ukraine in facing the Russian invasion has been limited to sending indirect supplies and military assistance to Ukraine, as well as imposing limited sanctions against Russia.

This research concludes with a set of recommendations that can be summarised in the following:

1. The Russian authorities must be forced to respect the principles enshrined in international law, among the most important of which are respect for the sovereignty and territorial integrity of states, non-use of power or threat, the principle of the peaceful settlement of international disputes, and finally, non-intervention in internal matters of states except in the cases outlined in the UN Charter.
2. Russia must respect the standards and limitations of contemporary international law, which restrict and limit the sovereignty of states within the scope specified by that law, and not return to the standards of traditional international law, which gave states absolute sovereignty and free rein to use armed force.
3. The Russian authorities must comply with the resolution issued by the International Court of Justice regarding the cessation of military operations against Ukraine. Furthermore, they should seek to resolve their dispute through diplomatic means to avoid isolation from the rest of the international community.
4. Russia must assume responsibility for what has been done to the Ukrainian people, from the extreme human suffering and immense destruction to the damage to the state's infrastructure.
5. The right of collective self-defence must be activated to preserve Ukraine's sovereignty, and we must search for other effective deterrence mechanisms to ensure that Russia will be punished for its illegal aggression. Moreover, we must defend the Ukrainian territorial integrity and unity against the Russian invasion.
6. We must reconsider the veto power of Russia and the other permanent five states of the Security Council and investigate which states exploit this power to violate the UN Charter, attack other states, and commit violations of international law provisions, including international human rights law, and international humanitarian law.

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Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

MILITARY JUSTICE IN UKRAINE: RENAISSANCE DURING WARTIME

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Submitted on 27 Jun 2022 / Revised 12 Jul 2022 / Approved **25 Jul 2022**
Published: **15 Aug 2022**

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Corresponding author, responsible for research methodology, writing and supervising. **Competing interests:** No competing interests were announced. **Disclaimer:** The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations, including the Supreme Court, despite the fact that she is serving as a Member of the Consultative Board of the Supreme Court.

2 **Translation:** The content of this article was translated with the participation of third parties under the authors' responsibility.
Funding: The authors received no financial support for the research, authorship, and/or publication of this article. Funding of this publication was provided by authors.
Managing editor – Dr. Olena Terekh. **English Editor** – Dr. Yuliia Baklazhenko.

How to cite: O Kaplina, S Kravtsov, O Leyba, 'Military Justice in Ukraine: Renaissance During Wartime' (2022) 3(15) Access to Justice in Eastern Europe 120–136. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000323
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Competing interests: Although the author serves as one of the managing editors of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this note, including the choice of peer reviewers, were handled by the other managing editors and the editorial board members. **Disclaimer:** The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.

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Keywords: *military courts; military justice; judiciary; judicial control; justice; jurisdiction.*

ABSTRACT

In the article, the authors raise issues that are relevant for the modern legal system of Ukraine, related to the need to revive the military justice system and, in particular, military courts. The authors emphasize that during the peaceful existence of Ukraine, a dangerous illusion was formed in the society regarding the unnecessary functioning of military justice in the state, however, unforeseen realities fundamentally changed the liberal ideas of peacetime. After the beginning of the armed aggression of the Russian Federation against Ukraine, the work of many courts was completely paralyzed, the judges did not have an algorithm of actions in war conditions, they urgently left for safe cities, including outside the territory of Ukraine, leaving proceedings, documentation, unfinished cases. The study allowed the authors to come to the conclusion that in a situation of continuing armed aggression, the presence of powerful Armed Forces in the state, and when the country is forced to fight for its independence, it is the military courts that are able to ensure legality and exercise justice and judicial control in accordance with their subject jurisdiction. In order to determine the optimal model of military justice, the authors examined the genesis of approaches that existed in society and characterized its attitude to the system of military justice. They analyzed the precedent practice of the European Court of Human Rights, in the context of alleged violations of Art. 6 of the Criminal Code during the administration of justice by military courts, as well as systematized key approaches developed by the Court, which are proposed to be taken into account when restoring the system of military courts in Ukraine. In addition, the authors systematized the existing models of military justice in the world, identified correlations that, apparently, led to the rejection of military justice by some countries, provided detailed arguments about the need to restore it in Ukraine, and indicated promising directions for further scientific research in this area.

1 INTRODUCTION

During the peaceful existence of Ukraine, a dangerous illusion was formed in society regarding the uselessness of functioning of the military justice, the military infrastructure, and later – of the existence of powerful armed forces altogether. The need to refuse military justice was reduced to the fact that:

1) the functioning of the military courts is not consistent with Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[4] (hereinafter referred to as the ECHR) and the case-law of the European Court of Human Rights (hereinafter referred to as the ECtHR);

2) the existence of military courts contradicts part 6 Art. 125 of the Constitution of Ukraine[5], which prohibits the creation of extraordinary and special courts;

3) 'the military in the mantle' (that is, judges who have officer ranks) consider cases against the established procedure for military service (military offenses), and hence cannot be objective;

4) a judge of a military court cannot be completely impartial, since he/she is subordinate to the command. Close communication of military courts with the military sphere can lead to

4 The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 25 June 2022.

5 Constitution of Ukraine: Law of Ukraine of 28 June No. 27-IX of 1996 <https:// https://zakon.rada.gov.ua/laws/show/254 k/96-vr#Text> accessed 28 June 2022.

interference in the justice process by commanders of military units or officials of the Ministry of Defense of Ukraine. Financing of military courts at the expense of the Ministry of Defense of Ukraine poses a threat of material pressure on these courts;

5) cases considered in military courts do not have features significant enough to establish the need of a system of the military courts;

6) military courts do not have their own separate sphere of jurisdiction, and only deal with a narrow subject area – cases of war crimes, so conflicts of jurisdictions of military and local courts may arise;

7) the peculiarities of the system of military courts, which does not correspond to the administrative-territorial structure of Ukraine, according to which all other courts in the state are built, creates problems with the definition of courts where decisions of military courts can be reviewed. First of all, this concerns the appeal, which must be ensured in all cases;

8) there is a problem with financing, namely, with the creation of military courts, the need is for significant financial resources, which are lacking in the context of reform processes and the economic crisis;

9) the reduction of the sphere of military justice is a steady trend around the world.

However, unforeseen realities radically changed the liberal ideas of peacetime regarding the uselessness of military justice. In 2014, an anti-terrorist operation (operation of the joint forces) and, in fact, a war began in Ukraine, which renewed the discussion about the functioning of military justice in Ukraine in general and military courts in particular. However, in eight years of political discussion, the system of military justice was never created. The reforms sometimes became the subject of political speculations, populist slogans, contradictory judgments, promises, but, unfortunately, not a priority direction of state policy, the focus of political will, which caused periodical emergence and fading of interest in the problems of creating a system of military justice in Ukraine.

The beginning of the full-scale armed aggression of the Russian Federation against Ukraine revealed the truth of the well-known proverb 'if you want peace - prepare for war.'

In the first days of the armed aggression of the Russian Federation against Ukraine, the work of some courts was completely paralyzed. In addition, in case of threat to the life, health and safety of the participants of the court proceedings and court visitors, the judges decided to suspend the implementation of the proceedings until the circumstances that had led to the termination of the proceedings were eliminated. And such a suspension in many cases lasts until now.

During the hostilities in the first months of the war, six court premises were destroyed or significantly damaged, including four appellate courts. Rocket fire destroyed the historic building of the Kharkiv Court of Appeal, the Economic Court of Mykolaiv region, damaged buildings of the Chernihiv Court of Appeal and the Economic Court of Chernihiv region.

The system of Ukrainian procedural legislation was also unprepared to ensure the proper functioning of legal institutions because procedural codes were adopted in peacetime and have been designed for peacetime. This led to the urgent development and issuing by the Supreme Court of the letters of explanation 'On Certain Issues of Criminal Proceedings under Martial Law'. In addition, on 6 March 2022, due to the inability of courts to administer justice, the President of the Supreme Court by his order changed the territorial jurisdiction of court cases of 48 Ukrainian courts.[6]

6 Letter from the Supreme Court No 1/0/2/22 'On Certain Issues of Criminal Proceedings in The Condition Of Martial Law' of 3 March 2022 <https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/war/Inform_lyst_2022_03_03.pdf> accessed 21 June 2022.

However, despite the difficult situation, law enforcement agencies continued to function and demonstrated not only resistance to the enemy, but also carried out pre-trial investigation of the crimes committed. This necessitated the consideration by investigating judges of petitions for selection of preventive measures, measures to ensure criminal proceedings, conduct of investigative (search) and secret investigative (search) actions. In addition, as of 1 July 2022, information was entered into the Unified Register of Pre-Trial Investigations (URPI) and pre-trial investigations were initiated regarding 20,699 crimes of aggression and war crimes; 10,268 crimes against national security. The pre-trial investigation of the so-called 'main' case of the Russian aggression against Ukraine is being carried out, and 623 persons-representatives of the military-political leadership of the aggressor country were notified of suspicion in absentia.[7] These statistics reflect only the war crimes committed after 24 February 2022, however, investigators and prosecutors faced the problem of obtaining rulings for investigative and secret investigative actions, election of preventive measures against detainees, obtaining rulings on the application of measures to ensure criminal proceedings, etc., because the usual system of territorial jurisdiction was destroyed.

All of the above gives grounds not only to raise the question of the expediency of creating and functioning of the military justice system in the state, which, even in conditions of war, would allow not to stop the execution by the courts of the constitutional function of administering justice and judicial control, but also to substantiate the expediency of its existence in the state.

2 EVOLUTION OF VIEWS ON MILITARY JUSTICE IN UKRAINE

The system of military justice of Ukraine for a long time was characterized by contradictory tendencies: some military justice bodies (for example, the Specialized Prosecutor's Office in the military and defense sphere) have been restored and are working effectively; others have been eliminated but there are disputes about their revival (for example, the resumption of the work of military courts). There is also a proposal to create a State Military Bureau of Investigation.

The rich experience of the functioning of military justice bodies in Ukraine was gained mainly during the time when Ukraine was a part of the Soviet Union. This fact may have led to an intuitive denial of such experience and attitude to the military justice bodies as vestiges of the Soviet past and the desire for a gradual rejection of them.

At the time of Ukraine's declaration of independence on 24 August 1991, there were military justice bodies functioning in the state, namely, in the military tribunals and in the military prosecutor's office. Taking into account the specifics of the activities of military formations, military courts should be retained in the system of general courts, which are significantly reformed and exempt from any dependence on the military command. The highest instance of military justice shall be the military Collegium of the Supreme Court as an appellate instance in cases considered by district military courts of the first instance, except for cases considered by judges with an expanded panel of judicial assessors and as a cassation instance in all cases considered by military courts of garrisons, districts, in including cases considered with the participation of judicial assessors.

Thus, at the initial stage of judicial and legal reform in Ukraine after the proclamation of independence, a strategic decision was made to preserve military justice with its partial

7 See 'Crimes Committed during a Full-scale Invasion of the Russian Federation' (*Official website of the Office of the Prosecutor General: official web portal*) <https://www.gp.gov.ua> accessed 21 June 2022.

reform, which was made in February 1993. By the resolution of the Verkhovna Rada of Ukraine military tribunals were renamed into military courts.

On 15 November 1991, the Law 'On the Prosecutor's Office'[8] enshrined the creation of military prosecutor's offices, defined their system, and established requirements for their employees.

In 1994, the law of Ukraine 'On the Judiciary of the Ukrainian USSR'[9] of 1981 was supplemented by Chapter 3-1 'Military Courts', which regulated the issues of their organization and functioning. Military courts functioned until 2010.

In 2002, the Military Law Enforcement Service was established in Ukraine[10], which, as we can see, completed the formation of a system of military justice.

Gradually, at the end of the first decade of the new century, the idea of liquidating military courts was actively discussed, which led to the beginning of the stage of the military justice crisis. The concept of improving the judiciary to establish a fair trial in Ukraine in accordance with the European standards was approved[11], which did not provide for military courts in the judicial system of Ukraine. In particular, the Decree of the President of Ukraine Viktor Yushchenko of 10 May 2006 approved the 'Concept of Improving the Judiciary to Establish a Fair Trial in Ukraine in Accordance with European Standards', which did not provide for military courts in the judicial system of Ukraine. Implementing the provisions of this program document, the President of Ukraine, Viktor Yanukovych, who was known for his views aimed at the demilitarization of Ukraine, in September 2010 issued a Decree by which he liquidated 15 military courts, including 2 appellate and 13 local ones, where 75 military judges worked.

Among other things, the liquidation of the system of military courts was justified by the fact that the number of cases considered by them is so insignificant that their maintenance is economically impractical. The western experts expressed their position on the inefficiency of the functioning of military courts, and therefore the inexpediency of their existence.[12] It was also envisaged to completely liquidate the specialized prosecutor's office, which was entrusted with the authority to supervise compliance with laws in the military sphere. By the way, it was also planned to reduce the number of the Armed Forces of Ukraine to 70 thousand people.

Attitude to the military justice system has changed significantly after the aggravation of the military-political situation in Ukraine in 2014. The Law of Ukraine 'On the Prosecutor's Office' in August 2014 was amended to create a military prosecutor's office, which in fact did not interrupt its work, and since 2012 has been reorganized into the prosecutor's office to monitor compliance with laws in the military sphere. Subsequently, the new Law 'On the

8 The Law of Ukraine 'On the Prosecutor's Office' № 1789-XII of 05 November 1991 (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <http://zakon5.rada.gov.ua/laws/show/1789-12> accessed 25 June 2022.

9 The Law of Ukraine 'On the Judiciary of Ukraine' № 2022-X of 05 June 1981 (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/2022-10#Text> accessed 25 June 2022.

10 The Law of Ukraine 'On the Military Law Enforcement Service in the Armed Forces of Ukraine' № 3099-III of 07 March 2002 (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/3099-14#Text> accessed 25 June 2022.

11 Decree of the President of Ukraine 'The Concept of Improving the Judiciary to Establish a Fair Trial in Ukraine in Accordance with European Standards' № 361/2006 of 10 May 2006 (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/361/2006#Text> accessed 25 June 2022.

12 S Overchuk, 'Military Courts Are a Necessary Component of Military Justice in Ukraine' (2015) 1 (11) Journal of the National University of Ostroh Academy. Series 'Law'..

Prosecutor's Office'[13] enshrined the status of military prosecutor's offices as a separate part of the prosecutor's office system.

It is inconsequential that it is the system of military justice bodies that can ensure the effectiveness of functioning, since only the completed system is able to work smoothly and perform the function that the state relies on it.

If we talk about the system in military justice, we can consider it in a broad and narrow sense. In the narrow sense, military justice means only military courts. In a broad sense, in our opinion, the concept of military justice covers interconnected judicial and law enforcement bodies, the competence of which extends to legal relations concerning the organization and activities of the Armed Forces of Ukraine and other paramilitary formations, as well as persons who are in their composition and have the status of a military serviceman.

Based on this understanding, the following bodies can be attributed to the system of military justice:

I) Military Law Enforcement Service in the Armed Forces of Ukraine is a special law enforcement formation within the Armed Forces of Ukraine, designed to ensure law and order and military discipline among servicemen of the Armed Forces of Ukraine in places of deployment of military units, in military educational institutions, institutions and organizations, military towns, on the streets and in public places; to fight with and prevent criminal and other offenses in the Armed Forces of Ukraine; to protect the life, health, rights and legitimate interests of servicemen, conscripts during the trainings, employees of the Armed Forces of Ukraine, as well as to protect the property of the Armed Forces of Ukraine from theft and other unlawful encroachments, and to participate in countering sabotage manifestations and terrorist acts at military facilities.

The military law enforcement service in Ukraine, as noted above, was established in 2002, and operates on the basis of the Law of Ukraine.[14]

Among the tasks of the Military Law Enforcement Service in the Armed Forces of Ukraine, there are, in particular: a) identifying the causes, prerequisites and circumstances of criminal and other offenses committed in military units and military facilities; search for persons who voluntarily left military units (places of service); b) prevention of commission and termination of criminal and other offenses in the Armed Forces of Ukraine; c) participation in the protection of military facilities and ensuring public order and military discipline among military personnel in places of deployment of military units, military towns, on the streets and in public places; d) execution in cases stipulated by law of decisions on the detention of military personnel in the guard watch; e) ensuring the execution of criminal penalties against military personnel who, according to the court verdict, are sentenced to be detained in a disciplinary battalion; f) participation in countering sabotage manifestations and terrorist acts at military facilities, etc.

When deciding on the introduction of a martial law or state of emergency regime in Ukraine or in some of its territories, the Law Enforcement Service is additionally tasked with: a) participation in the fight against hostile sabotage and reconnaissance groups on the territory of Ukraine; b) organization of collection, escort and protection of prisoners of war from the places (localities) where they are held after their capture, to the camps for prisoners of war; c)

13 See: Official website of the Verkhovna Rada of Ukraine: official web portal <https://zakon.rada.gov.ua/laws/show/1697-18#Text> accessed 25 June 2022.

14 The Law of Ukraine 'On the Military Law Enforcement Service in the Armed Forces of Ukraine' of 7 March 2002 No 3099-III (as amended on 1 April 2022) (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/3099-14#Text>accessed 25 June 2022.

ensuring compliance with the curfew in garrisons; d) protection of military facilities, military towns and their population, assistance in its evacuation; e) restoration and maintenance of order and discipline in military units; f) control over the movement of vehicles and transportation of goods of the Armed Forces of Ukraine (Art. 3 of the Law of Ukraine).

As you can see, the Military Law Enforcement Service in the Armed Forces of Ukraine is not empowered to carry out pre-trial investigation of military criminal offenses, although for a long time a proposal was discussed to create military police on its basis, which would have these powers.

However, there are certain vulnerabilities associated with doctrinal ideas regarding ensuring the impartiality of the exercise of their powers by such a pre-trial investigation body. However, among the principles of formation and functioning of the pre-trial investigation body there are: 1) out-of-departmental status; 2) independence from any public authorities, local self-government bodies, public associations and organizations; 3) full institutional independence of the investigative function performed. It is in such synergy that the objectivity and impartiality of the investigation should be ensured. This was also indicated by the Constitutional Court of Ukraine, in the Decision of 24 April 2018 in the case on the constitutional submission of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights regarding the compliance (constitutionality) of part six of Art. 216 of the CPC of Ukraine. In its legal position, the body of constitutional jurisdiction noted that

> the independence of the investigation of violations of human rights to life and respect for human dignity... means, in particular, that from the point of view of an impartial observer there should not be any doubts about the institutional (hierarchical) independence of the state body (its officials), authorized to carry out an official investigation... In this aspect, the independence of the investigation cannot be achieved if the competent public authority (its officials) is institutionally dependent on the body (its officials) to which the system is subordinated.15

Therefore, the hierarchical subordination of the law enforcement service in the Armed Forces of Ukraine to the Ministry of Defense of Ukraine cannot ensure the independence of the pre-trial investigation of criminal offenses committed by military personnel, and thus - the fulfillment of the state's positive obligations to ensure a quick, complete, and most importantly, impartial investigation so that everyone who has committed a criminal offense is brought to justice to the extent of his/her guilt, and no innocent person was accused or convicted, which stem from Art. 8 of the ECHR and Art. 2 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CrimPC of Ukraine). [1617]

(ii) Military Prosecutor's Office.

It should be noted that the Specialized Prosecutor's Office in the military and defense sphere has been introduced and operates in Ukraine at the moment. It is the only body of military justice that fully functions and, even in conditions of imposed martial law and armed aggression, performs the functions assigned to it by Art. 131-1 of the Constitution of Ukraine and the Law of Ukraine 'On the Prosecutor's Office': organizes and procedurally

15 Decision of the Constitutional Court of Ukraine of 24 April 2018 No.3-p/2018 in the case No 1-22/2018 (762/17) by the constitutional submission of the Verkhovna Rada Commissioner for Human Rights on the conformity (constitutionality) of part six of Art. 216 of the CrimPC of Ukraine (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/v003p710-18#Text> accessed 25 June 2022.

16 The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 25 June 2022.

17 Criminal Procedure Code of Ukraine of 13 April 2012 No. 4651-VI (*Official website of the Verkhovna Rada of Ukraine: official web portal*) < https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 25 June 2022.

manages pre-trial investigation of war and war crimes, supports public prosecution in courts in these cases, carries out [18][19] supervision of secret and other investigative actions of law enforcement agencies.

(iii) Military courts.

Ukraine has not created a system of military courts, the expediency of which is the subject of this study.

3. FOREIGN EXPERIENCE AND PRACTICE OF THE ECtHR IN RELATION TO MILITARY COURTS

3.1 Experience of states in creation of military courts

Analysis of the military justice system of about 60 states gives grounds to point out that there are 3 main models of building a system of military courts in the world.[20] *The first model* exists in states in which military courts operate on a permanent basis, both in peacetime and during hostilities, both on the territory of the state and outside its territory, for example, in military bases outside the country. It is this model that exists in the UK, Spain, Italy, Ireland, Canada, the People's Republic of China, Latin American countries (Argentina, Brazil, Venezuela, Colombia, Peru, Chile), Slovakia, the USA, Turkey, Switzerland, the countries of the former Soviet Union: the Republic of Azerbaijan, the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan, the Republic of Uzbekistan.

The second model is applied in those states where there is a 'mixed jurisdiction', that is, military 'courts' operate on a permanent basis in general civil courts. Moreover, this is not a full-fledged link of the judicial system, but only chambers, departments, council offices, etc., formed from officers who have a legal education. Such courts may also have a mixed composition of civilian and military judges. This model operates in Belgium, Bulgaria, the Netherlands, Norway, Croatia, France, Finland, and Hungary.

The *third model* is introduced in those states where military courts begin to exercise their powers during war or exercise them if the state has military bases abroad. In other instances, cases against military personnel are considered by civil courts of general jurisdiction. These models of military justice are created in Austria, Denmark, Georgia, the Czech Republic, Germany.[21]

According to our estimates, military courts operate in more than 40 countries of the world, including 12 European countries. In fact, every fifth state that has its own army, has military courts.

18 Constitution of Ukraine of 28 June 1996 (*Official website of the Verkhovna Rada of Ukraine: official web portal*) < https://zakon.rada.gov.ua/laws/show/254 k/96-vr#Text> accessed 25 June 2022.

19 The Law of Ukraine 'On the Prosecutor's Office' No 1697-VIII of 14 October 2014 (*Official website of the Verkhovna Rada of Ukraine: official web portal*) < https://zakon.rada.gov.ua/laws/show/1697-18#Text > accessed 25 June 2022.

20 See: Comité Directeur pour les Droits de l'Homme. Contribution à l'exercice de 'monitoring' du Comité des Ministres. Procédures Judiciaires devant les Tribunaux Militaires. CDDH (2003)015 addemdum III. Strasbourg, le 16 juin 2003 <https://rm.coe.int/09000016804600ef> accessed 25 June 2022.

21 See in more detail: F Andreu-Guzmán, *Fuero militar y derecho internacional : Los tribunales militares y las graves violaciones a los derechos humanos* (Comisión Colombiana de Juristas 2003) 137-149 (366); Kyle BJ, Reiter AG, *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy: The Politics of Military Justice* (Routledge 2021).

Studying the experience of reforming the military justice system in the countries of the former Soviet Union after its collapse, we saw the following pattern.[22] [23]

> The Republic of Estonia has a population of 1,331,796 as of 2022[24], and the armed forces account for about 5,500 troops[25].
>
> The population of the Republic of Latvia as of 2022 is 1,875,757[26]. Latvia's National Armed Forces consist of 6,700 professional servicemen and 9,300 National Guardsmen (a total of 16,000 people) [27].
>
> The Republic of Moldova, which has a population of 2,604,000 as of 2022[28], has an armed force of about 6,000 persons[29].
>
> Georgia has a population of 3,688,600 [30] and has armed forces of 37,000 people.[31]

The logic of justifying the decision to transfer the committed war crimes to the jurisdiction of ordinary local courts of these states is clear, since the costs of maintaining military courts are not proportional to the number of war crimes that can hypothetically be committed.

There is another example: Israel. The population of this country is 9,449,000 people[32]. The total number of regular armed forces of the IDF is 173,000 soldiers.[33]

Such parallels can be drawn regarding the construction of military justice in Ukraine.

As of 2022, the population of Ukraine is 41,167,300 people[34]. In accordance with Art. 1 of the Law of Ukraine 'On the Number of Armed Forces of Ukraine'[35] as of 1 January 2022, the

22 The population as of 2022 according to the Portal of official statistics <https://osp.stat.gov.lt/lietuvos-gyventojai-2020/salies-gyventojai/gyventoju-skaicius-ir-sudetis > accessed 25 June 2022.

23 The number of personnel of the national defense system who are undergoing professional military service. According to the Ministry of National Defense of the Republic of Lithuania. <https://kam.lt/personalas/> accessed 25 June 2022.

24 Population as of 2022 according to the Estonia Statistics Website < https://www.stat.ee/et/avasta-statistikat/valdkonnad/rahvastik/rahvaarv> accessed 25 June 2022.

25 The Estonian Defense Forces are peaceful as of 2022, according to the Defense Resources Council. <https://elukutse.ee/kaitsevae-uksused/ > accessed 25 June 2022.

26 The population as of 2022 according to the Official Statistics Portal. <https://data.stat.gov.lv/pxweb/lv/OSP_PUB/START__POP__IR__IRS/IRS010/table/tableViewLayout1/ > accessed 25 June 2022.

27 The National Armed Forces include the following military formations: Regular Forces – 6,700 troops, National Guard – 9,300 and reserves – 6,000 reserve soldiers as of 2022, according to the website of the National Armed Forces <https://www.mil.lv/lv/par-mums > accessed 25 June 2022.

28 The population as of 2022 according to the National Bureau of Statistics. <https://statistica.gov.md/category.php?l=ro&idc=103&> accessed 25 June 2022.

29 As of 2022, according to the website Global Firepower (GFP) <https://www.globalfirepower.com/active-military-manpower.php > accessed 25 June 2022.

30 The population as of 2022 according to the National Statistics Office of Georgia <https://www.geostat.ge/ka/modules/categories/316/mosakhleoba-da-demografia> accessed 25 June 2022.

31 The number of the Georgian Defense Forces (staff of military personnel) as of 2022 amounted to no more than 37,000 people according to the Legislative Bulletin of Georgia <https://matsne.gov.ge/ka/document/view/5062018?publication=0> accessed 25 June 2022.

32 According to the data of the Central Bureau of Statistics as of 31 December 2021 <https://www.cbs.gov.il/en/mediarelease/Pages/2021/Population-of-Israel-on-the-Eve-of-2022.aspx> accessed 25 June 2022.

33 As of 2022, according to the website Global Firepower (GFP) <https://www.globalfirepower.com/country-military-strength-detail.php?country_id=israel> accessed 25 June 2022.

34 According to the State Statistics Service of Ukraine, excluding the temporarily occupied territory of the Autonomous Republic of Crimea and the city of Sevastopol <https://ukrstat.gov.ua/> accessed 25 June 2022.

35 The Law of Ukraine 'On the Number of Armed Forces of Ukraine' of 05 March 2015 No 235-VIII (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/235-19#n5> accessed 25 June 2022.

number of armed forces in the amount of 261,000 people was approved, including 215,000 servicemen.

In May 2022, the President of Ukraine Volodymyr Zelenskyy said that currently the Armed Forces of Ukraine consist of 700,000 servicemen.[36] The military command iterates that there is the need to increase this number to 1 million.

3.2 The ECtHR case law related to the military courts

The ECtHR has repeatedly appealed to consider issues regarding the functioning of military courts in states. They were mainly raised in the context of alleged violations of Art. 6 of the ECHR. In its precedents, the ECtHR has developed key approaches that should be taken into account when creating and operating military courts.

The first approach is that

> the Convention applies in principle to military personnel, not just civilians. Arts. 1 and 14 state that 'every person under jurisdiction of the Contracting States shall enjoy 'without discrimination' the rights and freedoms set forth in Section I. However, during the interpretation and application of the Convention ... The Court shall bear in mind the peculiarities of military life and its impact on the situation of individual servicemen (para. 54).[37]

This means that each serviceman, having suffered a violation of the rights provided for by the ECHR, can also apply for their protection.

The second approach is due to the fact that, in principle , the ECtHR does not regard the existence of military courts negatively. 'The consideration by military tribunals of criminal charges against military[38]personnel in principle does not contradict the provisions of Art. 6 of the Convention.'[39]

The third approach is that there is no reason to consider judges of military courts less professional than their colleagues from the general courts, since they have undergone the same professional training as their 'civilian' colleagues.

The fourth and, in our opinion, the most important approach is that the Convention allows the functioning of military courts only as long as there are sufficient guarantees that ensure their independence and impartiality.[40] As noted in the case of *Bryan v. the United Kingdom* judgment:

In order to establish whether a tribunal can be considered as 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, the court of guarantees against outside pressures and the question w the body shows of independence[41].

36 V Orlova, 'Today Ukraine is Protected by about 700,000 Soldiers - the President' (*Information agency 'UNIAN'*, 21 May 2022) <https://www.unian.ua/war/ukrajinu-sogodni-zahishchaye-blizko-700-tisyach-viyskovih-prezident-novini-vtorgnennya-rosiji-v-ukrajinu-11835498.html> accessed 25 June 2022.

37 *Engel and others v the Netherlands* App no 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECtHR, 8 June 1976) para 54 <https://hudoc.echr.coe.int/eng?i=001-57479> accessed 08 July 2022.

38 *Morris v the UK* App no 38784/97 (ECtHR, 26 February 2002) para 59 <https://hudoc.echr.coe.int/eng?i=001-60170> accessed 08 July 2022.

39 *Cooper v the UK* App no 48843/99 (ECtHR, 16 December 2003) para 110 <https://hudoc.echr.coe.int/eng?i=001-61549> accessed 08 July 2022.

40 *Morris v the UK* (para 59).

41 *Bryan v the UK* App no 19178/91 (ECtHR, 22 November 1995) para 37 <https://hudoc.echr.coe.int/eng?i=001-57954> accessed 08 July 2022.

In *Findlay v. the United Kingdom*, the ECtHR affirmed the above approach that when stating the independence of a military court, the method of appointing a panel of judges, the term of their powers, the existence of guarantees against external influence and internal independence should be taken into account. Moreover, the independence and objective impartiality are closely related, so the court considers them together.[42]

As for the issue of 'impartiality', this requirement has two aspects. First, the court must be subjectively free from personal bias. Secondly, it must also be impartial from an objective point of view, that is, sufficient guarantees should be created to exclude any legitimate doubts in this regard.[43]

The concern regarding the functioning of military courts is repeatedly expressed in the decisions of the ECtHR in this context, since in some legal systems such independence and impartiality are not ensured, which jeopardizes the fairness of the court decision that they make.

For example, in *Findlay v. The United Kingdom*, the ECtHR stated that Mr. Findlay's concerns about the independence and impartiality of the military tribunal to which he faced various charges were objectively justified. The Court's concern centered on the multiple roles played in the trial by the convening officer. This officer played a key indictment role, but at the same time appointed the members of the military tribunal, who were subordinated to him by rank and fell under his chain of subordination. He also had the power to dissolve the military tribunal before or during the trial and acted as an 'affirming official,' resulting in the military tribunal's decision on the verdict and sentence not entering into force until he ratified it. The Court held that these fundamental deficiencies had not been corrected by the presence of safeguards, such as the participation of a lawyer who was not himself a member of the military tribunal and whose recommendations had not been made public to him.[44]

In *Inkal v. Turkey*, as regarded the criminal trial of a civilian in the Court of National Security, the ECtHR established certain guarantees of independence and impartiality that existed in relation to the military court. In particular, the court noted that: 1) the relevant military judges received the same professional training as their civil colleagues; 2) in the court session they used constitutional guarantees identical to the guarantees of civil judges; 3) that, according to the Turkish Constitution, they should be independent and free from the instructions and influence of state authorities. ECtHR identified other aspects that compromised the impartiality of judges. In particular, the judges were servicemen who belonged to the army, subordinated to military discipline and attestation reports.[45]

Direct subordination to the command, in the opinion of the authors, is one of the most frequent violations which affects impartiality in the administration of justice by military courts.

Thus, in another 'Turkish' case, the ECtHR stated the absence of the independence of the military court, since 'it reports in the hierarchy to the commander of the troops of martial law and / or the commander of the relevant army corps.'[46] In considering the already

42 *Findlay v the UK* App no 22107/93 (ECtHR, 25 February 1997) para 73 <https://hudoc.echr.coe.int/eng?i=001-58016> accessed 08 July 2022.

43 *Pullar v the UK* App no 22399/93 (ECtHR, 10 June 1996) para 30 <https://hudoc.echr.coe.int/eng?i=001-57995> accessed 08 July 2022.

44 *Findlay v the UK* (para 60, 74-78).

45 *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) para 67, 68 <https://hudoc.echr.coe.int/eng?i=001-58197> accessed 08 July 2022.

46 *Şahiner v Turkey* App no 29279/95 (ECtHR, 25 September 2001) para 41 <https://hudoc.echr.coe.int/eng?i=001-59666> accessed 08 July 2022. See also *İbrahim Gürkan v. Turkey* App no10987/10 (ECtHR, 3 July 2012) para 13-20 <https://hudoc.echr.coe.int/eng?i=001-111840> accessed 08 July 2022.

mentioned case *Morris v. the United Kingdom*, the ECtHR also pointed out the vulnerability of the position on the independence of military judges who served as officers in the Royal Army, were 'appointed solely ad hoc with the knowledge that they will return to their normal military duties at the end of the proceedings.' Nevertheless, the ECtHR did not consider that 'the special nature of their appointment was in itself sufficient to make the composition of the military tribunal incompatible with the independence requirements of Art. Art. 6 para. 1 of the Convention', but 'it has made the necessary presence of protection against external pressure all the more important in this case[47].

If the tribunal includes a person who is in a subordinate position from the point of view of his/her duties and the organization of service in relation to one of the parties, the parties may have legitimate doubts about the independence of this person. This situation seriously undermines the trust that courts should inspire in a democratic society, in connection with which, in particular, in the case the court found a violation of Art. 6 (1) of the Convention.[48]

It should also be noted that it is quite difficult in the context of the question of jurisdiction to determine the legitimacy of the consideration of a case against a civilian by a military court.

For example, in *Inkal v. Turkey*, the ECtHR noted that the court's review of civilian cases, consisting partly of military personnel, could raise legitimate concerns that the court may allow biased considerations to be unlawfully influenced.[49] Even if a military judge participated only in an interim decision in a case against a civilian who continues to be valid, the entire proceedings are deprived of the appearance of an independent and impartial court.[50]

Situations in which a military court has jurisdiction to try civilians for actions against the armed forces may raise reasonable doubts about the objective impartiality of such a court. A judicial system in which a military court is authorized to try a person who is not a soldier can easily be perceived as nullifying the distance that should exist between the court and the parties to the criminal proceedings, even if there are sufficient guarantees of the independence of this court.[51]

Considering complaints against criminal charges against civilians by military courts, the ECtHR generally quite categorically noted that it could be found to be compatible with Art. 6 only in very exceptional circumstances.[52]

Therefore, based on the approaches of the ECtHR regarding the requirements for military courts in the context of Art. 6 of the ECHR, we can formulate our own vision of the system of military courts in Ukraine.

47 *Morris v the UK* (para 70)

48 *Sramek v Austria* App no 8790/79 (ECtHR, 22 October 1984) para 42 <https://hudoc.echr.coe.int/eng?i=001-57581> accessed 08 July 2022.

49 *Incal v Turkey* (para 72). See also *İprahim Ülger v. Turkey* App no 57250/00 (ECtHR, 29 July 2004) para 26 < https://hudoc.echr.coe.int/eng?i=001-66522> accessed 08 July 2022.

50 *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) para 115 <https://hudoc.echr.coe.int/eng?i=001-69022> accessed 08 July 2022.

51 *Ergin v Turkey* (no. 6) App no 47533/99 (ECtHR, 4 May 2006) para 49 <https://hudoc.echr.coe.int/eng?i=001-75327> accessed 08 July 2022.

52 *Martin v the UK* App no 40426/98 (ECtHR, 24 October 2006) para 44 <https://hudoc.echr.coe.int/eng?i=001-77661> accessed 08 July 2022. See also *Mustafa v Bulgaria* App no 1230/17 (ECtHR, 28 November 2019) para 28-37 <https://hudoc.echr.coe.int/eng?i=001-198691> accessed 08 July 2022.

4 DETERMINANTS OF THE REVIVAL OF MILITARY COURTS IN UKRAINE

By unleashing aggression against Ukraine, Russia has demonstrated its strategic intention to restore full geopolitical control over post-Soviet countries, including those in the Black Sea basin. This determines Ukraine's presence in the conditions of constant struggle for independence, liberation of the occupied territory and restoration of state borders. Thus, Ukraine has an extremely difficult and important goal, the achievement of which is possible, among other things, with the help of the Armed Forces. Therefore, the issue of ensuring and improving the defense capability of the latter should be the focus of constant attention of the state authorities.

There is no doubt that the Armed Forces of any state can successfully perform their function only if they support the law-based and strict military discipline, if they are cleansed of persons who commit crimes, thus ensuring the strength of their ranks, as well as when personal rights and interests of military personnel and their families are protected by law. Thus, it is possible to draw an unequivocal positive conclusion, answering the question about the need to revive the system of military justice in Ukraine.

Almost half a year of experience in repelling armed aggression against Ukraine makes it possible to conclude that the unconditional advantage of creating military courts that will be endowed with the function of administering justice and judicial control is that their functioning will ensure *access to justice*. Namely, in those territories where the work of courts is temporarily blocked, the military and the court will be able to fulfill their functional purpose, including in combat conditions. It is military courts, and not prosecutors, as is currently done in Ukraine, that can be entrusted with the authority to exercise the function of not only administering justice, but also judicial control. That is, in the territories that are in the combat zone, close to the combat zone, are under threat of missile strikes or artillery shelling, the function of administering justice and judicial control can be fully transferred to military courts.

Second, military courts must ensure the *availability of justice*. When creating them, one should not proceed from the concept of their binding to a specific administrative-territorial unit, which will ensure mobility, change of location along with a change in the deployment of military formations or a change in the operational and tactical situation.

This model can ensure *the efficiency* of justice and judicial control, which a priori, in accordance with the Criminal Code of Ukraine[53], should be operational, ensure compliance with procedural deadlines for pre-trial investigation and application and measures to ensure criminal proceedings, which will have a positive impact not only on the implementation of pre-trial investigation, but also, above all, will contribute to ensuring the rights and legitimate interests of persons involved in criminal proceedings.

It should also be noted that on the territory of warfare, not only war crimes provided for by the Criminal Code of Ukraine are committed[54], but also war crimes related to the violation of the Geneva Convention of 1949[55], as well as stipulated in Art. 8 of the Rome Statute of the International Criminal Court[56]. The subjects of these crimes may be: 1) combatants, that

53 Criminal Procedure Code of Ukraine of 13 April 2012 No 4651-VI (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 25 June 2022.

54 Criminal Code of Ukraine of 5 April 2001 No 2341-IIi (Official website of the Verkhovna Rada of Ukraine: official web portal) <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 25 June 2022.

55 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III), 12 August 1949 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument> accessed 25 June 2022.

56 Rome Statute of the International Criminal Court, 17 July 1998, in force since 1 July 2002, United Nations, Treaty Series, vol 2187, No 38544 <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 25 June 2022.

is, participants of an armed conflict of an international nature (personnel and composition of the armed forces, militia personnel and volunteer units that are or are not part of the armed forces; personnel of organized resistance movements and guerrilla formations, if they meet certain conditions, in particular, have at the head a person responsible for their subordinates, have a certain and clearly visible from afar distinctive sign; openly carrying weapons; observe in their actions the laws and customs of war); 2) non-combatants, that is, persons who are part of the armed forces of the belligerent, assist it in achieving military success, but do not directly participate in hostilities (medical and spiritual personnel, intellectuals, war correspondents, lawyers, etc.); 3) civilians who commit crimes in the territory where the armed conflict continues, that is, persons who are not participants in the armed conflict, however, under certain conditions found themselves in the territory where the conflict continues; 4) prisoners of war (combatants and legitimate participants of the armed conflicted after their capture by the enemy); 4) mercenaries, persons involved in the armed conflict for the purpose of obtaining material benefits, who are not part of the armed forces of the belligerent state or other legitimate structures. As you know, the mercenary does not have the status of a combatant, and, accordingly, a prisoner of war. Thus, the third argument in support of the point of view on the need to create military courts is the specificity of the subject area in which military judges will work.

From the previous one follows the fourth argument in favour of the creation of military justice, which is determined by the requirements of *competence and professionalism*.

Another important aspect that influences the conclusion regarding the need to create military courts is that the investigation of war crimes and their trial are often related to *state secrets,* that is, a type of secret information covering, in particular, information in the field of defense, state security and law enforcement, the disclosure of which may harm the national security of Ukraine and which are subject to state protection. The law stipulates that the state secrets relate to a wide range of information in the field of defense. This, for example, may be the content of strategic and operational plans and other documents of combat management; information on the preparation and conduct of military operations, strategic and mobilization deployment of troops; information about other important indicators that characterize the organization, number, deployment, combat and mobilization readiness, combat and other military training, weapons and logistical support of the Armed Forces of Ukraine and other military formations, etc[57]. Such a small illustration indicates a significant segment of legal regulation of the list of information, non-disclosure of which can be of strategic importance and what can really be ensured only in the field of military justice.

In the context of the issue raised, one more important aspect should be pointed out, which is related to *traditions and experience*. The military courts in Ukraine were liquidated relatively recently, so the experience gained during the functioning of military justice, trained professional personnel can be used during the rapid restoration and 'launch' of military courts. In particular, the system of training legal personnel, including for military justice bodies, has not been lost and has been operating for many years at the Yaroslav Mudryi National Law University[58], a higher educational institution that has been training lawyers for 215 years. Military courts can be equipped with the graduates with the second (Master's) degree of the Military Law Institute, who, along with knowledge in the field of 'traditional'

57 The Law of Ukraine 'On State Secrets' No3855-XII of 21 January 1994 (Official website of the Verkhovna Rada of Ukraine: official web portal) <https://zakon.rada.gov.ua/laws/show/3855-12#Text> accessed 25 June 2022.

58 Yaroslav Mudryi National Law University. Military Law Institute Official website. <https://nlu.edu.ua/instytuty-fakultety/vijskovo-yurydychnyj-instytut/> accessed 25 June 2022.

law, receive in-depth knowledge of military law, international humanitarian law, social protection of servicemen, representation of military units in courts, etc.

One of the arguments for the need to create a system of military courts is also *a prospect*. We are talking about the fact that the law enforcement system of Ukraine sees its task in recording all the offenses committed on the territory of the state (both crimes and misdemeanors). Carrying out their quick, complete and impartial investigation and trial so that everyone who committed a criminal offense is brought to justice to the extent of his/her guilt is the task of criminal proceedings (Art. 2 of the CrimPC of Ukraine). Therefore, the law enforcement system of Ukraine will carry out pre-trial investigation for many years to fulfill the statutory task and establish peace, justice and the regime of legality in the state.

Another important factor is that judges of military courts, having experience in military service and consciously choosing the path of military justice, have *psychological stability* and stress resistance, which is extremely important in conditions of martial law or the administration of justice in the military sphere, while judges of general courts may not have it. Justice in Ukraine often has a more 'feminine face', while the conditions for the administration of justice during martial law differ significantly not only in the objective, but also in the subjective aspect. Therefore, in addition, it is necessary to point out another important factor that belongs to the subjective qualities of a judge of a military court – stress resistance.

Summarizing the arguments given in support of the idea of introducing military courts in Ukraine, it can be indicated that it includes the following elements: 1) the originality of normative regulation, which differs significantly from the traditional normative regulation of the subject area of the general court judge, including taking into account their specialization; 2) the exclusivity of the object in the trial – mainly military and military crimes; 3) the peculiar type of the subjects who are brought to justice; 4) the need to apply the regime of preservation of state secrets; 5) the presence of experience in military service (may be an optional requirement); 6) the exclusivity of objective conditions in which administration of justice or judicial control can be carried out by the judges of a military court; 7) requirements of a subjective nature, which consist in the need for psychological strength and stress resistance; 8) the existence of the need for military courts not only during the war, but also after the establishment of peace in order to ensure the prosecution of the perpetrators and a complete return to the regime of legality and the rule of law in the state.

Realizing that the creation of a system of military courts can take a lot of time for the state that has suffered armed aggression, and presupposes the allocation of certain funding, it is also possible to consider the creation of a compromise model of military justice in Ukraine. Such alternative models can be built at the expense of: 1) the introduction of military specialization in local, appellate and Supreme Court and; 2) the creation of military boards at local, appellate and cassation courts.

Such proposals do not violate the Constitution of Ukraine (Part 1 of Art. 125) and the Law of Ukraine 'On the Judiciary and Status of Judges' (Part 1 of Art. 17), which provide that the judicial system in Ukraine is built on the principles of territoriality, specialization and instance. [59] [60]

As for the procedural support of the military justice system, we consider it unnecessary to adopt special military procedural legislation, such as the Military Criminal Procedure Code

59 Constitution of Ukraine of 28 June 28 1996 () <https://zakon.rada.gov.ua/laws/show/254 k/96-vr#Text> accessed 25 June 2022.

60 The Law of Ukraine 'On the Judiciary and Status of Judges' No 2016 1402-VIII of 2 June 2016 (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 25 June 2022.

in Switzerland (Militärstrafprozess)[61] or the Code of Military Justice of France[62], because the current Code of Justice of Ukraine[63] is capable of ensuring proper legal procedure for pre-trial investigation, including military and war crimes, or under martial law. The Ukrainian CrimPC contains specially developed and introduced separate procedures 'Special Regime of Pre-trial Investigation, Trial under Martial Law' (Section IX-1, Arts. 615, 615-1, 616); 'Criminal Proceedings Containing Information Constituting a State Secret' (Chapter 40, Arts. 517-518); 'Peculiarities of Cooperation with the International Criminal Court' (Section IX-2, Art. 617-636). If necessary, small legislative corrections will ensure proper legal procedure for the implementation of legal proceedings. These include, in particular, proposals to consolidate the jurisdiction of military courts; permission to record the court session in cases of lack of electricity supply and impossibility of video recording of the court session; introduction of interruptions of the court session during the air alert; simplification of some procedures, etc. However, these are individual points that do not significantly affect the implementation of the criminal case trial, because its procedure can be fully implemented during martial law as well.

5 CONCLUSIONS

The study gave the authors the opportunity to draw the following conclusions. The decision, which was made in 2010 by the political authorities of Ukraine on the liquidation of military courts, should be evaluated critically, since the functioning of military justice systems and, in particular, military courts, as its component, should contribute to the protection of interests of Ukraine, ensuring the combat capability of the Armed Forces of Ukraine and other military formations, as well as protecting the rights and legitimate interests of military personnel and military institutions. Twelve years in a row, the discussion on the revival of military courts has been ongoing, and active steps aimed at the development and adoption of the relevant draft law were taken, which testified to the rejection by society of a political decision to terminate the existence of military courts.

The armed aggression of the Russian Federation against Ukraine has demonstrated the short-sightedness of this unpopular step, since on 24 February 2022 the work of some general courts, and therefore, investigative judges, was completely terminated, which prevented law enforcement agencies from conducting pre-trial investigation of criminal offenses in accordance with the current legislation, apply measures to ensure criminal proceedings, conduct investigative and secret investigative activities.

Therefore, for Ukraine, which not only repels the aggressor, but also actively improves its legal institutions, the methodology of comparative analysis, comparative research becomes especially in demand. It allows us to deeper understand the essence of legal regulators existing in other states, to identify general trends in the development of legal phenomena, to borrow really positive, proven experience, preventing protest legal divergence.

The appeal to the practice of the ECtHR, in which it mainly considers ensuring the right to a fair trial in the context of alleged violations of Art. 6 of the ECHR by military courts,

61 Militärstrafprozess (MStP) vom 23. März 1979 (Stand am 1. Januar 2017) <https://www.admin.ch/opc/de/classified-compilation/19790061/201701010000/322.1.pdf> accessed 25 June 2022.

62 Code de justice militaire (nouveau) Version en vigueur au 09 juillet 2022 <https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071360/LEGISCTA000006121306/#LEGISCTA000006121306> accessed 25 June 2022.

63 Criminal Procedure Code of Ukraine of 13 April 2012 No 4651-VI (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/4651-17#Text> accessed 25 June 2022.

gave the authors the opportunity to synthesize key approaches that should be taken into account when creating and operating military courts in Ukraine: 1) The Convention may be applicable to military personnel, not just civilians, which means that every serviceman who has suffered a violation of the rights provided for by the ECHR may also seek their protection; 2) The ECtHR in principle does not adversely relate to the existence of military courts. Consideration by the military courts of criminal charges against servicemen in principle does not contradict the provisions of Art. 6 of the ECHR; 3) there is no reason to consider judges of military courts less professional than their colleagues in the general courts, since they have undergone the same professional training as their 'civilian' counterparts; 4) The Convention permits the functioning of military courts only as long as there are sufficient guarantees to ensure their independence and impartiality.

The authors, adhering to the point of view that there is the need to create a system of military justice in Ukraine, believe that the revival of military courts in Ukraine, as an important component of the military justice system, is due to the specific scope of spheres and their subject competence, which is significantly different from the general courts and is able to ensure the administration of justice and judicial control, including in wartime. This specificity of the functioning of military courts is polyaspective and is stipulated by: 1) the specificity of normative regulation, which differs significantly from the traditional normative regulation of the subject area of a general court judge, including taking into account their specialization; 2) the exclusive object of the trial, which is mainly military and war crimes; 3) the specialty of the subjects who are brought to justice; 4) the need to apply the regime of preservation of state secrets; 5) the presence of experience in military service; 6) the exclusivity of objective conditions in which administering justice or judicial control can be carried out by judges of a military court; 7) requirements of a subjective nature, which consist in the need for psychological strength and stress resistance; 8) demand for military courts not only during the war, but also after the establishment of peace in order to ensure the prosecution of the perpetrators and the full return of the regime of legality and the rule of law in the state.

Among promising scientific directions, the authors see the definition of the model of judicial justice, the development of issues regarding the system of military courts, the formation of the judiciary, the definition of jurisdiction, which should be optimal for modern Ukraine, which is fighting for its independence.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

A CRIMINAL AND LEGAL ASSESSMENT OF COLLABORATIONISM: A CHANGE OF VIEWS IN CONNECTION WITH RUSSIA'S MILITARY AGGRESSION AGAINST UKRAINE

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Submitted on 23 Apr 2022 / Revised 25 May 2022 / Approved **14 Jun 2022**
Published online: **20 Jun 2022** // Last Published: **15 Aug 2022**

Summary: 1. Introduction. – 2. The Background of Changes to the Criminal Code. – 3. Key Changes to Crimes Against the Foundations of Ukraine's National Security After the Start of the War. – 4. The Essence of Collaboration Activities under the Criminal Code of Ukraine. – 5. Conclusions.

Keywords: *treason, collaborationism, war, martial law*

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Corresponding author, solely responsible for the manuscript preparing. **Competing interests**: No competing interests were announced. **Disclaimer**: The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations, although the author serves at the Supreme Court of Ukraine.
Managing editor – Dr Oksana Uhrynovska. **English Editor** – Dr Sarah White.

How to cite: N Antonyuk 'A Criminal and Legal Assessment of Collaborationism: A Change of Views in Connection with Russia's Military Aggression against Ukraine' 2022 3 (15) Access to Justice in Eastern Europe 137–145. DOI: 10.33327/AJEE-18-5.3-n000312

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

ABSTRACT

***Background**: The dynamics of amendments to the Criminal Code of Ukraine after the start of the war show that the criminal law was not sufficiently ready for application during the war. First of all, a number of acts that are socially dangerous have not been singled out as criminal acts. Some existing articles needed to be amended to differentiate criminal liability.*

***Methods**: This article is based on the use of comparative, historical, and statistical methods, which are the basis for proving the grounds for criminalisation or differentiation of acts, taking into account the martial law caused by the war waged by the Russian Federation against Ukraine.*

***Results and Conclusions**: Following the research conducted, we consider it possible to state that collaboration activities have a high level of public danger and should therefore be criminalised. The severity of punishment for such actions depends on the type of collaborationism. Scholars and law enforcers in countries analysing Ukraine's experience and changes in criminal law in connection with the war should clearly delineate the criminal range of acts of treason and analyse whether there are any socially dangerous acts that are obviously harmful to national security but remain outside of the notion of treason.*

***Keywords**: treason, collaborationism, war, martial law, Ukraine-Russia war, access to justice*

1 INTRODUCTION

For all Ukrainians, recent history is divided into two stages: before 24 February 2022, i.e., the time of relatively peaceful existence of the state of Ukraine, and after 24 February 2022, i.e., the time after the full-scale military invasion of sovereign Ukraine. After the aggressive actions of the Russian Federation in 2014, Ukraine tried to resist the enemy, looking for ways to find a political solution to the issue of capturing part of the territory of our state. However, it is now clear that Russia had its own plans, which were to destroy Ukraine as a state in general.

We would like to note that after 2014 and the beginning of Russia's aggressive actions in eastern Ukraine and Crimea, there was no radical change in the Criminal Code of Ukraine in terms of establishing criminal liability for cooperation with the enemy. The reason was that Ukraine was looking for ways to resolve this conflict and even discussed ways to release from criminal liability those who were involved in cooperation with the so-called republics, artificially created under the auspices of the Russian Federation in Donetsk and Luhansk regions.

However, since 2014, the enemy had no plans to peacefully seek a way out of the conflict and de-occupy Ukrainian territories but instead recruited people who would be their support during a full-scale offensive against Ukraine. Such people settled all over Ukraine and were involved in searching for information about the location of certain objects, their function, the mood of the population, the organisation of demonstrations, and the information war against Ukraine.

After 24 February 2022, all spheres of state activity had to be reorganised at an extremely rapid pace, taking into account martial law, which was introduced by the Decree of the President of Ukraine No 62/2022 'On the Imposition of Martial Law'.[2] As it turned out, the domestic criminal code was also not fully adapted to the application in wartime. Therefore, after the war, the legislator made several necessary changes and additions to it, which would

2 Decree of the President of Ukraine No 64/2022 of 24 February 2022 'On the Imposition of Martial Law' <https://www.president.gov.ua/documents/642022-41397> accessed 29 May 2022.

take into account the current situation in the country and allow the law enforcement bodies, in general, to respond properly to criminal acts.

This article aims to analyse the changes relating to criminal liability for treason and collaboration that have been made to the criminal law of the state undergoing armed aggression. To this end, the study examined the legislation that amended the Criminal Code of Ukraine, the relevant draft laws with explanatory notes to them, and the positions of domestic scientists who spoke about the changes.

2 THE BACKGROUND OF CHANGES TO THE CRIMINAL CODE

The Ukrainian experience in amending the criminal law is crucial for scholars to study in countries that live in peace and do not know what war is. After all, the legislation of each state must be ready for application in any situation, i.e., in peacetime and in wartime.

In fact, the codes of most, if not all, European states, as well as the Criminal Code of Ukraine (hereafter, the CrPC of Ukraine), were built, taking into account historical knowledge about the Second World War. However, too much has changed since the Second World War. The advent of computer technology, free access to the Internet and mobile communications alone have added a lot of changes. These changes, primarily of a technological nature, obviously did not affect the course of World War II.

However, in a period of parallel warfare to seize another state through the destruction of its titular nation, as well as information warfare, it is necessary to assess a number of actions in terms of their social danger or take into account certain criteria to increase criminal responsibility (differentiate it) considering martial law.

If we describe the amendments to the CrPC of Ukraine, we can state the following:

1. Amendments were mostly made to the Special Part of the CrPC of Ukraine, although two additions were made to the General Part of the CrPC of Ukraine.

2. The amendments to the Special Part of the CrPC of Ukraine did not concern only the sections that provide for liability for crimes against the foundations of national security and war crimes – changes have been made to the sections on property crimes, economic crimes, and computer crimes.

3. The changes mostly concerned dispositions, not sanctions of articles.

If we characterise the changes made in terms of content, they should be divided into two groups. The first group concerned the criminalisation of acts that were not previously considered criminal, and the second group concerned the differentiation of criminal liability. The term 'differentiation of criminal liability' in domestic criminal law means that the legislator takes into account the public danger of encroachment and/or the perpetrator with the subsequent definition of various measures of criminal influence for the offence.

The war in Ukraine has clearly shown the need for such differentiation of criminal responsibility, given that the actions were committed during martial law. We would like to note that earlier in the Criminal Code of Ukraine, there was such a circumstance that aggravated punishment as 'committing a crime based on the use of martial law' (para. 11, part 1 of Art. 67 of the CrPC of Ukraine). However, the war has shown that such an instruction in the CrPC of Ukraine is not enough.

In this publication, we will focus on the changes that have been made to the section that provides for liability for crimes against the foundations of national security of Ukraine, i.e., section 1 of the Special Part of the CrPC of Ukraine. This is discussed in the next part of the article.

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

3 KEY CHANGES TO CRIMES AGAINST THE FOUNDATIONS OF UKRAINE'S NATIONAL SECURITY AFTER THE START OF THE WAR

The legislator supplemented Part 2 of Art. 111 (treason) and Part 2 of Art. 113 (sabotage) of the CrPC of Ukraine with such an aggravating feature as the commission of crimes under martial law. In this case, both treason and sabotage, which are martial law, are punishable by imprisonment for a term of fifteen years or life imprisonment and confiscation of property, taking into account the time of their commission. In fact, the discretion of the court is minimised, as even imprisonment is certain. It is obvious that committing treacherous or sabotaging acts during martial law increases the degree of public danger of the perpetrator, and the danger to the object of encroachment increases the danger to national security.

Since 2014, the scientific community has been discussing the expediency of supplementing the CrPC of Ukraine with a separate article that would provide for criminal liability for collaborative activities. Opposite views were expressed on such expediency. Some scholars have argued that an article on treason can cover all manifestations of a collaborator's criminal activity.[3] Others supported the opposite approach, arguing that a number of socially dangerous acts were outside the boundaries of treason.[4]

The expediency of establishing criminal liability for collaborationism was discussed in a separate article of the CrPC of Ukraine, given the possible excessive severity of the sanction of the article on 'Treason' for some categories of citizens. After all, this is a particularly serious crime (Art. 111 of the CrPC of Ukraine), the commission of which is punishable by imprisonment for a term of twelve to fifteen years with or without confiscation of property.

Another debate that arose among scholars was to decide whether the crime scene should affect a person's criminal responsibility. It was a question of whether the facts of taking appropriate actions in the occupied territories were less socially dangerous. Thus, E. Pysmenskyi argues that treason applies to any act, regardless of the place of their commission, while collaborationism is a type of behaviour that necessarily takes place in the occupied territories and is demonstrated during the occupation.[5]

We note that criminal liability for collaborationism is provided for in a separate article in the Criminal Code of the Republic of Lithuania (Art. 120).[6] It deals with the actions of a citizen of the Republic of Lithuania, which assisted the illegal authorities in establishing the occupation or annexation of the Republic of Lithuania, suppressing the resistance of residents, and helping illegal authorities in the occupation or annexation.

We will not go into more detail in this discussion, as it has partially lost its relevance after the addition of Art. 111-1 'Collaborative Activities' to the CrPC of Ukraine.

The explanatory note to the draft law states that it is intended to limit access to positions related to the performance of state or local government functions for a period of fifteen years and provide for other appropriate penalties for persons who cooperated with the aggressor state, its occupying authority, its administration, and/or its armed or paramilitary

3 M Rubashchenko, 'Criminal Liability for Collaborationism under the Current Criminal Code of Ukraine' in V Tatsiy, V Borisov (eds), *Social Function of Criminal Law: Problems of Scientific Support, Lawmaking and Law Enforcement* (Materials of the international scientific-practical conference, Pravo 2016) 329-330.

4 E Pysmenskyi, 'Collaborationism in Modern Ukraine as a Criminal Law Problem' (2020) 12 Law of Ukraine 116-128.

5 Pysmenskyi (n 3) 121.

6 Lietuvos Respublikos baudžiamasis kodeksas <https://www.infolex.lt/ta/66150:str120> accessed 29 May 2022.

formations.[7] It seems that the legislators are demonstrating to the citizens of Ukraine who are in the temporarily occupied territories and carrying out active anti-Ukrainian activities that they are ready to recognise a number of actions as collaborationism and mitigate criminal liability by rejecting them as treason.

Thus, ***public denial*** by a citizen of Ukraine ***of armed aggression*** against Ukraine, the establishment and approval of temporary ***occupation*** of part of the territory of Ukraine, or ***public appeals*** by a citizen of Ukraine ***to support decisions and/or actions of the aggressor state***, armed formations, and/or occupation administration of the aggressor state, ***to collaborate*** with the aggressor state, armed formations, and/or the occupation administration of the aggressor state, or the ***non-recognition of the extension of the state sovereignty of Ukraine*** to the temporarily occupied territories of Ukraine shall be punished by deprivation of the right to hold certain positions or engage in certain activities for a period of ten to fifteen years. This is the so-called lustration procedure, which is the only major punishment for such acts.

Decisions on the expediency of creating a special rule on collaborationism or changes to existing articles on treason should be based on a domestic doctrinal understanding of the range of acts that are considered treason. Only after a clear understanding of the scope of the acts of treason should it be clarified whether there are manifestations of collaborationism that are not covered by existing criminal prohibitions and whether they pose a degree of public danger that is one of the grounds for criminalisation. In Ukraine, the addition of a new article on collaboration was carried out in a very short time. Therefore, there was no broad discussion on improving the structure and terms used by the legislator for objective reasons.

The article on collaborationism in the Criminal Code of Ukraine is extremely vast and consists of eight parts and a note (Art. 111-1 of the CrPC of Ukraine). This is not typical of domestic criminal law, as the traditional requirement for its text is clarity and conciseness. It seems that this is not without reason. The fact is that after the events of 2014 (Russia's attack on eastern Ukraine and the annexation of Crimea) in a number of criminal proceedings involving treason, the defence tried to narrow the range of criminal acts that are treason. Such manipulations with the content of the terms of the criminal law and appeals to legal uncertainty served as a prerequisite for the appearance of an article on collaborationism in the widest possible format with a significant specification of actions that are collaborationism.

4 THE ESSENCE OF COLLABORATION ACTIVITIES UNDER THE CRIMINAL CODE OF UKRAINE

Let us now focus on the understanding of treason and collaboration under the Criminal Code of Ukraine.

Only a citizen of Ukraine is a subject of treason (Art. 111 of the Criminal Code). He/she acts to the detriment of the sovereignty, territorial integrity and inviolability, defence capability, state, economic, or information security of Ukraine. Treason itself is committed in three forms: 1) the transition to the side of the enemy during an armed conflict; 2) espionage; 3) providing assistance to a foreign state, foreign organisation, or their representatives in carrying out subversive activities against Ukraine.

7 Explanatory note to the draft Law of Ukraine 'On Amendments to Certain Legislative Acts (Concerning Establishing Criminal Liability for Collaborative Activities' <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71220> accessed 8 April 2022.

During the preparation of the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine',[8] it was proposed to supplement the article on treason with a separate act. It was a question of envisaging collaborative activities along with the above-mentioned forms of treason. However, no such changes were made. As a result, they had to be adopted on 3 March 2022 by adopting the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine Concerning the Establishment of Criminal Liability for Collaborative Activities'.[9]

The very term collaborationism comes from the French. Collaboration is cooperation, i.e., conscious, voluntary, and intentional cooperation with the enemy in their interests and to the detriment of their state and its allies.[10] It is well known that the discussion about the expediency of self-criminalisation of collaborationism and the relationship of these actions with treason was conducted in most European countries after World War II. Indeed, the limits of criminal responsibility for such acts must be drafted with such care as to ensure, on the one hand, the territorial integrity and sovereignty of the state itself and, on the other, to prevent arbitrary and excessive restrictions on freedom of expression.

However, it seems that the level of freedom of speech, the dependence of citizens on propaganda, access to truthful information, and encroachment on the integrity and sovereignty of the state together allow us to conclude whether the state remains democratic and legal and whether criminal liability for collaborationism is excessive. In Ukraine, most acts recognised as collaborationism are a minor crime or even a misdemeanour (Part 1 of Art. 111-1 of the CrPC of Ukraine). However, some forms of collaborationism are particularly serious crimes.

According to law enforcement statistics, during the first 50 days of the war, the State Bureau of Investigation opened more than 240 criminal proceedings on suspicion of treason and collaboration.[11] Participants in these proceedings are often village council chairmen, deputies of various levels, and officials.

There are the following types of collaborationism:

- military collaborationism – service in military formations, police structures, intelligence, and counterintelligence bodies of the occupier;
- economic collaborationism – cooperation in any sector of the economy;
- cultural (spiritual) collaborationism – cooperation with the occupiers in the spiritual sphere, which, during the Second World War, contributed to the spread of loyal feelings among the population, promoting the exclusivity of the 'Aryan race', and improving the psychological mood of the occupiers;
- domestic collaborationism – associated with the establishment of friendly relations between the occupiers and the population;
- political, administrative collaborationism – cooperation in the occupying authorities.[12]

8 Draft Law 'On Ensuring the Rights and Freedoms of Citizens in the Temporarily Occupied Territory of Ukraine No 4473-1' of 19 March 2014 <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=50320> accessed 29 May 2022.

9 Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on the Establishment of Criminal Liability for Collaborative Activities' of 3 March 2022 <https://zakon.rada.gov.ua/laws/show/2108-20#n12> accessed 29 May 2022.

10 Encyclopedia of Modern Ukraine <https://esu.com.ua/search_articles.php?id=4446> accessed 14 April 2022.

11 'State Bureau of Investigation Investigates More Than 230 Cases of Treason, Two Thirds of Which Are in Donetsk and Luhansk Oblasts' (*State Bureau of Investigation*, 15 April 2022) <https://dbr.gov.ua/news/dbr-rozslidue-ponad-230-provadzhen-za-derzhavnu-zradu-dvi-tretini-z-yakih-u-doneckij-ta-luganskij-oblastyah> accessed 29 May 2022.

12 The Concept of 'Collaborationism' <https://uk.wikipedia.orgwiki/%D0%9A%D0%BE%D0%BB%D0%B0%D0%B1%D0%BE%D1%80%D0%B0%D1%86%D1%96%D0%BE%D0%BD%D1%96%D0%B7%D0%BC> accessed 14 April 2022.

The Ukrainian legislator recognised the collaborative activity of helping the enemy in the occupation of Ukraine in the occupied territories.

The lion's share of proceedings under this article is the so-called political collaborationism. Thus, often people in the temporarily occupied territories form 'alternative' local authorities in the occupied cities. Thus, in Mariupol, the mayor elected by the citizens refused to cooperate with the occupiers, so they manually selected a collaborator who agreed to cooperate.[13] There are dozens of similar examples in modern realities.

M.I. Havroniuk draws attention to the fact that collaborationism has four mandatory features. It is carried out under occupation, in the form of cooperation with the aggressor state, with representatives of the population of the state, and in order to harm the state of Ukraine, its patriots, or allies.[14] Indeed, several acts that the national legislature recognised as collaborationism were committed in the occupied territories. However, some of them, for example, the transfer of material resources to illegal armed or paramilitary formations established in the temporarily occupied territory or may be carried out in the territory of the state that is not occupied by the aggressor.

If we turn to the provisions of the CrPC of Ukraine, domestic collaborationism includes: public denial of armed aggression against Ukraine; establishment and approval of temporary occupation of part of the territory of Ukraine; public appeals to support the decisions and/or actions of the aggressor state (hereafter, the aggressor), armed formations, and/or the occupation administration of the aggressor state, to cooperate with the aggressor, armed formations, and/or the occupation administration of the aggressor; public calls for non-recognition of the extension of Ukraine's state sovereignty to the temporarily occupied territories of Ukraine.

In the absence of signs of political, administrative, or military collaboration, domestic collaboration can also include a voluntary holding by a citizen of Ukraine of the position not related to organisational and administrative or administrative-economic functions in illegal authorities established in the temporarily occupied territory, including in the occupation administration of the aggressor.

According to the Ukrainian criminal law, cultural collaboration is propaganda by a citizen of Ukraine in educational institutions to promote armed aggression against Ukraine, the establishment and approval of temporary occupation of part of Ukraine, the avoidance of responsibility for the aggressor's aggression against Ukraine, or actions of citizens of Ukraine aimed at implementing the standards of education of the aggressor in educational institutions.

Economic collaborationism can manifest itself in the transfer of material resources to the aggressor and/or conducting economic activities in cooperation with the aggressor, as well as voluntary occupation by a citizen of Ukraine of a position related to the performance of organizational or administrative functions in illegal bodies of power established in the temporarily occupied territory.

The most dangerous manifestations of collaborationism are political or administrative, which may take the form of participation in and conduct of illegal elections and/or referendums in the temporarily occupied territories or public calls for such illegal elections and/or referendums in the temporarily occupied territories, or carrying out information activities in cooperation with the aggressor.

13 'The Protege of the Occupiers in Mariupol Lied about the Number of People in the Besieged City' (*24 Channel*, 8 April 2022) <https://24tv.ua/ru/stavlennik-okkupantov-mariupole-zavralsja-o-kolichestve-ljudej_n1940576> accessed 29 May 2022.

14 M Havroniuk, 'Collaborators from the Point of View of the Criminal Code' <https://racurs.ua/ua/b222-kolaboranti-z-tochki-zoru-kriminalnogo-kodeksu.html> accessed 29 May 2022.

For example, the russian occupation administration has prepared to hold 'pseudo-referendums' in the temporarily occupied territories of the Kherson region in order to create a so-called 'people's republic' and join Russia. Some locals and pro-russian deputies are helping to organise such actions. In particular, they print ballots, forms, brochures, posters, and booklets for voting in a 'referendum' to create another pseudo-republic and recognise the occupying authority.[15] With a certain degree of caution, this type of collaboration can also include the voluntary holding of a position by a citizen of Ukraine in illegal judicial or law enforcement agencies established in the temporarily occupied territory. Voluntary participation of a citizen of Ukraine in illegal armed or paramilitary formations established in the temporarily occupied territory and/or in the armed formations of the aggressor state or providing such formations with assistance in fighting against the Armed Forces of Ukraine is a manifestation of military collaborationism.

The subtleties of the criminal-legal qualification of treason and collaboration should be discussed in a separate independent study.

A few words about punishment – the Ukrainian legislator has decided that economic and cultural collaborationism are minor crimes, and domestic collaborationism is a criminal misdemeanour. However, military, political, and administrative collaborationism has been recognised as a particularly serious crime. Characteristically, any manifestation of collaborationism is punishable by deprivation of the right to hold certain positions or engage in certain activities for a period of ten to fifteen years.

5 CONCLUSIONS

In conclusion, we would like to state that scholars and law enforcement officers in the countries analysing the Ukrainian experience and changes in criminal law in connection with the war should clearly outline the criminal range of acts of treason and analyse whether there are socially dangerous acts that are obviously harmful to national security but remain outside the notion of treason.

Collaborative activities, i.e., cooperation with the aggressor state, its occupation administration, and/or its armed or paramilitary formations in the military, political, informational, administrative, economic, and labour spheres, have a high degree of public danger because they aim to completely undermine and overthrow the state authority of a country that suffers from aggression. As a result, such actions should lead to criminal liability. The choice of type and degree of punishment, obviously, should depend on the type of collaboration. After all, for example, domestic and political collaborationism are incomparable things and differ significantly in the degree of social danger.

Equally important is the study of other changes to the Criminal Code of Ukraine made after the beginning of the armed aggression of the Russian Federation against Ukraine. After all, only conditions of martial law clearly demonstrate the gaps in the domestic criminal code or the need to differentiate responsibility for actions already envisaged in it. However, these changes will be the subject of a separate study.

15 'The Main Intelligence Directorate: The Occupiers are Preparing "Pseudo-referendums" in the South of Ukraine, Bulletins Are Ready' (*Nvynarnia*, 19 April 2022) <https://novynarnia.com/2022/04/19/okupanty-gotuyut-psevdoreferendumy-na-pivdni-ukrayiny-vzhe-ye-byuleteni-gur/> accessed 29 May 2022.

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Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

TRANSFORMATION OF BAR IN WARTIME IN UKRAINE: ON THE WAY TO SUSTAINABLE DEVELOPMENT OF JUSTICE (ON THE EXAMPLE OF THE ODESA REGION)[1]

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Submitted on 01 May 2022 / Revised 12 June 2022 / Approved **11 Jul 2022**
Published: **15 Aug 2022**

1 This article was prepared as part of the scientific project 'Justice in the Context of Sustainable Development' Project No. 22BF042-01 (2022-2024).

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Corresponding author, responsible for concept creation and text writing, as well as supervising the article. **Competing interests:** Although the author serves at the same institution as the Editor-in-Chief of AJEE, which may cause a potential conflict or the perception of bias, the final decisions for the publication of this article, including the choice of peer reviewers, were handled by the editor and the editorial board members, who are not affiliated with the same institution. **Disclaimer:** The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations.

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Co-author, responsible for writing and data collection. **Competing interests:** The author has no competing interests to disclose. **Disclaimer:** The author declares that her opinion and views expressed in this manuscript are free of any impact of any organizations, including Ukrainian National Bar Association, where she is a member.

Disclaimer: Both authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.

Translation: The content of this article was translated with the participation of third parties under the authors' responsibility.
Funding: This work was supported by the Ministry of Education and Science of Ukraine [Project No. 22BF042-01 (2022-2024)].
Managing editor – Dr. Olena Terekh. **English Editors** – Mg. Anastasiia Kovtun and Dr. Yuliia Baklazhenko.

How to cite: O Khotynska-Nor, N Bakaianova, 'Transformation of Bar in Wartime in Ukraine: on the Way to Sustainable Development of Justice (On the Example of Odesa Region)' 2022 3(15) Access to Justice in Eastern Europe 146–154. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000322

Keywords: *Bar, advocacy, attorney, war, martial law, Bar in wartime, functions of the Bar.*

ABSTRACT

Background: *Russia's war against Ukraine, launched on 24 February 2022, had determined new conditions for the existence of Ukrainian society, the state, and all fields of activity. The Bar was no exception. As an institution of civil society that protects human rights and interests, the Bar is an integral element of fair justice, the right which is inviolable even in wartime. However, the war made its corrections and created new rules, determining the specificity of the attorneys` activity, their behaviour, and the activity of the attorneys` self-governing bodies in wartime.*

The article presents the analysis of the peculiarities of functioning of the Bar of Ukraine in wartime on the example of the Odesa region. Its choice is due to the history and ancient traditions of Odesa Bar, whose representatives have already experienced periods of military aggression, and the available information about the results of its activity in wartime in the modern period. In wartime, it is impossible to obtain and systematize such data regarding the whole territory of Ukraine because part of the state is under occupation, and active hostilities are taking place on the other part.

The author's analysis was based on the decisions of the Odesa Regional Bar Council, the results of the activity of the Odesa Regional Qualification and Disciplinary Commission of the Bar, the results of their interaction with the Odesa Regional Military Administration, Odesa City Council, volunteer formations, volunteer organizations and foreign colleagues.

Methods: *The authors used a chronological method, synthesis and a method of information analysis. Actual statistical and empirical data are used for proper argumentation of the conclusions.*

Results and Conclusions: *A conclusion was made about the internal consolidation, as well as the external ability of the Bar to act together with civil society institutions and public authorities in countering the armed aggression against Ukraine.*

1 INTRODUCTION

The unique role of the Bar in public life, its specific features, such as independence, freedom in practising law, corporate spirit and high ethical requirements for attorneys, determine the persistent interest of researchers in legal science in the issues of development of this critical human rights institution. The mission and contribution of the Bar to the achievement of the public good, which humanity has observed throughout the centuries, consists of protection of human rights and freedoms and the provision of legal aid on a professional basis. At the same time, ideas about the Bar are changing under the influence of political transformations, development of legal relations, updating of the legislation that regulates them, technical progress, globalization, and transformation of social needs.

Russia's war against Ukraine, launched on 24 February 2022, led to new conditions for the existence of Ukrainian society, the state, and all fields of activity. The Bar was no exception.

As an institution of civil society that protects human rights and interests, the Bar is an integral element of fair justice. A person's right to a fair trial is inviolable even under martial law[4]. Continuity of functioning of the judicial protection system requires the courts and the Bar to transform to ensure a stable basis and effectiveness of its activity. At the same time, the war made its corrections and created new rules, determining the specificity of the activity of attorneys, their behaviour, as well as the activity of the attorneys` self-governing bodies in wartime.

Studies of the organization and activity of the Bar institute in wartime are not so common, although such studies certainly exist[5]. This may be explained by the characteristics of such a phenomenon as war, which dictates its rules, requirements, and consequences, as well as prevails over the established order of life in society.

In wartime, during hostilities or when territories are under occupation, the militarization of civil society, when the human rights field suffers especially, the state of affairs in the Bar reflects the level of problems in this field.

Our article aims to demonstrate the peculiarities of functioning of the Bar of Ukraine in the conditions of the legal regime of martial law on the example of the Bar of Odesa region. This region's choice is not accidental but is due to several reasons.

(a) Odesa Bar has its long and glorious history: the first reliable data date back to 1795 and relates to the activity of the magistrate's court in Odesa. Lists of attorneys who worked at Odesa Commercial Court, established in 1808, have also been preserved[6].

If we draw historical parallels, our predecessors, Odesa attorneys, knew what it was like to work under martial law. Combat operations on the territory of the city and region took place during the First World War (events of 1918-1919), the Civil War and the Red Terror (1919-1921), as well as during the Second World War (defence, occupation and liberation of Odesa in the period of 1941-1944). The state of war led to some restrictions, including the impossibility of practising law and the population's access to legal aid, as well as to a significant reduction in the number of attorneys in the region. The Organizational Bureau of Odesa Region Panel of Attorneys, a unique management structure that operated exclusively in the period from April 1944 to 26 January 1950[7], had to work hard to restore the state of human rights protection activity in the Odesa region, replenish Odesa Bar with new personnel and ensure the quality of the provided legal aid.

Today, in the 21st century, Odesa Bar is again experiencing the hardships of war and working under martial law.

(b) The war resulted in a limitation of the tools capable of ensuring data completeness for all Ukraine regions. Currently, it is possible to offer only separate data on the activity of the Bar, both temporally (from 24 February 2022 till present) and territorially (in Odesa or other separate regions of Ukraine). Thus, it is currently possible to analyze only partial

4 O Uhrynovska, A Vitskar, 'Administration of Justice during Military Aggression against Ukraine: The "Judicial Front"' 2022 3 (15) Access to Justice in Eastern Europe 1-10.

5 For example: Lawyers in Wartime: Conference, symposium (*Calenda*, 2 December 2014) <https://calenda.org/309742> accessed 30 May 2022; C Chenu, 'Le Barreau De Paris Pendant La Guerre' (1916) 33 (4), Revue Des Deux Mondes (1829-1971) 782–805 <http://www.jstor.org/stable/44818537> accessed 30 May 2022; F Biddle, 'The Lawyer in Wartime' (1943) 19 (6) North Dakota Law Review 146-148 <https://commons.und.edu/ndlr/vol19/iss6/2> accessed 30 May 2022; BJ Hibbitts, 'Martial Lawyers: Lawyering and War-Waging in American History' (2014) 13 (2), 10 Seattle Journal for Social Justice <https://digitalcommons.law.seattleu.edu/sjsj/vol13/iss2/10> accessed 30 May 2022.

6 Y Bronz, N Rudnytska et al, *Bar of Odesa and Odesa region: historical essays: monograph* (ed N Bakayanova, Odesa 2020) 16-18.

7 ibid, 226-246.

information, which, however, will allow us to draw certain conclusions for the future. Obtaining such information became possible in the Odesa region thanks to the Bar Council of Odesa Region.

The study of this information is essential because it is reliable and covers the situation in Odesa Bar, which generally reflects the peculiarities of functioning of the Bar in wartime in Ukraine. This information and conclusions based on it may be used in further scientific research to identify trends and predict the direction of the development of Bar in the post-war period.

The basis of our research was the chronological method, the method of analysis and synthesis of information. For proper argumentation of the conclusions, we also used statistical and empirical data based on the authors' observations and experience, as well as their long-term monitoring of the problems of functioning of the Bar in Ukraine.

We hope our article will be interesting and valuable to everyone interested in the Bar's development and sustainable functioning of the justice system.

2 ACTIVITY OF ATTORNEYS` SELF-GOVERNING BODIES OF UKRAINE IN WARTIME

On 24 February 2022, on the day of the introduction of martial law in Ukraine, an extraordinary meeting of the Odesa Region Bar Council was held, at which the members of the Council determined priority steps and made important decisions:

- on the specificity of arrangement of the Council's work in the conditions of martial law, including in remote mode;
- on the establishment of permanent coordination of activity with the Bar Council of Ukraine (hereinafter referred to as the 'BCU');
- on the establishment of the Coordinating Centre for helping attorneys[8].

The Chairman of the Bar Council of Odesa Region, by his Order as of 24 February 2022,[9] determined the rotation schedule of the members of the Council for prompt response to any urgent problems of the attorneys.

From 24 February 2022 to 24 May 2022, 6 meetings of the Bar Council of Odesa Region were held: three scheduled and three unscheduled[10]. During the scheduled meetings, decisions were made to forward 22 people for passing internships and issue the Licenses to Practice Law to 75 people[11]. It should be noted that at the time of martial law, the Bar Council of Ukraine delegated part of its powers to the regional councils: in particular, as regards the production of Licenses to Practice Law and Attorneys' ID cards, following the established requirements, taking into account technical capabilities[12].

8 Information provided by the Odesa Region Bar Council is used hereinafter in the text.

9 Official information was provided by the Odesa Region Bar Council at the request of the co-author of the article. There are currently no published data.

10 Official information was provided by the Odesa Region Bar Council at the request of the co-author of the article. There are currently no published data.

11 Official information was provided by the Odesa Region Bar Council at the request of the co-author of the article. There are currently no published data.

12 The Bar Council of Ukraine, Decision No 31 'On Peculiarities of Issue by the Region Bar Councils of the Attorneys ID cards of Ukraine in Martial Law' (2022) (16 March 2022) <https://unba.org.ua/assets/uploads/legislation/rishennya/2022-03-16-r-shennya-rau-31_62443af4cde30.pdf> accessed 30 May 2022.

Unscheduled meetings of the Bar Council of Odesa Region were held to settle the establishment of the Attorneys` Volunteer Centre, making decisions on the allocation of the funds for the needs of the Armed Forces of Ukraine and volunteer formations participating in protection and defence of Ukraine[13].

As to the arrangement of the Qualification and Disciplinary Commission of Odesa Region Bar Association (Commission), the Head of the Commission, by his Order as of 28 February 2022, suspended the activity of the Commission[14]. However, in order to enable those who expressed their intention to become an attorney and pass the qualification exams on the eve of the war, the Commission resumed its activity at the end of March 2022[15].

According to the results of the meeting of the Qualification Chamber, 17 certificates of passed qualification exams were issued[16].

The first meeting of the Commission's Disciplinary Chamber under martial law was held on 17 May 2022: 36 disciplinary proceedings were considered, and a decision was made to commence five disciplinary cases. By its Decision, the Bar Council of Ukraine (BCU) made amendments to clause 6.3.1. of the Regulations of the Qualification and Disciplinary Commission of the Bar, which allowed all members of the Disciplinary Chamber to participate in meetings remotely – via video conference[17].

In the context of the issue of disciplinary liability of attorneys, it is worth recalling that at an extraordinary meeting of the BCU, which took place on the first day of the war, 24 February 2022, it was recommended to the disciplinary bodies of the Bar not to bring attorneys to disciplinary liability during martial law[18]. At the same time, the specified decision is recommendatory and, in light of observance of the principle of legality, cannot override the requirements of the Law of Ukraine 'On the Bar and Advocacy' regulating the issue of disciplinary liability of an attorney.

As of the end of May 2022, according to the data of the Odesa Region Bar Council, there are 4,346 attorneys registered in the Odesa Region (out of a total of 63,950 attorneys in Ukraine), of which 3,370 are practising law, 976 have suspended the License to Practice Law.

It is necessary to pay attention to the fact that data on the attorneys are not available to the general public: by the Decision of the BCU, to prevent threats to the lives of attorneys and in order to protect personal data about attorneys during the period of declared martial law, the personal data of attorneys placed in the Unified Register of Attorneys of Ukraine was closed for public access[19].

13 Official information was provided by the Odesa Region Bar Council at the request of the co-author of the article. There are currently no published data.

14 Official information was provided by the Odesa Region Bar Council at the request of the co-author of the article. There are currently no published data.

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16 Official information was provided by the Odesa Region Bar Council at the request of the co-author of the article. There are currently no published data.

17 The Bar Council of Ukraine, Decision No 34 'On Amendments and Additions to the Regulations of the Higher Qualification and Disciplinary Commission of the Bar, the Regulations of the Qualification and Disciplinary Commission of the Bar of the Region and Regulations on the Procedure for Accepting and Reviewing Complaints Regarding the Attorney's Improper Behavior that may Result in His Disciplinary Responsibility' (2022) (25 March 2022) <https://unba.org.ua/assets/uploads/legislation/rishennya/2022-03-25-r-shennya-rau-34_625694d14f74f.pdf> accessed 30 May 2022.

18 The Ukrainian National Bar Association, Bar Council of Ukraine called on attorneys for mutual support and created a single information center <https://unba.org.ua/news/7309-rau-zaklikala-advokativ-do-vzaemnoi-pidtrimki-ta-stvorila-edinij-informacijnij-centr.html> accessed 30 May 2022.

19 Bar Council of Ukraine, Decision No 22 'On Closing Public Access to Personal Data of Attorneys in the Unified Register of Attorneys of Ukraine' (2022) (2 March 2022) <https://unba.org.ua/assets/uploads/legislation/rishennya/2022 -03-02-r-shennya-rau-22_62443775bdf77.pdf> accessed 30 May 2022.

Currently, it is difficult to obtain reliable data on the number of attorneys of the Odesa region who joined the ranks of the Armed Forces of Ukraine and territorial defence. In Odesa, only five applications were submitted by attorneys to suspend legal practice in connection with mobilization, but this in no way reflects the accurate picture of mobilization of attorneys in the region.

In accordance with the Decision of the BCU in March, during the period of martial law, failure to submit data to the Unified Register of Attorneys of Ukraine on suspension of legal practice in connection with military or alternative (non-military) service by attorneys shall not be considered a disciplinary offence[20]. Thus, systematization of the information in this part, both at the regional level and throughout Ukraine, may be possible only after the war's end.

3 SOCIAL PROTECTION OF ATTORNEYS OF UKRAINE

Among the wartime challenges faced by the legal community of Ukraine, the following ones may be specified: death of attorneys; severe injuries received by attorneys as a result of military actions; loss of housing and property by attorneys; forced evacuation of attorneys from the occupied territories and territories where hostilities are taking place; problematic economic situation, and in certain areas –absence of any income.

The **Ukrainian National Bar Association**[21] (hereinafter referred to as the 'UNBA') has the necessary financial and organizational resources to assist attorneys and their family members. Continuing the traditions of legal philanthropy, the All-Ukrainian charitable organization 'Charity Foundation for Attorneys` Support' was established by the Decision of the BCU to provide material support to attorneys and their family members who find themselves in difficult life circumstances[22]. In martial law conditions in Ukraine, the Foundation's activity is of particular importance. Any attorney registered with the Unified Register of Attorneys of Ukraine may receive charitable assistance.

In addition, during the martial law, a new body was created within the structure of the National Association of Attorneys of Ukraine – the Board of Trustees- to distribute charitable assistance to attorneys[23]. According to the Report 'International Charitable Assistance for UNBA during martial law'[24], from March to May 2022, the UNBA received financial assistance from colleagues from different countries, including Germany. As of May 2022, the Board of Trustees approved more than 330 applications from attorneys affected by the war, only 5 of which came from the attorneys of the Odesa region. Compared with other regions

20 Bar Council of Ukraine, Decision No 24 'On the Peculiarities of Military or Alternative (Non-Military) Service by Attorneys during Martial Law' (2022) (3 March 2022). <https://unba.org.ua/assets/uploads/legislation/rishennya/2022-03-24-r-shennya-rau-24_6244383f5d80a.pdf> accessed 30 May 2022.

21 **The Ukrainian National Bar Association** (hereinafter – the UNBA) was established pursuant to the Law of Ukraine 'On the Bar and Practice of Law' and is the all-Ukrainian non-governmental non-commercial and non-profit professional organization that unites all of the advocates of Ukraine with the aim of ensuring the implementation of the objectives of legal profession. It was established on the basis of professional membership.

22 Bar Council of Ukraine, Decision No 6 'On Establishment of the All-Ukrainian Charitable Organization' Charity Foundation for Attorneys Support' (2014) (28 February 2014) <https://unba.org.ua/assets/uploads/legislations/rishennya/2014.02.28- rishennya-6.pdf> accessed 30 May 2022.

23 The Board of Trustees was created to distribute charitable assistance to attorneys during martial law (headline from the screen) <https://unba.org.ua/news/7324-dlya-rozpodilennya-blagodijnoi-dopomogi-advokatam-pid-chas-voennogo-stanu-stvorena-opikuns-ka-rada.html> accessed 30 May 2022.

24 National Association of Lawyers of Ukraine, Report 'International Charitable Assistance for UNBA during martial law' (2022) <https://unba.org.ua/news/7433-naau-oprilyudnila-zvit-pro-mizhnarodnu-blagodijnu-pidtrimku-v-period-voennogo-stanu.html> accessed 30 May 2022.

(Kyiv city – 32 applications, Kyiv region – 55, Donetsk region – 143, Kharkiv region – 43)[25], this number of applications looks insignificant, but the events in the Odesa region during the spring of 2022 were significantly less destructive.

Interaction of Ukrainian attorneys with foreign colleagues to support attorneys is carried out in various directions:

- employment,
- internship,
- provision of accommodation for attorneys,
- facilitating admission to practice in foreign jurisdictions.

At the regional level, based on the results of online communication between the Odesa Region Bar Council and Polish attorneys (Lodz), assistance was provided in placing five families of Odesa attorneys who are being evacuated to the Republic of Poland.

The system of assistance to attorneys by the attorneys` self-governing bodies in Ukraine is essential in the conditions of martial law when the level of the professional workload of attorneys has significantly decreased. Many attorneys were also forced to leave the regions where they lived and practised law, due to danger to life or active hostilities in these regions.

4 ADVOCACY AND FREE LEGAL AID

According to the Council of Judges of Ukraine, during the war in Ukraine, about 11,500 court judgements were entered into the Unified State Register of Court Judgements every day. In pre-war times, this figure was about 30,000 court judgements per day[26]. Despite such understandable dynamics, a person's constitutional right to judicial protection cannot be limited. No shortened or accelerated procedures for the administration of justice are permitted. Attorneys protect the rights of clients in courts in accordance with the law.

In connection with martial law, new categories of cases appeared in the courts with no previous case law, which is currently being developed. Those include as follows:

- cases on speeding up adoption, determining the child's place of residence under the circumstances of martial law;
- compensation for the damages caused as a result of military actions;
- establishment of legal facts, such as a fact of death or birth under the circumstances of martial law and hostilities;
- labour disputes in the context of changes to legislation caused by martial law;
- cases of crimes provided for in Art. 111 (treason), Art. 113 (sabotage), Art. 114 (espionage), and Art. 438 (violation of laws and customs of war) of the Criminal Code of Ukraine (hereinafter referred to as the CrimPC), and others.

In order to provide methodical and informational support to attorneys, to comply with their professional duty to raise their professional level, webinars on current issues of legal practice are held permanently. At the same time, by Decision of the BCU No. 30 as of 16 March 2022,

25 National Association of Attorneys of Ukraine, Report 'International Charitable Assistance for UNBA during martial law' (2022) <https://unba.org.ua/news/7433-naau-oprilyudnila-zvit-pro-mizhnarodnu-blagodijnu-pidtrimku-v-period-voennogo-stanu.html> accessed 30 May 2022.

26 Ucraina, presidente Consiglio dei Giudici: 'Italia favorisca contatti con Rete europea dei consigli di giustizia' 2022 (Adnkronos, 05 April 2022) <https://www.adnkronos.com/ucraina-presidente-consiglio-dei-giudici-italia-favorisca-contatti-con-rete-europea-dei-consigli-di-giustizia_3FmHIW2KzxkkuMjTFlCVyV> accessed 30 May 2022.

attorneys during martial law shall be exempted from the requirement to obtain the required annual number of points for professional development[27].

The martial law made adjustments to advocacy in providing free legal aid, regulated by the Law of Ukraine on Free Legal Aid[28]. Thus, the number of attorneys providing free legal aid has decreased (primarily due to evacuation and mobilization of attorneys); legal aid is provided online, by phone, in instant messengers, and by e-mail. At the same time, attorneys continue to provide protection against criminal charges and represent persons in courts on behalf of the centres to provide free legal aid.

According to the Coordination Centre for free legal aid, as of May 2022, 126 attorneys provide free legal aid in the Odesa region, of which 62 are working in the region and 64 practice law in the city of Odesa[29].

In martial law conditions, public access to the Unified State Register of Court Judgments, the 'Status of Case Consideration', and 'List of Pending Cases' services is limited. The primary means of communication between attorneys and the court are phone calls, e-mail, a mailbox in the electronic document exchange system on the official web portal of the judiciary of Ukraine, and even Facebook Messenger.

The need to increase the efficiency of providing legal aid in wartime also simplified the attorney's authorization procedure. According to Decision of the BCU No. 45 as of 29 April 2022[30], during martial law, the attorney's office or attorney's association shall be allowed to issue a warrant without sealing it with a seal of a legal entity and without the signature of the head of an attorney's association or attorney's office. Legal relations between an attorney and attorneys' association, attorney's office shall be regulated by the internal documents of such legal entities.

As in other regions of Ukraine, there is a curfew in the Odesa region. In order to remove obstacles to the provision of legal aid, first of all, when defending in criminal proceedings, at the request of the Council to Odesa Regional Military Administration, 318 permits for free movement during the curfew were issued to attorneys for the period of martial law: in March – to 108 attorneys, in April – to 101 attorneys, in May – to 117 attorneys.

5 VOLUNTEER MOVEMENT IN ODESA BAR

A separate field of activity of the attorneys` self-governing bodies of the Odesa region is volunteering and assisting internally displaced persons and refugees who are not attorneys. A volunteer movement was formed at the Bar Council of the Odesa Region, which united the region's attorneys.

The Decision of the Bar Council of the Odesa Region established the Attorneys' Volunteer Centre on 1 March 2022. Working almost 24 hours a day, the Centre actively interacts with

27 Bar Council of Ukraine, Decision No 30 'On Suspension of Clauses 19, 20 of the Procedure for Improving the Qualifications of Attorneys of Ukraine during Martial Law in Ukraine' 2022 (16 March 2022) <https://unba.org.ua/assets/uploads/legislation/rishennya/2022-03-16-r-shennya-rau-30_62443a81789d9.pdf> accessed 30 May 2022.

28 Law of Ukraine of 2 June 2011 'On Free Legal Aid' <https://zakon.rada.gov.ua/laws/card/3460-17> accessed 30 May 2022.

29 Attorney`s duty schedule for May 2022: Odesa region <https://www.legalaid.gov.ua/wp-content/uploads/2022/05/grafik-dlya-pilotu-odesa-traven-2022-1.xlsx> accessed 30 May 2022.

30 Bar Council of Ukraine, Decision No 45 'On Amendments to the Regulation on the Warrant for Provision of Legal Aid' 2022 (29 April 2022) <https://unba.org.ua/assets/uploads/legislation/rishennya/2022- 04-29-r-shennya-rau-45_627a445521cd1.pdf> accessed 30 May 2022.

Odesa Region Military Administration and its Coordination Humanitarian Headquarters, Odesa City Council, Odesa Region Territorial Centre for Enlistment and Social Support, a military hospital, volunteers' formations, and volunteer organizations. Aid amounting for several million hryvnias was provided to families with many children, single parents, persons with disabilities, internally displaced persons, families, families of military personnel. Food, baby food, children's hygiene items and children's clothes were distributed, as well as medicines and medical goods for hospitals and surgery centres. Uniforms, helmets, body armour, knee pads, tactical gloves, large platoon medical aid kits with mobile stretchers for evacuation of wounded fighters, as well as individual first-aid kits, formed by attorneys with their own hands, were sent to the Armed Forces of Ukraine. In addition, delivering drinking water to the city of Mykolaiv for civilian residents in volumes of 4.4 to 8.8 tons of clean water per day is carried out almost daily, despite shelling and lack of fuel.

Analyzing volunteering activity of the Bar, it is worth noting that the provision of financial assistance and practical support by attorneys not only to attorneys but also to the Armed Forces of Ukraine, refugees, and displaced persons, regardless of whether they are attorneys, assistants or trainee attorneys, goes beyond the boundaries of the areas of activity of the professional association of attorneys, defined by the Article of Association of the UNBA. Such activity somewhat goes beyond the understanding of advocacy exclusively as an element of the justice system, which is of interest for further research of the functions of the Bar. It is believed that the volunteering activity of the attorneys` self-governing bodies, attorneys, attorneys' bureaus and attorneys' associations reveals the nature of the Bar as an institution of civil society.

6 CONCLUSIONS

The Bar of Ukraine in wartime showed internal consolidation, as well as external ability to act side by side with civil society institutions and public authorities to achieve the joint task of countering the armed aggression against Ukraine. At the same time, protection of human rights and freedoms remains the primary task of the Bar, and the principles of its organization and activity must be observed as a condition for the proper implementation of the Bar's activity, ensuring independence, autonomy and professionalism of this unique human rights institution.

Despite the threats and challenges faced by Ukrainian attorneys due to the war, they exert all their strength and involve all possible resources (physical, intellectual, financial, communication) to ensure sustainable functioning of justice in the state, prevent violations of human rights to a fair trial and adequate legal aid. The Bar in Ukraine is developing its potential and opening new horizons for legal practice.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

APPLICATION OF ADMINISTRATIVE JUDICIAL MECHANISMS IN THE FIGHT AGAINST INTERNAL THREATS TO NATIONAL SECURITY IN CONDITIONS OF RUSSIAN-UKRAINIAN WAR

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Submitted on 18 Jun 2022 / Revised 18 Jul 2022 / Approved **25 Jul 2022**
Published: **15 Aug 2022**

Keywords: *martial law, sanctions, public interest, rights, freedoms and interests of the individual, political party.*

ABSTRACT

Judicial control and authorization of state coercion or other interference in the sphere of private legal interest is a universal standard for building a political and legal system based on the

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Translation: The content of this article was translated with the participation of third parties under the authors' responsibility.
Funding: The author(s) received no financial support for the research, authorship, and/or publication of this article. The Journal provides funding for this article publication.
Managing editor – Dr. Oksana Uhrynivska. **English Editor** – Dr. Yuliia Baklazhenko.

How to cite: Ilnytskyy O 'Application of Administrative Judicial Mechanisms in the Fight Against Internal Threats to National Security in Conditions of Russian Ukrainian War' 2022 3(15) Access to Justice in Eastern Europe 155–164. DOI: 10.33327/AJEE-18-5.3-n000333

principles of the rule of law. To obtain reliable and substantiated conclusions, general and special research methods were used, which processed the results of theoretical research on the problems of administrative proceedings in Ukraine, materials of legal practice in the form of conclusions of international human rights institutions and Ukrainian courts. The study found that the proposed regulatory changes, which determine the dominant role of administrative courts in the application of sanctions related to the assets of individuals or the prohibition of political parties, perform a dual function - to ensure the necessary level of protection of rights, freedoms and interests of private individuals as well as administrative courts protect the national interests, national security, sovereignty and territorial integrity of Ukraine, counter terrorist activity, as well as prevent violations, restore violated rights, freedoms and legitimate interests of citizens of Ukraine, society and the state. Thus, the preconditions have been created for resolving these complex human rights issues while maintaining the necessary balance, even in exceptional martial law.

1 INTRODUCTION

1.1 Ontological basis of scientific interest

The full-scale military invasion of the Russian Federation into the territory of Ukraine on 24 February, 2022 was another point of growth of the long-term aggression of this state against the state sovereignty and territorial integrity of Ukraine. It is clear that this was preceded by serious and systematic training for a long time, which was carried out both outside and inside Ukraine. The aim of the latter was to maximize the weakening of institutional mechanisms of Ukrainian statehood, which should ensure ease of conquest by minimizing resistance and loyalty among the population, creating a favorable field for the establishment of occupation administrations and the formation of the latter through collaborationism, including political, economic, and military elite. Unfortunately, many of these subversive measures have long gone unnoticed by the state, under the guise of democracy and political pluralism, freedom of thought and speech, economic liberalism, and multi-vector public policy.

At the same time, the interests of national and public security, ensuring territorial integrity are considered universally recognized limits to the admissibility of the rights, freedoms, and interests of individuals in the leading regulatory standards of the human rights system. They are at the intersection of balancing the private law interests of a person with the concepts of the need to ensure public order to achieve the common good, including for the person holding the relevant private law or interest.

> 'The wording of Article 1 of the Constitution of Ukraine, which primarily indicates the definition of Ukraine as a sovereign and independent state, as well as its status as a democratic, social and legal state, indicates the consequent relationship between the need to ensure sovereignty and independence within the State to fulfill its further obligations on guarantees of democracy and the establishment and protection of human rights and freedoms as an element of the rule of law, ensuring the implementation of the constitutional principle of social and legal state' (paragraph 4 of the motivating part)[2].

The same international normative standards and long-term practice of their application prove the importance of fair and independent judicial procedures for authorizing the lawfulness of state coercion and restriction of individual rights and freedoms, their necessity and proportionality to achieve the relevant goal.

2 Case No 23-рп/2010 (Constitutional Court of Ukraine, 22 December 2010) [2011] Oficiynyi visnyk Ukrainy 101/128.

Substantive criteria of the relevant cases allow to confidently refer them to the category of public-law disputes that arise in connection with the exercise of the subjects of power of their public-power management functions for the implementation of relevant areas and forms of public policy. Therefore, the introduction of appropriate mechanisms is in the sphere of practical and scientific interest of the administrative judicial process.

The practice of the last year of the Supreme Court's operation in one of the complex categories of cases revealed an appeal against the application of special economic and other restrictive measures (sanctions) under the Law of Ukraine "On Sanctions" of 14 August 2014 № 1644-VII (hereinafter, Law № 1644-VII). And the changes in wartime updated the catalog of sanctions, supplementing them with Law № 2257-IX of 12 May 2022 the possibility of collecting assets belonging to a natural or legal person in state revenue, as well as assets in respect of which such person may directly or indirectly (through other natural or legal persons) perform actions identical in content to the right to manage them (para. 1-1 art. 4 of the Law № 1644-VII) in an administrative court.

At the same time, the beginning of June 2022 marked a mass hearing of cases banning political parties by the Eighth Administrative Court of Appeal in Lviv on lawsuits of the Ministry of Justice of Ukraine on the grounds of anti-state pro-Russian position and its open support on the basis of amendments to Law № 2243-IX. Thus, of the eleven parties identified in the decision of the National Security and Defense Council of Ukraine of 18 March, 2022 "On the suspension of certain political parties", enacted by the Decree of the President of Ukraine of 19 March, 2022 №153/2022, the court of first instance as of 17 June, 2022, banned 10 political parties that had a clear pro-Russian orientation in their political programs and public positions[3].

Undoubtedly, these political and judicial processes have intensified researchers' attention to the quality of the normatively defined procedure of administering justice in these categories of cases and the actual readiness of administrative courts to maintain the internal front of the struggle against the "Russian measure" in Ukraine.

1.2 Research methodology and source base

The reason for a detailed study of the stated issues were numerous materials of law enforcement practice, which was formed in a very short time and testified to the existence of systemic problems due to the scale of legal issues arising in the application of sanctions restricting the rights, freedoms and interests of private law, as well as bans on political parties. It also leads to the appeal of judicial institutions with requests for scientific conclusions on the procedure for applying the relevant procedures in the consideration of public law disputes and the formation of appropriate uniform practice.

Given the specifics of the topic, purpose and objectives, the basis of the study is a dialectical approach to research. The systematic method was used to establish the content and purpose of means and methods of protection of rights, freedoms and interests in accordance with regulations. On this basis, with the help of a formal-logical method, the definition of legal concepts that are essential (substantive) content, as well as the defined purpose of legal regulation was formulated. The formal-dogmatic method allowed to carry out the analysis of the normative-legal base of the state, to reveal the functional orientation of the system of protection of rights and interests of persons in disputable legal relations

3 The eighth appellate administrative court <https://8aa.court.gov.ua/sud4857/pres-centr/general/> accessed 19 June 2022.

with the participation of subjects of power, their technical and legal perfection. Several other general scientific research methods were also used, in particular: analysis (to study the systematic application of concepts), historical and legal (to study the establishment, change and development of the deposit guarantee system), comparative law (in a comparative study of legislation) and others.

The theoretical basis of the study was provided by the results of analytical reviews on the problems of administrative proceedings in Ukraine. However, the efficiency of the processes taking place in the social and legal systems led to the lack of systematic research on the subject. However, this does not mean the loss of practical significance of the search and uniformity of solutions.

At the same time, the applied theoretical approaches and the scientific conclusions formulated by the authors were substantiated by the wide application of legal practice materials through the conclusions of international human rights institutions and Ukrainian courts.

2 APPLICATION OF SPECIAL ECONOMIC AND OTHER RESTRICTIVE MEASURES (SANCTIONS) UNDER THE LEGISLATION OF UKRAINE

2.1 The nature of special economic and other restrictive measures (sanctions) and the problems of their application under the legislation of Ukraine

Special economic or other restrictive measures (sanctions) applied by states against threats to sovereignty and the constitutional order were based on Art. 41 of the UN Charter:

> 'The Security Council is empowered to decide what non-military measures should be applied to implement its decisions, and it may require Members to apply those measures. These measures may include the total or partial cessation of economic relations, rail, sea, air, postal, telegraph, radio or other means of communication, as well as the severance of diplomatic relations.'

In the theory of international law, economic sanctions are seen as a measure of lawful coercion[4] or through the prism of legalized countermeasures[5]. However, such coercion, according to the standards of international law, is a consequence of an illegal act, the nature of which should be determined solely on the basis of international law, and not the national law of the state; the application of these measures should not create conditions for violation of the basic principles of international law or violation of human rights and freedoms; the sole purpose of the sanctions is to restore the legitimate rights and interests of the victim and return to the previous state, including compensation for material damage[6]. Thus, the vector of their action is always directed outwards and must compensate for the limited influence of the state on the violator, which is not under its internal sovereign jurisdiction.

A systematic study of the provisions of Law № 1644-VII allows us to state that by their characteristics, special economic and other restrictive measures (sanctions) in Ukraine are law enforcement in nature, have a coercive restrictive effect on the violator. However, in

4 C Tomuschat, 'Are Counter-measures Subject to Prior Recourse to Dispute Settlement Procedures?' (1994) 5.1 European Journal of International Law 77–87.

5 AL Cherniavskiy, 'Principles and Conditions of Application of Countermeasures in the Contemporary International Law' (2017) 139 Problem of legality 278-285 doi: 10.21564/2414-990x.139.114563 (in Ukrainian).

6 J Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10.2 European Journal of International Law 436–439.

contrast to the measures of ordinary legal responsibility, which has as its primary purpose the punishment for the committed act, are given in art. 4 of the Law № 1644-VII special economic and other restrictive measures (sanctions) are measures to prevent and stop threats, in response to the existence of which they are applied. The personal and sectoral sanctions listed in the Law № 1644-VII, as a result of their action, are temporary measures of operational influence on the behavior of participants by establishing special restrictions in the implementation of state policy in certain areas (economic, financial, infrastructure, diplomatic, environmental, trade, cultural, etc.), aimed at pointing out the violation, eliminating opportunities to continue illegal activities and cause significant damage to protected legal relations to remedy the situation, avoid potential use of resources and opportunities through the functioning of the state mechanism to harm its protected fundamental values.

At the same time, their addressees may be citizens of Ukraine and legal entities resident in Ukraine, but only if they are entities engaged in terrorist activities[7].

Under the conditions of application of special economic and other restrictive measures (sanctions) to persons under private law, the question arises of assessing the legality of the intervention in each case. The introduction of the mechanism of personal (targeted) sanctions in international practice has led to the issue of ensuring compliance with the rights of sanctioned persons. As a general rule, there is a consensus that sanctions-restricted rights are not absolute and that public policy interests justify such interferences (as discussed in previous sections of the article). Therefore, a more important task for the sanctioning entity is to ensure that the sanctions procedure is followed. Such a procedure shall include: proper notification stating the reasons for the application of sanctions; sufficient evidence to justify sanctions; hearing; the possibility of reviewing the decision on the application of sanctions by an independent court[8].

Terrorism and terrorist activity as grounds for sanctions are legal categories, not political ones. Accordingly, their assessment should be made solely on the basis of this feature, outside of political activity, based on factual data or intelligence on terrorist activities, and meet the standard of 'true suspicion on reasonable grounds'[9].

Provided that the National Security and Defense Council of Ukraine, by its decision on the application of special economic and other restrictive measures (sanctions), actually pre-qualifies the actions of a person as being involved in terrorist activities, the National Security and Defense Council of Ukraine together with the President of Ukraine have the function of the "court" for the purposes of assessing the provision of guarantees of individual rights.

Instead, the activities of the National Security and Defense Council of Ukraine clearly do not correspond to the properties of a "fair and impartial court" in the sense of para. 1 art. 6 European Convention on Human Rights (hereinafter, ECHR), as the latter is a body under the President of Ukraine that coordinates and controls the activities of executive bodies in the field of national security and defense; its personal composition is formed by the President of Ukraine from among persons by political office, as well as by his own discretion (art. 107 of the Constitution of Ukraine). Thus, the National Security and Defense Council of Ukraine has neither functional nor institutional independence and impartiality to address the issue of targeted sanctions, is directly interested in taking measures to increase the

7 O Ilnytskyi, 'Citizens of Ukraine as subjects of special economic and other restrictive measures (sanctions) imposed by the Ukrainian state' (2021) 11 Entrepreneurship, Economy and Law 56–57, 62, doi: https://doi.org/10.32849/2663-5313/2021.11.07.

8 E Chachko 'Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law' (2019) 113.25 The American Society of International Law 157 doi: 10.1017/aju.2019.25.

9 O'Hara v. The United Kingdom App no 37555/97 (ECtHR, 16 October 2001) < https://hudoc.echr.coe.int/fre?i=002-6312> accessed 18 June 2022.

level of prevention and combating threats to national interests and national security in its competence and functions in the state.

In matters affecting fundamental rights, the expression of discretion given to the executive in the field of national security, in terms of unlimited power, would run counter to the rule of law, one of the fundamental principles of a democratic society enshrined in the Convention. Therefore, the law should indicate the scope of any such discretion given to the competent authorities and the manner in which it is exercised with sufficient clarity, taking into account the legitimate purpose of the precautionary measure concerned, to provide the person with adequate protection against arbitrary interference[10].

Preliminary existence of a court decision to establish the fact of a person's involvement in terrorism (as a result of criminal proceedings) or the grounds for inclusion in the relevant sanctions list (based on special administrative proceedings under Article 284 of the Code of Administrative Procedure of Ukraine, hereinafter CAP)) (so-called "judicial authorization") could be a sufficient level of guarantee of the national system of protection of individual rights in case of further restrictions when applying special restrictive measures on the basis of these decisions.

Unfortunately, Ukraine has chosen an administrative model for the application of sanctions. And the lack of prior judicial authorization to interfere in the rights, freedoms and interests of individuals in connection with the application of extraordinary measures to combat global threats is a special problem[11]. Other forms of overwatch by bodies and officials, which are elements of the law enforcement system with broad prerogatives to apply countermeasures in the fight against terrorism, are highly political and completely incapable of providing the necessary assessment of the need for the objectives and means. Although the ECtHR agrees in its practice with functional reservations, arguing that such individuals and bodies are better than a judge adapted to authorization and control, it is not yet convinced of this when it comes to analyzing objectives and means in terms of strict necessity.

With regard to a body authorized to permit restrictive measures by a non-judicial body, it may comply with the Convention if that body is sufficiently independent of the executive. However, the political nature of authorization and overwatch increases the risk of abuse. The Court reminds that the rule of law implies, inter alia, that the interference of the executive with human rights must be subject to effective scrutiny, which must normally be enshrined in a judicial manner, at least as a last resort, judicial scrutiny provides the best guarantees of independence, impartiality and procedures. The ex ante authorization of such a measure is not an absolute requirement in itself, as where there is thorough post factum judicial overwatch, this can offset the shortcomings of authorization.

However, post factum judicial control, by granting the right to appeal to a court against decisions, actions or omissions of public authorities, officials in the field of national security and defense is not an effective alternative, given that even the recognition of the relevant decision of the National Security and Defense Council the application of special restrictive measures unlawful and its abolition does not entail the restoration of rights, freedoms or interests restricted during the period of validity of the relevant restrictions. In addition, such control is currently exercised only as a result of consideration of a person's appeal to the court when appealing the relevant decisions and, in fact, presupposes the transfer of responsibility for proving the legality/illegality of coercive measures from the subject of power to that person.

10 Szabó and Viccy v. Hungary App no 37138/14 (ECtHR, 12 January 2016) < https://hudoc.echr.coe.int/fre?i=001-160020 > accessed 18 June 2022.

11 ibid.

2.2 Reforming the system of sanctions related to the assets of individuals in the legal regime of martial law

With the beginning of military actions of the Russian Federation against Ukraine, the protection of national interests, national security, sovereignty and territorial integrity of Ukraine, counteraction to terrorist activities, as well as prevention of violation, restoration of violated rights, freedoms and legitimate interests of citizens of Ukraine, society and state, which is proclaimed as a goal of the sanction mechanism in art. 1 of the Law № 1644-VII, received an additional pragmatic aspect - the search for sources of compensation for damage caused by armed aggression.

As of 8 June, the total amount of direct losses of the Ukrainian economy from damage and destruction of residential and non-residential buildings and infrastructure is $ 103.9 billion or 3.0 trillion. At the same time, the total losses of Ukraine's economy due to the war, according to joint estimates of the Ministry of Economy of Ukraine and Kyiv School of Economics, taking into account both direct and indirect losses (GDP decline, investment cessation, labor outflow, additional defense and social spending, etc.), range from $ 564 billion to $ 600 billion.[12]

In these circumstances, as well as given the huge amount of assets of pro-Russian agents and residents in Ukraine, it is short-sighted to force foreign states to block Russian assets and "not notice" them within their own jurisdiction.

In fact, the beginning of the trend of attack on Russian assets was laid by the Law of Ukraine "On Basic Principles of Compulsory Seizure of Property in the Russian Federation and Its Residents" of 3 March, 2022, which was only of framework nature.

At the same time, amendments to the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Increase the Effectiveness of Sanctions Related to the Assets of Individuals" of 12 May 2022 № 2257-IX, legislation of Ukraine on special economic and other restrictive measures (sanctions) was supplemented by the possibility of collecting in the income of the state assets belonging to a natural or legal person, as well as assets in respect of which such person may directly or indirectly (through other natural or legal persons) perform actions identical in content to exercise the right to manage them.

This sanction is of an exceptional nature and may be applied only to individuals and legal entities whose actions have created a significant threat to the national security, sovereignty or territorial integrity of Ukraine (including through armed aggression or terrorist activities) or have significantly contributed (including through financing) the commission of such actions by other persons, including residents within the meaning of the Law of Ukraine "On Basic Principles of Compulsory Seizure in Ukraine of Objects of Ownership of the Russian Federation and Its Residents".

This sanction may be applied only during the period of martial law and provided that the relevant natural or legal person in the manner prescribed by this Law has already been sanctioned in the form of blocking assets.

At the same time, the legislator took into account the previous problems of the general sanction mechanism described in paragraph 2.1 of this article, providing for the decision to recover the state's assets by the court in a special manner. It is clear that such a step is

12 Kyiv School of Economics <https://kse.ua/ua/about-the-school/news/za-ostannimi-obrahunkami-zagalna-suma-pryamih-zbitkiv-infrastrukturi-stanovit-103-9-mlrd/?fbclid=IwAR2AOzoM8GavWJWQ3WLBSjBu6tou6zEhJYB4vm6Gd-WKXbG-E-8VniI14Ao > accessed 19 June 2022.

quite justified, if we pay attention to the fact that the recovery of assets actually leads to the deprivation of property rights, as the grossest form of interference with the right of a person protected by Art. 41 of the Constitution of Ukraine and Art. 1 of the First Protocol to the ECHR. Both of these Acts contain a categorical imperative on the judicial procedure for restricting the right.

The authority to file a lawsuit is vested in the central executive body, which ensures the implementation of state policy in the field of recovery of state assets of persons subject to sanctions. This is how the State Financial Monitoring Service is defined today.

Based on the constitutive features of this case, which is characterized by a public law nature, it was logical, at the suggestion of the President of Ukraine, to refer this category of cases to the jurisdiction of administrative courts. This confirmed the previous conclusion that sanctions are not measures of responsibility, and therefore their application takes place outside of judicial proceedings. This led to the inclusion of CAP Art. 283-1 "Peculiarities of proceedings in cases of application of sanctions" as a part of normative group of urgent administrative cases.

The most significant novelty of the normative order was the expansion of the subject jurisdiction of administrative courts due to the fact that the relevant category of cases under the rules of administrative proceedings is considered in the first and appellate instance by the Supreme Anti-Corruption Court of Ukraine and its Appeals Chamber, respectively. Para. 6 of Art. 283-1 of CAP establishes the principles of absolute adversarial proceedings, which is not typical of administrative proceedings:

> 'The court shall rule in favor of the party whose evidence is more convincing than that of the other party.'

Apart from the reputational advantages of such a decision (given the authority of the Supreme Anti-Corruption Court of Ukraine), it is difficult to find a doctrinal justification for such an approach. Moreover, in these cases, administrative and criminal trials converge both institutionally (the High Anti-Corruption Court of Ukraine is part of the criminal justice system) and at the level of principles (excluding the principle of formal clarification in favor of adversarial proceedings).

3 PROHIBITION OF POLITICAL PARTIES IN THE PROCEDURE OF ADMINISTRATIVE JUDICIARY IN CONDITIONS OF MARTIAL LAW

Since the proclamation of Ukraine's independence, the political system of our state has been characterized by pluralism and openness. Minimum constitutional restrictions on the activities of political parties - a ban on those whose program goals or actions are aimed at eliminating Ukraine's independence, forcibly changing the constitutional order, violating the sovereignty and territorial integrity of the state, undermining its security, illegaly seizing state power, propagading war, violence, incitement of interethnic, racial, religious hatred, encroachment on human rights and freedoms, public health (para. 1 art. 37 of the Constitution of Ukraine) - led to the emergence of more than 370 parties of various orientations as of 1 January, 2022[13]. On the other hand, the openness of the political system allowed pro-Russian agents to be inspired through democratic procedures, who openly supported and disseminated Russia's anti-Ukrainian position in the activities of the state and used their mandate to the detriment of Ukraine.

13 Register of political parties of the Ministry of Justice of Ukraine <https://minjust.gov.ua/m/str_31094> accessed 19 June 2022.

Under martial law, the Law of Ukraine of 3 May 2022 № 2243-IX substantially updated the system of banning the activities of political parties in Ukraine. In particular, the list of established prohibitions in the activities of political parties of Ukraine was supplemented by justification, recognition as lawful, denial of armed aggression against Ukraine, including by presenting the armed aggression of the Russian Federation and/or the Republic of Belarus against Ukraine as an internal conflict, civil conflict, civil war, denial of temporary occupation of part of the territory of Ukraine; glorification, justification of actions and/or inaction of persons who committed or are carrying out armed aggression against Ukraine, representatives of armed formations of the Russian Federation, illegal armed formations, gangs, mercenaries created and/or subordinated, and/or managed and/or financed by the Russian Federation, as well as representatives of the occupation administration of the Russian Federation, which consists of its state bodies and other structures functionally responsible for the management of the temporarily occupied territories of Ukraine, and representatives of self-proclaimed bodies controlled by the Russian Federation, which usurped power in the temporarily occupied territories of Ukraine, including by defining them as "insurgents", "militias", "polite people", etc. (para. 10, 11 art. 5 of the Law of Ukraine "On Political Parties" of 5 April, 2001 № 2563-III).

It is obvious that these prohibitions are within the framework of general constitutional restrictions, specifying them in accordance with current circumstances, emphasize the military aggression of the Russian Federation and the Republic of Belarus against Ukraine as a major threat to the sovereignty and security of the state.

In case the court bans a political party, the property, funds and other assets of the political party, its regional, city, district organizations, primary units and other structural entities become the property of the state, as stated in the court decision.

The plaintiff in this category of cases is the central executive body, which implements the state policy in the field of state registration (legalization) of associations of citizens, other public formations, which immediately goes to court with an administrative lawsuit to ban a political party. Today such a body is the Ministry of Justice of Ukraine.

Cases banning political parties are considered by administrative courts in an exclusive subject-matter jurisdiction - the Administrative Court of Appeal in the appellate district, which includes the city of Kyiv - in a special procedural order defined by art. 289-3 of CAP. Just like proceedings on the application of sanctions, cases on bans of political parties were qualified by the legislator as urgent administrative cases, which determines the efficiency of the procedural deadlines for their resolution.

The appellate court in these cases is the Supreme Court, which is a panel of the Administrative Court of Cassation. The judgment of the Supreme Court in such cases is final and not subject to cassation.

Under martial law, administrative cases prohibiting a political party in accordance with Art. 289-3 of CAP as a court of first instance, are under the jurisdiction of the Administrative Court of Appeal in the appellate district, which includes the city of Lviv, which led to the consideration of all cases by the Eighth Administrative Court of Appeal.

Accordingly, the powers of administrative courts are now expanded due to the possibility of banning a political party and transferring property, funds and other assets of a political party, its regional, city, district organizations, primary units and other structural entities to state ownership. The decision of the administrative court, which came into force, is the only legal way to ban the activities of a political party in Ukraine on the grounds specified by law. At the same time, such a ban can be applied to a political party, regardless of its status - in case of violation of the established prohibitions, the court is authorized to ban the party

represented by the parliamentary faction in parliament.

The practice of active application of this procedure has shown its viability in the early stages in compliance with the basic regulatory requirements and guarantees of the defendants.

4 CONCLUSIONS

The war of the Russian Federation with the support of the Republic of Belarus against Ukraine and the ensuing martial law regime is an extraordinary legal regime that contains significant deviations from the guarantees and obligations of the state to repel threats to state sovereignty, security and territorial integrity. As a result, the public interest becomes predominant for the purposes of legal regulation.

At the same time, the goal of the struggle does not allow complete disregard for the principles of democracy and the rule of law, even in conditions of war. Taking care of its own protection, the state is obliged to implement safeguards for unjustified violations of human rights, freedoms and interests in the legal system. The universal standard of such a mechanism is judicial control over the activities of public administration bodies and judicial authorization of the application of coercion and restrictions.

The nature and principles of the judiciary have demonstrated the ability to establish the existence of grounds and conditions for interfering with a person's private interest and to resolve the issue of his or her fair restriction to ensure balance.

In these circumstances, the proposed regulatory changes, which determine the dominant role of administrative courts in the application of sanctions related to the assets of individuals or the prohibition of political parties, should be supported. At the same time, in these cases, administrative courts clearly perform the necessary functions of protecting national interests, national security, sovereignty and territorial integrity of Ukraine, countering terrorist activities, as well as preventing violations, restoring violated rights, freedoms and legitimate interests of Ukrainian citizens, society and state.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

TERRITORIAL TORT EXCEPTION? THE UKRAINIAN SUPREME COURT HELD THAT THE RUSSIAN FEDERATION COULD NOT PLEAD IMMUNITY WITH REGARD TO TORT CLAIMS BROUGHT BY THE VICTIMS OF THE RUSSIA-UKRAINE WAR

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Submitted on 02 May 2022 / Revised on 16 Jun 2022 / Approved **29 Jun 2022**
Published online: **06 Jul 2022** // Last Published: **15 Aug 2022**

Summary: 1. Introduction. – 2. The Milestone Case: Procedural History and the Supreme Court's Ruling. – 3. The Supreme Court's Ruling in a Broader Context: What the Supreme Court Did Not Say (explicitly). – 4. Instead of a Conclusion: Did the Supreme Court Rule Correctly? – 5. Epilogue.

Keywords: *jurisdictional immunity; restrictive immunity; relative immunity; limited immunity; territorial tort exception; Russia-Ukraine war; war crimes; tort law*

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Corresponding author, solely responsible for text (Credit taxonomy).
Competing interests: Although the author has a family relationship with one of the managing editors, the possible conflict of interest was negated by assigning the other managing editor to choose peer reviewers and make the final decision on the publication of the article.
Disclaimer: The author declares that his opinion and views expressed in this manuscript are free of any impact of any organizations.
Managing editor – Dr. Olena Terekh. **English Editor** – Dr. Sarah White.

How to cite: Karnaukh B 'Territorial Tort Exception? The Ukrainian Supreme Court Held that the Russian Federation Could Not Plead Immunity with regard to Tort Claims Brought by the Victims of the Russia-Ukraine War' 2022 3(15) Access to Justice in Eastern Europe 165–177. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000321

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

ABSTRACT

Background. *The jurisdictional immunity of a state means that the state cannot be involved as a defendant in a case considered by a foreign court. In Ukraine, the rule on the jurisdictional immunity of a foreign state is enshrined in Art. 79 of the Law of Ukraine 'On Private International Law'. Until 14 April 2022, the Ukrainian Supreme Court rigidly applied the provisions of the said article and recognised the Russian Federation's immunity with regard to claims brought by Ukrainian citizens seeking compensation for harm caused by the armed conflict that commenced in 2014. Yet shortly after 24 February 2022, when Russia's aggression against Ukraine entered a new phase, i.e., the phase of full-scale war, the Supreme Court changed its mind.*

Methods. *This note addresses the ruling of the Ukrainian Supreme Court of 14 April 2022 in case no. 308/9708/19, where the Court held that the Russian Federation could not plead immunity with regard to tort claims brought by the victims of the Russia-Ukraine war. In reaching this conclusion, the Court relied on the territorial tort exception enshrined in the European Convention on State Immunity (Basel, 16 May 1972) and the UN Convention on Jurisdictional Immunities of States and Their Property. Though neither of the two conventions has been ratified by either Ukraine or the Russian Federation, the Court found that these conventions indicate a general tendency in international customary law towards limiting the jurisdictional immunity of the states.*

The reasoning of the Supreme Court is examined by scrutinising the authorities the Court adduced in support of its ruling, as well as by putting the ruling in the broader context of the jurisprudence of the International Court of Justice (ICJ) and European Court of Human Rights (ECtHR).

Results and Conclusions. *It is concluded that what the Supreme Court utilised is not the territorial tort exception but rather the 'human rights/*jus cogens*' exception. Further, the case before the Ukrainian Supreme Court is distinguishable from the ICJ and the ECtHR cases, where it was held that notwithstanding gross violations of human rights, the respondent state should nevertheless enjoy immunity. Unlike those cases, the Ukrainian case was tried amid the ongoing war, when no reparation agreements had been concluded, the legitimate aim of 'promoting comity and good relations between states' had been frustrated, and it was no longer possible to justify the restriction of the plaintiff's right of access to a fair trial.*

1 INTRODUCTION

The jurisdictional immunity of a state means that the state cannot be involved as a defendant in a case considered by a foreign court. Otherwise, the foreign court would have to judge the actions of the state, and afterwards, within the execution proceedings, the foreign authorities would have to take coercive measures against the state, thereby exercising power over the latter. It would contradict the principle of sovereignty and equality of the states since *par in parem non habet imperium*.

In Ukraine, the rule on the jurisdictional immunity of a foreign state is enshrined in Art. 79 of the Law of Ukraine 'On Private International Law'. The article precludes filing a claim against a foreign state, involving a foreign state in a case as a defendant or a third party, seizing property that belongs to a foreign state and is located on the territory of Ukraine, or applying other means of securing a claim in respect of such property and recovering such property. The article provides for two exceptions to the rule of immunity. The first is when a foreign state (represented by the competent authorities) assents to be involved in

the litigation. The second exception is retorsion measures, i.e., denying the immunity of the foreign state in response to the fact that the latter state – in violation of international law ± does not accord immunity to Ukraine within its own jurisdiction. Retorsion measures, according to the article, are implemented by the Cabinet of Ministers of Ukraine.

Until recently, the Supreme Court rigidly applied the provisions of the said article and recognised the Russian Federation's immunity with regard to claims brought by Ukrainian citizens seeking compensation for harm caused by the armed conflict that commenced in 2014. In most of these cases,[2] the plaintiffs sought compensation for internal displacement resulting from the occupation of Ukrainian territory by Russian-backed separatists. Even if their housing was not physically destroyed, the plaintiffs lost the opportunity to use it, as well as suffered pecuniary and moral damage due to the need to relocate and the severing of social ties. One case concerned the harm caused by the death of the plaintiff's husband.[3] The claims were filed against the aggressor state.

In all these cases, the Supreme Court, referring to Art. 79 of the Law 'On Private International Law', concluded that in the absence of consent from the Russian Federation's diplomatic mission, such cases could not be considered by Ukrainian courts. The Supreme Court repeatedly emphasised that 'every sovereign state can be a defendant in the courts of another state only if there is an express or tacit assent to this effect conveyed by the authorized officials'.[4] Therefore,

> having obtained the statement of the claim, the judge at the stage of preparation of the case for trial must find out whether there is the consent from the diplomatic mission… to the dispute being considered by the courts of Ukraine. <…> If such consent is not obtained, the embassy may not acquire the procedural status of a defendant in civil proceedings.[5]

When plaintiffs attempted to shatter the Supreme Court's approach and insisted on the need to overturn the said position, the Supreme Court emphasised that the position was 'constant and settled'.[6] Yet shortly after 24 February 2022, when Russia's aggression against Ukraine entered a new phase, i.e., the phase of full-scale war, the Supreme Court changed its mind.

2 THE MILESTONE CASE: PROCEDURAL HISTORY AND THE SUPREME COURT'S RULING

In case no. 308/9708/19,[7] the widow of the army sergeant, acting in her own interests and on behalf of two minor children, filed a lawsuit against the Russian Federation claiming compensation for non-pecuniary damage caused by the death of her husband. He served in the Armed Forces of Ukraine and, in 2014, took part in the defence of the Luhansk region. The man received deadly shrapnel injuries when the Luhansk Airport was shelled by Russian-backed separatists using the 'Grad' system. As the war against Ukraine is waged

2 Case No 265/7703/19 (Judgment of the Supreme Court, 9 June 2021); Case No 280/1380/19-ц (Judgment of the Supreme Court, 4 November 2020); Case No 711/17/19 (Judgment of the Supreme Court, 13 May 2020); Case No 613/924/19 (Judgment of the Supreme Court, 3 November 2021); Case No 943/1741/19 (Judgment of the Supreme Court, 22 October 2021); Case No 712/10119/20-ц (Judgment of the Supreme Court, 22 September 2021).

3 Case No 357/13182/18 (Judgment of the Supreme Court, 3 June 2020).

4 See n 1 and n 2.

5 Ibid.

6 Case No 280/1380/19-ц (Judgment of the Supreme Court, 4 November 2020); Case No 265/7703/19 (Judgment of the Supreme Court, 9 June 2021).

7 Case No 308/9708/19 (Judgment of the Supreme Court, 14 April 2022).

by Russian troops, as well as by military formations created, sponsored, and managed by the Russian Federation, the woman claimed compensation from the Russian Federation.

The court of first instance, in line with the Supreme Court's case law relevant at the time, dismissed the claim on the ground of the Russian Federation's jurisdictional immunity. The court decision states:

> In resolving this case, the court considers that in accordance with the norms and principles of international law and current legislation of Ukraine there is no doubt that the Russian Federation is an aggressor state *vis-a-vis* Ukraine, and that its armed aggression entailed temporary occupation of the part of Ukraine, and that these circumstances may indeed cause moral damage to the people of Ukraine. <…> However, the fact that the temporary occupation of Ukraine was due to the armed aggression of the Russian Federation does not change the fact that the Russian Federation, as a state enjoying sovereignty, cannot be involved in a case before a court of general jurisdiction of Ukraine without its explicit or tacit consent expressed through its authorized bodies or officials'.[8]

In accordance with the requirements of procedural law,[9] a copy of the statement of claim with all the annexes, as well as the court's decision to initiate proceedings and the summonses, were sent to the Embassy of the Russian Federation and received by the addressee. However, the Embassy never responded. Hence, the court concluded that the Embassy did not consent to the case being heard and, on this ground, dismissed the claim.

The plaintiff lodged an appeal. The appellate court agreed that without the consent of the Russian Federation, the case could not be heard by Ukrainian courts, but it noted that this consent should be obtained in a particular way, namely, by applying to the Ministry of Justice, which, in turn, should instruct the Ministry of Foreign Affairs to contact the Embassy of the Russian Federation. Hence, following the regular procedures on defendant notification was not sufficient in this case. Therefore, the Court of Appeal held to apply to the Ministry of Justice and suspend the proceedings until a response was received or until a reasonable amount of time had passed.[10]

The plaintiff challenged this decision before the Supreme Court. And this time, in the judgment[11] delivered on 14 April 2022, the Supreme Court ruled that the Russian Federation could not invoke immunity. This conclusion is based on the provisions of two international conventions: the European Convention on State Immunity (Basel, 16 May 1972) (Basel Convention) and the UN Convention on Jurisdictional Immunities of States and Their Property (UN Convention). Both conventions[12] contain a rule known as the 'territorial tort exception'. Under this rule, immunity does not apply in a tort case where the plaintiff seeks compensation for death or injury to a person or damage to or loss of tangible property, as long as the harmful act or omission occurred in the territory of the state of the court and the tortfeasor was present there while committing the harmful act or omission.

Although neither of the two conventions has been ratified by either Ukraine or the Russian Federation, the Court has found that these conventions indicate a general tendency in international law towards limiting the jurisdictional immunity of states. The Supreme Court effectively implied that these conventions are resorted to not because they are binding on the two states involved but rather because they prove the existence of a particular rule in customary international law, which, in turn, applies regardless of whether states participate in the conventions or not.

8 Case No 308/9708/19 (Judgment of the Uzhgorod City-District Court, 2 February 2021).

9 See Arts 128, 177(1) and 187(5) Civil Procedure Code of Ukraine.

10 Case No 308/9708/19 (Decision of the Zakarpatskyi Appellate Court, 1 September 2021).

11 Case No 308/9708/19 (Judgment of the Supreme Court, 14 April 2022).

12 See Art 11 Basel Convention and Art 12 UN Convention.

In coming to that conclusion, the Supreme Court relied on two cases of the European Court of Human Rights (ECtHR), namely *Cudak v. Lithuania*[13] and *Oleynikov v. Russia*,[14] where the ECtHR recognised that the UN Convention, embodying the rules of customary international law, applies even to states that have not ratified it. Of particular importance is the case of *Oleynikov v. Russia*. In this case, the ECtHR not only confirmed the customary nature of the UN Convention provisions in general but also cited documents from the Russian authorities (letters of the President, ruling of the Constitutional Court, information letter of the Supreme Commercial Court) indicating that Russia itself endorses the idea of limiting jurisdictional immunity of a state.[15]

The Supreme Court identified six requirements that must be met for the territorial tort exception to apply: (1) the harmful act or omission must take place in the territory of the state of the court; (2) the author of the harmful act or omission (i.e., the state's agent or public official) must be present in the territory of the state of the court at the time the act or omission was committed; (3) the harmful act or omission may be attributed to the state; (4) liability for such an act or omission is provided for by the *lex fori*; (5) the harm consists in death, physical injury, damage, destruction, or loss of property; (6) there is a causal link between the act or omission and the relevant harm.

Since all the six requirements were satisfied in the present case, the Supreme Court held that the case should be considered regardless of whether the Russian Federation consented. The decision states that

> in determining whether jurisdictional immunity applies to the Russian Federation in the case under review, the Supreme Court takes into account the following:
> - the object of the claim is compensation for non-pecuniary damage caused to individuals, Ukrainian citizens, as a result of the death of another Ukrainian citizen;
> - the place of damage infliction is the territory of the sovereign state of Ukraine;
> - the damage was allegedly caused by the agents of the Russian Federation who violated the principles and goals enshrined in the UN Charter concerning the prohibition of military aggression against another state, viz Ukraine;
> - committing the acts of military aggression by a foreign state does not qualify as the exercise of its sovereign rights, but indicates a violation of the obligation to respect the sovereignty and territorial integrity of another state, viz Ukraine, as this obligation is enshrined in the UN Charter;
> - the national legislation of Ukraine is based on the idea, that as a blanket rule, damage caused in Ukraine to an individual as a result of wrongful actions of any other person (entity) may be compensated under the Ukrainian court judgment (so called principle of "general delict").[16]

As a result, the Supreme Court overturned the appellate court's decision to suspend the proceedings and sent a request to the Ministry of Justice. Now, the case must be considered by the Ukrainian courts on the merits.

13 *Cudak v Lithuania* App no 15869/02 (ECtHR, 23 March 2010) https://hudoc.echr.coe.int/eng?i=001-97879 accessed 02 May 2022.

14 *Oleynikov v Russia* App no 36703/04 (ECtHR, 14 March 2013) https://hudoc.echr.coe.int/eng?i=001-117124 accessed 02 May 2022.

15 Ibid paras 21-32 and 67.

16 Case No 308/9708/19 (Judgment of the Supreme Court, 14 April 2022). On the concept of 'general delict' in Ukrainian law, see B Karnaukh, 'Ukraine: The Untapped Potential of Tort Law' in E Aristova, U Grusic (eds), Civil remedies and human rights in flux: Key legal developments in selected jurisdictions (Hart Publishing 2022) 333-340.

3 THE SUPREME COURT'S RULING IN A BROADER CONTEXT: WHAT THE SUPREME COURT DID NOT SAY (EXPLICITLY)

Theoretically and historically, there are two distinct concepts of jurisdictional immunity of the state – absolute immunity and restrictive immunity.[17] Absolute immunity means that acts of the state (no matter what kind of acts are considered) can never be tried by a foreign court. In contrast, according to the concept of restrictive immunity, a distinction should be made between the acts falling within the domain of public law through which the state exerts its sovereign power (*acta jure imperii*) and the acts falling within the domain of private law through which the state participates in commercial transactions and other relations on par with the private persons or entities (*acta jure gestionis*). Under the concept of restrictive immunity, only the acts of the former kind shall be shielded from the jurisdiction of a foreign court (immunity); meanwhile, the actions of the latter kind may be tried by a foreign court (no immunity).

The tendency the Supreme Court was referring to in its judgment was the shift in international law from absolute immunity to restrictive immunity to the extent that the concept of absolute immunity has become obsolete. Thus, in order to decide whether a court has jurisdiction to adjudicate an action brought against a foreign state, it is necessary to ascertain whether the contested acts constituted an *acta jure imperii* (in which case immunity applies) or *acta jure gestionis* (in which case immunity may not be invoked).

In this context, the circumstances of the two ECtHR cases cited by the Supreme Court deserve closer scrutiny. In *Cudak v. Lithuania,*[18] the applicant worked at the Polish Embassy in Vilnius as a secretary and switchboard operator. Shortly after she reported sexual harassment by a colleague of the diplomatic mission to the Equal Opportunities Ombudsman, she was fired. She brought an action before the Vilnius Regional Court seeking compensation for wrongful dismissal. But when the Polish Foreign Minister pleaded immunity, the court closed the case. This decision was later upheld by the Court of Appeal and the Supreme Court of Lithuania.

The Supreme Court of Lithuania noted that the key issue in the case was to determine whether the relationship between the Republic of Poland and the applicant was of a public or private nature. Although the Lithuanian Supreme Court was unable to obtain information on the exact range of the applicant's duties, it concluded that judging by the job title, relations between the applicant and the Republic of Poland were governed by public law.

The ECtHR disagreed and found for the applicant, stating that her right of access to a court guaranteed by Art. 6 of the ECHR was violated. The ECtHR noted that the applicant 'did not perform any particular functions closely related to the exercise of governmental authority. In addition, she was not a diplomatic agent or consular officer, nor was she a national of the employer state'.[19] The Court also emphasised that the mere fact that she could have had access to certain documents or could have been aware of the content of telephone conversations was not sufficient.[20] And lastly, it should not be forgotten that the dismissal ensued after she alleged sexual harassment.[21] On these grounds, the ECtHR concluded that Poland could not invoke immunity under the circumstances, and hence the applicant had been unlawfully denied access to court.

17 Also known as 'relative' or 'limited'.
18 Cudak case n 12.
19 Cudak case, n 12 para 69.
20 Ibid para 72.
21 Ibid.

The case of *Sabeh El Leil v. France,*[22] though not mentioned in the Supreme Court's judgment, concerned similar facts. The case also involved the dismissal, but this time of a man who worked as an accountant at the Kuwaiti embassy in Paris. Here too, the discussion revolved over whether the applicant's job responsibilities indicated that his relationship with the embassy was of a public nature. And since the French courts did not pay due attention to this issue, hastily concluding that immunity applied, the ECtHR found a violation of the applicant's right of access to a court.

In *Oleynikov v. Russia,*[23] a citizen of the Russian Federation lent money to the Khabarovsk Office of the Trade Counsellor of the Embassy of the Democratic People's Republic of Korea (DPRK). As the money was not repaid in due time, Mr Oleynikov brought an action before the Khabarovsk Industrialniy District Court seeking to collect the money from the DPRK. However, the court returned his claim without consideration because of state immunity. The decision was upheld by higher courts. The ECtHR, having examined the Russian jurisprudence and the letters of the President of the Russian Federation, concluded that the respondent state itself embraced the concept of restrictive immunity.[24] Moreover, there were indications that Russia embraced it even before signing the UN Convention.[25] In view of this, the ECtHR found a violation of the applicant's right of access to a court due to the Russian courts' failure to carefully assess the nature of the transaction between the applicant and the Korean Embassy.

The two ECtHR cases referred to by the Supreme Court are distinguishable from the case before it. The ECtHR judgments do support the conclusion that absolute immunity has succumbed to restrictive immunity and that the two mentioned conventions on immunity apply even to the states that have not ratified them. At the same time, both ECtHR cases concern relations of a private law nature (an employment relationship in one case and a contractual obligation in the other). Therefore, these cases are not helpful in deciding if the aggressive war waged by the Russian Federation against Ukraine is *acta jure imperii* or *acta jure gestionis*.

The plaintiff in the Ukrainian case actually contended that Russia's war against Ukraine could not be considered an act of sovereign power. The Supreme Court agreed. However, it is worth noting that the justification and breadth of this contention in the plaintiff's interpretation and in the interpretation of the Supreme Court differ significantly. In the plaintiff's interpretation, the argument was premised on the fact that until 24 February 2022, the Russian Federation steadfastly denied the presence of its troops in Ukraine.[26] And since her husband died in 2014, the plaintiff insisted that the actions of the Russian Federation could not be considered *acta jure imperii* precisely because Russia's actions were 'non-public': Russia used its own weaponry and military units without any identification and completely

22 *Sabeh El Leil v France* App no 34869/05 (ECtHR, 29 June 2011) https://hudoc.echr.coe.int/eng?i=001-105378 accessed 02 May 2022.

23 Oleynikov case n 13.

24 Oleynikov case n 13 para 21-32.

25 Ibid para 67.

26 G Baczynska, 'Russia says no proof it sent troops, arms to east Ukraine' (*Reuters*, 21 January 2015) https://www.reuters.com/article/us-ukraine-crisis-lavrov-idUSKBN0KU12Y20150121 accessed 02 May 2022; P Engel, 'Putin: "I will say this clearly: There are no Russian troops in Ukraine"' (*Insider*, 16 April 2015) https://www.businessinsider.com/putin-i-will-say-this-clearly-there-are-no-russian-troops-in-ukraine-2015-4 accessed 25 May 2022; 'Putin reiterated the absence of the Russian army in the Donbass' (*Interfax*, 14 December 2017) https://interfax.com.ua/news/general/469917.html accessed 02 May 2022; S Walker, 'Putin admits Russian military presence in Ukraine for first time' (The Guardian, 17 December 2015) https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine accessed 02 May 2022. Yet, on the actual state of affairs, Global Rights Compliance, 'International Law and Defining Russia's Involvement in Crimea and Donbas' (13 February 2022) https://globalrightscompliance.com/wp-content/uploads/2022/05/International-Law-and-Russia-Involvement-in-Crimea-and-Donbas.pdf?fbclid=IwAR10X5oKd4-YcVtiTGaZC8m0Le9_MxchdQ2wTKeNFNcazaoWw6F7NP0YToc accessed 02 May 2022.

denied its involvement. This interpretation is akin to the principle of inconsistent behaviour prohibition, implying that a state cannot invoke immunity on the basis of *acta jure imperii* whenever the state itself does not consider its acts to constitute *acta jure imperii*.

In the interpretation of the Supreme Court, the argument obtained new reasoning and, as a result, a broader scope of application. The judgment reads:

> The Supreme Court proceeds from the fact that the aggressor state acted not within its sovereign right to self-defence, but, on the contrary, treacherously intruded the sovereign rights of Ukraine, acting on its territory, and therefore certainly no longer enjoys jurisdictional immunity in this category of cases. <…> committing the acts of military aggression by a foreign state does not constitute the exercise of its sovereign rights, but rather indicates a violation of the obligation to respect the sovereignty and territorial integrity of another state..'[27]

So, while the plaintiff maintained that Russia should not enjoy immunity because it acted in a stealthy manner, the Court held that Russia should not enjoy immunity because it acted in violation of international law. Under the plaintiff's interpretation, Russia would be devoid of immunity only with regard to events that took place before 24 February 2022; under the Supreme Court's interpretation, Russia would be devoid of immunity with regard to all the hostilities no matter whether they were stealthy or manifest.

But why even ask the question of whether Russia's invasion is *acta jure imperii* or *acta jure gestionis* when the two conventions provide for a territorial tort exception, and the requirements for the exception to apply are satisfied? The reason is that these conventions are not applicable as such but rather as documents proving the existence of a certain rule in customary international law. In particular, they prove the established tendency in international law towards limiting the immunity principle, according to which tendency a state can act in two guises, and only one of them shields it from the foreign court jurisdiction. Thus, the provisions of the two conventions should not be taken at face value; instead, they are applicable only inasmuch as they embody the restrictive immunity concept as established in customary international law.

With regard to the territorial tort exception specifically, it means that the exception applies *unless* the harmful act of the state amounts to *acta jure imperii*. In other words, the territorial tort exception implies only 'private law' torts (if they can be called so) – that is, torts that are not related to the exercise by the tortfeasor state of its sovereign powers; torts that, in principle, could have been committed by any private actor as well.

It is worth noting that Art. 31 of the Basel Convention explicitly provides that it does not apply to the actions of the armed forces of a state when in the territory of another state. This proviso apparently imposes restrictions on the range of application of the territorial tort exception. Although there is no similar proviso in the UN Convention, in the commentaries to it, the International Law Commission noted that Art. 12 does not apply to armed conflict.[28] Similarly, the Chairman of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property also pointed out that the UN Convention as a whole does not cover military activities.[29]

27 Case No 357/13182/18 n 9.

28 Document A/46/10: Report of the International Law Commission on the work of its forty-third session (29 April-19 July 1991) (1991) II(2) Yearbook of International Law Commission 1, 46, para 10.

29 United Nations doc. A/C.6/59/SR.13 (2005) UN General Assembly Fifty-ninth Session Official Records 1, 6, para 36.

The same conclusion was reached by the International Court of Justice (ICJ) in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*.[30] Having scrutinised the legislation and case law of a number of states, the ICJ held that 'customary international law continues to require that a state be accorded immunity in proceedings for torts allegedly committed on the territory of another state by its armed forces and other organs of state in the course of conducting an armed conflict'.[31] This case deserves closer attention, as it addresses another important aspect of the problem that was not explicitly articulated in the Supreme Court's decision.

The case originated from the fact that Italian courts adjudicated lawsuits brought by Italian citizens seeking compensation from Germany for the damage caused by the atrocities committed by the Third Reich during World War II. There were three categories of lawsuits: those concerning mass executions of civilians in June 1944 in Civitella, Cornia, and San Pancrazio; those concerning deportation for forced labour to Germany; and those concerning the refusal to recognise members of the Italian armed forces as prisoners of war. Germany instituted proceedings in the International Court of Justice, alleging that Italy violated international law by neglecting the principle of state immunity in the relevant cases.

In this case, the ICJ thoroughly substantiated the customary nature of the rules on state immunity, elaborated on the concept of restrictive immunity, and distinguished between the two incarnations in which a state can act. In addition, the ICJ clarified that the status of a state's acts as *acta jure imperii* does not depend on whether those acts are lawful or wrongful[32] (contrary to what the Supreme Court was implying, stating that 'the acts of military aggression by a foreign state does not qualify as the exercise of its sovereign rights'). The criterion instead consists in asking on the basis of which law – public or private – one can assess the lawfulness or wrongfulness of the relevant acts. If, to assess the lawfulness of the relevant state's acts, one should resort to the rules of public law, then such acts are *acta jure imperii*; if the assessment is based on the rules of private law, then the acts are *acta jure gestionis*. According to the ICJ, neither the gravity of the violations committed by the state affects the determination of which of the two incarnations the state acted in.[33]

However, Italy's case involved yet another strand of argument. It emphasised that the norms violated by the Third Reich possessed the status of *jus cogens*, or peremptory norms, which sit at the very summit of the international law hierarchy. They bind all the states unconditionally and regardless of any formalities (such as ratification of any instruments) and preclude the application of any other contradicting norms no matter the source of the latter (whether it is binding instruments or customary law). Thus, Italy contended that the prohibition on murdering civilians, as well as the prohibition on deporting people to forced labour, are *jus cogens* norms. And since the rule of state immunity contradicts these norms, it should not apply, having been overridden by the norms of a greater force.

Yet, the ICJ rejected the argument.[34] The ICJ held that there could not be any contradiction between the norms of *jus cogens* Italy invoked and the norms on state immunity since they belong to two 'parallel' planes that do not intersect: the former belong to substantial law, while the latter belong to procedural law (determining the jurisdiction of the court to adjudicate particular case). As long as the relevant norms address different subjects, they cannot relate to

30 Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, p 99, paras 64-79.

31 Ibid para 78.

32 Ibid para 60

33 Ibid paras 81-91.

34 Ibid para 93.

each other as contradicting. On this ground, the ICJ concluded 'that even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on state immunity was not affected'.[35]

To support its findings, the ICJ cited[36] similar case law from the courts of the United Kingdom, Canada, Poland, Slovenia, New Zealand, and Greece, as well as two ECtHR cases, viz *Al-Adsani v. the United Kingdom* and *Kalogeropoulou and Others v. Greece and Germany*. In *Al-Adsani,*[37] the applicant brought an action in an English court against the sheikh and the state of Kuwait, claiming compensation for damage caused by illegal detention and torture that he sustained in Kuwait. The English courts refused to adjudicate the case because of state immunity. In proceedings before the Court of Appeal, the applicant maintained, *inter alia*, that the prohibition of torture is a *jus cogens* rule and should therefore take precedence over the state immunity rule. The Court of Appeal rejected the argument.[38]

The applicant appealed to the ECtHR, alleging a violation of his right of access to a court. Though the ECtHR agreed that the prohibition of torture is a *jus cogens* rule, the ECtHR held that it did not follow from it that the state immunity could be disregarded. The ECtHR admitted that some national courts are sympathetic to the idea of lifting the immunity in cases concerning gross violations of human rights, which may qualify as violations of *jus cogens*. However, according to the ECtHR, this approach has not garnered enough recognition to be considered an established international law.[39] On this basis, the ECtHR, by nine votes to eight, ruled that there was no violation of the applicant's right under Art. 6 ECHR.

In *Kalogeropoulou and Others v. Greece and Germany,*[40] Greek citizens filed lawsuits in Greek courts against Germany. The plaintiffs were relatives of the victims of the massacres perpetrated by the Nazis in Distomo in June 1944. Greek courts adjudicated the cases and ruled for the plaintiffs. However, when it came to the enforcement proceedings, the Court of Cassation held that Germany enjoyed immunity and the decisions, therefore, could not be enforced. The applicants in this case also emphasised that the atrocities committed by the Nazis in Distomo amounted to crimes against humanity and *jus cogens* violations, and therefore, in their view, the immunity should be denied. Yet, the ECtHR, echoing *Al-Adsani,* stated that rejecting immunity because of *jus cogens* violation was not a universally recognised principle.

It should be noted, however, that the approach followed by the ICJ and the ECtHR (that *jus cogens* violation does not affect the immunity) is disputable. It is evidenced by dissenting opinions both in the case of *Jurisdictional Immunities*[41] and in the *Al-Adsani* case.[42] There

35 Ibid para 97.

36 Ibid para 96.

37 *Al-Adsani v The United Kingdom* App no 35763/97 (ECtHR, 21 November 2001) https://hudoc.echr.coe.int/eng?i=001-59885 accessed 02 May 2022.

38 *Al-Adsani v Government* of *Kuwait* and Others (No 2) [1996] 2 LRC 344.

39 Al-Adsani v The United Kingdom paras 62 and 66.

40 *Kalogeropoulou and Others v Greece and Germany* App no 59021/00 (dec) (ECtHR, 12 December 2002) https://hudoc.echr.coe.int/eng?i=001-23539 accessed 02 May 2022.

41 Dissenting opinion of Judge Cançado Trindade in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 179; Dissenting opinion of Judge Yusuf in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 291; Dissenting opinion of Judge ad hoc Gaja in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 309.

42 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting Opinion of Judge Ferrari Bravo in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting Opinion of Judge Loucaides in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001).

are two main counterarguments. The first is the different accounts of how *jus cogens* and the immunity rule relate to each other.[43] In this regard, it is noted that it is unacceptably formalistic to think that those two are not interconnected merely because the former is substantial while the latter is procedural. After all, a procedural rule that blocks access to a remedy effectively deprives the substantive rule of any practical meaning. Therefore, to separate the right as such from the remedies safeguarding would be equal to defying the idea that rights shall be 'practical and effective, not theoretical or illusory' (in the ECtHR's parlance).[44] The ECtHR was reproached for conducting the proportionality test in a superficial manner without carefully weighing the respective values of immunity rule and human rights.[45] In this vein, one can discern a case for a distinct exception to the immunity principle, which may be called the 'human rights/*jus cogens*' exception. The second counterargument boils down to drawing parallels with criminal law,[46] where universal jurisdiction is recognised with regard to war crimes and crimes against humanity. Why not recognise universal jurisdiction over tort claims concerning harm caused by those same crimes?

4 INSTEAD OF A CONCLUSION: DID THE SUPREME COURT RULE CORRECTLY?

As we have noted above, the case before the Supreme Court is distinguishable from *Cudak* and *Oleynikov*, which the Supreme Court adduced to support its ruling. Yet, the case is also distinguishable from *Jurisdictional Immunities, Al-Adsani,* and *Kalogeropoulou.* The distinctive criteria are different yet interrelated.

In the case of *Jurisdictional Immunities,* Germany had already paid reparations to Italy by the time the proceedings were instituted in 2008. The ICJ noted that 'Germany has taken significant steps to ensure that a measure of reparation was made to Italian victims of war crimes and crimes against humanity'.[47] And although Italy insisted that the reparations had not compensated for all the damage (particularly the damage that constituted the subject matter of litigation in the Italian courts), the ICJ held that this fact could not justify lifting the immunity.[48] Otherwise, courts considering civil claims of individuals would have to continually re-assess intergovernmental agreements and inquire whether those agreements encompassed all types of damage inflicted. Secondly, the state accountable for the damage would have significantly fewer incentives to participate in intergovernmental reparation agreements if we suppose that even having paid reparations under those agreements, the state would continue to be subject to a potentially unlimited number of claims from individuals.

43 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in Sabeh El Leil v France App no 34869/05 (ECtHR, 29 June 2011); Dissenting Opinion of Judge Ferrari Bravo in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting Opinion of Judge Loucaides in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); Dissenting opinion of Judge Cançado Trindade in Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) Judgment, ICJ Reports 2012, 179, paras 288-299.

44 *Zubac v Croatia* App no 40160/12, §77 (ECtHR, 5 April 2018) https://hudoc.echr.coe.int/eng?i=001-181821 accessed 02 May 2022.

45 F De Santis di Nicola, 'Civil Actions for Damages Caused by War Crimes vs. State Immunity from Jurisdiction and the Political Act Doctrine: ECtHR, ICJ and Italian Courts' (2016) 2 International Comparative Jurisprudence 107, 112 with accompanying citations.

46 Joint Dissenting Opinion of Judges Rozakis and Caflisch Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić in Al-Adsani v The United Kingdom App no 35763/97 (ECtHR, 21 November 2001); De Santis di Nicola n 46, 107, 114.

47 Jurisdictional Immunities case n 26 para 99.

48 Jurisdictional Immunities case n 26 paras 101-104.

In contrast, the Ukrainian case has been considered amid the ongoing war, when reparation agreements have not been signed (and, naturally, no reparation payments have been rendered). From the law and economics standpoint (under which tort law rules are seen as creating economic incentives for certain choices), the case for denying immunity could go as follows: as a result of denying Russia's immunity, Russia would face the protracted menace of hundreds of thousands of lawsuits, which could serve as an impetus for Russia to seek a settlement on reparations through negotiations and the conclusion of a bilateral agreement with Ukraine.

In the *Al-Adsani* and *Kalogeropoulou* cases, the issue of jurisdictional immunity was examined through the prism of the applicants' right to a fair trial, as provided for in Art. 6 ECHR.[49] And since the right to a fair trial is not absolute,[50] only some restrictions of this right are contrary to the ECHR. To decide on whether there is a violation, the ECtHR conducts three consequent inquiries: (1) whether the restriction was provided for by law; (2) whether the law providing for this restriction pursued a legitimate aim; and (3) whether the restriction is proportionate to the legitimate aim pursued. If the answers to all the three questions are affirmative, then the restriction is compatible with the ECHR; and if at least one of the answers is negative, then there is a violation of the ECHR.[51]

Undoubtedly, jurisdictional immunity is provided for by Ukrainian law (see Art. 79 the Law 'On Private International Law'). But the ECtHR formulates the legitimate aim of this kind of law as follows: 'The Court considers that the grant of sovereign immunity to a state in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between states'.[52]

'Comity and good relations' were undeniably legitimate aims to be pursued for Italy and Germany in 2012 (when the ICJ ruled in *Jurisdictional Immunities*), for Kuwait and the United Kingdom in 2001 (when the *Al-Adsani* case was decided), or for Greece and Germany in 2002 (when *Kalogeropoulou* case was decided). But this is not so for Ukraine and Russia in the spring of 2022.

Given the state of war, the goal of ensuring 'comity and good relations' with the aggressor can no longer be considered a realistic or reasonable aspiration and therefore can no longer justify restricting the rights of the state's own citizens. In contract law parlance, this is called frustration of purpose. Therefore, under the given circumstances, the answer to the second question of the ECtHR test appears to be negative.

At the end of the day, the analysis above suggests that what the Supreme Court utilised is not the territorial tort exception but rather the 'human rights/*jus cogens*' exception.

5 EPILOGUE

In its judgments, the ECtHR emphasised that it ruled on the basis of law 'as is', i.e., as it *was* at that moment; the ECtHR did not rule out the possibility of the law evolving in the future. And now, we may be seeing this very future unfolding before our eyes. Perhaps the Russia-Ukraine

49 However, F De Santis di Nicola suggests that analysing the cases from the perspective of the right to an effective remedy (Art. 13 of the ECHR) would prove to be more appropriate angle. See De Santis di Nicola n 46, 107, 112, 113.

50 Oleynikov case n 13 para 55; Cudak case, n 12 para 55; Al-Adsani case n 33 para 53.

51 See T Tsuvina, 'Right of Access to a Court: Approach of the ECtHR' (2020) 4 Entrepreneurship, Economy and Law 60.

52 Al-Adsani case n 33 para 54; Cudak case, n 12 para 60; Sabeh El Leil case n 21 para 52; Oleynikov case n 13 para 60.

war will cause the world to revisit the limits of jurisdictional immunity of the state so that the balance between sovereignty and human rights will shift further towards the latter.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

LIABILITY MECHANISMS FOR WAR CRIMES COMMITTED AS A RESULT OF RUSSIA'S INVASION OF UKRAINE IN FEBRUARY 2022: TYPES, CHRONICLE OF THE FIRST STEPS, AND PROBLEMS

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Submitted on 01 Jun 2022 / Revised 23 Jun 2022 / Approved **29 Jul 2022**
Published: **15 Aug 2022**

Summary: – 1. introduction. – 2. Violation of the War Laws and Customs is the Most Common Crime during the Russian Invasion of Ukraine. – 3. Liability Mechanisms for War Crimes Committed in Ukraine. – *3.1. Prejudicial decisions of international courts*. – *3.2. Methods for bringing Russia to justice*. – 4. Conclusions.

Keywords: *war crimes, aggression, investigation of Russian war crimes in Ukraine, International Criminal Court, ad hoc tribunal, universal jurisdiction.*

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Translation: The content of this article was translated by one of the co-author of this article – Ms Shunevych, under the authors' responsibility.
Funding: The author(s) received no financial support for the research, authorship, and/or publication of this article. The Journal provides funding for this article publication.
Managing editor – Dr. Oksana Uhrynovska. **English Editor** – Dr. Sarah White.

How to cite: Kaluzhna O, Shunevych K 'Liability Mechanisms for War Crimes Committed as a Result of Russia's Invasion of Ukraine in February 2022: Types, Chronicle of the First Steps, and Problems' 2022 3(15) Access to Justice in Eastern Europe 178-193. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000324

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ABSTRACT

Ukrainian law enforcement agencies are investigating more than 18,000 war crimes and crimes of aggression, including 18,177 violations of the laws and customs of war, more than 5,000 murders and 6,000 civilian injuries, and about 23,000 destructions of civilian infrastructure. We note these figures without considering the number of crimes committed in the occupied territories and the places of active hostilities. The number of crimes increases every day.

War crimes are a type of international crime, along with the crime of aggression, crimes against humanity, and genocide, which russia is committing in Ukraine. However, in the article's title, the term 'war crimes' is used in a unifying context.

The researchers outline the range of war crimes and note the lack of systematisation due to the non-ratification of the Rome Statute by Ukraine, which significantly complicates the qualification of crimes for practicing lawyers. The authors then analyse such mechanisms of bringing the military, officers, and officials of russia to justice as: a) the International Criminal Court (ICC), b) ad hoc tribunals, c) the European Court of Human Rights (ECtHR), d) national judicial systems on the principle of universal jurisdiction e) criminal proceedings of Ukraine, f) eclectic forms of cooperation of justice bodies of Ukraine with foreign and international partners, together with the chronology of the first steps for each. The rationality of the establishment of a special international ad hoc tribunal exists because of the duration of the proceedings in the ICC, the ICC workload and lack of funding, and the non-extension of the ICC jurisdiction to the crime of aggression due to Ukraine's non-ratification of the Rome Statute; ensuring the impartiality of the court in the eyes of the international community.

The authors draw the attention of the Ukrainian legislator to the need to improve the logistics of using foreign forensic experts' opinions in criminal proceedings on war crimes in Ukraine by amending the Criminal Procedure Code (CPC) on the procedure for its verification as sources of evidence.

The research methodology includes logical, historical, statistical, comparative law, and system-structural methods. The information base consisted of international legal acts, national legislation, official resources of authorities and international institutions, and other open data.

1 INTRODUCTION

Since Ukraine first faced the armed conflict initiated and supported by the Russian in Donbas in April 2014, the investigation of war crimes has not been a new activity for the investigation bodies, prosecutors, and courts of modern Ukraine. However, after the full-scale invasion of Ukraine by the Russian army on 24 February 2022, Ukraine faced unprecedented challenges for the national justice system and the necessity of the involvement of international justice in bringing the Russian military, government officials, and political and military leaders to justice.

The Office of the United Nations High Commissioner for Human Rights (UNHCR) has confirmed the deaths of 4,569 Ukrainians, including 304 children, and the injury of 5,691 civilians as of 19 June in consequence of Russia's full-scale war against Ukraine.[3] The organisation emphasises that the real numbers are much higher because receiving information from places where intense fighting continues is delayed.

3 'Ukraine: Civilian casualties as of 12 June 2022' <https://ukraine.un.org/en/185551-ukraine-civilian-casualties-12-june-2022> accessed 22 June 2022.

According to the up-to-date statistics of the Office of the Prosecutor General of Ukraine press service, as of 22 June 2022, law enforcement agencies registered a total of 18,872 war crimes (18,177 of which – under Art. 438 of the Criminal Code – are violations of laws and customs of war), 324 deaths of children, and 592 wounds of children. These data are incomplete and do not take into account the number of crimes committed in places of active hostilities during Russia's full-scale military invasion of Ukraine.[4]

The Office of the Prosecutor General provides procedural guidance to the pre-trial investigation of waging an aggressive war under Art. 437 of the Criminal Code (the 'main case'). Within the investigation, 623 people have already been reported[5] under Art. 442 of the Criminal Code of Ukraine for genocide.[6] As of 9 June 2022, law enforcement agencies have identified 104 suspects of war crimes in Ukraine and sent eight cases to court, where three sentences have been passed.[7] A digital resource, *warcrimes.gov.ua*, has been created by the Prosecutor General's Office to collect evidence.

Representatives of the Ukrainian Legal Advisory Group provided the data on destroyed civil infrastructure facilities in May 2022: 19,700 residential buildings (4,431 as of 22 March); 1,665 educational institutions (548 as of 22 March 22); 570 medical institutions (135 as of 22 March); 426 cultural and art institutions. The ongoing hostilities and the increase in available liberated territories, which had been occupied or controlled by Russian troops, caused a significant 'jump' in numbers.[8]

In Kharkiv, for example, according to Kharkiv Mayor Igor Terekhov, as of 23 May 2022, from 24 February, the Russian army destroyed 3,482 houses of various forms of ownership, of which 2,482 apartment buildings, 1,000 residential buildings, cooperatives, and private households, and 492 residential buildings are not subject to restoration.[9] Four hundred and ninety administrative buildings were damaged, including 109 schools, 98 kindergartens, 55 medical institutions, 46 cultural institutions, 14 higher educational institutions, and five temples.[10]

According to British intelligence, the major casualties, including civilian casualties, were caused because Russian troops do not use accurate and modern missiles for shelling; instead, they use outdated and ineffective missiles.[11] The Pentagon has also said that Russia has used medium-range and short-range missiles. This is outrageous because Russia has high-precision guided weapons. Russia has had the opportunity to use these weapons for surgical strikes on

4 'Crimes committed during the full-scale invasion of the Russian Federation' <https://www.gp.gov.ua/> accessed 22 June 2022.

5 Ibid.

6 'Challenges in war crimes trials were discussed at the international conference' (9 June 2022) <https://supreme.court.gov.ua/supreme/pres-centr/news/1282328/> accessed 22 June 2022.

7 I Venediktova, '104 suspects in committing war crimes in Ukraine have been identified' <https://www.ukrinform.ua/rubric-ato/3503336-venediktova-vstanovili-104-pidozruvanih-u-skoenni-voennih-zlociniv-v-ukraini.html?fbclid=IwAR2bkw_svd5zsXV6XL5InRaF2jN6WRRoXU_7ALugERgl2EV4qjxTy1ONVRw> accessed 22 June 2022.

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9 'About 3.5 thousand houses were destroyed in Kharkiv' <https://www.city.kharkov.ua/uk/news/u-kharkovi-zruynovano-blizko-35-tisyachi-budinkiv-50858.html> accessed 22 June 2022.

10 Ibid.

11 'Latest Defence Intelligence update on the situation in Ukraine' (11 June 2022, <https://twitter.com/DefenceHQ/status/1535495311044579328?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1535495311044579328%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=http%3A%2F%2Fwww.pravda.com.ua%2Fnews%2F2022%2F06%2F11%2F7351865%2F> accessed 22 June 2022.

specific military targets. Instead, they struck civilian areas with inaccurate weapons, killing children. Considering their arsenal, it seems that this was a conscious choice.[12]

Investigating such a large number of war crimes and prosecuting such a large number of criminals is an unprecedented challenge for the criminal justice system of Ukraine and for international justice. The article aims to determine the range (types) of war crimes, find the mechanisms of bringing the military, officers, and officials of Russia to justice, identify problems, and suggest ways to eliminate them.

2 VIOLATION OF THE WAR LAWS AND CUSTOMS IS THE MOST COMMON CRIME DURING THE RUSSIAN INVASION OF UKRAINE

War crimes (a) are international crimes along with the crime of aggression (b), crimes against humanity (c), and genocide (d). The purpose of this article is not to determine the full range of war crimes, nor the problem of their qualification, the completeness of their implementation in national law, or other criminal or international law aspects. However, a basic understanding of their nature is necessary for the criminal prosecution of it.

Thus, the term 'war crimes' is collective in international law. This term includes severe violations of the rules of warfare ('violation of the laws and customs of war') and violations of the international humanitarian law (treaty and custom law) norms and principles. These crimes are committed intentionally or through gross negligence. The Geneva Conventions of 12 August 1949 and Additional Protocol I to it of 8 June 1977 oblige states to criminalise severe violations of international humanitarian law. Ukraine fulfilled this requirement by including Art. 438 'Violation of the laws and customs of war' in the Criminal Code of Ukraine.

Following Part 1 of Art. 438 of the Criminal Code, ill-treatment of war prisoners or civilians, the expulsion of civilians for forced labour, the looting of national values in the occupied territories, the use of means of warfare prohibited by international law, ***and other violations of the laws and customs of war provided for by international treaties,*** the binding nature of which has been approved by the Verkhovna Rada of Ukraine, as well as the issuance of an order to commit such actions, could be qualified as a war crime. Part 2 of Art. 438 of the Criminal Code would increase the penalty to life imprisonment if these actions were combined with premeditated murder.

The list of violations of the laws and customs of war in Art. 438 of the Criminal Code of Ukraine is not exhaustive. The norm refers to international treaties ratified by Ukraine and includes about 50 violations that are not well known to prosecutors, investigators, and judges of Ukraine. Ukrainian lawyers should analyse the almost three dozen international treaties in which war crimes are often repeated or clarified to learn the list of such acts that constitute violations of the laws and customs of war. This task would be simplified by Ukraine ratifying the Rome Statute of the ICC.

According to the four Geneva Conventions of 12 August 1949, war crimes include premeditated murder; torture, and inhuman treatment, including biological experiments, intentional infliction of severe suffering or serious injury, harm to health; illegal,

12 'A Washington expert about MLRS for Ukraine: It would completely change the course of the fighting' <https://www.dw.com/uk/vashynhtonskyi-ekspert-pro-mlrs-dlia-ukrainy-tse-povnistiu-zminyt-khid-boiv-a-61978127/a-61978127?fbclid=IwAR0Q5h01w9aCSWW1lToBEnJ-eRucxwYkUvleM_tLysMWx1wzz6zmjWGpxbk> accessed 22 June 2022.

unmotivated, and large-scale destruction and misappropriation of property not caused by military necessity, committed against people and property protected by the Conventions; taking hostages, etc. (Art. 50 GC1,[13] Art. 51 GC2,[14] Art. 130 GC3,[15] Art. 147 GC4[16]).

Art. 85 of Additional Protocol I of 1977 expands the list of war crimes to include: the transformation of civilians or undefended areas into targets; carrying out an indiscriminate attack affecting the civilian population or civilian objects when it is known that such an attack will cause a large number of deaths and injuries among civilians; the deportation or relocation of all or part of the population of the occupied territory, etc.[17]

Art. 438 of the Criminal Code of Ukraine, based on customary norms of international humanitarian law, is also applied for violations of laws and customs of war.[18] For example, the use of semi-shell JHP (Jacketed Hollow Point) bullets (the semi-shell JHP are torn by falling into the flesh) or other weapons and ammunition that cause excessive damage and destruction, suffering, and are indiscriminate in nature have been considered by states as crimes since the First or Second World War. According to research by Amnesty International, the Russian army fired with prohibited cluster munitions – containers containing dozens of submunitions scattered at a given height above the ground in Kharkiv. High percentages of submunitions do not explode on impact and thus actually turn into landmines. Amnesty International researchers found fragments of 9H210/9H235 cluster munitions in various city residential areas. Doctors from two Kharkiv hospitals showed researchers pellets they had removed from the wounds of victims of the shelling.[19]

3 LIABILITY MECHANISMS FOR WAR CRIMES COMMITTED IN UKRAINE

3.1 Prejudicial decisions of international courts

On 28 February, Ukraine applied to the ECtHR with statement no. 11055/22 '*Ukraine v. Russia (X)*' on the indication of urgent interim measures to the government of the Russian Federation within the framework of para. 39 of the ECtHR Rules. The ECtHR immediately issued the decision on 1 March to indicate interim measures to state parties to the European Convention on Human Rights and Fundamental Freedoms (the Convention) during the consideration of the merits of a complaint of a violation of the Convention. Such interim

13 Convention on the Amelioration of the Condition of the Wounded and Sick in Armed Forces <https://zakon.rada.gov.ua/laws/show/995_151#Text> accessed 29 June 2022.

14 Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea <https://zakon.rada.gov.ua/laws/show/995_152#Text> accessed 29 June 2022.

15 Geneva Convention relative to the Treatment of Prisoners of War <https://zakon.rada.gov.ua/laws/show/995_153#Text> accessed 29 June 2022.

16 Convention relative to the Protection of Civilian Persons in Time of War <https://zakon.rada.gov.ua/laws/show/995_154#Text> accessed 29 June 2022.

17 Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 <https://zakon.rada.gov.ua/laws/show/995_199#Text> accessed 22 June 2022.

18 M Hnatovsky, T Korotky, 'Definition of war crimes in international criminal law' <https://yur-gazeta.com/publications/practice/kriminalne-pravo-ta-proces/viznachennya-voennih-zlochiniv-u-mizhnarodnomu-kriminalnomu-pravi.html> accessed 22 June 2022.

19 Amnesty International, '"Anyone can die at any time"': indiscriminate attacks by russian forces in Kharkiv, Ukraine' (Index: EUR 50/5682/2022 June 2022) <https://pressecloud.amnesty.de/s/p34zRES2QeCKZK9?dir=undefined&openfile=34875&fbclid=IwAR2bx7Q3G2ZvYSHOGvZ5N6wZOl4_ItMgP1wOJDKc5OMKhH0fk7uXlLpa3RI> accessed 22 June 2022.

measures are binding on the government of Russia. It states that the current hostilities pose a real and constant threat of severe violations of the conventional rights of the civilian population following Arts. 2, 3, and 8 of the Convention. The ECtHR stated:

> 'With a view to preventing such violations and pursuant to Rule 39 of the Rules of Court the Court decides, in the interests of the parties and the proper conduct of the proceedings before it, to indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops'.

On 4 March 2022, the ECtHR supplemented the decision, including a requirement for Russia to ensure unimpeded access of civilians to safe routes of evacuation, medical care, food, and other essentials, guaranteeing the rapid and unhindered passage of humanitarian aid and the movement of humanitarian workers.[20]

Thus, the ECtHR is monitoring the war waged by Russia against Ukraine. Russia's disregard for the Court's decision is a direct violation of the ECtHR's provisions, which will make it easier to prove violations, recover compensation, and pave the way for individual claims in the ECtHR and investment arbitrations by individuals and companies against the Russian Federation. Therefore, the decision of the ECtHR can be used as prejudice in other international and national courts.

On 26 February 2022, Ukraine filed a complaint with the UN International Court of Justice (The Hague, the Netherlands) regarding Russia's violation of the Convention on the Prevention and Punishment of the Crime of Genocide. On 16 March 2022, the UN International Court of Justice granted Ukraine's request to stop the Russian military invasion of Ukraine. The decision of the International Court of Justice (ICJ) is binding, and the refusal of the Russian Federation to voluntarily comply with this order will certainly have consequences for further consideration of the case on the merits.[21]

3.2. Methods for bringing Russia to justice

There are various mechanisms for bringing Russia, its military, officers, and officials of Russia to justice: 1) the ICC; 2) an *ad hoc* tribunal (if such will be created); 3) the ECtHR, as in the case of the shooting of plane MN17 over Ukraine; 4) national judicial systems; 5) criminal proceedings of Ukraine (and civil proceedings for property damage).

The International Criminal Court (ICC) is located in The Hague, the Netherlands. The ICC is not a part of the official UN structures, although the UN can initiate cases in ICC on the proposal of the UN Security Council. The ICC is a permanent judicial body that has existed since July 2002. The ICC activity is based on the Rome Statute, adopted in 1998 (signed by 120 states).

The basis of the ICC's *modus operandi* is the principle of *complementarity,* which is enshrined in Art. 17 of the Rome Statute and determines the sequence involving the ICC's jurisdiction as the court of 'last instance'. Thus, the complementary principle is applied here, which means that the ICC may be involved when the national investigation and justice possibilities are exhausted.

20 Ukraine v Russia (X) (no 11055/22) <https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c=> accessed 22 June 2022.

21 Order allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. (Ukraine v Russian Federation) <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> accessed 23 June 2022.

The Rome statute stipulates that states must prioritise the most serious crimes committed in their territories or by their citizens. The ICC can exercise jurisdiction only in cases where national legal systems cannot cope with their responsibilities, especially when states intend to act but are unwilling or unable to investigate crimes properly. The principle of complementarity is based on two other principles: *the principle of respect for the national jurisdiction* and *the principle of productivity and efficiency*. In general, the advantage of national jurisdiction over the ICC is that it provides the best access to evidence, witnesses, and areas where alleged crimes have been committed and, therefore, the best ability to investigate crimes. Moreover, the ICC as an institution may consider only a limited number of cases because of its limited human and financial resources compared with the number of armed conflicts in the world and the corresponding extent of possible consequences. Therefore, the principle of complementarity serves as a mechanism to stimulate states' efforts on their priority to investigate and prosecute the most serious international crimes. In the cases where the state cannot handle the proceedings, the ICC Prosecutor must be prepared to act decisively in investigations, demonstrating the international community's intention to prosecute international crimes.[22] The ICC jurisdiction extends to states that have ratified the Rome Statute or recognised the jurisdiction of the ICC.

So far, Ukraine has chosen the second option. Ukraine signed the Rome Statute on 20 January 2000, but on 11 July 2001, the Constitutional Court of Ukraine ruled that the Rome Statute did not comply with the Constitution of Ukraine (the court used far-fetched arguments, such as saying that Art. 1 of the Rome statute, which states that the 'ICC … complements national criminal justice authorities', contradicts the Constitution of Ukraine. If we use such an approach, the ECHR and its jurisdiction also do not comply with the Constitution of Ukraine, which is not true). That is one of the reasons why Ukraine did not ratify it.

Thus, the ratification of the Rome Statute 'remained frozen' for two decades due to a lack of political will. On 20 May 2021, the Verkhovna Rada of Ukraine adopted the Law 'On amendments to certain legislative acts of Ukraine concerning the implementation of norms of international criminal and humanitarian law'.[23] This law was sent to the president for signature on 7 June 2021. As of June 2022, the president has not yet signed it, so the Rome Statute has not been ratified by Ukraine. So, as of now, Ukraine has only the second option of recognising the jurisdiction of the ICC on its territory – the submission of an application for recognition of the jurisdiction of the ICC following Part 2 of Art. 12 of the Rome Statute. Ukraine has already submitted such applications to the ICC twice by adopting resolutions by the parliament: on the massacres during the Revolution of Dignity in 2014[24] and on war crimes and crimes against humanity during the war in Donbas in 2015.[25]

22 'The principle of complementarity: standards of international justice' Report of the Ukrainian Legal Advisory Group <http://justiceforthefuture.org.ua/uploads/MaterialDocument/ULAG_complementarity_web_ua_004_26_1594216073.pdf> accessed 23 June 2022.

23 The Law of Ukraine 'On amendments to certain legislative acts of Ukraine concerning the implementation of norms of international criminal and humanitarian law' <https://www.rada.gov.ua/news/Povidomlennya/208710.html> accessed 23 June 2022.

24 Resolution of the Verkhovna Rada of Ukraine on the Statement of the Verkhovna Rada of Ukraine on recognition by Ukraine of the jurisdiction of the International Criminal Court on committing crimes against humanity by senior state officials, which lead to particularly serious consequences and mass murders of Ukrainian citizens during peaceful protests between 21 November 2013 and 22 February 2014 <https://zakon.rada.gov.ua/laws/show/790-18#Text> accessed 23 June 2022.

25 Resolution of the Verkhovna Rada of Ukraine on the Statement of the Verkhovna Rada of Ukraine on recognition by Ukraine of the jurisdiction of the International Criminal Court on crimes against humanity and war crimes by senior officials of the Russian Federation and Leaders of DNR and LNR Terrorist Organizations which led to particularly severe consequences and the mass murders of Ukrainian citizens <https://zakon.rada.gov.ua/laws/show/145-19#Text> accessed 23 June 2022.

On 2 March 2022, 39 member states of the ICC filed an appeal with the ICC Prosecutor regarding the situation in Ukraine, following which the ICC Chief Prosecutor Karim A.A. Khan QC launched an investigation into Russian war crimes in Ukraine.[26]

On 3 May 2022, the Verkhovna Rada of Ukraine adopted Law No. 2236-IX 'On amendments to the Criminal Procedure Code and other legislative acts of Ukraine concerning cooperation with the ICC',[27] which entered into force on 20 May 2022. It regulates the ICC cooperation with the Office of the Prosecutor General and the Ministry of Justice of Ukraine before and after the ratification of the ICC Rome Statute. Law No. 2236-IX amended the Criminal Procedure Code of Ukraine, including Section IX-2 'Peculiarities of Cooperation with the International Criminal Court'.

Under the adopted amendments, the transfer of the materials of criminal proceedings investigated by national law enforcement agencies to the ICC is allowed (Art. 620 of the CPC of Ukraine). The ICC Prosecutor may perform the necessary procedural actions on the territory of Ukraine, except for those that can be performed in Ukraine only in agreement with the national prosecutor, the investigating judge, or judge (Art. 624 of the CPC of Ukraine). The question is if the evidence gathered during the pre-trial investigation in Ukraine may be used in the ICC case. The answer is yes. As the ICC does not have sufficient resources and powers to conduct all investigations, the ICC relies on the cooperation of states, as it is through active and prompt assistance from national bodies ICC could be effective.[28]

The jurisdiction of the ICC extends to the entire internationally recognised territory of Ukraine, including the temporarily occupied territories. The fact that Russia has not ratified the Rome Statute is not significant because Russia commits international crimes in the territory of Ukraine. The ICC has jurisdiction over crimes committed throughout Ukraine. The ICC does not have an *in absentia* procedure (in the absence of the accused). Therefore, in many cases, the Court will not be able to physically reach accused people to hold court hearings in their presence.

Even though ICC Prosecutor Karim A.A. Khan QC has already launched the investigation, there will be no investigation into the crime of aggression. The reason is that the Court does not exercise its jurisdiction over a crime of aggression committed by citizens or in the territory of a state that is not a party to the statute. Moreover, even if Ukraine ratified it now, ratification would not have a retroactive effect.

In addition, the proceedings on the ICC are long. For example, the ICC only completed the preliminary stage of the case study on the Maidan Massacre in Ukraine and the situation in Crimea and Donbas in December 2020. The ICC Prosecutor Fatou Bensoud concluded that there were sufficient grounds to believe that a 'wide range of acts involving war crimes and crimes against humanity under the jurisdiction of the court were committed in the context of the situation in Ukraine'.[29]

Taking into account the last two arguments (lack of jurisdiction of the ICC over acts of aggression on the territory of Ukraine and long terms of proceedings), there is a reason for establishing an *ad hoc* international tribunal. The tribunal should be similar to the

26 Requirement to investigate and punish Russian war crimes in international courts. Published April 18, 2022. <https://www.rada.gov.ua/news/razom/221903.html> accessed 23 June 2022.

27 Draft Law on amendments to the Criminal Procedure Code of Ukraine on cooperation with the International Criminal Court <https://itd.rada.gov.ua/billInfo/Bills/Card/39474> accessed 23 June 2022.

28 S De Gurmendi, H Friman, 'The Rules of Procedure and Evidence of the International Criminal Court' (2000) 3 Yearbook of International Humanitarian Law 289-336. doi:10.1017/S1389135900000672.

29 'Legal front: who and how Ukraine can prosecute in international courts' <https://dejure.foundation/tpost/1u106gg0r1-yuridichnii-front-kogo-yak-ukrana-mozhe> accessed 23 June 2022.

Nuremberg Trials after the Second World War or the International Tribunal for the Former Yugoslavia based, for example, on suggestions of the Chatham House, the Royal Institute of International Affairs.[30] The third argument for establishing the international tribunal is to ensure the court's impartiality. In order to provide access to justice in cases of aggression and war crimes by Russia, it should not be only Ukrainian courts that consider cases against Russia.

The Parliamentary Assembly of the Council of Europe supported establishing the *ad hoc* tribunal in late April. The Parliamentary Assembly recommended that Ukraine appoint a special representative on the consequences of Russia's aggression. On 19 May, the European Parliament, fully supporting the ICC Prosecutor's investigation and the work of the Commission of Inquiry of the Office of the United Nations High Commissioner for Human Rights, adopted a resolution establishing a special international tribunal. The document emphasises that the tribunal will investigate the crimes of military and government officials, political leaders, military leaders, and their allies involved in international crimes in Ukraine, over which the ICC has no jurisdiction.[31]

The Chairman of the Criminal Court of Cassation of the Supreme Court supported the idea of the establishment of the international tribunal for war crimes in Russia.[32]

On 20 May 2022, Anton Korynevych (Ukraine's agent at the UN International Court of Justice) announced that Ukraine had already prepared draft documents to launch a special international tribunal on Russia. These documents would be the topic of discussion with international partners. For the successful outcome of discussions, Ukraine has the support of 42 states in the UN International Court of Justice; two PACE resolutions, a resolution of the Lithuanian Parliament, and a resolution of the European Parliament.[33]

The ECtHR considers cases against states for violating the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols. Both individuals and state parties may apply to the ECtHR. Only a state party can be a defendant in the ECtHR. Today, the ECtHR is considering the case of the 'Netherlands and Ukraine v. Russia'. The case is about complaints of mass and systematic human rights violations in the temporarily occupied territories of Donbas, abductions, and attempts to smuggle orphans from Donetsk and Luhansk oblasts to Russia in 2014. In addition, there is the case concerning the shooting down of Malaysia Airlines plane MN17 over Ukraine. However, Russia announced its withdrawal from the Council of Europe and the denunciation (termination) of the Convention. Therefore, until Russia restores its membership in the Council of Europe, the ECtHR decision will be impossible to implement.

To bring to justice war criminals, it is necessary to follow the principle of universal jurisdiction, which allows for prosecuting foreigners who have committed international

30 A non-profit, non-governmental organisation based in London. The organisation's purpose is to analyse and promote understanding of major international issues and current affairs. It has been recognised several times as one of the most influential think tanks.

31 'Ukraine: MEPs want a special international tribunal for crimes of aggression' < https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression> accessed 23 June 2022.

32 'If we want to live in a democratic state, we must profess the appropriate principles – Stanislav Kravchenko, 17 June 2022' <https://supreme.court.gov.ua/supreme/pres-centr/news/1285735/> accessed 23 June 2022.

33 'Ukraine has prepared projects for the launch of an international tribunal over Russia' <https://www.unian.ua/war/tribunal-nad-rosiyeyu-ukrajina-pidgotuvala-proekti-dlya-zapusku-mizhnarodnogo-sudu-novini-vtorgnennya-rosiji-v-ukrajinu-11834841.html?_gl=1*6q6l00*_ga*MTAxMzI2NjYxNS4xNjUyNjE4NDQz*_ga_JLSK4Y8K67*MTY1MzA2MjQ5MS4xMy4xLjE2NTMwNjI1MzcuMTQ.*_ga_DENC12J6P3*MTY1MzA2MjQ5MS4xMy4xLjE2NTMwNjI1MzcuMTQ> accessed 23 June 2022.

crimes in the territory of another state based on the seriousness of such crimes, which are a threat to the entire international community. For example, in the USA, the 'human rights class actions' mechanism exists, the purpose of which is '…to obtain neither damages nor injunctions against the defendant: both remedies have 'added value', but the main goal is to expose the wrongdoer to the judgment of public opinion'.[34] The peculiarity of this approach is that victims, regardless of their citizenship, who believe that human rights have been violated in any territory outside the United States, can apply to the courts of national jurisdiction of the United States, because 'the idea of transnational public law litigation is predicated on the theory according to which the infringement of human rights is such disgraceful behavior that every civilized nation should allow the victims to sue the wrongdoers for damages in its own civil courts, no matter if the event took place elsewhere or if the parties to the case are aliens'.[35]

In practice, a narrower approach to universal jurisdiction is more commonly used: criminal prosecution in another country begins if a citizen of that country allegedly committed the international crime; if the crime was committed against a citizen of this country; or if the suspect is in the territory of that country.[36]

The investigation can be launched at any time because war crimes, crimes against humanity, and genocide are a grave threat to world security. Therefore, the statute of limitations does not apply in that case. At the same time, the principle of universal jurisdiction is an additional mechanism for prosecuting war criminals.

National justice systems are faster than the ICC, so universal jurisdiction allows international justice to rely not on other courts. Any state that adheres to this universal jurisdiction principle (today, about 150 states) can join the prosecution of perpetrators of war crimes. It simplifies the procedure for punishing criminals. For example, if an arrest warrant is issued in one state, but the suspect is hiding in another, he/she must be prosecuted under uniform rules. The state where a person is hiding should not become a 'quiet haven' for criminals and their assets. On 21 June 2022, US Attorney General Merrick Garland expressed US readiness to assist Ukraine in identifying, searching for, and punishing those guilty of war crimes: 'The United States has a clear message: our partners, and we will use all means to hold those responsible accountable, there is no place to hide'.[37] During the visit to Ukraine, the Attorney General announced the creation of the war crimes investigation team headed by Ellie Rosenbaum. The investigation team will consist of experts on investigations related to human rights violations and war crimes.[38]

Poland, Germany, Lithuania, Estonia, Slovakia, and Sweden were the first European countries to launch a criminal investigation into the events in Ukraine under the principle of universal jurisdiction.[39] Later, Latvia, Norway, and France launched their own investigations

34 E Silvestri 'Human Rights Class Actions' in A Uzelac, CH van Rhee (eds), *Transformation of Civil Justice* (Springer 2018), Ius Gentium: Comparative Perspectives on Law and Justice, vol 70. Springer, P. 202 <https://doi.org/10.1007/978-3-319-97358-6_11> accessed 23 June 2022.

35 Ibid. P.209.

36 Chubinidze, O. Universal Jurisdiction in National Legislation: Comparative Aspect. NAUKMA Research Papers. Law/ Vol. 4 (2019), P. 98-105 <https://doi.org/10.18523/2617-2607.2019.4.96-105> accessed 23 June 2022.

37 'The US attorney general makes an unannounced visit to Ukraine and pledges "unwavering support"' <https://cutt.ly/ZKzFLP1> accessed 23 June 2022.

38 'US attorney general announces team to prosecute war crimes in Ukraine' (21 June 2022) <https://cutt.ly/pKx7mLT.> accessed 23 June 2022.

39 I Venediktova, 'Six countries have launched the investigation into Russia's war crimes' <https://hromadske.radio/news/2022/03/20/shist-krain-pochaly-rozsliduvannia-voiennykh-zlochyniv-rosii-venediktova> accessed 23 June 2022.

too. Poland and Lithuania were the first countries to work with Ukrainian witnesses and victims who had arrived in these countries.[40] Germany[41] started investigating civilian, energy infrastructure shelling, and cluster bomb use[42] in March. In June, the head of the Federal Criminal Police Office, Holger Münch, announced that the police, in cooperation with the foreign intelligence service, was investigating a three-digit number of facts - potential war crimes. Investigations include those suspected of directly committing war crimes and political or military officials who give orders to commit crimes[43]. **France also has an anti-terrorist infrastructure, investigates crimes primarily against its citizens, and has launched four investigations for now. French law enforcement officers, together with Ukrainian law enforcement agencies, work in teams**[44]. For example, France joined the special group to investigate the circumstances surrounding the death of journalist Frederic Leclerc-Imhoff. He was killed during a movement in a humanitarian convoy near Severodonetsk in the Luhansk region[45].

During the visit to Ukraine, US Attorney General Merrick Garland announced the creation of the war crimes investigation team headed by Ellie Rosenbaum. The investigation team will consist of experts on investigations related to human rights violations and war crimes[46].

There are also other (eclectic or hybrid) forms of interstate and international assistance in investigating Russian war crimes in Ukraine. The results of such assistance (collected evidence) can be used, it seems, in the ICC, within the jurisdiction of states under the principle of universal jurisdiction or in the national justice of Ukraine. We can identify the three forms listed below.

a) A Joint Investigation Team (JIT) organised by Ukraine, Lithuania, and Poland on 25 March 2022 under the auspices of Eurojust.[47]

The JIT focuses on the collection, secure storage, and rapid exchange of information and evidence of war crimes of the Russian Federation, collected during investigations in the territory of the state parties. In addition, the focus of JIT is the identification of assets of

40 'Ukraine, Lithuania and Poland have set up a joint investigation team to investigate Russia's war crimes' <https://www.unn.com.ua/uk/news/1969681-ukrayina-litva-ta-polscha-stvorili-spilnu-slidchu-grupu-dlya-rozsliduvannya-voyennikh-zlochiniv-rf> accessed 23 June 2022.

41 Notably, Germany has universal jurisdiction over international crimes broadly and has the financial and human resources for such investigations. The German police, prosecutor's office, and migration service have specialized units in international crimes since the early 2000s. For example, even in the physical absence of suspects, Germany has amassed a solid analytical base on the conflicts in Syria and Iraq. As a result, a German court convicted a former Syrian intelligence officer of crimes against humanity in January 2022.

42 In Germany, the investigation of Russian war crimes in Ukraine has begun. 08.03.2022 <https://www.dw.com/uk/u-nimechchyni-pochaly-rozsliduvannia-voiennykh-zlochyniv-rosii-v-ukraini/a-61051225> accessed 23 June 2022.

43 German law enforcement officers are involved in investigating of hundreds of war crimes in Ukraine - the head of the Federal Department of Criminal Police. 18.06.2022 <https://www.radiosvoboda.org/a/news-nimetski-pravoohorontsi-rozsliduvannia-voienni-zlochyny/31904199.html> accessed 23 June 2022.

44 France has launched an investigation into war crimes in Ukraine. 14.04.2022 <https://lb.ua/society/2022/04/14/513421_frantsiya_rozpochala_rozsliduvannya.html> accessed 23 June 2022.

45 France has launched an investigation into the death of a journalist in the Luhansk region. 31.05.2022 <https://ua.korrespondent.net/ukraine/4482539-frantsiia-rozpochala-rozsliduvannia-zahybeli-zhurnalista-na-luhanschyni> accessed 23 June 2022.

46 US attorney general announces team to prosecute war crimes in Ukraine. June 21, 2022 <https://cutt.ly/pKx7mLT> accessed 23 June 2022.

47 Eurojust is a European agency that works with the judicial and police authorities of the EU member states. The primary purpose of Eurojust is to support and coordinate the work of investigators and prosecutors in respect of a serious crime involving two or more member states (Art. 85 of the Lisbon Treaty). <https://www.eurojust.europa.eu/> accessed 23 June 2022.

war criminals with a view to their freezing and confiscation.[48] The ICC became a part of the group in April, and Estonia, Latvia, and Slovakia joined later.[49]

Eurojust President Ladislav Hamran noted that the legal community had never reacted with such determination in the history of armed conflicts. According to him, the investigation of war crimes in Ukraine and bringing the perpetrators to justice will be one of the largest similar events. Prosecutor Karim A.A. Khan QC believes that the activity of JIT could become a model for international investigations in the future. According to him, this is how it is necessary to respond to such crimes, which ICC often investigate. Eurojust will provide JIT with technological assistance for collecting war crimes data, provide oral and written translation of the evidence collected, and ensure that all data collected by the JIT are available for exchange between all parties involved.[50]

b) Support and assistance 'on the ground' by foreign investigators and experts in gathering evidence of war crimes in Ukraine.

For example, on 11 April, a group of 18 French *gendarmes* and forensic scientists arrived in Ukraine.[51] According to the Prosecutor General of Ukraine, I. Venediktova, part of the group worked on examinations of bodies in mass graves, conducting forensic examinations and DNA analysis, taking genetic material from families looking for missing people in Bucha, and comparing it with samples of unidentified corpses. The other part of the group still works in the Chernihiv region.[52]

On 17 May, ICC Prosecutor Karim A.A. Khan QC confirmed through the ICC press service that a team of investigators, forensic experts, and support staff (42, including 30 from the Netherlands) would work with French and other countries' forensic experts in Ukraine. The aim is to help identify the remains of human bodies, perform ballistic analysis, and preserve forensic evidence.[53]

c) Provision of foreign states' financial, technical, and advisory assistance.

On 25 May 2022, the EU, the US, and Great Britain created the Atrocity Crimes Advisory Group (ACA), which assists in recording, documenting, investigating, and prosecuting the most serious international crimes. The ACA's primary mission is to support units of the Office of the Prosecutor General of Ukraine (UCP) in investigating war crimes and bringing perpetrators to justice, as well as operational cooperation with the EU member states, third partner countries, and the ICC, including the Joint Investigation Group

48 Ukraine, Lithuania and Poland have set up a joint investigation team to investigate Russia's war crimes' (25 March 2022) <https://suspilne.media/221675-ukraina-litva-ta-polsa-stvorili-spilnu-slidcu-grupu-abi-rozsliduvati-voenni-zlocini-rf/> accessed 23 June 2022.

49 I Venediktov, 'Estonia, Latvia and Slovakia have joined the group investigating crimes in Russia' <https://lb.ua/society/2022/05/31/518533_estoniya_latviya_i_slovachchina.html> accessed 23 June 2022.

50 'How the EU and the ICC help Ukraine investigate Russia's war crimes' (7 June 2022) <https://www.dw.com/uk/yak-yes-ta-mks-dopomahaiut-ukraini-v-rozsliduvanni-voiennykh-zlochyniv-rf/a-62051363?maca=ukr-rss-ukrnet-ukr-all-3816-xml > accessed 23 June 2022.

51 'A detachment of gendarmes from France has arrived in Ukraine to investigate Russian war crimes' <https://www.unian.ua/society/viyna-v-ukrajinu-pribuv-zagin-zhandarmiv-z-franciji-dlya-rozsliduvannya-viyskovih-zlochiniv-rf-pid-kiyevom-novini-lvova-11781810.html> accessed 23 June 2022.

52 I Venediktova, 'Thanks to the diplomacy of President Zelensky, we have created a strong legal front' <https://gp.gov.ua/ua/posts/irina-venediktova-zavdyaki-diplomatiyi-prezidenta-zelenskogo-mi-stvorili-potuznii-yuridicnii-front> accessed 23 June 2022.

53 'The prosecutor of the International Criminal Court sent the largest group of investigators in history to Ukraine' (17 May 2022) <https://www.pravda.com.ua/news/2022/05/17/7346773/> accessed 23 June 2022.

coordinated by Eurostat. The ACA brings together international experts to provide strategic advice and operational assistance to the Office of the Prosecutor General of Ukraine and other stakeholders on issues such as gathering and preserving evidence, operational analysis, investigation of conflict-related sexual violence, crime scene review, and forensic investigations, indictments, cooperation with international and national law enforcement agencies.[54] Canada allocated about $800,000 in assistance to the ICC to investigate sexual violence by Russian soldiers (according to the President of Ukraine V. Zelensky, following the conversation with the Prime Minister of Canada, Justin Trudeau).[55]

Lastly, the majority of war crimes cases will still be heard within Ukraine's national judiciary. Criminal proceedings in this category have no exceptions to the procedure. So general procedural order provided for in the CPC of Ukraine is applied. As well, the amendments to Section IX-1 of the CPC of Ukraine 'Special regime of pre-trial investigation and trial in martial law', in which the Verkhovna Rada responded to the challenges of martial law, and which are also applicable to all categories of criminal proceedings and regulate the features of pre-trial investigation and entering information into the Unified Register of Pre-trial Investigation, conducting a search, etc. should be taken into account. A notable divergence of war crimes proceedings is that the procedural management and prosecution of it is carried out by a specialised department for combating crimes committed in armed conflict (the so-called 'war department' in the Prosecutor General's Office) and by prosecutors of relevant regional prosecutor's offices.

The problem, which already exists, is the use of the opinions of forensic experts in criminal proceedings on war crimes in the national judiciary of Ukraine. The first aspect of this problem is the (im)possibility of using the results of the French, Dutch, and other foreign experts (criminologists, immunologists, geneticists (DNA) of the Special Investigation Group and the ICC) as a source of evidence or expert opinion in Ukraine. In criminal proceedings in Ukraine, only evidence obtained in the way prescribed by the CPC of Ukraine (Part 1 of Article 84 of CPC) can be used. According to the CPC testimony, physical evidence, documents, and expert opinions are procedural sources of evidence (Part 2 of Article 84 of CPC). Following Art. 10 of the Law 'On forensic examination' (the Law), a person can work as a forensic expert only after a procedure of certification and qualification (including training in state specialised institutions of the Ministry of Justice of Ukraine in a particular specialty). Moreover, under Art. 9 of the Law, such a person must be included in the state register of forensic experts. In addition, under Art. 7 of this Law, there is a state forensic monopoly on all types of forensic, medical, and psychiatric examinations. This means that only experts from state-specialised forensic institutions can perform these types of examinations in Ukraine. Therefore, the opinions of foreign forensic experts in Ukraine are not acceptable by law. At the same time, forensic and medical examinations are most in demand in the investigation of war crimes.

However, Art. 23 of the Law allows the heads of state specialised institutions to involve foreign specialists in the expert commissions with Ukrainian experts and employees of these institutions. It is necessary for them to get the consent of the body or person who appointed the forensic examination. Thus, Ukrainian investigators and prosecutors in war crimes proceedings should consider this fact in advance. They should ensure that the involvement of foreign experts in conducting the forensic examination is duly specified in the documents. In this case, the court recognise expert opinions with the participation of foreign experts as

54 The European Union, the United States and the United Kingdom have established the Atrocity Crimes Advisory Group (ACA).

55 'Canada has provided $ 800 million in special assistance to Ukraine – Zelensky' (14 June 2022) <https://suspilne.media/250238-kanada-nadala-ukraini-specdopomogu-na-800-mln-dolariv-zelenskij/> accessed 23 June 2022.

admissible evidence. Otherwise, if this is not done, the opinions of foreign experts can be used only in the status of a document (source of evidence), which, compared to the expert's opinion, has less importance in the evidence base.

The legal possibility of using the foreign expert opinions in war crimes proceedings in all courts (ICC, foreign jurisdiction courts on the principle of universal jurisdiction, and courts of Ukraine) could be an alternative option to bureaucratic red tape to legalise the opinions of foreign experts in criminal proceedings in Ukraine. However, this requires amendments to Art. 615 of the PC of Ukraine. Such a step would optimise the paperwork and not force experts to duplicate their opinions for domestic and foreign or international criminal proceedings. It would comply with the principle of procedural economy.

On April 29, 2022, a group of deputies introduced draft law No. 7330, 'On Amendments to the Criminal Procedure Code of Ukraine on Improving the Activities of Joint Investigation Teams,' to the Verkhovna Rada of Ukraine[56]. It seems that this draft law should solve the problem mentioned above. The draft law provides amendments to parts 1-3, a complete change of part 4, and new part 5 of Article 571 of the Ukrainian Criminal Procedure Code (Chapter 43 of the Criminal Procedure Code 'International legal assistance during procedural actions'). However, it does not answer several practical questions regarding the activities of special investigative groups. Perhaps, for this reason, the committees of the Verkhovna Rada of Ukraine are still working on it. Council of Europe experts expressed specific considerations regarding the provisions of the draft law[57]. In particular, in para. 3 p. 2 Art. 571 of the Criminal Procedure Code is proposed to regulate the procedure for creating a joint investigative team (JIG) and composition of JIG, including the process for appointing a senior investigator of the JIG - by a resolution of the head of the pre-trial investigation body in agreement with the Prosecutor General (or a person performing his duties). However, the draft law does not specify who can be a part of the group, whether its composition will be limited only to investigators (Ukrainian and foreign), or prosecutors, experts, and specialists may also be a part of the JIG. Including a wide range of specialists in the JIG is under European standards and best practices. Firstly, according to the valid observation of the Council of Europe experts, if the draft law defines the senior investigator role of the JIG as the chief, the entry of prosecutors into the JIG will become a problem, as it contradicts the status of the prosecutor under the legislation of Ukraine (Art. 75 of the Conclusion)[58]. Secondly, in our opinion, if the law does not provide for the possibility of including foreign countries' judicial experts in the JIG, their status as judicial experts will not correspond to Ukrainian legislation. In practice, it will cause disputes about the admissibility of their opinions. The draft law regarding the foreign experts' participation does not regulate these issues, and therefore, foreign experts will not be able to conduct forensic examinations individually. Their professional activity will be possible only by following Art. 23 of the 'Law on forensic examination'. This approach does not simplify documentary and bureaucratic procedures of carrying out expert examinations.

The second aspect of the problem is the significant demand for conducting many forensic (ballistic, explosive, other weapons) and medical examinations in this category of cases.

56 Draft law No. 7330 'On Amendments to the Criminal Procedure Code of Ukraine on Improving the Activities of Joint Investigation Teams' <https://itd.rada.gov.ua/billInfo/Bills/Card/39520?fbclid=IwAR0Xw7m_X3JeqUq9gAKdC08MEMu2L2P-yLKCduj_OkET3oRZi4Xl2jpyV2s> accessed 23 June 2022.

57 Expert opinion of the expert advisory group of the Council of Europe on support of the Office of the Prosecutor General of Ukraine regarding Draft law No. 7330 'On Amendments to the Criminal Procedure Code of Ukraine on Improving the Activities of Joint Investigation Teams <https://rm.coe.int/coe-expert-opinion-ua-joint-investigative-teams-draft-law-7330-ukr/1680a71abd> accessed 23 June 2022.

58 Ibid. Para. 53. p. 12.

A forensic examination is mandatory in all cases of death, injuries, mutilations, and contusions due to hostilities, missiles, artillery shelling, etc., under Part 2 of Art. 242 of the CPC to establish the causes of death or the nature and extent of injuries. A significant gap in the evidence base in cases under Art. 438 of the CPC is failure to conduct such examinations. Therefore, there is the possibility of a lack of proof of these circumstances beyond a reasonable doubt in case of failure to conduct the forensic examination. As these types of forensic examinations belong to the state forensic monopoly, the Ministry of Justice and the Ministry of Health (which administer the work of the relevant state forensic institutions) should direct forensic experts of the relevant specialties to the areas where the largest number of investigations are carried out. In addition, one of the problems is the time of conducting the forensic examination in prolonged occupation conditions. There is the risk of conducting forensic examinations being impossible due to the 'perishable' nature of the object of their study – the body of a person or corpse. As a result of physical processes – wound healing, decomposition of the corpse, the disappearance of micro-traces-layers – a significant part of the identification and diagnostic signs are not preserved. Forensic examinations of corpses are conducted after their exhumation, and examinations in cases of sexual violence in armed conflict are meaningless in general if they are done a long time after the crimes were committed. Therefore, for such cases, it is essential to consider the possibility of amending Art. 615 of the CPC on lowering the standard of proof: refusal of mandatory forensic medical examination in war crimes proceedings in case of objective impossibility of its timely conduct and inexpediency of such in obtaining evidence in the conditions of occupation. Otherwise, war criminals will avoid criminal liability due to the impossibility of proving their guilt in the form prescribed by procedural law.

4 CONCLUSIONS

Since the beginning of the full-scale Russian invasion of Ukraine on 24 February 2022, the Ukrainian judiciary has proved its effectiveness on the legal front. On 1 March 2022, at the request of Ukraine, the ECtHR ruled that the current military actions of Russia pose a real and constant threat of severe violations of the conventional rights of civilians under Arts. 2, 3, and 8 of the Convention. The ECtHR ordered the Russian government to refrain from military attacks on civilians and civilian objects. On 16 March 2022, the UN ICJ granted Ukraine's request to stop the Russian military invasion of Ukraine. In March 2022, the Prosecutor of the ICC launched an investigation into Russian war crimes in Ukraine.

Since Ukraine has not ratified the Rome Statute (which systematises war crimes), Ukrainian lawyers must refer to the 27 Conventions, which enshrine certain crimes.

There are mechanisms for bringing the military, officers, and officials of Russia to justice, such as a) the ICC; b) an *ad hoc* tribunal; c) the ECtHR; d) national judicial systems on the principle of universal jurisdiction; e) criminal proceedings of Ukraine; f) eclectic forms of cooperation of justice bodies of Ukraine with foreign and international partners.

The establishment of an international *ad hoc* tribunal is important given the length of proceedings, the workload and lack of funding for the ICC, and the non-extension of the ICC's jurisdiction over the crime of aggression due to Ukraine's non-ratification of the Rome Statute, ensuring the requirement of impartiality of the court from an outside observer.

It is necessary to adjust the use of foreign forensic expert opinions in criminal proceedings in Ukraine on war crimes by amending the CPC. It is also vital to consider the possibility of abolishing the rule on making forensic examinations mandatory in case of objective

impossibility and inexpediency of its conduct under conditions of prolonged occupation in case of objective impossibility and its obtaining.

We hope that this systematised information and these opinions will be helpful to practitioners and lawmakers.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

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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Submitted on 7 Apr 2022/ Revised 22 Apr 2022 / Approved **14 Jun 2022**
Published online: **20 Jun 2022** // Last Published: **15 Aug 2022**

Summary: 1. Introduction. – 2. Development of a Unified Concept of Judicial Activity and Administration of Justice in Martial Law. – 3. Court Consideration of Civil Cases in Wartime: Main Challenges and Ways to Solve Them. – 4. Concluding Remarks.

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

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Disclaimer: Both authors declare that their opinions and views expressed in this manuscript are free of any impact of any organizations.
The content of this article was translated with the participation of third parties under the authors' responsibility.
Managing editor – Dr Olena Terekh. **English Editor** – Dr Sarah White.

How to cite: O Uhrynovska, A Vitskar 'Administration of Justice during Military Aggression against Ukraine: The "Judicial Front"' 2022 3 (15) Access to Justice in Eastern Europe 194–202. DOI: https://doi.org/10.33327/AJEE-18-5.3-n000310

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.

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 Zelensky[3] 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 Kniazev, 2022' (Suspilne Novyny, 29 March 2022) <https://suspilne.media/222932-suddam-nebezpecno-viizdzati-gumanitarnimi-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://kievskiysud.od.ua/press-department/all-news/11860-bogdan-monich-pro-zdijsnennya-pravosuddya-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-opublikuvala-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-persoi-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 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'.

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.

- *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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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

MILITARY JUSTICE OF UKRAINE: PROBLEMS OF DETERMINING THE BODIES THAT GOVERN THE CONSTRUCTION OF ITS SYSTEM

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Submitted on 02 Jun 2022 / Revised 16 Jun 2022 / Approved **15 Jul 2022**
Published: **15 Aug 2022**

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Competing interests: Any competing interests were announced by co-authors. Disclaimer: The authors declare that their opinion and views expressed in this manuscript are free of any impact of any organizations.

Translation: The content of this article was translated with the participation of third parties under the authors' responsibility. **Funding:** The author(s) received no financial support for the research, authorship, and/or publication of this article. The Journal provides funding for this article publication. **Managing editor** – Dr. Serhii Kravtsov. **English Editor** – Mg. Anastasiia Kovtun& Dr. Yuliia Baklazhenko.

How to cite: A Niebytov, V Matviychuk, O Mykytchyk, O Slavna, 'Military Justice of Ukraine: Problems of Determining the Bodies that Govern the Construction of Its System' (2022) 3(15) Access to Justice in Eastern Europe 203–218. DOI: 10.33327/AJEE-18-5.2-n000323

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Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Keywords: *military justice; military police, pre-trial investigation bodies of military criminal offenses; military courts; judicial system; judicial control; justice; jurisdiction of war crimes.*

ABSTRACT

The article focuses on the *current issue of creating a military justice system for modern law enforcement practice. Based on the idea of military justice as a system of bodies, its composition, in the authors' opinion, should include: (1) the body that carries out the pre-trial investigation and/or supports law and order; (2) the body which oversees legality; (3) military courts.*

In the article, the authors consider the genesis of the functioning of each of the bodies mentioned above, which, in their opinion, should be part of the military justice system, and emphasize that the idea of creating a system of military justice in this completed form was constantly discussed among scientists and practitioners. However, after Russia's armed aggression against Ukraine began, it ceased to be an idea and should be implemented soon.

Considering proposals for the creation of a pre-trial investigation body, which should investigate criminal offences committed by military personnel or other persons belonging to the armed formations as the first stage in the system of criminal justice bodies, the authors give a list of existing risks, which, in particular, include their subordination, which should not affect the independence and impartiality of the investigation.

Despite some turbulence in the legislative regulation of the work of the military prosecutor's office in Ukraine, this body, with different names, structural construction, subordination and staffing for a long time, in accordance with the system of the law, carried out the pre-trial investigation of war crimes, supervision over the legality of pre-trial investigation bodies and procedural management of the investigation.

Particular attention in the article is paid to arguments supporting the opinion on creating a system of military courts. The reasoning is strengthened by the appeal to the Memorandum of the Council of Europe on military courts and the experience of the functioning of military justice in Switzerland, Poland and Spain.

1 INTRODUCTION

In order to understand the purpose of the authors of this article, the essence of their desire to develop appropriate approaches laid down based on the presented research, extreme relevance, and theoretical and practical significance for Ukrainian legal science, we invite the reader to imagine the situation in which the legal system of Ukraine finds itself. On 24 February 2022, at 5 a.m., residents of many Ukrainian cities and villages woke up to the impacts of multiple launch rocket systems, which were fired, among other things, at civilians of the country, buildings, enterprises, institutions, schools, kindergartens. Russia's full-scale aggression against the sovereign, independent, democratic, social, the rule of law state of Ukraine has begun.

Since the Russian invasion of Ukraine began, almost a third of Ukrainians have been forced to leave their homes. According to the United Nations, this is the most significant crisis of the movement of people in the world today. More than 7.1 million people remain displaced due to the war. An estimated 15.7 million Ukrainians urgently need humanitarian assistance and protection. [5]According to estimates of the Kyiv Institute of Economics, as of 08 June,

5 See: 'Ukraine Situation: Refugees from Ukraine across Europe' (Office of the United Nations High Commissioner for Refugees (UNHCR) : Official site, 16 June 2022) <C:/Users/asus/Downloads/Ukraine%20situation%20flash%20update%20No%2017%2017%2006%202022.pdf> accessed 01 July 2022.

the total amount of direct losses to the Ukrainian economy from damage and destruction of residential and non-residential buildings and infrastructure is $ 103.9 billion or UAH 3 trillion. [6]

In the situation of carrying out armed aggression in the territories that were subjected to shelling, where hostilities were conducted, the work of many state institutions, including bodies and institutions of justice, was paralyzed. Judges, among whom the vast majority are women, stopped their work and went to safe cities, including abroad, saving their lives and the lives of their families.

On 24 February, the President of Ukraine declared martial law in the state. However, the justice system had to work since the statistics of committed military and war crimes were added to the traditional statistics of cases to be considered by Ukrainian courts. In addition, law enforcement agencies did not stop carrying out pre-trial investigations that required judicial control over the rights and legitimate interests of persons involved in criminal proceedings, comply with reasonable deadlines or obtain admissible evidence during investigative (search) or covert investigative (search) actions. Each fact of not only the death or injury of people but also the destruction of housing, moving property or structures, as a result of any shelling of the aggressor is entered into the Unified Register of Pre-trial Investigations on the fact of violation of the laws and customs of war, and a pre-trial investigation is carried out, the result of which should be bringing the perpetrators to justice.

In the context of armed aggression in Ukraine, the issue of completing the creation of a system of military justice was significantly actualized, and it ceased to be controversial and turned into a direction toward concrete actions.

Attempts to build a slender effective structure of military justice existed before, starting from 2014. However, the reforms were not completed, which significantly affected the maintenance of legality in the state after 24 February 2022, in the territories where the fighting took place or close to them.

In part, this situation is understandable because any state builds its legal system, first of all, for a peaceful life and good neighbourly coexistence with other countries. But history demonstrates the need for a pragmatic attitude to the institutions of military justice, which, like the armed forces of the state, must carry out their functional activities, taking into account the existing risks, be able to predict them, manage them or neutralize them.

The victory of Ukraine is one of the fundamental conditions for the realization of the right of the Ukrainian people to self-determination, preservation of statehood and ensuring sustainable development of Ukraine based on the highest values of democracy, the rule of law, freedom, dignity, security and prosperity of citizens of all nationalities. Under Part 1 Art. 17 of the Constitution of Ukraine, the protection of the sovereignty and territorial integrity of Ukraine is the most crucial function of the state, the work of the entire Ukrainian people. The implementation of this norm of the Constitution of Ukraine in conditions of martial law, imbalance of martial law of Ukraine and Russia causes the need to mobilize all state resources, all institutions that, realizing their functional potential, can contribute to the victory. In this context, the creation of a system of justice capable of ensuring the right to a fair trial, which is guaranteed by Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Legality in the State. At the same time, the realities of

6 See: Project 'Russia will pay', KSE Institute (analytical center at the Kyiv School of Economics) together with the Office of the President of Ukraine, the Ministry of Economy, the Ministry of Reintegration of the Temporarily Occupied Territories, the Ministry of Infrastructure of Ukraine, the Ministry of Communities and Territories Development of Ukraine <https://kse.ua/ua/russia-will-pay/> accessed 01 June 2022.

today dictate the need to look from a different perspective at the justice system, which, under martial law, is forced to overcome the challenges it faces. [7] [8]

2. MILITARY JUSTICE SYSTEMS IN UKRAINE: DE LEGA LATA AND DE LEGA FERENDA

There are many definitions of a 'system' in science. Despite the differences in wording, all of them, in one way or another, rely on the translation of the Greek word '*systema*' – a whole consisting of parts, a set of elements that are in certain relationships with each other, interact (function) with each other, form a certain integrity, interact with the environment as a whole and obtain new properties that are absent from these objects if they exist separately.

Consideration of justice as a system serves as a conceptual basis, which the authors lay down in the study.

Speaking about the construction of a system of military justice, we proceed from the paradigmatic position that these are connected by relations of subordination and coordination of law enforcement agencies and judicial bodies, the substantive competence of which arises regarding the activities of the Armed Forces of Ukraine and other paramilitary groups, as well as other persons who have the status of a soldier. Based on the idea of military justice as a system of bodies, its composition, in our opinion, should include: (1) the body that carries out the pre-trial investigation and/or supports law and order; (2) the body which oversees legality; (3) military courts.

2.1. *The Military Law Enforcement Service in Ukraine* in the Armed Forces of Ukraine was established in 2002 and operates on the basis of the Law of Ukraine of the same name.[9] In accordance with Art. 1 of the said Law of Ukraine, military law enforcement service, a special law enforcement formation within the Armed Forces of Ukraine, is designed to ensure law and order and military discipline among service members of the Armed Forces of Ukraine in places of deployment of military units, in military educational institutions, institutions and organizations, military towns, on the streets and in public places; to prevent criminal and other offences in the Armed Forces of Ukraine, their termination; to protect the life, health, rights and legitimate interests of service members, conscripts during the passage of their trainings, employees of the Armed Forces of Ukraine, as well as to protect the property of the Armed Forces of Ukraine from theft and other unlawful encroachments, as well as to participate in countering sabotage manifestations and terrorist acts at military facilities.

The military law enforcement services in the Armed Forces of Ukraine, among others, are entrusted with the following essential tasks: a) identifying the causes, prerequisites and circumstances of criminal and other offenses committed in military units and military facilities; search for persons who voluntarily left military units (places of service); b) prevention of commission and termination of criminal and other offenses in the Armed Forces of Ukraine; c) participation in the protection of military facilities and ensuring public order and military discipline among military personnel in places of deployment of military units, military towns, on the streets and in public places; d) execution in cases stipulated

7 Constitution of Ukraine: Law of Ukraine No 27-IX of 28 June 1996 <https:// https://zakon.rada.gov.ua/laws/show/254 k/96-vr#Text> accessed 13 June 2022.

8 The Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 13 June 2022.

9 The Law of Ukraine 'On the Military Law Enforcement Service in the Armed Forces of Ukraine' of 7 March, 2002 No 3099-III (as amended on 1 April 2022) (Official website of the Verkhovna Rada of Ukraine: official web portal) <https://zakon.rada.gov.ua/laws/show/3099-14#Text> accessed 13 June 2022.

by law of decisions on the detention of military personnel in the guardroom; e) ensuring the execution of criminal penalties against military personnel who, according to the court verdict, are sentenced to be detained in a disciplinary battalion; f) participation in countering sabotage and terrorist acts at military facilities, etc.

When deciding on the introduction of martial law or state of emergency regime in Ukraine or some of its localities, the Law Enforcement Service is additionally tasked with: a) participation in the fight against hostile sabotage and reconnaissance groups on the territory of Ukraine; b) organization of the collection, escort and protection of prisoners of war from the places (localities) where they are held after their capture, to prisoners of war camps or prisoners of war; c) ensuring compliance with the curfew in garrisons; d) protection of military facilities, military towns and their population, assistance in its evacuation; e) restoration and maintenance of order and discipline in military units; f) control over the movement of vehicles and transportation of goods of the Armed Forces of Ukraine (Art. 3 of the Law of Ukraine).

It can be concluded that the Military Law Enforcement Service is not empowered to carry out the pre-trial investigation of military criminal offenses. However, for a long time, a proposal was discussed to create military police on its basis, which would have these powers, or another pre-trial investigation body.

At the same time, on 17 September 2021 by the Decree of the President of Ukraine No. 473/2021, the Decision of the National Security and Defense Council of Ukraine 'On the Strategic Defense Bulletin of Ukraine' was put into effect.[10] For this purpose, it was planned to develop the capabilities of investigative units and units of operational and investigative activities of the Military Police; develop the capabilities of the military police management bodies to ensure law and order and antiterrorist support at potentially dangerous objects in the system of the Ministry of Defense of Ukraine; achieve the compatibility of the Military Police with the relevant structures of NATO member states.

Attempts to create military police have repeatedly ended with the introduction of relevant draft laws to the Verkhovna Rada of Ukraine. For example, the Draft Law 'On Military Police' was developed in 2015, but it was not even included in the agenda.[11] In the memo, the developers of the draft law indicated that they relied on the fact that in the vast majority of the leading countries of Europe and the world, there are military police, law enforcement agencies with military status (military police, carabineers, gendarmerie) operate in the structure of their armed forces, subordinate to the Minister of Defense or have dual subordination, endowed with broad powers to identify, stop and investigate crimes committed by military personnel, and perform police and administrative functions in the interests of the whole country.[12] During the adoption of the new Criminal Procedure Code in 2012, investigative units of the Law Enforcement Service were not created. As a result, at this time in the state, there is a situation when, in fact, in combat conditions, during the execution of tasks in the area of the antiterrorist operation, the current system of pre-trial investigation bodies does not provide an effective and prompt investigation of mass war crimes, which adversely affects the state of readiness of military units and units

10 Decree of the President of Ukraine №473/2021 About commissioning Decision of the National Security and Defense Council of Ukraine of August 20, 2021 'On the Strategic Defense Bulletin of Ukraine' . See. : Official website of the President of Ukraine. Electronic resource. URL: https://www.president.gov.ua/documents/4732021-40121 accessed 13 June 2022.

11 See, for example: Draft Law of Ukraine 'On military police' No. 1805 from 21.01.2015 Official website of Verkhovna Rada of Ukraine http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53648 accessed 01 June 2022.

12 Draft Law of Ukraine 'On Military Police' No. 1805 from 21.01.2015 Official website of Verkhovna Rada of Ukraine http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53648 accessed 01 June 2022.

of the Armed Forces of Ukraine and other military formations established in accordance with the laws of Ukraine.[13]

> Subsequently, the development of laws on military police was entrusted to the Ministry of Defense of Ukraine, but the relevant units were never created.

After Russia's armed aggression against Ukraine began, it significantly intensified discussing the need to create military police. In particular, the acting head of the Military Law Enforcement Service in the Armed Forces of Ukraine - the head of the Main Directorate of the Military Law Enforcement Service of the Armed Forces of Ukraine, Colonel Volodymyr Hutsol, recently presented the next Law of Ukraine 'On Military Police'. In the report, he noted that during the preparation of the draft law, the experience and laws on the military police of all NATO member states were studied, and as a basis in the development of the concept of military police, an example of Poland was taken. 'The management in Poland is carried out by their head of the defence ministry, and we lay down the norms for management with coordination, which will be carried out by the Minister of Defense. In addition, there will be an increase in the powers of the military police, namely, the functions of pre-trial investigation and operational-search activities have been added.'[14]

The main difference between the military police and the existing Military Law Enforcement Service lies in the expansion of its competence to investigate crimes committed by military personnel and/or war crimes.

At the same time, empowering military police to conduct pre-trial investigations is associated with certain risks.

First, it should be borne in mind that determining the jurisdiction of the military police can create a conflict with the competence of the State Bureau of Investigation and the Security Service of Ukraine. Of course, investigating crimes committed by military personnel would be more effective in carrying out pre-trial investigation by the military police. However, the impartiality of the investigation carried out by the military police may be threatened since the military police and its objects of activity belong to the Ministry of Defence's management sphere.

The second problem that may be avoided when introducing the military police as a pre-trial investigation body in the military justice system is that the creation of this body may not correspond to doctrinal ideas regarding ensuring the impartiality of the exercise of its powers by such a pre-trial investigation body.The functions of the pre-trial investigation body are: 1) out-of-departmental status; 2) independence from any public authorities, local self-government bodies, public associations and organizations; 3) full institutional independence of the investigative function performed. It is in this combination that the objectivity and impartiality of the investigation should be ensured. This was also indicated by the Constitutional Court of Ukraine in the Decision of 24 April 2018, in the case on the constitutional submission of the Ukrainian Parliament Commissioner for Human Rights regarding the conformity (constitutionality) of part six of Art. 216 of the CrimPC of Ukraine. In its legal position, the constitutional jurisdiction body noted that

13 Criminal Procedure Code of Ukraine of April 13, 2012 Official web-portal of the Verkhovna Rada of Ukraine. https://zakon.rada.gov.ua/laws/show/4651-17#Text accessed 01 June 2022.

14 "The law 'On Military Police' is needed today": Briefing of Acting Head of the Military Law Enforcement Service in the Armed Forces of Ukraine — Head of the Main Directorate of the Military Law Enforcement Service of the Armed Forces of Ukraine Colonel Volodymyr Hutsola (Armiya Inform, 15 February 2022) <https://armyinform.com.ua/2022/02/15/zakon-pro-vijskovu-policziyu-potriben-uzhe-sogodni/> accessed 01 June 2022.

> the independence of the investigation of violations of human rights to life and respect for human dignity... means, in particular, that from the point of view of an impartial observer there should not be any doubts about the institutional (hierarchical) independence of the state body (its officials), authorized to carry out an official investigation... In this aspect, the independence of the investigation cannot be achieved if the competent public authority (its officials) is institutionally dependent on the body (its officials) to which the system is subordinated.[15]

As expected, the military police should be directed and coordinated by the Minister of Defense of Ukraine. Therefore, in this context, the subordination of the new pre-trial investigation body is of great importance to ensure the pre-trial investigation's independence and impartiality.[16]

2.2. *Military Prosecutor's Office*. Legislation on the military prosecutor's office was constantly in the zone of turbulence, relatively negatively affecting personnel, and even sometimes the results of actual functioning of this body. The military prosecutor's office was included in the system of the Ukrainian prosecutor's office by the new law of Ukraine 'On the Prosecutor's Office' of 29 November 1993. In 2012, the military prosecutor's office was liquidated after the liquidation of military courts. Instead, the direction of work of the prosecutor's office in the military and defence sphere was singled out.

The armed conflict of 2014 again forced scientists and practitioners to return to the issue of returning to military prosecutor's offices, whose competence included the pre-trial investigation of violations of the laws and customs of war. The following figures show the effectiveness of the work of the military prosecutor's office:

> 'During the period from September 2014 to April 2019, prosecutorial and investigative employees of military prosecutor's offices investigated 98,500 criminal proceedings, in 30,066 of them the pre-trial investigation was completed, including in 20,519 cases by sending indictments to the court. In the process of pre-trial investigation, 509.3 million UAH were reimbursed. During the work on representing the state's interests and citizens in the courts, the courts satisfied 5,856 lawsuits brought by prosecutors for a total amount of 2,367.4 million UAH. The defendants voluntarily reimbursed 302 million UAH, executed court decisions in the amount of 2716.8 million UAH, the area of returned land is 61,622 hectares. According to the materials of military prosecutors, a pre-trial investigations were launched in 6,114 criminal proceedings. Four thousand six hundred thirty-four protocols on committing administrative offences were drawn up and sent to the court; 4,530 of them were considered by the courts today. While maintaining the public prosecution, military prosecutors took part in the trial of 18,433 criminal proceedings, in respect of which 12,995 verdicts were adopted.[17]

15 Decision of the Constitutional Court of Ukraine of 24 April 2018 No 3-p/2018 in the case No 1-22/2018 (762/17) by the constitutional submission of the Verkhovna Rada Commissioner for Human Rights on the conformity (constitutionality) of part six of Art. 216 of the CrimPC of Ukraine (*Official website of the Verkhovna Rada of Ukraine*) <https://zakon.rada.gov.ua/laws/show/v003p710-18#Text> accessed 01 June 2022.

16 A Shoshura, 'The trial of the military should also be military' (*Official website of the Specialized Prosecutor's Office in the military and defense sphere of the Central region*, 17 November 2021) <https://vppnr.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=307997&fp=20> accessed 01 June 2022. See also, MZ Lutsiv, 'As for the creation of an effective system of military justice bodies in Ukraine' (Ukrainske Pravo, 26 May 20221) <https://ukrainepravo.com/scientific-thought/naukova-dumka/do-stvorennya-v-ukrayini-diyevoyi-systemy-organiv-viyskovoyi-yustytsiyi/> accessed 01 June 2022.

17 V Vdovitchenko, 'Military Justice System As Part Of The Military Organization Of Ukraine' (2019) 2 (60) Bulletin of the National Academy of Prosecutor's Office of Ukraine 16-27.

However, on 19 September 2019, the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine regarding Priority Measures for the Reform of the Prosecutor's Office' eliminated the military prosecutor's office, the regional prosecutor's offices, leaving district prosecutor's offices only in case of successful certification. Also, in case of successful certification by prosecutors and investigators of military prosecutor's offices, who are servicemen, the issue of their dismissal is resolved within the framework of the Law of Ukraine 'On Military Duty and Military Service', and those who undergo military service under the contract are granted the right to terminate the contract early. Thus, the demilitarization of military prosecutor's offices took place, and the reform processes did not even take into account the specifics of the activities of its personnel and the fact that many military prosecutors apart from general law competences, also had knowledge in the field of military law, as well as regarding tactics and combat use of troops, possessed special methods for detecting and investigating crimes in the military sphere. [18] [19]

Also, the Law mentioned above gave the Prosecutor General the right, if necessary, to create specialized prosecutor's offices as a structural unit of the Office of the Prosecutor General, regional or district prosecutor's offices.

Exercising the powers granted, the Order of the Prosecutor General established: 1) Specialized Prosecutor's Office in the military and defense sphere of the Central region, which ensures the implementation of the functions of the prosecutor's office on the territory of Vinnytsia, Zhytomyr, Kyiv, Poltava, Sumy, Cherkasy, Chernihiv regions and the city of Kyiv; 2) Specialized Prosecutor's Office in the military and defense sphere of the Southern region (as a regional prosecutor's office), which ensures the implementation of the functions of the prosecutor's office on the territory of Dnipropetrovsk, Zaporizhzhia, Kirovograd, Mykolayiv, Odesa, Kherson regions; 3) Specialized Prosecutor's Office in the military and defense sphere of the Western region' (as the regional prosecutor's office), which is entrusted with the implementation of the functions of the prosecutor's office in accordance with the competence on the territory of Volyn, Zakarpattia, Ivano-Frankivsk, Lviv, Khmelnytsky, Rivne, Ternopil, Chernivtsi regions; 4) Specialized Prosecutor's Office in the military and defense sphere of the joint forces (as a regional prosecutor's office), which ensures the implementation of the functions of the prosecutor's office on the territory of Donetsk, Luhansk and Kharkiv regions.[20]

The list of district prosecutor's offices in the military and defense sphere was approved in accordance with the order of the Prosecutor General of 02 March 21 No. 54 'On Certain Issues of Ensuring the Start of Work of Specialized Prosecutor's Offices in the Military and Defense Sphere (as District Prosecutor's Offices)'.[21]

However, during the military prosecutor's office liquidation, social guarantees were also eliminated to prosecutors, some of whom were exercising their functional duties in conditions of essential hostilities.

An extensive review of the transformation of legislation on the creation of a specialized prosecutor's office illustrates the expediency of the existence of this specialization. It should

18 The Law of Ukraine of 19 September No 113-IX 'On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecutor's Office' <https://zakon. rada.gov.ua/laws/show/113-20#Text> accessed 01 June 2022.

19 Ibid.

20 Order of the Prosecutor General 's Office No 66 'On Certain Issues of Ensuring the Start of Work of Specialized Prosecutor's Offices in the Military and Defense Sphere (as Regional Prosecutor's Offices)' https://zakon.rada.gov.ua/laws/show/v0066905-20#Text accessed 01 June 2022.

21 Order of the Prosecutor General of Ukraine of 2 May 2021 No 54 'On Certain Issues of Ensuring the Start of Work of Specialized Prosecutor's Offices in the Military and Defense Sphere (as District Prosecutor's Offices)' (*Prosecutor General's Office of Ukraine Official*) <https://old.gp.gov.ua/ua/ngpu2019.html?_m=publications&_t=rec&id=286098&s=print> accessed 01 June 2022.

be agreed with the opinion that the existence and further development of the military prosecutor's office is due to the need for specialization of prosecutorial supervision, since the military prosecutor's office is one of the types of specialized prosecutor's offices operating in special conditions of functioning of military formations stationed on an extraterritorial principle, specific legal relations regulated by combined arms statutes and acts of military management; the needs of proper supervision over the implementation of the Armed Forces of Ukraine and other military formations of their powers exclusively within the limits determined by the Constitution and the relevant laws of Ukraine; the presence of a special jurisdiction of criminal cases (for war crimes); ensuring the implementation of prosecutorial powers during military formations of antiterrorist measures on the territory of Ukraine, providing military assistance to other states, in case of participation in international military cooperation and in international peacekeeping operations, as well as in a combat situation; observance of the legality of military formations involved in the implementation of measures to ensure the legal regime of martial law and state of emergency, strengthening the protection of the state border of Ukraine and the exclusive (maritime) economic zone, the continental shelf of Ukraine and their legal registration, elimination of the consequences of natural and man-made emergencies.[22]

3. *Military courts.* As of today, the system of military courts has not been created in Ukraine. However, the proposals about the need to introduce it are constantly heard. The number of opinions in support of the creation of a system of military justice has increased significantly recently at the highest scientific level, emphasizing the fallacy of the decision regarding the liquidation of military courts. In particular, on 24 November 2015, a conference was held at the National Institute of Legislation of the Verkhovna Rada of Ukraine'Military Justice in modern conditions: Prospects for Development and Reformation'[23]; the Roundtable meeting 'Military Justice in Ukraine: Actual Problems of Organization and Implementation' was held on 6 June 2017 at V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine. Moreover, the creation of military justice was supported by the first deputy head of the Union of Lawyers of Ukraine, the first Ombudsman of Ukraine, Nina Karpacheva, who took part in the roundtable meeting and noted that[24]

> the issue of the restoration of military justice is extremely relevant, because the liquidation of military courts in 2010 was a serious mistake... The majority of members of the Executive Committee of the Union of Lawyers of Ukraine are in favour of the restoration of military justice. This coincides with the position of the General Staff of the Armed Forces of Ukraine, the Military Prosecutor's Office, Yaroslav the Wise National University, the Verkhovna Rada of Ukraine and representatives of civil society. The liquidation of military justice led to a decrease in the level and guarantees of legal protection of servicemen, access to military state secrets for too wide a range of persons, and in the conditions of military operations in the east of the country, these issues become of special importance .'

The workshop of the Geneva Centre for the Democratic Control of Armed Forces (DCAF) 'Legal Frame of the Security Sector Reform' was held on 05 October 2017 at Yaroslav Mudryi

22 Lutsiv (n 16).

23 'Military Justice into Modern Conditions: Prospects Development and reforming': roundtable meeting, 24 November 2015 <http://kubg.edu.ua/struktura/pidrozdili/yurydychna-klinika-astreya/zakhody/3620-viiskova-iustytsiia-v-suchasnykh-umovakh-perspektyvy-rozvytku-ta-reformuvannia-kruhlyi-stil-shcho-vidbuvsia-v-instytuti-zakonodavstva-verkhovnoi-rady-ukrainy-24-lystopada-2015-r-za-uchasti-yuk-astreya.html> accessed 01 June 2022.

24 The Recovery of Military Courts – a Priority step in the Reform of Military Justice (*Ukrainske Pravo,* 19 June 2017) <http://www.ukrainepravo.com/scientific-thought/pravova-pozytsiya/vidnovlennya-viyskovikh-sudiv-prioritetniy-krok-u-reformuvanni-viyskovoi-yustitsii/> accessed 01 June 2022.

University[25]. The round table 'Military Justice of partner states aiming at protecting military personnel'was held on 17 February 2018 with the participation of the Armed Forces of Ukraine. [26] On 26 January 2022, 'Certain issues of legislative regulation of the creation of a system of military justice' were discussed in Kharkiv[27]. Almost all participants of these events supported the restoration of the military justice system in Ukraine.

This issue became acute after Russia's armed aggression against Ukraine began. According to practitioners,

Today, a very popular statement in team building processes is 'The manager needs to develop empathy for subordinates'. A military judge will have a 'proper' empathy for the military. He/she will understand the motive of the crime committed and the influence of external factors (combat situation, relations in the team). The court is guided not only exclusively by law but also by its convictions. If one knows the peculiarities of the guard service and its nuances, if one knows how military rituals go, this is all important for one's own conviction. Therefore, the trial of the military should also be military.[28]

The monitoring of military justice, which the Committee on Human Rights conducted, gives grounds to point out that there are three main models of building a system of military courts worldwide. *The first model* exists in states where military courts operate permanently, both in peacetime and during hostilities.

The second model operates in those states where there is a 'mixed jurisdiction', that is, military 'courts' operate on a permanent basis in general civil courts. Moreover, this is not a full-fledged link of the judicial system, but it comprises only chambers, departments, council offices, formed by officers with legal education.

Third model is applied in those states where military courts begin to exercise their powers during the war or exercise them if the state has military bases abroad.[29]

Some states, such as Australia and Ukraine, are at the stage of reforming the military justice system, discussing these issues and getting acquainted with the experience of other states. [30]

Let us turn to the experience of the of military justice functioning in some European countries, which is necessary to conclude that military justice should be introduced in Ukraine.

25 Legal Frame of the Security Sector Reform <http://legalforum.nlu.edu.ua/en/events/workshop-of-the-geneva-centre-for-the-democratic-control-of-armed-forces-dcaf-legal-frame-of-the-security-sector-reform-october-5th/> accessed 01 June 2022.

26 'Military Justice Of Partner States Aiming At Protecting Military Personnel' (*Official site of the Ministry of Defense of Ukraine*) <http://www.mil.gov.ua/news/2018/01/17/v-komanduvanni-suhoputnih-vijsk-zs-ukraini-vidbuvsya-kruglij-stil-za-temoyu-vijskova-yusticziya-krain-partneriv-spryamovana-na-zahist-vijskovosluzhbovcziv/> accessed 01 June 2022.

27 Round table 'Certain issues of legislative regulation of the creation of a system of military justice' Yarolsaw the Wise National Law University <https://nlu.edu.ua/perspektyvy-vijskovoyi-yustycziyi-v-ukrayini-obgovoryly-na-kruglomu-stoli/> accessed 01 June 2022.

28 A Shoshura A. The trial of the military should also be military. Official website of the Specialized Prosecutor's Office in the military and defense sphere of the Central region URL: https://vppnr.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=307997&fp=20 accessed 01 June 2022.

29 F Andreu-Guzmán, 'Fuero militar y derecho internacional : los tribunales militares y las graves violaciones a los' (Comisión Colombiana de Juristas 2003) 137-149(; BJ Kyle, AG Reiter,, *Military Courts, Civil-Military Relations, and the Legal Battle for Democracy: The Politics of Military Justice* (Routledge 2021).

30 D Denton, 'A proposed new military justice regime for the Australian Defence Force during peacetime and in time of war' (The University of Western Australia 2020) < https://doi.org/10.26182/5e780a9802ff3> accessed 01 June 2022; D Denton, 'The Australian Military Justice System: History, Organisation and Disciplinary Structure',(2016) 6 (1) Victoria University Law and Justice Journal 27–36.

In particular, Switzerland has not fought wars on its own territory for more than 200 years but has not yet abandoned the military justice system. The Swiss legislator proceeds from the fact that for the effective implementation of military proceedings, the legal knowledge alone is not enough- it is necessary to know special military statutes that future lawyers do not study in classical universities when obtaining legal education, as well as the availability of sufficient experience in military service, which must be known from the inside. The Attorney General of the Canton of Bern, a lecturer in Lucernes, and the Academy of Prosecutors, points to this argument as the main one for the supporter of preserving military justice in Switzerland. [31]

The peculiarity of The Swiss Justice is that the primary sources of its functioning are the Military Criminal Procedure Code (literally - Military Criminal Procedure - Militärstrafprozess) of 23 March 1979, Decree on the implementation of military criminal proceedings of 24 October 1979, the Federal Law on The Army and Military Administration ([32] [33]*Bundesgesetz über die Armee und die Militärverwaltung*) of 3 February 1995 and the Military Criminal Code. [34][35]

The system of courts in Switzerland has three links, as is customary in most western European countries, which is preserved in systems of military justice; 2) military appellate courts that consider appeals against verdicts and other decisions of garrison courts. There are three such courts in Switzerland - French-speaking, German-speaking and Italian-speaking; 3) military court of cassation, which considers cassation complaints.

In the Swiss military justice system, there is a prosecutor called an auditor and an investagating judge who investigates cases to be considered in a garrison court.The investigating judge, a member of the garrison court is the only official authorized to conduct a preliminary investigation. The investigating judge investigates independently, without interfering in his/her activities on the part of the head or the prosecutor's office; in turn, the prosecutor (auditor) carries out procedural supervision over the activities of the investigating judge.

The system of military justice bodies of Spain has the following structure. The Spanish Constitution declares that 'the principle of unity of jurisdiction is the basis for the organization and functioning of courts'. Accordingly, it establishes that 'the law provides for the exercise of military jurisdiction strictly in the military sphere and in cases of state of siege (martial law), in accordance with the principles of the Constitution' (Para. 5 of Art. 117). [36]

Thus, military justice in Spain is a constitutionally enshrined institution integrated into the judiciary. Such integration was achieved by the creation of another (fifth) chamber – the Military chamber in the Supreme Court, which 'is the highest judicial body in all branches

31 MA Fels, 'Militärjustiz aus der Sicht der zivilen Strafverfolgungsbehörden', in Jusletter (13. Mai 2019) <https://jusletter.weblaw.ch/dam/publicationsystem/articles/jusletter/2019/979/openaccess/militarjustiz-aus-de_11f0de8210/Jusletter_militarjustiz-aus-de_11f0de8210_de.pdf> accessed 01 June 2022.

32 Militärstrafprozess (MStP) vom 23. März 1979 (Stand am 1. Januar 2017) <https://www.admin.ch/opc/de/classified-compilation/19790061/201701010000/322.1.pdf> accessed 01 June 2022.

33 Bundesgesetz über die Armee und die Militärverwaltung < https://www.admin.ch/opc/de/classified-compilation/19950010/index.html> accessed 01 June 2022.

34 Bundesgesetz über die Armee und die Militärverwaltung vom 3. Februar 1995 (Stand am 1. Januar 2022) < https://www.admin.ch/opc/de/classified-compilation/19950010/index.html> accessed 01 June 2022.

35 Swiss Criminal Code of 21 December 1937 (Status as of 1 June 2022) < https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en> accessed 01 June 2022.

36 Spanish Constitution of 1978 <https://www.lamoncloa.gob.es/documents/constitucion_inglescorregido.pdf> accessed 01 June 2022.

of justice, except for provisions relating to constitutional guarantees' (Para. 1 of Art. 123 of the Spanish Constitution). [37]

In the second half of the 80s of the twentieth century, after the entry into force of the Constitution, there was a significant reform of military justice, which culminated in the creation of a specialized jurisdiction in which the exercise of the judiciary is carried out exclusively by military courts, which, in accordance with Art. 1 of The 4/1987 Act is 'an integral part of the judiciary.' This connection is primarily because the Supreme Court (as the highest ordinary court) is also the highest court of military justice. That is, a special and unique jurisdiction was created to consider cases in the purely military sphere, consisting of:[38]

- Fifth Military Chamber of the Supreme Court (Sala Quinta de lo Militar del Tribunal Supremo);
- Central Military Court (Tribunal Militar Central);
- Territorial Military Courts (los Tribunales Militares Territoriales).[39]

The structure of military courts is the same in peacetime and wartime. In peacetime, the jurisdiction of military justice extends to offenses provided for by the Military Criminal Code (for example, treason, espionage). In addition, in peacetime, Spanish troops stationed abroad were also subject to the jurisdiction of military courts. Of course, military courts' competence is significantly expanded during military operations.

An essential difference between the military courts of Spain is that, depending on the military rank of the accused, a competent court is determined, which will be the court of the first instance. For example, for non-commissioned officers and junior officers, the court of the first instance will be the Territorial Military Court, and for generals – the Military Chamber of the Supreme Court. The appellate court within the framework of military justice is not provided. At the same time, convicted persons can file a cassation appeal to the military chamber of the Supreme Court, except for generals whom the Military Chamber convicted in the first and last instance.

In addition to the courts, the system of bodies of military jurisdiction includes the military legal prosecutor's office, which, under Art. 12 of Act 50/1981, incorporated into the public prosecutor's office and acts under the Spanish Attorney General (Art. 87 of Act 4/1987)[40]

In accordance with Art. 88 of law 4/1987 in the field of military jurisdiction, the Military Legal Prosecutor's Office promotes the action of justice and will act in defense of the legality and rights and interests protected by law, ex officio or on demand. Their functions are very strictly limited exclusively by competence within military jurisdiction.

The judicial police, as a body of military jurisdiction, within the powers established by law, carries out 'investigation of crimes, detection and delivery of the offender to military judicial bodies and military legal prosecutors' (Art. 86 of Law 4/1987).

37 Spanish Constitution of 1978 <https://www.lamoncloa.gob.es/documents/constitucion_inglescorregido.pdf> accessed 01 June 2022.

38 A number of laws regulating the activities of military jurisdiction bodies were adopted, in particular: Ley Orgánica 4/1987, de 15 de julio, de la Competencia y Organización de la Jurisdicción Militar. <https://www.boe.es/eli/es/lo/1987/07/15/4/con> accessed 01 June 2022 ; Ley Orgánica 2/1989, de 13 de abril, Procesal Militar. <https://www.boe.es/eli/es/lo/1989/04/13/2/con> accessed 01 June 2022 ; Ley Orgánica 14/2015, de 14 de octubre, del Código Penal Militar <https://www.boe.es/eli/es/lo/2015/10/14/14/con> accessed 01 June 2022 ; Ley 44/1998, de 15 de diciembre, de Planta y Organización Territorial de la Jurisdicción Militar <https://www.boe.es/eli/es/l/1998/12/15/44/con> accessed 01 June 2022.

39 Manual básico de tribunales y procedimientos militares. Ministerio de Defensa. Tribunal Militar Central. 2014. 456

40 Ley 50/1981, de 30 de diciembre, por la que se regula el Estatuto Orgánico del Ministerio Fiscal. <https://www.boe.es/eli/es/l/1981/12/30/50/con> accessed 01 June 2022.

From the point of view of building a military justice system, it is also advisable to turn to the experience of Poland, where military courts carry out justice in criminal cases, as well as the military prosecutor's office and military police which have been established and is fully operational.

The composition of the Military Courts, their functions and powers are provided for by the Constitution of the Republic of Poland, the Law 'On the System of Military Courts' of 21 August 1997, and the Law 'On the System of General Courts' of 27 July 2001.[41] [42]

In particular, in accordance with Art. 175 of the Constitution of Poland: 'Justice in the Republic of Poland is exercised by the Supreme Court, general courts, administrative courts and military courts. A special court or simplified proceedings may be opened only during the war.' [43] As for criminal proceedings, the jurisdiction of military courts is provided by the Criminal Procedure Code of Poland.

According to the law, military courts administer justice in criminal cases when committing a crime by a person serving in the Armed Forces of the Republic of Poland, as well as other persons, if provided for by law.

In accordance with this law, the system of military courts consists of military district courts and military garrison courts (Art. 3). In Poland, there are ten garrison courts, which act as courts of first instance, and two military district courts, which act as courts of appeal. Geographically, they are located in Warsaw and Poznan. At the same time, military district courts consider cases as courts of the first instance in some categories of cases.

The independence of the judiciary guarantees that the heads of military garrison and district courts and their deputies are appointed and dismissed from among the judges of these courts by the Minister of Justice of the Republic of Poland. The Minister of Defense only agrees to this. In accordance with Art. 5, 18 'On the System of Military Courts') control over the activities of military courts in the part of court decisions is carried out by the Supreme Court. The Minister of Justice supervises military courts' activities in terms of organization and administrative activities. The minister of national defence oversees the passage of active military service by military personnel of military courts.

The Military Chamber of the Supreme Court of Poland is an appellate court in respect of cases that district courts considered as courts of the first instance, as well as by the cassation instance in all cases considered by the military courts. In addition, the jurisdiction of the Military Chamber includes consideration of cases of disciplinary offences of military judges, military prosecutors, and legal advisers who are military personnel or civil servants of the Armed Forces of the Republic.

The civil authorities of the state control the activities of military courts. Thus, the Minister of National Protection, with the consent of the Minister of Justice, after agreeing with the State Council of Justice, by adopting an order, creates and liquidates military courts, as well as determines their location and other characteristics, aiming to rationally organize the implementation of military proceedings by establishing the number of courts, their staff, location in accordance with the location of military formations of the Armed Forces (paras. 3-4 of Art. 3 of the Law 'On the System of Military Courts').

41 Prawo o ustroju sądów wojskowych. Ustawa z dnia 21 sierpnia 1997 r. <https://lexlege.pl/prawo-o-ustroju-sadow-wojskowych/> accessed 01 June 2022.

42 Prawo o ustroju sądów powszechnych. Ustawa z dnia 27 lipca 2001 r. - Prawo o ustroju sądów powszechnych < https://lexlege.pl/prawo-o-ustroju-sadow-powszechnych/> accessed 01 June 2022.

43 Konstytucja Rzeczypospolitej Polskiej. Tekst uchwalony w dniu 2 kwietnia 1997 r. przez Zgromadzenie Narodowe < https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm> accessed 01 June 2022.

At the same time, the principle of access to justice, reducing the duration of court proceedings and their consideration within a reasonable period, and guaranteeing the exercise of the right to claim (judicial protection) are being implemented. When making decisions on the formation and location of military courts, the needs of the Armed Forces are also taken into account in the event of a declaration of mobilization and during the war (martial law).

The Supreme Court carries out the review of decisions of military courts, and organizational and administrative supervision belongs to the powers of the Ministry of Justice, which includes the Department of Military Courts.

Judges of the military courts of the Republic of Poland can only be military personnel who undergo active military service.

Thus, the three-level system of courts in Poland, the procedure for their organization and the administration of justice, on the one hand, ensure the realization of the right of military personnel to a fair trial in accordance with international standards. On the other hand, it is devoid of the risks that scientists and practitioners point to as negative factors in the functioning of military courts.

It should be noted that such a system is quite close and understandable for Ukrainian lawyers and, with minor national corrections, can be borrowed in implementing judicial reform in Ukraine.

It is known that in many states, reforms of military justice bodies are currently being carried out[44]. However, it is unconditional that in the context of the implementation of armed aggression imposed in the state of martial law and after the end of hostilities of the post-conflict society, the functioning of the Armed Forces of Ukraine, the number of which is approaching a million, the existence of military justice is vital.

3. CONCLUSIONS

The study allows the authors to draw the following conceptual conclusions. Ukraine's victory over the aggressor, the success of protecting Ukraine's national interests, and achieving peace and stability on the European continent, largely depend on the Armed Forces of Ukraine.

Russia's armed aggression and the introduction of martial law have significantly actualized attention to the legal problems associated with the completion of the creation of a full-fledged system of criminal justice bodies, which in tough conditions should maintain law and order, pre-trial investigation of military and war crimes, procedural management of the pre-trial investigation, as well as justice and judicial control, ensuring criminal prosecution of those responsible, preventing violations and procedural terms, ensuring legality in the application of measures to ensure criminal proceedings, the rights and legitimate interests of a person involved in military-criminal justice. The incompleteness of the initiated military justice reform adversely affected law enforcement practice after 24 February 2022 and the beginning of armed aggression against Ukraine.

The above task can can be performed only by the systems of military justice, which should include subordinated and coordinated law enforcement agencies and judicial bodies, the substantive competence of which arises regarding the activities of the Armed Forces of

44 D Cotelea, AP Alcántara, C Tempera, M Brach, C Foisseau and GA Ira, under the supervision and guidance of M Blokken, 'The Role of Military Courts Across Europe: A Comparative Understanding of Military Justice Systems' (28 April 28 2020) < https://finabel.org/the-role-of-military-courts-across-europe-a-comparative-understanding-of-military-justice-systems/> accessed 01 June 2022.

Ukraine and other paramilitary groups, as well as other persons who have the status of a soldier. Based on the idea of military justice as a system of bodies, its composition, in the authors' opinion, should include: 1) the body that carries out the pre-trial investigation and/or supports law and order; 2) the body to which it oversees legality; (3) military courts.

In the first link of the system of military justice, the bodies should maintain law and order and investigate criminal offenses committed by military personnel or other persons in the armed formations. Moreover, during its creation, risks associated with its subordination should be avoided since being subordinate to the Ministry of Defense of Ukraine can affect the independence and impartiality of persons to investigate.

The second body in the system of military justice should be the one that supervises in the form of procedural guidance on the conduct of the pre-trial investigation by a specialized body of pre-trial investigation of military justice and maintains public prosecution in court for war crimes. Despite some turbulence in the legislative regulation of the work of the prosecutor's office in Ukraine, this body (with different names, structural construction, belonging to military services and staffing) implemented a constitutional function for a long time, in accordance with the powers assigned by law.

The liquidation of military courts was a false step in the reform processes in Ukraine, and it became noticeable during the beginning of Russia's armed aggression against Ukraine. In particular, Switzerland', Poland', Spain' and other examples indicate that the closest for Ukraine is the experience of functioning of the military justice in Poland.

The establishment of military courts will ensure the availability of justice competence and professionalism, compliance with the procedural terms of the stage of judicial investigation; reasonable terms of criminal proceedings; effective judicial control over the application of measures to ensure criminal proceedings.

At the same time, it is necessary to take into account the fact that the effective functioning of military courts is possible only if several problems facing the state are solved: 1) the creation of a network of these courts, taking into account the deployment of military facilities; 2) determination of the substantive jurisdiction of these courts, which should be distinguished from the competence of other courts (whether only cases of war crimes or other cases in the military sphere will relate to it); 3) determining the place of these courts in the judicial system, taking into account the principle of instance (whether military courts will act only at the level of courts of the first instance, or include a relatively separate subsystem of courts of different instances); 4) ensuring the independence of military courts and their judges from the military command.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Note from the Field

Access to Justice Amid War in Ukraine Gateway

LEGAL CHALLENGES FOR UKRAINE UNDER MARTIAL LAW: PROTECTION OF CIVIL, PROPERTY AND LABOUR RIGHTS, RIGHT TO A FAIR TRIAL, AND ENFORCEMENT OF DECISIONS*[1]

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1 This is substantially updated paper, presented during the Department Talk: 'Legal Challenges and Solutions for Ukrainians at Home and Abroad during War (Martial Law and the Protection of Property, Civil and Commercial Dispute Resolution, Labor Law and Tax Law)' on 20 June 2022 at the University for Continuing Education, Krems, Austria (within the Ukrainian-Austrian R&D Project).

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Competing interests: The authors declare no conflict of interest of relevance to this topic. Nevertheless, three of them serve on the board of AJEE (Prof. Prytyka as a Member of the Advisory Board, Prof. Izarova as an Editor-in-Chief, and Dr. Terekh as a managing editor); thus, they were not involved in decision-making, and this note underwent the full process of peer review and editing. To avoid potential conflict or the perception of bias, the final decisions for the publication of this note were handled by other editors, including choice of peer reviewers. **Disclaimer**: The authors declare that all the opinions and views expressed in this manuscript are free of any impact of any organizations. **Translation**: The content of this article was prepared by co-authors in English. Parts 2 and 3 were translated by Dr. Terekh. **Funding**: The research, authorship, and/or publication of this article was supported by the Ministry of Education and Science of Ukraine [No M-52, May 24 2022, Ukrainian-Austrian R&D Projects].
Managing editor – Dr. Oksana Uhrynovska. **English Editor** – Dr. Sarah White.

How to cite: Yu Prytyka, I Izarova, L Maliarchuk, O Terekh 'Legal Challenges for Ukraine under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions' 2022 3(15) Access to Justice in Eastern Europe 219–238. DOI: https://doi.org/10.33327/AJEE-18-5.4-n000329

AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Submitted on 21 Jun 2022 / Revised 11 Jul 2022 / Approved **15 Jul 2022**
Published online: **08 Aug 2022** // Last Published: **15 Aug 2022**

Keywords: *martial law, property law, judiciary, enforcement of judicial decisions, labour relations*

ABSTRACT

Background: *On 24 February, russia launched a military attack on the entire territory of Ukraine, in connection with which the President of Ukraine declared martial law. According to the Law of Ukraine 'On Martial Law', martial law is a special legal regime introduced in the event of armed aggression, danger to the state independence of Ukraine, or its territorial integrity and arranges for the provision of appropriate state authorities, military command, military administrations, and local authorities self-governance of the powers necessary to avert the threat, repel armed aggression and ensure national security, and eliminate the threat of danger to the state independence of Ukraine, its territorial integrity, as well as the temporary restriction of the constitutional rights and freedoms of persons and citizens and the rights and legitimate interests of legal entities within the validity period of these restrictions. This study is designed to analyse the consequences of armed aggression against Ukraine and the introduction of the appropriate legal regime in such areas as the realisation of property rights, the administration of justice, the enforcement of court decisions, and labour relations.*

Methods: *To achieve the goals of the research, general scientific and special methods of scientific research were applied, such as comparative-legal and semantic-structural methods and the method of grouping, analysis, synthesis, and generalization.*

Results and Conclusions: *The introduction of the martial law regime throughout the territory of Ukraine affected all spheres of life and, as a result, requires adaptation to modern realities. In particular, this consists of changes to the current legislation because the martial law regime involves the restriction of certain constitutional rights and freedoms of persons and the introduction of new mechanisms – for example, the suspension of labour relations, changes in the jurisdiction of courts for the possibility of justice, expanding the competence of private executors, and even making changes to the regulations of ICAC due to the impossibility of sending documents by mail, as well as allowing process participants to personally participate in meetings.*

1 INTRODUCTION

The new stage of the armed aggression of the russian federation, which began on 24 February 2022, affected all aspects of life in Ukraine, including the exercise of ownership rights by individuals, legal entities, and non-residents.

Martial law is a special legal regime imposed in Ukraine or in certain localities in case of armed aggression or threat of attack, a threat to the state independence of Ukraine, or its

territorial integrity, providing certain powers to the relevant public authorities, military command, military administrations, and local governments that are necessary to deter the threat, repel armed aggression and ensure national security, and eliminate the threat to Ukraine's independence and territorial integrity, as well as temporarily restrict constitutional rights and freedoms of persons and citizens and the rights and legitimate interests of legal entities. Pursuant to the legislation of Ukraine, martial law must be introduced by the Decree of the President of Ukraine and approved by the Parliament of Ukraine by adopting the relevant Law.[6] Thus, on 24 February 2022, the President of Ukraine, by Decree No. 64/2022, introduced the legal regime of martial law in Ukraine, which was extended by the Presidential Decree on 17 May 2022 for 90 days until 25 August 2022.

It is also worth noting that martial law was not imposed in 2014, and the occupation of Ukrainian territories by russian troops was marked by temporary occupation of Ukraine – about 7% of the territory (pursuant to the Law of Ukraine of 2014). This law defines the legal regime, the procedure for regulating transactions, etc.

This paper offers a wide discussion of the issues of martial law and property law regulation with a focus on forcible seizure and alienation and compensation of damages (Part 2).

The main challenges and features of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (UCCI) in wartime are discussed in art 3. Essential elements of the Ukrainian judiciary and litigation amid war are sketched out in Part 4. The enforcement of judicial decisions in the occupied territory in Ukraine since 2014 is described in Part 5. Labour law regulations (restrictions of rights and freedoms of citizens under martial law) are discussed in Part 6. In conclusion, the authors underline the necessity of fully implementing the idea of human rights and allowing restrictions on the exercise of the rights by individuals, legal entities, and non-residents only within the necessary limits during martial law.

2 PROPERTY LAW REGULATION UNDER MARTIAL LAW IN UKRAINE (FORCIBLE SEIZURE AND ALIENATION, COMPENSATION OF DAMAGES)

Clause 3 of the Decree of the President of Ukraine establishes that the temporary imposition of martial law in Ukraine may restrict the constitutional rights and freedoms of persons and citizens under Arts. 30-34, 38, 39, 41-44, and 53 of the Constitution of Ukraine, including, in particular, the right to inviolability of housing, the right to own, use, and dispose of property and the results of intellectual and creative activities, and the ability to introduce temporary restrictions on these rights and legitimate interests of legal entities and the possibility of introducing and implementing of the measures of a martial law regime.[7]

The legal principles of forced alienation and seizure of property shall be as follows:

Part 5 of Art. 41 of the Constitution of Ukraine decrees that forced alienation of the objects of private property may be applied only as an exception for reasons of public necessity, on the basis and in the manner prescribed by the law, and subject to prior and full reimbursement of its cost. Forced alienation of such objects with subsequent full reimbursement of its cost shall be permitted only in the conditions of martial law or state of emergency.

6 Law of Ukraine No 389-VIII 'On the legal regime of martial law' of 12 May 2015 <https://zakon.rada.gov.ua/laws/show/389-19#Text> accessed 21 June 2022.

7 Decree of President of Ukraine No 64/2022 'On introduction of martial law' of 24 February 2022 <https://zakon.rada.gov.ua/laws/show/64/2022#n2> accessed 19 June 2022.

Art. 8 of the Law of Ukraine 'On Legal Regime of Martial Law' envisages the possibility of forced alienation of property in private or communal ownership and the seizure of property of state enterprises and state business associations for the needs of the state under the legal regime of martial law in the manner prescribed by the law. The procedure of alienation and seizure itself shall be regulated by the Law of Ukraine 'On Transfer, Forced Alienation or Seizure of Property under the Legal Regime of Martial Law or Emergency State'.[8]

'Forced alienation of property' means the deprivation of the owner of the right of ownership over a property in private or communal ownership, which becomes the property of the state for the purpose of its use under the legal regime of martial law or emergency state, subject to prior or subsequent full reimbursement of its cost.

'Seizure of property' means the deprivation of state-owned enterprises or state business associations of the right to manage or operatively manage the individually determined state property for the purpose of its transfer for the needs of the state under the legal regime of martial law or emergency state.

Basic principles: 1) the determination of the bodies authorised to apply seizure – military command (Commander-in-Chief of the Armed Forces of Ukraine, Commander of the Joint Forces of the Armed Forces of Ukraine, commanders of the types and certain kinds of troops (forces) of the Armed Forces of Ukraine, commanders (heads), military administration bodies, commanders of formations, military units of the Armed Forces of Ukraine and other military formations formed in accordance with the laws of Ukraine), together with military administrations (in case of their formation), with or without involvement of executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, or local governments; 2) the delimitation of the categories of 'forced alienation' and 'seizure' of property on the basis of legal title – the property in private or communal ownership shall be alienated, while the property of the state-owned enterprises or state business associations shall be seized; 3) the consolidation of the principle of compensation for the damages caused during imposition of martial law.

There are three options: a) full preliminary reimbursement of the cost of the forcibly alienated property; b) subsequent full reimbursement of its cost; c) providing the owner with another property in exchange, if possible. In addition, the return of the property that was forcibly alienated from legal entities and individuals is provided for as follows: after the abolition of the legal regime of martial law, the former owner or his/her authorised person has the right to demand in court the return of such property under the terms prescribed by the law.

Forced seizure of property of the russian federation and its residents (in the literature, this process is called nationalisation) may be carried out on the basis of the Law of Ukraine 'On Basic Principles of Forced Seizure of Property of the russian federation and its Residents' of 3 March 2022.[9] The law provides for the possibility of the nationalisation of the property of the following entities: russia as a state and residents of russia. This includes:

- individuals who are citizens of russia, as well as persons who are not its citizens but have close ties with the aggressor state, in particular, those who live in russia or are engaged in their main activities in its territory;
- legal entities (in particular, branches and representative offices) operating in Ukraine whose participants, shareholders, or beneficiaries directly or indirectly belong to

8 Law of Ukraine No 4765-VI 'On Transfer, Forced Alienation or Seizure of Property under the Legal Regime of Martial Law or Emergency State' of 17 May 2012 <https://zakon.rada.gov.ua/laws/show/4765-VI#Text> accessed 19 June 2022.

9 Law of Ukraine No 2116-IX 'On Basic Principles of Forced Seizure of Property of the Russian Federation and its Residents' of 3 March 2022 <https://zakon.rada.gov.ua/laws/show/2116-20#Text> 19 June 2022.

the aggressor state or legal entities whose participant, shareholder, or beneficiary is directly or indirectly russia.

The list was expanded by the adopted Law, which was not signed by the President of Ukraine. In particular, the National Security and Defence Council or a court may, by its decision, recognise any individuals or legal entities as residents of russia, regardless of their citizenship, place of residence/location, or activity, if they simultaneously meet the following requirements: that they publicly deny or support russia's armed aggression against Ukraine, as well as the imposition and adoption of temporary occupation of the territory of Ukraine, and did not stop or at least did not suspend their business (in particular, economic) activities in russia during martial law in Ukraine.

The property that can be nationalised is: movable and immovable property, cash, bank deposits, securities, corporate rights, and other property. The law stipulates that virtually any property (assets) that 1) is located or registered in Ukraine and 2) directly or through affiliates is owned by russia or its residents may be nationalised. Therefore, the law does not contain an exhaustive list of the objects that may be forcibly seized, and therefore any and all property belonging to russia or its residents may be subject to nationalisation.

The procedure for property nationalisation is carried out without any compensation and envisages the following sequence:

1. The Cabinet of Ministers drafts a decision on nationalisation and submits it to the National Security and Defence Council. The law requires that the draft decision contain the following data:

- a list of the property to be nationalised and its identification (location, registration, etc.);
- names of the persons whose property is subject to nationalisation;
- terms of nationalisation.

2. The National Security and Defence Council decides on nationalisation.

3. The President of Ukraine shall, by his Decree, put into effect the decision adopted by the National Security and Defence Council.

4. Within six months after the end of martial law in Ukraine, the Verkhovna Rada shall adopt a law approving the Decree of the President of Ukraine on nationalisation.

As a result of nationalisation, Ukraine will become the owner of the property. The nationalised property of russians will be temporarily or permanently transferred to a specialised, state-owned enterprise to be set up by the Cabinet. It is unknown at this time which company will be the holder of such property and how it will be managed.

Today, there is one example of nationalisation, associated with the forced seizure of corporate rights and assets of russian banks 'Sberbank of russia' and 'VEB' on the basis of the Decree of the President No. 326 'On Decision of the National Security and Defence Council of Ukraine of 11 May 2022 'On Forced Seizure in Ukraine of the Property of the Russian Federation and its residents'" of 11 May 2022, approved by the Law of Ukraine.[10]

In addition to nationalisation, the legislation of Ukraine provides criminal-procedural mechanisms for confiscation of property, which operates as follows. There are a number of

10 Decree of the President No 326 'On Decision of the National Security and Defence Council of Ukraine of 11 May 2022 "On Forced Seizure in Ukraine of the Property of the Russian Federation and its residents"' <https://zakon.rada.gov.ua/laws/show/326/2022#Text> accessed 19 June 2022.

examples when the Bureau of Economic Security, within the framework of the investigation of criminal proceedings, seizes material resources that were used for illegal operations on Ukrainian territory. According to the decision of the investigating judge, the seized assets are transferred for management to the Agency for Search and Management of Assets (ARMA).

The influence on the realisation of property rights of some categories of persons also regulates the introduction of mechanisms for the imposition of sanctions. In particular, on 12 May 2022, the Verkhovna Rada adopted the Law of Ukraine 'On Amendments to Certain Laws of Ukraine Regarding Increasing the Effectiveness of Sanctions Related to the Assets of Individuals' with the proposals of the President of Ukraine previously submitted as a result of the veto.[11]

In accordance with the Law 'On Sanctions', the central executive body, which ensures the implementation of the state policy in the sphere of recovery of assets in the state income, will submit a claim to the High Anti-Corruption Court for their recovery.[12] When the court decision enters into force, the Cabinet of Ministers of Ukraine will hand over these assets for temporary management to the above-mentioned body, the State Property Fund, military administrations and/or other state authorities and economic entities of the state economy. The grounds for the application of sanctions are the possibility of significant damage to the national security, sovereignty, or territorial integrity of Ukraine; substantial facilitation of armed aggression against Ukraine or personal participation in it, its financing, and logistical support; the organisation and holding of illegal elections or referenda; participation in the creation of occupation administrations; information promotion, consisting in the implementation of public actions, in particular, on the Internet or in the mass media, that incite armed aggression against Ukraine; justifying or recognising aggression and occupation as legitimate; the glorification of the occupiers, their illegal formations, mercenaries, or representatives of the occupation administration; inciting hatred against the Ukrainian people.

3 FEATURES OF THE WORK OF THE INTERNATIONAL COMMERCIAL ARBITRATION COURT AT THE UKRAINIAN CHAMBER OF COMMERCE AND INDUSTRY (UCCI) IN WARTIME

On 10 June 1992 – 30 years ago – the Presidium of the UCCI established the International Commercial Arbitration Court (ICAC) and approved its Rules of Procedure.

According to the study conducted by the Ukrainian legal publication 'Yurydychna praktyka' (Legal Practice), the main motivations for including the ICAC arbitration clause in commercial contracts are the residency of one of the parties to the contract (42%), the best ratio of efficiency, cost, and comfort of dispute settlement (33%), and the positive previous experience in litigation in the ICAC (25%). Among the main advantages of the ICAC compared to other arbitration institutions are the users call the price-quality ratio (64%), the process comfort and geographical location of the ICAC (40% each), and the low percentage, namely less than 1% of the abolition of decisions (28%). At the same time, 88% of the users are fully or mostly satisfied with the quality of arbitration services. The main

11 Law of Ukraine No 2257-IX 'On Amendments to Certain Laws of Ukraine Regarding Increasing the Effectiveness of Sanctions Related to the Assets of Individuals' of 12 May 2022 <https://zakon.rada.gov.ua/laws/show/2257-20#Text> accessed 19 June 2022.

12 Law of Ukraine No 1644-VII 'On Sanctions' of 14 August 2014 <https://zakon.rada.gov.ua/laws/show/1644-18#Text> accessed 19 June 2022.

competitors of the ICAC, according to the users, are VIAC (Vienna International Arbitral Centre) (52%), SCC (Stockholm Chamber of Commerce) (48%), and ICC (International Chamber of Commerce) (24%).[13]

From 1 January 2022, the ICAC received 71 lawsuits, of which 24 lawsuits were submitted after 18 March 2022. In April 2022, a decision was made on five cases. In May 2022, nine arbitration hearings were held. The work of the ICAC was suspended on 24 February 2022 due to the military aggression of the russian federation and resumed on 18 March 2022.

Under martial law, the ICAC of the UCCI has resumed receipt of statements of claim, as well as other procedural documents relating to the competence of arbitration institutions, and processes all incoming correspondence online and, if possible, directly. The ICAC Secretariat must ensure correspondence with arbitral tribunals in specific cases, parties to disputes, and other service users by electronic means and, where possible, by post. All documents and other files should be submitted electronically to the relevant e-mail addresses of the ICAC icac@icac.org.ua and IAC ddo@macom.org.ua. In addition, the most important procedural documents (statements of claim, responses to the claim, etc.) should also be sent by all types of mail or presented in person at the reception of the UCCI at 33, Velyka Zhytomyrska Str., Kyiv, Ukraine 01601.

The parties to the arbitration proceeding are offered the following options for holding arbitration hearings:

- to consider the case on the basis of the documents without holding oral hearings (Art. 46 of the ICAC Rules of Procedure);
- to conduct oral hearings using video conference systems (arbitrators and parties participate online) – the ICAC uses the ZOOM platform (Art. 47 of the Rules of Procedure);
- to conduct combined oral hearings (for example, arbitrators take part from the ICAC premises and parties participate online).

The main problem in arbitration that affects the prompt and effective settlement of disputes is forwarding documents in the course of arbitration proceedings.

Pursuant to Art. 11 of the ICAC Rules of Procedure, the main procedural documents – the statement of claim, response to the claim, summons, order, resolution, and decision of the ICAC – must be sent to the party in paper form: by courier, by regular mail, by registered letter with acknowledgement of receipt, or in person to the representative. Currently, the courier post abroad is not working; Ukraine has suspended postal services with russia and belarus. To ensure arbitration proceedings, the ICAC sends procedural documents to the parties from russia and belarus by e-mail. At the same time, there is a risk of the abolition of the ICAC decision taken in the absence of a representative of the party notified by e-mail of the date and place of the hearing in the arbitration proceeding. In order to clearly address this issue, the ICAC prepared amendments to its Rules of Procedure and adopted them on 1 July 2022.[14]

13 'Celebrating the 30 years of IACC foundation' <https://pravo.ua/mkas-pry-tpp-ukrainy-vidznachaie-30-littia/> accessed 19 June 2022.

14 <https://icac.org.ua/novyny-ta-publikatsiyi/reglament-icac-zi-zminamy-vid-01-lypnya-2022-roku-vzhe-na-sajti/> accessed 21 June 2022.

4 UKRAINIAN JUDICIARY AND LITIGATION AMID WAR

The right of access to justice for everyone, guaranteed by international treaties and by law,[15] cannot be displaced even amid war.[16] The Ukrainian government and Ukrainians are making great efforts to avoid narrowing or depriving human rights, especially access to justice. Nevertheless, the activity of the judiciary in martial law is a kind of test of strength. The courts function in the so-called 'judicial front', as it was rightly called in the literature.[17]

Today, courts in Ukraine perform justice under martial law with certain restrictions.[18] Ukrainian courts operate only in the absence of threats to the lives and health of the participants and court staff. Only sheer impossibility led to the termination of some Ukrainian courts and changes of territorial jurisdiction. Court staff went to great lengths to preserve court archives and records. The issues of the regulation of the work of judges and court staff were also analysed. The last parts deal with litigation, e-justice, and free legal aid – an essential part of access to justice. As a result, some interim conclusions are provided on the concept of justice amid wartime.

During its independence, Ukraine has formed an independent system of the judiciary, the development of which was prompted by the war a century ago.[19] At the time of the illegal invasion, more than six hundred local courts, appellate courts, and a Supreme Court as a court of cassation functioned in Ukraine.[20] The invasion of Ukrainian territory has inflicted losses, including courthouses and court staff. Since 24 February, justice has been paralysed in cities such as Chernigiv, Kharkiv, Kherson, Mariupol, and others.

The reasons for terminating courts activities are different, but we can sort them into two groups: the destruction of the court building (six courts have been completely destroyed or significantly damaged in Ukraine) and/or occupation by russian troops of territories where the courts are located. These criteria are significant for further court activities and general recommendations. For example, the building of the Kharkiv Court of Appeal was totally destroyed. Therefore, there is no possibility of administering justice properly.

To prevent the collapse of justice in Ukraine, the Supreme Court began to issue orders in March to change the territorial jurisdiction of courts under martial law after the changes of the Law 'On Judiciary and the Status of Judges'[21] by the Parliament of Ukraine.

15 Universal Declaration on Human Rights <https://www.un.org/en/about-us/universal-declaration-of-human-rights> accessed 21 June 2022; European Convention on Human Rights <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 21 June 2022.

16 It is important to add that Ukraine decided to derogate the Convention and Declaration <https://tyzhden.ua/News/136871> accessed 21 June 2022. Russia is not a member state of the Council of Europe <https://www.coe.int/en/web/portal/war-in-ukraine> accessed 21 June 2022; Ukraine derogation from European Convention on Human Rights in 2015 <https://www.coe.int/en/web/portal/news-2015/-/asset_publisher/9k8wkRrYhB8C/content/ukraine-derogation-from-european-convention-on-human-rights> accessed 21 June 2022.

17 O Uhrynovska, A Vitskar, 'Administration of Justice during Military Aggression against Ukraine: The "Judicial Front"' 2022 3 (15) Access to Justice in Eastern Europe. 1-10 DOI: https://doi.org/10.33327/AJEE-18-5.3-n000310

18 The Decree of the President of Ukraine No 64/2022 'On the imposition of martial law in Ukraine' <https://www.president.gov.ua/documents/642022-41397> accessed 29 March 2022. In English, see <https://www.president.gov.ua/en/news/prezident-pidpisav-ukaz-pro-zaprovadzhennya-voyennogo-stanu-73109> accessed 29 March 2022.

19 See more in I Izarova, 'Judicial Reform of 1864 on the Territory of the Ukrainian Provinces of the Russian Empire and Its Importance for the Development of Civil Proceedings in Ukraine' (2014) 2 (4) RLJ 114-128.

20 <https://court.gov.ua/sudova-vlada/sudy/>.

21 Law of Ukraine No 1402-VIII 'On Judiciary and the Status of Judges' of 2 June 2016 <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 19 June 2022.

As stated by the Head of the Supreme Court in his interview,[22] it was a hard decision to make: human lives are always the priority, and when considering the jurisdiction, we also had to take into account the place of the court (city or a village) and the appropriate region for appeals. During the first days of the war, 30-40 courts changed their jurisdiction.

Every year, Ukrainian courts consider approximately 4 million cases.[23] So, we have a great number of cases pending in courts, and it is easy to imagine how many of them were under consideration during the invasion. Ukraine has not yet fully implemented an e-justice system, and it is not enough to preserve the judicial decisions in the Unified State Register for the full and proper administration of justice.

Today, full access to this Register, as well as to the open services of 'Status of proceedings' and 'List of cases under consideration' on the portal of the Judiciary of Ukraine, is suspended. The reasons for this are clear: illegal access to the full court tools of this Register could provide enormous information about Ukrainian citizens, properties, state bodies, and even the military.

In March, recommendations were issued[24] and accordingly, each chairman and judge had to act and remove court cases, especially pending cases, or at least the most important cases (criminal cases, cases against minors, etc.) or try to place records in safes in the court. It was also recommended to digitalise records and copy the contents of the servers as soon as possible. At the same time, this procedure cannot always be applied, as, in some cases, the seizure of the territories of the courts was too fast. Court staff were simply not able to comply with these requirements in a timely manner. For example, there is a case of fully preserved court records in a destroyed building of the Borodianka District Court of the Kyiv region. In another case, the transportation of court records was heroically carried out by a judge of one of the courts, significantly endangering his life.[25]

The efforts to stabilise the work of the entire judicial system in Ukraine were amazing. On 3 March 2022, a law was adopted by Parliament that granted the power to change jurisdiction to the Chairman of the Supreme Court.[26] This case showed all of us how fragile our judiciary is. The judicial community united, and the Council of Judges of Ukraine issued recommendations on the work of courts under martial law.[27] They advised the transfer of all available employees to remote work, determined the minimum number of persons to be present in the court building during the working day, and organised a rotation of judges and court staff.

22 The interview of the President of Supreme Court <https://suspilne.media/222932-suddam- nebezpecno-viizdzati-gumanitarnimi-koridorami-pravosudda-v-ukraini-pid-cas-vijni/> accessed 29 June 2022; The interview of the Office of President's staff <https://www.dw.com/uk/yak-pratsiuie- sudova-systema-ukrainy-v-umovakh-viiny/a-61294651> accessed 29 June 2022.

23 <https://court.gov.ua/inshe/sudova_statystyka/>.

24 The Order 'On approval of the Procedure for evacuation, storage and destruction of documents in a special period 2019' <https://zakon.rada.gov.ua/laws/show/z1132-19#Text> accessed 29 March 2022; The Order of the President of the Supreme Court 'Recommendations to the courts of first and appellate instance in case of seizure of the settlement and / or court or imminent threat of its seizure' of 13 March 2022 <https://ips.ligazakon.net/document/view/vss00828?utm_source=jurliga.ligazakon.net&utm_medium=news&utm_content=jl03&_ga=2.65166062.1751405986.1648305523- 239448448.1648305523> accessed 29 March 2022.

25 O Khotynska-Nor, A Potapenko, 'Courts of Ukraine in Wartime: Issues of Sustainable Functioning' (2022) 31 Revista Jurídica Portucalense 218-240 https://revistas.rcaap.pt/juridica/article/view/27385 accessed 30 July 2022.

26 The Law of Ukraine 'On the Judiciary and the Status of Judges' <https://zakon.rada.gov.ua/laws/show/1402-19#Text> accessed 29 March 2022.

27 <http://rsu.gov.ua/ua/news/usim-sudam-ukraini-rsu-opublikuvala-rekomendacii-sodo-rooti-sudiv-v-umovah-voennogo-stanu>.

According to interviews and our own data, the court staff in Ukraine gathered, and many temporarily displaced judges and their families were welcomed by our Polish and Lithuanian colleagues and by colleagues from the west of Ukraine. Exact data is still not available, but the judiciary has tried to replace judges appropriately, maintaining their guarantees and safety measures. The most incredible violation happened to a judge of the Chernigiv court when her car was stopped, and her whole family was shot after she mentioned her status as a judge.

The next challenge Ukrainian courts faced during wartime was how to continue to consider cases and perform justice. Firstly, we have to differentiate between courts that can continue to work properly, without threats of invasion, and those that are threatened or under occupation.

Many litigants are not able to participate in court hearings due to their joining the Armed Forces of Ukraine, territorial defence, or voluntary military formations and for other reasons, or may not appear in court due to danger to life. The notifications of participants during the war became a challenge, and this marks the difficulty of guaranteeing the right of a person to a fair trial.

In order to organise the judicial case law and the everyday work of courts and ensure the proper administration of justice in wartime, the Council of Judges of Ukraine issued recommendations.[28] According to these recommendations, the courts, if possible, should: postpone cases (except for urgent cases) and withdraw them; set or postpone deadlines, if possible, at least until the end of martial law; split cases into urgent and not, and cases that are not urgent should be considered only with the written consent of all participants in the proceedings; use videoconferences for court hearings, even if a party might attend the videoconference from outside the court.

Access to courts cannot be properly provided without the right to legal aid. Free legal aid – the provision of legal services guaranteed by the state and financed from the State Budget of Ukraine – is particularly important.[29] In the last few years, Ukraine's free legal aid system has been constantly developed, as evidenced by the large number of state-of-the-art services that will help people contact BPD specialists and lawyers.[30] Among the free legal services, it is worth mentioning the apps for mobile devices. This very convenient and important service demonstrates a modern approach to solving legal problems amid the war. The WikiLegalAid legal advice platform is the fastest way to receive legal information, as it provides ready-made advice on many legal issues. Ukraine takes into account the experience of other countries that also underwent hostilities and developed their own free legal aid services.

5 ENFORCEMENT OF JUDICIAL DECISIONS ON THE OCCUPIED TERRITORY IN UKRAINE

Since 2016, Ukraine has provided a dual system of enforcement of decisions, which is represented by the bodies of the Department of State Executive Service with its bodies and private executors.

28 <http://rsu.gov.ua/ua/news/usim-sudam-ukraini-rsu-opublikuvala-rekomendacii-sodo-rooti-sudiv-v-umovah-voennogo-stanu>.

29 Law of Ukraine No 3460-VI 'On free legal aid' of 2 June 2011 <https://zakon.rada.gov.ua/laws/show/3460-17#Text> accessed 19 June 2022.

30

In general, as of 1 January 2022, 22% of enforcement proceedings (624,287 enforcement documents) were processed by private executors, which were subject to enforcement at the beginning of this year, amounting to almost UAH 150 million, while bodies of the State Enforcement Service processed 2,177,755 enforcement documents worth UAH 345,255 million.[31] This is the array of cases that actually existed at the time of the beginning of the war, most of which cannot be enforced today because of the occupation of the territories of Ukraine and related circumstances.

5.1 Obstacles impeding commencement and termination of enforcement proceedings on the occupied territories and solutions

As a result of the annexation in 2014 of the Autonomous Republic of Crimea, parts of the Luhansk and Donetsk regions, it was virtually impossible to enforce decisions in these administrative and territorial units. Departments of the executive service found themselves in a situation where they were forced to leave pending enforcement proceedings, where the authorities suspended their powers, and were unable to remove documents in the course of moving out of the territory not controlled by the Ukrainian authorities. Therefore, according to the Order of the Ministry of Justice of Ukraine,[32] the enforcement of decisions on debtors located in the temporarily occupied territory (these were at that time Donetsk, Horlivka, Debaltseve, Dokuchaievsk, Yenakiieve, Zhdanovka, Makiivka, Luhansk, Alchevsk, Pervomaisk and others,[33] where more than 23 departments of the state executive service were located), began to be carried out by enforcement agencies in the Kherson region. Today, after the invasion on 24 February 2022, the situation has worsened, and even more of the territory of Ukraine was annexed, including the majority of the Kherson region. As a result, no department operates in the territories temporarily out of Ukraine's control, and private executors cannot work there. Thus, there was a need for a change of approach to address both this and other issues regarding the execution of decisions in general under martial law, not only in the occupied territories but also in connection with their occupation, as executors cannot continue their activity, debtors cannot execute the decisions, and accordingly, debt collectors cannot resolve their claims.

Therefore, as a result of armed aggression, for the period until the cessation or abolition of martial law on the territory of Ukraine, the first measure that was applied immediately on 24 February prohibited enforcement proceedings and enforcement measures in administrative and territorial units temporarily occupied due to russian aggression.[34] In connection with the justified introduction of this ban, a number of issues must be urgently addressed, including the optimisation of the rules for presenting enforcement documents.

Therefore, in order to enable the executors from these territories to carry out their activity, as well as to meet the claims of debt collectors against debtors residing or registered in these

31 Association of Private Executers of Ukraine, 'Official page' <https://www.facebook.com/apvu.com.ua> accessed 21 June 2022.

32 Order No 476/5 of the Ministry of Justice of Ukraine 'On Amendments to the Instruction on the Organization of Enforcement of Decisions' of 7 February 2020 <https://zakon.rada.gov.ua/laws/show/z0690-20#Text> accessed 19 June 2022.

33 Order No 1085-r of the Cabinet of Ministers of Ukraine 'On approval of the list of settlements on the territory of which public authorities temporarily do not exercise their powers, and the list of settlements located on the line of contact' of 7 November 2014 <https://zakon.rada.gov.ua/laws/show/1085-2014-p#n8> accessed 19 June 2022.

34 Law of Ukraine No 2129-IX 'On Amendments to Section XIII "Final and Transitional Provisions" of the Law of Ukraine on Enforcement Proceeding' of 15 March 2022 <https://zakon.rada.gov.ua/laws/show/2129-20#Text> accessed 19 June 2022.

territories, it is necessary to change the rules for the presentation of enforcement documents and determine the place of enforcement. To do this, the binding obligation to commence enforcement proceeding exclusively at the place of residence of the debtor or location of his/her property or work shall be cancelled, and it shall be necessary to introduce the principle of extraterritoriality so that the debt collector could choose any executor anywhere, regardless of the location of the debtor or his/her property. Moreover, after the commencement of the enforcement proceeding, the executor still has the right to perform enforcement actions in the territory under the jurisdiction of Ukraine. The problems with proving the location of the debtor or his/her property have been observed before, and now, it will be even more difficult if he/she is a 'temporarily displaced person' or may even have gone abroad but owns the property located in the occupied territories. Thus, such innovations are justified to provide enforcement of decisions and support collectors.

In addition, since the beginning of the war, in order to ensure data protection and prevent unauthorised use of registers by private and state executors and avoid the violation of rights of the parties to the enforcement proceedings, the National Information Systems have temporarily blocked access to the Automated System of Enforcement Proceedings (ASEP) – a computer program that collects, stores, records, makes searches, generalises, and provides data on enforcement proceedings and ensures the formation of the Unified Register of Debtors and protection against unauthorised access. But since 18 March 2022, the work of the Unified Register of Debtors was restored, and it became possible to obtain information on debtors against whom enforcement proceedings are registered.

However, only the Order of the Ministry of Justice of Ukraine of 4 April 2022[35] regulated the issue of connecting executers to the ASEP in martial law and the Unified Register of Private Executors of Ukraine in wartime at the individual request of each executor by sending a written notice to the State Executive Service of the Ministry of Justice of Ukraine. However, so far, no such permit has been issued to any private executor – on the contrary, additional requirements are being set for this, even though all state executors received such permits immediately.

Due to the lack of access to the ASEP and their offices, all private executors, as well as state executors, from the occupied territories cannot:

1) continue to enforce decisions, namely, to identify certain types of property, seize it, and transfer it for sale and conduct such sales;

2) terminate enforcement proceeding in cases of independent execution of the decision by the debtor with the removal of the restrictive measures that have been previously taken against him/her (exclude data on him/her from the Unified Register of Debtors, cancel seizures of property, cancel temporary restrictions on the right to travel abroad);

3) return the enforcement documents (including for re-presentation to another executor in the unoccupied territory);

4) interact with various bodies through ASEP.

As one of the options, the community of private executors submitted a proposal to transfer initiated proceedings in the occupied territories to executors from other executive districts who are ready to start work, which necessitates the procedure for suspension of the activity with subsequent replacement of the private executor, even in the presence of pending enforcement proceedings.

35 Order No 1310/5 of the Ministry of Justice of Ukraine, 'Some issues of access to the automated system of enforcement proceedings and the Unified Register of Private Executors of Ukraine during martial law' of 4 April 2022 <https://zakon.rada.gov.ua/laws/show/z0381-22#Text> accessed 19 June 2022.

For example, a mechanism for settling such cases to continue the interaction of debtors from the temporarily occupied territories with other state executive services at their new location is already being worked out. Thus, despite the fact that according to the law, enforcement proceedings are not subject to transfer or closure by any other district, it is considered permissible for such a debtor to apply to the state executive service from another area to enforce the decision[36] and, accordingly, such enforcement proceedings will be closed if the debt is paid, and coercive measures will be lifted (as the restriction on the right to travel abroad).

It is also worth considering the possibility of a private executor from the occupied territories to change the location of the office, as well as the executive district, in a simplified manner, even in the presence of pending enforcement proceedings. Prior to the war, the issue of proportionality of the number of private executors in a region was acute. So, when authorising their relocation to another region, it is possible to introduce quotas for their number in order to evenly provide such specialists in all areas.

5.2 Introduction of other restrictive measures with regard to decision enforcement

Almost immediately after the invasion, in order to ensure the protection of national interests in future lawsuits of Ukraine, a moratorium (ban) was established on the enforcement of, *inter alia*, compulsory, monetary, and other obligations, the creditors (collectors) for which are the russian federation or persons associated with the aggressor state.[37]

According to another amendment by this Law in the field of enforcement, for the period until the cessation or abolition of martial law in Ukraine:

- Individuals may carry out expenditure transactions from accounts seized by the state executive service or private executors without taking into account its seizure, provided that the amount of recovery under the enforcement document for such a person does not exceed 100 thousand hryvnias; and for legal entities – debtors may carry out such transactions exclusively for payment of wages in the amount of not more than five minimum wages per month per employee, as well as payment of taxes, fees, and a single contribution to the obligatory state social insurance;
- Application of recovery on wages, pensions, scholarships, and other income of the debtor shall be terminated (except for decisions on the recovery of alimony and decisions for debtors that are citizens of the russian federation).

Subsequently, Bill No. 7317 'On Amendments in Enforcement of Decisions during Martial Law' of 26 April 2022[38] was already adopted on 12 May 2022 but was vetoed by the President of Ukraine to ensure the country's defence capability. The Bill envisaged a ban

36 Order No 2297/5 of the Ministry of Justice of Ukraine 'On amendments to some normative legal acts of the Ministry of Justice of Ukraine' of 9 June 2022 <http://search.ligazakon.ua/l_doc2.nsf/link1/RE37957.html> accessed 19 June 2022.

37 Law of Ukraine No 2129-IX 'On Amendments to Section XIII "Final and Transitional Provisions" of the Law of Ukraine on Enforcement Proceeding' of 15 March 2022 <https://zakon.rada.gov.ua/laws/show/2129-20#Text> accessed 19 June 2022.

38 Draft Law No 7317 'On Amendments to Certain Laws of Ukraine on Enforcement of Judicial Decisions, Decisions of Other Bodies (Officials) during Martial Law' of 26 April 2022 <https://itd.rada.gov.ua/billInfo/Bills/pubFile/12809> accessed 19 June 2022.

on enforcement of decisions on certain critical areas such as electricity, water supply, crop production, animal husbandry, food production, Internet access, vaccine production, space activities, defence industry, military administration, connections, military units, higher military educational institutions, military educational subdivisions of higher education institutions, establishments, and organisations as part of the Armed Forces of Ukraine, and railway transport enterprises.

However, due to the threat of artificial inclusion of business entities in the cohort of such debtors and the lack of clear criteria for identifying such debtors, the President of Ukraine vetoed this law and stressed the lack of a mechanism of establishment by the executor of the actual activity of the business entity. The record of some type of activity in the state classifier of economic activity may be formal, and the person may not actually be engaged in it, but it enables such a person to evade enforcement of the decision. Therefore, the President of Ukraine reduced the list of such persons exclusively to those debtors who are related to the defence complex and accordingly issued a warning not to extend such a moratorium on enforcement of decisions in the above cases.

The Law of Ukraine No. 7317 of 12 May 2022 also provides for the introduction of a ban on enforcement of decisions with regard to recovery of debts from individuals for housing and communal services. However, during three months of the war, Ukrainians accumulated more than 100 billion in debt for utilities. As a result, the utilities sector is in danger of collapsing, so these restrictions have not yet been introduced, and they are unlikely to be in force for a long time in all territories of Ukraine, in particular where there are no active hostilities.

5.3 Prospects for reducing the number of enforcement documents and scope of work of executors

On 28 February 2022, the Cabinet of Ministers of Ukraine settled some issues of notaries under martial law in its Resolution,[39] prohibiting the execution of writs of execution (notarial deeds that have a dual legal character and are also enforcement documents) under loan agreements that are not notarised, which previously often served as the basis for the initiation of enforcement proceedings. This situation is complicated by the proposals of Bill No. 7317,[40] which prohibits the enforcement of any writs of execution of notaries and only by private executors, which puts them at a disadvantage compared to the state – thus, the President of Ukraine proposed to extend such a ban to all executors. However, the number of non-executed writs of execution of notaries today, namely, 652,652, speaks to how common this way of meeting claims among debt collectors is. Therefore, such innovations are due to the risks of forgery of such enforcement documents, violations of procedures, and incorrect determinations of the amount of debt or its indisputability in order to protect the rights of the debtor, but will lead to a lack of work for executors.

In addition, today, the number of appeals to the court has decreased by 90% compared to the pre-war period, and the number of enforcement documents in this sphere will decrease accordingly. It is also expected that the first court decisions will be enforced no earlier

39 Resolution No 164 of the Cabinet of Ministers of Ukraine, 'Some issues of notary in martial law' of 28 April 2022 https://zakon.rada.gov.ua/laws/show/164-2022-%D0%BF#Text accessed 19 June 2022.

40 Draft Law No 7317 'On Amendments to Certain Laws of Ukraine on Enforcement of Judicial Decisions, Decisions of Other Bodies (Officials) during Martial Law' of 26 April 2022 https://itd.rada.gov.ua/billInfo/Bills/pubFile/12809 accessed 19 June 2022.

than six months, and the number of cases will be ten times less than the executors had in peacetime. And if we subtract from this number of cases a certain percentage of companies that fall under the moratorium introduced by Law No. 7317 and the category of cases under writs of execution, then it will not be economically profitable to engage in the enforcement of decisions in the near future.[41]

Due to the current state of affairs and future prospects, the community of private executors is now forced to look for alternative ways to generate income, in particular, by extending their powers, proposing to include in the list of their permitted types of activity the imposition of fines in favour of the state, the collection of fines, the establishment of facts, especially of damage or destruction of property as a result of military aggression of the russian federation, and determination of the scope of damages. Thus, private executors need proper assistance and parity on the part of the regulator, along with state executors, by providing them with equal conditions of access to procedural means of enforcement and development of additional areas of professional activity to support them and restore Ukraine's economy.

6 LABOR LAW REGULATIONS (RESTRICTIONS OF RIGHTS AND FREEDOMS OF CITIZENS UNDER THE MARTIAL LAW)

The issue of legislative regulation of labour relations during the period of martial law became a real challenge for Ukraine, as it is necessary to solve many problems related to the regulation of employer-employee relations in such a troubled period.

Ukraine has faced many difficulties in the field of labour relations due to martial law. The current crisis in the labour market is the worst in the history of independent Ukraine. The war caused new trends in the labour market and changes in the behaviour of both employers and job seekers. Russia's full-scale invasion has already destroyed approximately half of the labour market in Ukraine. According to the International Labor Organization, Ukraine has lost 4.8 million jobs since the beginning of the war, and the continuation of hostilities could increase this number to 7 million.[42] The State Employment Service indicates that in April, 283,356 unemployed people applied for 25,326 vacancies. That means there were almost 12 people applying for each job.[43]

According to the survey, the number of victims of reduced business activity and unemployment in Ukraine included 52% of respondents. In fact, every second Ukrainian either lost his/her job or was left partially or completely without his/her monthly income. The survey showed that 29.7% of respondents indicated that their company is currently not working at all, and 62% said that they were fired and do not receive a salary. Accordingly, 63.8% noted that they are currently unemployed and actively looking for work, and 71.4% of respondents stated that their income has changed for the worse since the beginning of the war.[44]

Data on the number of people who were forced to leave their homes due to active hostilities and seek shelter in safer regions of the country or abroad are also shocking. Statistics show that 5.4 million people went abroad and another 8 million are internally displaced persons.

41 Association of Private Executers of Ukraine, 'Official page' <https://www.facebook.com/apvu.com.ua> accessed 19 June 2022.

42 <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_844625/lang--en/index.htm>.

43 <https://glavcom.ua/economics/finances/robota-pid-chas-viyni-na-yaki-profesiji-je-popit-846229.html>.

44 <https://budni.rabota.ua/resume-job-search/pro-zvilnennya-zarplaty-ta-volonterstvo-rezultaty-opytuvannya-poshukachiv>.

And although many Ukrainians are returning home, the number of internally displaced persons is increasing due to the active bombing of the eastern and southern regions of the country.[45] These statistical indicators confirm the critical situation of the labour market in Ukraine. This situation required the state leadership to take certain measures. So, changes were made to the legislation as a matter of priority.

Restrictions on the constitutional rights and freedoms of citizens in the field of labour relations were introduced during the period of martial law, in particular, Arts. 43 and 44, which determine that everyone has the right to labour, including the possibility to earn one's living by labour that he or she freely chooses or to which he or she freely agrees. The employment of women and minors for work that is hazardous to their health is prohibited. Citizens are guaranteed protection from unlawful dismissal. The right to timely payment for labour is protected by law (Art. 43). Those who are employed have the right to strike for the protection of their economic and social interests (Art. 44).[46] Such constitutional restrictions were introduced on the basis of the Law of Ukraine 'On Organizing Labor Relations under Martial Law', adopted on 15 March 2022.[47] This act clarifies relevant restrictions of constitutional rights and freedoms and sets out special rules applicable to labour relations to replace the 'normal' rules of the Labor Code of Ukraine. Thereby, during the period of martial law, norms of labour legislation shall not apply in the relations regulated by this law.

This regulatory act introduces changes to the following provisions.

1) Conclusion of an employment contract in martial law

Probation can be set for all employees. However, in accordance with the provisions of the pre-war legislation, probation was not established when hiring: persons who have not reached the age of eighteen; young workers after graduating from professional educational institutions; young specialists after graduating from higher education institutions; persons released from military or alternative (non-military) service; persons with disabilities sent to work in accordance with the recommendation of the medical and social examination; persons elected to the position; winners of competitive selection to fill a vacant position; persons who have completed an internship while being hired away from their main job; pregnant women; single mothers who have a child under the age of fourteen or a child with a disability; persons with whom a fixed-term employment contract is concluded for a term of up to 12 months; persons for temporary and seasonal jobs; internally displaced persons. Probation was also not established when hiring in another area and when transferring to work to another enterprise, institution, or organisation, as well as in other cases provided for by law.

Employers may enter into fixed-term employment agreements with new employees for the duration of martial law or the period of replacement of the temporarily absent employee. This provision may cause a practical problem in the future when two persons apply for the same position: one who worked in the relevant position before the war and another person who performed the relevant work during the martial law period. At the same time, it is not known who the employer will prefer to continue the employment relationship.

2) Transfer and change of significant working conditions under martial law

Transfer to another job at the same enterprise, institution, or organisation, as well as transfer to another enterprise, institution, or organisation, or to another location together with the

45 <https://data.unhcr.org/en/situations/ukraine>.

46 Constitution of Ukraine <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> accessed 19 June 2022.

47 Law of Ukraine No 2631-IX 'On Organizing Labor Relations under Martial Law' of 15 March 2022 <https://zakon.rada.gov.ua/laws/show/2136-20#Text> accessed 19 June 2022.

enterprise, institution, or organisation was allowed only with the consent of the employee. But according to the Law of Ukraine 'On Organizing Labor Relations under Martial Law', during martial law, the employer has the right to transfer the employee to another job not stipulated in the employment contract without his/her consent (except for transfer to another location where active hostilities continue), if such work is not contraindicated for the employee's health, to prevent or eliminate the consequences of hostilities, or other circumstances that threaten or may threaten the lives or normal living conditions of people, with wages for work performed not lower than the average salary for previous work. Labour laws on the notification of an employee about a change in significant working conditions also do not apply. It should be pointed out that in pre-war legislation, two months' notification was required.

3) Termination of the employment contract at the initiative of the employee

In accordance with Art. 38 of the Labor Code of Ukraine, the employee had the right to terminate the employment contract, concluded for an indefinite period, by notifying the employer two weeks in advance. The Law of Ukraine 'On Organizing Labor Relations under Martial Law' establishes that in connection with hostilities in the area of the employer's location, the employee may terminate employment agreements on their own without a two-week notice period.

4) Termination of the employment contract at the initiative of the employer

Art. 43 of the Constitution of Ukraine guaranteed citizens protection from unlawful dismissal. At the same time, in accordance with the Labor Code, the dismissal of a person during the period of temporary incapacity for work, as well as during the period of the employee's leave, was considered illegal. In addition, the termination of the employment contract at the initiative of the employer was allowed for certain reasons (for example, due to absenteeism, incompatibility of the employee to the position held, etc.) exclusively with the prior consent of the trade union organisation of which the employee was a member. Under the current conditions, these warranties are void. Dismissal at the initiative of the employer during the period of his/her temporary incapacity for work, as well as during the period of the employee's leave, is allowed. The trade union's consent to dismissal of employees is only needed for dismissal of members of the trade union's elective bodies (rather than for all trade union members).

5) Involvement of certain categories of workers

Art. 43 of the Constitution establishes that the employment of women and minors for work that is hazardous to their health is prohibited. Now, it is allowed to use women's labour (except for pregnant women and women with a child under one year of age) with their consent in heavy work and work with harmful or dangerous working conditions, as well as underground work.

6) Establishment and accounting of working time and rest time; leaves

Current legislation states that a normal working week is 60 hours or 50 hours for employees with reduced working hours. The beginning and the end of daily work (shift) shall be determined by the employer only. Previously, a work week was 40 hours or 36 hours, respectively. Basic paid leave is granted for only 24 calendar days for all categories of employees. For example, for pedagogical workers, it used to be 56 days. Herewith, employers may refuse to grant leave to critical infrastructure employees. On the other hand, unpaid leave may be granted for the entire period of wartime (it used to be 15 days of unpaid leave per year).

7) Salary

Again, Art. 43 of the Constitution provided the right to timely payment for labour is protected by law. By the laws of wartime, salaries must be paid on the terms of the employment agreement, though such payment may be delayed if the employer is unable to pay salary due to hostilities. The relevant provision of the current legislation can cause significant abuse by the employer. Since martial law has been imposed on the entire territory of Ukraine, employers can delay or refuse to pay salaries at all, citing difficulties caused by martial law. At the same time, from the point of view of the legislation, this will not be considered a violation and will exempt such dishonest employers from liability.

8) Suspension of the employment agreement

Suspension of the employment agreement is a novel amendment to the current legislation introduced by the Law of Ukraine 'On Organizing Labor Relations under Martial Law'. Suspension of an employment agreement is defined as a temporary termination by the employer of providing the employee with work and a temporary termination of the employee's performance of work under the concluded employment contract. The employment contract may be suspended due to military aggression against Ukraine that excludes the possibility of providing and performing work. Termination of the employment contract does not entail termination of employment. The practical problem today is the lack of clear recommendations regarding the mechanism for implementing this procedure, as well as in the future regarding the process of restoring such legal relations.

Amending the current legislation is not the only step taken by the government to stabilise and improve the sphere of labour relations. Such stabilisation measures also include the following:

- the relocation of business (400 companies have been relocated, 216 of them have already resumed work, and 500 companies have been selected for relocation and started the process);[48]
- a one-time payment to all citizens affected by hostilities, monthly payments to internally displaced persons, and compensatory payments to persons receiving internally displaced persons;
- reducing the tax burden on business;
- compensation payments to entrepreneurs who hire internally displaced persons;
- changes to the legislation in accordance with the requirements of the time (for example, the Law of Ukraine 'On making changes to some legislative acts of Ukraine on strengthening the protection of workers' rights').

7 CONCLUSIONS

Martial law has affected the exercise of ownership rights by individuals, legal entities, and non-residents. During the period of martial law, the constitutional rights and freedoms of persons and citizens may be restricted, in particular, the right to inviolability of housing and the right to own, use, and dispose of property and the results of intellectual and creative activities, temporary restrictions on the rights and legitimate interests of legal entities may be introduced, measures of the martial law regime may be introduced and implemented. The law also provides the possibility of forced alienation of property for reasons of public

48 <https://www.dw.com/uk/relokatsiia-na-zakhid-ukrainy-yak-biznes-riatuie-vyrobnytstvo-vid-viiny/a-61669236>

necessity. Additionally, martial law made significant adjustments to the work of the ICAC. In particular, changes to the regulations of ICAC were adopted on 1 July 2022 in order to regulate the activities of arbitration during martial law.

Access to justice is an integral element of a contemporary democratic state governed by the rule of law. Though the idea of balance of state power provides less possibility to implement the right to a fair trial properly amid war and a pandemic, some of the current challenges make the proper administration of justice amid these obstacles almost impossible. Nevertheless, challenges of access to justice cannot replace the very concept of human rights protection. Therefore, the idea of a more flexible approach and wider discretion of judicial power should give us grounds for changes and full human rights protection.

It should also be noted that for the period of introduction of martial law from 24 February 2022, it was prohibited to initiate enforcement proceedings and take measures to enforce decisions in the territory of administrative and territorial units that are temporarily occupied due to military aggression. Therefore, in order to enable executors from these territories to carry out their activity, as well as to meet the claims of debt collectors against debtors residing or registered in these territories, it is necessary to simplify the rules for presenting enforcement documents all over the country.

Due to the lack of access to the Automated System of Enforcement Proceedings (ASEP) and their offices, private executors and state executors from the occupied territories also cannot: 1) continue to enforce decisions; 2) terminate enforcement proceedings in case of independent execution of the decision by the debtor with the removal of the restrictive measures; 3) return the enforcement documents. Settling this problem may be possible after connecting private executors to the ASEP and by distributing pending enforcement proceedings between private executors and allowing the transfer of open enforcement proceedings in the occupied territories to private executors from other executive districts ready to start working. It is also necessary to envisage the right of private executors from the occupied territories to change the location of the office and executive district in a simplified manner, as is already allowed for State Executive Service bodies. Due to the prospect of introducing a moratorium on enforcement of some decisions, a ban on execution of notaries' writs of execution, and forecasts of a decrease in the number of enforcement documents, the issue of extending powers of private executors is also relevant.

Russia's military aggression against Ukraine has also caused significant changes and restrictions on labour rights and guarantees. Thus, the Law of Ukraine of 15 March 2022 'On the Organization of Labor Relations in Martial Law' introduces restrictions on the constitutional rights and freedoms of man and citizen under Arts. 43-44 of the Constitution of Ukraine. In particular, such restrictions concerned the conclusion of employment contracts (the employer may enter into fixed-term employment contracts with new employees for the period of martial law or for the period of replacement of a temporarily absent employee); the transfer and change of significant working conditions (the employer also has the right to transfer the employee to another job without his/her consent the possibility of using women's labour with their consent in heavy work and work with harmful or dangerous working conditions, as well as underground work); the termination of employment contracts (the employee may terminate the employment contract on his/her own initiative without two weeks' notice); the establishment and accounting of working hours and rest time (an increase in working hours to 60 hours per week (50 hours per week with reduced duration)); the reduction of annual paid leave to 24 calendar days for all categories of workers (the employer is released from liability for violation of the terms of payment of wages if it happened as a result of hostilities); and other issues. A novelty for the current labour legislation was the possibility of suspending the employment contract. It should be noted that suspension of the employment contract does not entail the termination of employment. The current labour

legislation provides labour guarantees for persons drafted into the Armed Forces of Ukraine, as well as for persons who have joined the ranks of territorial defence.

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REFORMS FORUM NOTE

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Reform Forum Note

PROTECTING THE RIGHTS AND INTERESTS OF CONSUMERS OF NON-BANKING FINANCIAL SERVICES: IS AN ALTERNATIVE COURT POSSIBLE?

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Submitted on 30 Jan 2022 / Revised 1st 15 Apr 2022/ Revised 2nd **12 Jun 2022** /
Approved 24 Jul 2022 / Published: **15 Aug 2022**

Keywords: *financial services, state regulation of financial services, remedies of consumers of financial services, judicial protection, financial ombudsman*

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The content of this article was translated with the participation of third parties under the authors' supervision. **Managing editor** – Dr. Serhii Kravtsov. **English Editor** – Dr. Sarah White.

How to cite: Shovkoplias H, Dmytryk O, Mazur T, 'Protecting the Rights and Interests of Consumers of Non-banking Financial Services: is an Alternative Court Possible?' 2022 3(15) Access to Justice in Eastern Europe 239–248. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000328

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print) ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

ABSTRACT

This article considers the existing methods of protecting the rights and legitimate interests of consumers of non-banking financial services. Based on the current EU legislation, it is proposed to create the institution of a financial ombudsman as one of the possible alternative ways to protect the rights and interests of the relevant entities. It is emphasised that the financial ombudsman should be at the level of a state body in order to ensure the reliable protection of investors and consumers of financial services and faster response and resolution of problematic situations in disputes of individuals by public authorities.

The authors used the following special legal methods: conceptual-legal, comparative-legal, formal-legal, and others. For example, the comparative-legal method helped the authors compare the existing approaches to consolidation at the regulatory level of ways to protect the rights of consumers of non-banking financial services.

Based on the analysis of existing mechanisms for protecting the rights and legitimate interests of consumers of non-banking financial services and taking into account the experience of the countries of the EU, this article emphasises the relevance and expediency of implementing this suggestion in Ukraine, along with the judicial remedy of subjects of non-banking financial services markets and alternative remedies. In particular, attention is focused on the advantages of the financial ombudsman institution.

1 INTRODUCTION

The National Bank of Ukraine regulates the activities of non-bank financial services market participants: insurers, credit unions, financial companies, and lessors. The regulation of the market of non-banking financial services is carried out in order to comply with financial market participants' legal requirements, ensure equal access to financial services, protect the rights and interests of customers, and control the transparency and openness of the market. The National Bank develops and implements new regulations, taking into account the best international standards and practices.

The regulation of the non-banking financial services market is carried out by the National Bank of Ukraine, taking into account the principles defined by the Law of Ukraine 'On Financial Services and State Regulation of Financial Services Markets'[4] and other Laws of Ukraine. It should be noted that during martial law, the actions of the National Bank of Ukraine as a regulator have been aimed at deregulating the market, the purpose of which is to support market participants and provide an opportunity to focus on core activities.

The consequences of the financial crisis in Ukraine testified to the fact that the level of state regulation in the financial services markets proved to be insufficiently efficient and reliable. Despite the long period of time that has passed since then, the issue of the state's creation and development of systemic and quality regulation in the financial sector of Ukraine remains relevant and problematic.

The global financial crisis, on the one hand, proved to be a 'test for the strength' for Ukraine's financial sector, but on the other hand, it revealed its problems, which were not given enough attention even in the conditions of economic growth. First of all, we will discuss the following negative factors: 1) the low level of capitalisation of financial institutions; 2) the presence of

4 Law of Ukraine 'On Financial Services and State Regulation of Financial Services Markets' No 2664-III (12 July 2001) <https://zakon.rada.gov.ua/laws/show/2664-14#Text> accessed 11 June 2022.

risks and the difficulty neutralising them; 3) the non-compliance of the principles of financial institutions with international standards; 4) the insufficient level of protection of the rights of investors and consumers of financial services.

Ukraine did not have time to recover from the financial crisis, as the war with russia overtook it, significantly complicating the working conditions of non-bank financial service providers.

One of the conditions for the uninterrupted development of any legal relationship is the establishment of the rights and obligations of the subjects of such legal relations, together with the consolidation of guarantees and ways to protect their rights.

It should be noted that the issue of the protection of the rights and legitimate interests of participants in financial services markets is quite relevant. Currently, the national legislation of Ukraine provides various ways to protect the rights and interests of these entities. The protection of the rights and legitimate interests of the parties to the relevant legal relationship is enshrined in the current regulations of each of these participants to take action or apply to the competent state authorities to take action to ensure the inviolability of its rights and legitimate interests, the termination of their violation, and the elimination of the consequences of these violations. Usually, when studying the question of methods of protecting the rights of the subjects of certain legal relations, scholars conclude that rights can be protected both in court and in administrative (pre-trial) orders.

Based on the analysis of various methods of protecting the rights of the subjects of the respective legal relations, we conclude that it is possible to distinguish several groups of methods. These are methods aimed at: (a) recognising the right of the latter, changing or terminating the legal relationship; (b) terminating an act that infringes the right of the subject and enforcing the obligation; (c) restoring its pre-infringement status and making good any damage caused. In fact, there is a classification of methods of protecting rights depending on the purpose of each method and its aim. At the same time, from our point of view, the methods of protecting the rights of non-banking financial services enshrined in the current legislation have a single purpose – to protect the violated right or legitimate interest.

Due to the current situation involving russia's large-scale aggression against Ukraine, the main focus for non-bank financial services market participants is supporting their activities and mobilising resources to quickly address key issues and continue working. To facilitate work in such a difficult situation, the National Bank of Ukraine and the National Commission on Securities and Stock Market of Ukraine have relaxed a number of regulations.

The non-banking financial sector is an important part of the national mechanism for the formation of the country's financial resources, the main component of the entire financial services market. The corresponding development of the market of non-banking financial services in Ukraine is due to the creation and functioning of the current system of control and supervision through the implementation of global financial market standards. At the same time, the problem of developing a comprehensive model of control and supervision in the financial services market and the adaptation and implementation of European legislation to the legislation of our country are insufficiently covered and studied. The financial services market is constantly changing, and this situation requires regular research to address the problem of control and supervision. One of the main problems of control is the integration of Ukraine into the EU.

The problem of control as a form of state regulation of the financial services market, especially in the field of private pension provision, is extremely important, and its solution is necessary and urgent in the current conditions of economic crisis. The study of the forms and means of this type of state control, in our opinion, will solve a number of issues that arise when the relevant public authorities apply the law.

Therefore, the current financial services market of Ukraine needs immediate reform through the introduction of effective control mechanisms, the protection of the rights of investors and consumers of financial services, and the formation of a competitive national financial services market by eliminating disparities in the regulation and development of individual financial services markets.

The most effective way to protect the rights of participants judicially. This conclusion is based on the fact that administrative (pre-trial) procedure does not always allow us to observe the legal rights and interests of plaintiffs. In particular, the Decision of the Zaporizhia District Administrative Court No. 86265431 states that failure to comply with these procedural requirements eliminates the right of the person prosecuted to protect his/her rights and interests in an administrative pre-trial procedure and causes the illegality of the decision of the supervisory authority adopted as a result of the administrative offence.[5] A similar legal position is set out in the decision of the Supreme Court of 28 February 2018 in case No. 826/10418/16.

According to the Recommendations of the Committee of Ministers of the Council of Europe No. R (80) 2 concerning the exercise by the administrative authorities of discretionary powers adopted by the Committee of Ministers at its 316th meeting, the term 'administrative act' means any individual act or decision taken in the exercise of public authority of a nature directly related to the rights, freedoms, or interests of individuals. The term 'discretionary power' means a power that confers on an administrative authority a degree of discretion in its decision-making and enables it to choose from several legally acceptable decisions that it considers most appropriate. The exercise of such authority must take due account of the requirements for effective and efficient management, as well as the interests of third parties and the essential public interests.

Discretionary powers, in a narrower sense, are the ability to act at one's own discretion, within the law, and the ability to apply the law and take specific actions (or actions) among others, each of which is relatively correct (legal).[6]

A similar legal position is contained in the decision of the Supreme Court of Ukraine of 21 May 2013 in case No 21-87a13 and the decision of the Supreme Court of Ukraine of 19 September 2018 in case No. 815/4569/17.[7]

In modern conditions, the need to strengthen the protection of the rights of consumers of non-banking financial services in Ukraine is urgent. The financial crisis that affected the non-banking financial services markets in 2008-2009, the coronavirus pandemic, which began in March 2019, and the hostilities of 2022. The negative consequences of such events indicated the imperfection of consumer protection of financial services in Ukraine. In 2009, the Concept for the Protection of Consumers' Rights of Non-Banking Financial Services in Ukraine was developed, adopted, and approved by the order of the Cabinet of Ministers of Ukraine dated 3 September 2009 No. 1026,[8] which formed the basis for protecting the rights of non-banking financial services consumers. The purpose of this

5 Decision of the Zaporizhia District Administrative Court No 86265431 (10 December 2019) <https://youcontrol.com.ua/ru/catalog/court-document/86265431/> accessed 30 May 2022.

6 Resolution of the Supreme Court on the Cassation Appeal of the National Commission for State Regulation of Financial Services Markets in Case No 818 / 163/16 (22 January 2020) <https://youcontrol.com.ua/ru/catalog/court-document/81816316/> accessed 30 May 2022.

7 Resolution of the Supreme Court in Case No 815/4569/17 (19 September 2018) <https://youcontrol.com.ua/ru/catalog/court-document/815456917/> accessed 30 May 2022.

8 Order of the Cabinet of Ministers of Ukraine Concept for the Protection of Consumers' Rights of Non-Banking Financial Services in Ukraine No 1026 (3 September 2009) <https://zakon.rada.gov.ua/laws/show/1026-2009-%D1%80?lang=en#Text> accessed 11 June 2022.

Concept is to improve the system of consumer protection and ensure its effectiveness, which is implemented by:

1) the improvement of the legal framework on the scope and procedure for mandatory disclosure of information by non-bank financial institutions;
2) the adaptation of national legislation on consumer protection to EU legislation;
3) the coordination of the work of public authorities that regulate the market of financial services for the protection of consumer rights and the introduction of a procedure for assessing compliance with non-banking financial institutions of consumer rights;
4) the implementation of EU norms on consumer protection infrastructure (creation of consumer protection associations, the introduction of the ombudsman institution, and other mechanisms for pre-trial consideration of complaints and dispute resolution);
5) the introduction of a compensation mechanism in the financial services markets;
6) the improvement of the mechanism of state regulation of activity financial intermediaries;
7) the implementation of state-targeted training programs on consumer protection of state bodies' regulation of financial services markets;
8) the formation of separate units for the protection of consumer rights in the structure of public authorities that carry out state regulation of the financial services market;
9) the introduction of educational programs for consumers;
10) informing the public via public authorities;
11) providing information to the population through the media information on services of non-banking financial institutions and possible risks to consumers;
12) the introduction of international accounting and reporting standards;
13) the disclosure of information about the real, ultimate owners of non-bank financial institutions.

As noted by R.Y. Bacho, the current practice of non-banking financial services markets emphasises the insufficient level of consumer protection, imperfect mechanisms for the implementation of the rights of the latter, and their low financial and legal education.[9]

The system of protection of the rights of consumers of financial services in the EU occupies a leading place in the economic policy of these countries. A proper protection mechanism is a guarantee of public confidence in the financial market as a whole. The key principles of consumer protection in the EU are: 1) the principle of responsible and fair treatment of all categories of consumers of financial services; 2) the creation and implementation of an effective mechanism for pre-trial dispute resolution in the financial services market; 3) providing and disclosing the appropriate amount of information in the provision of financial services.

2 THE FINANCIAL OMBUDSMAN: ESSENCE AND SIGNIFICANCE IN RESOLVING DISPUTES

One of the main means of protecting the rights and legitimate interests of financial services clients in the non-banking financial services market of Ukraine is through the introduction of a financial ombudsman.

The term 'ombudsman' (a person authorised to deal with complaints) originated in 1809 in Sweden, when the Swedish parliament created an institution to protect the rights of

9 RJ Bacho, Markets of non-banking financial services: development regulation (institutional and analytical aspects) (RIK-U LLC Publishing House 2016) 282-283.

citizens who opposed the government in the courts. The idea of introducing the position of ombudsman gradually spread to many other states, belonging to the systems of both continental and common law.[10] Today, the institution of national ombudsmen is an integral part of the legal system in more than 100 countries, including the European Community, Australia, New Zealand, Great Britain, and others.

The ombudsman's out-of-court dispute resolution procedure was first introduced in Germany in July 1992 by the Union of German Banks (VdB). Since then, the fast and unbureaucratic procedure for dealing with customer complaints by the ombudsman has not only gained a recognised authority in society but has also become an integral part of the overall concept of working with customers of German private banks. Subsequently, institutes modelled on the German ombudsman became widespread in other countries, and not just European ones. Today, the institution of a financial system ombudsman operates in many countries (Germany, Britain, France, the Netherlands, Denmark, Sweden, Norway, Portugal, Italy, Ireland, Belgium, south Africa, Lithuania, Hungary, Poland, Pakistan, Sri Lanka).

The first institution of the financial system ombudsman in the CIS countries was established on 24 January 2009 in the Republic of Armenia in accordance with the law 'On the conciliator of the financial system'. In 2009, the Office of the Financial Ombudsman of Armenia received 378 complaints about financial institutions. Of the requirements accepted for consideration, 61% were resolved in favour of consumers, and financial institutions compensated customers more than 26 million drams (about 2 million roubles). In addition, in the Republic of Kazakhstan, there is an insurance ombudsman.

The main features of the German system are the following: the institute operates in the banking or other financial (e.g., insurance ombudsman) sector; there is only one ombudsman; the position is funded by the banks or other associations at which it is established; the ombudsman is appointed by the Board of the German Banks Union; the ombudsman only deals with consumer complaints; the ombudsman's decision is binding to the parties of the dispute if the amount of the dispute is under EUR 10,000.[11]

An ombudsman in the financial sphere (financial ombudsman) is an independent person who resolves out-of-court disputes between organisations providing financial services and their clients. Most often, ombudsmen resolve disputes that have arisen in the banking sector, the securities market and insurance services. The ombudsman, also considered a consultant who facilitates the settlement of claims, has the right to refuse to consider the case and, when accepted for consideration, to investigate the problem, provide explanations and recommendations and, as a result, make a decision.[12]

It should be noted that at one time, there were concerns about the proper functioning of the ombudsman. For example, I. Bezzub emphasises that the introduction of a financial ombudsman and the consideration of cases and appeals against decisions in this manner may lead to the substitution of court proceedings for disputes by the 'financial ombudsman', which is a direct violation of the Constitution of Ukraine and procedural codes. In particular, Bezzub equates the 'weight' of the financial ombudsman's decisions with the decisions of such bodies as courts, notaries, state executors, etc., which, unlike the ombudsman, are criminally liable for the decisions made. There may also be a disregard for the basic principle of the division of the parties to the dispute into the defence, the prosecution, and the body

10 G Zhukovskaya, R Oleynyuk, 'Banking ombudsman: the need for today' (2005) 8 (114) Bulletin of the National Bank of Ukraine 32-33.

11 R Khanyk-Pospolitak, 'Financial Ombudsman: Towards an Effective Customers Rights' Protection in Ukraine' (2019) 3 (2) Access to Justice in Eastern Europe 54.

12 NV Tkachenko, 'Organization of the ombudsman in ensuring the financial stability of the insurance market' (2009) 1 (20) Economy and Region 198.

dealing with the dispute. The financial ombudsman is an attempt to combine the functions of both the court and the bar.[13]

However, we believe that providing an effective, fast, and accessible way to resolve disputes with consumers of financial services will help restore consumer confidence in the financial market and its growth; reduce the burden on the judicial system of Ukraine; reduce the costs of consumers and financial institutions to resolve disputes, compared to litigation; strengthen the protection of the rights of consumers of financial services and increase their level of financial awareness; increase lending and create a basis for economic growth.

In the law of developed countries regarding the mechanism of protection of citizens' rights, the main tasks of the institution of ombudsman for financial markets are: (a) the prompt resolution of disputes between financial service providers and their consumers (recipients), (b) the development of recommendations to financial institutions on procedures and best practices, (c) explaining to consumers the terms of contracts and the practice of enforcing them; (d) identifying the main unfair terms of contracts that are frequently applied and stating the legal consequences of such contracts.

As for Ukraine, it should be noted that the institution of the ombudsman in our country is underdeveloped and is far from the level of European countries; therefore, it needs further development.

Only the Concept of consumer protection of non-banking financial institutions, approved by the order of the Cabinet of Ministers of 3 September 2009 No. 1026 stressed the need to create a modern infrastructure for consumer protection, taking into account the practice of EU countries: the creation of consumer protection associations, the introduction of the ombudsman, other mechanisms for pre-trial complaints and dispute resolution, etc. This mechanism should be 'one of the tools for out-of-court settlement of disputes in the relationship between consumers of financial services and professional market participants'. Support for the establishment of the institution of a 'financial ombudsman' was also mentioned in the 'Strategy of the development of the financial sector of Ukraine until 2015'.[14]

The main purpose of creating such an institution in Ukraine is to consider consumer complaints to financial institutions without the use of complex and lengthy court proceedings. This simplifies, speeds up, and, most importantly, reduces the cost of solving financial problems. In addition, the introduction of this institution will significantly reduce the burden on the judiciary and increase the population's level of confidence in the financial services market. This is an alternative to litigation and makes it easier and cheaper to protect the rights of consumers of financial services. The main directions of state policy and key measures for the development of the financial sector of Ukraine in accordance with the 'Strategy of the financial sector of Ukraine until 2025' are strengthening the protection of the rights of consumers and investors of financial services.

In our opinion, such tasks show that, along with consumer protection, the financial ombudsman will help increase confidence in financial institutions. Regarding the determination of the place in the system of consumer protection bodies, the institution of the ombudsman is considered as an additional but not an alternative means of legal protection in the system of mechanisms of human rights activities.[15]

13 I Bezzub, 'What financial ombudsman does Ukraine need: European experience' (2018) 8 (152) Public Opinion on Lawmaking 17.

14 Project of the 'Strategy of the development of the financial sector of Ukraine until 2015' <http://www.kbs.org.ua/ files / dpee1> accessed 30 May 2022.

15 Tkachenko (n 12) 199.

For example, the main goals of the financial ombudsman in the regulations of some countries are the following, which do not exhaust all measures of state regulation in the field of legal relations:

- to provide an accessible, simple, and fair out-of-court procedure for resolving civil disputes between credit institutions and their customers;
- to provide advisory assistance to clients and explain their rights and responsibilities;
- to form a reasonable practice of application of norms of the legislation;
- to form customs of business turnover, including for the purpose of further improvement of the legislation;
- to conduct public outreach on the application of financial services legislation.

Therefore, the financial ombudsman should be a body whose main purpose is to protect consumers of financial services out of court, whose members should be elected, in our opinion, in the current context of building financial services markets, from the Department of Supervision, and the supervision of non-bank financial institutions created in the future. It would be appropriate to introduce a provision that the consideration of disputes by the financial ombudsman is possible only in relation to those financial institutions that have officially joined the institution. Joining the institution of the financial ombudsman can be voluntary for financial institutions and be formalised in a special document, as is the case in some countries.

In our opinion, the introduction of the institution of an ombudsman in Ukraine as a body that has the right to decide cases out of court, where one of the parties is a consumer, will allow customers to acquire a faster binding solution but also the opportunity for the free and safe resolution of differences with financial service providers. Out-of-court settlement of a dispute is particularly attractive if the value of the dispute is insignificant and recourse to the court makes no economic sense.

Thus, our study confirms the need to introduce such an institution as a financial ombudsman in our country at the state level to ensure reliable protection of investors and consumers of financial services and the faster response and resolution of public authorities in problematic situations in disputes of individuals.

According to R. J. Bacho, currently, the only possible mechanism for consumers to protect their violated rights in the event of bankruptcy of a non-bank financial institution is to go to court. Despite the high probability of winning in court, the plaintiffs do not receive real material compensation due to the lack of liquid assets of bankrupt non-bank financial institutions, especially in the case of long-term delays in litigation. As a result, a large number of consumers lose their money and incur losses, which negatively affects the confidence in non-bank financial institutions and the services they provide. It is the loss of consumer confidence in non-bank financial institutions that is one of the biggest negatives that caused the crisis of 2008-2009.[16]

Taking all the aforesaid into consideration, it should be noted that in most countries of the world, more and more attention has been paid not so much to the development of systems of guarantees for clients of financial institutions but to the increase in financial literacy and financial security, which provides a conscious choice of non-bank financial services. Complex financial products and services (especially in the area of private pension provision) that are incomprehensible to clients may create additional risk factors and not be beneficial.

Another alternative for relieving the judiciary in Ukraine and resolving disputes related to the financial sector is the creation of a specialised financial court. More than 130,000 lawsuits – a quarter of all lawsuits in Ukraine – are disputes related to the financial sector. According to

16 Bacho (n 9) 284.

banks, today, the amount of debt that is the subject of litigation with borrowers is UAH 144 billion, more than UAH 18 billion for depositors and UAH 81 million for investors. The total amount of collateral for such lawsuits is about UAH 14 billion, and the amount of deposits is UAH 18 billion.[17]

In this context, it should be emphasised that the National Bank of Ukraine has a dual mandate to protect the rights of creditors and consumers of financial services. It is necessary to find the right balance to solve problems. In particular, it is not only about the workload of the judiciary but also about law enforcement, the unanimity of judicial practice, and the effectiveness of enforcement of court decisions to protect the rights and interests of the parties to the dispute. As can be seen, the development of an effective mechanism is an extremely urgent and timely issue, one of the solutions to which may be the creation of both a specialised financial court and a separate court for financial disputes.

It is evident that the practical solution to this issue should be approached carefully, taking into account the experience of foreign countries on this issue. After this analysis, in our opinion, the National Bank should conduct an open dialogue with market participants and public authorities on the prospects for the establishment and operation of such a court. As a result of such a discussion, it should initiate questions on specific changes to the legislative mechanisms related to the judicial protection of the rights and interests of creditors violated by unscrupulous debtors, as well as the implementation of the decisions received.

CONCLUSIONS

Given the study of judicial and alternative ways to protect the rights and interests of consumers of financial services, a number of conclusions were made, in particular:

1) Judicial protection of the rights and legitimate interests of participants in legal relations that arise in the market of non-banking financial services is the most reliable and effective. At the same time, given that there is an ongoing socio-economic crisis in Ukraine, which has become even more widespread and exacerbated by the imposition of martial law, as well as the workload and understaffing of the courts, the use of alternative dispute resolution protection of rights is relevant.
2) Based on a study of existing EU acts, it is established that the system of protection of the rights of consumers of financial services through the financial ombudsman already operates in more than forty developed countries. This system was implemented with the participation of the World Bank, which has significant experience in this area. Therefore, in Ukraine, to help solve consumer problems out of court, the World Bank and other reputable international organisations are proposing to create a system of a financial ombudsman. The fulfilment of this requirement will hasten the final and full integration of domestic financial markets into world capital flows, expand opportunities for cooperation with foreign funds and financial institutions, and strengthen partnerships with other countries in financial relations.

In our opinion, the introduction of the institution of a financial ombudsman in Ukraine as one of the possible alternative ways to protect rights should be assessed positively. Providing an effective, fast, and affordable way to resolve disputes with consumers of financial services will help restore consumer confidence in the financial market and its growth; reduce the

17 The NBU explained the expediency of creating a financial court <https://finclub.net/ua/news/nbu-poiasnyv-dotsilnist-stvorennia-spetsialnoho-finansovoho-sudu.html> accessed 30 May 2022.

burden on the judicial system of Ukraine; reduce the costs of consumers and financial institutions to resolve disputes, compared to litigation; strengthen the protection of the rights of consumers of financial services and increase their level of financial awareness; increase lending and create a basis for economic growth.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Case Notes

THE IMPLEMENTATION OF E-JUSTICE WITHIN THE FRAMEWORK OF THE RIGHT TO A FAIR TRIAL IN UKRAINE: PROBLEMS AND PROSPECTS

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Submitted on 02 Feb 2022 / Revised 1st 10 May 2022 / Revised 2nd **12 Jun 2022**
Approved 29 Jun 2022 / Published online: **06 Jul 2022** // Last Published: **15 Aug 2022**

Keywords: *e-justice, the right to a fair trial, e-court, digitalisation of justice, e-evidence, e-technology in court, justice amid Covid-19*

ABSTRACT

Problems and prospects for the implementation of the concept of e-justice within the framework of the right to a fair trial in Ukraine are especially relevant today due to the digitalisation of

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Corresponding author, contributed solely to the intellectual discussion underlying this paper, case-law exploration, writing and editing, and accept responsibility for the content and interpretation. (Credit taxonomy). **Competing interests:** the author has declared that no conflicts of interest or competing interests exist. **Disclaimer:** The author should declare that his or her opinion and views expressed in this manuscript are free of any impact of any organizations. **Acknowledgments:** The author would like to express his gratitude to the reviewers and editors of the journal as well as to the translator Galyna Kondyra.
Managing editor – Dr. Olena Terekh. **English Editor** – Dr. Sarah White.

How to cite: Maika M 'The Implementation of E-justice within the Framework of the Right to a Fair Trial in Ukraine: Problems and Prospects' 2022 3(15) Access to Justice in Eastern Europe 249–262. DOI: https://doi.org/10.33327/AJEE-18-5.2-n000320

state and legal relations. The components of the right to a fair trial and their relationship to the implementation of e-justice; a system of legal regulation, recent legislative changes, current conditions, and prospects for the development of e-justice in Ukraine require further research.

The author used the following methods to solve the relevant tasks: dialectical – problems in the functioning of e-justice in Ukraine; historical analysis –the evolution of the legal regulation and the scientific, legal doctrine of e-justice; analysis and synthesis – analysis of legal regulation, recent legislative changes, the current state of and prospects for the development of e-justice in Ukraine; deduction – allowed the author to move from the general provisions of legal theory to the application of these postulates in the study of e-justice; system analysis – suggesting ways to overcome the problems in the functioning of e-justice in Ukraine; formal and dogmatic – providing an analysis of the norms of current legislation; theoretical modelling – formulating the draft of legislative changes; comparative – a study of foreign experience in the legal regulation of e-governance, taking into account the practice of justice in Ukraine.

The author has identified problems in the functioning of e-justice in Ukraine and normative, legal, material, technical, and organisational problems in realising the principles of the right to a fair trial for citizens of Ukraine, taking into account the concept of e-justice as a component of e-governance. To solve these problems, the following are proposed: normative regulation of the procedure for submission and examination of e-evidence; certification and standardisation of computer equipment and software in the field of e-justice; legal education activities of the state in terms of promoting e-governance; improving the computer literacy of citizens and civil servants.

1 INTRODUCTION

Modern Ukraine, like the world's leading countries, is rapidly moving in the direction of building a new information society, the key feature of which is the transferring of communications into digital and electronic forms. This digitalisation of public life and communications includes the sphere of public administration.

The requirement of time, at the request of society, is the organisation of public administration through information networks, which ensures the functioning of public authorities in online modes and makes it possible for the subjects of legal relations to communicate with them. This organisation of public administration is commonly called 'e-governance'.[2]

Transferring the legal relationship between man and the state into an electronic format saves significant time and material and human resources and redirects them from the public to the private sphere.

K. Yefremova defines the e-justice system as an integral element of e-governance, which is implemented in order to ensure accessibility, accountability, effective feedback, inclusiveness, and transparency in the activities of public authorities.[3] Indeed, a fair, transparent, and impartial judicial authority is one of the elements of democracy, so e-justice guarantees the protection of individual rights and interests not only through the resolution of specific disputes but also via a lawful and clear procedure. The conglomeration of current social, legal, political, and technological trends in the field of mass communication creates new challenges and new opportunities, including in the direction of implementing changes in the procedure of justice. One of the key areas of reforming justice in Ukraine, which requires urgency in the context of the COVID-19 pandemic, is the realisation of the e-justice principle.

2 OV Bryntsev, E-court in Ukraine. Experience and prospects (Pravo 2016) 72.

3 KV Yefremova, E-court - the current state and prospects for improvement (Pravo 2016) 296.

According to O. Bryntsev, e-justice will help solve existing problems in the justice system, namely: ensuring access to justice through the exchange of electronic documents between all participants in the trial; reducing court costs on mail and paper documents; improving and speeding up the transfer of court documents between courts, etc.[4] E-justice is aimed at ensuring transparency and accessibility of justice, which will improve the quality of court work and result in significant savings in public funds.

Analysis of the results of the Strategy for the Development of the Judicial System in Ukraine for 2015-2020 allows us to conclude that some steps have already been taken to improve e-justice, including the transition to an automated distribution system, electronic communications, automated distribution of cases between judges, audio and video recording of meetings, the creation of software packages with search tools that allow connections to be found between certain rules of law and relevant court practice, and automated access of judges to state registers.[5]

While the automated distribution of court cases, the publication of court decisions, and online information on the time and location of judicial case considerations have become commonplace, the effects of the pandemic and the digitalisation of society have given impetus to apply the latest information technology in justice. In particular, there is a need to create alternative ways to go to court, remotely present evidence and review the case materials, and participate in court hearings without physically visiting the courtroom.

Practicing lawyers agree that information technology is a key tool for improving access to justice, increasing the efficiency of courts, and managing court cases.[6] At the same time, there are a significant number of opponents of the total digitalisation of public life, including those who analyse the problems of e-governance at the doctrinal level, the most important of which is excessive interference in private life.

O. Danylian emphasises the need to determine the limits of the informatisation of human life while noting that the informatisation of relations in the field of governance will not mean additional interference of the state and society in the private life of a person, as public administration has always caused such interference.[7]

Recently, more and more researchers have also been paying attention to the issue of e-justice as a separate area of e-governance. However, it should be noted that the study of the use of advanced achievements of information technology in e-justice is fragmentary and devoted mainly to certain aspects of this problem. Such circumstances indicate the lack of a comprehensive approach to the development and problems of electronic information technologies in judicial activity.

Moreover, the generalisation of scientific opinions expressed in monographs and other works on this topic shows that all the problems of the current state of e-justice in Ukraine are ultimately derived from one common issue– the insufficient scientific development of this topic.[8] The need to study e-justice as a component of e-governance and democracy thus determines the relevance and inexhaustibility of scientific research into the digitalisation

4 OV Bryntsev, E-court in Ukraine. Experience and prospects (Pravo 2016) 72.

5 The Strategy for the Development of the Judicial System in Ukraine for 2015-2020 (2014) <http://nsj.gov.ua/files/1467884108%D0%A1%D1%82%D1%80%D0%B0%D1%82%D0%B5%D0%B3%D1%96%D1%8F%20%D1%80%D0%BE%D0%B7%D0%B2%D0%B8%D1%82%D0%BA%D1%83%20%D1%81%D1%83%D0%B407.pdf > accessed 20 January 2022.

6 A Khodakivska, 'E-justice: Problems and Prospects' (businesslaw.org.ua, 13 May 2021) <https://www.businesslaw.org.ua/e-justice/> accessed 20 January 2022.

7 OH Danylian, 'Moral dilemmas of the information society' (2012) Informatsiine suspilstvo i derzhava: problemy vzaiemodii na suchasnomu etapi: Zbirnyk naukovyh statei 21–24.

8 KV Yefremova, E-court - the current state and prospects for improvement (Pravo 2016) 296.

of trials in Ukraine and the world. Based on the above, there is a need for a comprehensive study of the problems and prospects for the implementation of the 'e-justice' concept in terms of the right to a fair trial in Ukraine.

The tasks of this research article are the following: analysis of the components of the right to a fair trial and their relationship with the implementation of e-justice; the study of legal regulation, recent legislative changes, and prospects for the development of e-justice in Ukraine; an outline and characteristics of the problems of e-justice functions in Ukraine and the formation of ways to solve these problems.

2 COMPONENTS OF THE RIGHT TO A FAIR TRIAL AND THEIR RELATIONSHIP WITH THE IMPLEMENTATION OF E-JUSTICE

Based on the construction of para. 1 of Art. 6 of the European Convention of Human Rights and Fundamental Freedoms (ECHR), as well as an analysis of the European Court of Human Rights (ECtHR) practice, it can be concluded that the ECtHR enshrines the following elements of the right to a fair trial: 1) the right to a court; 2) fairness of the trial; 3) the right to a public hearing; 4) reasonable time of a trial; 5) consideration of the case by the tribunal established by law; 6) independence and impartiality of the tribunal.[9]

H. Berezhanskyi notes that the right to a fair trial is a multifaceted and complex category, the understanding of which is revealed through the prism of the following aspects: 1) essential; 2) institutional; 3) material; 4) procedural.[10]

The author defines the components of e-justice as follows: the ability to go to court and communicate with the court through electronic means of communication; submission and research of e-evidence; use of assistive information technologies and artificial intelligence for court decisions. These aspects of e-justice should be evaluated in terms of the right to a fair trial.

K. Yefremova determines the dissonance of information technology and procedural rules as one of the problems of justice digitalisation since now, a trend of the integration of new information technology into the existing system of procedural rules of different branches of court jurisdictions is dominant. Even if the rules of the judicial process change, it is only fragmentary and the minimum amount necessary for a particular innovation. The judicial process in general – the age of the basic norms of which is tens of years, and the age of the basic principles, tens of centuries – remains unchanged. As it is known, justice is one of the most conservative areas of human activity. The age of most basic principles of the judicial process is hundreds of years.[11]

O. Uhrynovska notes that the advantages of electronic exchange of documents between the court and the participants in the trial save money and time. In addition to significantly reducing the time required to serve a court summons, the introduction of electronic document management will save time for court staff in writing the summons, packing letters, printing, and sending procedural documents. The advantage of the electronic exchange of

9 Guide on Article 6 of the Convention – Right to a fair trial (civil limb) (2021) <https://www.echr.coe.int/documents/guide_art_6_eng.pdf> accessed 05 June 2022.

10 HI Berezhanskyi, 'Peculiarities of understanding the right to a fair trial' (2017) 3 Visnyk Kryminalnoho sudochynstva 191-196.

11 KV Yefremova, E-court - the current state and prospects for improvement (Pravo 2016) 296.

documents is also the proper confirmation of the fact that the party to a trial received a court summons or procedural document.[12]

Agreeing with the opinion of K. V. Yefremova and O. Uhrynovska, it should be noted that e-justice will promote the realisation of almost all components of the right to a fair trial, such as fairness of the trial, the right to a public hearing, and reasonable time of a trial. In particular, the access to court improves if it is possible to submit procedural documents to initiate a lawsuit using electronic resources online, the fairness and publicity of the trial will be guaranteed through the possibility of broadcasting court hearings on the Internet, and the reasonable time of a trial will be realised by reducing the time losses while submitting, sending, and processing evidence and ensuring the appearance of the parties to a trial in court. Other components of the right to a fair trial (such as consideration of the case by the tribunal established by law, independence, and impartiality of the tribunal) are exercised by providing access to automated court distribution of the cases system and public information about judges.

Researching the use of information technology in civil proceedings, A. Kalamaiko notes that the mandatory introduction of e-justice is currently impossible due to the lack of Internet, the computer literacy of the population of Ukraine, and other factors. Such actions may, in fact, deprive a significant part of the population of access to justice, which will negatively affect the observance of human rights, the implementation of administrative tasks, and the basic principles of civil justice.[13]

It is difficult to disagree with the conclusion of this scholar, given the current realities of Ukrainian society, because many citizens are still not provided with high-speed Internet, do not have electronic digital signatures, and do not participate in the implementation of e-democracy projects.[14]

This kind of situation is typical not only for Ukraine but for the world community as a whole. According to modern research, more than a third of the world's population has never used the Internet.[15]

Given the above, in order to implement the principle of equality of citizens before the law and the courts, without interrupting the state course on the digitalisation of public administration, a transitional period should be introduced at the legislative level, which will ensure a non-discriminatory approach to citizens, who for one reason or another do not use the latest technical means. This transitional period should provide an alternative to submitting documents to the court in writing and in person. The duration of such a period should take into account the age characteristics of the demographic segments of the population, the level of material security, religious confessions, and other characteristics.

The use of an exclusively electronic procedure for communicating with the court may obviously create some restrictions on going to court for subjects with a low level of computer literacy. Such restrictions, along with the observance of the principles of non-discrimination, impartiality, and transparency, must ensure the exercise of the right of access to court and

12 O Uhrynovska, 'Electronic document management in the civil process of Ukraine' (2017) 64 V*isnyk Lvivskoho Universytetu* 144–150.

13 AYu Kalamaiko, 'Introduction of information technologies and ensuring the principles of civil proceedings' (2021) 43 Chasopys Tsyvilistyky 58-65.

14 'Almost 6 million Ukrainians do not have access to high-speed Internet' (*suspilne.media*, 30 July 2020) <https://suspilne.media/51887-majze-6-miljoniv-ukrainciv-ne-maut-dostupu-do-svidkisnogo-internetu-mincifra/> accessed 20 January 2022.

15 'More than a third of the world's population has never used the Internet' (*ukrinform.ua*, 1 December 2021) <https://www.ukrinform.ua/rubric-world/3360595-ponad-tretina-naselenna-svitu-nikoli-ne-koristuvalisa-internetom-oon.html> accessed 20 January 2022.

participation in court proceedings for all sections of the population without exception. The question is: should these restrictions apply to businesses, legal entities, and public authorities?

According to the author, the state should encourage businesses and legal entities of private law to use electronic technologies in justice and optimise and simplify the procedure of bringing the matter before the court and judicial proceedings. Such incentives can be achieved by reducing court fees and justice costs and alleviating the tax burden on the salaries of IT professionals. However, the lack of modern technology in business must not be an obstacle to the exercise of the right of access to court. With regard to public authorities, given the focus of the state on e-governance, their participation in judicial proceedings through the e-justice technologies is a logical continuation of the state's digitalisation course.

Examining the foreign experience of e-justice implementation, A. Bezhevets analyses the mechanisms of creation and operation of e-courts and their use of e-evidence (including those created by means of blockchain technologies) using the example of the People's Republic of China (PRC), where three Internet courts have been operating for several years in Hangzhou, Beijing, and Guangzhou. Judicial proceedings through the court platform of the Internet court have the legal force of an ordinary judicial proceeding, despite the fact that the Internet court makes decisions online. It has been determined that the Internet courts have jurisdiction over disputes related to online sales of goods and services, lending, copyright and related rights, infringement of personal non-property rights and/or property rights via the Internet, infringement of domain name rights, liability claims for product quality, etc.[16] An analysis of this case gives ground to affirm that judicial institutions, which are accessed exclusively through the Internet, are created for cases arising from the IT relationship, which presupposes the computer literacy of subjects.

T. Tsuvina argues that online courts enable individuals to settle disputes before the trial itself, relieving the strain on the judicial system and increasing citizens' satisfaction, as well as confidence in courts as an institution in a democratic society.[17] Given the above, in our opinion, the exercise of the right to a fair trial, taking into account the peculiarities of e-justice, should be based on the principles of reasonableness and fairness.

European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment sets out the basic principles that must be observed when using artificial intelligence as a means of justice administration. They include the principle of respect for fundamental rights, non-discrimination, quality and security, transparency, impartiality, good faith, and user control.[18]

We consider that these principles can be extended to the institution of e-justice. In particular, respect for fundamental rights must be guaranteed by the quality, predictability, and flexibility of the legislation governing e-justice; the implementation of non-discrimination should be expressed in a single non-differentiated attitude and accessibility of judicial procedures for entities with different levels of digital literacy; quality and safety must be guaranteed by certification and standardisation of software and criminal law protection of legal relations in the field of violations of the rules of access and use of these software packages; transparency and impartiality in the field of e-justice should include public examination of pilot online

16 AM Bezhevets, 'E-justice as a necessary element of digital transformation of society' (2020) 4 (35) Informatsia i Pravo 142-146.

17 TA Tsuvina, 'Online courts and online dispute resolution in the context of the international standard of access to justice: international experience' (2020) 149 Problemy Zakonnosti 62-79.

18 European Ethical Charter on the use of Artificial Intelligence in judicial systems and their environment (2018) 8 <https://rm.coe.int/ru ethical-charter-en-version-17-12-2018-mdl-06092019-2-/16809860f4> accessed 19 January 2022.

justice projects; user control should eliminate technical, logical inconsistencies and errors in system settings.

On 9 December 2021, the European Commission for the Efficiency of Justice (CEPEJ) approved the Action Plan for 2022-2025 to improve the quality of justice through digitalisation. In order to accompany the ongoing digitalisation of the judicial systems (always ensuring that justice is efficient and high quality), it must take into account the following principles: support for the digitalisation and efficiency of the justice, transparency, human orientation, awareness, and responsibility. The following directions have been identified for improving the judicial system: the establishment of data exchange networks, the possibility of informing about the violation of the right of access to court, and the cooperation on the introduction of artificial intelligence in justice.[19] These declarative principles of e-justice functions indicate the need to take into account fundamental legal principles during the introduction of information technology in the judicial system of the state.

D. Reiling and F. Contini note that the introduction of e-justice and information technology in the justice procedure narrows the scope for judicial discretion.[20] This statement is correct. At the same time, the narrowing of the judicial discretion and the formalisation of the decision-making procedure can have both negative and positive effects on the exercise of the right to a fair trial. Thus, e-justice is an element of the modern system of relations between the court and the participants in the trial, which is designed to save resources in the administration of justice and improve the efficiency of the trial. To ensure the realisation of the right to a fair trial, e-justice, as a concept of judicial system development, should be based on norms that would prevent violations of the elements of this right, including access to court, fairness of the trial, public hearing, reasonable time of a trial, and the independence and impartiality of the tribunal established by law.

3 CURRENT SITUATION OF E-JUSTICE IMPLEMENTATION IN UKRAINE THROUGH THE PRISM OF RECENT LEGISLATIVE CHANGES AND WARTIME

N. Kushakova-Kostytska notes that the e-justice system is one of the elements of e-governance, which is now seen as a way of organising government through information networks ensuring the functioning of government in real-time, and making daily communication with citizens, legal entities, and non-governmental organisations as simple and accessible as possible.[21] In this context, e-justice can be defined as the use of modern information technology in justice. This includes the automation and implementation of online functions such as filing a complaint, annexes to it, and providing responses to complaints in electronic form, access to court documents, providing 'electronic' evidence, the online hearing of a case, sending participants to the process information on the current case via the Internet or text messages, and the operation of court sites, where one can find information on particular cases.

New procedural legislation, adopted in the 2017 revised version of the Civil Procedural Code, the Code of Commercial Procedure of Ukraine, and the Code of Administrative Procedure, in combination with the impact of the Covid-19 pandemic (2020-2022), gave

19 CEPEJ Action plan 2022 – 2025: 'Digitalisation for a better justice' (2021) <https://vkksu.gov.ua/userfiles/doc/cepej-link-1.pdf> accessed 19 January 2022.

20 D Reiling, F Contini, 'E-Justice Platforms: Challenges for Judicial Governance' (2022) 13 (1) International Journal for Court Administration <https://www.academia.edu/77339424/E_Justice_Platforms_Challenges_for_Judicial_Governance> accessed 03 June 2022.

21 NV Kushakova-Kostytska, 'E-justice: Ukrainian realities and foreign experience' (2013) 1 Yurydychnyi Chasopys Natsionalnoi Akademii Vnutrishnih Sprav 103-109.

impetus to public demand for easier access to court, including the use of modern information technology.[22]

Yu. Hryhorenko notes that the current procedural codes provide for the establishment and operation of the *Unified Judiciary* Informational *Telecommunication System* (hereinafter UJITS), which should ensure the exchange of documents (sending and receiving) in electronic form between courts, court and trial participants, trial participants themselves, etc.[23] The result of these legislative innovations was the approval by the Decision of Vyshcha Rada Pravosuddia (High Council of Justice, hereinafter HCJ) of Regulations on the functioning of certain subsystems of the UJITS of 17 August 2021 No 1845/0/15-21.[24] The UJITS is based on cloud technologies that ensure remote data processing and storage and provide Internet users with access to software and computing resources. Special software has also been developed for out-of-court hearings.

N. Kushakova-Kostytska notes that the electronic judicial system has several obvious advantages: timeliness of informing lawyers; saving working time of court employees; saving costs for printing documents, etc. Today, it is necessary to note key features such as electronic filling out of claim documents, online consultation on information and documents used in the justice process, holding an online meeting, electronic requests and provision of electronic copies, and the possibility to use certain electronic mail addresses to which users of the system can receive information from the court office or lawyers.[25]

Based on the author's own practical experience, as of today, in Ukraine, the e-court provides the parties with opportunities such as payment of court fees online, obtaining information on the stages of the judicial proceeding, obtaining information from the Unified State Register of Court Decisions[26] (which is an automated system for collecting, storing, protecting, accounting, searching, and providing electronic copies of court decisions), sending procedural documents to the parties to a trial by electronic means, sending a court summons in the form of SMS-messages, obtaining information on the presence of business entities (counterparties, debtors, guarantors, etc.) in the bankruptcy procedure, electronic acquaintance with court case materials and generation of powers of attorney, online participation in court hearings, electronic commencement of an action and submission of documents, and electronic communication about the consideration of the case through the 'DIIA' application.[27] The use of electronic technologies in justice procedures is confirmed by case law. In particular, the ruling of the Chernihiv Court of Appeal in case No 749/368/19 states that the court inspected the website and used data from the Internet as e-evidence.[28]

22 Law of Ukraine No 460-IX 'On amendments to the Code of Commercial Procedure of Ukraine, the CPC, the CAP concerning the improvement of the procedure for consideration of court cases' [2020] Vidomosti of the Verkhovna Rada 29/194 <https://zakon.rada.gov.ua/laws/show/460-20#Text> accessed 20 March 2020.

23 Yu Hryhorenko, 'The development of e-justice involves the further integration of electronic services for lawyers' (*unba.org.ua*, 8 September 2021) <unba.org.ua/news/6914-rozvitok-elektronnogo-pravosuddya-peredbachae-podal-shu-integraciyu-elektronnih-servisiv-dlya-advokativ.html> accessed 20 September 2021.

24 V Obukh, 'How e-justice works' (*ukrinform.ua*, 30 April 2020) <https:// www.ukrinform.ua/rubric-society/3016937-ak-pracue-elektronne-sudocinstvo-abo-vstati-sud-na-zvazku.html> accessed 30 July 2021.

25 NV Kushakova-Kostytska, 'E-justice: Ukrainian realities and foreign experience' (2013) 1 Yurydychnyi Chasopys Natsionalnoi Akademii Vnutrishnih Sprav 103-109.

26 Unified State Register of Court Decisions is an automated system for collecting, storing, protecting, accounting, searching and providing electronic copies of court decisions.

27 'DIIA' application is a mobile application, a web portal that provides electronic communication between authorities and citizens as well as the provision of public services.

28 Case No 749/368/19 [2019] Chernihiv Court of Appeal <http://www.reyestr.court.gov.ua> accessed 20 March 2021.

The e-justice system in Ukraine has faced difficulties due to the introduction of martial law. In particular, the electronic communication of citizens with the courts has become difficult (several courts have not yet been connected to the UJITS system). To ensure the security of personal data, the government has restricted the use of the Unified State Register of Court Decisions and the resources that can be used to find out the condition of the proceedings online. In addition, some judicial resources have been hacked. These circumstances necessitate the creation of safe conditions for the operation of electronic systems and the preservation of the personal data of their users.

Thus, we state that currently, there is proper legal regulation of the mechanism of e-justice in Ukraine, which allows the exercising of the right of access to court for the general population while not excluding the possibility of law enforcement problems in the use of e-justice means. At the same time, it is also expedient to analyse the reasons and preconditions that do not allow the e-justice system to function to the full extent.

4 PROBLEMS AND PROSPECTS OF THE ACTUAL IMPLEMENTATION OF E-JUSTICE IN UKRAINE

E-justice in Ukraine has significantly improved with the introduction of the Unified Judicial Information and Telecommunication System (UJITS) – a set of information and telecommunication subsystems (modules) that automate the processes of courts, bodies, and institutions in the justice system, including document management, automated distribution of cases, automated distribution between the court and participants in the trial, recording the trial and participation of participants in the hearing by videoconference, operational and analytical reporting, providing information assistance to judges, and the automation of processes that provide financial, property, organisational, and personnel information and telecommunication, as well as other needs of UJITS users.

Along with the normative definition of the work beginning of the UJITS, in the process of the UJITS functions, there are a lot of questions and logical inconsistencies in its application. The introduction of new technologies creates new challenges for the state that violates the principle of legal certainty and therefore negatively affects the exercise of the right to a fair trial. In particular, there was the issue of material support for courts with high-speed Internet connections and modern computer equipment that would meet the requirements of the software. A problem of making paper duplicates of electronic cases and the need to transfer documents submitted through the UJITS system in hard copy form arose.[29]

Among the gaps in the functioning of electronic systems in the field of justice, N. Kushakova-Kostytska indicates the imperfection of the software and non-compliance with current legislation requirements by authorities regarding registration in it.[30] In fact, despite the receipt of case materials by the court through the UJITS system, there is a need to transfer this case for consideration to a specific court, which entails the need to transfer the materials in hard copy form because, during the judicial proceeding, the judge has a duty to directly examine evidence and documents, and not all courtrooms are equipped with modern computers, the technical characteristics of which allow judges to easily use the UJITS software. This problem

29 'The courts have run out of money on the Internet: what it actually means' (*jurliga.ligazakon.net*, 11 December 2020) <https://jurliga.ligazakon.net/news/200254_v-sudakh-zaknchilis-grosh-na-nternet-shcho-tse-faktichno-oznacha> accessed 20 January 2022.

30 NV Kushakova-Kostytska, 'E-justice: Ukrainian realities and foreign experience' (2013) 1 Yurydychnyi Chasopys Natsionalnoi Akademii Vnutrishnih Sprav 103-109.

can be solved by providing courts with modern tablets or laptops with proper technical characteristics.

Among the problems of e-justice implementation, N. Kushakova-Kostytska notes a high risk of losing legally important information, computer illiterate judges and court staff at the level of qualified users (which is a serious problem for people, especially the older generation), and the development and commissioning (which in our conditions is even more difficult) of the relevant software, necessary technical equipment of courts, psychological aspect, because most of our citizens still prefer traditional 'paper' justice.[31]

Agreeing with the opinion of N. Kushakova-Kostytska, we note that the implementation of the UJITS, having relieved judges of routine technical work and having provided parties to a case with convenient opportunities to participate in the judicial proceeding, entailed an increase in the workload on the court staff (clerks, secretaries, assistants) because the procedure for registering case materials, the distribution of procedural documents, the formation of cases, and the issuance of procedural documents require modern skills in using computer equipment and significant time losses. This circumstance caused a massive outflow of personnel from the court staff, along with minimising the material incentives for court staff.[32]

Regarding the psychological aspects of the public's transition to electronic communication with the court, the author has already noted the low level of computer literacy of the general population, the so-called 'technical illiteracy' of citizens. Along with the escalation of security threats and hacker attacks, this psychological barrier is growing.

According to R. Oliinychuk, the organisational problems that hinder the reform of justice related to the provision of technical support for e-justice are obvious. To unload the Information Judicial Systems State Enterprise, which is responsible for the operation of the entire multifunctional UJITS, the State Judicial Administration has decided to establish the Judicial Services Centre State Enterprise, which is responsible for implementing innovations in domestic courts. Some subdivisions of the Information Judicial Systems State Enterprise were transferred to the Judicial Services Centre State Enterprise. The Information Judicial Systems State Enterprise provides services to two groups of users. On the one hand, there are 38,000 judges and court employees, and on the other hand, there are the trial participants. And such a conflict of interest hinders the development of the system.[33] After the task sharing, the Judicial Services Centre State Enterprise will maintain and operate the system and the open environment – i.e., provide services to the trial participants, legal entities, and individuals – while the Information Judicial Systems State Enterprise will continue servicing the courts, developing new versions of document flow, providing communication channels, and maintaining equipment and engineering services that will carry out technical control on site.

The scholar's opinion that the increased load on this software package will not be able to meet the needs of users is justified. Therefore, to create technical capabilities to serve a significant number of users, it is advisable to either allow time for the technical optimisation of the system or allow the partial devolution of resource administration to another entity.

According to R. Oliinychuk, such a division is justified because, in accordance with European practice, it is necessary to 'separate' the functions of servicing the trial participants and the technical support of the courts that consider their cases.[34]

31 Ibid.

32 'Employees of Ukrainian courts are being dismissed en masse' (*zib.com.ua*, 1 February 2021) <https://zib.com.ua/ua/146561.html> accessed 19 January 2022.

33 R Oliinychuk, 'E-justice as an element of the modern judicial system' (2021) 3 (27) Aktualni Problemy Pravoznavstva 141-147.

34 Ibid.

The problem of e-evidence research**,** the submission of which is provided by the new procedural legislation, is also urgent. In particular, in accordance with Parts 7 and 8 of Art. 85 of the CPC, the court, at the request of the party to a case or on its own initiative, may inspect the website (page) or other places of data storage on the Internet in order to establish and record their content. If necessary, the court may engage a specialist to conduct such an inspection.[35] Note that the use of such an inspection of the evidence at its location is possible provided that the e-evidence has not been removed from the place of data storage, which happens quite often.

D. Pernykoza doubts the admissibility of e-evidence, which, for instance, could be copied to disk or other data storage devices because the evidence can be regarded only as an electronic copy and not as the original. In practice, for example, a situation can happen in which a Facebook post can be deleted by the author at any time, and messages in Messenger, Telegram, Viber, or WhatsApp can be deleted by one of the interlocutors, resulting in their deletion for all chat participants. In particular, the Telegram messenger permanently deletes both the content of messages and the traces of their sending; WhatsApp deletes only the content but also permanently. Similar technology is used in Viber, although the technical support of the service can provide information only about the fact of sending messages or making calls, stating the date and time, but not their content.[36]

For instance, in its Judgement, the Supreme Court agreed with the assessment of the lower courts that there was no evidence that copies of the contract, invoice, and electronic mail, screenshots of which were available in the case file, were electronically signed by the authorised person, which made it impossible to identify the sender of the message, and the content of such a document is not protected from changes.[37]

Thus, the implementation of a normatively defined model of e-justice in Ukrainian realities faces an indefinite number of problems, including the material and technical support of judicial institutions and citizens, the computer literacy of users of electronic resources and networks, and the imperfect identification of executors of e-evidence and integrity of such evidence.

These problems, together with the possibility of future hearings without the use of paper counterparts, can create significant obstacles to the implementation of e-justice, which will further negatively affect the right to a fair trial as lack of material, technical, and security support for justice authorities will make it impossible to consider the case within a reasonable time and create obstacles for citizens to access the court. In the modern realities of the state, these problems need to be solved immediately.

5 PROPOSALS FOR SOLVING THE PROBLEMS OF E-JUSTICE IMPLEMENTATION IN UKRAINE

In its decision of 4 December 1995 in the case *Bellet v. France*, the ECtHR stated that Art. 6 of the Convention contains guarantees of a fair trial, one aspect of which is access to court. The level of access provided by national legislation must be sufficient to ensure a person's right to

35 Law of Ukraine No 460-IX 'On amendments to the Code of Commercial Procedure of Ukraine, the CPC, the CAP concerning the improvement of the procedure for consideration of court cases' [2020] Vidomosti of the Verkhovna Rada 29/194 <https://zakon.rada.gov.ua/laws/show/460-20#Text> accessed 20 March 2020.

36 D Pernykoza, 'E-evidence - the norm for Ukrainian justice' (*yur-gazeta.com*, 14 July 2020) <https://yur-gazeta.com/publications/practice/sudova-praktika/elektronni-dokazi--norma-dlya-ukrayinskogo-sudochinstva-ale-e-nyuansi.html> accessed 20 March 2020.

37 Case No 910/1162/19 [2020] Supreme Court of Ukraine <http://www.reyestr.court.gov.ua> accessed 20 March 2020.

a trial, given the rule of law in a democratic society. For access to be effective, a person must have a clear, practical opportunity to appeal against the actions that constitute an interference with his or her rights.[38] In today's digital age, the problems of providing electronic access to justice need to be solved as soon as possible. The implementation of e-technologies in justice and their application through the prism of Art. 6 of the ECHR is currently not reflected in the practice of the ECtHR, as the formation of practice in most cases takes a long time, but the problems described by the author related to the use of e-technology in judicial procedure may be the subject of arguments in the applicants' complaints in the near future in the context of a violation of the right to a fair trial.

Issues related to the material and technical support of courts, as well as other public authorities, are to be resolved by additional funding for the judicial branch, which will allow the courts to have the proper equipment with high-speed Internet connections and modern computer technology, as well as an increase in the salaries of court staff. Problems in the field of low levels of computer literacy should be solved through the introduction of training courses for court staff and persons involved in justice (lawyers, public officials, notaries, arbitrators). Risks of losing legally relevant information and intentional or negligent software failures should be resolved through the certification and standardisation of hardware and software. In order to overcome the psychological barrier of e-justice, it is advisable to strengthen legal educational work in this area.

Comparing the experience of Ukraine and Austria on the implementation of e-justice, R. Khanyk-Pospolitak identified the security of personal data, the possibility of hacker attacks on electronic systems, and the need to protect information storage systems as the shortcomings of e-technologies in justice.[39] The problem of identifying the authors of e-evidence and the court's methods of examining this evidence needs a systemic solution. To do this, according to the author of this article, it is necessary to improve the relevant modules of the UJITS and equip them with means of conducting preliminary examinations of electronic documents.

It is also expedient to take into account the position of V. Bondarenko and N. Pustova that for the creation of effective e-justice as a method of ensuring justice based on the use of information technology, we need further information and technical modernisation of the judicial system, improvement in the level of work culture with electronic means of the court staff, and the introduction of electronic record keeping in the judicial system, as well as the adoption of legal norms that allow us to unambiguously identify the institution of e-justice and standardise the concept and status of electronic documents.[40]

Continuing these statements, we emphasise the need for adequate financial support for the transition to e-justice that will take into account the interests of both traditional means of communication with the judicial authorities and the use of modern information technology, thus ensuring the right to a fair trial.

38 *Bellet v France* App no 23805/94 (ECHR, 4 December 1995) <http://www.echr.coe.int/echr> accessed 20 March 2020.

39 H Boscheinen-Duursma, R Khanyk-Pospolitak, 'Austrian and Ukrainian comparative study of e-justice: towards confidence of judicial rights protection' (2019) 4 (5) Access to Justice in Eastern Europe 42-59.

40 VA Bondarenko, NO Pustova, 'Foreign experience of legislative regulation of corruption prevention in the public service system and implementation of international law norms in the legal framework of Ukraine' (2016) 2 Naukovyi Visnyk Lvivskoho Derzhavnoho Universytetu Vnutrishnih Sprav 177-186.

5 CONCLUDING REMARKS

On the path to the digitalisation of public administration in general and the judicial system in particular, the modern legal system of Ukraine must combine today's information and technical challenges as well as centuries-old public demands for a fair trial that is accessible to everyone. At the same time, e-justice should be mediated through the principles of the ECtHR relating to judicial proceedings and implemented through electronic means of interaction between the court and the trial participants, based on the democratic principles of their equality. It is possible that in the near future, the ECtHR will evaluate legal proceedings carried out with the use of e-technologies in contracting states in terms of compliance with the right to a fair trial.

In creating software and regulatory prerequisites for the use of e-justice, Ukraine has faced a wide range of problems related to the implementation of the right to a fair trial, which significantly complicate the digitalisation of justice, including: a) the problem of evaluating e-evidence (which may create obstacles to the exercise of the right to a fair trial); b) inaccessibility of justice (providing a zero option transition to digital technology) for citizens with low levels of computer literacy and technical equipment (which may create obstacles to the exercise of the right of access to court); c) material and technical support of judicial authorities (which may create obstacles to the exercise of the right to a trial within a reasonable time); d) guarantees of security of information transfer in information systems (which may create obstacles to the exercise of the right to an independent and impartial tribunal); e) the general population's low level of understanding of digitalisation due to the psychological barrier of electronic communication (which may create obstacles to the exercise of the right of access to court).

At the same time, the possibility of electronic access to court is an urgent imperative of our time, which requires the optimisation of legislation and the creation of material, technical, and organisational prerequisites, which the author determines to be as follows: a) the regulation of the procedure for submission and examination of e-evidence; b) the certification and standardisation of computer equipment and software in the field of e-justice; c) the legal education of the state in terms of promoting e-governance; d) improving the computer literacy of citizens and civil servants.

The present research into e-justice, as a component of e-governance and democracy, shows the relevance and inexhaustibility of scientific developments in the field of digitalisation of judicial proceedings in Ukraine and the world, forming new areas for further research.

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AJEE
Peer-reviewed Journal

Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Case Note

COURT COMPOSITION AND ITS INVARIABILITY AS ELEMENTS OF A COURT ESTABLISHED BY LAW DURING COVID-19 PANDEMIC: LESSONS FROM POLAND

Krystian Markiewicz[1]

Submitted on 24 Feb 2022 / Revised 1st 22 Mar 2022 / Revised 2nd **07 Jun 2022**
Approved 29 Jun 2022 / Published online: **06 Jul 2022** // Last Published: **15 Aug 2022**

Key words: *COVID – 19 pandemic, panel of judges, composition of the court; collegial composition; the principle of an invariability (stability)of the panel of the courts*

ABSTRACT

Background: *The article discusses systemic and processual changes in provisions referring to the panels of judges in Poland. The statutory regulation adequate during the COVID-19 epidemic contains regulations whereby a single-judge panel is proper in the first and second instance. At the*

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Corresponding author, solely responsible for writing, conceptualization, data curation, and methodology.
Managing Editor – Dr. Olena Terekh. **English editing** – Dr. Yuliia Baklazhenko.
Competing interests: No competing interests were disclosed.
Grant information: The article was created as part of the grant implemented by the University of Silesia entitled 'Impact of the COVID-19 pandemic on the justice system. Case study and suggested solutions' from the NAWA intervention grants program no. BPN / GIN / 2021/1/00006 / U / 00001 (number UN-2105-001).
Funding: The author received no financial support for the publication of this article. The Journal provides funding for this article publication.

How to cite: K Markiewicz 'Court composition and its invariability as elements of a court established by the law during Covid-19 pandemic: lessons from Poland' 2022 3 (15) Access to Justice in Eastern Europe 263–281. DOI: https://doi.org/10.33327/AJEE-18-5.3-a000314

same time, the principle of invariability and stability of the courts' panel was exterminated. However, in case of Poland the protection of the dependent court, established with an extreme breach of law is protected by administrative and political decisions on shaping the court composition.

Methods: *dogmatic legal analysis. The subject of the dogmatic legal analysis is the content of the law and its interpretations found in the jurisprudence and views of the doctrine.*

Results and Conclusions: *The court 'shaped' in such a way guarantees the expected 'judgment'. There are fears that these standards of the highest judiciary bodies in Poland may spread among other courts which are managed by the presidents appointed by Justice Minister - General Prosecutor. Judges appointed in an illegal way will, by way of political decisions, be in particular court composition, and then talking about court independence will be completely untrue. Let's hope that COVID-19 pandemic will end soon. It is then necessary to make sure that all the restrictions on the right of recourse to court, introduced as a pretext to combat the pandemic, will be removed. Otherwise, the pandemic of lawlessness will stay with us much longer than Covid.*

1 INTRODUCTION

The issue of court composition and its invariability is of procedural and systemic nature and simultaneously touches upon the fundamental right, namely the right to have your case heard by a competent and lawfully established court. This paper concerns the issues connected with court composition, particularly the collegiality of court and the invariability of its composition in the context of Covid-related changes introduced in Poland. These considerations will be based on the issue of the right of recourse to court.

2 THE RIGHT TO A FAIR TRIAL AND PANELS OF JUDGES

Under S. 45(1) of the Polish Constitution2 each person shall have the right to have his or her case heard fairly and overtly, without undue delay, by a competent, independent, unbiased and sovereign court. S. 45 of the Polish Constitution creates inter alia the right of recourse to a competent court, i.e. such a court which - in the light of the statutory provisions - is not only competent to hear the case due to provisions concerning its jurisdiction over the subject matter, over the place and the function, but also adjudicates being properly empanelled and in line with its competence.

Art. 6 of the European Convention of Human Rights and Fundamental Freedoms (hereinafter – ECHR) obliges the countries being a party to the convention to organize the administration of justice in such a way so that courts and court procedures will meet all the requirements resulting from this provision. The rights guaranteed by the convention must have a real, practical dimension, which refers directly to their implementation by the justice administration bodies of the signatory countries obliged to do so[3]. Only such a body which meets the following prerequisites: a) organizational ones, i.e. it is lawfully established, independent (sovereign) and impartial and exercises the function of adjudication, namely is

2 Constitution of the Republic of Poland of 2 April 1997 <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> accessed 24 February 2022.

3 *Artico against Italy* App no 6694/74 (ECtHR, 13 May 1980) <https://hudoc.echr.coe.int/eng# {%22fulltext%22:[%22 6694/74%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57424%22]}>accessed 24 February 2022, Airey against Ireland App no 6289/73 (ECtHR, 9 October 1979) <https://hudoc.echr.coe.int/ eng#{%22fulltext%22:[%226289/73%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57419%22]} > accessed 24 February 2022.

competent to hear the cases covered by its jurisdiction under the rule of law, b) procedural ones, i.e. trial before this court is provided for by the law, c) functional ones, i.e. it has full authority in cases covered by its competence and jurisdiction to give legally binding decisions which may not be amended or repealed by non-court bodies' may be deemed a 'court as defined in Art. 6(1)'. Under Art. 6(1) ECHR the issue of proper court composition is contained in the phrases 'fair trial' by 'a tribunal established by law'[4].

In the European law (Art. 2 and 19(1)(2) of the Treaty on European Union (hereinafter - TEU[5]) it is incontestable that the requirement for independence of judges forms a part of the essential content of the right to fair trial, which itself carries significant importance as it guarantees the protection of all the rights derived by individuals from the EU law[6]. Case law of the Court of Justice of European Union (CJEU) unambiguously indicates that the right of recourse to independent court includes in its content also the composition of the adjudicating court. Thus, it refers to the right to have the case heard by a neutral judge. In the recent time, a very important decision referring to delegated judges CJEU held that Art. 19(1)(2) TEU, interpreted in the light of Art. 2 TEU and Art. 6(1 and 2) of the directive of European Parliament and Council (EU) 2016/343 on reinforcement of some aspects of presumption of innocence and the right to be present during the criminal trial[7] should be interpreted in such a way that it conflicts with the national law. Under the national law, the justice minister of a member state may, under the criteria which were not made public, on the one hand, delegate a judge to the criminal court of a higher instance for a definite or indefinite period of time, and, on the other hand, may, at any time under the decision which states no grounds therefor, end the delegation of such a judge irrespective of the fact whether it was made for indefinite or definite period of time[8]. So, in this judgement the discretionary influence of the Justice Minister - General Prosecutor on the court composition was blocked.

The comparative context indicates that the rule of court composition invariability in civil proceedings is not an absolute, but a prevailing European standard; however, it is desirable especially in terms of appellate courts and supreme courts[9].

4 *Dolińska-Ficek and Ozimek against Poland* App no 49868/19 and 57511/19 (ECtHR, 8 November 2021) <https://hudoc.echr.coe.int/eng#{ %22fulltext%22:[%22498 68/19%22],%22documentcollection id2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-213200%22]}> accessed 24 February 2022, ADVANCE PHARMA SP. Z O.O v POLAND App no 1469/20 (ECtHR, 3 February 2022) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%221469/20%22],%22documentcollectionid2% 22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-215388%22]}>accessed 24 February 2022.

5 Treaty on European Union (consolidated version O.J EU of 2012 C326, p 13).

6 Case *T PPU v LM*, C-216/18 (2018), ECLI:EU:C:2018:586. See also: K Gajda-Roszczynialska, 'Judicial independence as a constituent of the concept of "court of law" in the context of amendments to the Law on the organization of common courts introduced in the years 2015–2018' in K Gajda-Roszczynialska, D Szumiło-Kulczycka (eds), *Judicial management vs independence of judiciary* (Wolters Kluwer 2018) 26 et seq.; K Gajda-Roszczynialska, 'Test sześciu warunków unijnego standardu pojęcia „sądu" a polski wymiar sprawiedliwości – rozważania na kanwie wyroku TSUE z 27.02.2018 r. w sprawie C-64/16 Associação Sindical dos Juízes Portugueses' (2018) 3 Iustitia 6 et seq.

7 Directive of the European Parliament and Council (EU) 2016/343 dated 9 March 2016 on reinforcement of certain aspect of presumption of innocence and the right to be present during criminal trial (O.J. EU L 65, p 1).

8 Joined cases from C-748/19 to C-754/19 Prokuratura Rejonowa w Mińsku Mazowieckim and Others CJ, judgement dated 16 November 2021, ECLI:EU:C:2021:931; Joined cases from C-748/19 to C-754/19 Prokuratura Rejonowa w Mińsku Mazowieckim and Others CJ, opinion of the Advocate-General, M. Bobek dated 20 May 2021, ECLI:EU:C:2021:403.

9 B Hacker, W Ernst, *Collective Judging in Comparative Perspective. Counting Voices and Weighin, Opinions* (Oxford 2020).

3 THE RULES REFERRING TO PANELS OF JUDGES IN THE CIVIL PROCEEDING

3.1 The Rules Referring to Panels of Judges in the Civil Proceeding

It is a rule in the Polish procedural civil law that in the first instance the court is composed of one judge unless a special provision stipulates otherwise (S. 47 para. 1 of the Civil Proceedings Code (CPC)) [10]. In the first instance the following cases are heard by the court composed of one judge as the presiding judge and two lay judges: labour law cases for: a) determination of the existence, initiation or termination of employment relationship, determination of ineffectiveness of employment termination, reinstatement to work and reinstatement of previous work or pay conditions and claims sought therewith and compensation for unjustified or law-breaching termination of employment or dismissal, b) determination of breaching the principle of equal treatment in employment and claims connected therewith, c) compensation or redress with respect to mobbing; 2) family cases concerning: a) a divorce, b) separation, c) determination of ineffectiveness of establishing the paternity, d) dissolution of adoption. (S. 47 para. 2 CPC). This regulation concerns the composition of first-instance courts hearing cases during the contentious proceedings. In the non-contentious proceedings, the court is composed of one judge and two lay judges in adoption cases. Generally collegial composition includes lay judges, although collegial professional composition (3 judges) also exists. This is the case in issues concerning incapacitation where the regional court has jurisdiction as the first instance (S. 544 para. 1 CPC).

3.2 The Principle of the Collegiality of the Panels of the Courts of Appeal

In relation to the benefits resulting from collegial hearing of cases in the Polish procedural civil law there is a rule that in appeal proceedings the court is composed of 3 judges (appeal - S. 367 para. 3 CPC, complaint S. 397 para. 1 CPC, cassation complaint - S. 398. Appeal is the basic remedy for appealing against the substantive decisions. Under S. 367 para. 3 CPC the case is heard by three professional judges. Decisions concerning the evidence proceedings in a closed session are issued by the court composed of one judge. On 2 March 2006 para. 4[11] was added to S. 367 CPC. It provides for that ‹the decision on granting or withdrawing the exemption from court fees, refusal to exempt, rejection of the motion for exemption and imposition of a duty on the party to pay the costs and punishment with a fine may be granted by the court at a closed session composed of one judge'. A deviation from the collegial composition of the court concerns only procedural issues, not related to administration of justice. A quest for fleeing swiftness of the proceedings led to the situation in which even before the pandemic in 2019 a provision was implemented which indicated that at a closed session the court is composed of one judge, except when giving a judgement.[12] In brief it was assumed that the appeal court takes all the non-substantive decisions being composed of one judge. The rule that the judgement is awarded by the court of appeal composed of 3 judges was, however, retained.[13]

It should be noted here that in the Polish law there is a provision allowing for each case to be heard by the court composed of three professional judges if the case is especially complex (S. 47 para. 4 CPC). This refers mainly to the legal complexity, but we cannot exclude the complexity resulting

10 Act dated 17 November 1964, Civil Proceedings Code (Dz.U. of 2021 item 1805 as amended).

11 The Act dated 28 July 2005 on Court Fees in Civil Matters (Dz. U. 2021.2257)

12 The Act dated 4 July 2019 on amending the law: Civil Procedure Code and Certain Other Acts (Dz. U. 2019.1469)

13 Only in summary procedure and in the European proceedings concerning minor claims the court hears the appeal being composed of one judge (S. 505^{10} para 1 and S. 505^{27} para 1 CPC).

from convolution of facts. Three professional judges may also hear a case of a precedential nature.[14] A ruling of the president issued under S. 47 para. 4 – being of system-wide nature – is, however, above all a jurisdictional act shaping the composition of the court in a given case.[15] This provision was criticized in the literature and in practice it was used very rarely.[16]

The Polish procedural and systemic law concerning civil cases did not provide for the principle of invariability of court composition or random allocation of judges. Under the proximity principle expressed in the still applicable procedural provision, a judgement may be only awarded by judges who led the hearing directly preceding the awarding of the judgment (S. 323 CPC).[17] In turn, cases were allocated according to the order they were filed in.

Since 2015 when the power in Poland was taken over by populist parties fighting with the independence of courts and the division of powers , a number of changes have been adopted, including procedural and systemic ones. They touch upon also the problem discussed here. Theoretically they were supposed to enhance the standard of legal protection, but the practice showed something completely different.

3.3 The Principle of Invariability of the Adjudicating Court Composition

In 2017 the national legislator simultaneously introduced to the Polish legal order two principles: the principle of random allocation of judges to cases[18] and the principle of invariability of the adjudicating court composition (called also stability, steadiness principle). Since 12 August 2017 these two changes have been introduced to the Act -[19] Law on Common Courts (LCCS)' System. The first of them, namely the principle of random allocation of judges to cases, expressed in S. 47a para. 1 LCCS, under which cases are allocated to judges and assistant judges randomly, within particular categories of cases unless a case is to be allocated to the judge on duty[20]. It is obvious that for the court to be competent and independent, it should be composed on the basis of objective and transparent criteria. Theoretically introduction of the principle of random allocation of the cases was to confirm this. It is not a new solution - it was used before in criminal cases (S. 351 CrimPC in its version before 12 August 2017). The principles of allocating civil cases were defined in the regulation of operation of common courts [21]. They were also based on the principle of randomization (order of receiving them), which met international requirements[22]. Everybody was able to

14 J Gudowski, in T Ereciński (ed), *Kodeks postępowania cywilnego*, Komentarz ,Volume 1 (Wolters Kluwer 2016) 344, AG Harla, '*Precedensowy charakter sprawy cywilnej w rozumieniu kodeksu postępowania cywilnego. Uwagi de lege lata i de lege ferenda*' (2001) 4 Przegląd Sądowy 23.

15 Ibid para 14, 344

16 K Markiewicz, '*Właściwość sądu, skład sądu i wyłączenie sędziego w pracach Komisji Kodyfikacyjnej Prawa Cywilnego*', 2015 (2) Polski Proces Cywilny 296–297

17 K Markiewicz, in A Marciniak (ed) *Kodeks postępowania cywilnego. Vol. II. Komentarz do art. 2051–424[12]* (Beck 2019) 600-602.

18 B Przymusiński, *Ustrój sądów powszechnych. Przepisy z wprowadzeniem* (Wolters Kluwer 2017) 44–45.

19 Law on Common Court System of 27 July 2001 (Dz.U. of 2020 item 2072 as amended).

20 M Pytlewska, '*System Losowego Przydziału Spraw jako gwarancja bezstronnego prawa do sądu w kontekście Unii Europejskiej*' 2019 (40) Prawo w Działaniu 265.

21 Justice Minister Regulation of 18 June 2019 – regulations of operation of common courts (Dz.U. of 2021 item 2046 as amended). K Markiewicz, 'Niezawisłość i niezależność jako gwarancja dostępu do ochrony prawnej' in K Flaga-Gieruszyńska, R Flejszar, E Marszalkowka-Krześ (eds), *Dostęp do ochrony prawnej w postępowaniu cywilnym* (Beck 2021) 27–48.

22 'Recommendations of the Committee of Ministers of the Council of Europe No R (94)12' in Jerzy Jasiński (ed), *Sądownictwo. Organizacja – postępowanie – orzekanie, Vol IV* (Instytut Wymiaru Sprawiedliwości 1998).

determine how his/her case was allocated to a given judge. The newly introduced system contradicts the transparency of the process of allocating cases to judges. The central system of random allocation of judges is fully controlled by Justice Minister - Prosecutor General, i.e. by a party or a potential party to court proceedings, which contradicts international standards[23]. Contrary to the previous system, parties to the proceedings have no control over the ministerial system of case allocation. It should be added that this system was not introduced in the Constitutional Tribunal and the Supreme Court. Politicians made sure they will have influence on the choice of presidents and entrusted these presidents with the authority to allocate cases.

> At the beginning the Justice Ministry refused to provide non-governmental organizations with the algorithm of at-random selection and source code and the information where the servers are located. Provision of algorithm itself does not fully solve the problem[24]. Due to concealment and impossibility to verify the correctness of all the data about the system of at-random selection[25] it may be still argued that the judges are not allocated to cases randomly[26].

The second principle of invariability of the court composition[27] was expressed in S. 47b LCCS, added in the light of S. 1 of the Act dated 12 July 2017 amending the Law on Common Court System and Certain Other Acts. According to this principle, the composition may be changed only if the case cannot be heard by the hitherto used court composition or there is a long-term obstacle in hearing the case by the hitherto used court composition. Special importance of the principle of invariability of court composition introduced by the legislator is confirmed by the grounds for the bill where it was stated that[28] 'Once randomly chosen court composition, irrespective of the fact whether it contains one or a few judges, shall not be changed before the case is terminated'. In legislator's opinion only joint application of these two principles guarantees impartiality of the court, equality of the parties and internal transparency in case allocation. The Supreme Court has already underlined the significance of both principles and their interconnection in the context of exercising influence on court composition[29]. As it indicated, the legal notion of 'hitherto used court composition' should

23 See *Daktaras v Lithuania* App no 42095/98 (ECtHR, 10 October 2000) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2242095/98%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-58855%22]} > accessed 24 February 2022.

24 S Wikariak, 'MS ujawniło algorytm losowania sędziów' <https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8249422,nsa-ms-algorytm-losowania-sedziow.html> accessed 20 January 2022.

25 Only the judgement of Supreme Administrative Court of Poland of 19 April 2021, III OSK 836/21, LEX no. 3184818 obliged the Justice Minister to hear the motion of the challenging Foundation (...) based in Z. dated 4 December 2017 for the provision of algorithm of the System of Random Allocation of Cases within 14 days from receiving the judgement together with case files. The source code still has not been revealed, which is underlined by the Civic Network Watchdog Polska. – in K Batko-Tołuć, 'Losowanie sędziów a zaufanie społeczne' <https://siecobywatelska.pl/losowanie-sedziow-a-zaufanie-spoleczne/> accessed 20 January 2022>; 'Realizacja projektów informatycznych mających na celu usprawnienie wymiaru sprawiedliwości' <https://siecobywatelska.pl/wp-content/uploads/2021/09/P-19-038-LWR-410.023.02.2019-01.pdf> accessed 20 January 2022>. See also *Odpowiedź SSP 'Iustitia› na Białą Księgę w sprawie reform polskiego wymiaru sprawiedliwości przedstawioną przez Rząd RP Komisji Europejskiej* (Warszawa 2018) <https://www.iustitia.pl/images/pliki/odpowiedz_na_biala_ksiege_pl.pdf> accessed 30 September 2021; K Markiewicz, 'The battle for free of Judiciary courts in Poland in the years 2015–2018' in K Gajda-Roszczynialska, D Szumiło-Kulczycka (n 6) 17–60; K Markiewicz, '**Czy w Polsce są wolne sądy? Ocena z perspektywy trzech lat walki o praworządność' 2018 (4) Iustitia 186–204.**

26 More information in P Semper, '*System do poprawy?*' 2018 (3) Iustitia 148.

27 Ibid para 17, *600-601*; .

28 Uzasadnienie poselskiego projektu ustawy o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw, Sejm VIII kadencji, Sejm Paper no 1491.

29 The resolution of the Supreme Court dated 5 December 2019, III UZP 10/19.

be referred to the court composition from the moment of its creation and allocation of a given case to it as a result of randomization. The Supreme Court stated that introduction of the principle of court composition invariability was aimed at preventing the frequently abused practice where cases already allocated to a given judge were subsequently, after the start of the proceedings, allocated to other judges, often less experienced ones. On the other hand, introduction of the random allocation of cases was aimed, in turn (according to assumptions), to limit the possibility of exercising influence on the composition of the court hearing a given case and limiting doubts among citizens as to how individual courts are empanelled. In such a situation SC held that in order to make sure that random allocation of cases can meet in practice the assumed targets, it is necessary to cover the court composition randomly selected to hear a given case with the court composition invariability principle, even if this composition has not started the proceedings. It should be noted that the minutes of random allocation of judges are attached to case files so the parties may verify whether the court composition hearing the case is different from the court composition which was originally randomly selected to hear it. What is more, random allocation of cases in practice is an illusion if, despite choosing a given court composition, it will be possible to replace certain judges selected under the decision of the president of the court or the president of the division. This long quotation of the grounds for SC resolution is quite significant for further considerations and evaluation of the actions of the court president deciding on the composition and possible changes of court composition. It is worth noting that in 2019 not only a serious deviation occurred from collegiality to the benefit of adjudication by the courts of appeal consisting of one judge, which was discussed above, but also the rule was changed concerning the composition of the first-instance court which heard the case after the decision was repealed by the court of appeal. A very controversial provision was introduced, also from the perspective of European standards, saying that if the judgement is repealed and the case is referred back for reconsideration, the court shall hear it in the same composition unless it is not possible or it results in undue delay of the proceedings. Previous regulation functioning for several dozen years since the civil proceedings code was adopted required that the case be heard by another court composition.[30] So it may be concluded that court composition invariability principle in the Polish legal system exceeded even the borders of issuing a substantive decision concerning the case.

Both principles – random allocation of cases and court composition stability - were intended to guarantee the right of recourse to court as defined in S. 45(1) of the Polish Constitution. Their joint application - according to legislator's assumptions - should ensure also impartiality of the court, equally of the parties and external transparency of case allocation[31]. There is no doubt

30 B Cis, 'Skład sądu pierwszej instancji w przypadku uchylenia wyroku i przekazania sprawy do ponownego rozpoznania (art. 386 para. 5 k.p.c.)' in T Zembrzuski (ed), *Nowelizacja KPC 2019 – pierwsze doświadczenia, refleksje i postulaty,* (Warszawa 2021) 217-245; *San Leonard Ban Club v Malta* App no 77562/01 (ECtHR 29 July 2004) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2277562/01%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61962%22]}> accessed 7 June 2022. See also: *Toziczek v Poland* App no 29995/08 (ECtHR, 24 March 2012) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2229995 /08%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-112444%22]}> accessed 24 February 2022; *Indra v Slovakia* App no 46845/99 (ECtHR, 9 July 2004) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2246845/99%22],%22documentcollectionid2%2 2:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-68114%22]}> accessed 24 February 2022; *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2246845/99%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-68114%22]}> accessed 24 February 2022.

31 A Olaś , 'Skład sądu' in T Ereciński (ed), K Lubiński, T Ereciński (vol eds), *System Prawa Procesowego Cywilnego, Postepowanie nieprocesowe*, vol 4, part 1, vol 1 (Wolters Kluwer 2021) 647; B Kołecki, in I HaÿdukHawrylak, B Kołecki, A Wleklińska (eds), *Prawo o ustroju sądów powszechnych. Komentarz* (Wolters Kluwer 2018).

that also according to the national legislator the right of recourse to court means not only the right of recourse to the court composition empanelled lawfully, ensuring its independence, but also its stability. It is worth mentioning that the principles of random allocation of cases and court composition stability were not introduced into the Constitutional Tribunal and Supreme Court as there already were court presidents appointed by the present government and it is their role to empanel the court composition according to their discretion, change it as they wish, which is to be discussed later on in this paper. Empanelling by CT President of the court composition hearing cases in CT, which breaches these principles, is a commonly known fact among Polish lawyers[32].

4 THE PRINCIPLE OF INVARIABILITY OF THE ADJUDICATING COURT COMPOSITION DURING COVID – 19 PANDEMIC

Covid statutes concerned various procedural and systemic aspects. What is important is that in principle they limited the principles connected with the right of recourse to court in all of its aspects and this was not necessarily connected with epidemic restrictions.[33] What is important, they were introduced in the period of ruthless fight with Polish judges defending court independence[34]. It was also a period when disclosure of data was compelled which showed a collapse of court functioning also at the level of swiftness of proceedings. Here it needs to be explained that the first Covid statute 'fought' with the pandemic in such a way that it introduced the provision prohibiting the disclosure of the existing data concerning courts' operation in the period before the pandemic![35]

Out of the numerous Covid acts the last one is important in terms of court composition, namely S. 15zzs(1)(1)(4) of COVID-19 Act in the wording agreed by the Act dated 28 May 2021 on amending the Act - Civil Proceedings Code and certain other acts which changed the composition of the court hearing the case from three judges to one judge and authorized the court president to order that the case be heard by the hitherto used composition[36]. So, the problem concerns the change in court composition during the proceedings by the political factor by way of episodic statute but also permanent decrease in legal protection standard - particularly in 2nd-instance courts by replacing collegial composition with one-judge composition.

The Act dated 28 May 2021 on amending the Act - the Civil Proceedings Code and Certain Other Acts changed upon 3 July 2021 the COVID-19 Act in such a way that: in the period of pandemic risk or epidemic period announced due to COVID-19 and within a year from abolishing the last one of them, in cases heard according to the provisions of the CPC: in

32 Analiza działalności orzeczniczej TK w latach 2014–2017 opracowana przez zespół Ekspertów Prawnych przy Fundacji im. Stefana Batorego <https //www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Raport%20ZEP%20o%20funkcjonowaniu%20TK.pdf> accessed 30 Semptember 2021, and K Markiewicz, 'Niezawisłość i niezależność' 40.

33 See K Gajda–Roszczynialska, 'Przebudowa wymiaru sprawiedliwości w czasach pandemii COVID-19 ze szczególnym uwzględnieniem postępowania cywilnego' 2022 (1) Polski Proces Cywilny *22-23 <https://assets.contenthub.wolterskluwer.com/api/public/content/067af6f850d7463d94f217412c82a35d?v=ddf79089> accessed 7 June 2022.*

34 Ibid para 26.

35 S. 31zf of the Act dated 2 March 2020 on special solutions connected with counteracting, prevention and combating COVID-19, other infectious diseases and emergency situations caused thereby (Dz.U. of 2021 item 2095 as amended), hereinafter called COVID-19 Act, added by the Act dated 31 March 2020 on amending the Act on special solutions connected with counteracting, prevention and combating COVID-19, other infectious diseases and emergency situations caused thereby (Dz.U. item 568 as amended).

36 This issue is the subject matter of the legal question asked in case III CZP 73/21.

the first and second instance the court shall hear cases consisting of one judge; the court president may order that the case be heard by three judges if it deems it fit due to special complexity or precedential nature of the case (S. 15zzs[1] (1)(4)). S. 6(2) of the Amending Act provides for that cases which, before this Act became effective, were heard by the court with the composition other than of one judge, shall still be heard by the judge who was allocated the case, till the case is resolved in a given instance. This act became effective after the lapse of 14 days from the day it was published (s. 7 of the Amending Act). As a result of amending S. 15zzs1 (1)(4) of COVID-19 Act, which happened on 3 July 2021 in the period after this day the composition of the court hearing civil cases, if they were heard by a collegial composition, was changed, and the possibility of retaining such composition depends on court president's decision.

This regulation did not concern the proceedings in front of the Supreme Court as the body excluded from the structure of common courts, in which case it has nothing to do with (third) instance but with out-of-instance supervision over decisions in the legal scope[37]. This stipulation refers not only to hearing extraordinary legal remedies[38], but also to complaints under s. 3941 Civil Proceedings Code as the Supreme Court does not have the role of the second instance in this case[39].

It should be noted that in legal comparative aspect democratic states which in their legal systems have the composition invariability principle, have not decided to introduce the changes due to pandemic[40]. An exception involved Australia where in some cases participation of the jury during the interrogation was waived and the interrogation was conducted by one professional judge[41].

A question arises whether the Polish legislator did not outstrip other countries in the fight against Covid, whether the actions of the Polish government and politicians did not result from the care about the health and life of the judges. To find out, we should start from the analysis of the grounds for the bill[42] and the wider context of introduced changes.

It is known that pandemic can be justification for taking certain actions if they are really helpful in reaching the target declared in the Act title, namely counteracting, preventing and combating COVID-19, other infectious diseases and emergency situations caused by them[43].

The Polish legislator makes no attempt to hide the fact that Covid risk is rather an excuse and not the reason for introducing the said change. Indication in the grounds to the bill of the Amending Act that introduction of the amendment is 'dictated obviously by epidemic risk which is created by three people sitting next to each other in the court composition. It

37 S Włodyka, *Funkcje Sądu Najwyższego* (Kraków 1965) 9; T Zembrzuski, *Skarga kasacyjna. Dostępność w postępowaniu cywilnym* (Wolters Kluwer 2011) 53 – 56.

38 T Zembrzuski, 'Komplementarność nadzwyczajnych środków zaskarżenia – skarga kasacyjna a skarga o stwierdzenie niezgodności z prawem prawomocnego orzeczenia' in M Michalska-Marciniak (ed), *Wokół problematyki środków zaskarżenia w postępowaniu cywilnym* (Currenda 2015) 229.

39 T Zembrzuski, 'Przeciwdziałanie i zwalczanie epidemii COVID-19 w postępowaniu cywilnym, czyli pożegnanie z kolegialnością orzekania' 2022 (1) Polski Proces Cywilny 59 - 64.

40 A Nylund, B Krans, 'Conclusions on Civil Courts Coping with COVID-19' in A Nylund, B Krans (eds), *Civil Courts Coping with COVID-19*, 207.

41 D Bamford, 'Responding to COVID 19. Australian Civil Courts in 2020' in A Nylund, B Krans (eds), *Civil Courts Coping with COVID-19*, 7 - 9.

42 The grounds for the bill of the Act on Amendment to the Act - Civil Procedure Code and Certain Other Acts, Sejm IX kadencji, Sejm Paper no. 899.

43 K Gajda-Roszczynialska, 'Przebudowa wymiaru sprawiedliwości w czasach pandemii COVID-19 ze szczególnym uwzględnieniem postępowania cywilnego' 2022 (1) Polski Proces Cywilny 6 - 19. *https://assets.contenthub.wolterskluwer.com/api/public/content/067af6f850d7463d94f217412c82a35d?v=ddf79089*

doesn›t matter whether one or three judges hear the case'[44], may be interpreted only as the so-called declared but not real purpose of the changes. This results from the fact that this way of combating pandemic was introduced in the period when the Polish legislator resigned from legal regulations providing for Covid restrictions[45], and simultaneously the opinions of Advocates-General as well as decisions of the European Court of Human Rights (ECtHR) and CJEU appeared with respect to how to understand the notion of the court established by the statute. Sticking to the temporal aspect it should be underlined that it is a solution implemented not only in the period of epidemic risk or state of epidemic declared as a result of COVID-19 but within a year from the moment the last one of them was abolished. There is no justification, including a medical or organizational one, for setting the period of time during which the provision applies also within a year after the epidemic risk or state of epidemic ceased. This regulation, commonly criticised at the stage of consultative works, gives rise to a conclusion that such changes had another purpose than protection of judges' health. In terms of the purpose it does not meet the standards of episodic regulations.

In the aspect of coherence of the legal system it should be noted that the Amending Act leaves the collegial composition in administrative courts (province administrative courts and Supreme Administrative Court) and the Supreme Court, does not eliminate collegial court composition from all criminal cases[46]. What is more, it keeps such court composition in administrative courts even if cases are heard at a closed session (S. 15zzs[4] (3) of COVID-19 Act)[47]. Internal contradiction is here obvious.

In the light of the court practice it is inexplicable that the bill introducing the changes was justified in this way, as judges have contact with each other all the time in court buildings, also multi-person offices and that a possibility was introduced for the court president to order that the case be heard by three judges and that the collegial composition was retained in criminal and administrative cases. It should be added, which will be discussed also later, that court presidents, deciding on the collegial composition, are not guided by any medical criteria and such decisions do not result in any sanitary restrictions while the case is heard at a hearing or at a closed session. It needs no comment that the stated legislative motive is only ostensible. This may be only analysed in the categories of excessive and unlawful influence of the administrative factor on court composition. This solution is in fact commonly criticized during the consultative procedure. There is no doubt that these changes have a different purpose which may only be guessed.

In conclusion, the change in court composition should be interpreted as a normal statutory change whose real purpose was different than combating the pandemic. This completely changes the evaluation perspective of these amendments. The analysis of the consequences of changes should answer the question whether introduction of this ordinary act - and not 'a Covid act' - improved or limited the standard of legal protection. This statement is important

44 The grounds for the bill of the Act on Amendment to the Act - Civil Procedure Code and Certain Other Acts, Sejm IX kadencji, Sejm Paper no. 899.

45 So it is hard to detect reasonable and proportional reasons for introducing such systemic changes breaching the right of recourse to a competent court established by the law.

46 See D Szumiło-Kulczycka, 'Wpływ pandemii COVID-19 na realizację prawa do sądu w sprawach karnych w Polsce' 2022 (1) Polski Proces Cywilny 196 <https://assets.contenthub.wolterskluwer.com/api/public/content/1b9ca462e02c4d3a8a1a5bf6fce2be99?v=fd786e91> accessed 22 February 2022.

47 See the opinion of KIRP (National Council of Legal Advisers), 6–8; the opinion of NRA (National Bar Association), 14–15; similarly the opinion of SC, p. 4–5. Opinions available at <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=899> accessed 22 January 2022. The opinion of The Polish Judges Association ‹Iustitia' <https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/4114-opinia-stowarzyszenia-sedziow-polskich-iustitia-o-projekcie-ustawy-o-zmianie-ustawy-kodeks-postepowania-cywilnego-oraz-niektorych-innych-ustaw> accessed 22 January 2022.

because as we know, although each EU state is entitled to reorganized its courts, including also the court composition, it should not allow for deterioration of legislation in this aspect from the moment it acceded EU and reduction of protection of EU values and weakening of the rule of law (*non-regression principle*, Art. 2 TEU). Court of Justice stated such a principle – connecting the adoption by the member state of common EU values with being granted the membership (Art. 49 TEU)[48]. As it results from the model case law of CJEU, the following factors will be analysed in order to assess whether possible reorganization of courts is compliant with EU law requirements: ‹cumulative evaluation' of all essential circumstances and determination of 'real purposes' of introduced changes[49]. Evaluating these changes, the following criteria should be taken into account: the purpose, proportionality and effects of such changes in the context of guaranteed right of recourse to court. The period of time when they were introduced is another evaluative factor. It should be underlined that the changes made during the pandemic should be of temporary, proportional nature and should be aimed only at quick recovery from pandemic.

In my opinion it is indisputable that the analysed changes breached the principle of collegial court composition of courts of appeal. The author of the bill indicates that

> there are no objective or verifiable data allowing for assumption that the judgement awarded by one judge is less fair than by collective composition or that the case was less scrupulously analysed by one judge than by three judges. Such suppositions are deeply unfair for judges and what they prove only is lack of knowledge about how judges work. It would also mean a peculiar vote of mistrust for knowledge and skills of hard-working judges in first-instance courts who in fact having less experience and presumably knowledge than their peers from a higher instance must settle the case equally thoroughly and scrupulously[50].

Justification is an unsuccessful attempt to negate the practical experience and the legal doctrine. It is an obvious fact for all, apart from the bill creators, that collegial (three-person) court composition ensures higher professionalism and level of guarantee required both in special cases and in appeal proceedings[51]. This is also implicitly conceded by the bill creator if he/ she allows for cases to be heard in exceptional circumstances by collegial court composition. It is a common assumption that collegial court composition ensures higher adjudication standard, and at the same time ensures a higher level of guaranteeing the parties the right of recourse to court in the aspect of the right to fair trial and the right to be awarded judgement. Literature and case law share the opinion that collegial court composition constitutes the guarantee of court independence and enhancement of its sovereignty. One-person court composition is more exposed to any pressure and other attempts of unlawful exertion of influence on the way of proceeding and the content of the decision ('it is more difficult to corrupt a higher number of judges, in the same way as it is more difficult to corrupt a higher amount of water'). Hearing the case by collegial court composition gives a higher

48 Case C-896/19, *Repubblika v Il-Prim Ministru* (2021), ECLI:EU:C:2021:311; P Filipek, 'Reorganizacja sądownictwa polskiego w świetle wymogów prawa unijnego i standardów orzeczniczych Trybunału Sprawiedliwości Unii Europejskiej' in S Biernat (ed), *(nad?) Użycie art. 180 ust. 5 Konstytucji RP* (Warszawa 2021) 61–62; S Biernat, 'Wykorzystanie art. 180 ust. 5 konstytucji dla spłaszczenia ustroju sądownictwa powszechnego: prognoza ostrzegawcza' in S Biernat (n 48) *(nad?) Użycie*..., 70.

49 Joined cases C-585/18, C-624/18 and C-625/18, *A.K. v. National Council of the Judiciary and CP and DO v. the Supreme Court* (2019), ECLI:EU:C:2019:982, point 152; Case C-824/18 *A.B. et al. v National Council of the Judiciary* (JS judgement 2021), ECLI:EU:C:2021:153, point 138; Case C-619/18, *European Commission v Republic of Poland* (2019) ,ECLI:EU:C:2019:531, point 87.

50 The grounds for the bill of the Act on Amendment to the Act - Civil Procedure Code and Certain Other Acts, Sejm IX kadencji, Sejm Paper no 899.

51 A Olaś, 'Kolegialność a jednoosobowość – skład sądu I instancji w procesie cywilnym: doświadczenia i perspektywy' 2020 (3) Polski Proces Cywilny 497 and the literature quoted therein.

guarantee of independence and impartiality of judges and scrupulous and comprehensive analysis of a specific case by them[52].

Taking into account the nature of systemic and procedural changes in the last years, aimed at undermining court independence and guarantees of broadly defined fair trial , we should assume that also these changes were motivated by the same purpose. There is no doubt that this measure will result in weaker control of the adequacy of court composition in relation to the accusations concerning faultiness of allocation of judges. This lowers the legal protection standard due to deprivation by collegial court composition of the possibility to control the nomination procedure of one of the court members who was appointed to the position of a judge during defective procedures with the participation of ‹neo-NCJ'[53]. It should be noted that this measure is also dangerous because of the fact that adjudication by such persons in courts of appeal, as the last instance - and this problem refers mostly to them, due to the collegial court composition principle applying to courts of appeal - may lead to regarding the decisions granted by them as void[54]. There are cases where correctly appointed judges refused to adjudicate together with incorrectly appointed persons, which generally resulted in the instigation of a disciplinary action towards them[55]. So, it should be borne in mind that the hitherto used practice by disciplinary ombudsmen consisting in starting disciplinary proceedings for awarding a judgement will be significantly facilitated when the case is heard by single judge.

Finally, it should be noted that the said legislative measure eliminated from civil cases the social factor in the form of lay judges. It should be added that elimination of lay judges from hearing the cases means elimination of the social factor (e.g. in divorce matters) from justice administration, which breaches the principle defined in S. 182 of the Polish Constitution. In accordance with the view of the Constitution Tribunal the content of S. 182 of the Polish Constitution states that it is not possible either to completely exclude the civic factor from this function (administration of justice) or to narrow its role to such an extent so that it will have only a symbolic scope[56]. The provision of S. 15zzs (1) (1)(4) of COVID-19 Act leads in fact to temporary suspension of application of S. 182 of the Polish constitution and statues established in order to implement it.

So, it should be concluded that the changes caused the reduction in legal protection standard, in particular in proceedings initiated by appellate measures.

The provisions amended on the initiative of Justice Minister provide for that retaining the standard of hearing the cases by collegial court composition is permissible. In accordance with the amended provisions court president may order that the case be heard by three judges if he/she deems it fit due to special complexity or precedential nature of the case. Retaining the collegiality principle depends on an arbitrary decision of the court president, so an administrative factor quoted by the Justice Minister - General Prosecutor (S. 23–25

52 E Waśkowski, *System procesu cywilnego* (Wilno 1932), 157; A Olaś, 'Skład sądu' in T Ereciński (ed), K Lubiński, T Ereciński (vol eds), *System Prawa Procesowego Cywilnego, Postepowanie nieprocesowe*, vol. 4, part. 1, vol. 1, (Wolters Kluwer 2021) 647.

53 The National Council of Judiciary empanelled according to the provisions of the Act dated 8 December 2017 Amending the Act on the National Council of Judiciary and Certain Other Acts (Dz.U. z 2018 item 3).

54 Case C-487/19, *Waldemar Żurek v state CJ* (2021), ECLI:EU:C:2021:798.

55 In February 2022 the President submitted a bill presumably meeting the expectations of EC with respect to CJEU decisions dated 14 and 15 July 2021. The bill includes a prerequisite for disciplinary liability consisting in ‹refusal to administer justice›. Refusal to adjudicate with a judge who in ECHR's and CJEU's opinion was not correctly appointed, so a lawfully appointed court, results in disciplinary liability. In this way the Polish judges are faced with an alternative: either they adjudicate with incorrectly appointed judges or may be deprived of their post.

56 CT judgement dated 29 November 2005, P 16/04, OTK-A 2005/10, item 119.

LCCS). Thus, a potential party to the proceedings (S. 7 CPC) and the body supervising courts (S. 8–9a LCCS) have influence on the composition of the court hearing the case. Such regulations of the status of court presidents - particularly in the current political situation, taking into account the position of the Justice Minister being simultaneously the General Prosecutor - give obvious grounds for assuming that in this way a possibility was created for the administrative factor and executive power to have excessive influence on the constitutional and European standard, namely hearing the case by the court having statutorily established composition. It should be noted that the competences of the court president, as an administrative factor, should be limited to actions of administrative nature (S. 8 and S. 9a para. 1 LCCS), and the issue of proper court composition is not included in this group. This is confirmed by the fact that a number of procedural decisions which do not interfere in such important rights and values, as the ones mentioned above, referring inter alia to the change of mode and type of proceedings (s. 201 para. 2, S. 505(1) para. 3 CPC) require simultaneously the decision of the court. The introduced regulation, being a copy of the relict from the past - S. 47 para. 4 CPC – was already criticized in the literature[57]. We may remind ourselves the procedural and systemic position of the Justice Minister - General Prosecutor, well described in CJEU judgement, in which it was deemed that delegation by Justice Minister of a judge to the court composition does not meet the EU law standards of the right of recourse to statutorily established court[58]. Seeing the difference between both competences, the sum of ministerial entitlements and total context of court functioning should be taken into account, which requires critical evaluation of the administrative factor deciding on allocation of cases to judges and court composition.

In the Polish law the recently introduced regulation,[59] stating the systemic principle of the permanence of court composition and providing the exceptions from this principle is still valid. Court composition may be changed only if the case cannot be heard by the hitherto used court composition or there is a long-term obstacle in hearing the case by the hitherto used court composition (S. 47b para. 1 LCCS) or in case of a sudden obstacle (S. 47b para. 2 LCCS), if the necessity to take action in this case results from separate provisions or this is required to ensure swiftness of the proceedings. As SC explained in the above quoted resolution[60], the legislator introduced the principle of court composition invariability to ensure the swiftness of the proceedings. The principle underlines that once randomly selected, composition should not be changed until the proceedings are terminated (so the legislator referred this principle at the stage of devising the regulations already to the randomly selected composition even before any actions were taken by such composition in the case). However, exceptions from this principle were provided for in the Act and were dictated by organizational issues and the swiftness of the proceedings. It should be noted that the legislator found that even the change of the place where the judge works does not justify a deviation from the composition invariability principle, which shows how important the role of this principle is according to legislator's intention. Such contemplations lead to a conclusion that the provisions containing exceptions from the composition invariability principle should be strictly interpreted and a possible deviation from composition invariability principle. Therefore, its change in a given case should be justified by special, unforeseeable circumstances which could affect court's work organization or the swiftness of

57 A Olaś, 'Kolegialność a jednoosobowość – skład sądu I instancji w procesie cywilnym: doświadczenia i perspektywy' 2020 (3) Polski Proces Cywilny 522–523; K Markiewicz, 'Właściwość sądu, skład sądu i wyłączenie sędziego w pracach Komisji Kodyfikacyjnej Prawa Cywilnego' 2015 (2) Polski Proces Cywilny 296–297.

58 S CJ judgement dated 16 November 2021 from C-748/19 to C-754/19.

59 S. 47b LCCS added by the Act of 12 July 2017 amending the Law on Common Court System and Certain Other Acts, which came in force 12 August 2017

60 SC resolution dated 5 December 2019, III UZP 10/19.

the proceedings. At the same time, it should be underlined that the provisions apply also to the stability of court composition hearing the cases in the Supreme Court (S. 47b LCCS in relation to s. 10 para. 1 of the Act dated 8 Dec 2017 on the Supreme Court).[61]

There is no doubt that the legislator imposed on himself/ herself and on courts far-reaching requirements with respect to deviations from this principle. Reading the provisions introducing the said change will help us to answer the question whether the provisions of S. 47b of LCCS and S. 6(2) of the Amending Act conflict with each other or whether the latter supplement the provision stating the exceptions from the rule. Literary interpretation of the Amending Act is simple, a change in the composition takes place in all cases. S. 6(2) of the Amending Act provides for that cases which before this Act became effective were heard by the court with the composition other than of one judge, shall still be heard by this judge who was allocated this case, till the case is resolved in a given instance. This act became effective after the lapse of 14 days from the day it was published (s. 7 of the Amending Act).

The clear-cut wording of these regulations is not the reason for ending the process of their interpretation. The principle of clara *non sunt interpretanda* was at present regarded as completely inadequate interpretation directive. Arguments of methodological, empirical and ethical nature were put forward against using it in practice and, in particular, the thesis saying that in case of linguistic clarity of the provisions it is prohibited to further interpret them using other rules than grammar rules, was refuted[62]. Adopting such an approach leads to undermining of trust to administration of justice and the state, as it excludes the possibility of considering the arguments allowing to challenge the results of grammatical interpretation due to their collision with the values whose implementation the law should support. So, interpretation of the regulations could not be limited only to their explicit wording, as a result of which there appeared a necessity to verify the content of such regulations also in the light of functional rules (*omnia sunt interpretanda*)[63].

It was found that the situation connected with COVID-19 was not a reason (lack of real purpose of combating pandemic), but merely an occasion for introducing the changes. Once again it should be emphasized that the decision the court president takes about the court composition is not determined by any epidemic-related criteria (they include: special complexity or precedential nature of the case) and the consequences of such administrative decision will not include taking any measures of sanitary or epidemiologic nature. Prerequisites for the court president regarding the court composition changes had been provided for in the CPC for several dozens of months (S. 47 para. 4 CPC) and it was not necessary to repeat them in the Amending Act if the change concerns the cases heard under CPC provisions. So it should be deemed that the nature of the changes and moment of their introduction (one year after pandemic breakout, when the Covid restrictions were being loosened and were functioning not only during the epidemic risk period or COVID-19-related epidemic state but within a year from abolishing the last one of them, do not allow for a conclusion that it was not possible for the case to be heard by the hitherto used composition or there was an obstacle preventing the case from being heard by the hitherto used composition (S. 47b para. 1 LCCS) or there was a sudden obstacle (S. 47b para. 2 LCCS). We cannot rule out a possibility that it was an attempt to improve the efficiency of courts and find the way out of the judicial crisis

61 Dz. U of 2021, Item 1904.

62 M Zieliński, 'Clara non sunt interpretanda – mity i rzeczywistość' 2012 (6) Zeszyty Naukowe Sądownictwa Administracyjnego 9, 15; Z Radwański, 'Uwagi o wykładni prawa cywilnego' 2009 (1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 13–16.

63 Also in the decision of the RC in Poznań dated 10 November 2020, XV Cz 759/20, where a legal question was directed to SC concerning III CZP 103/20, LEX no 3268907.

resulting from the actions of the Justice Ministry or its negligence in the last years[64]. However, this aspect was not stated in the grounds and if this was to be the case, it would be doubtful to solve the collision between the swiftness of the proceedings and the fairness of the proceedings to the benefit of the former one. What is important, such a measure would not match the purpose with which the Act was introduced, namely combating the pandemic. So, if there is lack of a clear *ratio* deserving legal protection, such a regulation should be regarded as an instrumental measure interfering in the composition of the courts hearing the case.

In other words, S. 47 para. 4 CPC not only remained in force but, because it was repeated in the episodic act, the role of the court president in determining the composition of the court hearing the case was emphasized. Simultaneously a number of provisions concerning the collegial court composition were changed, namely deleted. In short, a higher standard of legal protection in the Polish civil proceedings, previously a fundamental standard in the appeal proceedings, is now in the hands of the court president appointed by the Justice Minister[65]. There is no doubt that such a change may be deemed a measure aimed at controlling the content of court decisions as it affects the scope of cases allocated to judges.

5 CONCLUSIONS

The changes concerning court composition were sudden and resulted in chaotic allocation of cases. They concerned the cases which court composition had already been determined and even cases already heard by the court of three judges. I am of the opinion that introduction of such regulations is in principle unacceptable due to a lower standard of legal protection. However, in order to minimize negative consequences, the legislator should have introduced the regulation concerning the change taking into account another temporal principle, namely the one enabling the continuation of hearing the case by the originally determined composition[66]. Such a legislative measure would at least reduce the range of breached principles, and despite this would allow to avoid procedural paradoxes in relation to the change in court composition also in already pending cases. Such a paradox can be exemplified by a situation in which a decision issued by collegial composition (fully composed of professional judges or lay judges) before the Amending Act became effective, is subject to control after this Act became effective as a result of the appeal or complaint by the court composed of one judge. It leads to disruption of internal logic of mechanisms applied in civil proceedings, and finally may raise doubts in the society with respect to impartiality of the judge who sits alone and interferes in the content issued by collegial composition.

The substantive regulation of the Amending Act lowers the legal protection standard, also in the scope of court composition determined lawfully through lowering the quality of this protection and through the influence of the administrative factor of executive power on

64 A Begier, R Cebula, Ł Małecki-Tepicht, M Plaskacz, A Wypych-Knieć, U Żółtak, *Obietnice a rzeczywistość – statystyki sądów rejonowych po pięciu latach «reform» (2015–2020) (Iustitia Raporty* 2021); A Begier, A Wypych-Knieć, Ł Małecki-Tepicht, *Sadownictwo w czasie COVID-19 – raport z badania oceny wpływu pandemii COVID-19 na wymiar sprawiedliwości w Polsce (Iustitia Raporty* 2021).

65 *Nota bene* it is debatable how such composition should be selected after president's decision that the case should be heard by three judges: see the question in case III CZP 82/21, BOSN.

66 M Walasik, 'Intertemporalna reguła kontynuacji w prawie procesowym cywilnym' in P Grzegorczyk, K Knoppek, M Walasik (eds), *Proces cywilny. Nauka – Kodyfikacja – Praktyka. Księga jubileuszowa dedykowana Profesorowi Feliksowi Zedlerowi* (Warszawa 2012).

court composition. In turn the intertemporal regulation of the Amending Act is obviously incompatible with the said predictability and fair trial principles.[67]

The Amending Act is of episodic nature but the problem discussed here is not. In Poland we still have the epidemic state announced because of COVID-19, and the legislator constantly modifies the regulations by way of episodic acts which are to regulate the social life in this period, not excluding court proceedings from this area. So it is important for the stability of the legal system to make sure that despite extraordinary situation the level of legislation will meet the standards of the rule of law, especially will not undermine the trust to the state and the law established by it, in particular when the law-enacting mode is shortened.[68]. The consequences of the case being heard by the improperly empanelled courts of second instance constitute the reason for invalidity of the proceedings (S. 379(4) CPC) and can provoke cassation complaints (S. 398[3] para. 1(2) CPC). If such a stance is admitted, this may result in repealing the decisions, prolonging the proceedings and lowering the authority of the courts and citizens' trust to the state, also to the judiciary. We should not disregard the fact that recent years in Poland are full of stories of defective decisions connected with court jurisdiction and composition; this refers to negligent legislation in the scope of procedural changes[69], problems with appointing the judges under the law and their independence and delegation in general and court presidents. The situation is also complicated by the fact that the Act dated 20 December 2019 on Amendment to the Act - Law on System of Courts, the Act on the Supreme Court and Certain Other Acts introduced to the Law on the System of Courts S. 42a under which it is inadmissible within the court or court bodies' operation to challenge the empowerment of the courts and tribunals, constitutional state bodies and the bodies of law supervision and control or to determine or assess by the court or another public administration body whether the appointment of the judge was compliant with the law or whether the judge so appointed is authorized to perform the administration of justice[70] The provisions contained in the Law on the System of Courts, which provide for the highest disciplinary penalties - moving the judge to another place of work or ex officio deprivation him/her of the right to be a judge (S. 109 para. 1a in relation with S. 107 para. 1(2–4) LCCS) for 'actions challenging the existence of the employment relationship of the judge, the effectiveness of the appointment of the judge or empowerment of the constitutional body of the Republic of Poland', namely for checking whether somebody is a judge, are synchronized with this The fact that CJ decisions dated 14 and 15 July 2021 challenged the disciplinary system in Poland only supplements the above arguments, but these decisions are not executed by Polish authorities[71].

Instead of summing up, it is worth noting that even guarantee provisions concerning the stability of court composition may be insufficient with respect to political and administrative influence. I mean here actions of court presidents appointed by the executive power. This is best illustrated by the case in which the Supreme Court asked for preliminary ruling in

67 K Markiewicz, 'Wpływ regulacji «covidowych» na zasadę niezmienności (stabilności) oraz kolegialność składów sądów odwoławczych', 2022 (1) Polski Proces Cywilny 38 <https://assets.contenthub.wolterskluwer.com/api/public/content/808e0a1a41574ad1b596e1528fbec91e?v=38d0ccf8> accessed 24 February 2022.

68 Decision of the RC in Poznań dated 10 November 2020, XV Cz 759/20, where a legal question was directed to SC concerning III CZP 103/20, LEX no 3268907.

69 See legal questions inter alia in cases: III CZP 82/21; III CZP 49/21, LEX no 3268908; III CZP 1/21, LEX no 3171965; III CZP 108/20, LEX no 3225666; III CZP 95/20, BOSN; III CZP 69/20, LEX no 3253399; III CZP 63/20, LEX no 3212835; III CZP 32/20, LEX no 3209917; III CZP 12/20, LEX no 3088895.

70 Act dated 20 December 2019 amending the Law on Common Court System, the Act on the Supreme Court and Certain Other Acts (Dz.U. of 2020, item 190 as amended).

71 Case C-791/19, *European Commission v Republic of Poland* (2021), ECLI:EU:C:2021:596; and case C-204/21, *European Commission v Republic of Poland* (2021) LEX no 3196955.

a very important case which concerns the status of neo-judges and consequences of the decisions issued by them. As a result of this request for a preliminary ruling submitted by the increased composition of seven judges of the Supreme Court [72] CJEU on 6 October 2021 awarded quite an explicit judgement [73]. To implement it, it was necessary for the Polish court submitting the question to give the judgement. Neo-judges managing the Polish Supreme Court (M. Manowska) and the Civil Chamber of SC (J. Misztal-Konecka), in which the case was heard, took a number of measures to prevent the case from being heard, including the 'arrest' of court files for many weeks. When, despite these obstacles, a date for the session was determined by the current Judge-Rapporteur, the President of SC managing the Civil Chamber decided to act through proper shaping of court composition. She issued a new ruling on court composition, changing it in breach of the court composition continuation principle (S. 47b LCCS in relation to S. 10 para. 1 of the Act dated 8 December 2017 on the Supreme Court) appointing mostly neo-judges, so these persons who the judgement directly concerns (sic!), removing at the same time one of the judges from the court composition.[74] This is how jugglery of court composition, known previously from the actions of the Polish political CT[75], became a fact in the Supreme Court. And all these measures were taken in order to retain the status quo of lawlessness in SC empanelled by the persons who are not lawfully appointed judges[76]. This perfectly shows various aspects of court - established lawfully, competent and independent. We cannot sacrifice one element and speak responsibly about the court as defined in S. 6 ECHR, S. 49 EU's Charter of Fundamental Rights, S. 19(1) (2) TEU. The right of recourse to court either is or is not guaranteed to anybody who is entitled to it. To ensure this all the elements must be harmonized, supplement each other and protect each other.

However, in case of Poland the protection of the dependent court, established with an extreme breach of law is protected by administrative and political decisions on shaping the court composition. The court 'shaped' in such a way guarantees the expected 'judgment'. There are fears that these standards of the highest judiciary bodies in Poland may spread among other courts which are managed by the presidents appointed by Justice Minister - General Prosecutor. Judges appointed in an illegal way will, by way of political decisions, be located in particular court composition, and then talking about court independence will be completely untrue. Let's hope that COVID-19 pandemic will end soon. It is then necessary to make sure that all the restrictions on the right of recourse to court, introduced as a pretext

72 Case III CZP 25/19, then the case file no changed into III CZP 1/22

73 Case C-487/19, *Waldemar Żurek v state* (2021) ECLI:EU:C:2021:798.

74 Out of 7 judges asking the question, in the meantime 3 of them retired, which should lead to random selection of 3 judges from among these who the case does not concern.

75 *Xero Flor w Polsce sp. z o.o. v Polska* App No 4907/18 (ECtHR, 7 May 2021) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%224907/18%22] ,%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CH AMBER%22],%22itemid%22:[%22001-210065%22]}> accessed 24 February 2022, which found that the composition of the Constitutional Tribunal, which is empanelled by the persons who took the places already taken, namely the so-called doubles, does not meet the criteria of ‹the lawfully empanelled court›.

76 *ADVANCE PHARMA SP. Z O.O v POLAND* App no 1469/20 (ECtHR, 3 February 2022) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%221469/20%22],%22documentcollectionid2%22:[%22GRAND CHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-215388%22]}> accessed 24 February 2022, *Dolińska-Ficek and Ozimek against Poland* App no 49868/19 and 57511/19 (ECtHR, 8 November 2021) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2249868/19%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-213200%22]};> accessed 24 February 2022, CJEU dated 15 July 2021, C-791/19, *Reczkowicz v Poland* App No 43447/19 (ECtHR 22 July 2021) in which the independence of the current NCJ was directly questioned, see *M Szwed*, 'ECHR: Izba Dyscyplinarna narusza Europejską konwencję praw człowieka [Analiza wyroku]' <https://oko.press/etpcz-izba-dyscyplinarna-narusza-europejska-konwencje-praw-czlowieka-analiza-wyroku/> accessed 30 September 2021.

to combat the pandemic, will be removed. Otherwise the pandemic of lawlessness will stay with us much longer than Covid.

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Certificate of state registration of the print media KB No 23634-13474P

Typeset by Iryna Roina, Dakor.

Cover-list by Alona Hrytsyk

Printed by Publishing House VD 'Dakor': Bandery Stepana str., 20A, Kyiv, 04655, Ukraine

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