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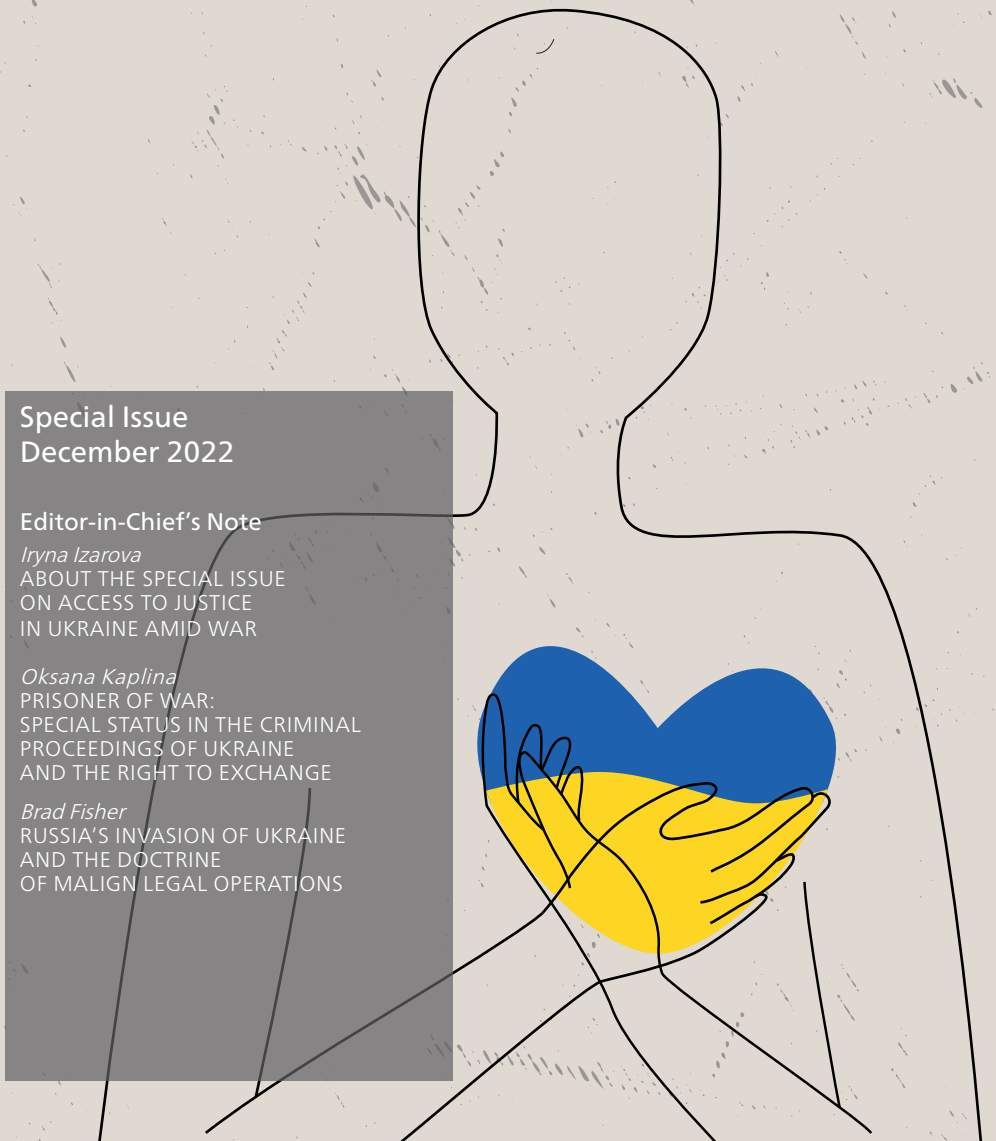

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ACCESS TO JUSTICE IN EASTERN EUROPE

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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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Editor-in-Chief's Note

ABOUT THE SPECIAL ISSUE ON ACCESS TO JUSTICE IN UKRAINE AMID WAR

In this issue, we have collected articles and notes written by authors on various topics related to the war in Ukraine.

Among the research articles, we have a few contributions on the most requested issues. Our authors studied topical questions and tried to find solutions where they found a lack of proper regulations, gaps, and insufficient information on the reality of the war in Ukraine, using the experience of other war conflicts, modern doctrines, and approaches to argue for their conclusions and recommendations.

War is a horrible thing by its nature, even though we must ensure the protection of rights and appropriate regulation for all who are involved. Even when we are talking about prisoners of war – military personnel – who were captured, we have to reflect the essence of humanity and the rule of law. This is particularly the case when legitimising the exchange of prisoners of war in national legal systems, which is extremally important as this requires the coordination of the national regulations, international humanitarian law, and international human rights law, which 'should have an integrative effect on national legal systems'. All this may be found in the article of ***Oksana Kaplina***, one of the leading and prominent Ukrainian scholars in the field of criminal procedure. The author's conclusions are illustrated by a concrete, practical example of the first sentence of the Ukrainian court against a combatant, which makes the article absolutely exclusive.

The article of ***Brad Fisher***, a young American researcher, on the topic of Malign Legal Operations or lawfare, gives readers an in-depth analysis of the practice of legal exploitation, particularly as it relates to international security. Moreover, in this article, the author argued that Russia's attack on Ukraine this year was predictable and even obvious. We still believe that the best form of conflict resolution is prevention; therefore, any well-argued research related to the prevention of war is a valuable contribution to the efforts to achieve peace. Please enjoy reading this article and the author's recommendations for responding to illegal behaviour in the form of the Counter-MALOPs Toolkit: Identify; Disrupt; and Defend.

Investigation of war crimes committed in Ukraine during this war is a hard task not only for the national bodies but for the international community as well. In this case, joint investigative groups are carrying out activities using cooperation between pre-trial investigation bodies of Ukraine through the Prosecutor General and the International Criminal Court. In the article of ***Oksana Kaluzhna and Kateryna Shunevych***, readers may learn about important issues of ICC jurisdiction in Ukraine (which has not ratified the ICC Rome Statute), as well as the ICC model of administration of justice, the rules of admissibility of evidence, the status of experts, and the features of expert involvement during ICC trials.

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We would like to draw attention to the authors' conclusions that aim to help justice prevail and to overcome gaps in criminal procedure regulation in Ukraine.

Our next article sets out the issues of protection of the right to health, which was analysed by authors from both perspectives – citizens and medical staff. Due to the war in Ukraine, the issues of the international and national instruments protecting the right to health have become even more relevant and important. In this study, readers may find evidence of gaps and inconsistencies in the existing system of regulatory and institutional means of protection for human rights to health, both at the international and national levels. The authors' conclusions concerning the reconsideration of the existing approaches to the protection of the right to health are worth reading and could help to develop a more efficient system of defence for the rights of the population and medical staff during the war.

Some of the most horrible crimes committed during wars are those related to sexual violence. Special attention is paid to such crimes against women due to their widespread and long-lasting effects on their health and the significant impact on society. In ***Maya Khater's*** article, a comprehensive analysis of laws prohibiting sexual assault against women with a particular focus on international law to address these crimes may be found. Her findings address the practical implementations of these laws, which are absolutely necessary for the protection of the vulnerable rights of women.

During the war, the number of people who have disappeared has increased significantly. It is hard to express the grief of families who have lost people amid military conflict; therefore, it is extremally important for the law to provide a clear and simple way to recognise the person as missing or disappeared, which is a novelty in Ukrainian law. The difference between a person who has disappeared and a missing person is primarily aimed at protecting these persons due to guarantees of protection of his/her rights and assisting in the search for that person. Gaps in the implementation of this procedure were found by authors ***Oksana Uhrynovska and Yurii Onyskiv*** and should attract the attention of policymakers, as well as experts in this field and lawyers.

Among the notes, one of the most interesting and valuable is a study focused on territorial integrity, which is one of the most requested issues even in times of peace, though today, it has become absolutely essential during the war. In this study, the nature and meaning of the unamendable provisions of the constitution were analysed, with particular focus on the issue of territorial integrity of states as regards the military aggression, occupation, and unacknowledged annexation of part of Ukrainian territory by Russia – Crimea. The co-authors of this note, ***Hryhorii Berchenko, Tetiana Slinko, and Oleh Horai***, argued for the need for the protection of the territorial integrity of states and the lack of any justification for its violation.

Notably, Ukraine's environmental damage due to the unjustified war sparked the interest of scholars from other states. In this issue, the note by ***Mohamad Albakjaji*** from Saudi Arabia analyses the responsibility for environmental damages caused by war. Significant losses of natural resources cannot go unpunished. The author discusses the issue at the international level, particularly regarding the responsibility of the aggressor state for the environmental damages incurred to the victim state, as well as the specific responsibility for the environmental damages incurred in Ukraine.

Two opinion articles were included in this issue due to their interesting approaches and valuable conclusions. ***Luiza Romanadze***, one of the most passionate Ukrainian mediators and president of the 'Ukrainian Academy of Mediation', contributes a discussion of the permanent and stable functioning of mediation in Ukraine and cooperation between courts and mediators in a post-war reality.

Maryna Stefanchuk, a member of the project ***'Justice in the context of sustainable development'***, discussed the issue of judiciary restoration in Ukraine and shared her views

on the modernisation and optimisation of the judiciary in Ukraine, in particular, the prevention of the duplication of powers among the bodies and institutions and the effective use of resources.

In their note, ***Oleh Yaroshenko and Olena Lutsenko*** discussed the changes that have affected working life under martial law in 2022. Analysis of Ukrainian law and international documents, as well as their own experience, gave the authors a basis to identify gaps in the regulation of labour relations in wartime and propose ways to improve the implementation of labour rights.

One of the most painful issues amid war is the issue of children. The protection of children's rights is a key element of human civilization, and their vulnerability requires more attention to all the essential parts of their existence. The adoption of a child is one of the oldest and most effective institutions to help to realize the right to be raised in a family. Nevertheless, the reality of war brings many nuances, and ***Yuliia Hartman's*** research helps to highlight these. You may find the comprehensive study of adoption regulations in the context of martial law, as well as the most recent issues, such as: the reunification of adoptive parents with an adopted child evacuated outside of Ukraine; the transfer of child placement processes to a digital format; the adoption conditions and registration of children during martial law; the peculiarities of registration of candidates for adoptive parents; the circle of subjects who can be adoptive parents during martial law; the functioning of the institute of temporary placement of children in Ukraine and the institute of guardianship and care during martial law; the peculiarities of the procedure for trial of adoption cases; and the existing national control mechanisms for displaced children. There should be no child left without parents as a result of the war with the help of transparent and effective mechanisms of prevention in practice.

In Ukraine, we are very aware of what fake justice means – the history of the Soviet occupation has taught us lessons. In this incredible article, co-authors ***Volodymyr Makarchuk, Ivan Terlyuk, Yaryna Bohiv, Olena Romtsiv, and Mykhailo Parasiuk*** were so brave to raise issues of so-called 'collective courts', which were held for propaganda purposes, where 'saboteurs', marauders, and rapists were sentenced by show of hands. They analyse the so-called 'Criminal Code' with its death penalty for 'especially serious crimes' without specifying their list of self-proclaimed republics. The authors raise the issue of formal 'justification' and direct practice of the death penalty in certain areas of the Donetsk and Luhansk regions of Ukraine affected by the uprising and subjected to Russian aggression. Please enjoy reading this valuable contribution and share it to help protect human rights.

I would like to express my endless thank to my colleagues, scholars from Ukraine who are working amid the war on topics that are important for all – for the protection of human rights and to develop Ukrainian law and mechanisms for its implementation. I thank all our international authors for their valuable contributions to this discussion. I truly believe that all the conclusions will be useful for further reforms and the main goal – to help prevent war and minimise losses in ongoing conflicts.

I am also happy to have the opportunity to announce a joint discussion with the participation of our authors and our audience – we would be happy to share results and exchange opinions with all who are interested. Please see the announcement on our website.

Slava Ukraini!

Editor-in-Chief
Prof. Iryna Izarova
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Ukraine

RESEARCH ARTICLE

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Research Article

PRISONER OF WAR: SPECIAL STATUS IN THE CRIMINAL PROCEEDINGS OF UKRAINE AND THE RIGHT TO EXCHANGE

Oksana Kaplina

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Published: **15 Dec 2022**

Keywords: *armed conflict, war crimes, prisoner of war, exchange of prisoners of war, prosecution of combatants, due legal procedure, prisoner of war as a participant in criminal proceedings, criminal proceedings in absentia, release from serving a sentence.*

ABSTRACT

Background. *This article is devoted to the relevant issue of the creation of appropriate normative regulation of criminal prosecution of prisoners of war who were captured during the armed conflict in Ukraine and their exchange. Despite the positive dynamics of destabilisation processes taking place all over the world, and in some places connected with the outbreak of military*

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Author, solely responsible for research and writing (Use Credit taxonomy). **Competing interests:** Any competing interests were included. **Disclaimer:** The author declares that her opinion and views expressed in this manuscript are free of any impact of any organisations, despite she serves as a Member of the Supreme Court she does not represent their view or opinions. **Translation:** The content of this article was translated with the participation of third parties under the author's responsibility. **Funding:** The author received no financial support for the research, authorship, and/or publication of this article. The Journal provides funding for this article publication.
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conflicts of an international nature, insufficient attention is paid to the issue of legitimising the process of exchange of prisoners of war in national legal systems.

Methods: *The problem is complicated by the need to coordinate national legal mechanisms with the norms of international humanitarian and human rights laws, which cannot be competitive, but instead should have an integrative effect on national legal systems. Relying on the norms of international humanitarian law, the author concludes that prisoners of war, as legal participants in an armed conflict, due to the immunity (privilege) of the combatant, do not bear individual responsibility for the initiation of an aggressive war or participation in it and must be repatriated after its end, with the exception of cases where they committed so-called 'general criminal' crimes or violated the laws and customs of war. Moreover, the author's position is illustrated by a concrete practical example of the first sentence of the Ukrainian court against a combatant.*

Given that until July 2022, the Ukrainian criminal procedural law lacked a proper mechanism aimed at the exchange of prisoners of war, it is quite logical to direct the legal policy of the state to the development of the relevant procedural legislation.

Results: *Considering the significant dangerous challenges that Ukraine has faced, and the amendment of the legislation, the author refer to the analysis of the factors that determined the special normative regulation of the procedural order of prisoners of war; analyse the criminal procedural status of the suspect-prisoner of war; and point to the differentiation of the procedural orders of such an exchange, the key criterion for the division of which is the procedural status of the person. Using the example of the first sentence in Ukraine to a Russian prisoner of war and relying on the norms of international humanitarian and national law, the author illustrate the specifics of the criminal liability of combatants. Evaluating the procedure of exchange of prisoners of war and criminal proceedings in absentia which were positively introduced in the legislation of Ukraine, it was concluded that the exchange is not an act of forgiveness, but an opportunity to return Ukrainian citizens, which is of the utmost importance in the hierarchy of values for the state.*

1 INTRODUCTION

Unfortunately, local wars have always been a tool of policy of many states and the global strategy of competing international powers. Despite the processes of globalisation – the erasure of borders, the powerful digital transformation of all spheres of social life, and the rapid development of economies – humanity has not yet learned to solve geopolitical problems in a peaceful, diplomatic way.

It is even more unfortunate that an armed conflict is ignited on the European continent, where the vast majority of the population has been brought up in the spirit of non-acceptance of any manifestation of intolerance or use of armed force. However, the realities are that on 24 February 2022, Russia launched an unprecedented armed aggression against Ukraine, which essentially became an aggravation of the armed conflict that had been simmering for eight years in the east of Ukraine. The offensive of the armed forces of the aggressor country took place along the entire line of the state border between Ukraine and Russia. The aggressor also used the temporarily occupied territories of the Luhansk and Donetsk regions and Crimea, which was annexed in 2014, as a springboard for the offensive. However, in the first days of the offensive, the enemy met with fierce resistance from the Armed Forces of Ukraine, territorial defense forces and ordinary Ukrainian citizens. Thus, an international armed conflict, unprecedented for the territory of Eastern Europe in the 21st century, began.

Armed aggression is certainly a test of the maturity of all state institutions of Ukraine, among which the defense sector plays a key role. However, in a state governed by the rule of law,

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even in times of war, the well-coordinated work of the state's legal system, which is thus tested for maturity and strength, is of great importance.

2 THE SYSTEM OF UKRAINIAN LAW IN THE CONDITIONS OF WAR

After the start of armed aggression, not only state institutions and the legal system as a whole but also the system of law itself faced complex challenges. This especially applies to criminal procedural law because law enforcement agencies faced extremely difficult tasks connected to the need to both maintain constitutional law and order in the state and perform a new function that was not inherent to them – the implementation of pre-trial investigations of military and war crimes, and the prosecution of persons who have the status of combatants and have committed war crimes on the territory of Ukraine.

The Criminal Procedure Code of Ukraine, which entered into force on 20 November 2012[1], is a modern codified normative act, however, it was developed and adopted in conditions of peace and stability in the functioning of state institutions and was designed for its application in peacetime. In no way did it contain differentiated procedures for criminal proceedings, which would be aimed at normalising the implementation of criminal proceedings under martial law. It should be noted that certain corrections were made to the Criminal Procedure Code of Ukraine in 2014 after the events in Donetsk and Luhansk regions. However, the novelties introduced by the Criminal Procedure Code were almost never applied, since the anti-terrorist operation (the operation of the joint forces) covered only a small part of the state, which made it possible to carry out criminal proceedings in the ordinary regime, and the normative regulation was and still is quite fragmented and non-complex.

The criminal legislation also turned out to be unprepared because the Criminal Code of Ukraine[2] did not contain the appropriate normative regulation for the qualification of war crimes committed during the war. The provision of the Rome Statute of the ICC[3], which enshrines the list of war crimes, and the four Geneva Conventions of 12 August 1949[4] and its Additional Protocol of 8 June 1977[5] were not implemented prior to the outbreak of hostilities. In Crimea, investigators, prosecutors, and judges faced the problem of the need

1 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 21 November 2022.

2 Criminal Code of Ukraine of 5 April 2001 No. 2341-VIII (*Official website of the Verkhovna Rada of Ukraine: official web portal*) < https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 21 November 2022.

3 Rome Statute of the International Criminal Court. Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544 <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 20 November 2020.

4 Geneva Convention on the Amelioration of the Fate of the Wounded and Sick in Active Armies <https://zakon.rada.gov.ua/laws/show/995_151#Text> accessed 20 November 2020; Geneva Convention on the Amelioration of the Fate of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea <https://zakon.rada.gov.ua/laws/show/995_152#Text> accessed 20 November 2020; Geneva Convention on the Treatment of Prisoners of War <https://zakon.rada.gov.ua/laws/show/995_153#Text> accessed 20 November 2020; Geneva Convention on the Protection of the Civilian Population in Time of War <https://zakon.rada.gov.ua/laws/show/995_154#Text> accessed 20 November 2020; Additional Protocol to of 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 20 November 2020.

5 Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), dated 8 June 1977 <https://zakon.rada.gov.ua/laws/show/995_199#Text> accessed 20 November 2020.

for a systematic interpretation and application of the norms of current national legislation and the so-called law of war – the norms of international humanitarian law.

Several mechanisms for bringing perpetrators of war crimes to justice are recognised: national, international and mixed[6]. Without their consideration in detail (which goes far beyond the scope of our research) we note that every person who has committed a socially dangerous act, which contains the composition of a criminal offense provided for by the Criminal Code of Ukraine, must be held criminally liable.

The parties to an armed conflict are also obliged by the norms of international humanitarian law to conduct an investigation into violations of international humanitarian law[7]. That is why national legislation must necessarily contain norms on responsibility for violations of the rules of warfare provided for by international humanitarian law. In Ukraine, such a norm is, primarily, Art. 438 of the Criminal Code 'Violation of laws and customs of war'[8].

Given the fact that military conflicts of an international and non-international nature are a frequent occurrence in the world, the European Court of Human Rights (ECtHR) has repeatedly addressed the problems of effective investigation of crimes committed during armed conflicts, emphasising the relationship between international humanitarian law and international human rights law. In particular, in the case of *Georgia v Russia* (II), the ECtHR noted that

> "In general, it may be observed that the obligation to carry out an effective investigation under Article 2 of the Convention is broader than the corresponding obligation in international humanitarian law […] Otherwise, there is no conflict between the applicable standards in this regard under Article 2 of the Convention and the relevant provisions of international humanitarian law."[9]

In *Kaya v. Turkey*, the ECtHR developed a very important legal position that all serious violations of human rights must be subject to prompt, impartial, thorough, and independent official investigation. Moreover, the ECtHR applies this provision also in the case of a pre-trial investigation in the context of an armed conflict, because 'neither the scale of violent military clashes, nor the large number of them, can cancel the obligation to ensure the effective and independent investigation of deaths related to clashes in which the security forces participated.'[10]

6 For more detail, see: I Marchuk, 'Green Light from the ICJ to Go Ahead with Ukraine's Dispute against the Russian Federation Involving Allegations of Racial Discrimination and Terrorism Financing' EJIL Talk, European Journal of International law 2019. <https://www.ejiltalk.org/green-light-from-the-icj-to-go-ahead-with-ukraines-dispute-against-the-russian-federation-involving-allegations-of-racial-discrimination-and-terrorism-financing/> accessed 20 November 2022; I Marchuk, 'From Warfare to Lawfare: Increased Litigation and Rise of Parallel Proceedings in International Courts: A Case Study of Ukraine's and Georgia's Action Against the Russian' in *Book The Future of International Courts* (2019) 217-234; YI Usmanov, 'International mechanisms for the protection of the right to life in armed conflicts' (2018) 140 Problems of Legality 154-165 <http://plaw.nlu.edu.ua/article/view/121621/121075> accessed 20 November 2022.

7 For example, Art. 103 of the Geneva Convention on the Treatment of Prisoners of War stipulates that 'Any judicial investigation of a prisoner of war shall be conducted with such speed as the circumstances permit and in such a manner as to cause the trial to commence as soon as possible.' See also 'Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy and Good Practice', published in 2019 by the International Committee of the Red Cross and the Geneva Academy of International Humanitarian Law and Human Rights. <file:///C:/Users/asus/Downloads/guidelines_on_investigating_violations_of_ihl_final.pdf> accessed 21 November 2022.

8 Criminal Code of Ukraine of 5 April 2001 No 2341-VIII (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 21 November 2022.

9 *Georgia v Russia (II)* App no 382663/08 (ECtHR, 21 January 2021) para 325 < https://hudoc.echr.coe.int/fre#_ftn42> accessed 21 November 2022.

10 Kaya v Turkey, App no 22729/93, 19 February 1998, para 91. <https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_22729-93> accessed 21 November 2022.

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In the case of *Al-Skeini and others v. the United Kingdom*, the ECtHR also indicated that

> "... the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict… It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators […] and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life."[11]

Considering that international documents, legal positions of the ECtHR refer the requirement to carry out an effective investigation to *jus cogenus* norms. The state is obliged to conduct such an investigation, including war crimes, despite difficult conditions, such as a state of emergency or armed conflict, which determines its obligation to provide law enforcement agencies with appropriate legal regulation.

Taking into account Ukraine's positive obligations and the lack of normative regulation, the Parliament of Ukraine, with the beginning of a full-scale war on 24 February 2022, directed the course of legal policy to active rule-making and adopted several packages of changes and additions to the current legislation in 'turbo mode', including the Criminal Procedural Code and the Criminal Code of Ukraine, with the aim of creating normative regulation of the procedure for carrying out criminal proceedings in conditions of war. It can even be stated that in the first two months of the war, a differentiated form, a special order of criminal proceedings, was created, which took the form of an institution of criminal proceedings and contains a set of norms aimed at regulating the order of pre-trial investigation and trial in martial law conditions.

3 FACTORS CAUSING THE NECESSITY FOR SPECIAL NORMATIVE REGULATION DURING THE PERIOD OF WAR

The factors that determined the need to create a special regime of pre-trial investigation and trial under martial law[12] can be divided into several groups.

The first group consists of circumstances of a legal nature. These include:

a) the lack of adequate material and procedural legislative support, the specifics of which in the conditions of war are in the systematic regulatory regulation; and the application of norms of international humanitarian law and international human rights law in addition to national legislation, as well as bringing them into compliance with the requirements of international humanitarian law of Ukrainian legislation;

b) the fact that the pre-trial investigation, even under martial law, must be both carried out in accordance with the law and the norms of the current legislation because criminal proceedings on the territory of Ukraine are conducted on the grounds and in the manner provided by the Criminal Procedure Code, regardless of the place where the criminal offense

11 Al-Skeini and Others v The United Kingdom, App no 55721/07, 7 July 2011, para 164. <https://hudoc.echr.coe.int/fre?i=001-105606> accessed 21 November 2022.

12 Section IX-1 'Special Regime of Pre-Trial Investigation, Trial Under Martial Law' of the 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 21 November 2022.

was committed (part 1 of Art. 4 of the Criminal Procedure Code of Ukraine);

c) any restrictions on the rights of a person in criminal legislation, which are determined by martial law, must have a legitimate purpose, be proportionate, and be based on current legislation;

d) the demand for simplified procedures;

e) the impossibility of applying certain norms of current legislation or even entire legal institutions, which is explained by conditions of an objective nature.

The second group consists of determinants of an organisational nature: a) carrying out hostilities on a certain territory of the state; b) lack of access to part of the occupied territory and the impossibility of conducting a pre-trial investigation and ensuring effective control and constitutional order there; c) destruction of administrative buildings and/or criminal procedural documents, materials of pre-trial investigations and court proceedings; d) inability of investigative judges, prosecutors, investigators, detectives, inquirers and other employees of law enforcement agencies to fulfill their powers; e) complete or partial non-functioning of state authorities and local self-government; e) destruction of the established mechanism of state administration; f) a sharp increase in the number of criminal offenses caused, among other things, by committing military and war crimes; g) lack of mobile communication and Internet; and h) mass migration processes, which cause the impossibility of involving participants in criminal proceedings to participate in investigative (search) actions, other procedural actions, court proceedings, and the impossibility of bringing to criminal responsibility persons for whom preventive measures in the form of detention were not chosen and who are hiding from pre-trial investigation bodies and the court in the territory not controlled by Ukraine.

The third group consists of factors of a security nature: a) the risk of conducting individual investigative actions or a pre-trial investigation in general in areas of active hostilities, b) the impossibility of ensuring safety for the life and health of participants in a certain procedural actions or criminal proceedings in general; and c) the impossibility of attracting witnesses, specialists, jurors, appointing and conducting an examination, which would determine the receipt of admissible evidence in criminal proceedings, due to hostilities.

A number of factors of a subjective nature can be distinguished as the fourth group: a) a lack of work experience in emergency conditions; b) the suddenness of the situation, which caused in some cases the inability of managers to organise subordinates to perform tasks under martial law; and c) a lack of experienced personnel who would be able to ensure the implementation of a pre-trial investigation under martial law.

4 PROCEDURE FOR CRIMINAL RESPONSIBILITY AND EXCHANGE OF PRISONERS OF WAR

One of the issues that arose in the criminal process of Ukraine is the problem of normalising the procedural status of prisoners of war who committed crimes. As is well known, the procedural status of prisoners of war is the subject of normative regulation of 'Geneva law'[13]. Until July 2022, criminal procedural legislation did not provide for the definition of the term 'prisoner of war'. Efforts to introduce the process of bringing combatants to criminal responsibility and their exchange into the legal field have been made by Ukrainian legislators

13 Geneva Convention on the Treatment of Prisoners of War. <https://zakon.rada.gov.ua/laws/show/995_153#Text> accessed 21 November 2022.

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before, in view of the anti-terrorist operation (operation of the united forces) since 2014. In particular, in 2017, the concept of a prisoner of war was introduced in para. 8 of the Instructions on the Procedure for Implementing the Norms of International Humanitarian Law in the Armed Forces of Ukraine[14]. The Ukrainian legislator borrowed this concept almost *verbatim* from the Geneva Convention[15]. However, it was rather the harmonisation of the norms of international humanitarian law with national legislation. Despite the smouldering armed conflict in the East of Ukraine since 2014, the Ukrainian legislator did not anticipate the possibility of a large-scale armed aggression by Russia. Therefore, in the criminal proceedings there was no mechanism aimed at normalising the procedural status of a combatant who is brought to criminal responsibility.

It must be said that the persons who took part in the events in the east of Ukraine in 2014-2021, despite the lack of proper regulation and Russia's denial of their participation in it, were still brought to criminal responsibility and exchanged for Ukrainian military personnel. The lack of a legal mechanism led to informal practices being used to overcome the existing gap. In particular, a suspect who was held in custody, and for whom an exchange agreement was reached, was placed in non-isolation custody, after which he or she was released from custody in the courtroom and sent for exchange. Such cases became a custom, an informal practice, since their number was insignificant.

However, on February 22, 2022, after the start of the full-scale armed aggression against Ukraine and an increase in the number of prisoners of war, there was a need to adopt new legislation that would be consistent not only with the norms of international humanitarian law but also become the legal basis for a proper criminal procedural mechanism for bringing them to criminal responsibility and exchange (subject to agreements being in place).

It should be noted that combatants, in accordance with the norms of international humanitarian law, enjoy immunity (privilege) and cannot be prosecuted for participating in an armed conflict, with the exception of cases of international crimes committed, in particular war crimes, as well as so-called general crimes, provided by the national legislation on criminal liability. In these cases, the combatant, taking into account the principle of inevitability of punishment existing in Ukrainian law, should be held criminally liable. As an example, we can cite the first sentence that was handed down in the criminal trial of Ukraine against the 21-year-old Russian Armed Forces serviceman Vadym Shishimarin[16], who became the first Russian soldier to appear before a Ukrainian court for committing a war crime.

> In particular, on 24 February 2022, a serviceman of the Russian Armed Forces (Person 1), being the commander of the military unit of the 4th Tank Kantemyriv Division of the Moscow Region of the Armed Forces of the Russian Federation, having a personal automatic firearm, together with other persons not identified by the pre-trial investigation, including servicemen of the 13th Guard Tank Shepetovsky

14 Instructions on the procedure for implementing the norms of international humanitarian law in the Armed Forces of Ukraine. Approved by the Order of the Ministry of Defense of Ukraine of 23 March 2017 <https://zakon.rada.gov.ua/laws/show/z0704-17#n1359> accessed 21 November 2022.

15 Geneva Convention on the Treatment of Prisoners of War Ratified with reservations by Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR No 114a-03 of 03 July 1954. Entered into force for Ukraine on 3 January 1955. <https://zakon.rada.gov.ua/laws/show/995_153#Text> accessed 22 November 2022.

16 We are not changing the name due to the widespread media coverage of this trial. See: 'The first trial of a war criminal, Russian military officer Vadym Shishymarin, took place in Ukraine' (*Ukrainian News Agency*) <https://nv.ua/ukr/ukraine/events/sud-na-rosiyskim-soldatom-shishimarinim-reportazh-nv-novini-ukrajini-50244061.html> accessed 20 November 2022; 'The first verdict under Art. 438 of the Criminal Code over the Russian murderer-military Shishimarin: regarding legal qualifications' (*Protocol*) <https://protocol.ua/ru/pershiy_sudoviy_protses_nad_rosiyskim_viyskovim_shchodo_pravovoi_kvalifikatsii/> accessed 20 November 2022.

Krasnoznamyonny, Order of Suvorov and Kutuzov Regiment of military unit Number 1 and the commanders of the Armed Forces of the Russian Federation, set out from the city of Graivoron of the Belgorod Region of the Russian Federation in the direction of the Russian-Ukrainian border and at approximately 9 o'clock in the morning of the same day crossed the state border of Ukraine in Sumy Oblast.

A military convoy with servicemen of the Russian Federation, including Person 1, in compliance with the order of unidentified commanders of the Armed Forces of the Russian Federation, crossed the state border of Ukraine on February 24-26, 2022 and continued its movement through the territory of Ukraine. While following the route, servicemen of the Armed Forces of the Russian Federation in the territory of the Sumy region repeatedly came under fire from the Armed Forces of Ukraine, who were performing their duty, provided for in Art. 65 of the Constitution of Ukraine on protection of independence and territorial integrity of Ukraine.

In connection with these shellings, on February 27-28, 2022, the unidentified commanders of the Russian Armed Forces decided to form a military convoy of the Russian Armed Forces consisting of five units of equipment, namely: IFV, KAMAZ vehicle, two gasoline trucks and another IFV with a number of servicemen of the Russian Armed Forces who went to the Russian Federation. Among others, this column included servicemen of the Russian Armed Forces, namely: Person 1 and other servicemen.

At approximately 08:00 a.m. on 28 February 2022, from a place not determined by the pre-trial investigation, near the village of Komyshi, Okhtyrsky District, Sumy Oblast, the above-mentioned column of the Armed Forces of the Russian Federation set off towards the state border of Ukraine with the Russian Federation, passing through the village of Komyshi and continuing in the direction of Chupakhivka settlement of Okhtyrskyi district of Sumy Oblast.

The specified convoy of five units of military equipment of the Armed Forces of the Russian Federation and personnel, being in the town of Chupakhivka, moved along Lenina Street, after which it crossed the bridge of the Tashan River and left on the Lebedynska street and continued towards the village of Grinchenkove, Okhtyr district, Sumy Oblast. However, in the vicinity of the village of Grinchenkove, the said convoy was destroyed by the Armed Forces of Ukraine, as a result of which the IFV and the Kamaz vehicle were destroyed.

In this regard, about 15 servicemen of the Russian Armed Forces, who were left without means of transportation, divided into several groups, one of which included 5 servicemen of the Russian Armed Forces, namely: Person 1 and other persons.

At approximately 10:30 a.m. on the highway between Chupakhivka and the village of Grinchenkove, the specified servicemen noticed a gray Volkswagen Passat car (station wagon body) moving towards them from the direction of the village of Dovzhik in the direction of the village of Grinchenkove.

When this car leveled with servicemen of the Armed Forces of the Russian Federation, the latter, acting with the aim of taking possession of this car, fired a number of shots from their automatic weapons in the direction of the specified car, as a result of which the body, windshield and front left wheel were damaged. At the same time, the driver stopped and, in order to save his own life and health, left his car, hiding on the roadside on the right side of the road.

After the shelling of the car, five servicemen of the Russian Federation: Person 1 and other persons, together with their weapons, namely Kalashnikov assault rifles, got into it and started moving in the direction of Chupakhivka settlement of Okhtyr district of Sumy Oblast.

Driving along Lebedynska Street in the town of Chupakhivka, in the direction of

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> the Tashan River, the said servicemen of the Russian Armed Forces near building No. 52 on the sidewalk, saw a civilian, who was a citizen of Ukraine, a local resident Person 2, born in 1959, who, without posing any danger to the servicemen of the Russian Federation, being dressed in civilian clothes, unarmed, was returning to his home with a bicycle and talked on a mobile phone.
>
> Mistakenly believing that the citizen of Ukraine Person 2 intends to inform about their location, the serviceman of the Russian Armed Forces instructed Person 1 to kill the specified civilian Person 2.
>
> Violating the laws and customs of war provided for by the Additional Protocol to the Geneva Convention of 12 August 1949, applicable to the protection of victims of international armed conflicts (Protocol I), of 8 June 1977, a serviceman of the Russian Federation Person 1, carrying out a criminal order, realizing that the victim is a civilian person, was not armed, did not pose a threat to him, acting deliberately, fired several (3-4) aimed shots through the open rear left window of the car from his personal automatic weapon, a 5.45 mm Kalashnikov assault rifle, into the head of the victim, as a result of which the latter received a wound of the parietal-temporal area on the left, crushing of the bones of the vault of the skull and destruction of the brain.
>
> The accused fully admitted his guilt in committing the crime.[17]

Analysing the given verdict of the court, it should be noted that the accused, in accordance with Art. 43 of the Additional Protocol to the Geneva Convention of 12 August 1949, which applies to the protection of victims of international armed conflicts (Protocol I) of 8 June 1977[18] , had the status of a combatant, as he was a legal participant in an international armed conflict. This is confirmed by the materials of the pre-trial investigation and court evidence: 1) the accused was the commander of the branch of the military unit Number 1 '4th Tank Kantemyriv Division of the Moscow Region' of the Armed Forces of the Russian Federation; 2) had a personal automatic firearm; 3) acted together with other persons not identified in the pre-trial investigation, including servicemen of the '13th Guards Tank Shepetovsky Krasnoznamyonny, Order of Suvorov and Kutuzov Regiment' of military unit NUMBER_1; and 4) left the city of Graivoron of the Belgorod region of the Russian Federation in the direction of the Russian-Ukrainian border and at approximately 9:00 a.m. of the same day, illegally crossed the state border of Ukraine in Sumy Oblast.

As a rule, such persons, when captured, are prisoners of war and, in accordance with the provisions of international humanitarian law, and are subject to placement in appropriate camps for prisoners of war, and due to the immunity (privilege) of a combatant, they do not bear individual responsibility for participating in an armed conflict and must be repatriated after the end of the armed conflict, only if, however, they did not violate the laws and customs of warfare. The actions of such combatants cannot be qualified as crimes (which often happened in the first months of the war) according to Art. 110 of the Criminal Code of Ukraine[19] 'Encroachment on the Territorial Integrity and Inviolability of Ukraine'; Part 3 of Art. 332-2 of the Criminal Code of Ukraine 'Illegal Crossing of The State Border of

17 Verdict of 23 May 2022 in criminal proceedings No 1-kp/760/2024/22 Case No 760/5257/22 regarding Person 1, a native of Ust-Ilimsk, Russian Federation, a citizen of the Russian Federation, a soldier of the military unit NUMBER 1 of the Russian Army, accused of having committed the crime provided for in Part 2 of Art 438 of the Criminal Code of Ukraine <https://reyestr.court.gov.ua/Review/104432094> accessed 20 November 2022.

18 Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (Protocol I), dated 8 June 1977. <https://zakon.rada.gov.ua/laws/show/995_199#Text> accessed 20 November 2022.

19 Criminal Code of Ukraine of 5 April 2001 No 2341-VIII (*Official website of the Verkhovna Rada of Ukraine: official web portal*) <https://zakon.rada.gov.ua/laws/show/2341-14#Text> accessed 21 November 2022.

Ukraine'; Art. 258 – 258-5 of the Criminal Code of Ukraine (terrorism); and Art. 437 of the Criminal Code of Ukraine 'Planning, Preparing, Starting and Waging an Aggressive War', since under this article only the higher military and political leadership of the aggressor state is responsible (according to Article 8bis of the Rome Statute of the International Criminal Court[20]: persons who are able to actually carry out controlling or directing the political or military actions of the state). In addition, they should not become participants in criminal proceedings. Their detention is carried out in accordance with the report of the authority responsible for the placement of prisoners of war, and not on the basis of the resolution on the detention of the investigator, the prosecutor and the selection of a preventive measure against them by the investigating judge in accordance with the requirements of the current criminal procedural legislation.

However, in this case, the serviceman Person 1 committed a war crime, which was the intentional killing of a civilian, therefore information about him should have been – but was not – entered into the Unified Register of Pretrial Investigations with qualification under Part 2 of Art. 438 of the Criminal Code of Ukraine 'Violation of the Laws and Customs of War', a pre-trial investigation launched, and the accused brought to criminal liability in accordance with the requirements of current Ukrainian legislation.

In general, since the beginning of the armed aggression of the Russian Federation against Ukraine, the Prosecutor General's Office has registered and initiated investigations into 49,629 crimes of aggression and war crimes, including 47,948 under Art 438 of the Criminal Code of Ukraine 'Violation of the laws and customs of war'[21].

In connection with the need to bring national legislation to the norms of international humanitarian law in the criminal process of Ukraine, the problem arose of directing the criminal legal policy of the state to establish the proper legal procedure for the exchange of prisoners of war, including those who were brought to criminal responsibility and acquired the status of suspects, respectively to the norms of the current criminal procedural legislation. Such a procedure was not provided for in the criminal process of Ukraine at all.

In order to create such a procedure, the Ukrainian Parliament and the Cabinet of Ministers of Ukraine adopted a number of legislative acts. These are, in particular, Resolution No. 721 of 17 June 2022 'On the Procedure for the Implementation of Measures Regarding the Treatment of Prisoners of War in a Special Period'[22], Resolution of the Cabinet of Ministers of Ukraine No. 413 of 04 May 2022 'The Procedure for Detaining Prisoners of War'[23], Law of Ukraine 'On the Introduction of amendments to the Criminal and Criminal Procedural Codes of Ukraine, and other legislative acts of Ukraine regarding the regulation of the procedure for the exchange of persons as prisoners of war'[24].

In accordance with these laws, a new subject appeared in the criminal process of Ukraine: a person in respect of whom an authorised body made a decision on exchange as a prisoner

20 Rome Statute of the International Criminal Court. Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol 2187, No 38544 <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf> accessed 20 November 2022.

21 The official website of the Office of the Prosecutor General of Ukraine <https://www.gp.gov.ua> accessed 20 November 2022.

22 Resolution of the Cabinet of Ministers of Ukraine No 721 of 17 June 2022 'On the Procedure for the Implementation of Measures Regarding the Treatment of Prisoners of War in a Special Period' < https://zakon.rada.gov.ua/laws/show/721-2022-п#Text> accessed 20 November 2022.

23 Resolution of the Cabinet of Ministers of Ukraine No 413 of 04 May 2022 'Procedure for Keeping Prisoners of War' < https://zakon.rada.gov.ua/laws/show/413-2022-п#Text> accessed 20 November 2022.

24 The Law of Ukraine 'On Amendments to the Criminal Code and Criminal Procedural Code of Ukraine and other legislative acts of Ukraine on regulating the procedure for the exchange of persons as prisoners of war' of 28 July 2022 No 2472-IX.

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of war, which is understood as any person who has the procedural status of suspect, accused or convicted and who is included in the list for exchange as a prisoner of war by a relevant authorised body.

A sign of such a person is that they: 1) have the status of a combatant, which is defined by the Geneva Conventions; 2) committed a so-called general criminal war crime; 3) such actions were committed during an armed conflict of an international nature, in particular, between Ukraine and Russia; 4) have been notified of the suspicion of committing a war crime (or an indictment against them has been submitted to the court, or a guilty verdict has been issued); 5) have received the procedural status of a suspect (of the accused if the indictment has been submitted to the court or of the convicted if the indictment has entered into force); 6) the authorised body has made a decision to exchange him or her as a prisoner of war; and 7) who is included by the relevant authorised body in the list for exchange as a prisoner of war.

The law does not provide for a separate systemic regulation of the procedural status of a suspect (accused, convicted) prisoner of war in a separate article, most likely in connection with its exclusive regulation, so to speak, the motives of ad hoc regulation. A comparison of the procedural status of a suspect and a suspect-prisoner of war gives reason to assert that the Ukrainian criminal procedural legislation, in view of its integrability with the norms of international humanitarian law, expands the procedural status of the latter, granting them the general status of a suspect, whose rights and obligations are provided for in Art. 42 of the Criminal Code of Ukraine and further provides for a number of additional rights, guarantees and obligations.

In particular, Clause 20-1 of the Procedure for Detention of Prisoners of War[25], once again reminds the latter that if they are participants in criminal proceedings, they are guaranteed the opportunity to exercise the relevant rights defined by the Criminal Procedure Code of Ukraine.

At the same time, unlike Clause 4, Part 3, Art. 42 of the Criminal Code of Ukraine, according to which the suspect/accused has the right not to say anything about the suspicion against him/her, or the accusation, based on the provisions of Art. 17 of the Geneva Convention on the Treatment of Prisoners of War, which is also reflected in clauses 10-11 of the Procedure for Detention of Prisoners of War[26]. The latter are required to state only their surname, first name, military rank, date of birth, and army, regimental, personal or serial number or, if not available, other equivalent information. At the same time, interrogation of prisoners of war should be conducted in a language they understand, without the use of torture and other coercive measures.

Also, a feature of the criminal procedural status of a prisoner of war, which is not inherent to other suspects (accused and convicted) in criminal proceedings, is their right to exchange, if a decision on exchange has been made in relation to them by an authorised body and if they are included in the list for exchange as a prisoner of war by the relevant authorised body. We believe that we should talk about the right to exchange. This is indicated by the legal requirement to obtain the written consent of the prisoner of war for the exchange[27]. Thus, the latter has a discretionary right that cannot be enforced.

Long discussions regarding the procedure for normalising the procedural order of such an exchange, the rejection of several draft laws by the Parliament of Ukraine led to a certain

25 Resolution of the Cabinet of Ministers of Ukraine No. 413 of 04 May 2022 'Procedure For Keeping Prisoners Of War' <https://zakon.rada.gov.ua/laws/show/413-2022-п#Text> accessed 20 November 2022.

26 Ibid.

27 In particular, this is Part 1 of Art 84 of the Criminal Code of Ukraine and Part 5 of Art 201-1, p. 5, part 1, Art 280, Part 2 of Art 335 of the Criminal Procedure Code of Ukraine.

legislative consensus. At present, the criminal process of Ukraine provides for two orders, which differ depending on the procedural status of the prisoner of war who participates in criminal proceedings: 1) in relation to the suspect and the accused and 2) in relation to the convicted person, in respect of whom the verdict has become legally binding and who is serving a sentence.

The first procedure is related to the implementation of the exchange procedure in relation to a prisoner of war who is under pretrial investigation, has been notified of suspicion, or an indictment has been submitted to the court, and he/ she has received the status of an accused. If the authorised body has made a decision to transfer such a suspect/accused for exchange as a prisoner of war, with a petition, in the manner provided by Art. 184 'Petition of The Investigator, Prosecutor for The Application Of Preventive Measures' and 132 'General Rules for the Application of Measures to Ensure Criminal Proceedings' of the Code of Criminal Procedure of Ukraine, the prosecutor must apply to the investigating judge and the court for the cancellation of a preventive measure in connection with the adoption by the authorised body of a decision on exchange.

In view of the general requirement regarding the validity of the motion, the prosecutor must attach to the motion for the cancellation of the preventive measure materials confirming the adoption by the authorised body of the decision on the transfer of the suspect/accused for exchange as a prisoner of war and the written consent of the suspect/accused for the exchange as a prisoner of war.

A copy of the petition and the materials attached to it shall be provided to the suspect/ accused no later than three hours before the beginning of consideration of the petition.

The request of the prosecutor to cancel the preventive measure is considered by the investigating judge and the court on the day of its arrival in court with the obligatory participation of the prosecutor.

The investigating judge and the court, after verifying the circumstances confirming the adoption by the authorised body of the decision to transfer the suspect/accused for exchange as a prisoner of war and the suspect/accused giving consent to such an exchange, issues a decision on the cancellation of the preventive measure and the transfer of the person (Article 201-1 of the Criminal Procedure Code of Ukraine)[28].

In this case, the suspected prisoner of war, the accused, is immediately released from custody and transferred to the supervision of an authorised body, if the authorised official of the place of detention in which he/she is detained does not have another court decision that has entered into legal force and directly provides for holding the suspect/accused in custody (Part 6 of Article 202 of the Criminal Procedure Code of Ukraine). The law does not provide for the possibility of appealing the decision of the investigating judge or the court on the cancellation of a preventive measure against a prisoner of war who is subject to exchange. Their further detention and measures regarding the treatment of a suspect or accused released from custody are carried out in accordance with the above-mentioned procedure established by the Cabinet of Ministers of Ukraine for prisoners of war 'Procedure for Detention of Prisoners of War'[29].

Parallel to this mechanism, after the authorised body has made a decision to hand over the suspect for exchange as a prisoner of war and the suspect has given written consent to such

28 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 21 November 2022.

29 Resolution of the Cabinet of Ministers of Ukraine No 413 of 04 May 2022 'Procedure for Keeping Prisoners of War' <https://zakon.rada.gov.ua/laws/show/413-2022-п#Text> accessed 20 November 2022.

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an exchange, the pre-trial investigation regarding them is stopped by a reasoned decision of the prosecutor, or the investigator in agreement with the prosecutor. A copy of the resolution is sent to the defense and the victim. Moreover, in contrast to the undifferentiated procedure, when the pre-trial investigation regarding a prisoner of war who is subject to exchange is stopped, the decision to stop it on this basis is not subject to appeal (clause 5 part 1, part 4 of article 280 of the Criminal Procedure Code of Ukraine).

Similarly, if a prisoner of war is on trial, their case is referred to the court, and at that time the authorised body has made a decision to transfer the accused for exchange as a prisoner of war and the accused has given written consent to such exchange, the court stops the court proceedings until the exchange is carried out or until receiving information from the authorised body that such an exchange did not take place. The decision to stop the court proceedings on the specified grounds is not subject to appeal.

The procedure considered by us and introduced into the criminal procedural legislation does not mean a complete refusal of the state to prosecute persons who committed war crimes on the territory of Ukraine. The state takes a complimentary step regarding the exchange not because of reluctance to conduct pre-trial investigation, economy of criminal repression, or because of forgiveness. It would be wrong from a moral point of view, especially to the memory of dead civilians, as well as military personnel of the Armed Forces of Ukraine. Rather, such actions are taken due to the fact that the exchange is not so much the transfer of a prisoner of war to an aggressor country, but an opportunity to return Ukrainian citizens to their homes, which in the hierarchy of values for the state is vastly more important than bringing to criminal responsibility a prisoner of war suspect accused, even if they committed war crimes on the territory of Ukraine.

Therefore, since Ukraine does not refuse to prosecute prisoners of war who have committed war crimes, the following mechanism has been implemented in the state. After the exchange of the suspect as a prisoner of war has been carried out or such exchange has taken place, the suspended pre-trial investigation is resumed by the resolution of the investigator or prosecutor (Part 1 of Art. 282 of the Criminal Procedure Code of Ukraine). Regarding a person in respect of whom the authorised body made a decision to exchange as a prisoner of war and such an exchange took place, a special pre-trial investigation may be initiated, i.e., in the absence of the suspect, which is carried out on the basis of the decision of the investigating judge in criminal proceedings regarding the crime committed.

If the exchange of a prisoner of war took place, the prosecutor or the investigator, in agreement with the prosecutor, must initiate the issue of conducting a special pre-trial investigation before the investigating judge. In such a petition, the agent of the state must indicate the grounds for carrying out criminal proceedings in the absence of the suspect, which include: 1) a brief summary of the circumstances of the criminal offense in connection with which the petition is submitted; 2) legal qualification of the criminal offense with an indication of the article (part of the article) of the Law of Ukraine on criminal responsibility; 3) a statement of the circumstances that give grounds to suspect a person of committing a criminal offense, and a reference to such circumstances; 4) materials confirming the adoption by the authorised body of the decision to transfer the suspect for exchange as a prisoner of war and the fact of exchange; and 5) a list of witnesses whom the investigator or prosecutor deems necessary to interrogate during the consideration of the petition.

The investigating judge considers such a petition no later than ten days from the date of its receipt in court with the participation of the investigator, the prosecutor who submitted it, and the defense counsel, who can be engaged by the suspect himself, and if he has not done so, the duty to take measures to engage one rests with investigating judge.

A copy of the decision is sent to the prosecutor, the investigator and the defense attorney. Information on suspects, in respect of whom the investigating judge has issued a decision to carry out a special pre-trial investigation, shall be entered into the Unified Register of Pre-trial Investigations immediately, but no later than 24 hours after the decision is issued, and published in mass media of nationwide distribution and on the official website of the Office of the General Prosecutor.

Notices of summons of a suspect in the event of a special pre-trial investigation in connection with a decision by an authorised body to hand over a suspect for exchange as a prisoner of war are published in mass media of nationwide distribution and on the official website of the Prosecutor General's Office.

From the moment of publication of the notice in mass media of nationwide distribution and on the official website of the Prosecutor General's Office, the suspect is deemed to have been duly familiarised with its content.

Copies of the procedural documents to be served on the suspect are sent to the defense attorney.

The specifics of pre-trial investigation in absentia and trial in the absence of the suspect or accused are provided for in Chapter 24-1 of the Criminal Procedure Code of Ukraine[30].

The law provides guarantees of compliance with the rights of the person in respect of whom it is carried out: 1) proceedings *in absentia* are possible only in exceptional cases; 2) the procedure for its implementation is a special (extraordinary) procedure for criminal proceedings, which is regulated by a separate chapter 24-1 of the Criminal Procedure Code of Ukraine; 3) this procedure is consistent with the norms of international humanitarian law; 4) it is carried out in relation to a prisoner of war who has committed a war crime in respect of which there is a well-founded suspicion, which has been reported to them; 5) is carried out exclusively on the basis of the decision of the investigating judge; and 6) provides for additional guarantees of compliance with the rights of such a suspect, including the mandatory participation of a defense attorney.

It should be noted that such absenteeism is often criticised by lawyers and scientists. However, a special pre-trial investigation in the absence of the suspect or accused (*in absentia*) exists in many countries of the world: Austria, Bulgaria, Denmark, Estonia, Germany, the Netherlands, France, etc. It is consistent with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the UN General Assembly in 1985, which states that victims should have the right to access justice mechanisms and to prompt reparation; at the same time, all UN member states are obliged to ensure that judicial and administrative procedures meet the needs of victims of crimes to a greater extent[31]. It also does not contradict Resolution (75) 11 of the Committee of Ministers of the Council of Europe 'On the Criteria Regulating Proceedings Conducted in The Absence of The Accused' of 19 January 1973[32] and

30 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 21 November 2022.

31 Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power dated 29 November 1985. Legislation of Ukraine / Verkhovna Rada of Ukraine < https://zakon.rada.gov.ua/laws/show/995_114#Text> accessed 20 November 2022.

32 About the criteria regulating the hearing conducted in the absence of the accused (adopted by the Committee of Ministers on January 19, 1973 at the 217th meeting of the Representatives of Ministers): Resolution 75 (11) of the Committee of Ministers of the Council of Europe <http://echr-base.ru/res75_11.jsp> accessed 20 November 2022.

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Recommendation No. 6 R (87) 18 of the Committee of Ministers of the Council of Europe to member states 'Regarding Simplification of Criminal Proceedings' of 17 September 1987[33].

We believe that 'wartime' realities require the search for new means of ensuring the inevitability of criminal liability of prisoners of war for 'general criminal' crimes committed on the territory of Ukraine. When choosing between the complete absence of criminal procedural activity aimed at holding persons criminally responsible and punishing persons who committed crimes during the armed conflict on the territory of Ukraine, and carrying out criminal proceedings in absentia, it is better to choose the second option, since this procedure will ensure not only the identification of the person who committed the crime, but also the collection and consolidation of evidence in the form of witness statements, material evidence, expert opinions, and documents that can be used later in international judicial institutions. By introducing such a specialised (non-typical) order into the field of legal regulation, the legislator has the task not of simplifying criminal proceedings but of achieving the tasks defined in Article 2 of the Criminal Procedure Code of Ukraine, with minimal deviation from the general order due to the specifics of the situation. Reputational and moral factors are important. In this way, Ukraine demonstrates that despite armed aggression and the need to repel it, to solve extremely complex social problems bordering on survival in war conditions, the state finds the strength and means for the functioning of both the legal system and branches of law, with a legitimate purpose and in the legal field, as a European country where the rule of law and legality prevail.

The first order given above and analysed in this article is related to the normalisation of the procedure aimed at introducing a proper procedure for the exchange of a prisoner of war suspect or accused (defendant) at the stage of pre-trial investigation and conducting proceedings against them in absentia. However, in the event that a court order has already been passed for such a person's verdict, such a procedure cannot be applied. Due to the fact that the sentence against such a prisoner of war has already entered into force, and the person has the status of a convicted person, this person can only be released from serving the sentence. Therefore, in connection with the adoption by an authorised body of a decision to hand over a prisoner of war who has already been convicted, the legislator provided for an independent procedure for their release from serving a sentence (84-1 of the Criminal Code of Ukraine, clause 13-4, part 1, Art. 237, Art. 537 of the Criminal Procedure Code of Ukraine).

In particular, the issue of release from serving a sentence in connection with the adoption by an authorised body of a decision to transfer a person for exchange as a prisoner of war is decided by the court at the request of the prosecutor. The law sets a fairly short period for consideration of such a petition. It is considered by the court with the participation of the prosecutor on the day of their arrival at the court by a single judge in accordance with the rules of judicial proceedings provided for in Art. 318-380 of the CPC of Ukraine. In order to be released from serving the sentence and exchanged, the convict's consent must also be obtained (Art. 539 of the Criminal Procedure Code of Ukraine).

If the exchange of such a convict did not take place, the court, at the request of the prosecutor, makes a decision on their referral to further serve the previously imposed punishment (Part 2 of Art. 84-1 of the Criminal Code of Ukraine).

In the event that a person who was released by the court from serving a sentence in connection with the adoption by an authorised body of a decision on their transfer for

33 Recommendation No. 6 R(87)18 of the Committee of Ministers of the Council of Europe to member states 'Regarding the Simplification of Criminal Justice' (17 September 1987) <http://zakon4.rada.gov.ua/laws/show/994_339> accessed 20 November 2022.

exchange as a prisoner of war and such an exchange took place, during the unserved part of the sentence of a new criminal offense, the court shall impose a punishment on them according to the rules provided for in Arts. 71 and 72 of the Criminal Code of Ukraine, i.e., by adding punishments based on the totality of sentences.

5 CONCLUSIONS

The conducted research allowed the author to draw the following conclusions.

Russia's armed aggression against Ukraine became a test of the maturity of all state institutions of Ukraine, among which the defense sector plays a key role. However, in a state governed by the rule of law, even in times of war, the coordinated work of state institutions, the system of law as a whole, and the legal system also become important. This especially applies to such a field of Ukrainian law as Criminal Procedural law because law enforcement agencies face extremely difficult tasks, which are connected to the need to maintain constitutional law and order in the state and perform new functions that were not inherent to them – the implementation of pre-trial investigations of military and war crimes, and the prosecution of persons who have the status of combatants and have committed war crimes on the territory of Ukraine.

Taking into account that the implementation of an effective investigation of war crimes in accordance with the norms of international humanitarian and human rights laws belongs to the norms of *jus cogenus*, and further taking into account the positive obligations of Ukraine and the gap in the normative regulation of certain segments of activity, the Parliament of Ukraine directed the course of legal policy towards active rule-making and adopted several packages of changes and additions to the current legislation, aimed at harmonising its norms with international humanitarian law and creating a proper procedure for carrying out criminal proceedings in conditions of war. As a result, during the first two months of the war, a differentiated form, a special procedure of criminal proceedings, was created, which was formalised into the institution of criminal proceedings and contains a set of norms aimed at regulating the procedure for conducting pre-trial investigations and conducting trials under martial law.

Factors that determined the need to create a special regime of pre-trial investigation and court proceedings under martial law, including norms regarding the exchange of prisoners of war, include a set of circumstances of a law enforcement, organisational, security and subjective nature.

The procedural order created in Ukraine, aimed at carrying out the exchange of prisoners of war, is a model of proper legal procedure, which can be borrowed in the comparative legal aspect by states with an unstable security situation as it is based on the norms of international humanitarian and human rights laws and contains a system of guarantees, observance of the rights of combatants, effective pre-trial investigation, and the possibility of conducting criminal proceedings in absentia, which in turn will ensure both the private interests of the person who committed the war crime and the interests of justice.

The possibility of exchanging prisoners of war does not mean Ukraine's complete refusal to prosecute persons who have committed war crimes on the territory of Ukraine. The state takes a complimentary step regarding the exchange not because of reluctance to conduct pre-trial investigation, economy of criminal repression, or because of forgiveness. The exchange is not so much a transfer of a prisoner of war to an aggressor country, but rather an opportunity to return Ukrainian citizens home, which in the hierarchy of values for the state is more important than bringing a prisoner of war suspect/accused to criminal responsibility,

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even if they committed war crimes on the territory of Ukraine. The reputational and moral factor is also important. In this way, Ukraine demonstrates that despite the armed aggression and the need to repel it, the solution of extremely complex social problems bordering on survival in war conditions, the state finds the strength and means for the functioning of the legal system, branches of law, in the legal field, as a European country, where the rule of law and legality prevail.

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Research Article

RUSSIA'S INVASION OF UKRAINE AND THE DOCTRINE OF MALIGN LEGAL OPERATIONS

Brad Fisher

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ABSTRACT

This article offers a trans-disciplinary legal analysis of the Russian Federation's total invasion of Ukraine from the perspective of *Malign Legal Operations* (MALOPs). Known colloquially as *lawfare,* the notion of MALOPs in this article is defined as 'the exploitation of legal systems by employing disinformation to shape perceptions of legitimacy, justify violations, escape legal obligations, contain adversaries, or to advantageously revise the rule of law'. Unlike the bumper-sticker term *lawfare*, MALOPs offers a theoretical approach to conceptualise,

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identify, and ultimately disrupt the practice of legal exploitation, particularly as it relates to international security. This article asserts that Russian MALOPs provided a near-certain indication of attack in the months leading up to Russia's total invasion of Ukraine. Furthermore, this research suggests that MALOPs are a principal tool for revisionist states like the Russian Federation and the People's Republic of China to pursue legal asymmetries in pursuit of geopolitical objectives. Finally, this research recommends a novel approach for responding to this behaviour in the form of the Counter-MALOPs Toolkit: *Identify; Disrupt; and Defend*.

1 INTRODUCTION

In 2019, I co-wrote 'The Minsk Trap: Moscow's Perversion of the Conflict Arbitration Process in Ukraine', which was featured in *The Scientific Journal of the National University of Kyiv – Mohyla Academy: Legal Sciences, volume 4*. The piece characterised the conflict arbitration process in Ukraine from Russia's invasion in 2014 to the re-emergence of the Steinmeier Formula in 2019. At the time, this so-called formula was touted as the solution to the ongoing Russo-Ukrainian war in eastern Ukraine. The article provided a summary of arbitration efforts over the previous five years and introduced my principal contribution to international legal and security studies – the notion of *Malign Legal Operations (MALOPs)*. MALOPs are best characterised as 'the exploitation of legal systems by employing disinformation to shape perceptions of legitimacy, justify violations, escape legal obligations, contain adversaries, or to advantageously revise the rule of law'.[1] I applied the notion of MALOPs to the Russo-Ukrainian international armed conflict to conclude that 'Minsk II is a trap set by Russia to violate Ukrainian sovereignty through the creation of special-status regions in exchange for a reduction in covert aggression'.[2] The article asserted that Minsk was not a binding agreement under the auspices of public international law, namely the Vienna Convention. Furthermore, the principles of Minsk I were adopted into Ukrainian domestic law as the Law of Ukraine No. 1690-VII 'On Special Self-Governance Procedure in Separate Regions of Donetsk and Luhansk Oblasts' (hereafter the law on the special status). However, this law was non-binding due to Russia's refusal to abide by its pre-conditions for full implementation. Russia spent the past eight years employing all available fora of international legal mechanisms and instruments of national power, including soft-power tactics like corruption and coercion, to force Ukraine into capitulation via this *Minsk Trap*. As stated in the 2019 article, this trap allowed Russia to:

a. Set the terms and conditions for conflict arbitration;

b. Create strategic predictability and constrain Ukraine;

c. Placate the international community by offering a seemingly legitimate conflict resolution mechanism without having to offer any concessions, commitments, or cease aggression;

d. Weaken Ukraine's sovereignty and halt its Euro-NATO ambitions; and

e. Exercise plausible deniability regarding its direct participation in the so-called internal armed conflict, allowing it to modulate the war using separatists and Russian forces.

1 Brad Fisher, 'The Kremlin's Malign Legal Operations on the Black Sea: Analyzing the Exploitation of Public International Law Against Ukraine' (2019) 5 Kyiv-Mohyla Law and Politics Journal 193.

2 Nadia Volkova, 'The Minsk Trap: Moscow's Perversion of the Conflict Arbitration Process in Ukraine' (2019) 131 73.

Ultimately, the article concluded that neither the Minsk I nor II agreements were properly codified under public international law and, as written into Ukrainian law, were unenforceable without concessions untenable to Russia. This meant that Ukraine could technically avoid the trap, unencumber itself of the seemingly insurmountable international pressure to capitulate, and re-engage with the Russian Federation on new terms. These terms needed to re-characterise the conflict, primarily with Russia being acknowledged as an aggressor and participant. This would replace the status quo, which at the time was built upon Russia's terms as a so-called guarantor of regional security in what they claimed was an internal armed conflict (civil war). Unfortunately, this never came to fruition, and Ukraine spent the three years since the original article holding back Russian-led separatists at the contact line and working towards a diplomatic resolution.

On 24 February 2022, the Russian Federation initiated a full-scale and multi-axis invasion of Ukraine that it deceivingly labelled a 'Special Operation to Liberate Donetsk and Luhansk' (hereinafter 'Special Operation'). The months leading up to this outright aggression followed the same Russian playbook used in Georgia and Crimea. It also followed the same Soviet playbook used against Finland, Hungary, Afghanistan, and other nations, whereby illegitimate governments were recognised and supported under the guise of the UN Charter and notions of collective self-defence and self-determination.[3] First, the Russian Federation established breakaway governments in the Donetsk and Luhansk Oblasts in 2014. Next, Russia recognised their independence in 2022 after failing to force capitulation from the Ukrainian Government by way of its Minsk Trap. Finally, Russia committed an act of aggression against Ukraine under the guise of assisting these so-called independent republics. In execution, Russia invaded the whole of Ukraine beyond these two oblasts, citing an obligation to address what it characterised as genocide and Nazism in Ukraine without producing evidence or bringing any such claims to international bodies. There is much to be learned by continuing my original article and assessing why the Minsk Trap concluded this way. This article makes three primary assertions:

1. *MALOPs* were employed by the Russian Federation in the months leading up to its recognition of the so-called Donetsk and Luhansk People's Republics as independent republics and, ultimately, *MALOPs* provided the purported legal basis for Russia's aggression and invasion of Ukraine;
2. *MALOPs* are a principal tool of the Russian Federation in pursuit of its geopolitical objectives;
3. Applying a *Counter-MALOPs toolkit* to the Russo-Ukrainian case offers future state victims of *MALOPs* an opportunity to defend against similar strategies.

This article asserts that MALOPs are a principal weapon in Russia's information warfare arsenal and are an indispensable part of the Russian grand strategy. Manipulating the *de jure* international order to create a *de facto* reality is precisely Russia's objective so that it can reshape the Rules-Based International Order in its image, or at a minimum to its advantage. Acknowledging this grand strategy, it is possible for other countries to develop a toolkit for countering MALOPs. In doing so, future victims can manage and avoid international pressure to capitulate, as Ukraine did for eight years. This behaviour ultimately forces the Rules-Based International Order to exercise itself in defence of its fundamental principles, lest it succumb to revisionist actors in pursuit of a *de facto* international order.

3 Christi Scott Bartman, 'Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us' (2010) 43 Case Western Reserve Journal of International Law 423 <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1163&context=jil>.

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2 RUSSIA'S RECOGNITION OF THE SO-CALLED DONETSK AND LUHANSK PEOPLE'S REPUBLICS

Russian President Putin and his government employed a series of justifications for the *de facto* annexations between Transnistria, South Ossetia, Abkhazia, Donbas, and Crimea. Having failed in eastern Ukraine, these same faux legal arguments were employed to justify Russia's now outright aggression against Ukraine. These arguments include claims of humanitarian intervention, historic rights, the protection of Russian citizens, the principle of self-determination, collective self-defence, and the responsibility to protect. Practitioners of MALOPs abuse or attempt to revise the law to achieve political objectives in a Machiavellian fashion, whether on the battlefield, at the UN, diplomatically, or otherwise. They actively seek, create, and employ legal asymmetries to affect strategic outcomes. In some cases, the law is the instrument of manipulation, and in other cases it is the target of the manipulation. More often than not, however, both are true. This behaviour typically takes the form of faux legal arguments, perverted interpretations of the law, legal asymmetries, and minimum viable arguments that present sufficient uncertainty to maintain a destabilising fog of war. The list goes on, but one of the most common attributes of those who practice MALOPs is a duplicitous approach to legal domains whereby the law is overtly praised as universal while covertly abusing it to achieve objectives and undermine legal systems altogether.[4] As with any fraudulent activity, it benefits the MALOPs practitioner to ensure a wide subscribership to maintain an expansive locus of control.

While loosely based on legal precedent and adorned with the language of international law, these faux legal explanations fail to achieve consensus amongst the international community. However, the issue for Russia is not whether the world agrees – it is whether the Russian people agree. As the leader of the world's largest nuclear nation, Putin does not feel beholden to international condemnation but does view negative domestic opinion as an existential threat to political power. Therefore, the primary target of Russian MALOPs are the Russian people. This is supported by studies showing that organisations like Russia's 'Internet Research Agency', colloquially known as the 'troll farm', employ more information operations against Russia than any other target.[5] If sufficient justification can be offered to achieve domestic consensus, then power will be secured, and international opinion will become far less important. Furthermore, the aforementioned fog of war can be established by offering legal justifications based upon minimum viable arguments that create just enough confusion to spur international debate. All of this is achieved through the employment of the seven tenants of MALOPs: (I) information operations; (II) containment; (III) legitimacy shaping; (IV) probing legal lacunae; (V) exploiting loopholes; (VI) abdicating obligations; and (VII) malign influence.

2.1 Information Operations

There are numerous conflicting terms used to describe the act of manipulating, distorting, or otherwise instrumentalising information or data to achieve asymmetry over an adversary. The United States government recognises terms like *information warfare, propaganda,*

4 Vladimir Putin, 'Putin Speech and the Following Discussion at the 2007 Munich Conference on Security Policy' (2007) <http://russialist.org/transcript-putin-speech-and-the-following-discussion-at-the-munich-conference-on-security-policy/> accessed 28 November 2018.

5 Philip N Howard, John Kelly, Graphika Camille François, 'The IRA, Social Media and Political Polarization in the United States, 2012-2018' (2019) <https://int.nyt.com/data/documenthelper/534-oxford-russia-internet-research-agency/c6588b4a7b940c551c38/optimized/full.pdf> accessed 15 July 2022.

misinformation, disinformation, information operations, and others. Two of these terms are used for the purposes of this research. *Disinformation*, as used in the definition of MALOPs, shall be defined as follows: 'the spreading of intentionally false information.'[6] Examples, according to the United States Congressional Research Service's Defense Primer bulletin on the concept of *Information Operations,* include planting false news stories in the media, tampering with communications before public release, spreading deliberately crafted and unfounded conspiracy theories or hoaxes through social media, or deliberately false information masquerading as the state communications or propaganda of an adversary. The next term used in the theory of MALOPs is *information operations*. In the United States' Joint Publication 3-13, *Information Operations,* the Secretary of Defense defines the term as 'the integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting their own.'[7] A major problem with this widely accepted definition is that the United States unnecessarily restricts the concept by stating that activities only constitute information operations if they occur during military operations. The Russian Federation also utilises the term information operations; however, they do not artificially restrict themselves by stove-piping the term strictly to military operations or otherwise. This is no surprise, as the manipulation of information, the management of perceptions, and the control of public opinion were the bedrock of Soviet policy and continue today with the Russian Federation. Igor Nikolaevich Panarin, a PhD in psychology and member of the Military Academy of Science of the Russian Federation, dedicated his life to the study of interstate conflict in the information domain. He summarised *information warfare* in a more holistic way than Western theorists, stating that the term constitutes:

> a type of confrontation between parties, represented by the use of special (political, economic, diplomatic, military and other) methods [based on different] ways and means that influence the informational environment of the opposing party [while] protecting their own [environment], in order to achieve clearly defined goals. [Therefore] The major dimensions for waging informational-psychological confrontations [are] political, diplomatic, financial-economic, [and] military… [it] aims to interrupt the balance of power and achieve superiority in the global information dimensions [by targeting] the decision-making process of the adversary.[8]

This definition is more inclusive than the US notion and provides the theoretical foundation for the information manipulation that is central to the theory of MALOPs, whereby deliberately fake, altered, or faux legal arguments are put forth based upon false narratives of legitimacy. Since validating an act or activity under the law is a principal way to achieve widespread recognition or legitimacy, it behoves a malicious actor to manipulate the understanding of their behaviour such that observers perceive it to be legitimate and therefore legal. This is nothing new but has not been previously recognised as a matter of state doctrine.

In the case of Russia's 2022 invasion of Ukraine, international media was flooded by false narratives claiming Ukrainian genocide in the Donbas region in the months leading up to the invasion on 24 February.[9] One could argue that these claims never ceased following

6 Catherine A Theohary, 'Defense Primer: Information Operations' (*Congressional Research Service*, 15 December 2020) <https://crsreports.congress.gov/product/pdf/IF/IF10771> accessed 27 November 2021.

7 Ibid.

8 Ofer Fridman, *Russian 'Hybrid Warfare' Resurgence and Politicisation* (Oxford University Press 2018).

9 Grzegorz Rossoliński-Liebe, Bastiaan Willems, 'Putin's Abuse of History: Ukrainian "Nazis", "Genocide", and a Fake Threat Scenario' [2022] The Journal of Slavic Military Studies <https://www.tandfonline.com/doi/pdf/10.1080/13518046.2022.2058179?needAccess=true> accessed 15 July 2022.

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Russia's initial invasion of Ukraine in 2014, but a trained observer would have noticed a discernible uptick in the use of the language of international law with the goal of shifting public perception in favour of a *legitimate Russia* against an *illegitimate Ukraine* under the auspices of Public International Law.[10] For example, Putin doubled down with German Chancellor Schultz on 15 February 2022, just nine days before the invasion. 'I have to say that Russophobia is a first step toward genocide… We see and know what is happening in the Donbas. It certainly looks like genocide'. As a point of comparison, President Putin claimed in 2014 that '[Ukraine has] demonstrated a large-scale crisis of the international law, basic norms of the universal declaration in human rights and the convention to prevent genocide'. This statement is an excellent example of Russian *legitimacy shaping* against Ukraine, which will be discussed later. From human rights to violations of international law and basic norms or outright genocide, Putin left little to the imagination. Despite being completely lacking in evidence, these accusations were damaging enough to whip up domestic support for Putin and were used to support Russia's continued intervention in Ukraine. As Professor Michael Newton opined, there exists a 'very real danger that the media can be manipulated and used to mask genuine violations of the law with spurious allegations and misrepresentations of the actual state of the law'.[11]

Another example is from then-Russian President Medvedev in 2008 when he justified the Russian interventions in South Ossetia and Abkhazia.

> [T]he aggression and genocide unleashed by the Saakashvili [Georgian President] regime have changed the situation...We therefore had no choice but to take the decision to recognize these two subjects of international law as independent states [South Ossetia and Abkhazia] …in order to prevent the killing of people and a humanitarian catastrophe, in order for justice to triumph and for these peoples to realize their right to self-determination, we have recognized their independence. No two cases are alike in international law.[12]

It is at the point where the language of international law, or legal vernacular, is used in a particular information operations campaign that the activity crosses into the realm of MALOPs. These activities are immensely powerful, and in cases where the objective is an act of aggression, these MALOPs are often reserved for the final months leading up to the aggressive act. Ultimately, terms like 'denazification' became synonymous with Russia's invasion of Ukraine and leveraged demagoguing rhetoric and historicity to shape perceptions while eliciting imagery of the Nuremberg Trials and a so-called global Ukrainian menace.

2.2 Legal Containment

Perhaps one of the most common forms of MALOPs is the manipulation of legal domains to achieve containment or predictability. The very nature of the law is to create standards for individuals within a society or within groups of societies to exist within an established and accepted status quo. If one wished to operate outside of that status quo, then it would be imperative to maintain a high subscribership to that system to maximise their ability to operate at the fringes. The most stunning example of this is Russia and China's common

10 The United States Department of State, 'Fact vs. Fiction: Russian Disinformation on Ukraine' (2022) <https://www.state.gov/fact-vs-fiction-russian-disinformation-on-ukraine/> accessed 15 July 2022.

11 Michael A Newton, 'Illustrating Illegitimate Lawfare' (2010) 43 Case Western Reserve Journal of International Law <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1155&context=jil> accessed 21 December 2020.

12 BBC News, 'Interview with BBC Television - President of Russia' (*The Kremlin Website*, 2008) <http://en.kremlin.ru/events/president/transcripts/1228> accessed 25 May 2020.

rhetoric in support of the universality of international law. It is a common talking point for Putin. 'It is necessary to make sure that international law has a universal character both in the conception and application of its norms'.[13] At the same time, however, the law is used as a weapon to control states that participate in this so-called universal system. Zon Wenshen noted this in his 2004 book about the Chinese Communist Party's doctrine of legal manipulation titled *Legal Warfare: Discussion of 100 Examples and Solutions*. He asserted that Legal Warfare is 'controlling the enemy through the law, or using the law to constrain the enemy'.[14] Another example comes from the notion of *Unrestricted Warfare*. The term was first coined in a 1999 book by the same name and written by two Chinese Colonels in the People's Liberation Army (PLA), Liang and Xiangsui. They argued that, in modern conflict, a state must do whatever is necessary to achieve its political objectives and that every adversary has weaknesses to be exploited, regardless of its military strength. To exploit these weaknesses, they argued, one must seize every opportunity to contain. 'The best way to achieve victory is to control, not to kill'[15] and to be the first to establish legal regulations to guarantee control as a sponsor rather than as a beneficiary.

Grigorii Ivanovich Tunkin was a principal Soviet international legal scholar whose contributions made up much of the Soviet Union's approach to international law. His comments about predictability, or containment, are particularly important to this discussion. 'The creation of norms of international law is the process of bringing the wills of States into concordance …[a] normative system making it possible to **foresee the reaction of other actors** in the inter-States system to particular actions of a State'.[16] Lauri Mälksoo, who published *Russian Perceptions of International Law* in 2015, highlighted Western naivety towards the willingness of Russia to take a duplicitous approach towards international agreements in order to achieve asymmetric advantages. 'Western scholarship on Soviet approaches to international law has to some extent failed because it has taken Soviet declarations about international law too easily at their face value. The official rhetoric about international law can also have deceptive qualities when the purpose may be to mislead the other or to trump him with his own weapon'.[17] This approach is a key trait inherited by the Russian Federation from the Soviets. Orde Kittrie, who published the book *Lawfare* in 2016, conveyed this concept through a discussion of what he called *compliance-leverage disparity lawfare.*[18] Re-stated more simply, there is a form of leverage to be gained over an adversary through a manufactured disparity between compliance and feigned compliance. With MALOPs, the objective is to create this disparity without an adversary's awareness, which is a form of legal asymmetry.

Concerning the war in Ukraine, Putin attempted to achieve legal containment over Ukraine in textbook fashion through the Minsk Agreements. The Kremlin was able to establish an

13 Putin (n 4).

14 Zong Wenshen, *Legal Warfare: Discussion of 100 Examples and Solutions* (PRC: PLA Publishing House 2004).

15 Qiao Liang, Wang Xiangsui, *Unrestricted Warfare* (Echo Point Books & Media 1999) https://doi.org/B67812.

16 Christi Scott Bartman, *Lawfare: Use of the Definition of Aggressive War by the Soviet and Russian Federation Governments* (Cambridge Scholars Publishing 2010).

17 Lauri Mälksoo, *Russian Approaches to International Law* (OUP Oxford 2015)."ISBN":"9780191789625", "abstract":"This paper points to the intimate relationship between international legal writing and history. It typifies modes of engagement with history in international law in order to contrast, rather impressionistically, a traditional approach with a set of present-day critiques. It proposes that the distinction between professional historiography and legal work proper is in some way misleading: while there are significant differences in terms of their respective objectives and styles, legal work inevitably requires a positioned engagement with the past, thus producing (or contributing to the production of

18 There is no consensus amongst practitioners or the academy as to what normative definition, if any, can be applied to the term lawfare. It has grown to mean everything and, as a result, is diluted to the point of meaning nothing at all.

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internationally recognised framework for conflict resolution and mediation framed as an internal armed conflict between the Ukrainian government and its citizens rather than as an international armed conflict with Russia as a clear aggressor against Ukraine. Furthermore, Putin achieved legal containment over the West through the Normandy Format. The leaders of France, Germany, Ukraine, and Russia met on 6 June 2014 during a ceremony honouring the 70th anniversary of the Allied invasion of German-occupied France to discuss the conflict in Ukraine. This Normandy Format established the Trilateral Contact Group to facilitate arbitration and conflict resolution between Ukraine, the separatists, and Russia, with the OSCE providing mediation. The Russian Federation refused to acknowledge its role as the aggressor and instead insisted that it was simply a 'guarantor' of regional stability rather than an antagonist.[19] As a result, Russia was able to apply significant pressure on Ukraine to capitulate. The pressure eventually came also from the international community, which knew that some agreement must be made within the Trilateral Contact Group for relations between Russia and the international community to normalise following the principled stance taken by the West via sanctions in 2014. Having full control over the separatists in the so-called breakaway republics, Russia was able to modulate tensions like a rheostat by controlling the Minsk process, an international legal instrument, to bend the geopolitical status quo for its benefit. Once established, the Kremlin made sure that no other internationally recognised conflict arbitration process could replace the Minsk process, thereby solidifying containment and control over the conflict.

President Putin originally had high hopes for President Zelenskyy in terms of his pliability and willingness to cede eastern Ukraine. He believed that the more progressive new Ukrainian leadership would usher in new progress towards capitulation via full Minsk implementation. Dmitry Peskov, the Kremlin's Press Secretary, noted after Zelenskyy's inauguration that the 'conflict in Eastern Ukraine' is a 'domestic [policy] issue of Ukraine which can and must be solved by the President on the basis of… [the] Minsk agreements'.[20] After several initial engagements between the Zelenskyy administration and the Trilateral Contact Group, Zelenskyy saw the Minsk Trap for what it was and refused to implement a one-sided agreement. Tensions flared over the proceeding years, and Russia ultimately abandoned its Minsk Trap in favour of a more cumbersome and resource-intensive approach to recognise and absorb, much like it used in the weeks following the seizure of South Ossetia, Abkhazia, and Crimea. The important lesson here is that Ukraine could have reasonably predicted a full invasion, at least of the entire Donbas region, following its refusal to acknowledge and acquiesce to Putin's Minsk Trap. Putin saw this as his only option for dealing with his failure in Ukraine.

2.3 Shape Legitimacy

Legitimacy shaping operations are the manipulation of perceptions concerning a given act or fact, specifically through the lens of domestic or international law, in the eyes of the public or other targeted audiences. Information operations, as the foundation of MALOPs, are the most critical aspect of legitimacy shaping and utilise traditional media, modern information technology, and social media. The primary aspects of legitimacy shaping operations are to: manufacture uncertainty around a target's legitimate legal claim or position; wrongly claim,

19 'Russia Guarantor of Ukraine Settlement, Not Party Fulfilling Deal - Kremlin' *(Sputnik News,* 2015) <https://sputniknews.com/politics/201502131018209668/> accessed 16 July 2022.

20 'Putin Will Laud Zelenskyy If He Ends War & Mends Ties with Russia – Kremlin — RT World News', (*Russia Today*, 20 May 2019) <https://www.rt.com/news/459838-putin-Zelenskyy-donbass-peace/> accessed 16 July 2022.

deny, or accuse a target of legal violation or manipulation; prop up one's own duplicitous approach to legal domains; portray oneself favourably or as adherent to legal principles despite engaging in MALOPs; or characterise one's own malign behaviour as justified or innocent. In 2015, Aurel Sari, Associate Professor of Public International Law at the University of Exeter, asserted that 'law has become a vernacular for debating the legitimacy of war. Not only has the density of legal regulation increased, but legal processes now play a far more prominent role in warfare than they ever did before'.[21]

To understand the power of legitimacy shaping, one must recognise just how damaging a simple allegation, regardless of legitimacy, can be. These activities can cause enormous and even irreversible harm to an organisation, individual, or to the national security of a State. Commander Robert De Tolve described this in a 2012 article titled 'At What Cost? America's UNCLOS Allergy In The Time of Lawfare'.

> While it is self-evident that the legitimacy of legal claims labeled "lawfare" must be determined on a case-by-case basis, it is likewise clear that the "sting" of an allegation of illegality can immediately and often irreparably diminish the perceived legitimacy of national security related actions in the eyes of governmental officials as well as their constituents. Therefore, regardless of their ultimate resolution, the underlying claims can instantaneously result in varying degrees of national security "cost" to the extent that they succeed in increasing skepticism of or opposition to the national security interests…[22]

In the case of Russia's 2022 invasion of Ukraine, legitimacy-shaping operations were a principal tactic in developing a plausible *casus belli* for invasion, especially for consumption by the Russian public. On 19 January 2022, eleven members[23] of Russia's communist party submitted a proposal to the Duma calling for the government to vote on sending it forward to President Putin for consideration. This proposal was titled 'To the President of the Russian Federation V.V. Putin on the need to recognize the Donetsk Republic and the Luhansk People's Republic'.[24] The proposal cited humanitarian purposes, the population's desire to speak and write in the Russian language, freedom of religion, and the Ukrainian government's so-called violation of their rights and freedoms. It accused the new (post-2014 revolution) authorities of Ukraine of glorifying Nazi ideologies and being intolerant of established historical norms, daily life, and the will of the people. On the one hand, the proposal cited the Russian-manufactured referendums in May 2014 titled the *Act on self-determination of the Donetsk People's Republic* and the *Act on self-determination of the Luhansk People's Republic* as reasons to recognise the so-called republics. The proposal claimed that these referendums received a majority of 89% and 96% votes, respectively. On the other hand, the proposal claimed that recognition should be approved because the Ukrainian government refused to pay pensions and provide basic government services to these people. The first argument created the conditions for the second, yet the Russian communists cited them both.

Additionally, the proposal cited that the Minsk agreements, which it claimed 'laid the main vector for the protection of rights and freedoms and the restoration of peaceful life citizens, infrastructure and economies of the Donetsk People's Republic and of the Luhansk People's

21 Aurel Sari, 'Legal Aspects of Hybrid Warfare' (*Lawfare: Hard National Security Choices Blog*, 2015) <https://www.lawfareblog.com/legal-aspects-hybrid-warfare> accessed 16 July 2022.

22 Robert De Tolve, 'At What Cost? America's UNCLOS Allergy In The Time of "Lawfare"' (2012) 61 Naval Law Review <http://www.jag.navy.mil/documents/navylawreview/NLRVolume61.pdf> accessed 16 July 2022.

23 GA Zyuganov, II Melnikov, VI Kashin, YuV Afonin, NV Kolomeitsev, DG Novikov, LI Kalashnikov, KK Taysaev, NI Osadchim, VI Bessonov, and AV Kurin.

24 GA Zyuganov and others, Draft Resolution No 58243-8, To the President of the Russian Federation VV Putin on the need to recognize the Donetsk Republic and the Luhansk People's Republic 2022.

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Republic', were unfulfilled by Ukraine with none of the relevant clauses of the agreements implemented. The proposal accused Ukraine of 'simulating compliance' to work towards a truce and the implementation of Minsk II while consistently violating the cease-fire across the entire line of contact and destroying civilian homes, schools, and other infrastructure. Ultimately, the proposal repeated the false narrative that Ukraine was committing a 'genocide of their own people'. For Russia's part, the proposal claimed that 'democratic bodies have been built with all the attributes of legitimate power' and that Russia regularly sends 'humanitarian convoys… with food, construction materials, medicines and gifts for children'.[25]

The proposal concludes with the unmistakable faux legal claims adorned with the language of international law meant to legitimise Russia's illegal claims. These last two sentences include what a trained observer will immediately recognise as a thinly veiled declaration of war.

> Recognition will create grounds for providing security guarantees and protection of their peoples from external threats and the implementation of policies of genocide against the inhabitants of the republics, as well as to strengthen international peace and regional stability in line with the goals and the principles of the Charter of the United Nations and process of international recognition of both states.

The proposal ended with the assertion that Russia and the newly recognised so-called republics will negotiate 'a legal basis for interstate relations, providing regulation of all aspects of cooperation and mutual assistance, including security issues'.[26]

Ultimately, on 21 February, President Putin approved the recognition of both so-called republics as 'sovereign and independent' states due to 'Ukraine's refusal to peacefully resolve the conflict in accordance with the Minsk agreements'. The declaration approved the drafting of a 'treaty on friendship, cooperation and mutual assistance'[27] for each so-called state and also approved the introduction of Russian peacekeeping forces on the territories of these so-called states. This declaration amounted to another clever step in Putin's shaping of the legitimacy of his imminent invasion. For those paying close attention, it was a pre-meditated and carefully choreographed plan. In November 2019, the separatist's so-called parliament passed a law on the state border, whereby they theoretically laid claim to the entire Donetsk Oblast rather than only the occupied portions. They stipulated that the self-proclaimed polity's border would only temporarily run along the line of engagement 'pending conflict resolution'.[28] Later, on 4 February 2022, former security minister and Russian-planted separatist leader in the self-proclaimed Donetsk People's Republic Alexander Khodakovsky requested in an interview with Reuters that Russia send 30,000 soldiers.[29] Unbeknownst to the international community, when Putin signed the decree of recognition on 21 February 2022, Russia's acknowledgement of these so-called states was a recognition of their entire territorial claims and not simply of the borders associated with the line-of-contact in the stalemate in eastern Ukraine. Therefore, according to Russia's justification and formal requests from the so-called republics, Ukraine immediately became an occupying force the moment Russia recognised the independence of these regions. With the intent to send

25 Ibid.

26 Ibid.

27 'Putin Signs Decrees on Recognizing Donetsk and Lugansk Republics' (*TASS*, 21 February 2022) <https://tass.com/politics/1407731> accessed 15 July 2022.

28 'The DPR Recognizes as Its National Border the Boundaries of the Donetsk Region - Donbass Insider' (*Donbas Insider*, 1 December 2019) <https://www.donbass-insider.com/2019/12/01/the-dpr-recognizes-as-its-national-border-the-boundaries-of-the-donetsk-region/> accessed 15 July 2022.

29 Anton Zverev, 'Exclusive: Senior Separatist Urges Russia to Send 30,000 Troops to East Ukraine' (*Reuters*, 7 February 2022) <https://www.reuters.com/world/europe/exclusive-senior-separatist-urges-russia-send-30000-troops-east-ukraine-2022-02-07/> accessed 15 July 2022.

peacekeepers, an international armed conflict was seemingly inevitable but was actually the result of a well-choreographed MALOPs campaign designed to contain Ukraine, shape its government as illegitimate and as violators of human rights and international law, and present a faux justification for invasion under the guise of historic right, responsibility to protect, collective self-defence, and the right to self-determination.

Perhaps Carl Hvenmark Nilsson of the Center for Strategic and International Studies best captured Russia's claims that Ukraine refused to peacefully settle the so-called internal armed conflict.

> A strategic pattern has emerged whereby Russia, as a perpetrator of and party to a conflict, dictates the conditions of the cease-fire, and then actively pursues the violation of the same agreement for its own political, military, and territorial gain. This serves a dual function: it undermines the international legal norm of cease-fires and provides a diplomatic "process" whereby eventually the international community loses interest and focus in resolving the conflict, allowing the freeze to be controlled by the Kremlin.[30]

2.4 Probe Legal Lacunae

Gaps in legal theory or understanding are often the raw materials for Malign Legal Operators to achieve their objectives. They manipulate these gaps because it is far easier to exploit unexplored spaces than it is to manipulate the law itself. As prescribed in Unrestricted Warfare, the objective is to be the first to set up regulations and precedents. The Council of Europe described this best in 2018 with their draft resolution on the problem of so-called *hybrid warfare*.

> [T]here is no universally agreed definition of hybrid war and there is no law of hybrid war. However, it is commonly agreed that the main feature of this phenomenon is legal asymmetry, as hybrid adversaries, as a rule, deny their responsibility for hybrid operations and try to escape the legal consequences of their actions. They exploit lacunas in the law and legal complexity, operate across legal boundaries and in under-regulated spaces, exploit legal thresholds, are prepared to commit substantial violations of the law and generate confusion and ambiguity to mask their actions.[31]

Russia's weaponisation of referendums is a prime example of this behaviour. It was used in Crimea, Donetsk, Luhansk, South Ossetia, Abkhazia, and Chechnya. Since the 2022 invasion, referendums have been executed in occupied Kherson, Zaporizhzhia, Donetsk, and Luhansk. Russia purports that over 90% of voters decided to join Russia, which now claims ownership of over 18% or 90,000 square kilometres of Ukrainian territory. Furthermore, Russia is issuing Russian passports and fast-tracking the application process for Ukrainian citizens in occupied territories via an executive decision from Putin in May.[32] They are also forcefully deporting Ukrainian citizens to re-education camps inside Russia, changing area codes and cellular service in occupied territories, and re-settling Russian citizens into these

30 Carl Hvenmark Nilsson, 'Revisiting the Minsk II Agreement' (2016) <www.csis.org> accessed 23 September 2019.

31 COE Draft Resolution 14523, 2018.

32 '№ 183 Об Определении в Гуманитарных Целях Категорий Лиц, Имеющих Право Обратиться с Заявлениями о Приеме в Гражданство Российской Федерации в Упрощенном Порядке' (Указ Президента Российской Федерации, 25 May 2022) <http://publication.pravo.gov.ru/Document/View/0001202205250004#print> accessed 16 July 2022.

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areas to ensure a positive vote once the referendum occurs. In fact, US Secretary of State Antony Blinken confirmed on 22 September that Russian citizens were temporarily bussed into these regions for the sole purpose of ensuring a positive vote. In May, the United Russia party's secretary general visited Kherson and announced 'Russia is here forever',[33] while Peskov said on 19 May that 'nothing should be done with Ukraine's occupied territories without the will of the people of those territories' and that Kherson should be absorbed into Russia 'as legitimately as Crimea'. He reiterated that

> the inhabitants of Kherson Region should decide after all – this is the primary thing. And the inhabitants of Kherson region should also determine their fate. Of course, this issue should be clearly and carefully verified and assessed by lawyers and legal specialists, because, of course, such fateful decisions should have an absolutely clear legal background, legal justification, and be absolutely legitimate, as was the case with Crimea.[34]

The chair of the Federation Council Committee on Constitutional Legislation, Andrey Klishas, also stated that citizens of all Ukrainian territories occupied by the Russian Federation, not just those living in Donbas, have the right to decide if they would like to become part of Russia.

> It's not just citizens of the Donetsk People's Republic and the Luhansk People's Republic who have the right to decide whether to continue to stay with Russia. So do residents of the Kherson region, Zaporizhzhia, all of the territories where denazification has taken place and people have gained the right to determine their future.[35]

These are all methods of shaping the legitimacy of illegal aggression and occupation. They fall perfectly within the definition of MALOPs. Whenever confronted over this abuse, Russia cites the *Kosovo Precedent* and the principle of self-determination.[36] However, Russia distorts these principles by manufacturing referendums, coercing civilian populations, or manipulating the results in its favour. The referendum itself is of little consequence to MALOPs practitioners and only serves as a tool to legitimise its behaviour to naïve observers, those looking for plausible deniability, or for political expediency.

2.5 Exploit Loopholes

Unambiguous language is often impossible when crafting international treaties because small details cannot be agreed upon in full. To preserve the interests of all parties, the language of the agreement is deliberately left vague or is simply not comprehensive. As a consequence, unclear or incomplete language can be used by MALOPs practitioners to manipulate agreements in ways other than intended. Sari highlighted that these so-called *legal vulnerabilities* are often created for the sake of political pragmatism.

33 Roman Petrenko, 'Путінський Сенатор Приїхав у Херсон і Заявив, Що "Росія Тут Назавжди" | Українська Правда' (*Ukrainska Pravda*, 6 May 2022) <https://www.pravda.com.ua/news/2022/05/6/7344470/> accessed 16 July 2022.

34 Roman Petrenko, 'Putin Official Says Kherson Region Should Enter Russian Federation "as Legitimately as Crimea" | Ukrayinska Pravda' (*Ukrainska Pravda*, 11 May 2022) <https://www.pravda.com.ua/eng/news/2022/05/11/7345495/> accessed 16 July 2022.

35 Olha Hlushchenko, 'Russian Media: Russian Passports to Be Issued in Kherson and Zaporizhzhia Oblasts', (*Ukrainska Pravda,* 27 May 2022,) <https://news.yahoo.com> accessed 16 July 2022.

36 Dean B Pineles, 'How the "Kosovo Precedent" Shaped Putin's Plan to Invade Ukraine | Balkan Insight' (*Balkan Transitional Justice*, 9 March 2022) <https://balkaninsight.com/2022/03/09/how-the-kosovo-precedent-shaped-putins-plan-to-invade-ukraine/> accessed 16 July 2022.

> [T]hresholds and lines exist not because they are the result of legislative oversight or incompetence, but because they reflect underlying political choices and stalemates. There are gray areas in the law because States do not want, or could not agree, that all of it is black and white. Consequently, combating legal uncertainty at best offers only a partial solution. Developing sound policy and doctrine would seem to be a more realistic way of maintaining unity of effort.[37]

An example is Russia's abuse of the Organization for Security and Cooperation in Europe's (OSCE) 2011 Vienna Document. It requires states to provide public declarations at least 42 days in advance of military exercises. According to Art. 41, 'Notifiable military activities carried out without advance notice to the troops involved are exceptions to the requirement for prior notification to be made 42 days in advance'. Furthermore, Art. 47 states that notifications are only required if over 13,000 troops are involved. Finally, Art. 58 waives these declarations when they pertain to no-notice drills of less than 72 hours in duration. Russia exploits these articles as legal loopholes by declaring snap exercises and deploying troops to coerce others, support ongoing military operations, or intimidate neighbouring states. Between 2014 and 2022, Russia conducted numerous snap exercises in Belarus and along Ukraine's border. In 2021, Russia amassed troops along the Belarusian and Russian borders with Ukraine in almost the same way as it did prior to the invasion in 2022. These activities not only prepared Russian forces for the invasion but had a coercive effect on Ukraine and the West. Finally, it desensitised the international community. In the months leading up to February of 2022, the snap drills in 2021 were cited constantly by those claiming that no invasion would occur or that it was just another intimidating tactic.

Some of the most common legal loopholes exploited by Russia concern the law of the sea and other treaties delimiting the world's oceans. For example, NordBalt was a €550 million, 450-kilometre underwater cable project from Sweden to Lithuania that would fulfil over half of Lithuania's energy needs at a time when it was dependent upon Russia for 35.5% of its energy. The Russian Navy repeatedly executed snap drills within Lithuania's Exclusive Economic Zone to close portions of the Baltic Sea under the guise of military exercise zones with the sole objective of imposing cost and risk on the project. Another example concerns the Black Sea. The Montreux Convention of 1936 establishes the acceptable use of the Bosporus and Dardanelles straits (hereinafter the Turkish Straits) and restricts the passage of ships to and from the Black Sea. It was intended to maintain Turkish control over the straits, to restrict the navies of Black Sea nations from utilising the sea as a base of operations for expeditionary activities, and to satisfy the West by containing the Soviet Union to the Black Sea. The Convention specifies when submarines belonging to Black Sea nations may transit the straits:

> Black Sea Powers shall have the right to send through the Straits, for the purpose of rejoining their base, submarines constructed or purchased outside the Black Sea, provided that adequate notice of the laying down or purchase of such submarines shall have been given to Turkey. Submarines belonging to the said Powers shall also be entitled to pass through the Straits to be repaired in dockyards outside the Black Sea…[38]

Turkey is not a signatory member of UNCLOS, therefore the Montreux Convention is the only international governance structure for the use of the straits. In the years leading up to Russia's full-scale invasion, it frequently manipulated the convention by sending its diesel-electric submarines south through the straits for critical repairs, only to take part in combat

37 Sari (n 21).

38 League of Nations, '1936 Montreux Convention' (1936) <http://sam.baskent.edu.tr/belge/Montreux_ENG.pdf> accessed 21 May 2019.

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operations against anti-government forces in Syria for years before slowly steaming for St Petersburg while touting its expeditionary naval power.

Russia's weaponisation of *Status of Forces Agreements* (SOFA) is another loophole. For example, the Russian Federation signed a SOFA with the Syrian government on 26 August 2015 titled the 'Agreement between the Russian Federation and the Syrian Arab Republic on the deployment of an aviation group of the Russian Armed Forces on the territory of the Syrian Arab Republic'. It served as Russia's legal justification for direct military action in Syria. This document achieved, *inter alia*, the following Russian objectives: control of an air base at no charge; the right to move personnel, weapons, equipment, and ammunition freely to Syria and at no charge; and diplomatic immunity for personnel and property to include no taxes or legal vulnerability for any actions taken by Russian forces while in Syria. In comparison, US SOFAs with other nations are long and extremely detailed, while the aforementioned SOFA was only seven pages in length. US SOFAs do not offer blanket indemnification in the way that Russia's do. In essence, the Russia-Syria SOFA provides free reign to Russian Forces in Syria. Politically, Russia shaped its pro-Syrian government intervention in much the same way it did with interventions in its near-abroad under the guise of so-called humanitarian peace-making efforts. However, in this instance, the underlying narrative was not built on the so-called responsibility to protect Russian speakers or the Russian world abroad but a more general claim ostensibly under the guise of the UN Charter's Art. 51 right to collective self-defence. This more generalised justification is what makes Russia's intervention in Syria particularly concerning because it laid the groundwork for MALOPs outside of the former Soviet sphere.

2.6 Abdicate Obligations

The previously discussed tenants of MALOPs often constitute the *legal and informational preparation* of the battlefield. When a MALOPs practitioner is successful in shaping the legitimacy of a conflict or situation and achieves sufficient legal containment over an adversary, they can begin to abdicate legal obligations to justify follow-on actions. This includes a military intervention or illegal incursion. For example, Russia used numerous faux legal arguments to justify its violation of Ukraine's sovereignty from 2014-2022. This includes Agreements between the Russian Federation and Ukraine on Friendship, Cooperation, and Partnership in 1997, on the Black Sea Fleet in 1999, on the Azov Sea and Kerch Strait in 2003, on the state border in 2003, and the foundational principles of the UN Charter. Of importance to this discussion is that blatant violations of the law do not constitute MALOPs. It is the perversion of legal mechanisms to justify violations that qualifies a particular act as MALOPs. Putin illustrated the abdication of legal obligations perfectly in 2014 following his invasion of eastern Ukraine and the illegal occupation of Crimea.

> [I]f it's a revolution, what does that mean? It is difficult for me then to disagree with some of our experts who believe that there is a new state in this territory. Just as it was after the collapse of the Russian Empire, after the Revolution of 1917, a new state emerges. And with this state and in relation to this state, we did not sign any binding documents.[39]

This same technique was used leading up to Russia's 2022 invasion through the recognition

39 Vladimir Putin, 'Vladimir Putin Answered Questions from Journalists about the Situation in Ukraine' (*The Kremlin*, 2014) <http://www.kremlin.ru/events/president/news/20366> accessed 5 January 2019.

of the so-called Donetsk and Luhansk republics.[40] In doing so, Russia was able to cite the so-called legitimate invitation of a newly-recognised nation as justification to introduce forces on sovereign Ukrainian territory. This was not a coincidence but rather the result of years of careful planning. In fact, one can now see that more time was spent on the legal and informational preparation of the battlefield than on actually preparing for battle. Ukrainian forces left Russia's self-proclaimed world-class military bloodied following strategic defeat within 48 hours of the invasion. Even months into the invasion, Russia continues to employ information operations adorned with the language of international law to justify its blatant violation of the UN charter, the definition of aggression, and the principles of international law to continue its aggression.

2.7 Malign Influence

The final tenant of MALOPs is malign influence or *corruption*. Anton Shekhovtsov, a member of the Free Russia Foundation, established malign influence as 'soft coercion, sharp power, mimetic power and dark power with the intent to mislead and confuse democratic nations and their leadership, hence the influence emanating from these approaches is inevitably negative in the normative sense and is termed here as malicious'.[41] As it pertains to the law and Public International Law, malign influence within legal domains was previously defined by this author as 'a dual or mimetic application; the first is a seemingly genuine effort to uphold and support the international norms and institutions that comprise international order. The second to be observed is a simultaneous and malign effort to subvert and exploit these same norms and institutions for geopolitical gain'.[42] For example, Russia vetoed the UNSC resolution to nullify the illegal referendum in Crimea in 2014 in what French diplomat Gérard Araud claimed amounted to a veto of the UN Charter itself. This occurred again in 2022 following the invasion. Even in the months leading up to Russia's invasion, a carefully choreographed show played out in Russia as the world watched in confusion. From Putin selecting the communist party to put forth the proposal for the recognition of the so-called republics to the Duma considering competing proposals to maintain a destabilising legal fog of war to keep the world from responding in advance of the recognition, the entire process was an elaborate farce built upon malign influence and corruption.[43] The primary talking point from Russian state media and propaganda outlets was that the proposal could not be taken seriously precisely because it came from the communist party. This elaborate deception worked because these same talking points were echoed by pundits throughout the international community, including within western media. Even US officials largely dismissed the proposal and ultimate recognition, claiming that Russian 'peacekeepers' in Donbas represented no significant departure from the norm.[44] However, a trained MALOPs

40 'State Duma Ratifies Treaties on Friendship, Cooperation, Mutual Assistance with DPR, LPR - Russian Politics & Diplomacy - TASS' (*TASS*, 22 February 2022) <https://tass.com/politics/1408337> accessed 16 July 2022.

41 Anton Shekhovtsov, 'Conceptualizing Malign Influence of Putin's Russia in Europe' (2020) <https://www.4freerussia.org/wp-content/uploads/sites/3/2020/04/Maligh-Influence_web_eng-5.pdf> accessed 7 May 2020.

42 Brad Fisher, 'Ideological Aggression and International Law: Soviet and Russian Malign Influence Withing Legal Domains (MILDs)' (2020) 5 Наукові записки НаУКМА. Юридичні науки <http://nrplaw.ukma.edu.ua/article/view/208086> accessed 16 July 2022.

43 'State Duma to Consider Two Competing Appeals to President on Donbass — Speaker - World - TASS' (*TASS*, 14 February 2022) <https://tass.com/world/1403111> accessed 16 July 2022.

44 Jeff Mason and Idrees Ali, 'Russian Troops in Ukraine's Donbas Won't Trigger Broader Sanctions - U.S. Official' (*Reuters*, 21 February 2022) <https://www.reuters.com/world/us-casts-doubt-biden-summit-with-putin-eyes-new-sanctions-tuesday-official-2022-02-21/> accessed 16 July 2022.

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defender would have seen the initial reporting and immediately understood that Russia not only intended to invade Ukraine but that they planned to do so by recognising the whole of the Donetsk and Luhansk oblasts as independent republics and then offering security assistance to expel the so-called Ukrainian invader. Further malign influence comes in the form of a coalition built by the Russian Federation to normalise the recognition as a matter of custom. So far, eight countries and five *de facto* states have publicly supported either the recognition or the decision to recognise the so-called republics.[45]

Another example of malign influence within legal domains comes from the International Tribunal for the Law of the Sea. It rules 19-1 that Russia was in violation of UNCLOS and must return the three Ukrainian naval vessels and 24 sailors seized during the 2018 Kerch Strait incident. The single dissenting vote was a Russian judge that argued in favour of UNCLOS Art. 298 para. 1(b), which excluded military activities and therefore meant that ITLOS had no jurisdiction over the Kerch incident. Russia claimed that the sailors were seized in a law enforcement operation, would not treat them as prisoners of war, and charged them as criminals under domestic Russian law. Simultaneously, Russia argued before the tribunal that their activities included a mix of law enforcement and military vessels, meaning that their military activities did not fall under the purview of ITLOS. This lone dissenting Russian judge may have been inconsequential to the overall ruling; however, his position was broadcast over Russian media, social media, blogs, and periodicals. His talking points were all the Kremlin needed to shape the legitimacy of the case, at least domestically, and to ignore the ruling altogether. In a win for Putin, the case was ultimately settled extrajudicially when the newly elected President Zelenskyy executed a prisoner swap for the sailors. Zelenskyy's motivation for doing this was entirely pragmatic, and rightfully so, to save his sailors, but it also legitimised Russia's faux legal objection because the prisoner swap was used within Russian media to justify the no-jurisdiction claims.

3 DEVELOPING A MALIGN LEGAL OPERATIONS DEFENCE

The aforementioned tenants of MALOPs are intangible and often extremely difficult to discern from the regular and, at times, messy course of public international law. It can be challenging to determine what is malign and what is a good-faith legal position or justification. This fact creates a scenario wherein a practitioner of MALOPs can accuse or counter-accuse a good-faith actor of MALOPs in order to further confuse the facts and deepen the destabilising fog of war surrounding a particular situation or case. There are many reasons that this author coined the term MALOPs rather than the colloquially accepted term, *lawfare*. Specifically, the term is obsolete, doctrinally inappropriate, and incomprehensive in describing or accounting for the modern realities associated with the manipulation of legal domains. Additionally, the term lawfare, as commonly accepted and as defined by Maj Gen Charles Dunlap in 2001, is value-neutral. Value neutrality consistently fails to capture the modern realities of conflict both with and within legal domains. The act of playing a sport in accordance with the rules can be very simply called by the name of the sport. The act of playing outside the rules of a sport is known as cheating, and this word is reserved to describe and account for those who refuse to conform to established norms. As defined, using the term lawfare to describe both the proper and improper applications of legal domains muddy the proverbial waters and does more harm than good in identifying and holding the practitioners of MALOPs accountable. To defend against MALOPs, other countries in the crosshairs of Russia's – and China's – legal manipulation can apply the MALOPs toolkit.

45 **States:** Russia, Syria, North Korea, Belarus, Central African Republic, Nicaragua, Sudan, Venezuela. **De Facto States:** Donetsk People's Republic, Luhansk People's Republic, South Ossetia, Abkhazia, Artsakh.

This toolkit identifies three necessary actions: identify MALOPs, disrupt them, and then present an enhanced defence against them. The **identification stage** includes: (1) raising MALOPs literacy; (2) gathering and sharing MALOPs intelligence; and (3) operationalising the legal domain and its operators. MALOPs literacy, for example, is exactly what this article intends to achieve. The **disruption stage** includes: (1) integrated strategic litigation; (2) combatting the litigator's dilemma; (3) illuminating MALOPs; and (4) and increasing accountability. Finally, the **defensive stage** includes: (1) building legal resilience and a deterrent posture; (2) red teaming and war gaming; and (3) closing gaps, loopholes, and vulnerabilities.

3.1 Identify: Literacy, Intelligence, and Operationalising Legal Domains

The first act in the *identify* phase is to build MALOPs literacy. This includes spreading awareness of these activities and building the methodologies contained in my concept of MALOPs into the analysis and decision-making process unique to each organisation. As stated in my early research on this subject, 'understanding the nature of the problem and making diplomats, lawmakers, peacebuilders, politicians, commanders, and other government servants aware of the issue is the first and most important step of this process'.[46] The first question that a key decision-maker should ask after being notified of a pending international agreement, tribunal, or other critical instrument of public international law should be, 'In what way could the other side be employing MALOPs to seek an asymmetric or otherwise advantageous position?' This will never be achieved without first building literacy and a common understanding. The term lawfare failed to achieve normative significance over the past twenty-one years, and it is not widely accepted amongst government and policymaking organisations. It served as a very helpful bumper-sticker term, which is exactly what it was intended to do but does not enjoy a seat at the table when serious policy discussions are taking place. This must change moving forward, and this can be achieved through the concept of MALOPs.

The second act in defending against these activities is to build a MALOPs-specific intelligence portfolio. For example, Russian parliamentarian Sergey Mironov introduced draft Law 462741–6 on 28 February 2014. It offered the legal means to absorb the territory of another state. Seventeen days later, on 20 March, Crimea was absorbed by the Russian Federation. The exact legislation proposed by Mironov was not used, but an extrapolation of the draft legislation would have indicated that a major geopolitical movement was about to take place, and enhanced deterrent measures could have changed the course of history. This exact same scenario played out in 2022 with the Russian Communist proposal for the recognition of the so-called republics. It benefits the MALOPs practitioner to maintain a high subscribership to the international legal system because the constituents of this system can then be manipulated by the practitioner's duplicitous behaviour. This is precisely why both China and Russia so often cite 'universality' and the 'principles of international law' while simultaneously misapplying and misrepresenting them. This is also why the practitioner must always feign compliance, even if great theatrics are required to do so. These theatrics are exactly what the world witnessed in the weeks leading up to Russia's illegal invasion of Ukraine under the guise of peacekeeping, responsibility to protect, and a so-called special operation. This is good news for MALOPs defenders because the intrinsic need to perform theatrics and put forth faux legal arguments makes the behaviour a public endeavour that can be observed, tracked, correlated, and addressed publicly.

46 Fisher (n 1).

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With respect to this study's focus on Russia and China as the principal MALOPs practitioners, it must be noted as a matter of academic integrity why other countries are not mentioned as well. Indeed, all states are guilty of misrepresenting or twisting legal domains to better suit their needs and interests in one form or another throughout history. The differentiator used in this research is the employment of MALOPs as doctrine or as part of a grand strategy with the additional objectives of revising or upending the legal principles themselves versus using MALOPs as a one-off means of political expediency. When China employs its doctrine of 'legal warfare' to illegally seize territory in the South China Sea, it not only damages the integrity of UNCLOS and the UN Charter, but it shapes the state of the art of public international law in China's likeness. If the United States were to negatively exploit international legal domains to achieve some political objective, then it might benefit the US in the short term, but the long-term damage makes this behaviour foolish and counterproductive.

The third act of the *identify* stage is to operationalise the legal domain and its defenders. It is not enough for legal counsel to offer black-letter legal analysis and advise leaders and policy-makers on how to remain compliant or caution them against activities that may create legal troubles or liabilities. Legal advisors must tread into new territory, and, in addition to the above, they must become operational by recognising the legal domain as not simply an instrument of power but as a source of power. In modern conflict, legal domains are both a weapon and a battlefield, both fought with and fought over. Until this is realised, naïve states will continue to be outwitted by unscrupulous actors seeking asymmetric advantages by manipulating the international legal system. Not only must MALOPs be taken seriously, but decision-makers must actively seek out MALOPs counsel when building strategies to counter this behaviour.

3.2 Disrupt: Integrated Strategic Litigation, Litigator's Dilemma, Illumination, Accountability

To disrupt a MALOPs campaign is to create sufficient non-linear dilemmas, impose sufficient risk, and create enough pressure that the practitioner is disincentivised from continuing the behaviour. This is achieved through a combination of several techniques, the first of which is *Integrated Strategic Litigation*. The European Center for Constitutional and Human Rights defines Strategic Litigation as a technique that

> aims to bring about broad societal changes beyond the scope of the individual case at hand. It aims to use legal means to tackle injustices that have not been adequately addressed in law or politics…successful strategic litigation brings about lasting political, economic or social changes and develops the existing law. Public outreach materials accompanying the case can help to explain the context of the proceedings.

As this research has made clear, the legal case is typically secondary to the information victory. It is for these reasons that a victim of MALOPs must not only conduct strategic litigation but *integrated strategic litigation*. The additional qualifier is necessary because minor seams in a government's approach to countering MALOPs are not only disadvantageous, but inconsistencies can do more harm than good as the MALOPs practitioner is able to exploit these seams to further their own legal manipulation.

For example, Ukraine's then-President Poroshenko, government officials, and the international community demanded that the 24 Ukrainian sailors seized during the 2018 Kerch Strait incident be treated not as criminals but as prisoners of war. Simultaneously and during Ukraine's ITLOS request for relief several months later, the Ministry of Justice claimed that the sailors were illegally detained while executing an innocent passage aboard

ships with military immunity under UNCLOS. This may seem harmless, but the damage done to Ukraine's MALOPs defence as a result of these inconsistencies was considerable. To claim that the sailors were prisoners of war is to acknowledge that the two countries are at war and that international humanitarian law applies to the situation. In this case, the Ukrainian sailors were legal targets and were foolish to be sailing anywhere near Russian-claimed waters or the Kerch Strait. To claim that the sailors were conducting an innocent passage of Russia's territorial waters was another catch-22 because that claim legitimises Russia's ownership of Crimea by acknowledging its 12-mile territorial waters. These inconsistent public messaging campaigns bolstered Russia's legitimacy shaping efforts surrounding its aggression against Ukraine. Poroshenko should have instead taken an integrated approach by consulting specialists, the Ministry of Justice, the Legal Department of the Ministry of Defense, and the National Security and Defense Council to develop a single concerted approach to the management of the legal domain and public engagement through integrated strategic litigation. The security services of Ukraine could have also played a role by employing counter-disinformation efforts and combatting Russian propaganda using a unified voice. This unified approach could have also included international voices. Both Russia and Ukraine called for UNSC meetings over the incident. The Russian-sponsored proposal to label the incident a border violation by the Ukrainian Navy did not pass, with four in favour, seven against, and four abstaining. These numbers show just how much malign influence Russia has over the process. Furthermore, the inconsistencies noted within the Ukrainian government also existed internationally. The US Ambassador to the UN claimed that Russia must respect the navigational rights and freedoms of Ukraine and all states. Later, the UN High Commissioner classified the Ukrainians as prisoners of war. The differences in these two positions blur the same seam between *war* (prisoners of war) and *peace* (navigational rights and freedoms) that Russia operates in so comfortably.

Combatting the litigator's dilemma is another way to disrupt MALOPs. A major difficulty when countering MALOPs, both in and out of the courtroom, is the intrinsic need for litigators to present a fully developed body of evidence. This is necessary for many reasons, first and foremost, to uphold the integrity of the practice of law altogether. The unscrupulous MALOPs practitioner, however, is only concerned with shaping legitimacy and only requires a sliver of truth, if even that, to fabricate an information operations campaign in support of a particular MALOP. The challenge of understanding this threat and strategising around it can be referred to as the litigator's dilemma, which is the balance between addressing MALOPs at the speed of relevance and the need to build thorough legal arguments for submission to formal tribunals and courts. While the scrupulous litigator is conducting research and building a reputable case, for example, like Ukraine spending nearly five months building and submitting a request for ITLOS relief under the auspices of UNCLOS following the Kerch Strait incident, the MALOPs practitioner is already moving on to develop the next faux- or quasi- legal argument. Russia's counterclaim that ITLOS lacked jurisdiction due to military activities under UNCLOS Art. 298 was not likely developed over the course of several months but rather established before the tribunal even began. An adept MALOPs practitioner would have had this claim ready as the Malign Legal Operation was designed, even prior to the Kerch incident itself.

The next and perhaps most important step in disrupting a particular MALOPs is *illumination*, or the act of shining a public light on the behaviour to display its underlying malicious intent. This technique is often an effective method to build literacy as well. For example, the Ukrainian Navy established in 2019 that the previously discussed Kerch Strait Incident was planned in advance.[47]

47 Patrick Tucker, 'Russia Launched Cyber Attacks Against Ukraine Before Ship Seizures, Firm Says' (*DefenseOne*, 2018) <https://www.defenseone.com/technology/2018/12/russia-launched-cyber-attacks-against-ukraine-ship-seizures-firm-says/153375/> accessed 15 December 2018.

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> Evidence also exists, according to the Contact Point Cell of the Ukrainian Naval Forces, that localized control over the electromagnetic spectrum was present during the incident to include possible communications jamming and spoofing of the Automatic Vessel Identification System (AIS) in the area of the Strait. These reports of both cyber and electromagnetic interference are evidence that this incident was planned in advance, discrediting the legal disinformation employed against the Ukrainian Navy.[48]

Additionally, *Bellingcat* reported that global positioning system (GPS) data showed that the Ukrainian ships were actually outside of 12 nautical miles from the illegally seized territory following a 12-hour chase to the south of the strait. In fact, the Ukrainian ships were attempting to return to Odesa when they were finally seized.[49] These facts dramatically changed the narrative and indeed, the legitimacy of Russia's claims, but they were mostly unknown to the general public. An integrated strategic litigation campaign could have amplified these points through political, media, and other channels to illuminate Russia's legitimacy shaping and disinformation.

The final tool for MALOPs defenders to disrupt these legal manipulations is *increased accountability*. This may seem obvious, but MALOPs frequently occur with no accountability. The practitioner offers sufficient plausible deniability or faux-justification for political leaders, even those in adversary nations, to turn a blind eye to the behaviour as a matter of political expediency. An objective of information warfare is to sew political division and distrust amongst the general public of an adversary nation so that political leaders are afraid to take bold action against malign behaviour for fear of inciting additional domestic unrest. Those who study Soviet and Russian Reflexive Control Theory would recognise this as what Russian Colonel Komov called strategic 'paralysis' in 1997.[50] A previous example of MALOPs cited Russia's repeated exploitation of the Montreux Convention, Art. 12, to rotate submarines between the Black Sea and combat duties off the coast of Syria under the guise of emergency repairs. It is possible for the international community to address this issue, yet Russia continues the abuse, and no attempts are made. One must remember, after all, that the legal victory is of less importance than the informational victory. Bringing attention to the malfeasance is itself a victory.

> [T]he treaty allows for the revision of Article 12 given that it is initiated with agreement from at least two high-contracting parties to the treaty. In this example, verbiage could be included indicating that submarines undergoing repair must sail directly for their intended point of dry dock and the conduct of combat or purely military operations during this process will result in violation of the treaty. *Even if it is not politically possible to close this loophole, it should not preclude affected parties from attempting to remedy this abuse.*[51]

Even if efforts to hold the MALOPs practitioner accountable are unrealistic or unsuccessful, the public diplomacy benefits would be substantial as it brings awareness, literacy, and illumination to the situation. A lawyer or legal team may unilaterally dismiss the benefits of a *public diplomacy victory*; however, an *integrated strategic litigation* team would immediately value the benefits, even if the legal case is unsuccessful.

48 Fisher (n 1).

49 Michael Cruickshank, 'Investigating The Kerch Strait Incident - Bellingcat' (*bellingcat*, 2018) <https://www.bellingcat.com/news/uk-and-europe/2018/11/30/investigating-the-kerch-strait-incident/> accessed 14 December 2018.

50 Timothy L Thomas, 'Russia's Reflexive Control Theory and the Military' (2004) 17 Journal of Slavic Military Studies 237 <https://www.rit.edu/~w-cmmc/literature/Thomas_2004.pdf> accessed 28 November 2021.

51 Fisher (n 1).

3.3 Defend: Legal Resilience and Deterrence, Red Teams and War Games, Closing Gaps

With a MALOPs campaign successfully identified and disrupted, MALOPs defenders can set about shoring up their legal systems to offer a proper defence. Sari first introduced the notion of *legal resilience* as a measure to combat what this author defines as MALOPs – 'Legal resilience is concerned with the resistance of legal systems to change and their capacity to adapt in response to disturbances. In essence, the aim of legal resilience theory is to understand how legal systems cope with internal and external shock'.[52] There are no prescribed actions or qualifiers for a legal system to be classified as legally resilient, but it is built upon a commitment to the rule of law and the defence of its spirit and intent. Legal resilience is an operationalised mindset and guide for decision-making so that legal decisions are developed with resilience in mind.

> Legal resilience highlights the contribution that international law can make to render societies more resilient against hybrid and gray zone threats *and* that the international rule of law itself must be strengthened to withstand the kind of subversion associated with these concepts. The legal resilience perspective thus offers diverse stakeholders a common framework for analysis and a shared set of objectives to guide them in countering the legal challenges arising in the current strategic environment.[53]

For comparison, China has no concept of legal resilience in its published doctrine of legal warfare; however, it does utilise legal binding and legal protection, suggesting that they do employ the legal domain defensively in addition to offensively. The result of a legally resilient system is credible legal deterrence. 'Legal Resilience projects a desired posture, which discourages the opponent from using *Lawfare* partially or totally. The mere understanding by the opponent that a robust Legal Resilience guards the "legal front" will make Lawfare meaningless or at least a non-primary option in Gray Zone environments'.[54]

The next critical step in establishing a MALOPs defence is to execute legal red teaming and including the legal domain in war games. Specifically, *red teaming should be executed* as often as possible.

> This process involves the creation of independent teams within an organization with the goal of thinking and acting like the adversary in order to identify what legal gaps, loopholes, and mechanisms are ripe for exploitation. This includes the manipulation of specific cultural and societal norms within disinformation campaigns against a legal position or the rule of law.[55]

MALOPs red teaming is the emulation of a potential adversary's malign legal capabilities against a target. MALOPs red teams operate to highlight an adversary's ability to: (1) identify vulnerabilities of the target's legal or informational posture; (2) expose legal lacunae or loopholes for exploitation; (3) positively shape the adversary's legitimacy while degrading that of the target; (4) evaluate the target's susceptibility to legal containment; and (5) justify the abdication of legal obligations. In doing so, legal red teams seek to: (1) build legal resilience

52 Aurel Sari, 'Legal Resilience in an Era of Gray Zone Conflicts and Hybrid Threats' [2019] SSRN Electronic Journal.

53 Ibid.

54 AB Munoz Mosquera, N Chalanouli, 'Decoding Gray Zone Environments. Legal Resilience' Presented to the University of Exeter – 'Legal Resilence in an Era of Hybrid Threats'.

55 Fisher (n 1).

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and a posture of legal deterrence; (2) support MALOPs literacy, intelligence, illumination, and accountability; and (3) foster the development of integrated strategic litigation approaches and best practices. According to a 2008 report by the US Defense Science Board on 'Capability Surprise', red teaming is the process by which red teams produce useful output for consumption by decision- and policy-makers.

> Red teams can fulfill various roles: playing the adversary, inventing plausible threats, challenging assumptions, serving as devil's advocate, and offering alternative approaches. Red teaming is especially important in today's security environment. Nimble adversaries, with access to global technology markets, are very difficult targets for intelligence.[56]

War gaming consists of 'a simulated battle or campaign to test military concepts and usually conducted in conferences by officers acting as the opposing staffs'. These activities are critical to successful military operations and to imagining the incredible range and scope of possibilities once hostilities initiate. While one can never totally predict how an armed conflict will play out, significant advantages can be developed by conducting scenario-based war games to identify previously unknown capability, resource shortfalls, or strategic advantages to be leveraged. The difference between red teaming and war gaming is subtle but important. A red team looks for vulnerabilities and weaknesses by thinking like the adversary, while a war game employs both a red team and a so-called blue team (friendly forces) in order to test or exercise a specific scenario. There should be no question as to how beneficial legal war gaming can be when attempting to build a defence to ongoing MALOPs and legitimacy shaping.

The final and most difficult step is to *secure the legal frontier* by addressing known gaps, vulnerabilities, and loopholes. This step, like legal resilience, is both a perspective and an enduring task. In order to close loopholes and legal gaps, all participants must be MALOPs-literate, and each person involved in international negotiations, diplomacy, and statecraft must serve as their own red team. Care must be applied to international negotiations or when considering unexplored legal territory because the status quo and precedents created by these decisions will have lasting effects on individual or national security, especially if other parties have malicious intent or seek legal containment. As previously discussed, however, these legal vulnerabilities are often deliberate as a matter of political pragmatism. It is critically important to remember the reasons behind political pragmatism or a particular aversion to the practice of public international law. These things should be maintained in institutional memory so that, following political change or renewal, the reasons for a pragmatic approach towards legal domains are not leveraged by the other side. George Keenan, an American diplomat, knew this well. 'Moscow has no abstract devotion to United Nations Organization ideals. Its attitude to that organization will remain essentially pragmatic and tactical'.[57] Keenan, the victim of numerous unkept international agreements, fully understood the challenge presented by MALOPs. Lauri Mälksoo would argue that this is due to the underlying 'competing universalistic ideological basis' between the two powers. Or, from the perspective of this research, one side executes MALOPs due to a fundamental disagreement with the present international status quo (and who it most benefits). To reiterate an earlier Mälksoo quote,

> Western scholarship on Soviet approaches to international law has to some extent failed because it has taken Soviet declarations about international law too easily at their face value. The official rhetoric about international law can also have

56 Defense Science Board, 'Capability Surprise Volume I: Main Report' (2009) <http://www.projectwhitehorse.com/pdfs/Ed9/4. Capability Surprise Vol I DSB-2009.pdf> accessed 2 January 2022.

57 George Kennan, 'The Long Telegram' (*The National Security Archive*, 1946).

> deceptive qualities when the purpose may be to mislead the other or to trump him with his own weapon.[58]

Another prime example of increased accountability comes from the days leading up to both Russia's full invasion in February 2022 and also Russia's faux referendums in September 2022. The tool of illumination was used repeatedly by Ukraine, the US, the UK, Canada, France, the Baltics, and countless other nations to highlight Russia's MALOPs in advance of Russia's behaviour, thereby discrediting Putin and robbing him of the initiative. As discussed previously, control over a narrative is the first step in controlling the perceived legitimacy and eventually the socially accepted legality of a situation. Getting ahead of the MALOPs practitioner is a wildly effective way to slow, or halt, a particular MALOPs campaign. With respect to the referendums, illumination coupled with Ukraine's successful counter-offensive resulted in the referendums being postponed many times. Ultimately, the staged votes were conducted while Russian forces were simultaneously retreating from the territories they purported to own. Other accountability techniques are sanctions, the clever posturing of military forces, and of course the use of military force when executed in a just, proportional, and legal way.

4 CONCLUSION

This research considered the current global crisis brought about by the Russian Federation's illegal war of aggression and crimes against the Ukrainian people. Tens of thousands of Ukrainians have been killed by Russia's aggression since 2014, with millions of civilians displaced and a rapidly expanding list of atrocities against non-combatants. This analysis was conducted by applying the concept of MALOPs to the current situation to develop an understanding of why the invasion was predictable, why the draft legislation on the recognition of the so-called Donetsk and Luhansk Republics was absolute confirmation that war was imminent, and how other states can begin to protect themselves from MALOPs in the future. This research also established the incredible role of information operations on the modern physical and legal battlefields and the criticality of the legal preparation of the battlefield for modern conflict. In doing so, this article established the following:

1. MALOPs were employed by the Russian Federation in the months leading up to its recognition of the so-called Donetsk and Luhansk People's Republics as independent republics and, ultimately, MALOPs provided the purported basis for Russia's aggression and invasion of Ukraine;
2. MALOPs are a principal tool of the Russian Federation in pursuit of its geopolitical objectives, and no legitimate claim exists to justify the so-called Special Operation or any act of aggression against Ukraine.
3. Applying a Counter-MALOPs toolkit to the example of Russia's invasion offers future state victims of MALOPs an opportunity to defend against similar strategies.

This author created the theory of MALOPs in 2019 to provide an appropriate vernacular for the description, identification, and response to modern legal exploitation. Great care

58 Mälksoo (n 17)."ISBN":"9780191789625","abstract":"This paper points to the intimate relationship between international legal writing and history. It typifies modes of engagement with history in international law in order to contrast, rather impressionistically, a traditional approach with a set of present-day critiques. It proposes that the distinction between professional historiography and legal work proper is in some way misleading: while there are significant differences in terms of their respective objectives and styles, legal work inevitably requires a positioned engagement with the past, thus producing (or contributing to the production of

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must be taken to not become a MALOPs practitioner in the pursuit of justice or in response to this behaviour. The damage done to the rule of law and international norms through manipulation of the law in ways other than intended is equally destructive when they are well-intentioned as when they are malign. As Sari cautioned, 'Law-abiding states must therefore mediate between both challenges: they cannot afford to counter lawfare, hybrid and gray zone challenges harmful to their national interests with identical means without chipping away at the international rule of law'.[59] Ultimately, Ukraine refused to succumb to Russia's Minsk Trap between 2014 and 2022 but is now enduring the Russian consequence for refusing to capitulate. Ultimately, no counter-MALOPs toolkit can stop outright aggression if that is the concerted aim of the MALOPs practitioner. However, Ukraine's refusal to capitulate forced the Rules-Based International Order, buttressed by public international law, to exercise itself in defence of its founding principles and the UN Charter. On 14 July 2022, President Zelenskyy took part in a conference in The Hague.

> [R]ight now, it depends on our joint efforts whether humanity will have such an instrument as international law. Will humanity live in chaos and constant violence from those who believe that force solves everything and that aggression allows us to disguise any wishes of tyrants as law? The aggressor must lose both on the battlefield and at the level of meaning so that the war becomes a heavy loss primarily for the aggressor, not the victims.[60]

His words demonstrate a full understanding of MALOPs and the behaviour that this theory aims to describe. In the end, according to Zelenskyy, the ultimate objective is to 'save international law itself'.[61]

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59 Sari (n 52).

60 Volodymyr Zelenskyy, 'Telegram: Contact @V_Zelenskiy_official' (*Official Telegram Channel*, 14 July 2022) <https://t.me/V_Zelenskiy_official/2534> accessed 16 July 2022.

61 Ibid.

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Research Article

EVIDENCE IN THE INTERNATIONAL CRIMINAL COURT – THE ROLE OF FORENSIC EXPERTS: THE UKRAINIAN CONTEXT

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ABSTRACT

Background: *Ukraine faced unprecedented challenges for to the national justice system and the possibility of using international justice to bring the Russian Federation military, officers,*

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and officials to justice after the full-scale invasion of Ukraine by the Russian Federation on 24 February 24, 2022. Since In March 2022, the ICC Prosecutor has started an investigation of into war crimes in Ukraine. In addition, joint investigative groups are carrying out activities. Cooperation between pre-trial investigation bodies of Ukraine through the Prosecutor General of Ukraine with and the International Criminal Court has been established. Therefore, the research of into possible problems in the criminal procedure of prosecution for war crimes is one of the priority areas for Ukrainian law enforcement practice and legal science.

Methods: *The present article is devoted to the peculiarities of the ICC international criminal justice, in particular the ICC jurisdiction in the territory of Ukraine (Ukraine has not ratified the ICC Rome Statute), the ICC model of administration of justice, the rules of admissibility of evidence, the status of experts, and the features of expert involvement during ICC trials.*

Results and Conclusions: *The authors found that several provisions of the joint Order of the Ministry of Internal Affairs of Ukraine, the Ministry of Health of Ukraine, and the Office of the Prosecutor General 'On approval of the Procedure for interaction between bodies and units of the National Police of Ukraine, health care institutions and the bodies of the Prosecutor's Office of Ukraine in establishing the fact of the death of a person during martial law on the territory of Ukraine' dated 9 March 2022 do not correspond to the Code of Criminal Procedure of Ukraine. The authors emphasise that the erroneous provisions of this bylaw could serve as a legal basis for avoiding criminal responsibility for war crimes.*

1 INTRODUCTION

On 24 February 2022, the army of the Russian Federation started a full-scale invasion of Ukraine. The number of victims among the civilian population is increasing every day. As of 29 August 2022, the Office of the United Nations High Commissioner for Human Rights (OHCHR) recorded 5,663 dead and 8,055 wounded civilians in Ukraine (13,718 in total).[1] These data are only approximate because of the lack of access to the territories of Ukraine temporarily occupied by the Russian Federation, the presence of mass burial sites and, accordingly, the difficulty that state authorities face in identifying these bodies, along with daily air attacks by the enemy. These reasons prevent us from stating exact numbers. Experts from the American non-profit organisation Armed Conflict Location and Event Data Project (ACLED), which records violence for political reasons, assume that the total number of registered deaths is greatly underestimated.[2] Similarly, civilian buildings and structures are destroyed every day because of the criminal actions of the Russian Federation. According to data published in an independent legal analysis by the New Lines Institute Analytical Center of the University of Pennsylvania, Russian forces are frequently using indiscriminate, wide-range weapons or cluster munitions, targeting densely populated areas in at least eight regions of Ukraine,[3] resulting in destruction and loss of life.

Criminal prosecution of the military, officers, and officials of the Russian Federation for war crimes committed on the territory of Ukraine as a result of the full-scale invasion of Ukraine by Russia on 24 February 2022, is being carried out by pre-trial investigation bodies

1 'Ukraine: Civilian casualties as of August 28, 2022' <https://ukraine.un.org/en/196929-ukraine-civilian-casualties-28-august-2022> accessed 31 August 2022.

2 Sarah Habershon, Rob England, Becky Dale, Olga Ivshyna. 'Is it possible to find out how many people died in Russia's war against Ukraine?' (BBC News, 4 July 2022) <https://www.bbc.com/ukrainian/features-62028612> accessed 27 July 2022.

3 'An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent' <https://newlinesinstitute.org/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/> accessed 27 July 2022.

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and prosecutors within the framework of the national judicial system, as well as within the mechanism of the International Criminal Court (ICC).

The ICC has limitations on the number of investigations t can carry out as an institution, given that the ICC has limited human and financial resources compared to the number of armed conflicts in the world and the scope of their possible consequences. Therefore, it is expected that the ICC will consider the most significant and most serious war crimes of the Russian Federation, and the vast majority of them will 'fall on the shoulders' of national courts. Therefore, the initial task of the present research is to outline the peculiarities of the ICC jurisdiction, characterise the ICC model of justice, and examine the peculiarities of proof and admissibility of evidence in the ICC.

In order to bring a person to justice and ensure compensation for damages, it is necessary to conduct a proper independent investigation of the crimes committed. In particular, evidence is required to establish the causes of the death of civilians, the fact of torture, the causes of destruction of civil infrastructure, and the amount of damage caused as a result of the criminal actions of the Russian Federation. Special knowledge in the form of forensic examination and expert opinions attached to the proceedings is necessary for proving these (and other) elements of the subject of proof in cases of this category. A forensic examination must be conducted in each case in the proceedings in the courts of national jurisdiction under Clause 1 Part 2 of Art. 242 of the Criminal Procedure Code. At the same time, ICC can use the expert examination results by Ukrainian forensic experts as evidence during the consideration of cases.

Therefore, the detailed focus of this article is on such practical issues as who might be an expert capable of conducting such an examination, the results of which can be used in the ICC; whether the ICC sets specific requirements for experts; what the procedural status of an expert is, etc. One of the key issues is that of entities authorised to involve an expert in proceedings at the ICC to provide evidence based on the results of expert examination. Attention is also paid to the issue of the admissibility of such evidence. The present article aims to outline answers to these questions.

2 JURISDICTION OF THE ICC REGARDING THE PROSECUTION OF OFFENDERS WHO COMMITTED CRIMES AS A RESULT OF THE FULL-SCALE INVASION OF UKRAINE BY THE RUSSIAN FEDERATION

The ICC will consider a case if the state a) ratifies the ICC Rome Statute, which regulates the administration of justice of the ICC, or b) recognises the ICC jurisdiction under Part 2 of Art. 12 of the ICC Rome Statute. Ukraine signed the Rome Statute on 20 January 2000 but had not ratified it prior to the full-scale Russian invasion of Ukraine. At the same time, Ukraine recognised the jurisdiction of the ICC twice in 2014 and 2015 in connection with war crimes committed by the Russian Federation on the territory of Ukraine.

The ICC jurisdiction does not extend to the crime of aggression committed on the territory of a state or by citizens of a state that is not a party to the Statute. This rule is generally for states that have not ratified the Statute and have only recognised the jurisdiction of the ICC under Part 2 of Art. 12 of the same. It should be noted that from the point of view of proof, it is easier to prosecute the military and political leadership of the aggressor state for the crime of aggression than for war crimes and crimes against peace. Thus, in order to prove the guilt of a person for war crimes or crimes against peace, it is necessary to establish the entire chain of connections from the perpetrators of the crime (soldiers) to the immediate leaders who gave the order, up to the highest military and political leadership.

The jurisdiction of the ICC extends to the entire internationally recognised territory of Ukraine, including the temporarily occupied territories. The fact that the Russian Federation has not ratified the Rome Statute is not significant because the Russian Federation commits international crimes on the territory of Ukraine. The ICC does not have a procedure for considering a case *in absentia* (in the absence of the accused), but it is clear that in many cases, criminals will be beyond the reach of the court.[4]

On 2 March 2022, 39 member states of the ICC filed an appeal with the ICC Prosecutor regarding the situation in Ukraine. As a result, the ICC Chief Prosecutor Karim A. A. Khan QC launched an investigation into Russian war crimes in Ukraine.[5] Therefore, the ICC will indeed consider the cases of crimes committed by Russian military personnel on the territory of Ukraine as a result of the invasion of Ukraine by the Russian Federation on 24 February 2022.

3 THE ICC MODEL OF JUSTICE

The Rome Statute is 'a combination of elements originating from different legal traditions which were subsequently reflected in the Rules' that was adopted following lengthy negotiations.[6] Although the Statute reflects the adversarial model ('adversarial', 'accusatorial', 'common', 'Anglo-American' model) of justice (a clear division of the powers of the prosecution and defence, cross-examination, etc.),[7] the practice of the two *ad hoc* tribunals was more mixed, combining features of adversarial and inquisitorial ('inquisitorial', 'civil', 'continental' model) legal traditions.[8]

The main difference between the so-called inquisitorial and adversarial models of justice is the method of finding the truth: in the adversarial system, this search for (procedural) truth 'lies in the hands of the parties' and therefore conflict is at the centre of the proceedings (the 'two cases approach'), and in the inquisitorial model, the establishment of the truth depends on the state authorities responsible for criminal prosecution (the 'one case approach').[9]

Despite including the characteristic features of the adversarial model, the provisions of the ICC contain many exceptions to the typical features of this theoretical model. In particular, it refers to the active role of the court in the proceedings and to such exceptions to the principle of directness as the admissibility of written testimony and other evidence in court if they were collected *ex parte* during the investigation, thereby forming a separate ICC procedural system *for* the administration of justice.[10] On the one hand, there is an opportunity for

4 Oksana Kaluzhna, Kateryna Shunevych, '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' <https://ajee-journal.com/ajee-gateways> accessed 8 August 2022.

5 The requirement to investigate and punish war crimes of the Russian Federation in international courts, posted on 18 April 2022 <https://www.rada.gov.ua/news/razom/221903.html> accessed 26 July 2022.

6 S De Gurmendi, H Friman, 'The Rules of Procedure and Evidence of the International Criminal Court' (2000) 3 Yearbook of International Humanitarian Law 296 doi:10.1017/S1389135900000672 <https://www.cambridge.org/core/journals/yearbook-of-international-humanitarian-law/article/rules-of-procedure-and-evidence-of-the-international-criminal-court1/C421C0B68B573391596D8A133632666B> accessed 26 July 2022.

7 J Doherty, 'Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials' (2013) 26 (4) Leiden Journal of International Law 943.

8 De Gurmendi, Friman (n 8) 289-336.

9 Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2011) 3 Third International Criminal Law Review 1-37 <https://ssrn.com/abstract=1972235> accessed 26 July 2022.

10 Michele Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models' (2011) 36 North Carolina Journal of International Law & Commercial Regulation 288-289 <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1921&context=ncilj> accessed 26 July 2022.

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the parties to collect and submit evidence in the case at their discretion, thus realising the principle of equality and the adversarial principle.

At the same time, the court acts as a proactive rather than a passive participant in the process. For example, in one of the cases considered at the ICC,

> …the court, having established that the prosecutor neglected his duty to provide received exculpatory evidence for the defense, chose to postpone the proceedings, rather than making a decision on the inadmissibility of undisclosed evidence or dropping the charges against the accused, due to the abuse of the process, which confirms the presence of elements of the inquisitorial system.[11]

4 EVIDENCE AND THE ADMISSIBILITY OF EVIDENCE AT THE ICC

The document that defines the proof process in the ICC is the Rules of Procedure and Evidence.[12] The Rome Statute specifies three types of evidence: 1) testimony of witnesses, 2) documentary evidence, 3) material and other evidence, the question of admissibility and relativity of which is decided by the Trial Chamber (Arts. 64-69). The parties following Art. 69 of the Rome Statute of the ICC have the right to submit evidence to which admissibility requirements apply. There is no uniform official investigation file; the prosecution and the defence must independently determine the evidence they plan to use during the trial. However, there is a requirement for the prosecution. In every case of the discovery of evidence that can prove the innocence of the accused, the prosecution must provide it to the defence. The prosecution and the defence provide evidence to each other and the Pre-Trial Chamber for review before trial. The role of the victim in the proceedings is auxiliary. The victim has the right to participate in all stages of the proceedings, express his/her position, and demand compensation.[13]

The court is empowered to require the parties to submit evidence that the court deems necessary to establish the truth in the case. At the same time, the requirements for the admissibility of evidence are less strict compared to approaches in national legal systems. As Michele Caianiello points out, this is because '...parties who are not familiar with the international procedural system can easily present their cases, without limiting themselves to the technical nuances typical of national models'.[14] The ICC is guided by the principle of free evaluation of information when deciding on the admissibility of evidence,[15] taking into account the issue of 'the probative value of evidence and the damage that such evidence may cause to a fair trial or a fair assessment of the testimony of a witness'.[16]

The Rules of Procedure and Evidence allow exceptions to the principle of the directness of examination of evidence. For example, if the witness who gave a previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of the previously recorded testimony in one of the following situations: both the prosecution and the defence had the opportunity to examine the witness during the recording; the witness who gave the previously recorded testimony is in the trial, and the prosecution, defence, and

11 Ibid, 300.

12 The Rules of Procedure and Evidence <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf> accessed 26 July 2022.

13 De Gurmendi, Friman (n 8) 312.

14 Caianiello (n 12) 287.

15 De Gurmendi, Friman (n 8) 312.

16 Michele Caianiello, Giulio Illuminati, 'From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court' (2000) 26 N.C. J. INT'L L. 407 <https://scholarship.law.unc.edu/ncilj/vol26/iss2/3> accessed 26 July 2022.

representatives of the Trial Chamber have the opportunity to examine the witness during the trial (Rule 68, 'Prior recorded testimony'). Thus, the possibility of using a testimony obtained during the investigation is connected with the condition that the defence was present and had the opportunity to question the witness during the interrogation, during the pre-trial investigation, or directly during the trial.

If the defence was denied the right to cross-examine, the witness testimony in the ICC could not be used as admissible evidence (Rule 68 of the ICC). This includes situations when the defence was not invited to the interrogation at the stage of the pre-trial investigation. As a result, witness interrogation was conducted only by the prosecution, the investigator (including with the participation of the prosecution), or the investigating judge (Art. 225 of the Criminal Procedure Code of Ukraine). In these situations, the defence counsel or the suspect is absent (including in cases where at the time of the witness interrogation, there was no defence, i.e., no one had been informed of the suspicion).

The exception to the principle of directness in the ICC Rules is essential in the context of the traumatic psychological impact on the psyche of minor witnesses of violence by repeated interrogations. As a result of interrogations, the mind of the interrogated person plunges into memories of events and re-experiences the same emotions (re-victimisation). However, the theory and practice of the judiciary today try to take all possible measures to prevent this from happening. For example, they use specific techniques to minimise the negative psycho-emotional impact on children during criminal proceedings.

The evidence may be declared inadmissible by the court in cases where there are substantial doubts about its authenticity or where the admission of the evidence would be incompatible with the fair trial and would cause severe damage to it (Art. 69 of the Rome Statute of the ICC).

Based on the judicial practice of the ICC, the 'two-stage test of verification of evidence for admissibility' was formed: at the first stage, the Pre-Trial Chamber of the ICC determines whether there is the 'investigation or prosecution' at the domestic level; at the second stage, the question to be resolved is whether the state is 'truly unwilling or unable' to investigate crimes under the ICC jurisdiction.[17]

5 EXPERT STATUS AT THE ICC

The Rules of Procedure and Evidence do not contain a definition of the term 'expert'. The expert at the ICC acquires the status of a witness and is the person '…who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute' (para. 14 of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*).[18] The concept of an 'expert witness' as a person who, thanks to specific knowledge, skills, or training, can help the Trial Chamber understand or determine an issue of a technical nature that is the subject of the dispute is also mentioned in the decision of the ICC in *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Decision on Defence's proposed expert witnesses and related applications seeking to introduce their prior recorded testimony under Rule 68(3) of the Rule)* of 28 April 2022 (para. 9).[19]

17 Tomas Hamilton, 'Case Admissibility at the International Criminal Court' (2015) 14 The Law & Practice of International Courts and Tribunals 305-317 <https://ssrn.com/abstract=2715037> accessed 26 July 2022.

18 *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_05764.PDF> accessed 20 July 2022.

19 *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_03280.PDF> accessed 26 July 2022.

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The expert's role, given his/her specialised knowledge, is to help the court understand and resolve special issues beyond a layperson's ordinary experience and knowledge.[20] Experts must perform their professional duties with 'maximum neutrality and objectivity'.[21] As noted by Irish researchers R. Derham and N. Derham, the expert's primary duty is to assist the court, but this does not impose any additional duty on him/her to act as a mediator or usurp the role of the court in deciding the facts.[22]

An expert authorised to conduct an expert examination is chosen from the List of Experts approved by the Secretariat of the ICC or is proposed by a party. The Pre-Trial Chamber must approve the decision (Part 2 of Art. 113 of the Rules and Procedures of Evidence) – that is, the court is the entity authorised to involve an expert in the proceedings.

The List of Experts is maintained by the ICC Registry. Experts can be included in the List after determining the person's experience in the relevant field (Art. 44 of the ICC Regulations).[23] A person who intends to be included in the List must provide a detailed biography, proof of qualifications indicating experience in the relevant field, and, if possible, proof of inclusion on the list of experts of any national court.[24] Such a List should be open to the ICC bodies and all participants in the proceedings.[25] The List should provide a wide selection of experts, all of whom will have had their qualifications verified; moreover, they will have undertaken to uphold the interests of justice when admitted to the List (para. 24).[26] In addition, when compiling the List, the Secretariat of the ICC should have regard for equitable geographical representation and a fair representation of female and male experts, as well as experts with expertise in trauma, including trauma related to crimes of sexual and gender-based violence, children, the elderly, and persons with disabilities, among others.[27] As of 16 June 2021, this List has more than 140 experts.[28]

In determining whether the evidence of an expert witness may be introduced into evidence, the Chamber must decide whether: the witness is an expert as defined above; testimony in a particular area of expertise would assist the Chamber; the expert's expected testimony corresponds to his/her competence; the provided report and/or testimony does not 'usurp' the Chamber's function as the final arbiter of fact and law.[29] At the same time, '...concerns about the independence or impartiality of an expert witness do not affect the admissibility of the testimony or opinion provided by him/her, but it does affect the significance of the evidence provided by him/her'.[30] During the expert witness interrogation, the court has the right to ask questions of the expert before and after the interrogation by the party. At the

20 'The Use of Experts in International Arbitration' <https://rlw.juridice.ro/17537/the-use-of-experts-in-international-arbitration.html> accessed 27 July 2022.

21 Ibid.

22 R Derham, N Derham, 'From ad Hoc to Hybrid—The Rules and Regulations Governing Reception of Expert Evidence at the International Criminal Court' (2010) 14 (1) The International Journal of Evidence & Proof 36 doi:10.1350/ijep.2010.14.1.339.

23 Regulations of the Court <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> accessed 27 July 2022.

24 Derham, Derham (n 24) 36.

25 Ibid.

26 *Prosecutor v Lubanga*, Decision on the procedures to be adopted for instructing expert witnesses, ICC-01/04-01/06-1069 (ICC TC I, Dec. 10, 2007) <http://www.worldcourts.com/icc/eng/decisions/2007.12.10_Prosecutor_v_Lubanga1.htm > accessed 27 July 2022.

27 Ibid.

28 List of the ICC experts <https://www.icc-cpi.int/sites/default/files/2021-06-16-list-of-experts-eng.pdf> accessed 27 July 2022.

29 Derham, Derham (n 24) 25-56.

30 Ibid.

same time, the defence has the right to interrogate and cross-examine the expert after all the other participants.[31]

In the decision in *The Prosecutor v. Thomas Lubanga Dyilo* of 14 March 2012, the ICC noted that when assessing the testimony of expert witnesses, the Chamber has considered factors such as the established competence of the particular witness in his/her field of expertise, the methodologies used, and the extent to which the findings were consistent with other evidence in the case and the general reliability of the expert's evidence (para. 112).[32]

6 PECULIARITIES OF EXPERT INVOLVEMENT AT THE ICC

During the consideration of a case at the ICC, there are two ways of involving an expert: a) involving an expert via the Pre-Trial Chamber of the ICC; b) the use of expert opinions drawn up following the national legislation of the state and transferred to the ICC through international cooperation.

a) Use of the results of the forensic examination at the ICC conducted by experts engaged by the Pre-Trial Chamber of the *ICC*

The Pre-Trial Chamber of the ICC decides on the involvement of an expert in the proceedings (Art. 56 of the ICC Rome Statute). At the request of the victims or their legal representatives, at the request of the accused, or on its initiative, the Court may engage appropriate experts to assist in determining the scope of the offence and the extent of any damage, loss, or injury caused to the victims and to offer various options as to the appropriate types and compensation forms (Part 2 of Art. 97 of the Rules of Procedure and Evidence).

The Pre-Trial Chamber, when deciding to carry out a medical, psychological, or psychiatric examination, takes into account the nature and purpose of the examination, as well as the person's consent to participate in such an examination (Part 1 of Art. 113 of the Rules and Procedures of Evidence). According to Part 5 of Art. 44 of the ICC Regulation, the Pre-Trial Chamber may issue orders relating to the subject of an expert report, determine the number of experts, the method of presenting their evidence in court, and determine time limits for the preparation and publication of their report.[33]

The parties have the right to provide 'joint instructions' to the expert, i.e., to provide jointly agreed questions, the answers to which the expert should find as a result of conducting the expert examination. If the parties do not agree on the questions, they provide 'separate instructions' to the expert. After the examination, the expert draws up a single opinion, which should include answers to all the questions raised by the parties (para. 16).[34]

As the British researcher Dragana Radosavljevic points out, the opinions/testimony of experts (in particular, psychiatric expertise) are treated ambiguously, although international courts have shown a willingness to listen to and examine the experts' testimony when it seems

31 Ibid.

32 Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF> accessed 20 July 2022.

33 Regulations of the Court <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> accessed 27 July 2022.

34 *Prosecutor v Lubanga*, Decision on the procedures to be adopted for instructing expert witnesses, ICC-01/04-01/06-1069 (ICC TC I, Dec. 10, 2007) <http://www.worldcourts.com/icc/eng/decisions/2007.12.10_Prosecutor_v_Lubanga1.htm> accessed 27 July 2022.

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necessary 'in the interests of justice'.[35] This is because this evidence fulfils three procedural goals: as a fact-finding tool; as evidence relevant to the establishment of a complete defence (e.g., duress); as evidence that may influence the mitigation of the sentence.[36] In some international criminal trials, expert witnesses played a crucial role in convictions, as they were allowed to express an opinion on the 'ultimate question' – whether the defendant had the relevant mental state required for the crime of which he had been accused.[37]

However, international tribunals take the position that the absence of an expert's opinion/testimony is not decisive in cases where there are convincing testimonies of eyewitnesses.[38] For example, in the practice of the ICC, proving the coercive circumstances that made consent impossible is sufficient to prosecute a person for committing sexual violence.[39] In this case, it is not necessary to conduct a forensic examination to establish the severity of bodily injuries or to establish the lack of consent of the victim, which is confirmed by Part 3 of Rule 63. According to that Rule, the Trial Chamber does not make a legal requirement regarding the need to confirm the proof of any crime under the jurisdiction of the Court, in particular, crimes related to sexual violence.

In general, the Court may take into account the opinions/testimony of experts during the proceedings at the ICC if they are relevant to the case and are 'important enough' to assist the tribunal in considering the issue of prosecution for 'the most serious crimes'.[40] These 'most serious crimes' are systematic or largescale conduct that may have 'caused social alarm to the international community', along with a person who was a 'most senior leader suspected of being most responsible for the crimes within the jurisdiction of the Court'.[41]

It should be noted that there is another possibility of involving experts who have special knowledge in solving the case by ICC. In order to collect evidence, the ICC Prosecutor's Office at the pre-trial stage may involve 'external non-witness experts' to provide expert opinions.[42] Such experts indirectly play a role in generating prosecutorial 'facts', 'knowledge', and 'objective truths'.[43] This right follows from Part 2 of Art. 15 of the ICC Rome Statute, according to which the ICC Prosecutor can receive information through the sources he/she considers appropriate, in the form of written or oral testimony. There are no special requirements for external non-witness experts in the normative ICC regulation.

b) Use of the results of the forensic examination, conducted by experts involved in the procedure following the national legislation of Ukraine, at the ICC

Since the Court does not have sufficient resources and powers to conduct investigations, the ICC relies on the state's cooperation. If the national authorities provide active and prompt assistance, the ICC can be effective in administering justice.[44] Thus, Art. 93 of the

35 D Radosavljevic, 'Scope and Limits of Psychiatric Evidence in International Criminal Law' (2013) 13 (5) International Criminal Law Review 1013-1035 doi: https://doi.org/10.1163/15718123-01305011

36 Ibid.

37 Ibid, 1016.

38 R May, M Wierda, *International Criminal Evidence* (Brill 2021) doi: https://doi.org/10.1163/9789004479647

39 International Protocol on Documentation and Investigation of Sexual Violence in Conflict, Article 59 <https://womenua.today/UWC-library/unwomen/37-International_Protocol_2017_2nd_Edition_UKR.pdf> accessed 26 July 2022.

40 Derham, Derham (n 24) 25-56.

41 Hamilton (n 19) 305-317.

42 A Overton, D Rothe, 'The International Criminal Court and the External Non-Witness Expert(s), Problematic Concerns: An Exploratory Endeavour' (2010) 10 (3) International Criminal Law Review 345-364 doi: https://doi.org/10.1163/157181210X507868

43 Ibid.

44 De Gurmendi, Friman (n 8) 289-336.

Rome Statute stipulates that expert opinions drawn up based on the results of examinations under the state national legislation may be submitted to the ICC in the order of cooperation between the state and the ICC.

After the full-scale invasion of the Russian Federation in the territory of Ukraine on 24 February 2022, the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 7304 on 3 May 2022.[45] The Law regulates the procedure for Ukraine's cooperation with the ICC by providing for Chapter IX-2 'Peculiarities of cooperation with the ICC' in the Criminal Procedure Code of Ukraine. These changes allow for the transfer of the materials of criminal proceedings that were investigated by national law enforcement agencies to the ICC (Art. 620 of the Criminal Procedure Code of Ukraine). In practice, the opinion of an expert who was involved by national law enforcement agencies during the investigation of criminal proceedings could be transferred to the ICC. Such expert opinions must meet the requirements of national legislation regarding their drafting.

At the same time, it is appropriate to note specific problems that arose at the national level in connection with the invasion of the Russian Federation and, as a result, may affect the prosecution of offenders by the ICC. According to Art. 12-2 of the Law of Ukraine 'On the Legal Regime of Martial Law', shortening or speeding up any forms of judicial proceedings during martial law is prohibited. Accordingly, forensic expert institutions should continue conducting expert examinations and providing expert opinions to promote the administration of justice.

At the same time, as a reaction to the legal regime of martial law and military actions in the territory of the state, the 'Order of interaction between bodies and units of the National Police of Ukraine, health care institutions and the bodies of the Prosecutor's Office of Ukraine in establishing the fact of the death of a person during martial law on the territory of Ukraine' (hereinafter – the Order) dated 9 March 2022 No. 177/450/46 was adopted by the Ministry of Internal Affairs of Ukraine, the Ministry of Health of Ukraine, and the Prosecutor General's Office.[46] At first glance, the purpose of this document is to eliminate obstacles and improve forensic expert activities. The need for such an act could be read between the lines because of the significant increase in forensic examinations in connection with the number of dead and injured people, damaged buildings and infrastructure, etc.

However, this bylaw contradicts specific provisions of the Criminal Procedural Code of Ukraine, which is the main one in the regulation of criminal procedural relations in Ukraine. Other normative acts must be adopted in accordance with it. If there is a need to change the legal regulation, then such a change should be carried out by amending the Criminal Procedure Code of Ukraine.

The Order (Clause 2 of Section 3.3) provides that the basis for conducting a forensic medical examination is a resolution, referral, report, or other document drawn up by an authorised person of the military administration, the National Police of Ukraine, the Security Service of Ukraine, the Prosecutor's Office or other authorised bodies. The provision of this clause contradicts Art. 242 of the Criminal Procedure Code of Ukraine, according to which the decision adopted by the person conducting the inquiry, the investigator, the prosecutor, or the decision of

45 Draft Law on Amendments to the Criminal Procedure Code of Ukraine on Cooperation with the International Criminal Court No 7304 of 20 April 2022 <https://itd.rada.gov.ua/billInfo/Bills/Card/39474> accessed 26 July 2022.

46 'The order of interaction between bodies and units of the National Police of Ukraine, health care institutions and the bodies of the Prosecutor's Office of Ukraine in establishing the fact of the death of a person during martial law on the territory of Ukraine' approved by the Order of the Ministry of Internal Affairs of Ukraine, the Ministry of Health of Ukraine, and the Office of the Prosecutor General 9 March 2022 No 177/450/46 <https://zakon.rada.gov.ua/laws/show/z1299-17> accessed 26 July 2022.

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the investigating judge, or the agreement between the defence party and the Bureau of Forensic Medical Examination is the legal basis for conducting a forensic medical examination.

Such documents that are provided for by the Order ('napravlenia', 'vidnoshenia' or other documents) cannot be considered a legal basis (as a procedural document provided for by the Code of Criminal Procedure) for conducting an examination. The possibility of drawing up such a document by an authorised person of the military administration and applying to the Forensic Medical Examination Bureau is also not provided for in the Criminal Procedure Code of Ukraine. In addition, an authorised person of the military administration is not an investigator and does not have (and cannot have) the powers of an investigator or inquirer (even during martial law). Therefore, any documents drawn up by representatives of the military (district or regional administrations) do not give rise to criminal-procedural relations, nor are they a legal basis for creating evidence – an expert opinion. Moreover, the issuance of such documents by these officials is an excess of the official powers provided for by law, i.e., a classic example of a violation of Part 2 of Art. 19 of the Constitution of Ukraine, according to which 'state authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine'. Therefore, the powers of military administration employees regarding the involvement of forensic medical experts in Clause 2, Section 3 of the Order contradict the Constitution of Ukraine, the Criminal Procedure Code, and the Law 'On the Legal Regime of Martial Law'.

We assume that this innovation in the Order for conducting forensic medical examinations based on the 'napravlenia', 'vidnoshenia' or other documents of an authorised person of the military administration was proposed in a (hasty and uncoordinated) response to the challenge of the reality of the war – the mass death of people as a result of military actions in the territory of Ukraine and the need for their identification, the establishment of the causes of death, and other important features of the subject of proof of war crimes (for example, suffering from hunger or thirst, the torture of prisoners of war and/or civilians, etc.). However, to this day, the effect of these provisions of the Order has not been corrected, so either this error has not yet been noticed by numerous specialists-employees of the specified ministries and the Prosecutor General's Office (which is quite strange) or this 'error' is targeted (which is even more strange) in order to encourage the incorrect practice of conducting forensic medical examinations based on instructions, referrals, or other documents of employees of military administrations. Such forensic expert opinions may be excluded from the evidence base as inadmissible in future legal proceedings within the national judiciary and the ICC.

In addition, after analysing the Order mentioned above, it is possible to single out certain features of conducting forensic medical examinations during martial law:

- prior to the forensic medical examination, an information notification regarding the corpse is duplicated at the telephone number specified by the territorial police body;
- at the same time, even under the current conditions, if the police officers do not have prior information about the corpse in the forensic medical institution, but the corpse is there, the forensic medical expert conducts an examination (this provision also does not comply with the Code of Criminal Procedure);
- the expert who conducted the forensic medical examination is obliged to provide information about the cause of death to the person who made the decision about the examination within three days after the beginning of the examination. In this case, we are talking about cases in which the resolution (para. 7, para. 2, para. 4 of the Order), a reference to the 'napravlenia', 'vidnoshenia' or other document (para. 1, para. 2, para. 4 of the Order) or the decision of the investigating judge, or the agreement between the defence party and forensic medical examination

bureau (242, 243 of the Criminal Procedure Code of Ukraine) is absent in the specified provision of the Order. In this case, based on the literal interpretation of this provision, if the basis for the forensic medical examination was a document other than the investigator's decision, the forensic expert is not obliged to provide information about the death of a person.

- employees of the forensic medical examination bureau provide the expert's opinion to the person who sent the corpse for examination within three days after its preparation. In this context, the question arises whether 'the person who sent the corpse for examination' is the same as 'the person who made the decision to conduct the examination and sent the relevant document to the forensic medical examination bureau'. If not, then based on the interpretation of the Order, the person who made the decision to conduct an examination receives only information about the causes of death (and does not receive an expert's opinion as evidence).
- forensic experts carry out measures for further identification of the corpse (fixation and mandatory photography of special signs, dental formulas, removal and storage of objects for molecular genetic examination);
- when there are clear signs of damage from a gunshot, explosive, burn, chemical, radiation, or other injuries resulting from hostilities, regardless of whether the victim is military or civilian, a medical certificate of death is issued by a forensic medical expert based on an external examination. At the same time, the forensic expert takes mandatory photographs of the corpse with sufficient digital documentation, selection of material for forensic immunological and molecular genetic research (if necessary), and, if possible, preservation of the elements that caused the injury. The Order allows for a situation wherein, if the cause of a person's death is apparent and includes various types of damage resulting from hostilities, a forensic medical examination may not be conducted. The Order thus contradicts Part 2 of Art. 242 of the Criminal Procedure Code.[47]

We would like to note that the specifics of conducting forensic medical examinations provided for in the Order are not temporary. Therefore, it will not cease to operate with the end of martial law in the territory of Ukraine, and there is thus a need to bring the specified bylaw into compliance with the provisions of the Criminal Procedure Code of Ukraine. The errors of the bylaw threaten to create risks for the recognition of expert opinions as inadmissible because the procedure for the expert involvement and conducting an examination, provided for by the Code of Criminal Procedure of Ukraine, will not be followed. In such a case, the question arises of whether such a situation will be a chance for the defence to request that evidence be considered inadmissible both within the national judiciary of Ukraine and in the ICC in an attempt to avoid criminal liability. The bylaw contributes to the possibility of such a result in the future, mixing the concept of 'forensic examination' as a means of proof in criminal proceedings and the administrative procedure of examining a corpse for the purpose of issuing a death certificate.

47 KA Shunevych, 'Peculiarities of forensic expert activity during the full-scale armed aggression of the Russian Federation against Ukraine. Actual problems of human rights, the state, and the legal system' in *Materials of the XXI International Student and Postgraduate Scientific Conference* (April 22-23, 2022), Faculty of Law of Ivan Franko National University of Lviv, 222-226.

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7 CONCLUSIONS

The ICC jurisdiction extends to states that have ratified the ICC Rome Statute or have recognised the jurisdiction of the ICC following Part 2 of Art. 12 of the ICC Rome Statute. At the time of the invasion of the Russian Federation on 24 February 2022, Ukraine had not ratified the Rome Statute. The Chief Prosecutor of the ICC, Karim Ahmad Khan, launched an investigation into war crimes of the Russian Federation in Ukraine at the request of 39 ICC members on 2 March 2022. As a result, war crimes committed by Russian military personnel in the territory of Ukraine will be a subject of consideration at the ICC. The jurisdiction of the ICC extends to the entire internationally recognised territory of Ukraine, including the temporarily occupied territories.

The Rome Statute generally established an adversarial model for the administration of justice, but the ICC Statute contains many exceptions to the typical features of this theoretical model (the active role of the court in the proceedings; the admissibility of written statements and other evidence in court, if they were collected *ex parte* during the investigation). Therefore, justice in the ICC is carried out according to the ICC electric separate procedural system of the ISS.

The document that defines the specifics of proof in the ICC is the Rules of Procedure and Evidence. Each party has the right to present evidence to which the exact requirements of admissibility apply. The requirements for the admissibility of evidence are less stringent than approaches in national legal systems so that parties unfamiliar with the international procedural system can easily present their cases without being limited by the technical nuances typical of national models. The ICC applies the principle of free assessment of evidence, and exceptions to the principle of the directness of evidence are allowed.

An expert at the ICC has the status of a witness ('expert witness') and, thanks to his/her special knowledge, skills, or training, helps the Trial Chamber understand or determine issues of a technical nature that are the subject of the dispute. The expert must be neutral and objective. The Trial Chamber chooses an expert from the List of Experts either approved and administered by the ICC Registry or involves them at the proposal of the parties to the process. As of 16 June 2021, the List includes more than 140 experts.

The ICC has two ways of involving an expert to provide an opinion/testimony: a) the involvement of a specific expert by the ICC Pre-Trial Chamber by selection from the List of ICC Experts approved by the Secretariat of the ICC; b) the involvement of an expert who carries out his/her activities under national legislation, via international cooperation between the state and the ICC.

The second method raises concerns regarding the admissibility of a forensic expert's opinion if it is provided without compliance with the requirements of the Criminal Procedure Code of Ukraine. Therefore, Ukrainian bylaws in the field of regulation of forensic examination must be brought into line as soon as possible with the main regulatory act in the field of regulation of criminal procedural relations – the Criminal Procedural Code of Ukraine – and, in the case of a real, justified need and intention to change the legal regulation of these relations, must reflect such changes in the Criminal Procedure Code of Ukraine.

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Research Article

PROTECTION OF THE RIGHT TO HEALTH DURING THE PERIOD OF ARMED CONFLICT: THE EXPERIENCE OF UKRAINE

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Keywords: *right to health, protection of human rights, international humanitarian law, armed conflict, civilian persons, medical staff*

ABSTRACT

This article deals with the protection of the right of the civilian population and medical workers to health. The issue of rights violations arises in connection with the armed conflict between the Russian Federation and Ukraine, which has been ongoing since 2014. On 24 February 2022, its second phase began, which has been characterised by a large-scale offensive by the Russian army. The hostilities are still ongoing, and some areas are temporarily occupied.

The aim of the present paper is to reveal the essence of the main international legal, and national means of protecting the right to health in a period of armed conflict.

Methods. *A combination of general scientific and special scientific approaches was used, as well as a number of methods, namely: dialectical, comparative, analytical, synthetic, and complex methods and the method of generalisation.*

The results of the study have proved that the existing system of regulatory and institutional means of protection of human rights to health, both at the international and national level, is not able to do this successfully.

Conclusions. *The right to health in the current period of the armed conflict is limited legally and forcibly for those who stay in the rear by the state on whose territory the armed conflict continues. It is illegal when one of the parties to the conflict violates IHL norms. Despite the normative means of ensuring and protecting the right to health and a wide range of institutional protections established by the parties to the armed conflict – Ukraine and the Russian Federation – the existing system is unable to protect the right of civilians to health. First of all, this is due to the Russian Federation's violation of the established IHL rules. At the same time, the lack of a quick and effective protection mechanism leads to the fact that civilians, and sometimes medical workers, increasingly feel defenceless against aggressors. Therefore, it seems that the world community should review the existing approaches and establish more effective means of protecting human rights, including the right to health.*

1 INTRODUCTION

Since February 2014, an armed conflict has been taking place on the territory of Ukraine, one of the parties of which is the Russian Federation (hereafter – RF). Its new active phase began on 24 February 2022, with the large-scale invasion of the Russian army into the territory of Ukraine. On the same day, the decree of the President of Ukraine of 24 February 2022 No. 64/2022 introduced martial law,[1] which has now been extended until 21 November 2022.[2]

Hundreds of people die and are injured every day in Ukraine, including civilians. Official data on the number of dead and wounded among the military in Ukraine is not disclosed, but

1 Decree of the President of Ukraine of 24 February 2022 No 64/2022 'On the Introduction of Martial Law in Ukraine' <https://zakon.rada.gov.ua/laws/show/64/2022#n2> accessed 20 September 2022.

2 Law of Ukraine of 15 August 2022 No 2500-IX 'On the Approval of the Decree of the President of Ukraine "On Extending the Period of Martial Law in Ukraine"' <https://zakon.rada.gov.ua/go/2500-20> accessed 20 September 2022.

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on 2 June 2022, the President of Ukraine told the International Security Forum in Bratislava that every day in Donbas, about 100 soldiers died and another 450-500 were injured.[3] There are also numerous victims among the civilian population.[4] As of 25 July 2022, 12,272 civilian casualties were recorded, with a reported 5,237 killed and 7,035 injured.[5]

In general, this trend confirms the statement of A. Khorram-Manesh – 'since the turn of the century, we have seen a transition from conventional wars that follow international rules and regulations to hybrid wars and terrorism, which do not follow traditional rules'.[6]

As a result of non-compliance by the RF with rules and customs of warfare, the most important values of humanity are violated, which include, in particular, the rights to life and health. Ensuring the right to health of the civilian population is especially important in this situation. First of all, due to active fighting and shelling, a significant number of civilians suffer injuries, fractures, and burns every day. All of them require emergency medical care, a sufficient amount of medication, and sometimes quite complex surgical operations. This causes a significant burden on medical institutions located not only on the front line but also in the so-called 'rear', especially in conditions where some of them are completely destroyed, and others have suffered damage due to targeted shelling by the RF army. So, as of 24 July 2022, 'more than 746 health care facilities are in need of restoration, and more than 123 were destroyed, since the beginning of the war'.[7] WHO's/Health Cluster's Attacks on Health Care Team has verified '414 attacks on health care, including 350 reports of attacks affecting health facilities, as of 27 July'.[8] Medical workers are killed and wounded, and ambulances are fired upon. A heavy load on health care facilities is observed in the rear, where civilians have moved from under the occupation or due to hostilities near their settlements. According to official data, the number of internally displaced persons in Ukraine currently totals 6.6 million.[9] It is predicted that this number will increase due to the recently announced mandatory evacuation from the Donetsk region.[10] Evacuation announcements from other

3 'Zelensky Told the EU Leaders about the Real Losses of the Armed Forces in Donbas' (*Ukrainska Pravda,* 2 June 2022) <https://www.pravda.com.ua/news/2022/06/2/7350156/> accessed 20 September 2022.

4 The bloodiest tragedies in 2022 have been: the airstrike on the Drama Theater in Mariupol (about 600 people died, 16 March); the rocket attacks on the Mykolaiv regional state administration building (37 dead, 29 March); the attack on the Kramatorsk railway station (more than 50 people died, including five children, and 98 were injured, 8 May); the attack on the 'Amstor' shopping centre in Kremenchuk (22 people died and 59 were injured, 27 June); the attack on a recreation centre and a nine-story residential building in Serhiyivka, Odesa region (20 people died, including a child, and 38 were injured, 1 July); the attack on a five-story residential building in Chasiv Yar, Donetsk region (48 dead, including a child, 9 July); the attack on the central part of Vinnytsia (25 dead, including three children, and 202 people injured, 14 July); the attack on the Chaplyno railway station (25 dead, including two children, and 31 people injured, 24 August). The hostilities continue. Kharkiv and Mykolaiv, as well as the border areas of the Dnipropetrovsk region, Sumy region, Kharkiv region, and Chernihiv region are subjected to almost daily shelling from MLRS. Every week, the Russian army launches missile strikes on the territory of Ukraine. This indicates a constant increase in the number of dead and wounded both among the military and among the civilian population.

5 'Ukraine: civilian casualty update 25 July 2022' <https://www.ohchr.org/en/press-releases/2022/07/ukraine-civilian-casualty-update-25-july-2022> accessed 20 September 2022.

6 M Bersi, 'A Healthier World Is One without War' (*School of Public Health,* 30 March 2022) <https://www.bu.edu/sph/news/articles/2022/a-healthier-world-is-one-without-war/> accessed 20 September 2022.

7 'Five months of fighting full-scale Russian aggression. 150 days of resistance, unbreakable on the way to victory' (*Ministry of Health of Ukraine*, Facebook, 24 July 2022) <https://www.facebook.com/moz.ukr> accessed 20 September 2022.

8 WHO, Surveillance System for Attacks <https://extranet.who.int/ssa/LeftMenu/Index.aspx> accessed 20 September 2022.

9 IOM, Ukraine – Internal Displacement Report — General Population Survey Round 7 (17-23 July 2022), 29 July 2022.

10 'Vice Prime Minister Iryna Vereshchuk: Consider evacuating – we will take care of you and your loved ones' (*Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine*) <https://minre.gov.ua/> accessed 20 September 2022.

regions of Ukraine are expected. Once in a safe place, these people will also look for opportunities to receive medical care and services. It should not be forgotten that during a war, the epidemic situation is quite unfavourable. Unsanitary conditions, a significant number of wounded and sick people, the presence of a humanitarian crisis in all regions of Ukraine, and the lack of an opportunity for the relevant state bodies to carry out sanitary and epidemiological surveillance throughout the country create a favourable environment for the spread of the so-called 'diseases of war', such as cholera, dysentery, tetanus, etc. It is also worth noting the continuation of the COVID-19 pandemic in Ukraine, which is gaining momentum again.[11] The disruption of the continuity of treatment for tuberculosis, HIV/AIDS, diabetes, etc., in the temporarily occupied territories will lead to the spread of these diseases among the population, which will pose a threat not only to Ukraine but also to other countries. The rapid spread of HIV/AIDS, viral hepatitis, and other sexually transmitted diseases is expected due to the mass rape of women in the occupied territories, as well as the commission of other sexual criminal offenses against our citizens.

The above determines the expediency of conducting a study on ensuring the right to health during an armed conflict at two levels:

1) international, which concerns the protection of the right to health of prisoners of war, wounded, and sick both among the military and among the civilian population, and

2) national, which should show how the state, on whose territory there is an armed conflict under martial law, ensures the right to health of ordinary citizens who are in the rear.

2 INTERNATIONAL LEGAL MEANS OF PROTECTION OF THE RIGHT TO HEALTH DURING THE PERIOD OF AN ARMED CONFLICT

The World Health Organization (hereafter – WHO) constitution states, 'Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.[12] The world community recognises the right to health as a good that belongs to the natural right of the first generation of human rights. It is multi-component and includes the right to health care services and the right for everyone to use various services, institutions, and things without discrimination. No small role in ensuring the right to health is played by those factors that determine the health of any person, namely: safe environmental conditions and access to clean drinking water, healthy food, proper sanitation, and housing, as well as access to health-related education and information, provision of quality medical care, etc.[13]

V. Lyaskovsky rightly points out that violations of the law of armed conflicts and human rights in such conflicts are practically the same regardless of the country's geographical

11 'Coronavirus in Ukraine: the Ministry of Health stated that the incidence rate is increasing, there are fatalities' (*Slovo i dilo: analytical portal*, 10 August 2022) <https://www.slovoidilo.ua/2022/08/10/novyna/suspilstvo/koronavirus-ukrayini-moz-zayavyly-riven-zaxvoryuvanosti-zrostaye-ye-letalni-vypadky> accessed 20 September 2022.

12 Constitution of the WHO <https://www.who.int/about/governance/constitution> accessed 20 September 2022.

13 Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000). For text, see UN Doc. E/C.12/2000/4 (2000): A Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 85 (2003); V Kovalchuk, B Melnychenko, K Marysyuk, et al, 'Right to Health in the Decisions of the European Court of Human Rights' 2022 (55) 1-2 Informatologia 14-26 DOI: 10.32914/i.55.1-2.2; O Yaroshenko, V Steshenko, O Tarasov, I Nurullaiev, M Shvartseva, 'Right to Health Care: The Practice of the ECtHR and the Case of Ukraine' (2022) 18 The Age of Human Rights Journal 239-256 https://doi.org/10.17561/tahrj.v18.6496.

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location.[14] Therefore, the study of international legal and national means of protection of human rights during armed conflicts is necessary. The current war in Ukraine has become the largest in Europe since World War II, and the number of human rights violations is expected to be significant.

Based on the understanding of the diversity of definitions of the concept of international legal means intended to ensure and protect basic human rights,[15] in the context of international legal means of protecting the right to health, it is worth considering:

1) *normative means*, to which it is necessary to attribute international legal acts that determine the rules of activity and formulate the rights and obligations of the relevant subjects regarding the protection of the right to health, as well as international documents that usually do not contain norms or rules of conduct (in particular, declarations, statements, memoranda), and

2) *institutional means*, which include the activities of international bodies for monitoring and control over the observance of human rights and freedoms, including the right to health.

Normative means of ensuring and protecting the right to health. In times of peace, the right to health care is guaranteed by a number of international legal acts and international documents: the Universal Declaration of Human Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms, the Convention and Protocol Relating to the Status of Refugees, the United Nations International Convention on the Elimination of All Forms of Racial Discrimination, the European Social Charter, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Declaration on the Promotion of Patients' Rights in Europe, the Convention on Human Rights and Biomedicine, the International Health Regulations, recommendations of the WHO, etc.

During an international armed conflict, the right to health is additionally guaranteed by four Geneva Conventions and three additional protocols. As O. Senatorova rightly points out, their provisions form the so-called 'Geneva law' or international humanitarian law (hereafter – IHL) *stricto sensu*.[16] Thus, the right to health is directly or indirectly guaranteed in point a) part 1 and part 2 of Art. 3, Art. 4, Arts. 12, 13, 15, 18, 19-28, 29, part 5 of Art. 32, Arts. 33, 35, 36, 38-44, 46 I of the Geneva Convention, Arts. 3, 6, 7, 9, 10, 12-15, 20-30, 34-35, 37-40, 47, 51 II Geneva Convention, Arts. 3, 13, 15, 18-20, 22, 23, 25-32, 46, 47, 51-55, 72, part 2 of Art. 97, 98, 109, 110, 112-114, 122 III of the Geneva Convention, Art. 18-19, Art. 21-22, Art. 23, Art. 56, Art. 91, 92 IV of the Geneva Convention, which determine the specifics of the protection of the civilian population during the war. In 1977, two Additional Protocols to the Geneva Conventions were adopted: on the protection of victims of international armed conflicts and on conflicts of a non-international nature. Another protocol concerning the adoption of an additional distinctive emblem was signed in 2005.[17] They also mention the right to health.

At the same time, it is fair to criticise L. Rubenstein and argue that the Geneva Conventions are silent on the current obligations of belligerent states to offer affordable, acceptable, and

14 VI Lyaskovskyi, 'Legal Regulation of Armed Conflicts at The Present Stage and Features of The Application of International Humanitarian Law in Them' (2013) 5 Legal Science 113 <http://nbuv.gov.ua/UJRN/jnn_2013_5_14> accessed 26 September 2022.

15 M Antonovych, 'The International System of Human Rights Protection: Through the Prism of Ukraine' (2007) 3 Law of Ukraine 37-41 <https://core.ac.uk/download/pdf/149240005.pdf> accessed 26 September 2022.

16 OV Senatorova, *Human Rights and Armed Conflicts* (textbook, FOP Holembovska 2018) 21.

17 The Geneva Conventions and their Commentaries <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> accessed 26 September 2022.

high-quality medical services to the civilian population. Instead, there is a requirement to provide continuity of medical services, for example, through the prevention and treatment of infectious diseases.[18] But only a 'pure' requirement does not guarantee its fulfilment. And if, at the beginning of the 19th century, scientists claimed that the 'IHL provides robust protection to health care services',[19] the experience of the hybrid war in Syria[20] and Ukraine proves the opposite.[21]

Institutional means of ensuring and protecting the right to health. Violations of IHL may result in: political responsibility, which will be expressed in satisfaction, reprisals, retorts, and collective sanctions; material responsibility in the form of restitution and/or reparation; criminal liability of natural persons (see all Geneva Conventions have an article (respectively 49/50/129/146), which declares the obligation of the parties to introduce into law the necessary norms that will ensure effective criminal sanctions for persons who have committed or ordered to commit a serious violation of IHL). According to O.V. Vasylenko, state responsibility has a more preventive (deterrent) effect because it acts as an additional incentive that forces a state participating in an armed conflict to comply with IHL norms. Individual responsibility implies criminal prosecution of individual war criminals who massively commit 'serious violations' of the norms of international law of armed conflicts, the list of which is contained in each of the Geneva Conventions.[22]

Institutions that provide judicial protection of human rights include *ad hoc* courts: the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, created by the UN resolution in 1993 and 1994, as well as the special court for Sierra Leone. Their appearance at the end of the 20th century was preceded by the holding of the Nuremberg and Tokyo tribunals after World War II. The activity of international criminal tribunals implies both the application of previous rules of IHL (written and customary) and the creation of new legal norms in the field of IHL and even in the field of human rights protection.

However, the International Criminal Court (hereinafter – ICC) makes the most significant contribution to the protection of the norms of international law of armed conflicts and bringing the persons who occupy the highest positions in the system of state authorities and management to criminal responsibility for violations of the norms of IHL. It is a permanent organisation whose activity is based on the principle of complementarity.[23]

According to the Rome Statute (hereinafter – RS), the jurisdiction of the ICC extends to the most serious crimes, such as: genocide, crimes against humanity, war crimes, and crimes of

18 L Rubenstein, 'War, Political Conflict, and the Right to Health' (2020) 22 (1) Health and Human Rights 339-341.

19 K Footer, L Rubenstein, 'A Human Rights Approach to Health Care in Conflict' (2013) 95 (889) International Review of the Red 167-187, at 167. doi:10.1017/S1816383113000349.

20 RJ Haar, CB Risko, S Singh, et al. 'Determining the Scope of Attacks on Health in Four Governorates of Syria in 2016: Results of a Field Surveillance Program' (2018) PLoS Med 15(4). DOI: 10.1371/journal.pmed.1002559; L Rubenstein (n 18) 339-341.

21 K Goniewicz, M Goniewicz, W Pawłowski, 'Protection of Medical Personnel in Contemporary Armed Conflicts' (2016) 69 (2 Pt 2) Wiad Lek 280-284.

22 O Vasylenko, 'Some Aspects of Responsibility for Violations of the Norms of International Law of Armed Conflicts' 2020 (9) ΛΌΓΟΣ. The Art of Scientific Mind 122-125. DOI: 10.36074/2617-7064.09.027.

23 Despite the fact that Ukraine signed the ICC Statute (RS) back on 20 December 2000, it was ratified only after the large-scale offensive of the Russian army on the territory of Ukraine (20 May 2022). At the same time, in 2014, Ukraine recognised the jurisdiction of the ICC and granted it the right to investigate all alleged international crimes committed on Ukrainian territory. In 2020, the ICC launched an official investigation. On 13 September 2000, Russia signed the RS, but having never ratified it, on 16 November 2016, by order of V. Putin, it refused to participate in it. This happened after the ICC confirmed that the occupation of Crimea is an international armed conflict. However, withdrawing from the agreement does not prevent the ICC from prosecuting crimes committed by Russian citizens on the territory of Ukraine.

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aggression. The commission of almost each of them may be accompanied by actions that grossly violate the right to health care (paras b, c, d of Art. 6, paras b, c, d, e, f, g, j, k of Part 1 Art. 7, paras ii, iii, para a part 2 of Art. 8, paras i, iii, iv, v, vi, vi, viii, ix, x, xi, xvii, xviii, xix, xx, xxii, xxiv, xxv point b Part 2 of Art. 8, points and point c Part 2 of Art. 8, points i, ii, iii, iv, v, vi, ix, xii point e Part 2 Art. 8 of the RS).

Summarising the above, it is worth stating that the presence of the provisions of the Geneva Conventions, as well as the Additional Protocols to them, which guarantee the right to health during such a conflict, today have a restraining effect on the parties to the armed conflict. Judicial protection of the right to health is possible only in the context of bringing to individual criminal responsibility persons who are guilty of the most serious crimes, the objective side of which constitutes actions that violate the right to health and which fall under the jurisdiction of the ICC. Therefore, I. Protsenko correctly notes that the result of finding persons guilty of war crimes is the imposition of the ICC on them not only of imprisonment but also compensation for damage (Art. 75 of the RS) and punishment in the form of a fine or confiscation (Art. 77 of the RS), which can be transferred to the Trust Fund in the interests of persons affected by crimes.[24] However, as practice shows,[25] the proof of guilt does not always correspond to full compensation for the damage caused to the victim.

According to ordinary citizens, the European Court of Human Rights (hereafter – ECtHR) is considered to be the most effective institution for the protection of human rights. This is primarily because 1) in the event of a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms, the injured person (persons) may be awarded personalised payment of material and/or moral damage, and 2) the terms of consideration at the ECtHR are usually shorter than in other international institutions. The ECtHR does not lose its role even during armed conflicts because where war crimes are concerned, the right to life is often violated, and torture and other types of ill-treatment of a person take place. This imposes on states not only negative obligations but also positive obligations, which include responsibility for crimes related to the violation of fundamental rights and freedoms. On the procedural level, the same positive obligations provide for conducting effective investigations of violations contained in the Convention for the Protection of Human Rights and Fundamental Freedoms.

At one time, in the case *Hassan v. the United Kingdom* (para 104), the ECtHR noted that 'the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law'.[26] O. Senatorova sees in this the opening of the door to the application of IHL because the ECtHR emphasised the importance of *erga omnes* in its precedent practice regarding armed conflicts.[27]

It should be noted separately that in a situation with a Russian-Ukrainian war due to active hostilities and 'effective control' outside its own territory, the Court may apply extraterritorial jurisdiction.[28] At the same time, the state's obligation to ensure human rights arises from

24 I Protsenko, 'Modern International Legal Means of Protecting the Property Rights of Civilians During Armed Conflicts' 2020 (11) Law of Ukraine 92. DOI: 10.33498/louu-2020-11-091.

25 See 'The Al Mahdi case' (*The Trust Fund for Victims*) <https://www.trustfundforvictims.org/en/what-we-do/reparation-orders/al-madhi> accessed 26 September 2022.

26 *Hassan v the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22hassan%22],%22itemid%22:[%22001-146501%22]}> accessed 27 September 2022.

27 Senatorova (n 16) 105.

28 Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights: Factsheet. July 2018. <https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf > accessed 27 September 2022.

the very fact of establishing control over a certain territory with the help of its own armed forces or through subordinate local administration.[29] Thus, it can be predicted that the ECtHR will also consider cases related to the occupied Ukrainian territories.[30] The court has repeatedly considered disputes about violations of human rights in the occupied territories.[31] So, as O. Plotnikov rightly observes, it is hardly to be expected that the ECtHR will refuse to recognise the responsibility of the Russian Federation for human rights violations in the occupied territories of Ukraine […]. However, the responsibility of Ukraine cannot be excluded, as well as the possibility of avoiding such responsibility by the Russian Federation, at least in some cases.[32]

At the same time, an accurate assessment of the nature of human rights violations in these territories is complicated, on the one hand, by the fact that representatives of international organisations, even with humanitarian missions, are not allowed to enter these territories.[33] On the other hand, there is difficulty in recording the facts of violations in connection with the abandonment of civilians in the occupied territories due to the small number and unreliability of humanitarian corridors,[34] with the departure of victims and potential witnesses of crimes to other states.[35]

But it should be borne in mind that the Protection of Human Rights and Fundamental Freedoms does not directly provide for a norm regarding the protection of the right to health. At the same time, the analysis of the practice of the ECtHR shows that the realisation of the right to life is impossible without guaranteeing the right to health. The right to life is considered to be violated not only in the case of a person's death but also in the case of injuries that, although they did not cause the person's death, posed a serious

29 Senatorova (n 16) 106.

30 Although Ukraine has not exercised control over Crimea and parts of the Donetsk and Luhansk regions since 2014 (when they became part of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic'), parts of the Donetsk, Zaporizhzhia, Kharkiv, and Kherson regions were occupied after 24 February 2022 and are currently de-occupied, together with the Kyiv, Chernihiv, Sumy, and part of the Kharkiv regions, which were under the control of the Russian Federation for a long time.

31 See *Loizidou v Turkey* App no 40/1993/435/514, *Ilascu and Others v Moldova and Russia* App no 48787/99, *Mozer v the Republic of Moldova and Russia* App no 11138/10, *Cyprus v Turkey* App no 25781/94, *Xenides-Arestis v Turkey* App no 46347/99, *Papamichalopoulos and others v Greece* App no 14556/89, *Chiragov and Others v Armenia* App no 13216/05, *Khlebik v Ukraine* App no 2945/16, etc.

32 O Plotnikov, 'International Legal Responsibility for the Observance of Human Rights in the Occupied Territories of Ukraine' (2020) 11 Law of Ukraine 89. DOI: 10.33498/louu-2020-11-080.

33 'Report on the Human Rights Situation in Ukraine 16 February To 15 May 2019' (United Nations, 1 June 2019) <https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-16-february-15-may-2019> accessed 27 September 2022; 'Situation Of Human Rights In Ukraine In The Context Of The Armed Attack By The Russian Federation 24 February – 15 May 2022' <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-06-29/2022-06-Ukraine ArmedAttack-EN.pdf> (*United Nations,* 29 June 2022); A Pavlenko, 'Diseases of War. The Head of the WHO in Ukraine Assesses the Probability of the Spread of Cholera, Dysentery and Tetanus' (*NV-Ukraine,* 27 August 2022) <https://nv.ua/ukr/ukraine/events/interv-yu-z-golovoyu-vooz-v-ukrajini-shcho-potribno-ukrajinskim-medikam-novini-ukrajini-50259013.html> accessed 27 September 2022.

34 'Situation of Human Rights in Ukraine' (n 33); 'High Commissioner updates the Human Rights Council on Mariupol, Ukraine. 16 June 2022' (*United Nations,* 16 June 2022) <https://www.ohchr.org/en/statements/2022/06/high-commissioner-updates-human-rights-council-mariupol-ukraine> accessed 27 September 2022.

35 Thus, as of 10 August 2022, 6,377,256 refugees who left Ukraine due to the war were recorded in Europe. See: 'Ukraine Refugee Situation' (*Operational Data Portal*) <https://data.unhcr.org/en/situations/ukraine> accessed 27 September 2022; as of 26 May 2022, according to the Ukrainian government, 1.4 million Ukrainian citizens were deported to Russia from temporarily occupied Ukrainian territories, of which 230,000 were children. See: 'The RF Deports the Ukrainian Children in Order to Destroy the Ukrainian Nation' (*Ukrinform,* 26 May 2022) <https://www.ukrinform.ua/rubric-ato/3492343-rf-deportue-ditej-z-metou-znisenna-ukrainskoi-nacii-ukraina-v-radbezi-oon.html> accessed 27 September 2022.

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threat to his life. The state also has a positive obligation to protect people from the risk of contracting a disease that can cause death. The right to health can also be reflected through the prism of the prohibition of torture, the guarantee of the right to freedom and personal integrity, a fair trial, respect for personal and family life, the inviolability of housing, etc.[36] In this aspect, we have numerous violations on the part of the Russian Federation, based on the reports and articles of international organisations.[37] Therefore, the right to health can be protected in the ECtHR in connection with the established facts of torture of the civilian population in the occupied territories, sexual violence that resulted in the infection of victims with HIV/AIDS, deprivation of their humanitarian aid (in particular, drinking water, food, medical products), resulting in the use of dangerous products or the interruption of treatment, as well as the appearance of mental illnesses, which deprive the civilian population of the opportunity to live a full life.

It should be noted separately that the OSCE Special Monitoring Mission to Ukraine, which has been working since March 2014 at the invitation of the Ukrainian government, plays an extremely important supporting role. In particular, it documents violations of human rights and IHL, records the number of deaths and injuries due to the armed conflict among the civilian population, and systematically publishes reports on the situation with human rights and thematic reports concerning individual aspects, events,[38] etc. The facts of human rights violations recorded by it may serve as evidence of IHL violations in international institutions.[39] No less significant is the contribution of the Ukrainian Helsinki Human Rights Union, Regional Center for Human Rights, Center for Civil Liberties, Truth Hounds, Kharkiv Human Rights Protection Group, and a number of other human rights organisations that periodically provide the ICC with evidence of crimes committed by the Russian military in Ukraine from 2014.[40]

36 Y Shvets, 'Features of the Protection of the Right to Health Care in The European Court of Human Rights' 2018 (1) 1 National Law Journal: Theory and Practice 57; V Kovalchuk, B Melnychenko, K Marysyuk, et al, 'Right to Health in the Decisions of the European Court of Human Rights' (2022) 55(1-2) Informatologia 14-26. DOI: 10.32914/i.55.1-2.2; O Yaroshenko, V Steshenko, O Tarasov, et al, 'Right to Health Care: The Practice of the ECtHR and the Case of Ukraine' (2022) 18 The Age of Human Rights Journal 239-256. DOI: 10.17561/tahrj.v18.6496.

37 'Situation of human rights in Ukraine' (n 33); 'High Commissioner updates the Human Rights Council on Mariupol, Ukraine' (n 34) ; 'Ukraine: Humanitarian situation deteriorates as major cities bear the brunt of heavy fighting' (*International Committee of the Red Cross*, 22 June 2022) <https://www.icrc.org/en/document/ukraine-humanitarian-situation-deteriorates-major-cities-bear-brunt-heavy-fighting> accessed 27 September 2022; 'Ukrainian Humanitarian Situation Reports' (*Unicef Ukraine*) <https://www.unicef.org/ukraine/en/research-and-reports> accessed 27 September 2022.

38 As of 10 August 2022, the Mission has prepared 53 public reports on the human rights situation in Ukraine and a number of thematic reports on civic space and fundamental freedoms in Ukraine, sexual violence related to the conflict, the human rights situation in the Autonomous Republic of Crimea, human rights violations and IHL violations in the context of the events near Ilovaisk in August 2014, etc.

39 'Ukraine: Monitoring the Devastating Impact of the War on Civilians' (*United Nations*, 24 May 2022) <https://www.ohchr.org/en/stories/2022/05/ukraine-monitoring-devastating-impact-war-civilians> accessed 27 September 2022.

40 'What Laws and Customs of War Does Russia Violate in Ukraine?' (*Ukrainer*, 12 June 2022) <https://ukrainer.net/laws-russia-violate/> accessed 27 September 2022.

3 NATIONAL NARRATIVES REGARDING ENSURING THE RIGHT TO HEALTH IN THE PERIOD OF ARMED CONFLICT AND THEIR PRACTICAL IMPLEMENTATION IN UKRAINE

Normative means of ensuring and protecting the right to health. The right to health is guaranteed by a number of Ukrainian legal acts. In particular, Part 1 of Art. 3 and Part 1 of Art. 49 of the Constitution of Ukraine, Art. 8 of the Fundamentals of Ukrainian Legislation on Health Care (1992), Laws of Ukraine 'On Ensuring Sanitary and Epidemic Welfare of the Population' (1994), 'On Protection of the Population from Infectious Diseases' (2000), 'On Childhood Protection' (2001), 'On the Fight against Tuberculosis' (2001), 'On the Prevention of Acquired Immunodeficiency Syndrome (AIDS) and Social Protection of The Population' (2010), etc. However, it is not absolute, and therefore, based on Art. 64 of the Constitution of Ukraine, it may be temporarily limited under conditions of a state of emergency or martial law. The scope of such restrictions is regulated by the Laws of Ukraine 'On the Legal Regime of Martial Law' (2015) and 'On Approval of the Decree of the President of Ukraine "On the Introduction of Martial Law in Ukraine"' (2022).

The current Criminal Code (hereinafter – CC) of Ukraine contains a number of norms that protect the right to health of every person (Arts. 131, 138, 139, 140, 141, 184, etc.). These norms are applied both in peacetime and in the period of armed conflict when it comes to the violation of the right to health by a medical and/or pharmaceutical worker. Also, the CC of Ukraine provides for a number of special norms for violations of IHL (Arts. 435, 433, 438, 445). These norms cover all significant violations of IHL contained in agreements ratified by Ukraine. At the same time, it is worth noting that most of their provisions are not sufficiently specified, which does not contribute to effective prosecution for violations of IHL. Therefore, sometimes the opening of criminal proceedings may take place under the general articles of the Criminal Code of Ukraine (item 8, part 2, Art. 115, Arts. 121, 122, 125, 126, 127, 194, etc.).

Institutional means of ensuring and protecting the right to health care. The national institutional bodies that ensure the protection of the right to health include: the police, the prosecutor's office and the court. These bodies: 1) make it possible to bring to justice medical workers who violate the right to health of individual citizens in peacetime and during an armed conflict in a territory free from hostilities; 2) contribute to the prosecution of those guilty of violating IHL norms, which provide for the right to health, during an armed conflict. In particular, the Office of the Prosecutor General carries out proper documentation of war crimes and crimes against humanity committed by the Russian army in Ukraine. However, it is worth noting that due to a number of objective reasons, it is quite difficult to bring the perpetrators to criminal responsibility for violations of IHL norms, and therefore the main burden of protecting the right to health in armed conflicts is expected to be placed on international institutions.

Practical implementation of the right to health during armed conflicts under martial law. As already mentioned, the right to health is not an absolute right, and therefore the state can take a number of legitimate and justified measures aimed at limiting the right to health of the population in the rear during the introduction of martial law. The experience of the Russian-Ukrainian war testified that the following measures were taken:

1. *Restrictions on trade of medicinal products originating from aggressor countries.* In particular, immediately after the full-scale invasion of Ukraine, it was forbidden to register and sell medicinal products from the Russian Federation and the Republic of Belarus (hereafter –

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RB).[41] In May, the Ministry of Health (hereinafter – MOH) was given the right to refuse state registration or cancel the registration of a medicinal product if one, several, or all stages of its production are carried out by enterprises located on the territory of the aggressor countries.[42] It is worth noting that such a decision will affect the exclusion from the pharmaceutical market of a number of international pharmaceutical companies that have at least one stage of production on the territory of the Russian Federation and the Republic of Belarus. In turn, this can create a shortage of medicine.

2. *Imposition of a moratorium on the implementation of planned measures of state control of the quality of medicinal products by the State Service of Ukraine for medicinal products and drug control.*[43] This control is currently carried out by international organisations and national regulatory bodies in the field of quality control of medicinal products. However, their detection of falsified pharmaceutical products does not entail a temporary ban on their circulation. Only the State Health Service can do this. Thus, a situation arises when the end user can receive low-quality medicine that can harm his/her health.

3. *Simplification of the procedure for registration of medicinal products, as well as conditions for their storage and transportation*. The provisions of a number of legal acts issued at the end of February and in the spring of 2022 by the Cabinet of Ministers of Ukraine (hereinafter – CMU) and the Ministry of Health of Ukraine[44] provide for: a) a simplified mechanism for the registration of medicinal products (including immunobiological medical preparations and blood preparations), as well as the continuing effects of registration certificates for medicinal products, and b) simplification of the procedure for issuing conclusions on the quality of medicinal products and facilitating access to medicinal products by granting permission for their import in foreign packaging; c) temporary refusal to apply requirements regarding the minimum shelf life of medicinal products supplied to Ukraine, d) simplified requirements for the transportation of medicinal products and preservation of medicinal products in warehouses.

4. *Absence of a clear and strict mechanism of control by the state over the circulation of medical products that arrive in Ukraine as humanitarian aid*. The state institution, the 'Public Health Center of the Ministry of Health of Ukraine', is authorised to receive medical products that are provided free of charge in the form of humanitarian and charitable aid and to distribute them among healthcare institutions and organisations.[45] However, it was not foreseen to whom the Center of Public Health is accountable and under whose control. A control

41 Orders of the Ministry of Health 'Some Issues of Emergency State Registration of Medicinal Products During Martial Law' of 26 February 2022 No 384 and 'On the Ban on the Use of Medicinal Products from the Republic of Belarus on the Territory of Ukraine' of 19 March 2022 No 503.

42 Law of Ukraine of 22 May 2022 No 2271-IX 'On Amendments to the Law of Ukraine "On Medicinal Products" regarding restrictions on the circulation of medicinal products, the production of which is located on the territory of the Russian Federation or the Republic of Belarus, as well as on the export of medicinal products from Ukraine' <https://zakon.rada.gov.ua/laws/show/2271-20#Text> accessed 27 September 2022.

43 Decree of the CMU of 13 March 2022 No 303 'On the Termination of Measures of State Supervision (Control) and State Market Supervision in Conditions of Martial Law' <https://zakon.rada.gov.ua/go/303-2022-%D0%BF> accessed 27 September 2022.

44 See Order of the Ministry of Health of 26 February 2022 No 384 'Some Issues of Emergency State Registration of Medicinal Products During Martial Law', which approved the 'Procedure for emergency state registration of medicinal products, medical immunobiological products, blood preparations supplied to Ukraine during the introduction of martial law, under obligations', Order of the Ministry of Health of 3 March 2022 No 406 'Regarding the Circulation of Certain Medicinal Products in the Conditions of Martial Law in Ukraine', Resolution of the CMU of 15 April 2022 No 471 'Some Issues of Emergency State Registration of Medicinal Products, Medical Immunobiological Products, Blood Preparations, which are Produced or Supplied to Ukraine during the Period of Martial Law, Under Obligation'.

45 Order of the Ministry of Health of Ukraine of 12 March 2022 No 474 'Some Issues of Receiving Humanitarian and Charitable Aid Under Martial Law' <https://zakon.rada.gov.ua/go/v0474282-22> accessed 27 September 2022.

mechanism was also not created for volunteers, public organisations, and pharmaceutical companies engaged in humanitarian aid of medical products or for the persons who receive it. This has led to reports of abuse, theft, and selling of this aid.[46]

5. *Limitation of the possibility of bringing medical workers to civil liability in the case of providing poor-quality medical care.* In order to protect the violated right to quality medical services, individuals usually had the right to go to court and compensate for material and moral damage that occurred as a result of receiving poor-quality medical services in civil proceedings. Since, in such a case, we are talking about bringing the medical worker to civil liability, the burden of proving his/her guilt rests with the patient him/herself. For this, the latter should apply for a clinical expert assessment of the quality of medical care and medical service, which is carried out by the Clinical Expert Commission of the Ministry of Health of Ukraine.[47] But since March 2022, such an assessment of the quality of medical care during the period of martial law, as well as within 30 calendar days after its termination or cancellation, will not be conducted.[48] Thus, having received material damage during martial law, for example, as a result of poor-quality dental prosthetics, a person will not be able to receive compensation for it in civil proceedings.

6. *Cancellation of anti-epidemic restrictions in the conditions of an unfavourable epidemic situation.* The disaster that preceded a full-scale war in Ukraine was the COVID-19 pandemic. As of 24 February 2022, there were five regions in our country that received a red level of epidemic danger of the spread of the coronavirus. At the beginning of the war, 25,789 cases of coronavirus were recorded per day, while 2,818 people were hospitalised, and another 276 people died.[49] At the same time, on 26 March 2022, the division of regions of Ukraine into 'green', 'yellow', 'orange', or 'red' levels of epidemic danger during the spread of COVID-19 was cancelled.[50] This led to the *de facto* cancellation of all quarantine restrictions. Currently, it is only recommended to follow anti-epidemic measures aimed at preventing the spread of the coronavirus disease. Mandatory vaccination of certain categories of workers was also suspended.

On the scale of the country, regulatory and institutional means of ensuring and protecting the right to health, forming an allegedly harmonious system, fail during war and are not able to properly ensure the ability of civilians to exercise their rights. The Ministry of Health of Ukraine is already warning that the war will have negative consequences for the health of Ukrainians in the long term. In particular, an increase in the number of diseases with advanced stages of development (stage III and IV oncological diseases), an increase in the number of heart attacks and strokes is expected, psychological support will be needed by about 15 million Ukrainians, and approximately 3 million people will need the help of a

46 In total, by July 2022, the National Police of Ukraine initiated 294 criminal proceedings for crimes related to humanitarian aid, charitable donations, and free aid (some of which involved medical products) <https://mvs.gov.ua/news/igor-klimenko-19-tizniv-povnomasstabnoyi-viini-v-cifrax-nacionalnoyi-policiyi> accessed 27 September 2022.

47 Order of the Ministry of Health of Ukraine of 5 February 2016 No 69 'On the Organization of Clinical and Expert Assessment of the Quality of Medical Care and Medical Services' <https://zakon.rada.gov.ua/laws/show/z0285-16#Text> accessed 27 September 2022.

48 Order of the Ministry of Health of Ukraine of 20 March 2022 No 508 'On Amendments to the Order of the Ministry of Health of Ukraine of 5 February 2016 No 69' <https://zakon.rada.gov.ua/go/z0352-22> accessed 27 September 2022.

49 'Coronavirus in Ukraine. The situation in Ukraine. Information as of 24 February 2022' (*Ministry of Health of Ukraine*) <https://covid19.gov.ua/> accessed 27 September 2022.

50 Decree of the CMU of 9 December 2020 No 1236 as amended of 26 March 2022 'On the Establishment of Quarantine and the Introduction of Restrictive Anti-Epidemic Measures in order to Prevent the Spread of the Acute Respiratory Disease COVID-19 caused by the SARS-Cov-2 Coronavirus on the Territory of Ukraine' <https://zakon.rada.gov.ua/laws/show/1236-2020-%D0%BF#Text> accessed 27 September 2022.

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psychiatrist or psychotherapist.[51] To minimise these consequences, Ukraine is currently launching a national mental health program and the project 'Rehabilitation of War Injuries in Ukraine', which is part of the National Barrier-Free Strategy.

4 PROTECTION OF MEDICAL WORKERS AND HEALTHCARE FACILITIES: REALITIES OF RUSSIAN AGGRESSION IN UKRAINE

The realisation of the right to health is impossible without medical workers and the activities of medical institutions. In addition, the provision of medical aid in conflict conditions is the duty of any state and the basis for the realisation of the human right to health. To fulfil their obligations, states have agreed on a number of rules that are set out in the Geneva Conventions and Additional Protocols. *De jure* health workers (both civilian and military) in armed conflict have certain privileges. If they observe certain rules, they should be provided with the opportunity to perform their professional duties, and the wounded and sick, respectively, to receive medical assistance. A separate level of regulation of the protection of medical workers and facilities in conditions of armed conflict is acts of a recommendatory nature of international governmental and non-governmental organisations (for example, Resolution of the UN General Assembly 37/197, Resolution Council of Europe 904 (1988), Resolution WHA46.39, Resolution WHA55.13, etc.).

At the same time, the experience of the modern Russian-Ukrainian war has proved that the declaration of such norms does not always mean their implementation by at least one of the parties. For example, in February 2015, journalist A. Luhn posted a photo of a bombed ambulance on social media. Luhn explained that the car was on the western part of the road heading south, from Artemivsk to Luhansk. It is highly probable, based on the situation, that the shelling was from illegal military formations. According to the journalist, this was not the only car with traces of shelling.[52] In 2018, as written by G.V. Gabrelyan, the Russian military carried out 11 attacks on medical workers and medical institutions in Ukraine. As a result, two people died, seven were injured, three medical workers received life threats, and three drivers were injured. As for medical institutions, two were damaged, and four were forcibly closed.[53] On 13 July 2020, a military medic was killed while evacuating the body of a slain Ukrainian Armed Forces serviceman, although the Ukrainian Armed Forces, in coordination with the OSCE, had previously planned the operation, having received security guarantees and a cease-fire commitment from the Russian occupation forces in the area.[54] In general, almost every year from 2014 to 2022, Russian forces unlawfully attacked not only civilian objects but also medical facilities and sanitary transport and killed or injured medical workers.

51 'Lyashko Told How the War Will Affect the Health of Ukrainians in the Long Term' (*Slovo I dilo: analytical portal,* 18 August 2022) <https://www.slovoidilo.ua/2022/08/18/novyna/suspilstvo/lyashko-rozpoviv-yak-vijna-vplyne-zdorovya-ukrayinczi v-dovhostrokovij-perspektyvi> accessed 27 September 2022.

52 '"The surround' for peaceful residents. Obstructing the evacuation of the civilian population during the armed conflict in Donetsk and Luhansk regions' in *Violations of human rights and international crimes during the war in Donbas* (almanac of monitoring reports, NGO 'Civil Liberties Center' 2018) 70 <https://ccl.org.ua/wp-content/uploads/2021/08/kami-export-combinereport_ccl_mf_v5-1.pdf > accessed 27 September 2022.

53 G Gabrelyan, 'Problems of the Protection of Medical Personnel in the Context of the Armed Conflict in Ukraine' (2019) 3 Social Law 95.

54 'War crime: Ukraine calls on the OSCE to respond to the killing of a doctor in Donbas' (*Ukrinform,* 15 February 2020) <https://www.ukrinform.ua/rubric-ato/3063424-voennij-zlocin-ukraina-zaklikae-obse-vidreaguvati-na-vbivstvo-medika-na-donbasi.html> accessed 27 September 2022.

However, no one has been punished for any incident to this day. A similar situation, as noted by Abdulkarim Ekzayez, took place in Syria. Moreover, just like in Ukraine, they remain unpunished.[55] Perhaps that is why, since the full-scale invasion of the Russian Federation into the territory of Ukraine, numerous violations of IHL have been recorded: dropping of air bombs and rocket attacks on medical facilities, shooting of ambulances, and the killing and torture of medical workers not only in the frontline but also in the frontline zone and in the occupied territories. For example, a psychologist from the town of Dymer in the Kyiv region[56] said that they brought a young man to the hospital whose feet were shot to pieces. He was in the Red Cross, carrying the wounded, and they caught him and tortured him.[57]

As a result, on 23 May 2022, WHO and 88 countries supported Ukraine's resolution 'Health emergency in Ukraine and refugee receiving and hosting countries, stemming from the Russian Federation's aggression', noting the Russian Federation's aggression against Ukraine '[…] is causing a serious impediment to the health of the population of Ukraine, as well as having regional and wider than regional health impacts'.[58]

The international community urged the RF to immediately cease any attacks on hospitals and other healthcare facilities and to fully respect and protect all medical personnel and humanitarian personnel exclusively engaged in medical duties, along with their means of transport and equipment. In addition, the need for respect for and protection of the sick and wounded, including civilians, health and humanitarian aid workers, and healthcare systems, was emphasised.[59]

However, as subsequent events have shown, no appeals are of any importance for the RF. For example, on 14 July 2022, as a result of rocket fire in the city of Vinnytsia (a regional centre 'in the rear'), the Neuromed Medical Center was destroyed, as a result of which three doctors died, and there were both wounded and dead among the patients and staff of the clinic, including a seven-year-old child.[60]

In general, as of 27 July 2022, there were 414 verified attacks on health care, which took the lives of 85 people and injured 100 people.[61] According to Ukraine's calculations, for the period from 24 February to 24 July 2022, the Russians damaged almost 900 healthcare facilities, 127 hospitals were completely destroyed, 90 ambulances were shot and disabled, 250 vehicles were seized and not returned, 450 pharmacies were damaged and do not work, and

55 M Bersi, 'A Healthier World Is One without War': At a recent School of Public Health seminar, experts discussed the long-term effects of war on the health of populations (*School of Public Health*, 30 March 2022) <https://www.bu.edu/sph/news/articles/2022/a-healthier-world-is-one-without-war/> accessed 27 September 2022.

56 The village of Dymer, Kyiv region, was under occupation for 35 days.

57 'The Russians tortured a guy from the Red Cross...' (*Ukrainian Helsinki Human Rights Union,* 2 August 2022) <https://helsinki.org.ua/articles/rosiiany-katuvaly-khloptsia-z-chervonoho-khresta/?fbclid=IwAR3vEPwNApKNrUCHHaCrjpErLjly7kY-BAQ36lGwsTyVkAYtdHLzRVu913s> accessed 27 September 2022.

58 Resolution No A75/A/CONF./6 of 23 May 2022 'Health Emergency In Ukraine And Refugee Receiving And Hosting Countries, Stemming From The Russian Federation's Aggression' <https://apps.who.int/gb/ebwha/pdf_files/WHA75/A75_ACONF6-en.pdf> accessed 27 September 2022.

59 ibid.

60 'In Vinnytsia, a Rocket Attack Completely Destroyed the Neuromed Center: There Are Preliminary Casualties' (*Fakty,* 14 July 2022) <https://fakty.com.ua/ua/proisshestvija/20220714-u-vinnyczi-raketnyj-udar-vshhent-znyshhyv-czentr-nejromed-poperedno-ye-zagybli/> accessed 27 September 2022; 'A Doctor Injured as a Result of a Rocket Shelling of the City Died in Vinnytsia' (*Ukrinform,* 2 August 2022) <https://www.ukrinform.ua/rubric-regions/3541964-u-vinnici-pomer-likar-poranenij-unaslidok-raketnogo-obstrilu-mista.html> accessed 27 September 2022; 'Russia Killed Them: Photos and Names of Victims of the Occupiers: Attack on Vinnytsia' (*Apostrophe,* 16 July 2022) <https://apostrophe.ua/ua/news/society/accidents/2022-07-16/ih-ubila-rossiya-foto-i-familii-zhertv-udara-okkupantov-po-vinnice/274444> accessed 27 September 2022.

61 5 WHO, Surveillance System for Attacks on Health Care.

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41 were destroyed.[62] At the same time, it should be remembered that a large part of Ukraine is under occupation, and therefore it is extremely difficult to track the number of damaged, destroyed, or closed healthcare facilities there, and it will be possible to calculate it only after de-occupation. It should be noted separately that there are reports of the sale of medicines on the markets, which cannot guarantee their safety, in particular, due to improper storage conditions.[63]

The authorities of Ukraine are trying to restore medical facilities as quickly as possible in the de-occupied territories, and international organisations and EU countries, in turn, are helping with mobile medical teams and medical products until the healthcare facilities have resumed their work, as well as taking injured civilians for treatment and rehabilitation.

5 CONCLUSIONS

The right to health is not an absolute human right, and therefore during an armed conflict, it is limited legally and forcibly for citizens who remained in the rear by the state on whose territory the armed conflict continues; further, it is illegal when one of the parties to the conflict violates IHL norms. The experience of the Russian-Ukrainian war proved that ensuring the right to health in the conditions of martial law declared in connection with the armed conflict is a difficult task. Despite the normative means of ensuring and protecting the right to health (both at the international legal and national levels) established by the parties to the armed conflict – Ukraine and the Russian Federation – as well as a wide range of institutional (primarily at the international level) means of protection, the existing system is not able to protect the right of civilians to health. It seems that in order to successfully protect the right to health in the conditions of war, the parties to the conflict must, first of all, adhere to the following key rules: 1) not to inflict unjustified strikes on civilian infrastructure objects, endangering the life and health of the civilian (peaceful) population; 2) not to destroy or damage health care facilities, not to fire on ambulances, and not to take medical personnel and hospital patients prisoner, thereby ensuring the possibility for medical workers to perform their professional duties, and for patients to receive proper and quality medical care; 3) to create humanitarian corridors in the occupied territories, which would allow, among other things, the establishment of an effective supply of medicines (for insulin patients, HIV patients, etc.).

At the same time, it should be noted that, unfortunately, neither national nor international legislation provides quick mechanisms for the protection of IHL in the researched area. This approach leads to the fact that civilians often feel defenceless against aggressors. Therefore, it seems that the world community should review existing approaches and establish more effective means of protecting human rights, including the right to health.

62 'Invaders Damaged Almost 900 Objects of Health Care Facilities in Ukraine – Lyashko' (*Ukrinform,* 24 July 2022) <https://www.ukrinform.ua/rubric-ato/3535627-zagarbniki-poskodili-majze-900-obektiv-zakladiv-ohoroni-zdorova-v-ukraini-lasko.html> accessed 27 September 2022.

63 'There are problems with access to medicines in the temporarily occupied territories – V. Lyashko' (*Weekly magazine 'Apteka',* 13 June 2022) <https://www.apteka.ua/article/636507> accessed 27 September 2022; '"It's an eerie chaos" More than 5,000 Ukrainian pharmacies were under occupation. How does farm retail work in the temporarily uncontrolled territory of Ukraine' (*Forbes,* 22 July 2022) <https://forbes.ua/inside/velike-malenke-porno-12082022-7663> accessed 27 September 2022.

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Research Article

THE RESPONSIBILITY FOR ENVIRONMENTAL DAMAGES DURING ARMED CONFLICTS: THE CASE OF THE WAR BETWEEN RUSSIA AND UKRAINE

Mohamad Albakjaji

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Keywords: *Environment, damage, responsibility, international law, customary law, Russia, Ukraine.*

ABSTRACT

Background: *There is no war without catastrophic impacts, not only on humans and states but also on the environment and nature. As with all wars, the question is raised as to whether an invasion or aggression is legitimate according to international law. This research aims to discuss an emerging issue at the international level, which is the responsibility of the aggressor state for*

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the environmental damages incurred by the victim state. This paper discusses the possibility of establishing Russia's responsibility for the environmental damages incurred in Ukraine. It will also shed light on the possible ways Ukraine may raise Russia's responsibility, internationally speaking. The novelty of this study stems from its originality – it is the first on this topic in the field of international relations and international law.

Methods: *In this research, the author used a case study to provide an in-depth perspective on the responsibility of the invading state for the environmental damages caused to the victim state. Here, the author used a historical and statistical framework to shed light on the impacts of the Russian aggression against Ukraine on the environment. Moreover, analytical and structural methods were deployed to explain the methods by which Ukraine and the international community might establish Russian responsibility for the environmental damages caused by the invasion. To support the ideas discussed in this paper, the author uses legal texts, international conventions, and official reports issued from national and international institutions.*

Results and Conclusions: *The author found that the Russian aggression against the Ukrainian territory has caused severe environmental damages, which cannot go unpunished. Although traditional international law may be insufficient to punish Russia, customary law, warfare law, and international environmental law include rules that may be used to raise the Russian responsibility for these damages.*

1 INTRODUCTION

Since the first day of the Russian aggression, Ukraine has suffered catastrophic environmental losses, and as time has passed and the war has continued, the environmental damages have increased and become more serious. In the months since Russia invaded, many pieces of research have been conducted, shedding light on issues of the legitimacy of this invasion and the attitudes of countries and international law towards such an aggressive attack. Yet, the gap in the previous legal literature is that the question of the environmental damages of the attack and Russia's responsibility for such losses have not yet been discussed. Therefore, the present research will attempt to answer the following two questions:

- What are the most important environmental damages caused by the Russian attack on Ukraine?
- What are the possible ways in which Ukraine can raise the issue of the responsibility of Russia for environmental damages?

To answer these questions, the first section will discuss the most important environmental effects of the Russian invasion of Ukraine from the perspective of international law, environmental law, and international custom. The second section will discuss the effectiveness of these legal frameworks in raising the issue of the responsibility of Russia.

2 OVERVIEW OF THE SOURCES

Green and Kirsch have both discussed the humanitarian consequences of the Russian assaults, as well as its impacts on the globe, nations, and people.[1] Green outlined the

1 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 Krisch N, 'After hegemony: the law on the use of force and the Ukraine crisis' (EJIL:Talk!, 2 March 2022) <www.ejiltalk.org/after-hegemony-the-law-on-the-use-of-force-and-the-ukraine-crisis> accessed 20 July 2022.

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impacts of the invasion on the international level, arguing that the invasion would have implications not only for Ukrainian territory but for the whole world. Sanger focused on the reasons behind this invasion, explaining that Russia claimed that the main reason for the invasion was that Ukraine wanted to create its own nuclear weapons in cooperation with the USA.[2] Other scholars have discussed the issue of enhancing military justice during wartime. They argued that during the Russian invasion, most of the courts were completely paralysed, so Ukraine had to establish military justice during the war.[3] Prytyka et al. discussed the impacts of the martial law regime imposed in Ukraine following the Russian aggression. They highlighted the impacts of this new regime on other areas, such as the realisation of property rights, the administration of justice, the enforcement of court decisions, and labour relations, where a new legal framework is needed to reorganise these issues during wartime.[4] Further, Kaluzhna et al. tried to establish the Russian responsibility for this invasion, arguing that this invasion counts as a war crime – which is a type of international crime. They alerted the Ukrainian legislature to the necessity of adopting new amendments in many important areas, such as amending the Criminal Procedure Code (CPC) to verify sources of evidence.[5]

Regarding environmental protection, many studies and publications have emerged on the impacts of the Russian invasion of Ukraine, such as the work of De Ferrer (2022) and the report of WWWF on the environmental impact of Russia's war in Ukraine.[6] Although the literature discussed the Russian invasion of Ukraine from various perspectives, the impacts of the invasion on the environment and the Russian responsibility for environmental damages have not yet been raised in the literature. This is the basis for the originality of the current research, which makes this study a reference point for both academics and practitioners. Hence, the next section will elaborate on the impacts of the Russian aggression on Ukrainian green spaces and the environment and the best ways for Ukraine to raise the Russian responsibility for the environmental damages.

3 THE ENVIRONMENTAL IMPACTS OF THE RUSSIAN INVASION

Ukraine is a country that aspires to open up to Europe and become part of the EU confederation. It was previously part of the Soviet Union, from which it inherited an outdated industrial and energy infrastructure that has impacted the ecosystem. As a result of this inheritance, Ukraine's CO2 intensity and air pollution are the highest in Europe. With the dramatic increases in pollution in Ukraine, the rates of diseases and deaths have become

2 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 4 August 2022.

3 O Kaplina, S Kravtsov, O Leyba, 'Military Justice in Ukraine: Renaissance During Wartime' (2022) 3(15) Access to Justice in Eastern Europe 120-136.

4 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.

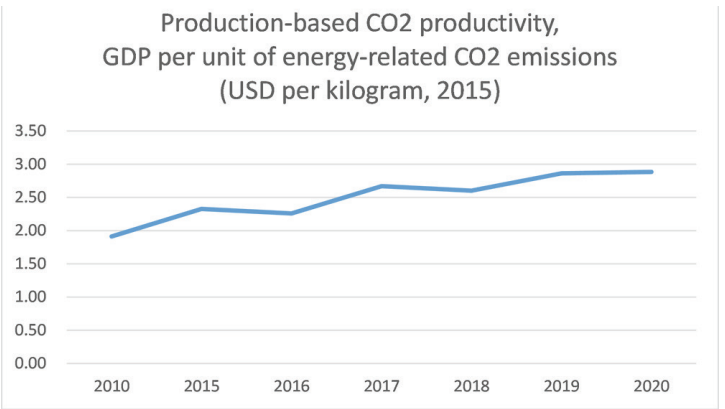
5 O Kaluzhna, K Shunevych, 'Liability Mechanisms for War Crimes Committed as a Result of Russia's Invasion of Ukraine in February 2022: Types, Chronicle of the First Steps, and Problems' 2022 3(15) Access to Justice in Eastern Europe 178-193.

6 M de Ferrer , 'Radiation levels at Chernobyl are rising: The environmental impact of Russia's war in Ukraine' (Euro News, 25 February 2022) <https://www.euronews.com/green/2022/02/25/radiation-levels-at-chernobyl-are-rising-the-environmental-impact-of-russia-s-war-in-ukrai> accessed 28 July 2022. See also 'Assessing the Environmental Impacts of the War in Ukraine' (World Wildlife Fund (WWF), 13 June 2022) <https://wwfcee.org/news/assessing-the-environmental-impacts-of-the-war-in-ukraine> accessed 6 August 2022.

the highest among the Organization for Economic Cooperation and Development (OECD) countries. Again, green spaces and water resources have dramatically decreased as a result. This will leave the region with a toxic legacy for future generations.[7]

Following the revolution of dignity and the initiative to join the EU by signing the agreement in 2014, Ukraine has adopted its plan to transition into a low-carbon, green economy. Major steps have been taken in this regard, such as the 'Strategy of the State and Environmental Policy of Ukraine for the Period till 2030', with its action plan to reduce pollution by 2025.[8] The national plan to end coal mining and the national system to implement new and effective environmental policies have been established as well. A legal reform has also been established in line with the UN association agreement. Regarding institutional reform, the 2030 plan aims to integrate ministries and businesses into the green economy transition. To implement the EU green deal, an inter-ministerial body has been established, which is supervised by the Deputy Prime Minister. These inspiring initiatives have been supported by Ukraine's international partners, such as the OECD.

Chart 1 clearly shows the tangible results of these reforms in terms of CO2 emissions.



Source: OECD.stat, EU4Environment (2022), 'Towards the green transformation of Ukraine: State of Play in 2021 Monitoring progress based on the OECD green growth indicators'.[9]

According to the chart, these reforms brought impressive and tangible results. The OECD has noted that the emission of CO2 has clearly been reduced, and the use of renewable energy sources has increased compared to previous years. In addition, the rate of water usage and sewage networks doubled to 64% of the population. Additionally, the green spaces and protected areas have increased, so that they cover nearly 7% of the country.

Unfortunately, all hopes for environmental progress and transition into sustainability in Ukraine have vanished after the Russian invasion of Ukraine, which has caused devastating

7 'Economic cost of the health impact of air pollution in Europe – clean air, health and wealth' (World Health Organization Regional Office for Europe) <https://www.euro.who.int/__data/assets/pdf_file/0004/276772/Economic-cost-health-impact-air-pollution-en.pdf> accessed 4 August 2022.

8 D Saha, P Bilek, E Cherviachenko, M von Mettenheim, R Stubbe, 'Economic reasons for a green reconstruction programme for Ukraine' (Berlin, April 2022) 1-16 <https://www.lowcarbonukraine.com/wp-content/uploads/PB_03_2022_en_Green-reconstruction.pdf> accessed 4 August 2022.

9 'Towards green transformation of Ukraine: State of Play in 2021 Monitoring progress based on the OECD green growth indicators' (EU4Environment, 2022 forthcoming) <https://www.eu4environment.org/app/uploads/2021/05/Ukraine-country-profile-2020-21-second-edition.pdf> accessed 4 August 2022.

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effects on the land and also led to the displacement and killing of thousands of people. Also, the shelling of land, forests, energy infrastructure, water, and ecosystems has caused immediate and long-term damage to the whole country.[10] Many of these issues, such as air and water pollution and the leakage of toxic substances, could be considered cross-border environmental damages, which will not be limited to the Ukrainian territories but will impact the whole European area or even further.[11] Also, because of military operations, the amount of waste has increased, such as medical waste, uncollected household waste, and shell fragments. These types of waste require special treatment, which is costly and exceeds the capabilities of Ukrainian finance.[12]

Although the environmental damages have increased over time, these damages are usually unreported. This is because the national monitoring systems have been disrupted or destroyed. However, some governmental efforts have been put in place to document the environmental damages, such as the EcoZagroza system, which includes a dashboard with data on the environmental damages resulting from the war. In addition, special governmental bodies have been established to record the environmental impacts of the war. These bodies could record more than 1,200 cases of environmental damage caused by the aggression.[13]

The UN Environmental Program (UNEP) and the environmental authority within the UN system are supporting the Government of Ukraine on a remote environmental impact monitoring basis. They are preparing to undertake field-level impact assessments, which are expected to be a colossal task, given the scale and geographical spread of reported incidents. As an international reaction to this invasion, the UNEP has prepared a program in cooperation with the Ukrainian government to monitor the environmental impacts of the Russian invasion. This supporting program is very important for UNEP, as it helps the UN review the environmental state, globally speaking. However, this task seems very difficult, as the environmental incidents are spread over a large geographical area.[14]

The UNEP has conducted many impact assessments in different areas of the conflict around the world, such as Sudan, South Sudan, Somalia, Afghanistan, the occupied Palestinian territories, Lebanon, Colombia, Kosovo and the Western Balkans, Iraq, and Congo. As mentioned by the UNEP Executive Director Inger Andersen: 'war is literally toxic'.[15] Lubrani, the UN's Resident Coordinator in Ukraine, also mentioned the tragedy of the displaced Ukrainians who need a clean environment to encourage them to return.[16]

10 Ibid.

11 'Briefing on the environmental damage caused by the Russian invasion of Ukraine' (Ministry of Energy and Environment Protection of Ukraine, April 2022) <https://mepr.gov.ua/en/news/39144.html> accessed 4 August 2022.

12 Ibid.

13 'Environmental impacts of the war in Ukraine and prospects for a green reconstruction' (OCED 2022) <https://www.oecd.org/ukraine-hub/policy-responses/environmental-impacts-of-the-war-in-ukraine-and-prospects-for-a-green-reconstruction-9e86d691/> accessed 4 August 2022.

14 The report of the UN environment programme (4 July 2022) <https://www.unep.org/news-and-stories/press-release/un-warns-toxic-environmental-legacy-ukraine-region> accessed 4 August 2022.

15 She added that 'The mapping and initial screening of environmental hazards only serves to confirm that war is quite literally toxic,' 'The first priority is for this senseless destruction to end now. The environment is about people: it's about livelihoods, public health, clean air and water, and basic food systems. It's about a safe future for Ukrainians and their neighbors, and further damage must not be done.' UN warns of toxic environmental legacy for Ukraine, region. 'Ukraine will then need huge international support to assess, mitigate and remediate the damage across the country, and alleviate risks to the wider region,' she added. The report of the UN environment programme (n 15).

16 He stated that 'Millions of displaced Ukrainians need a safe and healthy environment to come home to if they are expected to be able to pick up their lives. As soon as the fighting ends, and it must end soon, a colossal clean-up operation must be supported'. See The report of the UN environment programme (n 15).

The next section will outline the main damages or impacts of the Russian invasion on the Ukrainian environment, elaborating on different aspects of these environmental damages.

3.1 Impacts on Energy and Infrastructure

According to the UNEP, the conflict has caused damage in many fields, such as energy infrastructure and nuclear power sites, as well as mines and industrial sites. Many industrial sites have been damaged, some of which were storing dangerous substances, such as solvents, ammonia, and plastics. Dangerous substances have been released from explosions in agro-industrial sites, including fertiliser and nitric acid sites. Also, reports stated that livestock farms have been targeted, and the bombings have caused the death of a large number of animals. Therefore, the livestock carcasses will be a further risk to public health and the environment.

The cleaning process and removing the destroyed housing debris will be challenging as well, especially where this debris is already mixed with toxic substances, especially asbestos. Also, there are risks and threats coming from military operations and the use of weapons that leave military waste and asbestos. This will make the cleaning process challenging in urban areas. Thus, the military invasion will have a long-term impact on public health and poses a threat, such as cancer and respiratory conditions.[17]

3.2 Impacts on Natural and Protected Areas

Regarding the strategic location of the country, the CBD Fifth National Report (2013) clearly described the importance of this, stating that:

> *Ukraine has a high diversity of habitats and species. It is part of a broader region stretching across Central and Eastern Europe sometimes referred to as the "Green Heart of Europe". This includes rare steppe ecosystems, coastal wetlands, alpine meadows, ancient beech forests, and extensive peatlands. The country shares a part of the Danube Delta, the second-largest river delta of continental Europe and the largest reed-bed in the world. It includes vast pine, oak, and birch forests and peat bogs in the Polyssia region of northern Ukraine. The Carpathian Mountains in the western part of the country are home to ancient beech forests and alpine meadows. Importantly, rare steppe ecosystems survive in the central and eastern parts of Ukraine.[18] Ukraine takes up 35% of Europe's biodiversity, there are over 70,000 rare and endemic flora and fauna. This could unfortunately be destroyed during this war. 16% of Ukraine's land area is covered by forests.[19]*

According to the Ukrainian Ministry of Environment and Natural Resources, more than 900 natural sites covering 30% of the protected sites in Ukraine have been affected by

17 'How has the war impacted Ukraine's environment?' Report of the Word Economy Forum. 21. March. 2022. https://www.weforum.org/videos/the-environmental-cost-of-russia-s-war-in-ukraine?collection=popular-video-51fa76d387. Accessed on 25 July 2022.

18 'Assessing the Environmental' (n 7)

19 They also stated that: 'The territory of Ukraine contains habitats that are home to 35% of Europe's biodiversity, including 70,000 plant and animal species, many of them rare, relict, and endemic. They include European bison and brown bears, lynx, and wolves as well as sturgeon, the world's most threatened group of species'. See 'Fifth National Report of Ukraine to the Convention on Biological Diversity' (CBD Fifth National Report, 2013) <https://www.cbd.int/doc/world/ua/ua-nr-05-en.pdf> accessed 25 July 2022.

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military operations.[20] Satellite data from the European Forest Fire Information System indicates that the invasion has destroyed over 100,000 hectares of natural ecosystems.[21] Moreover, the Emerald Network is under threat – more than a fifth of the Emerald Networks sites, which are protected under the Bern Convention, have been destroyed because of the military invasion. As troops concentrate along the Siverskyi Donets River, dense forests have been degraded by military shelling.[22] Also, military operations pose a threat to more than 14% of the Ramsar sites and wetland sites, which are internationally recognised by the Ramsar Convention on Wetlands. In addition to the destruction of natural sites, military operations pose a threat to wildlife, as these operations occur in spring, which is the reproductive season for animals.[23]

As indirect impacts, most natural site activities have been suspended, especially in the regions of Donetsk, Luhansk, Zaporizia, Kherson, Mykolaiv, Kharkiv, Sumy, Chernihiv, Kyiv, and Crimea, where it has been reported that the troops have withdrawn, and the rangers and other staff in these sites have been called to join the army and territorial defence. So, these sites have been left unattended and without any care. Many of them have been damaged and need to be restored. Also, many of these sites have been affected by significant numbers of refugees, as the facilities and resources have been greatly damaged. Synevir National Park and the Carpathian Biosphere Reserve have provided a refuge for more than 15,000 refugees. Displacing the staff of environmental enforcement forces or having them join the army has increased the risk of illegal logging. Also, the treatment facilities in the conflict areas, such as Severodonetsk, Lysychansk, Rubizhne, and Popasna, have been damaged as well and are spewing wastewater into the environment.[24] On 21 March, an attack targeting a chemical plant near Sumy led to the emission of ammonia. In addition, the explosion of an acid tank led to the forming of a toxic cloud of nitrogen acid near Rubizhne. Moreover, increasing military operations in the region will inevitably increase GHG emissions at a time when all the efforts aim to reduce such emissions.[25]

3.3 Economic Impacts and Opportunity Costs

As mentioned earlier, the longstanding heritage of the Soviet Union has posed a significant threat to Ukraine in contemporary times. Energy, oil, mining, and industrial sites have become a source of threat because of the indiscriminate Russian bombing of these facilities, which has caused a release of toxic acid and hazardous materials that have negative impacts on the air, ecosystem, freshwater resources, and soil. Heavy metals and other substances may permeate underground and affect the soil and the quality of the underground water, which will not be suitable for use. This is exactly what happened in the eastern area. The treatment facilities were threatened, as were Severodonetsk, Lysychansk, Rubizhne, and Popasna. These sites have started spewing wastewater into the soil. As a result, this has caused the pollution of the water sources.

Undoubtedly, the war has had economic impacts that affect the environment. Many plans, strategies, and investments have been either cancelled or delayed because of military operations. Ukraine has a plan, and there are strategies and other engagements, such as the

20 'How has the war impacted Ukraine's environment?' (n 18).
21 'Assessing the Environmental' (n 7).
22 Ibid.
23 Ibid.
24 Ibid.
25 Ibid.

Nationally Determined Contribution (NDC), which was adopted by the Paris Agreement in June 2021.[26] According to this agreement, Ukraine is committed to reducing greenhouse gas emissions by 65% by 2030.[27] However, these strategies and plans have currently been cancelled. So, the environment has lost many green opportunities.

Unfortunately, most renewable energy sources are located in the south and east of the country, where many of these sites have been dramatically destroyed by military operations. In losing such activities, Ukraine lost many golden opportunities for investments that could have helped the country fulfill its environmental obligations and engagements. Conservation activities have been cancelled as well. Many projects funded and run by WWF-Ukraine and other international and European organisations have been negatively affected.[28]

3.4 Nuclear Risks

Immediately after the first day of the Russian invasion, a risk of radiation was reported equivalent to approximately 28 times the annual limit.[29] According to the Environmental Performance Index, Ukraine has a low-performance indicator in many areas, such as air and ecosystem protection. The war makes the situation worse than ever.[30]

The military operation in the vicinity of the Zaporizhzhya nuclear power plant, which has six reactors, may increase the risk of radiation crises that will spread to Europe.[31] As mentioned by de Ferrer in the report on radiation levels at Chornobyl, Ukraine runs more than 15 nuclear sites. So, any damage to one of these by military operations will have catastrophic impacts on the environment and people. The report raised the issue that the pollution and leakage from these sites will affect not only Ukraine's territory but the whole European region as well and cause severe health problems, such as cancer.[32]

26 In order to achieve the long-term temperature goal set out in Art 2, parties must reach a global peak of greenhouse gas emissions as soon as possible, recognising that peaking will take longer for developing country parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty. See the website of the United State. Climate change. Paris Agreement. https://unfccc.int/sites/default/files/english_paris_agreement.pdf > Accessed on 25 July 2022.

27 EU4Environment (n 10).

28 The report of the World Wildlife Organization stated that: 'The outbreak of war has frustrated plans to translocate European bison from Poland to the Chornobyl Biosphere Reserve in Ukraine – part of a multi-year effort to create the largest free-roaming herd of bison in Europe on over 200,000 hectares of protected areas stretching from Ukraine to Belarus. Investments in improving the management of protected areas have also been suspended, including investment in park facilities and infrastructure. The process of granting official protection to over 10,000 hectares of virgin forest, which had been expected in 2022, is on hold'. See 'Assessing the Environmental' (n 7).

29 'Ukraine invasion: rapid overview of environmental issues' (Conflict and Environment Observatory, 25 February 2022) <https://ceobs.org/ukraine-invasion-rapid-overview-of-environmental-issues/> accessed 28 July 2022.

30 Wolf MJ, Emerson JW, Esty DC, de Sherbinin A, Wendling ZA, et al, *2022 Environmental Performance Index* (Yale Center for Environmental Law & Policy 2022).

31 de Ferrer (n 7).

32 Ibid. In addition, after Russia occupied the territory, Ukraine blocked off the North Crimean Canal, which was used to divert water from the Dnieper River to irrigate cropland and supply chemical industries, including the 'Crimean Titan' – the largest producer of titanium dioxide in Europe, which saw a major environmental incident in 2018. See de Ferrer (n 7).

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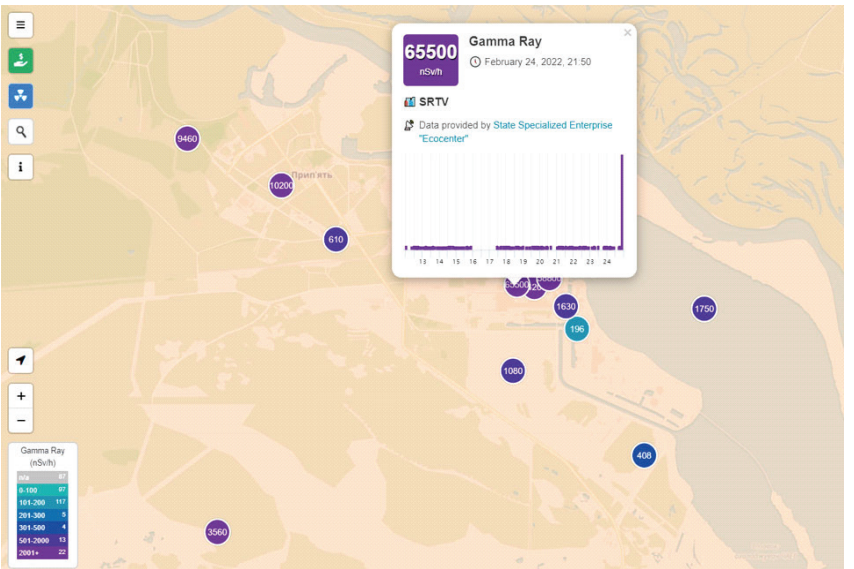

Screenshot from the State Agency of Ukraine on the Exclusion Zone Management online portal showing a spike in gamma radiation from the evening of 24 February. See also 'Ukraine invasion' (n 30).

3.5 Impacts on Water

It is undeniable that the conflict has had an impact on water where pumping stations, purification plants, and sewage facilities have been bombed.[33] For example, the water supply infrastructures have been reduced as a result of the severe shelling near sources of drinking water in the country. This has had a horrible impact on citizens, and about 1.4 million people have no access to the water.[34] The shelling has affected the water supplies from the Dnipro River to the city of Mykolaiv, which was damaged. This has also affected the access to drinking water for people who were supplied drinking water in the neighbouring regions.[35]

Also, the leakage of toxic substances has impacted both superficial and groundwater quality. The forests and green spaces have been negatively affected by military operations. Another event that has affected the sources of water in Ukraine is the damage to dams, especially the hydropower dams, where the shelling of these sites caused catastrophic impacts.[36]

33 'UN warns of toxic environmental legacy for Ukraine, region' (UN Environment Programme, 4 July 2022) <https://www.unep.org/news-and-stories/press-release/un-warns-toxic-environmental-legacy-ukraine-region> accessed 28 July 2022.

34 'Direct damage caused to Ukraine's infrastructure during the war has reached over $105.5 billion (Kyiv School of Economics, 2022) <https://kse.ua/about-the-school/news/direct-damage-caused-to-ukraine-s-infrastructure-during-the-war-has-reached-over-105-5-billion/> accessed 28 July 2022.

35 Ibid.

36 For example, if the Kyiv hydropower dam was breached, it would create a devastating flood as well as spread radioactive sediments from the Pripyat River, which flows through Chornobyl, that have accumulated behind the dam, potentially contaminating the river down to the Black Sea. A dam on the Siverskyi Donets River in the Donetsk region has already been damaged, impacting water quality. 'Assessing the Environmental' (n 7).

Having covered the environmental impacts of the Russian invasion, this paper will now elaborate on the international law perspective and the ways in which the international community and Ukrainian government can establish the responsibility of Russia for the environmental damages.

4 THE ENVIRONMENTAL DAMAGES AND THE LEGAL RESPONSIBILITY FROM AN INTERNATIONAL PERSPECTIVE

Regarding environmental damages during wartime, international law has dealt with this issue regarding two aspects. The first is international warfare law, which deals with all impacts resulting from war, including environmental issues. The second is international environmental law, which is a branch of international warfare law that focuses on environmental issues during conflicts. Both laws are divided into conventional law and customary law. Conventional law consists of agreements and is voluntarily incorporated into national legal frameworks, whereas customary law is derived from the practice of the states.

4.1 International Environmental Law

According to the American Bar Association, international environmental law is a set of agreements and principles that reflect the world's collective effort to manage our transition to the Anthropocene by resolving our most serious environmental problems, including climate change, ozone depletion, and the mass extinction of wildlife.[37]

The first issue the international committee was concerned with was the pollution of the sea. This concern stems from the impacts of the second world war, which caused horrible damage and harm to the sea ecosystem. The first international convention on this field is the International Convention for the Prevention of Pollution of the Sea, which was adopted in 1952 and has been signed by 72 states so far. This treaty was updated in 1962 (OILPOL 62), 1969 (OILPOL 69), and 1971 (OILPOL 71). Russia is not a party to this convention.

Also, concerns about affecting cultural and natural heritage have been addressed by the international committee in the Convention on the Protection of the World Cultural and Natural Heritage, which was adopted in 1972. Russia ratified this convention on 12 October 1988. However, Russia does not respect its obligations to protect regional, international, cultural, and natural heritage. By invading Ukraine, Russia has posed a threat to the international and regional green space in Ukraine.

The UNES Convention and the Protocol on Water and Health are considered the first international conventions. This convention is a unique legal framework that aims to ensure the sustainable use and protection of transboundary water resources. Russia is a party to this convention. Art. 1 clearly stipulates that:

> The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact.

37 D Hunter International Environmental Law International treaties and principles protect the environment and guard against climate change, Article, January 05, 2021. See the website of the American Bar Association: David Hunter International Environmental Law. International treaties and principles protect the environment and guard against climate change <https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/international-environmental-law/> accessed on 4 August 2022.

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2. The Parties shall, in particular, take all appropriate measures:

(a) To prevent, control and reduce pollution of waters causing or likely to cause transboundary impact;

(b) To ensure that transboundary waters are used with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection;

(c) To ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact;

(d) To ensure conservation and, where necessary, restoration of ecosystems.

Regarding responsibility and liability, Art. 7 provides that:

> The Parties shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability.

In practice, Russia has not achieved or respected this. An example of this is the city of Kryvyi Rih, which is the largest city in central Ukraine, with an estimated population of 650,000 people, which is still suffering from floods after the local dam was subject to Russian missile strikes. The city's water pumping station was targeted by Russian cruise missiles, which led to the collapse of the dam and river water flowing toward the streets and nearby buildings.

In practice, current international environmental law is insufficient to compensate the victims of Russia's environmental attack on Ukraine's territory for many reasons. Firstly, Russia will use its right to veto any resolution that might be taken by the security council aiming to compensate the victims. Secondly, personal culpability is not provided for by current international environmental law. However, Russia may be liable according to many international conventions and customary law sources. Russia is a member state of many international environmental conventions and agreements. Examples of these conventions are the following:

Convention / Treatment	Threat
UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes	The shelling of the reactor unit and the seizure of the Zaporizhzhya NPP by Russian militants have posed a threat to the world's nuclear and radiation safety.
Convention on International Trade in Endangered Species of Wild Fauna and Flora	As a result of the invasion, the natural heritage is suffering irreparable damage.
Convention on Biological Diversity	The conflict has posed a threat to biodiversity. As mentioned earlier, the invasion has destroyed over 100,000 hectares of natural ecosystems.
Vienna Convention for the Protection of the Ozone Layer	The shelling of the reactor unit and the seizure of the Zaporizhzhya NPP by Russian militants have posed a threat to the world's nuclear and radiation safety.
UN Convention to Combat Desertification	Ukraine makes up 35% of Europe's biodiversity, and there are over 70,000 rare and endemic flora and fauna. This could unfortunately be destroyed during this war. 16% of Ukraine's land area is covered by forests.
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal	The Russian invasion of the Exclusion Zone has led to a loss of control over the Chornobyl Shelter, damaged nuclear fuel storage facilities and radioactive waste disposal sites, and threatened international environmental security as a whole.

Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management	The Russian invasion of the Exclusion Zone has led to a loss of control over the Chornobyl Shelter, damaged nuclear fuel storage facilities and radioactive waste disposal sites, and threatened international environmental security as a whole.
Convention on Wetlands of International Importance, especially as Waterfowl Habitats	In Ukraine, which is called the 'Green Heart of Europe', there is significant species diversity.
Convention for the Protection of the Black Sea against Pollution	More than half of the Ramsar sites in Ukraine are used by the Russian army during hostilities against the Ukrainian people. This is primarily land on the coasts of the Azov and Black Seas and in the lower reaches of the Danube and Dnipro.
Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques	
UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage	As a result of the invasion, the natural heritage is suffering irreparable damage.
UN Framework Convention on Climate Change and Suspension of Membership in the International Coordinating Council of the UNESCO Man and Biosphere Program	

Source: Ministry of Ecology and Natural Resources, <https://www.kmu.gov.ua/en/news/mindovkillya-ukrayina-vimagaye-viklyuchiti-rosiyu-z-mizhnarodnih-prirodozahisnih-organiv-ta-ugod> accessed 4 August 2022.

Under these international agreements, Russia should abide by its obligations to protect the environment and respect the sovereignty of other members and their independence. However, by invading Ukraine, Russia grossly violated the main principles of international environmental law, human rights, global peace, and nuclear security, as mentioned in Table 1. As a reaction to this illegal invasion, Ukraine requested the UN terminate and suspend the membership of Russia in international environmental organisations.

Russia is supposed to respect the principles of customary law adopted by the Stockholm declaration and the World Charter for Nature. Russia should abide by the principles of customary international rules adopted in international cases, such as the cases of *Trail Smelter* and *the Corfu Channel*. However, such rules only raise the liability for civil damages and include vague terms. For example, in *Trail Smelter*, the court held that state liability is raised for environmental damage of 'serious consequence' proven with 'clear and convincing' evidence.[38]

So, the terms of serious consequences limit the power of the victim state that suffers from damages of non-serious consequences that may have impacts on environmental resources. It would be better to include the list of damages resulting from serious consequences rather than making it an open term that might exclude some damages that do not have serious consequences. Creating a term that is subject to the discretion of the court is not a good solution. Undoubtedly, the Russian invasion has caused substantial damage to the Ukrainian and EU environment, which includes serious and non-serious consequences. Ukraine may face significant consequences, such as the shelling of water filtration plants, which has caused

38 Reports of International Arbitral Awards Recueil des Sentences Arbitrales, *Trail Smelter Case* (United States, Canada) <https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf> accessed August 2022.

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damage to the citizens and soil as well. While this damage is not considered damage with serious consequences, the shelling of the Zaporizhzhya nuclear site might very well be considered as such. Russia will be released from its liability, as much of the damage will not be compensated because there are no 'serious consequences'. So, it would be better to stop limiting the damages to only those of that sort. The term 'damage' should be the basic term that determines the responsibility of the state. Also, the term 'clear and convincing' evidence denotes expensive, difficult work, especially for countries that do not have substantial economic and financial capabilities that qualify them to prepare such evidence during conflicts.

By applying these rules to the case at hand, it is clear that the casualties Ukraine is suffering have serious and disastrous consequences. In this case, it is undisputed that the environmental effects on the region are disastrous. Also, it will be easy to provide clear and convincing evidence because the environmental damages are direct results of Russian actions. So, Russia should shoulder the responsibility for the clean-up costs, which will eventually total over several billion dollars.

The term 'past damages' limits the right of the state to file a legal suit against Russia for future casualties. As is common in conflicts, the environmental damages may not be clear in the short term – it could appear ten years later or even more. A good example is Kuwait, which is still suffering from the effects of the Iraqi invasion in August 1991. So, if we limit the liability of the state to past damages, this will release Russia from its responsibility for any expected future damages, which may be more significant, disastrous, and of more serious consequences than the current or past damages.

In addition, Russia also breached the Stockholm Declaration. According to Principle 21,

> States have the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[39]

Russia's actions and invasion have clearly resulted in environmental damage to Ukraine and other neighbours, such as the EU zone. Furthermore, Russia has breached the World Charter for Nature, in particular, sections II and III, by causing destruction to large spaces of irreplaceable natural resources in Ukraine without any military justification.

Assuming that Russia is able to pay compensation for environmental damages (although reports indicate that Russia has been suffering from financial crises even before the invasion), the current law does not raise the possibility of personal liability. It could be nearly impossible to bring individuals (such as leaders and presidents) who are still in power to the international court of law because the current international legal framework only raises the civil responsibility of the state for the environmental damages resulting from its actions. Therefore, it seems difficult to claim for the future damages that will most likely happen.

4.2 International Warfare Laws

Many international instruments have been created to protect nature and the environment. The Convention on the prohibition of military or any other hostile use of environmental modification techniques is one of the most important international agreements in this field, to which Russia is a party.[40] Art. 1 states that

39 The Audiovisual Library of International Law/Declaration of the United Nations Conference on the Human Environment Stockholm, 16 June 1972 <https://legal.un.org/avl/ha/dunche/dunche.html> accessed 4 August 2022.

40 Russia signed this convention on 18 May 1977 and ratified it on 30 May 1978.

> States parties undertake not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State party- quotation.

Also, to define the concept of an environmental modification technique, Art. 2 provides that:

> Any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.[41]

Another aspect of environmental protection in conventional warfare law is the 1977 Protocol I to the Geneva Convention of 1949.[42] Russia signed the agreement on 12 December 1977 and ratified it with a reservation on 29 September 1989, but it withdrew its membership on 23 October 2019.[43] Art. 35 (3) provides that: 'It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'.[44]

It is evident that this protocol is broader than the (ENMOD) convention, as the protocol has the intention to include any means of warfare that may cause damage to the environment. The ENMOD provision is limited to environmental modification techniques. In terms of the parties concerned, the protocol is addressed to warring parties, while ENMOD governs the relations between state members.

The Geneva Convention of 1949 also addressed the importance of protecting the right to property, which is conceived as one of the main human rights. Art. 53 provides that

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.[45]

The Hague Conventions on Land Warfare of 1899/1907, which is considered a source of conventional law, was conceived as customary internal law by the Nuremberg Tribunal. The Nuremberg Tribunal held that the LOAC principles in The Hague Conventions on Land Warfare of 1899/1907 had the force of customary law, binding even on non-signatory states.[46]

41 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD) <https://www.un.org/disarmament/enmod/> accessed 25 July 2022.

42 Adopted on 8 June 1977, Protocols I and II are international treaties that supplement the Geneva Conventions of 1949. They significantly improve the legal protection covering civilians and the wounded, and – for the first time – lay down detailed humanitarian rules that apply in civil wars. See Additional Protocols I and II additional to the Geneva Conventions <https://www.icrc.org/en/doc/resources/documents/misc/additional-protocols-1977.htm> accessed 4 August 2022.

43 See Treaties, States Parties and Commentaries. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 > accessed 4 August 2022.

44 Additional Protocol to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and>accessed 10 August 2022.

45 Geneva Convention Relating to the Protection of Civilian Persons in Times of War of 12 August 1949 <https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf> accessed 4 August 2022.

46 BK Schafer, 'The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct Are Permissible During Hostilities' (1989) 19 CAL. W. INT'L L. REV. 287, 289.

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It is worth mentioning that The Hague Convention of 1899 was limited to the prohibition of poison and materials causing unnecessary suffering, whereas The Hague Convention of 1907 was much broader because it aimed to humanise war as much as possible.[47]

Protocol II of 1977 on the Protection of Victims of Non-International Armed Conflict is considered a source of customary international law. Art. 14, which is on the protection of objects indispensable to the survival of the civilian population, provides that:

> Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.[48]

In order to raise Russia's liability, according to ENMOD, two elements should be met. First, the actions must be considered an 'environmental modification technique'.[49] The second element is related to the impact period, where the action must cause 'widespread, long-lasting or severe effects'. The first element requires the state to have 'deliberately' aimed to change the Earth's natural processes. So far, it is unclear yet whether the Russian invasion will have global impacts, such as global warming. Regarding the second element, this has already been met since it is clear that Russia's invasion will have environmental impacts on Ukraine's territory and the European region as well for a long period of time, especially serious damages proceeding from military operations near nuclear sites and chemical factories.

Although the Russian actions against Ukraine have had a negative impact on the environment, it is so difficult to prove that Russia intends to modify the environment.[50] Another source of Russian liability for environmental damages is the Geneva Convention of 1949. The convention prohibits property destruction except where such destruction is absolutely necessary for military operations. In this case, it is clear that Russia has destroyed Ukraine's property by shelling the infrastructures, factories, and energy sites, which has caused hundreds of waves of migrations of citizens.[51]

Regarding The Hague Convention of 1907, it is clear that this convention includes extremely broad preventions, which makes it difficult to determine which actions are prohibited. So, raising the Russian liability under this convention for environmental impacts will be unrealistic. However, it might be better to hold Russia liable on the grounds of liability for war crimes. As the war is considered lawless, it seems that it is governed by a set of international law tools, such as the Geneva Convention, which prohibits causing severe environmental

47 Art 55: 'The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct'. See the International Committee of the Red Cross. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. < https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0C16200ECC1B0C3EC12563CD00516954 > accessed on 3 August 2022. See also AS Waldemar, 'Protection of Civilians Against the Effects of Hostilities under Customary International Law under Protocol I' (1986) 117 U.J. INT'L L. & POL'Y 133-34.

48 Additional Protocol to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-additional-geneva-conventions-12-august-1949-and-0> accessed 4 August 2022.

49 ENMOD Convention, Art 1.

50 It is worth mentioning that ENMOD was applied in different contexts, such as the Vietnam war, where the US intended to modify and manipulate the rainfall process during the war. See A Roberts, R Guelff, *Documents on the Laws of War 387* (2nd edn, OUP, 1989).

51 Additional Protocol to the Geneva Conventions of 12 August 1949 (n 50).

damage to the environment. Also, in some circumstances, the International Criminal Court (ICC) considers such actions a war crime.

In the past, there were some examples of how a victim country could get compensation for the actions generated by an invading country, which caused severe environmental losses. Here, we can raise the difficulty of proving the severe loss to the environment, as sometimes the losses are not severe at the present time, though the loss will be severe in the long term. Undoubtedly, the psychological problems caused to individuals as a result of these losses, such as the loss of forests and landscapes, as well as loved ones, are beyond description. Who will compensate them? Unfortunately, current international law does not take that into consideration. An example of this is the Gulf War in 1991, where Iraqi military forces destroyed and set fire to hundreds of oil wells in Kuwait, which caused severe environmental damage in the form of tons of sulphur dioxide, causing respiratory illnesses and damaging crops.[52] As an international action, the UN ordered Iraq to pay $3 billion as compensation for the environmental damages. The challenge that Ukraine may face is demonstrating that the destruction is widespread, long-term, and severe. Usually, the international criminal court tries individuals, not states. That is why it seems difficult to file a Lawsuit against Russia. Current international law does not include concrete protection for the environment. That is why there is a call to adopt a new Geneva Convention that explicitly provides effective protection for the environment during war.

In a different way, Russian liability may be raised under Protocol II, which prohibits 'destroying' or 'rendering useless drinking water installations and supplies' during the conflicts. Under this protocol, it is clear that Russia is liable for destroying the water installations, supplies, filtration sites, and drinking water sources in eastern, southern, and eastern Ukraine, as mentioned earlier.

During armed conflicts, much damage can affect our environment. Current international norms and standards cannot provide effective protection for the environment during conflicts. Most of the international norms are ambiguous and include general points. The international law commission prepared a draft that includes new principles for protecting the environment during armed conflicts. Delegating the international commission to prepare a draft and new principles proves that the current international law is incoherent, outdated, and inadequate.

These principles are considered a mix of law and treaty that includes guidance and best practices to follow during armed conflicts. The draft of Principle 16 is very important, as it emphasises a treaty rule that prohibits the spillage of natural resources during the war. In the same sense, the draft of Principle 14 reiterates the international principles applied during conflict. Moreover, new principles have been adopted, such as cooperation in evaluating environmental damages and remedial measures, such as the obligation to remove toxic substances resulting from conflicts (DP 26). It is notable that the new principles outline the issues of remediation, cooperation, and responsibility.[53]

In addition to environmental protection during war, the protection of displaced people and refugees has been taken into consideration where the principle emphasises the necessity of protecting the environment in the areas where refugees are located. Also, the issue of human displacement has been treated widely, and this protection extends to include the environment of the areas of transit as well (D8). The new principles are not only addressed to states but to corporations as well. It requires companies to exercise their due diligence to

52 B Jones, 'The pollution from Russia's war will poison Ukraine for decades' (Vox, 2 June 2022) <https://www.vox.com/down-to-earth/2022/6/2/23143250/ukraine-russia-war-pollution-emissions-environment> accessed on 4 August 2022.

53 See also Draft 14, 16, DP, 26.

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protect the environment and displaced people, and it prohibits them from financing conflicts or participating in trading and exploiting natural resources in areas of conflict or areas of displacement (principles 10, 11). As most of these new rules are considered a reflection of customary international law, codifying such rules and incorporating them into national laws will increase the opportunity to apply them to courts and international organisations.

As mentioned earlier, customary law has included some provisions that address the protection of the environment during conflict. In the philosophy of customary law, the sources of obligations do not come from agreements. It may be driven by the practice of states adopting a specific approach to an issue. Also, international conventions and declarations may be addressed to every state, even if a particular state is not a party to them. Moreover, international case law may be a source of obligations for non-state parties. This is attested to by the universal acceptance of these declarations and principles by the international community members.

Regarding international declarations and conventions, the Stockholm Declaration of 1972, parts of the Law of the Sea Convention of 1982, and the World Charter for Nature of 1985 are considered examples of international instruments that may be binding on all states (including non-state members). Principle 6 of the Stockholm Declaration of 1972 states that:

> the discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted ...

in addition, Principle 7 stipulates that:

> States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life ... In terms of liability and responsibility, Principle 21 states that: 'responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.

Principle 22 provides that 'States shall co-operate to develop further the international law'.[54]

In the same way, following the Stockholm Declaration, the UN passed the World Charter for Nature on 28 Oct 1985, which clearly included a part on the impacts of war and conflict on the environment. Principle 5 provides that:

> nature shall be secured against degradation caused by warfare or other hostile activities.

In an explicit and clear way, the charter provides that:

> natural resources shall not be wasted, and that military activities damaging to nature shall be avoided.

The UN also passed the United Nations Convention on the Law of the Sea on 10 December 1982, which was mainly adopted in order to protect the sea against pollution. Although Russia signed the convention with a reservation, this convention, which is considered part of customary law, is a binding agreement on states that do not sign this convention. So, the customary law and the general approach of the states' practice will make it a source of obligation. Art. 194 a, 1 states that:

> States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution

54 Stockholm Declaration, at principle 22.

> of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.

Moreover, some principles of customary law are derived from international cases. The *Trail Smelter* case is an example that includes principles that are considered customary law. The Tribunal concluded, with respect to future harm, that:

> no State has the right to use or permit to use its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Another example is the case of the *Corfu Channel*. The international court considered the possibility of raising the Albanian responsibility based on knowledge of the minefield. The international court held that 'every State's obligation not to knowingly allow its territory to be used for acts contrary to rights of other States'.

5 CONCLUSIONS

The Russian invasion has highlighted that international law is not sufficient to protect the environment against harm and damages resulting from war and that the current international legal framework cannot bring a nation such as Russia to justice.[55] International law is very narrow when covering environmental issues and lacks effective mechanisms to make it binding. Here, the author suggests some recommendations that could be taken into consideration.

Firstly, Russia's responsibility can be established based on customary law and the provisions of international environmental law. Secondly, as Russia is a member of some international environmental agreements, it can be prosecuted for violating the provisions of these agreements. Also, given that international customary law has become firmly established, as it reflects the practices of states, Russia can be held accountable based on the provisions of international customary law related to the environment. Finally, based on this, the author found that implementing the new Geneva Convention that includes more provisions on military activities with fewer exceptions and prosecuting leaders who cause the destruction and considering them as war criminals for the environmental damages resulting from their actions are the best ways to establish Russian responsibility for the environmental damages resulting from the invasion.

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55 As Wuerth states, international law is not strong enough to do everything well. In this respect, the international community should focus on enhancing the norms, raising the liability for violating these norms, and investigating the reasons behinds this violation. 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 23 June 2022.

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Reforms Forum Note

SEXUAL VIOLENCE AGAINST WOMEN DURING ARMED CONFLICTS: RUSSIAN AGGRESSION AGAINST UKRAINE AS AN EXAMPLE

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ABSTRACT

Sexual violence is a significant issue that violates human rights and is a source of increasing concern for women during international and local armed conflicts. It has widespread impacts on civilian communities and on women in particular, with grave and long-lasting health, psychological, and social impacts. The descriptive analytical method was used to investigate and

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analyse laws prohibiting sexual assault against women, focusing on the role of international law in addressing these crimes. It was found that multiple international laws are in place to address this violence, but the enforcement of these laws requires work.

Methods: *The descriptive-analytical method is used to investigate and analyse legal provisions prohibiting sexual violence against women. A set of recommendations is derived for how to limit and avoid the deterioration of such phenomena and to deal with it at legal, social, political, health, and other levels.*

Results and Conclusions: *Due to its consequences, which include physical, psychological, social, and economic complications, sexual assault is regarded as one of the most serious violations of human rights. The scarcity of judicial trials and prosecutions against perpetrators of this violence is considered to be a driving force behind these crimes.*

1 INTRODUCTION

Armed conflicts, across all times and continents, involve human rights abuses. The longer armed conflicts continue, the more security issues are faced by women and the more potential there is for persecution to occur. During armed conflicts, women are subjected to human rights abuses and suffer from violence related to discrimination and vulnerability. Phenomena of sexual violence against women include mistreatment, torture, sexual abuse, and trafficking.

This research aims to study and highlight the legal mechanisms that are to be followed by relevant authorities to limit the occurrence of this violence and to provide appropriate protections to preserve the safety, dignity, and privacy of women.

2 SEXUAL VIOLENCE UNDER THE PROVISIONS OF INTERNATIONAL LAW

The term 'sexual violence' refers to all sexual assault on women that causes them physical and psychological pain, including the threat of such abuse, pressure to participate, or associated deprivations of freedom. There are various international legal conventions and texts prohibiting sexual assault against women during armed conflicts. The 1948 UDHR promotes equality of rights and freedoms among men and women, which includes rights to bodily protection and freedom from sexual abuse, torture, and other inhumane treatment.[1] According to the 1979 CEDAW, all human rights must guarantee gender equality, and the state parties must take all necessary measures, including legislative ones, to prevent the exploitation of women.[2]

In 2017, the General Recommendation No. 38 of the CEDAW identified that some asylum policies and measures restrict women's movement and increase their vulnerability to sexual violence and other forms of exploitation because many of them struggle to meet their basic needs. It urged states to take whatever steps necessary to stop the exploitation of women, including legislative measures to suppress sexual violence associated with armed conflict.[3]

1 Arts. 2, 3, 5, and 7 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly Resolution 217 A (III) (10 December 1948).

2 Arts. 1, 2, and 6 of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly (18 December 1979).

3 General Recommendation No. 38 on Trafficking in Women and Girls in the Context of Global Migration Committee on the Elimination of Discrimination against Women, CEDAW/C/GC/38 (20 November 2020).

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According to the Beijing Declaration of 1995, all types of violent acts against women must be eliminated through the adoption and implementation of appropriate legislative measures. This encompasses violent behaviours that occur during hostilities, such as abortion, routine rape, sexual enslavement, and forced pregnancies.[4] The 1984 Convention against Torture requires that states must swiftly conduct an immediate and fair investigation when there are grounds to suspect that acts of abuse are being committed in one of the regions under their jurisdiction and that exceptional circumstances, such as wars and conflicts, shall not be a justification or invocation for violence.[5]

The United Nations Security Council has made decisions to put an end to this violence, including Decision No. 1325, issued in 2000, which addresses issues relating to women, peace, and security. It was concluded that civilians make up the vast majority of individuals harmed by armed conflicts and that once such conflicts are started, troops and armed units progressively target non-military people. It was resolved that countries at war have to safeguard women against sexual violence and other forms of sexual abuse. The warring governments must also ensure that individuals who commit such atrocities are brought to justice by, for instance, filing lawsuits against perpetrators and excluding amnesty provisions from these types of crimes.[6]

The 2010 Security Council Decision No. 1960 also condemned all types of violence, including sexual violence in armed conflicts, stressing the necessity of all combatants abiding by the rules imposed by international law. The conflicting parties must establish a proper legal prosecution system that manages war crimes, including cases of sexual violence, and institute systematic arrangements for monitoring, analysing, and reporting these types of crimes. It also stresses that the jurisdiction of the conflicting parties must be expanded to put an end to sexual violence, whether it is committed as a tactic of war or occurs spontaneously as a result of an armed conflict.[7] The United Nations has put in place several mechanisms to end this violence, which include appointing a special representative on this violence, establishing a panel of experts on the subject, appointing women's protection advisors, and establishing specialised monitoring, analysing, and reporting mechanisms.

Notwithstanding the significance of international legal efforts to combat this violence, it is urgently necessary to reach a formal international agreement to include sexual assault as a prohibited crime stipulated under international law. This will ensure that such crimes are prevented, perpetrators are punished, and a safe environment is created for victims. An example of such a convention is the 2011 Istanbul Convention. This convention aims to prevent violence in all of its forms, including sexual assault that occurs during both peace and war times.

4 Arts. 114 and 115 of the Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women (4-15 September 1995) 6.

5 Arts. 2, 12 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment New York (10 December 1984).

6 Security Council Resolution 1325, adopted by the Security Council at its 4213th meeting (31 October 2000) 3.

7 Security Council Resolution 1960, adopted by the Security Council at its 6453rd meeting (16 December 2010) 4.

3 SEXUAL VIOLENCE UNDER PROVISIONS OF INTERNATIONAL HUMANITARIAN LAW

Although international law prohibits sexual violence, conflicts inevitably raise the probability that brutal and violent crimes against women will occur. Given that women are among the populations most vulnerable to violence, they ought to be given high priority when violence is addressed. Women are in urgent need of protection against sexual abuses, whether committed by regular military force members, militias, armed gangs, or civilians.

International humanitarian law places special emphasis on the protection of women due to biological characteristics that make them vulnerable to violence and explicitly prohibits all types of sexual violence. In addition, it stipulates the criminal responsibility of perpetrators. The Geneva Conventions and Additional Protocols is one of the main references for the protection of women against this violence, whereas the Geneva Convention (III) of 1949 stipulates in article 14 that women shall be protected while taking into account their gender. According to the 1949 Geneva Convention (IV), civilian women shall be respected in particular from attacks on their honour, notably against rape or any other manner of defilement. These acts of sexual violence should be outlawed everywhere, at all times, and against all women, irrespective of characteristics such as nationality, religion, and age, to ensure that women's honour and dignity are protected.[8] Additional Protocol I, which is related to the four Geneva Conventions of 1979, protects women from all forms of outrage upon personal dignities, including acts of rape and enforced prostitution, whether committed by military or civilian persons.[9]

The Rome Statute has determined that all types of sexual assault during war, such as rape, sexual slavery, and forced pregnancy, constitute major breaches of international humanitarian law. Furthermore, these crimes are considered to be international offences that are subject to the Court's jurisdiction as crimes against humanity or war crimes. The statute has also stipulated a set of measures to protect sexual assault victims' dignity as well as their psychological and physical integrity.[10]

Despite the importance of recognising the international criminal responsibility associated with acts of this type of violence, the paucity of convictions highlights the failure to address crimes of this nature. As of 2022, the International Criminal Court has issued only a single conviction against perpetrators of sexual violence. This identifies the need for further efforts to activate the International Criminal Court to ensure accountability for such crimes.[11]

4 EXAMPLES OF SEXUAL VIOLENCE

Throughout history, there have been instances of sexual assault against women and other human rights violations committed during international and local military conflicts. These violations endanger global peace and security. Several recent examples of this violence are presented below.

8 Art. 27, the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, adopted by the Diplomatic Conference of Geneva (12 August 1949).

9 Arts. 75, 76, Protocol Additional 1 to the Protection of Victims of International Armed Conflicts, adopted by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (8 June 1977).

10 Arts. 7, 8, and 68, Rome Statute of the International Criminal Court, adopted at a diplomatic conference in Rome, Italy, 17 July 1998, entered into force on (1 July 2002).

11 T Altunjan, 'The International Criminal Court and Sexual Violence: Between Aspirations and Reality' (2021) 22 German Law Journal 878.

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4.1. The Democratic Republic of the Congo

Since the 1990s, the Congo has had a history of suffering caused by civil disruptions and political instability, which has resulted in high rates of sexual torture and brutal rape of women. Women have suffered from repeated crimes of sexual assault committed by militias, armed troops, and rebel organizations.[12] This has led to describing the eastern region of the country as the capital of rape in the world, given the forms of sexual assault committed against women there.

4.2. The Bosnia and Herzegovina War

International reports indicate that during the war between Bosnia and Herzegovina that took place between 1992 and 1995, hundreds of women were sexually assaulted by men from different ethnic groups. Rape was used as a weapon of war in acts of terrorism and genocide by Serbian forces in particular.[13] After ICTFY was established in 1993, the Tribunal declared systematic rapes and other types of sexual assault committed by Serbian forces to have been a crime against humanity.[14] In March 2016, Radovan Karadzic, the President of the Bosnian Serb Republic throughout the conflict in Bosnia and Herzegovina, was found guilty of crimes against humanity. The Trial Chamber of ICTY commanded him to forty years in jail, and in March 2019, the Appeals Chamber of the Tribunal increased the sentence to life imprisonment.[15]

4.3. The Pakistani War Against Bangladesh

In 1971, in the Pakistani war against Bangladesh, sexual assault was used as a weapon of terror. Individuals from the Pakistani military and pro-Bengali militias abducted, tortured, and assaulted women in a systematic campaign of mass rape to achieve political and military objectives.[16] After the war, Bengali and Indian soldiers were also implicated in the rape of Bihari women on the pretext that they supported Biharis in Pakistan.[17]

4.4. The American War Against Iraq

On 12 March 2006, during the American War against Iraq, five American soldiers were accused of raping a fourteen-year-old Iraqi girl in the Muhammadiyah neighbourhood in the capital, Baghdad. They subsequently killed her and the rest of her family who was in the

12 L Clifford, P Eichstaedt, et al, 'Sexual Violence in the Democratic Republic of Congo', Institute for War & Peace Reporting, Netherlands, (October 2008) 6.

13 JA Vetlesen, Evil and Human Agency: Understanding Collective Evildoing (Cambridge Cultural Social Studies 2005) 197.

14 JO Bell, The Bosnian War Crimes Justice Strategy a Decade Later (FICHL Policy Brief Series, No. 92, Torkel Opsahl Academic Publisher 2018) 3.

15 International Criminal Tribunal for the former Yugoslavia Radovan Karadžić (IT-95-5/18), Case Information Sheet, (2019) 1.4.

16 L Sharlach, 'Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda' (2000) 22(1) New Political Science 92.

17 Y Saika, Women, War, and the Making of Bangladesh: Remembering 1971 (Duke University Press 2011) 169.

house, burned their bodies, and set fire to the house in an attempt to destroy evidence.[18] Furthermore, the Islamic State in Iraq and the Levant has used sexual assault against the Yazidi women sect – an ethnoreligious minority in Sinjar Province in northern Iraq – as a tool of terror and ethnic cleansing.[19] Thousands of Yazidi women have been kidnapped by ISIS to be raped, trafficked, and kept as sex slaves.[20]

4.5. Armed Conflict in Syria

In the ongoing Syrian conflict that began in 2011, female detainees have suffered from sexual exploitation, rape, and abduction, both in government detention centres and at checkpoints controlled by various armed groups, primarily ISIL in the northeast of the country.[21] On the other side, women are sexually assaulted during their detention and interrogation procedures in prisons and detention centres.[22]

4.6. Myanmar's Armed Forces Against Rohingya Women in Burma

Since August 2017, attacks, deteriorating security, and serious abuses of human rights have forced thousands of Rohingyas in Myanmar to flee to Bangladesh. Numerous women and girls have been victims of sexual violence by Myanmar's armed forces and rebel groups. The United Nations has classified acts of sexual violence against women as crimes of ethnic cleansing and weapons of racial genocide for the Rohingya in Myanmar.[23]

5 THE CAUSES AND CONSEQUENCES OF SEXUAL VIOLENCE

Sexual violence is considered in international disputes to be not merely raping out of control but rape employed to accomplish both political and military objectives.[24]

During wars, rape and other forms of sexual violence have been used as a weapon of war or military strategy committed by leaders to achieve military goals. The frequent practice of rape in war is because it is a cheap, efficient, and easily accessible weapon. The strategic benefits of it are used as a tool to humiliate and frustrate civilians, who feel they are unable to protect women in society,[25] as well as terrorising and intimidating the enemy, weakening morale, applying pressure, and getting revenge.

18 J Frederick, Black Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death (Broadway 2010) 258-261.

19 B Aubert, 'ISIS' Use of Sexual Violence as a Strategy of Terrorism in Iraq' (27 July 2021) E-International Relations 3-6.

20 Amnesty International, 'Escape from Hell: Torture and Sexual Slavery in Islamic State Captivity in Iraq, London, United Kingdom' (22 December 2014) 4.

21 Secretary-General, Report of 'Conflict-Related Sexual Violence', No. S/ 2020/ 487 (3 June 2020) 32.

22 A Jarbawi, A Khalil, 'Armed Conflicts & Security of Women' (Al Nasher Advertising Agency, Birzeit, Palestine, November 2008) 19.

23 A Anwary, 'Sexual Violence Against Women as a Weapon of Rohingya Genocide in Myanmar' (2022) 26(3) The International Journal of Human Rights 400.

24 Bharat H Desai, Balraj K Sidhu, 'Sexual Violence in Conflict Zones: A Challenge for International Law?' (2017) LII(7) Economic & Political Weekly 15.

25 R Nordås, DK Cohen, 'Conflict-Related Sexual Violence' (2021) 24(1) Annual Review of Political Science 199.

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In some cases, sexual assault is utilized as a tool to reward the aggressors or to urge them to engage in the activities of the authority that employs them, such as in the case of ISIS in both Iraq and Syria.[26] Moreover, sexual violence can be considered a corollary of societal collapse and the lack of respect for the rule of law. It is also a symptom of the insecurity associated with conflict situations, where gender inequality and social norms of discrimination against women can be exploited to deliberately abuse and harm them, as in cases of sexual assault in the Congo.

Frequently, this violence results in injury or death. Victims may suffer from serious health and reproductive damage, including mutilation, complications associated with abortion, infertility, and sexually transmitted diseases such as HIV/AIDS. Victims may also suffer from psychological consequences involving fear, self-loathing, and depression. Healing and recovering from physical disabilities and emotional disorders after being exposed to sexual violence may take many years, and victims may continue to suffer from these consequences for the rest of their lives.[27]

Apart from the health repercussions that women and girls experience after exposure to sexual violence, they may also experience serious social consequences that may last for a long time. The victims of this violence have typically experienced rejection and isolation from their local communities and suffer from associated fears of stigmatisation and blame. As a consequence, victims live with a sense of shame, depression, and helplessness. They may commit suicide as a result of shock or the social pressures imposed on them.[28]

Sexual violence also has economic consequences. Victims may lose their livelihoods due to work disabilities associated with sexual violence, destruction or confiscation of their property, evictions, and displacement.[29]

6 SEXUAL VIOLENCE DURING THE RUSSIAN INVASION OF UKRAINE

The majority of the world's countries have condemned Russia's aggression on Ukraine, which began on February 24 of this year, for the lack of legal justification and the horrible damages and casualties suffered by Ukrainian civilians.[30] Russian aggression against Ukraine resulted in gross breaches of international humanitarian law. Among those violations are the arbitrary killing of civilians, forced disappearance of innocent civilians, lack of distinction between civilian and military targets, the use of internationally prohibited weapons, and the targeting of Ukrainian residential areas and infrastructure. This resulted in the loss of thousands of civilian lives and approximately 4 million internally displaced persons and refugees looking for safety, protection, and humanitarian assistance.[31]

26 S Ribeiro, D Ponthoz, International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law (2nd edn, UK Foreign & Commonwealth Office 2017) 19.

27 Secretary-General, Report of 'Women, Peace, and Security', No. S/ 2002/ 1154 (16 October 2002) 2, 12.

28 K Bennoune, 'Do We Need New International Law to Protect Women in Armed Conflict' (2007) 38(2) Case Western Reserve Journal of International Law 367.

29 The United Nations High Commissioner for Refugees, 'Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response' (May 2003) 24.

30 A Osborn, P Nikolskaya, 'Russia's Putin Authorises "Special Military Operation" against Ukraine' (Reuters, 24 February 2022).

31 United Nations High Commissioner for Refugees, 'Refugee Arrivals from Ukraine (since 24 February 2022)' (8 May 2022),

Along with the aforementioned, by May 2022, the United Nations had received numerous complaints and reports of sexual assault instances concerning the conflict committed by Russian combatants or allies of Russia. The Russian forces have used sexual violence against women and systematic and far-reaching sexual assault as a weapon of war and part of their war strategy and as a tool for intimidation in conflict situations. There is a glaring contradiction between the bitter reality from which Ukrainian civilians suffer and the actions taken by the international community to stop this aggression. Reports of hundreds of cases of sexual violence committed by Russian forces all over the country have been forwarded to international organisations, including rape, mass rape, the threat of sexual violence, sexual harassment, and compelled observation of sexual acts committed against family members. Frequently, these cases were accompanied by other violations of human rights, such as murder and looting. In addition, victimised women described being subjected to forced nudity, sexual touching, and sexual assault in order to pass through checkpoints.[32]

For example, Russian armed forces committed crimes against unarmed civilians during their occupation of the Ukrainian city of Bucha, including mass murder, torture, and rape, according to videos leaked on 1 April 2022.[33] After learning of the Bucha massacre, the UNGA enacted resolution ES-11/3 on 7 April 2022, actively suspending Russia's membership in the Council of Human Rights due to its egregious and persistent violations of international law during the conflict with Ukraine. The resolution was approved by a majority of ninety-three votes to twenty-four, with fifty-eight abstentions. Russia resigned from the council before the resolution was voted on.[34]

There have been numerous accounts of Russian soldiers sexually assaulting Ukrainian women who were hiding in shelters. In several cases, children were forced to witness their mothers being raped and killed.[35] One of the reports mentions that, in the Ukrainian city of Kyiv, two Russian soldiers broke into a house, gunned down the owner, and proceeded to sexually assault the dead man's wife three times.[36]

Russian armed forces and its affiliated groups had previously committed sexual abuse of women in Ukraine before the violence that broke out in 2022. In 2014, a report issued by the UNHCR documented dozens of cases of torture and abuse, the majority of which occurred in the context of deprivation of liberty.[37]

Survivors of sexual assault in the ongoing conflict in Ukraine face various obstacles and challenges to accessing justice, including a lack of faith in the national and international justice systems and officials' inexperience in dealing with these crimes. In response, the Ukrainian authorities have made efforts to benefit from the experience of nations that have expertise in assisting those who have been sexually assaulted during the armed war. Moreover, they have collaborated with various actors, including investigative branches, law enforcement, and civil society organisations to provide support, care, and assistance to victims of sexual assault.[38]

32 UN, 'Sexual Violence "Most Hidden Crime" Being Committed against Ukrainians', Civil Society Representative Tells Security Council, Press Releases (6 June 2022).

33 M Amann, M Gebauer, F Schmid, 'Possible Evidence of Russian Atrocities: German Intelligence Intercepts Radio Traffic Discussing the Murder of Civilians' (Spiegel Thema, 7 April 2022).

34 Resolution of the General Assembly of United Nations A/RES/ES-11/3 (7 April 2022).

35 Insecurity Insight, Report 'Sexual Violence, and the Ukraine Conflict', Switzerland (April 2022) 1, 2.

36 Office of the UNHCR, Report 'The Situation of Human Rights in Ukraine in the Context of the Armed Attack by the Russian Federation, 24 February to 15 May 2022' (29 June 2022) 26.

37 Office of the UNHCR, Report 'Conflict-Related Sexual Violence in Ukraine 14 March 2014 to 31 January 2017' (16 February 2017) 3.

38 Council of ECHR, 'Memorandum on the human rights consequences of the war in Ukraine', Strasbourg (8 July 2022) 11.

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If we want to stop sexual assault in armed conflicts, such as that committed in the Russian conflict with Ukraine, we must address its root causes and contributing factors. The most prominent among these is the lack of security and stability during armed conflicts, enforced displacement, persecution, and human rights violations. Consequently, the ideal way to put an end to this violence is to strive for political and diplomatic solutions, move forward with negotiations on Russia's cessation of hostilities, and ensure the specialised support and treatment of the victims of sexual violence, particularly in the context of the Ukrainian war. In fact, international diplomacy is the most effective means of influencing the behaviour of states, fostering peaceful international relations, and promoting human rights.

7 CONCLUSIONS AND RECOMMENDATIONS

Despite the multiplicity of international legal conventions and texts prohibiting sexual violence against women in armed conflicts and several efforts and accomplishments that have been made in this regard on the international stage, regrettably, these crimes are still pervasive. Regardless of international reports that regularly document this violence, in all the world regions, access to effective remedies and justice is poor and severely limited, and perpetrators continue to go unpunished on a large scale. This means that the enforcement of international conventions against this violence still requires more work and support.

Among the recommendations, the following should be given:

- Efforts need to be made to stop Russia's gross violations of international law, including the perpetration of sexual violence against women, in its illegal invasion of Ukraine.
- Efforts need to be made to guarantee access to adequate legal remedies for victims of sexual assault in Ukraine and elsewhere to give priority to their security, safety, and dignity. Efforts are also needed to document and investigate cases of sexual violence to ensure that perpetrators are prosecuted. The absence of effective justice for sexual crimes encourages these crimes to be repeated without regret or fear of the consequences.
- Support is needed for local and international organizations in Ukraine to enhance their capacity to handle cases and offer services to women who have been sexually assaulted.
- Material and moral assistance, including healthcare, psychological care, and economic support, need to be provided to Ukrainian victims of sexual assault to facilitate their recovery.
- Measures should be taken to safeguard Ukrainian women from sexual violence and to help victims on their road to recovery, including addressing feelings of blame or stigma associated with the event.
- Awareness must be raised through mass media and campaigns, events, and activities to condemn all forms of violence and to draw attention to laws that prohibit sexual violence against women during armed conflicts.

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28. Secretary-General, Report of 'Women, Peace, and Security', No. S/ 2002/ 1154 (16 October 2002).

29. Security Council Resolution 1325, adopted by the Security Council at its 4213th meeting, (31 October 2000).

30. Security Council Resolution 1960, adopted by the Security Council at its 6453rd meeting (16 December 2010).

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36. United Nations, 'Sexual Violence "Most Hidden Crime" Being Committed against Ukrainians, Civil Society Representative Tells Security Council, Meetings Coverage and Press Releases' (6 June 2022).

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Reform Forum's Note

UNAMENDABLE PROVISIONS OF THE CONSTITUTION AND THE TERRITORIAL INTEGRITY OF UKRAINE

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Keywords: *entrenchment clauses; eternity clause; militant democracy; territorial integrity; absolute entrenchment; unamendability; constituent power.*

ABSTRACT

Background: *Unamendable constitutional provisions arose with the appearance of the first constitutions in the USA and Norway, but did not become widespread. The unamendability of a republican form of government, included in the Constitution of France in 1885, continued this tradition. Such provisions became more widespread after the Second World War. Countries that gained independence began to include a mention of territorial integrity in such provisions. Ukraine belongs to such countries (the Constitution of 1996). Since 2014, Ukraine has faced encroachment on its territorial integrity by an aggressor state – its eastern neighbor. Given these circumstances, the study of the nature and meaning of unamendable provisions of a constitution has particular relevance.*

Methods: *The following methods were used in the work to research the main approaches to the unamendable provisions of the constitution. The system-structural method was useful when providing a structural characterisation of the concept of unamendable provisions, as well as its varieties, establishing a relationship with other concepts (multilevel constitutional design). The logical-legal method made it possible to discover the positions of scientists regarding an optimal list of unamendable provisions, the possible violation of such provisions in the situation of a constitutional revolution, and the positions of the Constitutional Court of Ukraine regarding the protection of territorial integrity in Ukraine. The comparative method was used to study the experience of foreign countries.*

Results and Conclusions: *The paper analysed the legal consequences of violation of territorial integrity, concluding that military aggression, occupation and unacknowledged annexation of part of Ukrainian territory by Russia is not a reason to refuse territorial integrity as an unamendable provision of the Constitution of Ukraine. On the contrary, the protection of this provision should be strengthened.*

1 INTRODUCTION

Formal rules for constitutional amendments have existed since the first written constitutions. However, the requirements ensuring unamendability of provisions of the constitution were not widespread from the beginning, although the situation has changed significantly over the course of several centuries. We refer to the so-called unamendable constitutional provisions that prohibit, in one form or another, amendment to the constitution. The first instance of such was in the United States, where for the first time an unchanged position was enshrined in Art. V of the US Constitution – no state without its consent can be deprived of an equal right to vote in the Senate with other states[1]. The second constitution was the Basic Law of Norway in 1814. According to Art. 112 of the Constitution of the Kingdom of Norway, the proposed amendments should not contradict the constitutional principles, but relate only to the change of individual provisions that do not change the content of the Constitution[2]. Material requirements for constitutional changes became more widespread only in the 20th

1 For more information about the history of the unamendable provisions see: M Hein, 'Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism' (2019) 3(21) European Journal of Law Reform 226-242.

2 Constitution of the Kingdom of Norway, Constitution of the countries of the world: Swiss Confederation, Kingdom of Norway, Finland Republic (OVK 2021) 124.

century. In Ukraine, such unamendable provisions are enshrined in Art. 157 and 158 of the Constitution of Ukraine of 1996 [3].

2 UNAMENDABLE PROVISIONS AND UNAMENDABILITY OF THE CONSTITUTION: GENERAL REMARKS

We must immediately clarify the terminology. We operate with the term "unamendable provisions", which is frequently used in English legal literature[4]. Unamendable provisions limit the power to amend the constitution, they prohibit the use of such power in relation to certain constitutional subjects, principles or institutions[5].

Instead of the term "unamendable provisions" other terms can also be used: warning about the invariance, warning about eternity, formula (clause, guarantee) of eternity or unamendability ("eternity clause" – eng.[6], "Ewigkeitsgarantie" – germ.). The term "eternity clause" is used directly in the decisions of the Federal Constitutional Court of Germany. As indicated by the FCS of Germany in the decision regarding the Lisbon Treaty (Judgment of 30 June 2009, para. 214) [7]:

> "With the so-called eternity guarantee, the Basic Law reacts on the one hand to historical experiences of a gradual or even abrupt erosion of the liberal substance of a basic democratic order (freiheitlichen Substanz einer demokratischen Grundordnung). However, it also makes it clear that the constitution of Germany, in accordance with international developments, has had a universal basis since the United Nations came into existence, which should not be changeable through positive law".

Unamendable provisions are also called "absolute entrenchment" – para. 89, 201, 206, 219 of the Report on Constitutional Amendment adopted by the Venice Commission [8] (hereinafter – Report CDL-AD(2010)001-e). In all cases, we are talking about the provisions of the constitution which prohibit making changes to it. We will later identify all the given formulations using the generalised term " unamendable provisions " or "formula of unamendability ". However, when we mention the author's position, the term used by this author will be used. The terminology of the Venice Commission is also preserved.

Another important aspect is that unamendable provisions may not only be formally established in a positive constitutional text. Foreign experience testifies to a significant role in the formulation of unchanging positions of judges who interpret a positive constitutional text. In this case, the constituent power speaks not only through the positive text of the constitution, but also through judges (for the Kelsenian model of constitutional control – judges of the constitutional court). As an example, we can name the doctrine of the basic structure of the constitution (India)[9] and the doctrine of substitution of the constitution

3 Constitution of Ukraine, July 28 1996 <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80> accessed 20 November 2022.

4 Y Roznai, Unconstitutional constitutional amendments (Oxford University Press 2017).15.

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7 BVerfGE 123, 267 - Lissabon <https://www.servat.unibe.ch/dfr/bv123267.html> accessed 20 November 2022.

8 CDL-AD(2010)001-e. Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009). <https://www.venice.coe.int/webforms/documents/?pdf=cdl-ad(2010)001-e> accessed 20 November 2022.

9 S Krishnaswamy, Democracy and constitutionalism in India: a study of the basic structure doctrine. (Oxford University Press 2010, 2010) 244.

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(Colombia)[10], developed by the judicial bodies of these nations. In these cases, implicit unamendable provisions are formed. We must take into account such cases while giving the general characteristics of unamendable provisions; however, unfortunately, there is no opportunity to dwell on such cases in detail within the framework of this article.

The literature also uses the term "unamendability". Unamendability can be associated with certain positive and explicitly expressed provisions in the text of the constitution, but it can also be manifested in implicit provisions formulated by judicial bodies (in both cases, explicitly or implicitly expressed unamendability is characterised by us through the prism of unamendable provisions).

Richard Albert and Bertil Emrah Oder denote by the term " unamendability " a certain state, that is, a set of characteristics that ensure their own unamendability in both practice and result[11]. Unamendability appears in a very broad sense – as a combination of a number of factors. At the same time, such unamendability itself does not follow only from unamendable norms per se, but also encompasses other factors and circumstances.

The absolutely unamendable and reinforced procedure for amending specific provisions are singled out, which is almost " unamendable " in practice (para. 216 Report CDL-AD(2010)001-e). The last thesis of the Venice Commission can be developed through the idea that constitutional design is often multi-layered. According to Rosalind Dixon and David Landau, multi-level constitutional design aims to combine the advantages of rigidity and flexibility by creating rules for making different constitutional amendments to different parts of the constitution[12].

At the same time, it is possible to cite the position of Michael Hein, who singles out a general concept of "entrenchment clauses", and two varieties within it. First, "general prohibitions of amendments", and also "general constraints on amendments", which distinguish two or more groups of constitutional subjects to which different strict rules of amendment apply[13]. The first variety is what we call unamendable provisions, the second variety is the same multi-level constitutional design mentioned above by Dixon and Landau.

We consider unamendable provisions narrowly, that is, as absolutely unamendable. Let us now turn to the explicit options for enshrining such provisions (formulae of unamendability) in foreign constitutions.

Yuriy Barabash[14] names two trends in the constitutional consolidation of unamendable provisions: the establishment of a clear list of such provisions and the consolidation of only general wording regarding the limitation in constitutional reform[15].

It is worth paying attention to the approach of the Venice Commission, which distinguishes between *provisions* and *principles*. A relatively small number of constitutions contain rules that certain provisions cannot be changed – this means that any proposed amendment to the formulation of a provision is unacceptable. A more extensive method, however, is to enshrine that certain principles in the constitution cannot be changed. This is a much more

10 K Bernal, 'Unconstitutional constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the constitutional replacement doctrine' (2013) 2(11) International Journal of Constitutional Law 339–357.

11 R Albert, 'Constructive Unamendability in Canada and the United States' (2014) 67 Supreme Court Law Review 188-193; R Albert, B. E Oder (eds.) An Unamendable Constitution? Unamendability in Constitutional Democracies. (Springer 2018) 5.

12 R Dixon, D Landau, 'Tiered Constitutional Design' (2018) 2(86) The George Washington Law Review 438.

13 Hein, M. Op. cit. 227.

14 I Barabash, The state-legal conflicts in the theory and practice of constitutional law (Pravo 2008), 161.

15 It is clear from the context that we use " unamendable provisions».

flexible approach that allows some degree of change as long as the basic elements of the protected principles are maintained (para. 209 Report CDL-AD(2010)001-e).

An example of *provisions,* in the above sense of the Venice Commission, are the unamendable provisions of the Turkish constitution, which indicates the norms to which changes cannot be made[16]. Countries whose constitutions contain the *principles* are France, Italy, the Czech Republic, Portugal, and Ukraine (para. 210-214 Report CDL-AD(2010)001-e).

3 UNAMENDABLE PROVISIONS AND THE CONSTITUTIONAL REVOLUTION

Different views on the interpretation of the concept of constitutional revolution were given attention by Gary Jeffrey Jacobsohn and Yaniv Roznai. In the sphere of public law, the analytical structure has rarely suffered such widespread but insufficiently theoretical application as the term "constitutional revolution". This is an idea that has been generously applied to various issues that are not similar in significant aspects [17].

We can cite the meaning that Mark Tushnet uses. He describes the situation of compliance with procedural continuity, but as a meaningful break in continuity. Sometimes ordinary constitutional processes can be used in the service of revolutionary transformation. Successful revolutions change the identity of the state, and we can determine whether the constituent power was carried out retrospectively, applying the criteria for success [18].

From a formal point of view, as Carl Schmitt wrote, the legitimacy of the constitution does not mean that the constitution was created according to previous constitutional laws. It is unthinkable that a new constitution, which is a new fundamental political decision, would subordinate itself to the previous constitution and place itself in dependence on it[19].

The Venice Commission in the Report CDL-AD(2010)001 (para. 22) claims:

> "Sometimes even unlawful constitutional reform or revolutionary acts may be considered legitimate and necessary, for example in order to introduce democratic governance in non-democratic countries or overcome other obstacles to democratic development. Originally unconstitutional acts of change may also gain widespread acceptance and legitimacy over time, just as perfectly and democratically drafted constitutions may be in need of radical reform over time."

All historical evidence indicates that for constitutions that function over any period of time, absolute entrenchment will never be absolute in practice. If circumstances change enough, or if the political pressure gets too strong, even "unamendable" rules will be changed – one way or another. In such situations, constitutional unamendability may even have the negative effect of unduly prolonging conflicts, thereby simultaneously exerting more pressure and increasing the costs to society of eventual necessary reform (para. 219 Report CDL-AD(2010)001-e by the Venice Commission).

According to Konrad Hesse, no constitution can be preserved by prohibiting certain changes to the constitution if it loses its normative force [20]. The Basic Law's claim to the permanent inviolability of its main content is based on the fact that the pre-legal foundation of belief in

16 This approach is also used in the Constitution of the Republic of Cyprus.

17 G.J Jacobsohn, Y Roznai, Constitutional revolution. (Yale University Press 2020) 17.

18 M Tushnet, 'Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power' (2015) 4(13) International Journal of Constitutional Law 642-643.

19 Schmitt C, Verfassungslehre (Duncker & Humblot 2017) 88.

20 Hesse K, Basics of Constitutional Law of Germany (Legal literature 1981), 328.

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legitimacy is preserved. If it disintegrates, the requirement for the validity of the constitution loses its effect. Even constitutions are mortal (Josef Isensee)[21]. These opinions are quite understandable in the case of the previously mentioned break in continuity and the creation of a situation of constitutional revolution. In fact, according to Mark Tushnet, the decision of the nation to change the unamendable provision can be interpreted as an attempt to change the current government in a revolutionary way. Since constitutions are inevitably imperfect, they cannot fulfill the ambitious goal of some of its creators - which is to help avoid revolution[22].

The theory of constitutional unamendability defines a fundamental difference between primary constituent power and secondary constituent power. The latter is limited by unamendability, and the former, which is perceived as the constitutional-democratic power of the people, is not limited by unamendability (Yaniv Roznai)[23].

Therefore, unamendable provisions by their nature relate primarily to the introduction of amendments to the constitution, and they can be questioned only by a constitutional revolution - the introduction of textual changes that violate unamendable principles or the formation of a new interpretation of unamendable provisions with an unamendable text. It is also widely believed that the unamendable provisions do not work in the case of a complete revision of the constitution according to the procedure established in it, as well as in the case of adoption of a new constitution outside the existing rules[24].

In connection with the above, there is often some criticism in the literature aimed at the use of the term "eternity". According to Yaniv Roznai, the term "eternity clause" is inaccurate:

> "These provisions are neither eternal nor unchangeable. While they serve as a mechanism for limiting the amendment power, they do not – and cannot – limit the primary constituent power. Even unamendable provisions are subject to changes introduced by extra-constitutional forces. Moreover, their content can also 'change' through judicial interpretation." [25]

Roznai argues that the best term is from the Brazilian constitution, which calls the relevant provisions the "petrous clauses". In the original Spanish "cláusula pétrea" means stone clause or stone provisions[26].

In our opinion, both "stone" and "eternity" are certain metaphors that have acquired legal status. The specific term used to indicate the relevant phenomenon may vary depending on the country, relevant national legal traditions, and legal techniques. Such metaphors denote legal presumptions ("stone", "eternity"), and such presumptions can, of course, be refuted if they fail to provide the appropriate unamendability in practice. As long as the presumptions are not refuted, they should be taken seriously and recognised as unamendable provisions, "formulas of eternity", etc.

21 J Isensee, P Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band XII: Normativität und Schutz der Verfassung. (C.F. Müller Verlag 2014) 37.

22 M Tushnet, 'Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power' (2015) 4(13) International Journal of Constitutional Law 641-642.

23 Y Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures' in book: Albert R, Contiades X, Fotiadou A (eds.) The foundations and traditions of constitutional amendment (Hart Publishing 2017) 23.

24 There is a discussion on this issue. For example, the Swiss Constitution of 18 April 1999 extends its unamendable principles to both amendments and the adoption of a new constitution (Art 193: 'The mandatory provisions of international law must not be violated'). However, the detailed analysis of this discussion is not included in the subject of the study of this article.

25 Y Roznai, Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers (PhD diss., the London School of Economics 2014) 23-24.

26 Y Roznai, Unconstitutional constitutional amendments. (Oxford University Press 2017) 129.

It is believed that the effect of unamendable provisions can be neutralised not only when adopting a new constitution according to existing procedure, by the primary constituent power, or by a constitutional revolution. This is the idea of the so-called "double amendment". It means that the provision that establishes unamendability (formula of unamendability) is repealed or changed first, then those provisions that were protected by the formula of unamendability are changed, losing their special protection after the first amendment [27].

Let us start with an interesting analogy given by J. Bryce. The ancient Greek republics sometimes passed laws that contained the clause that anyone who proposed their repeal would be punished by death. Therefore, anyone who sought to repeal such a law began with a proposal to repeal the law that threatens execution[28].

At the beginning of the 20th century, the Ukrainian scientist in exile V. Starosolsky questioned the meaning of absolute bans on changing the constitution in 1923:

> "Do they make it impossible to change the constitution from the point of view of law, or is it possible to change the constitution legally despite them? After all, there is still an opportunity to change, first of all, the ban itself, and then the resolutions to which this ban applies." [29]

Richard Albert points out that Art. V of the US Constitution creates the possibility of amending the guaranteed provision itself to circumvent the guarantee itself [30].

"Double amendment" is rather a hypothetical construction, as its implementation is very difficult in practice. Meanwhile, the Constitution of Portugal was recently amended to the formula of unamendability in one time (one of the unamendable provisions (k) from Art. 288 of the Constitution of Portugal was removed), although the introduction of such changes was quite controversial [31]. In 2017, changes to the formula of unamendability were made in Kazakhstan but were later revoked in 2022. The changes were opportunistic and related to guaranteeing the status of President Nazarbayev [32]. Thus, although rather isolated, unamendable provisions themselves can be changed, as evidenced by relevant cases from practice.

According to Yaniv Roznai, if unamendable provisions that are not self-entrenched can be easily changed through the double amendment procedure, this does not make explicit unamendability useless. At a minimum, unamendability adds a procedural hurdle, and thus better protection of a fixed value or rule as the double amendment process is still procedurally more complex and possibly more time-consuming than the single amendment process[33].

There are arguments for directly establishing the immutability of the formula of unamendability itself. As András Sajo and Renáta Uitz aptly put it, the norm of protection

27 See more: R Albert, 'Amending constitutional amendment rules' (2015) 3 (13) International Journal of Constitutional Law 655–685.

28 D Bryce, American Republic: In 3 parts Part 1. National Government (Printing House V. F. Richtep 1889), 402.

29 V Starosolsky, State and political law. Part 2 (Lohos Ukraine 2017), 186.

30 R Albert, 'Amending constitutional amendment rules' (2015) 3 (13) International Journal of Constitutional Law 663.

31 See more: X Contiades (ed), Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA (Routledge 2013) 287-288; M Hein, 'Constitutional Norms for All Time? General Entrenchment Clauses in the History of European Constitutionalism' (2019) 3(21) European Journal of Law Reform 237.

32 H Berchenko, T Slinko, Y Tkachenko, V Kobryn, 'Preliminary Judicial Control of Amendments to the Constitution: Comparative Study' (2022) 4(16) Access to Justice in Eastern Europe.

33 Y Roznai, 'The Uses and Abuses of Constitutional Unamendability' in book: Contiades X, Fotiadou A (eds.), Routledge handbook of comparative constitutional change (Routledge 2021) 165.

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without "protection" is the Achilles' heel of the constitution[34]. It is very difficult to find direct instructions in foreign constitutions to prohibit changes to the very rules of making changes or certain unamendable provisions. The exception is part 2 of Art. X of the Constitution of Bosnia and Herzegovina, according to which no amendments to this Constitution may cancel or limit any of the rights and freedoms referred to in Art. II of this Constitution, or change this clause[35].

At the same time, it is important not to forget that amendment rules can change informally and Richard Albert names this as uncodified changes to formal amendment rules[36]. Moreover, the content of the formula of unamendability can evolve with the help of the practice of its application (formation of custom) or judicial interpretation.

Thus, immutability can lose its meaning as a result of its direct denial, without formal rejection or cancellation. In April 2015, the Constitutional Chamber of the Supreme Court of Honduras decided that the article of the constitution, which was not subject to revision and related to the limitation of the term in office of the president, does not have legal force[37].

In our opinion, the change or cancellation of the unamendable provision itself seems illegal. If this is allowed, the unamendable provision is quite the opposite and simply creates certain complications in the form of the need to make a "double amendment" - first to cancel the unamendability provision, and then to change or cancel some specific regulatory provision of the constitution. Despite the above examples of Portugal and Kazakhstan, where this happened, these cases appear to be illegal. The Portuguese example did not become the subject of constitutional control, so such changes did not have a legal assessment. And last but not least, the "oversaturation" of the Portuguese constitution with unamendable provisions played its role in the very idea of corresponding changes, which once again raises the question of the need to include only the most important norms/principles in the corresponding unamendable list. However, the Kazakh case, where the corresponding changes to the formula of unamendability were recognised as constitutional, remains quite unique today.

Changing or cancelling the formula of unamendability is a rather controversial idea. Konrad Hesse, while considering the Basic Law of the Federal Republic of Germany, notes that it is impossible to remove the force of Art. 79, paragraph 3, by the fact that it can be removed during constitutional changes[38].

Aharon Barak also thought about the possibility of changing the formula of unamendability in the constitution. He draws attention to the concept of the basic structure of the constitution and emphasises that if the material requirement for such structure of the constitution is fixed, not only in the provision on amendments to the constitution but also in the whole constitution, then the amendment to the provision on amendments is insufficient, since the amendment would be unconstitutional. If the basic structure requirement is indeed implied by the language of the whole constitution, then a new constitution is needed to remove the basic structure requirement[39].

34 A Sajo, R Uitz, The constitution of freedom: an introduction to legal constitutionalism (Oxford University Press 2017) 50.

35 Constitution of Bosnia and Herzegovina (of November 21, 1995), Constitutions of the countries of the world: Republic of Slovenia, Bosnia and Herzegovina, Republic of North Macedonia (OVK, 2021) 94.

36 R Albert, Constitutional Amendments Making, Breaking, and Changing Constitutions (Oxford University Press 2019) 136-138.

37 A Sajo, R Uitz, The constitution of freedom: an introduction to legal constitutionalism (Oxford University Press 2017) 50.

38 K Hesse, Basics of Constitutional Law of Germany (Legal literature 1981), 331.

39 A Barak, 'Unconstitutional Constitutional Amendments' (2019) 3 (44) Israel Law Review 335.

4 WHAT PROVISIONS SHOULD BE UNAMENDABLE?

Let us now draw attention to the radical approach. There is a critical attitude towards the very formulas of eternity. Andrew Arato highlights the fact that constitutional insurance in the form of rules of perpetuity and immutable constitutions may not be tenable.[40] In his opinion, empirically, the post-sovereign paradigm is unlikely to lead to provisions about eternity[41]. In our opinion, the proposed rejection of eternity formulas seems impossible and impractical.

We are faced with a difficult dilemma. Unamendable provisions should play a regulatory function. At the same time, excessive and unjustified admiration for unamendability can play a bad joke on it – no one will take it seriously and we risk getting many such paradoxical cases, like those that were cited in Portugal, Kazakhstan, and also in Honduras.

Yaniv Roznai defends the idea that the more similar the democratic characteristics of the powers to make changes to the properties of the primary constitutional power, the less it should be limited. And vice versa: the closer it is to the legislative power, the more it should be bound by restrictions[42]. A similar opinion related to constitutional control is expressed by Gary Jeffrey Jacobsohn. The degree in which we decide to give courts responsibility for judicial control over amendments to the Constitution should at least depend partly on the relative ease or difficulties of amending the document[43].

According to the Venice Commission (Report CDL-AD(2010)001-e), it should be possible to discuss and amend not only constitutional provisions on government, but also provisions on fundamental rights and all other parts of the constitution (para. 248). Constitutions that were originally adopted by undemocratic regimes should be open to democratic debate, reassessment and relatively flexible amendment (para. 247). Among the special principles protected by unamendability there usually can be found one or several of the following: a fundamental democratic (or republican) form of government, a federal structure, sovereignty, territorial integrity, and certain fundamental rights and freedoms (para. 215).

In any case, the establishment of unamendable provisions is the sovereign right of the constituent power. As scientists, we can only talk about the expediency of fixing certain provisions in certain societies as unamendable, as well as the (in)efficiency of an excessively broad or excessively narrow list. Of course, such provisions function in the specific conditions of the political system, parliamentarism, legal culture and customs. The main issue is that they act in the conditions of a specific judicial power, whose representatives are given the right to verify compliance with unamendable provisions when amendments are made to the constitution (in the absence of a direct instruction, they themselves recognise such a right; less often, they refuse to recognise it).

40 A Arato, The Adventures of the Constituent Power: Beyond Revolutions? (Cambridge University Press 2017) 418.

41 A Arato, The Adventures of the Constituent Power: Beyond Revolutions? (Cambridge University Press 2017) 412.

42 Y Roznai, 'Amendment Power, Constituent Power, and Popular Sovereignty: Linking Unamendability and Amendment Procedures' in book: Albert R, Contiades X, Fotiadou A (eds.) The foundations and traditions of constitutional amendment (Hart Publishing 2017); Y Roznai, Unconstitutional constitutional amendments. (Oxford University Press 2017) 162.

43 G.J Jacobsohn, 'An unconstitutional constitution? A comparative perspective' 2006 3(14) International Journal of Constitutional Law 487.

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5 TERRITORIAL INTEGRITY: UKRAINIAN EXPERIENCE OF CONSOLIDATION AND PROTECTION

As previously mentioned, territorial integrity is often recognised as an unamendable provision of the Constitution. So, for example, in Art. 152 of the Constitution of Romania, named the "Limits of revision", among other things, it is stipulated that territorial integrity cannot be subject to revision[44]. According to Art. 288 of the Constitution of Portugal, laws on the revision of the Constitution must respect the national independence and unity of the state (paragraph a.)[45].

Many constitutions protect one or more of the following principles: "national unity", "territorial integrity", "existence of a state", "sovereignty" or "independence"[46]. Yaniv Roznai names 29 such constitutions that have been in force at different times and continue to be in force, which include Angola, Azerbaijan, Burundi, Cameroon, Cape Verde, Chad, Côte d'Ivoire, Cuba, Djibouti, Equatorial Guinea, Kazakhstan, Guatemala, Madagascar, Mauritania, Mexico, Moldova, Mozambique, Nepal, Portugal, Romania, Rwanda, Sao Tome and Principe, Somalia, Tajikistan, and Timor-Leste[47].

Silvia Suteu believes that although the justification for the existence of such provisions is difficult, they can be united under the aegis of the protection of the state: the territory, being an integral part of the life of the nation, its protection becomes commensurate with the survival of the state. It is crucial that these provisions should not be combined with the provisions on the unitary (as opposed to federal) character of the state. While the latter relate to administrative-territorial organisation, territorial integrity refers to a more fundamental desire to ensure the survival of the state[48].

In Ukraine, territorial integrity is an immutable principle: according to Art. 157 of the Constitution, it cannot be changed if the changes are aimed at eliminating independence or violating territorial integrity. Obviously, the reason for the emergence of this norm was that for the Ukrainian people, independence and territorial integrity have great value and are connected with real survival. Having been absorbed by various empires for many decades, Ukraine finally became independent in 1991 and its borders were internationally recognised. At the same time, internal and external threats to encroachment on independence and territorial integrity have not disappeared.

The Constitutional Court of Ukraine carries out preliminary control over draft laws on amendments to the Constitution on the subject of their compliance with the requirements of Art. 157 and 158 of the Constitution of Ukraine [49]. However, in its entire history, the Constitutional Court of Ukraine has never established a violation of territorial integrity in draft laws submitted to the parliament. The closest to this was the situation with the consideration of the draft law on the decentralisation of power (conclusion of July 30,

44 Constitution of Romania <https://www.presidency.ro/en/the-constitution-of-romania> accessed 20 November 2022.

45 Constitution of the Portuguese Republic, Constitution of the countries of the world: Italian Republic, Vatican City State, Kingdom of Spain, Portuguese Republic (OVK 2021), 315.

46 Y Roznai, 'Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers' (PhD diss., the London School of Economics 2014) 33.

47 Y Roznai, Unconstitutional constitutional amendments. (Oxford University Press 2017) 25.

48 S Suteu, Eternity Clauses in Democratic Constitutionalism (Oxford University Press 2021) 30.

49 H Berchenko, 'Preliminary control over changes to the Constitution: legal positions of the Constitutional Court of Ukraine' (2019) 6-1 Law and Society 9-16; H Berchenko, 'Reservation of the Constitutional Court of Ukraine as an element of the procedure for introducing amendments to the Constitution of Ukraine' (2020) 66 Actual Problems of Politics 118-123.

2015)[50]. At that time, it was proposed to supplement Chapter XV "Transitional Provisions" of the Constitution of Ukraine with paragraph 18 of this content:

> "Features of local self-government in certain districts of Donetsk and Luhansk regions are determined by a separate law."

These changes were obviously aimed at implementing the Minsk agreements concluded in 2015. On this occasion, four judges of the Constitutional Court of Ukraine expressed their separate opinions. In particular, judge M. Melnyk drew attention to the possible violation of territorial integrity by the proposed changes. The changes themselves were never adopted.

The territory of Ukraine within the existing border is integral and inviolable - as is stated in Part 3 of Art. 2 of the Constitution of Ukraine. The protection of territorial integrity by the Constitutional Court of Ukraine was manifested in 2014, when it adopted two decisions:

- in the case based on the constitutional submissions of the Acting President of Ukraine, the Chairman of the Verkhovna Rada of Ukraine and the Human Rights Commissioner of the Verkhovna Rada of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea "On holding a Crimean-wide referendum" (the case of holding a local referendum in the Autonomous Republic of Crimea) from March 14 2014[51];
- in the case of the constitutional submission of the Acting President of Ukraine and the Chairman of the Verkhovna Rada of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea "On the Declaration of Independence of the Autonomous Republic of Crimea and the City of Sevastopol" from March 20 2014[52].

Both acts of the Verkhovna Rada of the Autonomous Republic of Crimea, which were recognised as unconstitutional, violated the territorial integrity of Ukraine.

The Constitution of Ukraine in Art. 37 also embedded the protection of territorial integrity into the mechanism of banning political parties and other associations. It is forbidden to form associations, and the activities of those formed should be prohibited if their program objectives or actions are aimed at eliminating the independence of Ukraine or violating the sovereignty or territorial integrity of the state. These provisions can be called a manifestation of militant democracy (democracy capable of defending itself) and a logical continuation of the recognition of territorial integrity as an unchanging principle. At the same time, the Constitutional Court of Ukraine, unlike many European constitutional courts, does not consider cases on the prohibition of associations of citizens, and these cases have been referred to administrative courts since 2005. The corresponding practice is already quite significant[53].

In a number of decisions, the Constitutional Court of Ukraine recognised the principle of protecting territorial integrity as a legitimate goal for applying the concept of "militant democracy". In the decision of July 16 2019, in the case of the constitutional submission of 46 people's deputies of Ukraine regarding the compliance with the Constitution of Ukraine

50 Conclusion of the Constitutional Court of Ukraine of July 30 2015, <https://zakon.rada.gov.ua/laws/show/v002v710-15#Text> accessed 20 November 2022.

51 Judgment of the Constitutional Court of Ukraine of March 14 2014, No 2-рп/2014 <https://zakon.rada.gov.ua/laws/show/v002p710-14#Text> accessed 20 November 2022.

52 Judgment of the Constitutional Court of Ukraine of March 20 2014, No 3-рп/2014 <https://zakon.rada.gov.ua/laws/show/v003p710-14#Text> accessed 20 November 2022.

53 Y Barabash, H Berchenko, 'Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine' (2019) 9:3(28) Baltic Journal of European Studies 3-24.

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(constitutionality) of the Law of Ukraine "On Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their symbols"[54] (paragraph 2 point 11 and paragraph 3 point 14 of the motivational part) the Constitutional Court of Ukraine declared:

> "…illegal armed formations use the symbols of the communist regime to oppose Ukrainian state symbols and the idea of Ukrainian statehood, to discredit the idea of democracy, pose a real threat to human rights, the state sovereignty of Ukraine and its territorial integrity."
>
> "…the red star and other symbols of the communist regime are widely used in the temporarily occupied territories of Ukraine by the armed forces of the Russian Federation, illegal armed formations created, supported and financed by the Russian Federation, as well as self-proclaimed bodies under the control of the Russian Federation, which usurped power functions in these territories and that is why it is a real threat to the state sovereignty of Ukraine, its territorial integrity and democratic constitutional system."

In the decision of December 21 2021, No 3-p/2021[55] in the case of the constitutional submission of 47 People's Deputies of Ukraine regarding the compliance with the Constitution of Ukraine (constitutionality) of certain provisions of Art. 6 of the Law of Ukraine "On Television and Radio Broadcasting", Art.s 15, 15-1, 26 of the Law of Ukraine "On Cinematography" (paragraph 2, paragraph 4 and paragraph 1, paragraph 5 of the motivational part) the Constitutional Court of Ukraine also declared:

> "For a long time, the Russian Federation pursued an unfriendly state policy towards Ukraine, and in 2014 grossly violated the state sovereignty and territorial integrity of Ukraine, the norms of international law and its international commitments."
>
> "In view of the fact that since 2014 the occupying state has grossly violated the norms of international law, the state sovereignty and territorial integrity of Ukraine, occupied the Autonomous Republic of Crimea, the city of Sevastopol and certain areas of the Donetsk and Luhansk regions, as well as taking into account the threats that Ukraine faces as a victim of the aggressive state policy of the Russian Federation, the central bodies of the executive power of Ukraine may have the appropriate discretionary powers and carry out normative regulation of the procedure for entering a person into the List of persons who pose a threat to national security, in particular, by adopting subordinate regulations."

At the same time, there is an ambiguous attitude towards the Ukrainian formula of unamendability in scientific circles. Yaniv Roznai and Silvia Suteu argue that the unamendable protection of territorial integrity is a particularly ineffective type of eternity clause, as it is subject to both the internal threat of secession and the external risk of forcible annexation[56]. It is argued that one can hardly imagine a rougher demonstration of the impotence of territorial integrity as a constitutional principle and, perhaps, the impotence of law in general, than in this case. In the opinion of Konstantinos Pilpilidis, which he expressed specifically in the aspect of protecting territorial integrity, non-observance of the provisions on eternity causes contempt for the entire constitution[57].

54 Judgment of the Constitutional Court of Ukraine of July 16 2019, No 9-p/2019 <https://zakon.rada.gov.ua/laws/show/v009p710-19#Text> accessed 20 November 2022.

55 Judgment of the Constitutional Court of Ukraine of December 21 2021, No 3-p/2021 <https://zakon.rada.gov.ua/laws/show/va03p710-21#Text> accessed 20 November 2022.

56 Y Roznai, S Suteu, 'The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle' (2015) 03(16) German Law Journal 542; Roznai Y, Unconstitutional constitutional amendments. (Oxford University Press 2017) 131.

57 K Pilpilidis, 'A Constitution for Eternity: An Economic Theory of Explicit Unamendability' in book: R Albert, B.E Oder (eds.), An Unamendable Constitution? Unamendability in Constitutional Democracies. (Springer, 2018) 72.

We cannot leave the above criticism unanswered. It is true that "Ukraine's continuing dependence on Russia stems from the hundreds of years that the Ukrainians were governed by the Russian Empire and later the USSR."[58] However, we emphasise that it would be a mistake in the conditions of temporary occupation to seriously consider the case of 2014 as a legitimate decision on the independence of the "people of Crimea", as well as the case of 2022 with quasi "referendums" in the territories of the Donetsk, Luhansk, Kherson and Zaporizhia regions temporarily occupied by Russia. That is, we do not accept the idea of the appearance in 2014 and later in 2022 of new subjects of constituent power within the boundaries of separate territories occupied by Russia and their fictitious implementation of either the primary constituent power or the carrying out of a legitimate constitutional revolution. In short, in reality, all of this led to the accession (annexation) of the relevant territories by Russia and was not recognised by Ukraine and the UN.

It is no accident that we have so meticulously analysed the cases described in the literature when the clause on unamendability is considered to be no longer valid. Although these cases remain debatable, none of these cases is related to the occupation and unrecognised annexation by one state of the territory of another sovereign state.

In this regard, one cannot fail to mention the constitutional right to resistance, which is quite widespread in the world but was not directly reflected in the text of the Constitution of Ukraine[59]. The fundamental question lies in the relationship between the principle of efficiency, proclaimed by Hans Kelsen, and the principle of legitimacy. It is our deep conviction that the principle of effectiveness should have meaning in combination with the principle of legitimacy, and not replace it.

In certain situations, it is indeed possible to use the doctrine of "effective control", but this does not mean that we recognise such control by Russia of the occupied territories as legitimate. In fact, in 2014, a temporary occupation and subsequent unrecognised annexation of the territory of Ukraine by another state took place[60]. Likewise, the 2022 quasi-referendums on joining the Russian Federation in the temporarily occupied part of the territory of four regions of Ukraine (Donetsk, Luhansk, Kherson, and Zaporizhzhia), which were announced and organised by the temporary occupying Russian authorities, also led to an unrecognised and illegal annexation. That is why, in our opinion, the external threat to the Ukrainian formula of unamendability is not a sufficient reason for changing or abandoning the formula itself. The movement for the de-occupation of the territory is the practical embodiment of this formula in real life, the protection of the principle of legitimacy against the crude "right of force", no matter how difficult this path may be.

6 CONCLUSIONS

Although unamendable provisions have become a common feature of constitutional design, not all constitutions contain unamendable provisions. Multilevel constitutional design (in the terminology of Rosalind Dixon and David Landau) can be considered a competitor of unamendable provisions. The key problems associated with the constitutionalisation of unamendable provisions are related to the establishment of an optimal list that would correspond to national specificities, as well as the creation of protection mechanisms.

58 I Barabash, O Serdiuk, V Steshenko, 'Ukraine in European human rights regime: Breaking path dependence from Russia' in book: The EU in the 21st Century: Challenges and Opportunities for the European Integration Process (Springer International Publishing 2020) 247 – 270.

59 H Berchenko, Constitutional Right to Resist (2020) 4 Problems of Legality 18-30.

60 O Zadorozhniy, Crimea's Anexia - an International Crime (K.I.S. 2015).

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There are cases where unamendable provisions lose their force. Therefore, we should emphasise the need to not exaggerate the role of the semantics of the words "eternity" and "unamendability"; nor should we overestimate the regulatory influence of unamendable provisions or consider them as a kind of panacea for the protection of certain values. Unamendable provisions/principles can cease to be valid in the event of changes being made under the condition of a constitutional revolution (both formal, i.e., through the establishment of a new regulation; and informal, through a new interpretation of existing norms) and adoption of a new constitution with or without compliance with the current procedure. Another case discussed in this context is the application of the double correction mechanism. It is worth noting that the legality of such a development of events is not universally recognised in all cases.

Violation by the aggressor state of the territorial integrity of Ukraine as an unamendable provision of its Constitution is unequivocally illegitimate and unlawful. We emphasise that such a gross violation by an external force does not mean discrediting the formula of unamendability itself and does not necessitate the rejection of such a formula - as a whole, or as individual elements - in the Constitution of Ukraine. It only means that the Constitution must be restored. However, the opposite option, which is a rejection of the very principle of territorial integrity or recognition of its declarative nature (fictitiousness), would mean a rejection and discreditation of the Constitution.

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Case Note

DECLARING A NATURAL PERSON MISSING OR DEAD IN CIVIL PROCEEDINGS: NEW CHALLENGES IN THE CONDITIONS OF ARMED AGGRESSION IN UKRAINE

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Summary: 1. Introduction. – 2. Proceedings on The Recognition of a Person as Disappeared: Features and Differences from The Recognition of a Person as Missing. – 3. Proceedings Declaring a Person Dead and The Difference from Establishing the Fact of Death of a Person in the Temporarily Occupied Territories. – 4. Key Legal Issues of Proceedings in Cases of Recognition of a Natural Person as Missing or Declared Dead in the Conditions of Hostilities and Temporary Occupation of Certain Territories of Ukraine. – 5. Conclusions.

Keywords: *recognition of a person as disappeared; declaring a person missing; declaring a person dead; proceeding in the temporarily occupied territories; the Institution of the Commissioner for Missing Persons in Special Circumstances.*

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ABSTRACT

The armed aggression against Ukraine has been started in 2014 when Crimea and part of Ukrainian territory were occupied. It led to the disappearance of number of people and the new notion of missing persons amid military conflict appeared in the legislation of Ukraine. The new law defines the concept of persons who have disappeared due to special circumstances and in connection with a military conflict. The difference between this institution is that the recognition of a missing person is primarily aimed at protecting these persons. The status of a missing person within military conflict provides a person with a number of guarantees in order to protect his/her rights and assist in the search for that person. However, today the implementation of this institute is incomplete. This study aimed to discover the gaps that prevent the full protection of the rights of missing persons and to optimize the activities of the authorities to protect this category of persons, based on the national legislation and case law. It was also discussed the Institution of the Commissioner for Missing Persons in Special Circumstances was introduced in April 2022, aimed to coordinate the authorities, law enforcement agencies on the search for missing persons.

1 INTRODUCTION

The armed aggression of the Russian Federation against Ukraine has been going on since 2014. The annexation of the Autonomous Republic of Crimea and the city of Sevastopol, the war in eastern Ukraine and, finally, the large-scale invasion of Ukraine, which began on 24th of February, 2022, have led to open hostilities and temporary occupation of certain territories of Ukraine. The protection of all citizens of Ukraine, especially those who still live in the occupied territories, their lives and health is one of the functions of the state. However, due to the loss of control over the territories occupied by the enemy, the capabilities of the state authorities of Ukraine to protect citizens are significantly limited. In order to protect the rights and freedoms of these citizens, the Verkhovna Rada of Ukraine adopted a number of legal acts, including the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in The Temporarily Occupied Territory of Ukraine' of 15 April 2014 with changes and additions, 'On the Peculiarities of the State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions' of 18 January 2018.[1]

Military actions and temporary occupation of part of the territory of Ukraine are the reason for the disappearance of people and their deaths. The exact number of missing persons is unknown. According to the Permanent Mission of Ukraine to the Autonomous Republic of Crimea and the public organization Krym SOS[2], since 2014 about 45 people have become victims of enforced disappearances, the fate of 15 of them is still unknown. The number of missing persons in the temporarily uncontrolled part of Donetsk and Luhansk regions is also unknown. According to the International Committee of the Red Cross, their number can vary from 800 to 1,500 people[3]. The number of missing persons as a result of

1 The Law of Ukraine 'On the Peculiarities of the State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions' <https://zakon.rada.gov.ua/laws/show/2268-19#Text> accessed 25 July 2022.

2 Krym SOS, Report 'Enforced Disappearances in Crimea During the Period of Occupation by The Russian Federation In 2014-2020' (*Hromadskyi Prostir*, 2 December 2020) <https://www.prostir.ua/?news=krymsos-predstavyla-zvit-nasylnytski-znyknennya-u-krymu-za-period-okupatsiji-rosijskoyu-federatsijeyu-u-2014-2020-rokah> accessed 25 July 2022.

3 International Day of Disappeared: hundreds of families of the missing from the Donbas conflict still await news about their beloved ones. International Red Cross Committee, 30 August 2021. https://blogs.icrc.org/ua/2021/08/30/idod-2021-eng/ accessed 25 July 2022.

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the invasion of Ukraine on 24th of February 2022 is still unknown[4]. Cases of war crimes by the armed forces of the Russian Federation have been repeatedly reported: killings of civilians, hostage-taking, illegal deportation, and so on[5]. Under such conditions, it is quite difficult to determine the exact number of missing persons. According to the Verkhovna Rada Commissioner for Human Rights, about 33,000 residents of Mariupol were victims of illegal deportation to the territory of the Russian Federation and the occupied part of the Donetsk region[6]. Also, more than 1100 civilians were killed in Kyiv region during an occupation, 412 of them were from Bucha[7].

2 PROCEEDINGS ON THE RECOGNITION OF A PERSON AS DISAPPEARED: FEATURES AND DIFFERENCES FROM THE RECOGNITION OF A PERSON AS MISSING

The Civil Code[8] and the Civil Procedure Codes of Ukraine[9] provide for and regulate the possibility and procedure for declaring a natural person disappeared or declaring him or her dead. According to Art. 43 of the Civil Code of Ukraine, a natural person may be declared disappeared by a court if **within one year there is no information about his/her whereabouts at his/her place of permanent residence.** If it is impossible to establish the day of receipt of the latest information about the person's whereabouts, the beginning of his/her absence is the first day of the month following that in which such information was received, and if it is impossible to establish this month, then it is the 1st January of the following year.[10] The Civil Court of Cassation in its decision of 7 May 2018 (case № 225/1297/17) [11] noted that the disappearance is a certificate in court of the long absence of an individual in his/her place of permanent residence under conditions that failed to establish his/her whereabouts (stay). When a person is declared disappeared, the presumption that the person is alive is applied, but it is impossible to establish his/her whereabouts at this time, and this presumption is

4 The commissioner calls on citizens of Ukraine to report the facts of the disappearance of relatives and loved ones without fail. The official portal of the Verkhovna Rada Commissioner for Human Rights, 13 July 2022 < https://www.ombudsman.gov.ua/news_details/upovnovazhenij-zaklikaye-gromadyan-ukrayini-obovyazkovo-povidomlyati-pro-fakti-zniknennya-rodichiv-i-blizkih > accessed 25 July 2022.

5 Commissioner: The occupiers are committing war crimes against Ukrainian citizens taken prisoner. The official portal of the Verkhovna Rada Commissioner for Human Rights, 08 May 2022 < https://ombudsman.gov.ua/news_details/upovnovazhenij-okupanti-vchinyayut-voyenni-zlochini-stosovno-ukrayinskih-gromadyan-zahoplenih-u-polon > accessed 25 July 2022.

6 Held an online meeting with Catherine Bomberger, Director-General of the International Commission on Missing Persons. The official portal of the Verkhovna Rada Commissioner for Human Rights, 04 May 2022. < https://www.ombudsman.gov.ua/news_details/upovnovazhenij-provela-onlajn-zustrich-z-generalnim-direktorom-mizhnarodnoyi-komisiyi-z-pitan-zniklih-bezvisti-ketrin-bomberger > accessed 25 July 2022.

7 Evidence of horrific war crimes and torture of civilians continues to be found in the lands liberated from the rashist occupiers. The official portal of the Verkhovna Rada Commissioner for Human Rights, 29 April 2022. < https://www.ombudsman.gov.ua/news_details/upovnovazhenij-prodovzhuyut-viyavlyatisya-svidchennya-zhahlivih-voyennih-zlochiniv-ta-katuvan-rashistami-mirnogo-naselennya > accessed 25 July 2022.

8 Civil Code of Ukraine < https://zakon.rada.gov.ua/laws/show/435-15#Text > accessed 25 June 2022.

9 Civil Procedure Code of Ukraine <https://zakon.rada.gov.ua/laws/show/1618-15#Text> accessed 25 June 2022.

10 Civil Code of Ukraine: Law of Ukraine of 16 January, 2003 № 435-IV. Information of the Verkhovna Rada of Ukraine. 2003. № 40. Art. 356.

11 Resolution of the Civil Court of Cassation of the Supreme Court in the case № 225/1297/17 of 7 May 2018 (*Unified State Register of Court Decisions*) https://reyestr.court.gov.ua/Review/74342201 accessed 25 July 2022.

rebuttable. The norm of Art. 43 of the Civil Code of Ukraine provides, first of all, to find out the place of permanent residence of a person at the time of his/her disappearance, the measures taken by the applicant to establish the whereabouts of the person in question, and whether all possibilities for his/her whereabouts have been exhausted.

The grounds for recognizing an individual as disappeared are **a set of legal facts**, i.e. the legal structure, which includes:

a) lack of information about the stay of an individual in his/her place of permanent residence;

b) lack of information about the actual whereabouts of the person and the inability to obtain such information;

c) the expiration of one year from the date of receipt of the latest information on the location of the natural person or from the date determined in accordance with part two of Art. 43 of the Civil Code of Ukraine;

d) the applicant has a legal interest in resolving the issue of recognizing the person disappeared.[12]

At the same time, the courts of first instance in Ukraine have repeatedly emphasized that the subject of evidence in cases of recognition of a natural person as disappeared is:

– disappearance of a citizen;

– the presence of a legal interest of the person submitting the application for recognition of the citizen as disappeared;

– attempts by the applicant to search for the person;

– inability to establish the whereabouts of the person;

– the existence of circumstances that threatened the life of a disappeared individual;

– the presence of circumstances that give reason to assume the death of a person from a particular accident;

– the existence of circumstances that give reason to believe that a person may intentionally hide: be wanted, unwilling to pay alimony or comply with other court decisions, etc.;

– no dispute about the right.[13]

It should also be noted that after the beginning of the Russian armed aggression, the notion of missing persons appeared in the legislation of Ukraine. The legal status of such persons is determined by the Law of Ukraine 'On the Legal Status of Missing Persons' of 12 July 2018[14]. According to this law, a missing person is a natural person in respect of whom there is no information about his/her whereabouts at the time of application for search filing.

This Law also defines the concept of persons who have disappeared due to special circumstances and in connection with a military conflict - these are persons who have

12 Resolution of the Supreme Court of Cassation in the case № 225/1297/17 of 7 May 2018 (*Unified State Register of Court Decisions*) <https://reyestr.court.gov.ua/Review/74342201> accessed 25 July 2022.

13 Decision of the Chervonozavodsky District Court of Kharkiv in the case № 646/85/20 of 10 January 2020 (*Unified State Register of Court Decisions*) <https://reyestr.court.gov.ua/Review/86831777> accessed 25 July 2022.

14 The Law of Ukraine № 2505-VIII 'On the Legal Status of Missing Persons' (12 July 2018) <https://zakon.rada.gov.ua/laws/show/2505-19#Text> accessed 25 July 2022.

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disappeared due to armed conflict, hostilities, riots within the state or in connection with natural or man-made emergencies or other events that may result in the mass death of people and persons who have gone missing in a zone of armed conflict during their military service or in any other circumstances that confirm the fact that a person is in that zone.[15] Although the above categories of persons have a similar normative wording, there is a number of significant differences between them in the **reasons** for acquiring such status, **the order** of its acquisition and **the legal consequences** in case of acquisition.

A person may be declared *disappeared* only by *a court decision* in the manner prescribed by Chapter 4 of Section IV of the Civil Procedure Code of Ukraine[16]. If a person is declared missing, the notary at his/her last place of residence describes the property belonging to him/her and *establishes guardianship over it*. Upon the application of the interested person or the body of guardianship and custody over the property of a natural person, whose whereabouts are unknown, guardianship may be established by a notary until the court decides to declare a person disappeared.

The guardian over the property of a natural person declared disappeared or a natural person whose whereabouts are unknown, *assumes the performance of civil duties in his/her favour*, repays debts at the expense of his/her property, *manages this property in his/her interests*, provides possession at the expense of this property to persons, whom the person who became disappeared was obliged by law to take care about. Also, *the spouse* of a missing person *acquires the right to divorce in a simplified manner* through the state bodies of registration of civil status, and obligations closely related to the missing person are terminated.

The subjective composition of the applicants in this case is not directly defined by law. In judicial practice, there are most often cases of appeals to the court by close relatives of the person against whom the proceedings are conducted, less often by the authorities endowed with certain powers or heads of military units. The main criterion for the possibility of going to court is legal interest. This property follows directly from the essence of the right to go to court. Its absence entails the impossibility for the person to file an application and to initiate a civil case, as he/she is not a proper applicant [17].

For example, in case № 129/716/16-c, which was considered by the Haisyn District Court of Vinnytsia Oblast, the applicant applied for considering her husband disappeared. According to the applicant, her husband went missing during the fighting near Ilovaisk in 2014 and his whereabouts are still unknown. Recognizing him missing was necessary for the applicant to obtain the status of a person covered by the Law of Ukraine 'On the Status of War Veterans, Guarantees of Their Social Protection' in order to receive subsidies, social assistance and benefits provided by current legislation. The court found a legal interest and upheld the application[18].

In another case 671/282/19, a representative of the Volochysk District State Administration of the Khmelnytsky Region appealed to the court in the interests of a minor to declare his father disappeared. At the hearing the applicant supported his application and requested that it be granted. The court found that the child was deprived of parental care. The father is not interested in his son's life. Where he is now is unknown, but according to information held by the deceased wife of the disappeared man and the Volochysk police department, his

15 ibid.

16 Civil Procedure Code of Ukraine (n 11).

17 Y Polyuk, 'Legal Interest as A Prerequisite for The Emergence of The Right to Go to Court' in G Ulyanov (ed), *Traditions and Innovations of Legal Science: Past, Present, Future* (International Scientific-Practical Conference, Odesa, 19 May, 2017, Vol 2, Helvetica Publishing House 2017) 689-692.

18 Decision of the Haisyn district court of the Vinnytsia region in case No 129/716/16-ts of 1 April 2016 (*Unified State Register of Court Decisions*) <https://reyestr.court.gov.ua/Review/57089327> accessed 25 June 2022.

father's place of residence was village Bile, Lutuhyne district of Luhansk region. Due to the uncontrollability of this territory by the Ukrainian authorities, the Volochysk Regional State Administration is deprived of the opportunity to protect the rights of the child and find his father. The child lives with the mother's roommate. It is he who raises and fully supports the child and wants to adopt him. Thus, in this case, a special type of legal interest of the public authority was established[19].

The decision to declare a person missing may be revoked only by a court. The grounds for revoking the decision are the receipt by the court of an application for the appearance of a natural person who has been declared disappeared or information about the whereabouts of this person. An application may be submitted by a person who has been declared disappeared or by another interested person to the court that made the decision to declare the person disappeared or to the court at the place of residence of the person.

Accordingly, in case of cancellation of the court decision on recognition of a natural person as disappeared, the legal consequences of such recognition lose their force, and the rights of such a person must be restored in the manner prescribed by law.

Thus, the recognition of a person as disappeared is most often necessary to satisfy the legitimate interests of others, mainly his/her close relatives.

At the same time, a person may acquire the status of *missing from the moment of submitting an application* to the National Police *on the fact of disappearance* of a person and his/her search or by a court decision. The person is considered missing until the moment of termination of his/her search. Simultaneously, the acquisition of such a status by an individual does not preclude the application to the court by his/her relatives or other interested persons with a request to declare him/her missing or to declare him/her dead. Even if the court makes one of these decisions, the person does not lose his/her rights as a missing person. A missing person has all the rights guaranteed by the Constitution and laws of Ukraine, as well as the right to a comprehensive investigation into the circumstances of his/her disappearance and to establish his/her whereabouts. The state is obliged to take all possible measures to search for a missing person. This person retains *the place of work*, position held and average earnings at the enterprise, institution, organization, regardless of subordination, but not more than until the moment of *declaring such a person dead* in the manner prescribed by law. Persons who went missing during military service as a result of armed conflict and/or hostilities are provided with the *guarantees by the Law of Ukraine 'On Social and Legal Protection of Servicemen and Members of Their Families'*[20] and other laws of Ukraine.

According to the original version of this Law, in order to ensure coordination of the activities of state bodies authorized to register and/or search for missing persons, including the search for missing persons in the area of anti-terrorist operation in Donetsk and Luhansk regions, the area of measures To ensure national security and defense, to repel and deter the armed aggression of the Russian Federation, *a Commission on Persons Missing in Special Circumstances was established*. This is an advisory body created under the Cabinet of Ministers of Ukraine. Also, this Law provides for the creation of the Unified Register of Missing Persons, the Procedure for which is established by the Cabinet of Ministers of Ukraine. This register contains information on missing persons, information that allows them to be identified, the presence or absence of a court decision declaring a person missing or declaring him/her dead, and other information that may help in the search for a person.

19 Decision of the Volochysk District Court of the Khmelnytsky Region in the case № 671/282/19 of 18 March 2019 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/80544928> accessed 25 June 2022.

20 The Law of Ukraine 'On Social and Legal Protection of Servicemen and Members of Their Families' <https://zakon.rada.gov.ua/laws/show/2011-12> accessed 25 July 2022.

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On 14 April 2022, this Law was subject to amendments, according to which it now applies only to persons who went missing in special circumstances - persons who went missing due to armed conflict, hostilities, temporary occupation of part of the territory of Ukraine, natural or man-made emergencies[21].

The concept of a search group was also introduced – this is to be understood as a humanitarian mission of the bodies authorized to register and/or search for missing persons in special circumstances, as well as to perform other functions related to the implementation of this Law, organizations and/or individuals, aimed at searching persons who have disappeared under special circumstances, their remains, search and marking of burial places of persons who disappeared under special circumstances, removal of bodies (remains) of deceased (dead) persons and removal of their remains. Also, instead of the Commission, the institution of the Commissioner for Missing Persons in Special Circumstances was introduced. It is he who coordinates the authorities, law enforcement agencies on the search for missing persons. The activities of the Commissioner are provided by the Secretariat of the Commissioner on issues of persons who have disappeared under special circumstances, which is formed as a part of the responsible body of executive power. In addition, notaries acquire the right to establish custody of the property of a missing person, at the request of the person concerned.

The difference between this institution and the previous one is that the recognition of a missing person is primarily aimed at protecting these persons. As can be seen, the status of a missing person provides a person with a number of guarantees in order to protect his/her rights and assist in the search for that person. However, today the implementation of this institute is incomplete. In order to eliminate the gaps that prevent the full protection of the rights of missing persons and to optimize the activities of the authorities to protect this category of persons, amendments to the legislation were adopted.

3 PROCEEDINGS DECLARING A PERSON DEAD AND THE DIFFERENCE FROM ESTABLISHING THE FACT OF DEATH OF A PERSON IN THE TEMPORARILY OCCUPIED TERRITORIES

An individual may be declared dead by a court if his or her place of residence has not been known for *three years*; and *within six months* – if he or she has gone missing in circumstances that threatened his/her life or give grounds to assume his or her death from an accident; and if it is possible to consider an individual dead from a certain accident or other circumstances due to man-made or natural emergencies - *within one month* after the completion of a special commission formed as a result of man-made or natural emergencies. An individual who has gone missing in connection with *hostilities* or an armed conflict may be declared dead by a court after the *expiration of two years* from the date of the end of hostilities. Taking into account the *specific circumstances* of the case, the court may declare an individual dead before the expiration of this period, but *not earlier than the expiration of six months*.

The procedural order for declaring a person dead is similar to declaring him or her disappeared. The same applies to the subjective composition of the participants in the proceedings and the requirements for them regarding the right to go to court. For example, in case № 308/10708/19 the applicant applied to the Perechyn District Court of the Zakarpattia

21 The Law of Ukraine 'On Amendments to the Law of Ukraine "On the Legal Status of Missing Persons" and other legislative acts of Ukraine regarding the improvement of legal regulation of social relations related to the acquisition of the status of persons missing under special circumstances' <https://zakon.rada.gov.ua/laws/show/2191-20#n5> accessed 25 July 2022.

Oblast to declare his brother dead. The claims are based on the fact that his brother lived in temporarily occupied Donetsk. The last time information about him was obtained was in 2014, according to which in July of that year, gunmen broke into his brother's house and took him away in an unknown direction. He has not returned home since then, and his relatives have no information about his whereabouts. Since the brother went missing in circumstances that threatened his life, the brother's declaration of death is necessary for him to claim inheritance, so in view of the above, he asks to satisfy the application. The court found that the applicant had a legal interest and upheld the application to declare his brother dead.[22]

It should also be noted that in the CPC of Ukraine there is an institution of establishing the fact of death of a person in the temporarily occupied territories. Unlike the institution of declaring a person dead, which is regulated by Chapter 4 of Section IV of the CPC of Ukraine, the establishment of the fact of death is based on procedural rules that determine the establishment of facts that have legal significance. Peculiarities of consideration of such cases are defined in Art. 317 of the CPC of Ukraine.

An application to establish the fact of a person's death in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, may be filed by the relatives of the deceased or their representatives in court outside such territory of Ukraine. Cases of establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, shall be considered immediately from the moment of receipt of the relevant application by the court. Decisions in such cases are subject to immediate execution.

The main difference between declaring a person dead and establishing the fact of death is that declaring a person dead is based on the presumption of his/her death *in the absence of evidence to the contrary*, and *establishing the fact of a person's death is based on evidence of his/her death*. Also, the legislation does not provide for the procedure in case a person whose death has been established turns out to be alive. There are also no significant legal consequences for establishing the fact of a person's death. For example, when a person is declared dead and his/her inheritance is opened, the heirs do not have the right to alienate this property for 5 years. The law does not provide for such a prohibition to establish the fact of a person's death[23]. Therefore, in our opinion, the two above-mentioned institutions do not have significant differences, and in some cases duplicate each other, which may complicate the possibility of their enforcement.

4 KEY LEGAL ISSUES OF PROCEEDINGS IN CASES OF RECOGNITION OF A NATURAL PERSON AS MISSING OR DECLARED DEAD IN THE CONDITIONS OF HOSTILITIES AND TEMPORARY OCCUPATION OF CERTAIN TERRITORIES OF UKRAINE

Today, there are two key legal issues related to the proceedings and evidence in cases of recognition of an individual as disappeared or declared dead: the determination of jurisdiction and the admissibility of evidence.

In accordance with Part 1 of Art. 305 of the CPC of Ukraine, the application for recognition of a natural person disappeared or declaring him/her dead is filed with the court at the place

22 Decision of the Perechyn District Court of the Zakarpattia Region in the case № 308/10708/19 of 7 December 2020 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/93645170> accessed 25 June 2022.

23 V Pleeva, V Mazur, 'Correlation of The Concepts "Declaring A Person Dead" And "Establishing the Fact of Death" Under the Civil and Civil Procedure Legislation of Ukraine' 3 (2018) Law and Society 104-109.

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of residence of the applicant or at the last known place of residence (stay) of a natural person whose whereabouts are unknown, or at the location of his/her property. But as of today, due to hostilities and loss of control over certain territories of Ukraine, some courts are unable to perform their functions, and the High Council of Justice at the beginning of the invasion could not exercise its powers due to lack of quorum. Under such conditions, on 3 March 2022, the Verkhovna Rada of Ukraine adopted amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges', according to which in connection with natural disasters, hostilities, measures to combat terrorism or other emergencies, the court may be terminated with the simultaneous determination of another court that will administer justice in the territory of the court that has ceased to exist, and which is closest to the court whose work has been terminated, or to another designated court, by a decision of the High Council of Justice, and in case of impossibility of the High Council of Justice to exercise its powers - by order of the Chairman of the Supreme Court.[24] According to the Chairman of the Supreme Court V. Knyazev, since the beginning of the invasion, the jurisdiction of about 20% of Ukrainian courts has been changed.

Another, more serious problem is the admissibility of evidence. Since Ukraine does not recognize the legal personality of either the occupation administrations or the 'authorities' of self-proclaimed quasi-state entities, the documents issued by them cannot be recognized as admissible evidence. However, there is a principle in international law called the Namibian Exceptions, formulated by the International Court of Justice in its Advisory Opinion of 21 June 1971 (Namibia case). This principle is also actively used in the practice of the European Court of Human Rights and the courts of Ukraine. It states that documents issued by occupation administrations can be recognized if their non-recognition leads to serious violations or restrictions on the rights of citizens. This does not mean recognizing the occupying power or its legal capacity.

As an example, we could take the decision of the European Court of Human Rights in the case of *Cyprus v. Turkey*. Referring to this finding of the UN International Court of Justice, where the Court concluded that in situations similar to the one in the present case, the obligation to ignore the actions of *de facto* entities, such as the Turkish Republic of Northern Cyprus, was far from absolute. The Court considers that, in the territory in question, the lives of its inhabitants were taking their turns, and that the de facto authorities, in particular the relevant courts, must ensure a satisfactory standard and protection of that life. The Court noted that, in the interests of these residents, third states and international organizations, especially the courts, could not simply ignore the actions of such authorities. The opposite conclusion would mean the complete disregard of all the rights of the inhabitants of this territory in any discussion of them in the international context, and this would amount to the deprivation of their minimum rights belonging to them. In concluding, the majority of the Court emphasized that there was no reason to legitimize the 'TRNC' and reiterated that the Government of the Republic of Cyprus remained the sole legitimate Government of Cyprus[25].

This principle is often used by the courts of Ukraine. For example, in case № 524/551/20, the Avtozavodsky District Court of Kremenchuk considered an application to declare the applicant's father missing[26]. In November 2017, he took his personal belongings and went

24 The Law of Ukraine № 2112-IX 'On Amendments to Part Seven 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' (3 March 2022) < https://zakon.rada.gov.ua/laws/show/2112-20#n2> accessed 25 July 2022.

25 Judgment of the European Court of Human Rights in the case of *Cyprus v Turkey* of 10 May 2001 (Case 25781/94 <https://hudoc.echr.coe.int/Eng?i=001-59454> accessed 25 June 2022.

26 Decision of the Avtozavodsky District Court of Kremenchuk in the case № 524/551/20 of 24 February 2020 (Unified State Register of Court Decisions) <https://reyestr.court.gov.ua/Review/87779347> accessed 25 July 2022.

to the Autonomous Republic of Crimea, Alushta, where his brother lived. Since then, her father's whereabouts have been unknown. She applied to the Ministry of Internal Affairs of the Autonomous Republic of Crimea, but it was not possible to establish his whereabouts. Referring to the above circumstances, the applicant requests that her father be declared disappeared. The fact is necessary for the applicant to apply for a subsidy for housing and communal services. The proof that the applicant's father did indeed disappear is the decision of the Russian Ministry of the Interior in Alushta of 19 January 2018, which instituted proceedings on the fact of his disappearance. Taking into account the documents issued in the temporarily occupied territory confirming the disappearance of the applicant's father, the court is guided by the case law of the European Court of Human Rights as well as by the 'Namibian exceptions' of the UN International Court of Justice: documents issued by the occupying authorities must be recognized if their non-recognition leads to significant violations or limitations of citizens' rights. However, in exceptional cases, the recognition of acts of the occupying power in the limited context of the protection of human rights does not in any way legitimize such authority. This was the key to the decision granting the application and declaring the applicant's father disappeared[27].

In another case, the applicant applied to the Pavlograd City District Court of the Dnipropetrovsk Region for her husband to be declared disappeared (case 185/4679/19). The statement is substantiated by the fact that in January 2014 her ex-husband left home and did not return. He did not get in touch with his relatives. He was not at the address of his close relatives, the company where he worked was liquidated, and the applicant's website found out from the Mirotvorets website that her ex-husband had been a fighter for the DNR terrorist organization since 2016. Satisfying this statement, the court took into account the evidence - a printout from a page on the Internet (from the site 'DNR'), which confirmed as of August 2016, this person was a militant IAF (Illegal armed formations) 'Oplot'.

In this case, the court also used the 'Namibian Exceptions' in the context of assessing documents issued by institutions in the occupied territories as evidence, as the possibility of gathering evidence in such cases may be significantly limited, while establishing the relevant facts is essential for realization of a number of human rights, including the right to property (inheritance), the right to respect for private and family life, etc. [28]

Thus, it can be concluded that the Russian aggression against Ukraine creates obstacles in the exercise of civil rights and in the performance of its functions by the state. Therefore, when conducting civil proceedings for the recognition of an individual as missing or declaring him/her dead in the conditions of hostilities and temporary occupation of certain territories of Ukraine, the peculiarities provided by national and international law for such conditions should be observed.

5 CONCLUSIONS

Summarizing all the above, we can draw the following conclusions.

The difference between declaring a person disappeared and declaring a person missing is that the institution of disappeared persons is primarily aimed at protecting persons to whom this disappeared person may create difficulties in exercising their rights and legitimate interests, while recognition of a missing person is aimed precisely at the protection of this

27 Ibid.

28 Decision of the Petropavlovsk District Court of Dnipropetrovsk region in the case № 185/4679/19 of 22 October 2019 (*Unified State Register of Court Decisions*) <https://reyestr.court.gov.ua/Review/85825105> accessed 25 July 2022.

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person, the protection of his/her fundamental rights, including civil and labour ones. There are also significant differences in the legal and factual grounds for acquiring these statuses, the procedure for their acquisition and loss of these statuses. In addition, the acquisition by a person of the status of a missing person does not deprive the persons concerned of the right to go to court to declare him or her missing or to declare him or her dead.

The main difference between declaring a person dead and establishing the fact of death in the temporarily occupied territory is that recognizing a person dead is based on the presumption of death in the absence of evidence of another, and establishing the fact of death in the temporarily occupied territory is made directly on evidence of death. Also, declaring a person dead is an independent type of case, which is considered in a separate proceeding, and the establishment of the fact of death belongs to the cases of establishing the facts that have legal significance. In other respects, these two institutions do not have significant differences, and in some places duplicate each other.

Today there are two main legal problems related to the recognition of an individual as disappeared or declaring him/her dead in the conditions of hostilities and temporary occupation of certain territories of Ukraine: determining the jurisdiction of cases and the admissibility of evidence.

In connection with hostilities, some courts in Ukraine do not have a *de facto* capacity to administer justice. In this regard, the Verkhovna Rada of Ukraine adopted amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges', according to which in connection with natural disasters, hostilities, measures to combat terrorism or other emergencies, the work of the court may be terminated with the simultaneous determination of another court that will administer justice in the territory of the court that has ceased to exist, and which is closest to the court whose work has been terminated, or to another designated court, by a decision of the High Council of Justice, and in case of impossibility for the High Council of Justice to exercise its powers - by order of the Chairman of the Supreme Court.

Despite the non-recognition by Ukraine and most UN member states of the legal capacity of the occupation administrations of the Russian Federation and the 'authorities' of quasi-state entities, documents issued by them may be recognized as admissible evidence if their non-recognition entails significant restriction or violation of rights, freedoms of citizens. Taking these documents into account does not automatically recognize the occupation administration or its legal personality. This principle is called 'Namibian Exceptions'.

Armed aggression against Ukraine creates difficult conditions for the realization of rights and interests. In order to protect the vulnerable category of Ukrainian citizens living in the temporarily occupied territories or having relatives there, a number of legal acts were adopted. Special legal institutions aimed at protecting individuals affected by the war in Ukraine have also been introduced. However, their implementation is not yet complete, and some of them contain significant inaccuracies, which could hamper the exercise of their rights by vulnerable citizens of Ukraine, especially in the context of open armed aggression.

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Case Note

WORKING IN WAR: THE MAIN CHANGES IN LABOUR RELATIONS AND WORKING CONDITIONS UNDER MARTIAL LAW IN UKRAINE

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ABSTRACT

Background: *Maintaining labour regulations and the quality of working conditions is a considerable challenge during wartime and martial law. This paper outlines the changes that have affected the working life of employees who continued in employment, both inside and outside Ukraine, under martial law in 2022. Using a qualitative analysis of Ukrainian labour regulations, ILO and Ukrainian government statistics, and direct observation, we show how the legal regulation of labour relations and working conditions has changed under the influence of active hostilities. During the war in Ukraine, many employees started to work remotely, and some companies have relocated their production facilities to areas where there are no active hostilities and continue to operate. At the same time, the legal regulation and nature of labour relations and the quality of working conditions have changed significantly - yet regulations have failed to keep up with the levels of flexibility and timeliness required to respond effectively in the ongoing crisis.*

Methods*: In order to achieve objective scientific results, the authors used such methods as analysis and synthesis to understand and build a logical chain of ideas. The authors used the statistical method to emphasise their positions with real data regarding the situation that developed in practice.*

Results and Conclusions: *We draw conclusions regarding the problems of employees implementing their labour rights during wartime, identify applied aspects of labour law in wartime conditions, and propose ways to improve the situation regarding the implementation of labour rights.*

1 INTRODUCTION

Today, the basis of Ukrainian labour legislation is the Code of Labour Laws of Ukraine[1], adopted on December 10, 1971 (hereinafter called the Labour Code of Ukraine) and enacted on July 1, 1972. The Labour Code of Ukraine has been amended 154 times since its existence, which allowed for relatively effective solutions to urgent problems in the social and labour spheres. In particular, in 2015 there were 15 such changes. At the same time, the Labour Code of Ukraine, which was developed for a planned economy, does not allow a successful response to the challenges of time, which is inconvenient for the modern economy, nor supports small and medium businesses with the appropriate level of employment flexibility required by employers and employees, especially in martial law. Even the terminology of the Code remains archaic. For instance, Art. 118 of the Labour Code of Ukraine deals with guarantees for employees elected to positions in Komsomol organisations. And this, unfortunately, is not an isolated example.

The Verkhovna Rada of Ukraine dealt with important issues (civil service and local government reform, election legislation, recoding of civil law, criminal law reform, etc.), ignoring the need to address the problems that always arise in the field of economics. And this is surprising, because without the economy, the existence of human society would be impossible. Everyone, since childhood, is exposed to various economic phenomena every day, such as buying and selling goods, receiving a salary or scholarship, using money, getting a loan, and so on.

Along with the commodity and capital markets, the labour market is an important component of a market economy. Such economic phenomena as the labour market, unemployment,

1 The Labour Code of Ukraine: Law No 322-VIII of 10.12.71. The Official Bulletin of the Verkhovna Rada of Ukraine, 1971, Appendix to No. 50, Article 375. https://zakon.rada.gov.ua/laws/show/322-08#Text accessed 30 September 2022.

inflation, and taxes affect the living conditions of each person. And while the legislature dealt firmly with the budget, taxes and fees, little attention was given to the labour market and labour relations during all the years of Ukraine's independence. In fact, the only significant achievement of the last decade is the adoption on July 5, 2012 of the Law of Ukraine "On Employment of Population"[2].

The central executive bodies also did not particularly care about these issues. Thus, in accordance with the Regulation on August 20, 2014[3], although the formation and implementation of state policy in the areas of labour, employment, labour migration, labour relations and social dialogue are two of the key activities of the Ministry of Economy, the latter did not deal with them. They provided a solution only in cases where further disregard in the relevant field was impossible. This is particularly illustrated by the structure of the Ministry of Economy, where only two of its more than 40 divisions take care of the above issues: (1) the Directorate of Labour Market Development and Wage Conditions and (2) the Directorate of Employment and Labour Migration. This looks strange, to put it mildly, because the economically active population of Ukraine is about 16.7 million people, of whom just over 15 million are employed.

During the war, significant changes have taken place in the working life of employees who remained in Ukraine or left the country and continued to work under martial law in 2022.

In this article we are going to show how the legal regulation of labour relations and working conditions has changed under the influence of active hostilities, based on a qualitative analysis of labour legislation, observations, and statistics of the ILO and Ukrainian government services.

We used analysis and synthesis to understand and argue a logical chain of ideas to their conclusions. The statistical method helps to emphasise conclusions with real data regarding the actual situation.

2 LABOUR CODE OF UKRAINE OR THE LAW "ON THE ORGANISATION OF LABOUR RELATIONS IN MARTIAL LAW": THE SCOPE OF ACTS DURING MARTIAL LAW

At the beginning of the war, Ukraine had labour legislation that did not meet the requirements of peacetime, much less wartime. Separate attempts to resolve labour law issues related to the mobilisation were made on March 27, 2014[4] and on May 20, 2014[5]: (1) the list of grounds for termination of the employment contract was supplemented; (2) the procedure for dismissal of employees was clarified; and (3) for a special period, and in connection with changes in

2 On Employment of Population: Law of Ukraine on July 5, 2012 No 5067-VI. *The Official Bulletin of the Verkhovna Rada of Ukraine.* 2013. No 24. Art. 243. https://zakon.rada.gov.ua/laws/show/5067-17#Text accessed 30 September2022.

3 Issues of the Ministry of Economy: Resolution of the Cabinet of Ministers of Ukraine on August 20, 2014 No 459. *Official Gazette of Ukraine.* 2014. No 77. Art. 2183. https://zakon.rada.gov.ua/laws/show/459-2014-%D0%BF#Text accessed 30 September2022.

4 On Amendments to Certain Legislative Acts of Ukraine Concerning Ensuring Mobilization: Law of Ukraine on March 27, 2014 No1169-VII. *The Official Bulletin of the Verkhovna Rada of Ukraine.* 2014. No 20–21. Art. 746. https://zakon.rada.gov.ua/laws/show/1169-18#Text accessed 30 September2022.

5 On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Defence and Mobilization Issues During Mobilization: Law of Ukraine on May 20, 2014 No1275-VII. *The Official Bulletin of the Verkhovna Rada of Ukraine.* 2014. No 29. Art. 942. https://zakon.rada.gov.ua/laws/show/1275-18#Text accessed 30 September2022.

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the organisation of production and labour related to the implementation of measures during the mobilisation, specified guarantees for employees during the performance of state duties. In the latter case, given the failure of the first edition of Art. 119 "Guarantees for employees during the performance of state or public duties" and given the constant problems of law enforcement, the parliament made nine more attempts to make changes and additions to it.

The adoption on March 15, 2022 by the Verkhovna Rada of Ukraine of the Law of Ukraine "On the Organisation of Labour Relations in Martial Law" (hereinafter referred to as the OLR Martial Law)[6] allowed a partial solution to the most pressing issues of overcoming acute military challenges facing employers in the organisation of labour relations and assurance of labour rights of employees. Since its entry into force on March 24, 2022, the rules of application of labour legislation, and even personnel records in general, have changed[7].

The fundamental rights of citizens related to the exercise of the right to work are provided by Articles 43–46 of the Constitution of Ukraine[8]. According to Art. 64 of the Constitution of Ukraine, in conditions of martial law or state of emergency, certain restrictions on rights and freedoms may be established, indicating the time period of these restrictions. At the same time, the rights provided for in Articles 43–46 of the Constitution of Ukraine are not included in the list of those that cannot be restricted under any circumstances.

According to the OLR Martial Law, restrictions on the constitutional rights and freedoms of men and citizens are introduced for the period of martial law in accordance with Articles 43 (labour), 44 (strike) of the Constitution of Ukraine.

However, during martial law, the norms of labour legislation do not apply to the relations regulated by the OLR Martial Law. In view of the above, the provisions of the OLR Martial Law, which regulate some aspects of labour relations differently than the Labour Code of Ukraine, have priority application for the period of martial law. At the same time, other norms of labour legislation that do not contradict the provisions of the OLR Martial Law must be applied in the relationship between an employee and an employer.

For the period of martial law, the norms of the Labour Code of Ukraine[9] do not apply to:

- reduction of work by one hour on the eve of holidays and non-working days
- duration of the working day on the eve of the weekend with a six-day working week not more than 5 hours
- limitation of overtime limits (four hours for two consecutive days and 120 hours per year)
- transfer of the day off to the next day after a holiday or non-working day
- transfer of days off and working days in accordance with the recommendation of the Cabinet of Ministers of Ukraine

6 On the organization of labour relations in martial law: Law of Ukraine on March 15, 2022 No 2136-IX. Official Gazette of Ukraine. 2022. No 31. Art. 1634. https://zakon.rada.gov.ua/laws/show/2136-20#Text accessed 30 September2022.

7 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 233-236. https://doi.org/10.33327/AJEE-18-5.4-n000329

8 Constitution of Ukraine: Law on June 28, 1996 No 254к/96-BP. The Official Bulletin of the Verkhovna Rada of Ukraine, 1996, No. 30, Art. 141. https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text accessed 30 September2022.

9 The Labour Code of Ukraine: Law No 322-VIII of 10.12.71. The Official Bulletin of the Verkhovna Rada of Ukraine, 1971, Appendix to No. 50, Art. 375. https://zakon.rada.gov.ua/laws/show/322-08#Text accessed 30 September2022.

- prohibitions on engaging in work on weekends, holidays and non-working days
- compensation for involvement in work on weekends, holidays and non-working days.

3 FEATURES OF LABOUR RELATIONS AND WORKING CONDITIONS IN THE PERIOD OF MARTIAL LAW IN UKRAINE

For the period of martial law in Ukraine, the Verkhovna Rada of Ukraine provided for the following innovations:

1) The procedure for organising personnel records and the management and archival storage of personnel documents in areas of active hostilities shall be determined independently by an employer. The only condition is to ensure reliable accounting of work performed by an employee and accounting for labour costs.

2) As a general rule, an employment contract is concluded in writing. Art. 24 of the Labour Code of Ukraine defines mandatory cases of concluding an employment contract in writing. For the period of martial law, the parties of labour relations may deviate from this rule and independently determine the form of employment contract convenient for them.

At the same time, other stages of concluding an employment contract are maintained and should be followed:

(1) initiating the conclusion of an employment contract;

(2) approval of the content of an employment contract;

(3) registration of the conclusion of an employment contract;

(4) informing an employee about working conditions;

(5) registration of an employment record book and social insurance of an employee.

An employer received the right to conclude fixed-term employment contracts with new employees; and if an employee's presence is doubtful for a period of time, and it seems appropriate during martial law, the right of replacement of a temporarily absent employee. The last formulation of the OLR Martial Law (2022) is possible outside the period of martial law. The purpose of concluding such agreements is to promptly recruit new employees, as well as to eliminate staff and labour shortages. The question of expediency of the conclusion of the corresponding contracts is solved by an employer at his/her own discretion.

3) During the period of martial law, the condition of the probation period for employment may be established for any category of employee. However, this is the employer's right, not a duty. The issue is decided at his/her own discretion.

4) The procedure for transferring to another job and changes in significant working conditions also underwent substantial innovation, while the procedure for moving to another job remained the same.

The consent of an employee is not required for transfer at the initiative of an employer, if the following conditions are met:

1) purpose – to perform work aimed at preventing or eliminating the consequences of hostilities, as well as other circumstances that pose or may pose a threat to life or normal living conditions;

2) is not carried out in another area on the territory in which active hostilities continue. Otherwise, the consent of the employee is required;

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3) remuneration for work performed is not lower than the average salary for previous work.

According to the general rule (Part 3 of Art. 32 of the Labour Code of Ukraine) on changing significant working conditions (systems and amounts of remuneration, benefits, working hours, establishing or abolishing part-time work, combining professions, changing ranks and names of positions, etc.) notification must occur no later than two months. Under martial law, this requirement does not apply. Therefore, employees can be warned about a change in significant working conditions immediately after an employer decides to make such a change, but not later than admission to work with changed working conditions. In this case, employees who have not refused to change significant working conditions - but are unable to move to a new location of the enterprise due to hostilities - cannot be fired in accordance with paragraph 6 of Part 1 of Art. 36 of the Labour Code of Ukraine. Alternatively, they can be sent by an employer on a simple basis, have their employment contract suspended, or can go on leave without pay.

5) According to Art. 38 of the Labour Code of Ukraine, an employee has the right to terminate an employment contract concluded for an indefinite period, notifying an employer in writing within two weeks. In addition, the above article provides cases where an employee may ask to terminate an employment contract within a requested period of time.

Under martial law, an employee has the right to terminate an employment contract on his/her own initiative within the period specified in his/her application in the presence of the following conditions:

1) conduct of hostilities in the areas in which the enterprise is located, and the existence of a threat to the life and health of an employee;

2) work under an employment contract is not conditioned by forced involvement in socially useful work under martial law or involvement in the performance of work on critical infrastructure facilities. In the same case, when an employee is involved in socially useful work under martial law, or is involved in the performance of work on critical infrastructure, he/she does not have the appropriate right.

6) If there are grounds provided by law, the employer's right to dismissal is not limited. An employer is entitled to dismiss an employee during his/her temporary incapacity for work, as well as to keep an employee on leave (excluding maternity and childcare leave until the child reaches the age of three). However, a very temporary incapacity for work (without taking into account the specifics of paragraph 5 of Art. 40 of the Labour Code of Ukraine) or the employee's leave is not an independent reason for dismissal. An exhaustive list of grounds is listed in Articles 40 (10 grounds) and 41 (8 grounds) of the Labour Code of Ukraine.

At the same time, special attention should be paid to the fact that such dismissal occurs when there are legal grounds for dismissal of an employee at the initiative of an employer (Articles 40, 41 of the Labour Code of Ukraine), and not on the grounds of temporary incapacity or leave.

Under martial law, the prior consent of the elected body of the primary trade union organisation is not required for dismissal by the employer on any grounds. This rule does not apply to dismissals of employees elected to trade union bodies. With regard to the latter, the requirements of the Law of Ukraine "On Trade Unions, Their Rights and Guarantees of Activity"[10] should be observed.

10 On Trade Unions, Their Rights and Guarantees of Activity: Law of Ukraine on September 15, 1999 No 1045-XIV. *The Official Bulletin of the Verkhovna Rada of Ukraine.* 1999. No 45. Art. 397. https://zakon.rada.gov.ua/laws/show/1045-14#Text accessed 30 September2022.

All other stages of the procedure for termination of an employment contract at the initiative of an employer have not changed.[11]

7) During the period of martial law, a mechanism of postponement of an employment contract was introduced. The postponement of an employment contract being a temporary termination of employment by an employer or by an employee under the concluded employment contract.

Postponement does not entail termination of employment.

Postponement can be initiated by both an employer and an employee. In order to avoid disputes about the postponement of a contract, the opposite party should be notified in writing or electronically.

8) The normal working hours of employees during martial law have been increased from 40 to 60 hours per week. Working hours were reduced to 50 hours per week for minors, workers engaged in work with harmful working conditions, teachers, doctors, etc. However, increasing the length of working hours during martial law is a right, not an obligation, of an employer. In this case, the tariff rate (salary) of an employee does not change in the direction of increase. Remuneration is paid in the same amount as for normal working hours.

Significant changes were made in the mode of operation. If a five-day or six-day working week had been established by an employer together with the elected body of the primary trade union organisation taking into account the specifics of work, the opinion of the labour collective, and in agreement with the local council, then in martial law an employer makes a decision in conjunction with the military command along with military administrations.

The leg al norms on working at night have changed (from 10 pm to 6 am). Thus, (1) pregnant women, women with a child under the age of one and persons with disabilities are involved in work only with their consent, and (2) the duration of work is not reduced by one hour.

9) In accordance with Art. 70 of the Labour Code of Ukraine, the duration of weekly uninterrupted rest must be at least 42 hours. Under martial law, the duration of weekly rest can be reduced to 24 hours. However, an employer decides on the issue of reducing the duration at his/her own discretion. It is the employer's right, rather than a duty

During martial law, an employer has the right to deny an employee any type of leave if the latter is involved in work on critical infrastructure. This entitlement does not apply to social leave such as maternity leave and childcare leave until the child reaches the age of three. Accordingly, if a person's work is not used at the specified facilities, the granting of leave takes place according to the usual procedure which operated in peacetime. The order of granting annual leave is determined by schedules approved by an employer in agreement with the union, and communicated to employees. The specific period of leave is agreed between an employee and an employer, who must notify the former in writing of the date of commencement of leave no later than two weeks.

10) Part 1 of Art. 53 of the Law of Ukraine "On Education"[12], pedagogical, academic and research employees are entitled to extended paid leave. According to Part 6 of Art. 6 of the

11 Lutsenko O. 2019. Anticorruption compliance: International experience in legal regulation and innovation for Ukraine. *Humanities and Social Sciences Reviews.* 7 (5). P. 768

12 On education: Law of Ukraine on September 5, 2017 No 2145-VIII. *Bulletin of the Verkhovna Rada*. 2017. No. 38–39. Art. 380. https://zakon.rada.gov.ua/laws/show/2145-19#Text accessed 30 September2022.

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Law of Ukraine "On Vacations"[13], executives of educational institutions and pedagogical, academic and research employees are granted an annual basic leave of up to 56 calendar days. However, the duration of leave may be shorter depending on the specific position of an employee and the educational institution where he/she works. According to the "Procedure for granting annual basic leave"[14] it is 56 calendar days for schoolteachers.

In view of the above, the provisions of the Law "On the organisation of labour relations in martial law"[15], which regulate certain aspects of hired labour differently than any act of labour legislation or legislation containing certain rules governing employment, have priority application for the period of martial law.

Therefore, during martial law, an employer is released from the obligation to provide an employee with annual leave of more than 24 days. However, Art. 4 of the Law of Ukraine "On Vacations"[16], in addition to the annual leave mentioned above, also distinguishes additional leave in connection with studies, creative leave, leave to prepare for and participate in competitions, social leave, and leave without pay. Basic leave is also not the only annual leave. If the duration of the employee's annual basic leave (as in the case of teachers) is more than 24 calendar days, the difference in leave days is not lost, but must be granted after the end of martial law.

At the same time, the Law "On the organisation of labour relations in martial law"[17] does not suspend or repeal Art. 9^1 of the Labour Code of Ukraine. According to which, enterprises - within their power and at their own expense - may establish leave in addition to that which is prescribed by the law on labour and social benefits for employees. Accordingly, during martial law, an employer has the right to provide employees the main paid annual leave lasting more than 24 days, taking into account the peculiarities of labour organisation and economic conditions, within its power and at its own expense. However, granting longer leave during martial law is an employer's right, not an obligation.

11) The Law of Ukraine "On Vacations"[18] provides for two types of leave without earnings:

1) unpaid leave at the request of an employee, which is provided on a mandatory basis.

   The legislation distinguishes 19 categories of citizens who are entitled to such leave, and its maximum duration. Thus, for old-age pensioners and persons with disabilities of group III it is up to 30 calendar days per year. To receive leave, an

13 On Vacations: Law of Ukraine on November 15, 1996 No 504/96-BP. *The Official Bulletin of the Verkhovna Rada of Ukraine.* 1997. No 2. Art. 4. https://zakon.rada.gov.ua/laws/show/504/96-%D0%B2%D1%80#Text accessed 30 September2022.

14 On approval of the Procedure for granting annual basic leave lasting up to 56 calendar days to executives of educational institutions, educational (pedagogical) units (subdivisions) of other institutions and establishments, pedagogical, academic employees and researchers: Resolution of the Cabinet of Ministers of Ukraine; Procedure on April 14, 1997 No 346. *Official Gazette of Ukraine.* 1997. No 16. Art. 73. https://zakon.rada.gov.ua/laws/show/346-97-%D0%BF#Text accessed 30 September2022.

15 On the organization of labour relations in martial law: Law of Ukraine on March 15, 2022 No 2136-IX. *Official Gazette of Ukraine.* 2022. No 31. Art. 1634. https://zakon.rada.gov.ua/laws/show/2136-20#Text accessed 30 September2022.

16 On Vacations: Law of Ukraine on November 15, 1996 No 504/96-BP. *The Official Bulletin of the Verkhovna Rada of Ukraine.* 1997. No 2. Art. 4. https://zakon.rada.gov.ua/laws/show/504/96-%D0%B2%D1%80#Text accessed 30 September2022.

17 On the organization of labour relations in martial law: Law of Ukraine on March 15, 2022 No 2136-IX. *Official Gazette of Ukraine.* 2022. No 31. Art. 1634. https://zakon.rada.gov.ua/laws/show/2136-20#Text accessed 30 September2022.

18 On Vacations: Law of Ukraine on November 15, 1996 No 504/96-BP. *The Official Bulletin of the Verkhovna Rada of Ukraine.* 1997. No 2. Art. 4. https://zakon.rada.gov.ua/laws/show/504/96-%D0%B2%D1%80#Text accessed 30 September2022.

employee must submit a written application to the employer, which must specify: a) the reason for leave; b) the start time; and c) the duration.

2) leave without earnings with the consent of the labour relation parties.

For family reasons and other circumstances, an employee may be granted unpaid leave for a period determined by his/her agreement with an employer, but not more than 15 calendar days per year. Under martial law, restrictions on the 15-day period for granting this leave are lifted. During this period, employees were given the right to ask an employer to grant unpaid leave of any duration, which may significantly exceed 15 days.

However, it is not possible for an employer to force employees to go on leave without saving their earnings. An employee must make a request. On the other hand, an employee cannot go on vacation arbitrarily without the consent of an employer as this can be considered absenteeism without good reason.

Important guarantees for granting unpaid leave are that an employee retains his/her place of work for the time of their provision, and the time spent is included in the length of service - both of which entitle them to annual basic leave[19].

If an employee does not want to go on unpaid leave and the company is unable to operate due to hostilities, an employer can issue a simple leave.

In the case of declaring downtime, payment is made on the terms specified in the collective agreement but should not be less than two-thirds of the tariff rate set for an employee category (salary)[20].

12) The Constitutional Court of Ukraine stated that the right to earn a living is inalienable from the right to life itself, as the latter is real only when materially secure[21].

The right to timely remuneration for work is protected by law.

The main legislative acts regulating the issue of remuneration of labour are the Laws of Ukraine "On Remuneration of Labour"[22] and the Labour Code of Ukraine.

The state regulates wages by (1) establishing the minimum wage and other state norms and guarantees; (2) establishing the conditions and amounts of remuneration of managers of enterprises based on state or municipal property, employees of enterprises financed or subsidised from the budget; and (3) employee income taxation.

19 Oleg M Yaroshenko, Dmytro Ye Kutomanov, Nataliya A Maryniv, Tetiana V Dudenko 'Features of Corporate Liability for Violation of Competition Law' 2020 9 *International Journal of Criminology and Sociology* 1523.

20 Some issues of remuneration of employees of state bodies, local governments, enterprises, institutions and organizations financed or subsidized from the budget, in martial law: Resolution of the Cabinet of Ministers of Ukraine on March 7, 2022 No 221. *Official Gazette of Ukraine.* 2022. No 25. Art. 1308. https://zakon.rada.gov.ua/laws/show/221-2022-%D0%BF#Text accessed 30 September2022.

21 Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 52 people's deputies of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine "On Peculiarities of Dismissal of Persons Combining the Mandate with Other Activities" and the constitutional petition of 89 people's deputies of Ukraine interpretation of the provisions of paragraph 2 of part two of Article 90 of the Constitution of Ukraine, Art. 5 of the Law of Ukraine "On Peculiarities of Dismissal of Persons Combining the Mandate with Other Activities" (case on dismissal of People's Deputies of Ukraine from other positions in case of combination): Decision of the Constitutional Court of Ukraine on January 29, 2008 № 2-рп/2008. Official Gazette of Ukraine. 2008. No 80. Art. 2697. https://zakon.rada.gov.ua/laws/show/v002p710-08#Text accessed 30 September2022.

22 On remuneration of labour: Law of Ukraine on March 24, 1995 No 108/95-BP. The Official Bulletin of the Verkhovna Rada of Ukraine. 1995. No 17. Art. 121. https://zakon.rada.gov.ua/laws/show/108/95-%D0%B2%D1%80#Text accessed 30 September2022.

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> "In Ukraine, the tariff rate is the main initial normative value that determines the amount of wages. Tariff rates set the amount of wages for workers who perform various jobs per unit time."[23]

An employer is released from liability for breach of the obligation to pay wages if he/she proves that this violation occurred due to force majeure (combat or other force majeure). The Chamber of Commerce and Industry of Ukraine reported on the fact of force majeure on February 24, 2022[24]. These circumstances from February 24, 2022 to their official end are extraordinary, inevitable and objective. After eliminating the above circumstances, an employer is obliged to fulfil all its obligations to pay an employee.

13) The procedure for involving certain categories of workers (women, workers with children) has been innovated during the period of martial law.

14) An employer has the right to refuse an employee any kind of leave (except maternity leave and childcare leave until the child reaches the age of three) if the latter is involved in work on critical infrastructure. Annual basic paid leave is limited to 24 calendar days. Restrictions on the 15-day period of unpaid leave are lifted for the period of martial law. However, as before, unpaid leave will be granted solely on the initiative of an employee.

15) At the initiative of an employer, certain provisions of a collective agreement may be suspended for the period of martial law.

16) Under martial law, many citizens have been forced to flee their homes and work from abroad to support Ukraine's economy and provide for their families. As a result, the use of telework has become more acute.

In Ukraine, telework was legalised on March 17, 2020 as one of the measures to prevent COVID-19[25]. However, on February 27, 2021, the Parliament divided remote and home-based work[26].

The key features of remote work are:

A. There is a written employment contract.

B. An employee independently determines a workplace and is responsible for safe and harmless working conditions there (Part 3 of Art. 14 of the Law of Ukraine "On labour protection"[27]). A common mistake in practice is for the employer to indicate the address at which an employee will work remotely. An employee independently determines the place of work and performs work outside the work premises or territory of an employer (paragraph 4 of section I of the Standard form of employment contract for telework).

23 Yaroshenko OM, Lutsenko OYe, Vapnyarchuk NM 'Salary optimisation in Ukraine in the context of the economy Europeanisation' 2021 28(3) Journal of the National Academy of Legal Sciences of Ukraine 234.

24 Letter of the Chamber of Commerce and Industry of Ukraine dated 28.02.2022 No 2024 / 02.0-7.1 [Regarding force majeure] < https://ucci.org.ua/uploads/files/621cba543cda9382669631.pdf> accessed 29 June 2022

25 On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19): Law of Ukraine on March 17, 2020 No 530-IX. Official Gazette of Ukraine. 2020. No 26. Art. 955. https://zakon.rada.gov.ua/laws/show/1213-20#Text accessed 30 September2022.

26 On Amendments to Certain Legislative Acts of Ukraine Concerning the Improvement of Legal Regulation of Telework, Homework and Work with the Use of Flexible Working Hours: Law of Ukraine on February 4, 2021 No 1213-IX. Official Gazette of Ukraine. 2021. No 20. Art. 850. https://zakon.rada.gov.ua/laws/show/1213-20#Text accessed 30 September2022.

27 On labour protection: Law of Ukraine on October 14, 1992 No 2694-XII. The Official Bulletin of the Verkhovna Rada of Ukraine. 1992. No 49. Art. 668. https://zakon.rada.gov.ua/laws/show/2694-12#Text accessed 30 September2022.

C. An employee distributes working time at its discretion (Part 5 of Art. 60^2 of the Labour Code of Ukraine).

D. An employee may combine the remote format with work at the workplace in the premises or on the territory of an employer (Part 6 of Art. 60^2 of the Labour Code of Ukraine).

E. An employee is guaranteed free time for rest - a period of disconnection (Part 9 of Art. 60^2 of the Labour Code of Ukraine).

Remote work can be introduced at the time of an epidemic or pandemic threat; the need for self-isolation of the employee in cases established by law; in the case of an armed aggression threat; or during a man-made, natural or other emergency (Part 11 of Art. 60^2 of the Labour Code of Ukraine). The Labour Code of Ukraine does not determine which state body is authorised to decide on the existence of such threats and for how long they will exist. It is necessary to rely on other regulations that correspond to the specific situation.

Thus, during the armed aggression, the introduction of telework became even more important to support the country's economy and help employers and employees organise the labour process. We are currently facing extremely difficult living and working conditions. Many Ukrainians were forced to leave their homes in search of security for themselves and their families, so they went abroad. Although the Labour Code of Ukraine does not contain restrictions on the use of telework from abroad by persons working for domestic employers, in wartime there are some bylaws that introduce such restrictions. Thus, for the period of martial law, civil servants and employees of a state body may work remotely by decision of the head - but only on the territory of Ukraine.[28] The resolution of the Cabinet of Ministers of Ukraine "Some issues of organisation of work of employees of public sector economic entities for the period of martial law"[29] caused considerable concern, as it provided that employees of public sector entities by decision of the executive body or head business entities can work remotely, but only on the territory of Ukraine. Members of the executive body or the head of the business entity - by the decision of the business entity, the general meeting of shareholders/participants of companies with an authorised capital of which 50% of shares/stakes belongs to the state, as well as supervisory boards of business entities - may work remotely on the territory of Ukraine.

It should be emphasised that economic entities of the public sector of the economy are entities operating on the basis of state ownership only, as well as entities whose state share in the authorised capital exceeds 50%, or is of a value that provides the state the right to decisive influence on economic activity of these entities (Part 2 of Art. 22 of the Economic Code of Ukraine[30]). Such widespread application of this regulation will force employers to take measures against employees who are abroad but still have the opportunity to perform their duties remotely. This resolution allows such employees to be subject to disciplinary action. Does it protect the rights of citizens and help businesses and employees earn a living in martial law? Is it possible to resort to such measures if workers have gone abroad under threat of destruction? We hope that the resolution will undergo significant changes,

28 Some issues of the organization of work of civil servants and employees of state bodies during martial law: Resolution of the Cabinet of Ministers of Ukraine on April 12, 2022 No 440. Uriadovyi kurier on April 14, 2022. No 86. https://zakon.rada.gov.ua/laws/show/440-2022-%D0%BF#Text accessed 30 September2022.

29 Some issues of organization of work of employees of economic entities of the public sector of the economy for the period of martial law: Resolution of the Cabinet of Ministers of Ukraine on April 26, 2022 No 481. Uriadovyi kurier on April 28, 2022. No 97. https://www.kmu.gov.ua/npas/deyaki-pitannya-organizaciyi-roboti-pracivnikiv-subyektiv-gospodaryuvannya-derzhavnogo-sektoru-ekonomiki-na-period-voyennogo-stanu-481 accessed 30 September2022.

30 Economic Code of Ukraine: Law of Ukraine of 16.01.2003 No 436-IV. The Official Bulletin of the Verkhovna Rada of Ukraine. 2003. No 18. Nos.19–20, Nos. 21–22, Art. 144. https://zakon.rada.gov.ua/laws/show/436-15#Text accessed 30 September2022.

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and the legislator will clarify the question on who exactly are the subjects to which it applies.

Presently, according to current legislation, an employee can combine the remote format with work at the workplace in the premises or on the territory of an employer, provided that an employee and an employer have agreed on this issue (Part 6 of Art. 60^2 of the Labour Code of Ukraine). If remote work is introduced by an employer in case of emergency by order, it is necessary to agree with an employee on which days he/she will work remotely and on which days he/she will be in the office, and record this agreement in the order on remote work.

In the cases provided for in Part 11 of Art. 60^2 of the Labour Code of Ukraine, introduction of remote work is the employer's right. The Labour Code of Ukraine does not require the consent of an employee. An employer is only obliged to acquaint an employee with the order before the date from which he/she introduces remote work, within two days from the date of its acceptance. If an employee is unable to work remotely during the existence of these circumstances, an employer may exercise his/her right to suspend or declare a simple employment contract.

Of course, in terms of the resolution of the Cabinet of Ministers "Some issues of organisation of work of employees of economic entities of the public sector for the period of martial law"[31], employers have the right to impose disciplinary sanctions for violations of labour discipline because the timely and accurate responsibilities and orders of an employer, and the obligations of an employee, are enshrined in Art. 139 of the Labour Code of Ukraine. However, it is necessary to analyse the specific extreme difficulties of living conditions and the reasons for being forced to find temporary shelter and work remotely from abroad due to the impossibility of working in Ukraine.

Thus, the conditions for the use of remote work in martial law have changed - but not for the better for workers. We hope this Resolution[32] will undergo significant changes and gain a limited and clear range of subjects to which it will apply.

4 STATISTICAL DATA

4.1. Statistics on Ukrainians who left Ukraine during the war in search of work and security

The most important consequence of the war in Ukraine is the lives lost and the humanitarian crisis associated with the huge numbers of besieged, traumatised and displaced persons. There are also, however, numerous significant economic implications[33].

Modern researchers of domestic labour markets consider the current situation quite paradoxical: on the one hand, in the context of globalisation there are increasing

31 Some issues of organization of work of employees of economic entities of the public sector of the economy for the period of martial law: Resolution of the Cabinet of Ministers of Ukraine on April 26, 2022 No 481, Uriadovyi kurier on April 28, 2022, No 97. https://www.kmu.gov.ua/npas/deyaki-pitannya-organizaciyi-roboti-pracivnikiv-subyektiv-gospodaryuvannya-derzhavnogo-sektoru-ekonomiki-na-period-voyennogo-stanu-481 accessed 30 September2022.

32 Some issues of organization of work of employees of economic entities of the public sector of the economy for the period of martial law: Resolution of the Cabinet of Ministers of Ukraine on April 26, 2022 No 481. Uriadovyi kurier on April 28, 2022. No 97. https://www.kmu.gov.ua/npas/deyaki-pitannya-organizaciyi-roboti-pracivnikiv-subyektiv-gospodaryuvannya-derzhavnogo-sektoru-ekonomiki-na-period-voyennogo-stanu-481 accessed 30 September2022.

33 OECD Economic Outlook, Interim Report March 2022: Economic and Social Impacts and Policy Implications of the War in Ukraine 2022 <https://www.oecd-ilibrary.org/sites/4181d61b-en/index.html?itemId=/content/publication/4181d61b-en accessed 30 June 2022

opportunities for labour mobility, expanding the sphere of employment; on the other hand, the labour market is not protected from external and internal threats. The external threat caused, in particular, by the annexation of Crimea and the war in Ukraine, resulted in heavy losses in the domestic labour market. Internal migration from the occupied territories caused additional strain in the central and western regions and negatively affected the overall unemployment rate in the country [34][35].

There are an estimated 5.23 million refugees and those forcibly displaced from Ukraine who have moved to neighbouring countries. The ILO estimated that approximately 1.2 million of the total refugee population were working prior to the aggression[36].

The refugee population comprises primarily women, children, and persons over the age of 60. The ILO estimated that among the total refugee population, approximately 2.75 million are of working age. Of these, 43.5 per cent, or 1.2 million, were working prior to the onset of the conflict and subsequently left or lost their jobs.

Estimated labour market characteristics of the Ukrainian refugee population[37]

Labour force status	***Distribution (%)***	***Full time or part time work***	***Distribution (%)***
Employed	43.5	Full-time (>35 hours/ week)	87.4
Unemployed	3.7	Part-time <35 hours/ week)	7.7
Outside labour force	52.8	Not classified	4.8
Total	*100.0*	*Total*	*100.0*

Occupation (skill level) – Main job	***Distribution (%)***	***Education (aggregate level)***	***Distribution (%)***
Skill level 1 (low)	15.5	Basic	15.3
Skill level 2 (medium)	35.5	Intermediate	18.5
Skill levels 3 and 4 (high)	49.0	Advanced	66.2
Total	*100.0*	*Total*	*100.0*

34 Hirman A, Volkova N 'Migration in the context of economy state regulation in Ukraine' 2016 14 (1) Socio-Economic Problems and the State' 84–85.

35 Yaroshenko Oleg M, Karina V Gnatenko, Hanna V Anisimova, Sofiia O Shabanova, Andrey M Sliusar 'Prohibition of discrimination as a principle of social security in the context of ensuring sustainable well-being' 2020 Rivista di Studi sulla Sostenibilita 185.

36 The impact of the Ukraine crisis on the world of work: Initial assessments <https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/documents/briefingnote/wcms_844295.pdf> accessed 1 July 2022.

37 According to the ILO.

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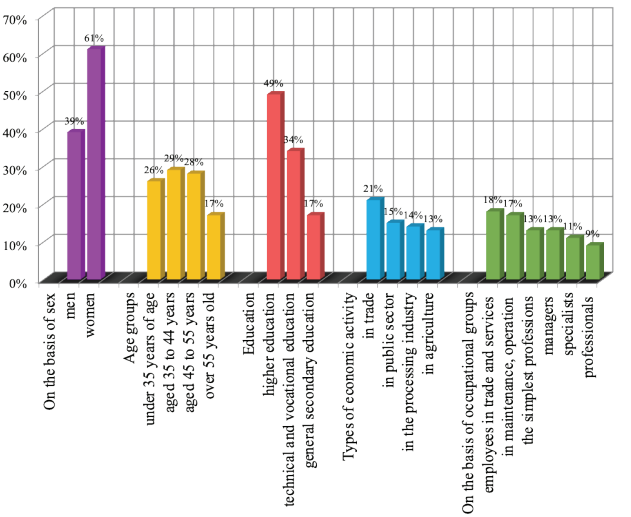
Occupation (ISCO-08) – Main job	*Distribution (%)*	*Status in employment – Main job*	*Distribution (%)*
Managers	8.3	Employees	88.3
Professionals	25.2	Self-employed	11.7
Technicians and associate professionals	15.5	***Total***	***100.0***
Clerical support workers	5.7		
Service and sales workers	21.7		
Skilled agricultural, forestry and fishery workers	0.6		
Craft and related trades workers	4.3		
Plant and machine operators, and assemblers	3.2		
Elementary occupations	15.5		
Total	100.0		

4.2. Statistics on Ukrainians who have remained in Ukraine and are looking for job

According to the latest published data of the State Statistics Service of Ukraine, as of June 1, 2022, 311,000 people had the status of unemployed in Ukraine[38].

The situation on the labour market in Ukraine during martial law



38 The situation on the labour market and the activities of the State Employment Service of Ukraine in January–May 2022 < https://www.dcz.gov.ua/analitics/67 > accessed 1 July 2022.

On the basis of sex: in the total number of registered unemployed, 122,500 were men (39 per cent), and 188,500 were women (61 per cent).

On the basis of age groups: 26 per cent of the registered unemployed were under 35 years old; 29 per cent were aged 35 to 44 years; 28 per cent were aged 45 to 55 years; and 17 per cent were over 55 years old.

On the basis of education: 49 per cent of the registered unemployed had higher education; 34 per cent had technical and vocational education; and 17 per cent had general secondary education.

On the basis of types of economic activity: among the registered unemployed, 21 per cent were previously employed in trade; 15 per cent in public administration, defence or compulsory social insurance; 14 per cent in the processing industry, and 13 per cent in agriculture, forestry and fisheries.

On the basis of occupational groups, the registered unemployed are dominated by employees:

- in trade and services – 18 per cent (sales person, cook, sales consultant, security guard, junior nurse, assistant educator, social worker, waiter, bartender, hairdresser, maid);
- in the maintenance/operation of equipment and machines – 17 per cent (driver, boiler operator/driver, tractor driver in agricultural production, road worker, gas station operator, tractor driver, loader driver, boiler driver, fireman, dry-cleaning operator, machinist turner, pump driver installation worker, grain processing equipment worker);
- in the simplest professions – 13 per cent (auxiliary worker, cleaner of office/ production premises, caretaker, storekeeper, packer, loader, kitchen worker, landscaping worker, janitor, goods receiver, dishwasher);
- managers – 13 per cent (sales manager, general manager, head of department, warehouse manager, store manager, supply manager, farm manager, head of postal department, personnel manager);
- specialists – 11 per cent (nurse, educator, sales representative, personnel inspector, merchandiser, dispatcher, commodity expert, freight forwarder, sales agent, mechanic, technician, paramedic);
- professionals – 9 per cent (civil service specialist, teacher, economist, engineer, lawyer, educator, teacher, librarian, pharmacist, security engineer labour, inspector, marketer, land surveyor, social worker, engineer).

As can be seen from the diagram, the main share of people who lost their jobs during martial law are people of active working age with a high level of education and experience. Key areas of the Ukrainian economy (agricultural sector, public sector, etc.) have lost a significant part of the workforce. The Ukrainian government has developed programs for the transfer of production capacities located in the territory of active hostilities to other areas. Of course, this will potentially help restore business and preserve human resources. But we should not forget about the destroyed enterprises and completely destroyed production facilities. Therefore, Ukraine cannot do without joint and effective programs with international communities and foreign governments.

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5 CONCLUSIONS

The authors' analysis of the labour legislation and the study of the real situation in the labour market of Ukraine gives grounds to assert that during martial law in Ukraine the Parliament began to actively restore changes in the regulation of labour relations. Therefore, for the period of martial law, an employer received the right to conclude fixed-term employment contracts with new employees. The condition of probation of an employee at employment can be established for any category of employees. Substantial innovations have been introduced in the procedure for transfer to another job and changes made in significant working conditions.

If there are grounds provided by law, the employer's right to dismissal is not limited. Under martial law, the prior consent of the elected body of the primary trade union organisation is not required for dismissal by an employer on any grounds. Additionally, a mechanism for suspending employment contracts was introduced.

During martial law, working hours were increased and an employer was entitled to deny an employee any type of leave (except maternity leave and childcare leave until the child reaches the age of three).

Under martial law, many citizens have been forced to flee their homes and work from abroad to support Ukraine's economy and provide for their families. As a result, the issue of the use of remote work has become more acute and many novelties of the legal regulation of such work have been introduced.

But will these measures help to improve the situation in the field of labour and employment in Ukraine? Will these and the changes in legislation be able to bring back employees who have gone abroad? We have our doubts about this. After all, with the adopted changes, the Parliament allowed the delay of the payment of wages, but at the same time set significantly longer working hours. Moreover, the Parliament provided for the employer's ability to postpone employment contracts, send employees on unpaid leave, etc. Will such changes stabilise the situation in the field of labour relations?

We believe that to stabilise the situation in labour law issues, laws should be developed that would benefit both employees and employers. Perhaps, those employers who were able to keep all (or at least most) of their company's personnel potential should provide certain benefits, subventions for business recovery, or reduce the number (or amount) of taxes.

In addition, employees, who have left Ukraine, should not be discriminated against by such norms of laws that establish the obligation of certain categories of employees (for example, the public sector of the economy) to work only on the territory of Ukraine. We believe that this is unacceptable and discriminatory, since they left Ukraine forcibly and most of these people had their homes destroyed, and relatives or close friends who died.

Thus, in our opinion, Ukraine currently has unfavourable conditions for labour resources and the regulation of labour relations and working conditions, and therefore it is necessary to make joint efforts to change the situation by involving practitioners, scientists and authoritative international organisations (such as, the ILO) in order to develop favourable labour legislation for the war and post-war period.

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Case Note

ADOPTION DURING THE WAR IN UKRAINE: HOW NOT TO LOSE A CHILD

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Summary: 1. Introduction: children amid war in Ukraine. – 2. Information on children who suffered as a result of full-scale military operations. – 3. Legal mechanisms for ensuring the rights of children who were left without parental care during the war in Ukraine – *3.1. Reunification of adoptive parents with an adopted child. – 3.2. Transferring processes from placement of children to a digital format. – 3.3. Conditions for adoption and registration of children during martial law. – 3.4. Registration of candidates for adopters. – 3.5. Entities that can be adopters. – 3.6. Institute of Temporary Placement of Children in Ukraine. – 3.7. Institute of guardianship and care during martial law. – 3.8. Procedure for trial of adoption cases. – 3.9. National control mechanisms for displaced children. – 3.10. Foreign experience regarding the problem of "children of war".* – 4. Conclusions.

Keywords: martial law in Ukraine; adoption; temporary placement; family forms of upbringing; children left without parental care; orphans; children who are deprived of parental care.

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ABSTRACT

Background: *During martial law, the protection of children's rights is of the utmost importance. One key aspect is the realisation of the right to raise a child in the family, and one of the ways this can be exercised is through adoption. However, martial law adoption has many nuances and pitfalls that require careful research.*

Methods: *In this article, the author carried out a comprehensive study of both the changes in the legislation of Ukraine in terms of adoption in the context of martial law and the alternatives that can be applied to adoption during wartime. In particular, the following issues were considered: reunification of adoptive parents with an adopted child evacuated outside of Ukraine; transfer of child placement processes to a digital format; adoption conditions and registration of children during martial law; peculiarities of registration of candidates for adoptive parents; circle of subjects who can be adoptive parents during martial law; the functioning of the institute of temporary placement of children in Ukraine and the institute of guardianship and care during martial law; peculiarities of the procedure for trial of adoption cases; and existing national control mechanisms for displaced children. The advantages of temporary placement over adoption during martial law and current practice in this regard are also analysed. In addition, the article provides statistical information about children who suffered as a result of a full-scale war, information about family forms of upbringing, information about the number of court proceedings in the category of adoption cases, as well as foreign experience in overcoming the problem of "children of war".*

Results and Conclusions: *The result of this study is the determination of ways to solve the fate of children who were left without parents as a result of the armed aggression of the Russian Federation, as well as clarification of the mechanisms of their functioning in practice.*

The best way to make children good
is to make them happy.
Oscar Wilde

1 INTRODUCTION: CHILDREN AMID WAR IN UKRAINE

During the first month after the beginning of the full-scale military invasion of the Russian Federation in Ukraine, adoptions in some regions of Ukraine were suspended and impossible to carry out. This applied both to processes started before the war and to new applications for adoption. Such a pause was not related to changes in legislation, but rather, it was caused by objective realities.

In April 2022, the Verkhovna Rada of Ukraine published a notice[1] that during the period of martial law, the adoption procedure did not change and adoption takes place on general grounds, taking into account the norms of national legislation. That is, there was no question of suspending the adoption procedure. However, the legislation regulating adoption activities needed to be adapted to the new realities caused by the state of war in (a) procedural aspects related to the territorial stay of children who can be adopted, (b) procedures related to candidates for adopters and persons who wish to become them, (c) the functioning of services in affairs of children, and (d) the decision of the fate of children left without parental

1 *Usynovlennya v Ukrayini vidbuvayetsya na zagalnyh pidstavah, z urahuvannyam norm nacionalnogo zakonodavstva* 'Adoption in Ukraine takes place on general grounds, taking into account the norms of national legislation' (2022) <https://www.rada.gov.ua/news/razom/221242.html> accessed 15 October 2022.

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care. Corresponding changes were gradually introduced into national legislation throughout the period of full-scale war, which is currently ongoing.

During the full-scale war, according to the National Information Bureau, more than 11,000 children were illegally deported to the Russian Federation or its occupied territories. An even larger figure of more than 550,000 illegally displaced children was announced by the occupying country itself. Such terrible numbers once again sharpen our attention to the urgency of the problem of protecting children's rights during military aggression, in particular, on such aspects as adoption, temporary placement of children, guardianship and care, and control of children's movements. As of today, the adoption procedure is carried out taking into account the introduced changes, which increases the relevance of scientific research on the problems of adoption in the conditions of military aggression of the Russian Federation.

The topic of the research is relevant and has scientific value in view of the lack of other comprehensive analyses of the outlined problem and the extreme importance of this issue within the framework of modern realities.

The goal is a thorough analysis of changes in legislation related to adoption activities under martial law in Ukraine, the functioning of institutions for temporary placement and guardianship during martial law, control mechanisms for displaced children, and research of current statistical data on children affected by full-scale armed aggression of the Russian Federation.

To achieve this goal, the following methodology was used: the current legislation was analysed in the areas that regulate the adoption procedure, temporary placement, establishment of family forms of upbringing, and guardianship and care. Further analysis was carried out of official statistical information provided by state authorities. The judicial practice of the national courts of Ukraine is summarised, in particular, in such categories as cases of adoption by citizens of Ukraine living in the territory of Ukraine, adoption by citizens of Ukraine living outside the territory of Ukraine, and adoption by foreigners.

2 INFORMATION ON CHILDREN WHO SUFFERED AS A RESULT OF FULL-SCALE MILITARY OPERATIONS

Since the beginning of Russia's war against Ukraine on February 24, 2022, one of the population groups most affected by Russian aggression is children. Thousands of children were forced to leave their homes, to be evacuated, thousands were illegally separated from their parents, hundreds of children were orphaned, died or went missing.

According to the Ministry of Social Policy, at the beginning of hostilities, 105,459 children studied and/or stayed in 727 institutions with round-the-clock care. During February - July 2022, 6,582 children were evacuated, of which 2,077 were relocated (evacuated) within Ukraine and 4,505 outside Ukraine.

During this period, some of the children who were evacuated were returned to Ukraine either individually or as part of an institution. Some of the children were returned to their parents or placed in the families of Ukrainian citizens through institutions of adoption, guardianship and care, foster families, and family-type children's homes.

Currently, 6,415 children are being evacuated, of which 1,953 children are within Ukraine, and 4,462 abroad. Among the children currently being evacuated, 3,521 children have the status of orphans - children deprived of parental care. Of them, 952 children were evacuated within Ukraine, 2,569 children outside Ukraine.

From August 1, 2022, the state child tracing portal "Children of War" (https://childrenofwar.gov.ua) became operational in Ukraine - an information platform on which information about children who suffered as a result of military operations during the full-scale aggression of the Russian Federation against Ukraine is updated daily (disappeared, wounded, deported)[2]. On this portal, you can also view the list and photos of children who have disappeared.

As of October 15, 2022, according to the "Children of War" state portal:

- 430 children died and 823 children were injured (according to the Office of the General Prosecutor)
- 249 children went missing (according to the National Police of Ukraine);
- found - 7460 children
- illegally deported to the Russian Federation or to the temporarily occupied territories of Ukraine:
  - 9,755 (according to the National Information Bureau). According to the Children's Commissioner, published in RFE/RL's sources, "these are children who, according to the statements of their parents, acquaintances and relatives, were recognized as forcibly deported or displaced."
  - more than 550,000 children according to data from open sources published by the Russian Federation;
- 96 children were returned to the territory of Ukraine from the territory of the Russian Federation and occupied territories (according to the National Information Bureau of Ukraine)3.

It should be noted that these data are not final, as work is ongoing to establish them in places of active hostilities and temporarily occupied and liberated territories.

As of August 12, 2022, 3,182 children have remained without parental care since February 24, 2022. For 541 children, the loss of parental care is directly related to the war. This was announced by the Deputy Director of the Department for Protection of Children's Rights and Ensuring Equality Standards of the National Social Service, Volodymyr Vovk, on the broadcast of the Yedyni Novyni telethon[4]. Of these, there are 106 orphans whose parents have died; 206 orphans whose parents have died but for whom there is no documentary evidence; and 109 children who have the status of children deprived of parental care, who can be placed in family forms, and if parents are found, will be reunited with them.

According to the Deputy Minister of Social Policy Ulyana Tokareva, since the beginning of this year, as of September 30, 2022, Ukrainians have adopted 458 orphans (350 of them - during the full-scale war), and foreigners 94 orphans[5].

2 *Informatsiya shchodo zabezpechennya prav ditey v umovah viyny* 'Information on ensuring the rights of children in wartime' (2022) Uryadovyy Kuryer. <https://ukurier.gov.ua/uk/articles/informaciya-shodo-zabezpechennya-prav-ditej-v-umov/#:~:text=Станом%20на%2001.09.2022%20вже,виховуються%20в%20сімейних%20формах%20виховання> accessed 15 October 2022.

3 *Dity viyny* 'Children of War' <https://childrenofwar.gov.ua/> accessed 15 October 2022.

4 *Vid pochatku vtorgnennya rf ponad 3000 zalyshylycya bez batkivskogo pikluvannya* 'Since the beginning of the invasion of the Russian Federation, more than 3,000 children have been left without parental care' (2022) Zaxid.Media <https://news.sebastopol.ua/post2927630> accessed 15 October 2022.

5 Sokolova, A., *Yak viyna vplyvaye na pryhystok ditey-syrit v Ukrayini.* 'How the war affects the orphanage in Ukraine' Deutsche Welle (2022) <https://www.dw.com/uk/sistema-bula-paralizovana-ak-vijna-vplivae-na-prihistok-ditejsirit-v-ukraini/a-63553401> accessed 28 October 2022.

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Last year, as of September 30, 709 children were adopted by Ukrainians, 203 by foreigners[6]. Statistics regarding prospective adopters are also known — as of August 31, 2022, there are 1,252 persons on the register of prospective adopters, of which 214 people were sidelined already during martial law.

3 LEGAL MECHANISMS FOR ENSURING THE RIGHTS OF CHILDREN WHO WERE LEFT WITHOUT PARENTAL CARE DURING THE WAR IN UKRAINE

The realities caused by Russia's full-scale invasion of Ukraine led to the need for legislative adaptation of certain points related to the implementation of adoption activities. It should be noted right away that during martial law, it is impossible to make changes to the adoption procedure that either simplify or complicate it.

This is due to the need to prevent abuse, and restrictions and violations of children's rights and interests that may be caused by such changes, in conditions where it is often difficult to find documents and establish the real situation with the child's parents. In particular, it is about the risks of fraud, criminal motives for adoption, hidden trafficking of children, additional traumatisation of the child, etc.

However, some changes are still permissible. They relate to the settlement of issues of registration of candidates for adoptive parents, children who can be adopted, activities of guardianship and guardianship bodies, etc., which arose in connection with the territorial movements of such subjects. The first procedural changes since the introduction of martial law were put into effect at the end of May 2022 and were gradually implemented until the beginning of September.

3.1 Reunification of adoptive parents with an adopted child

Amendments to the adoption procedure were initiated by the amendments to the Procedure for conducting adoption activities (hereinafter referred to as the Procedure), introduced by Resolution No. 618 of the Cabinet of Ministers of Ukraine dated May 24, 2022[7].

The resolution established a list of documents and the procedure for taking away an adopted child during the introduction of a state of emergency or martial law on the territory of Ukraine if the child is temporarily moved (evacuated) outside of Ukraine. These changes were designed to address the problem of reunification of adoptive parents and a child who had already been adopted before the start of a full-scale war but had not yet been transferred to the adopters, having been evacuated abroad before such transfer.

In accordance with the changes made, in the event that an adopted child is temporarily moved (evacuated) outside of Ukraine during the introduction of a state of emergency or martial law on the territory of Ukraine, the adopters are obliged to pick up the child in the presence of an official of the consular institution of Ukraine after presenting the package of documents specified by the Resolution. Upon the fact of the transfer of an adopted child to the adopters by an official of the consular institution of Ukraine in the presence of the

6 Sokolova, A., *Yak viyna vplyvaye na pryhystok ditey-syrit v Ukrayini*. 'How the war affects the orphanage in Ukraine' Deutsche Welle (2022) <https://www.dw.com/uk/sistema-bula-paralizovana-ak-vijna-vplivae-na-prihistok-ditejsirit-v-ukraini/a-63553401> accessed 28 October 2022.

7 Postanova Kabinetu Ministriv Ukrayiny pro vnesennya zmin do poryadku provadzhennya diyalnosti z usynovlennya ta zdiysnennya naglyadu za dotrymannyam prav usynovlenyh ditey Resolution of the Cabinet of Ministers of Ukraine No. 618 of 24.05.2022 'On Amendments to the Procedure for Implementation of Adoption Activities and Supervision of Observance of the Rights of Adopted Children' <https://zakon.rada.gov.ua/laws/show/618-2022-п#Text> accessed 15 October 2022.

adopters, an act of transfer of the adopted child is drawn up, which includes the fact of acceptance of the child by the adopters, the person who took care of the child before its transfer to the adopters, an official of the consular institution of Ukraine in whose presence the transfer of the child was carried out, the identity of the adopters, their signatures, details of the court decision on the adoption of the child, and the date and place of the transfer of the child to the adopters.

3.2 Transferring processes from placement of children to a digital format

Further procedural changes were made on May 31, 2022 by Cabinet Resolution No. 636 "On Amendments to Certain Resolutions of the Cabinet of Ministers of Ukraine Regarding Digitalization of the Processes of Placement of Children in Family Forms of Education"[8].

This Resolution refers to the finalisation of a single electronic data bank on orphans and children deprived of parental care, and the families of potential adopters, guardians, custodians, adoptive parents, and foster parents, which is maintained in the Unified Information and Analytical System "Children", as well as the Unified State Web Portal of Electronic Services and the processes of its information interaction with relevant databases and state registers.

The relevant innovations were aimed at facilitating the process of submitting and receiving the necessary documents by future adopters, speeding up the verification of submitted documents by competent authorities and significantly simplifying the entire procedure.

In particular, the Resolution refers to:

- the introduction and systematic updating of information about the child in the Unified data bank: state of his/her health, changes in appearance, etc., so that future adopters can track information about the child
- the opportunity for citizens of Ukraine to receive online consultation regarding the adoption procedure from the children's service
- the opportunity for citizens of Ukraine to submit an application for registration of candidates for adoptive parents with other mandatory documents not only by place of residence in paper form, but also in electronic form

It follows from the explanations of the Ministry of Social Policy[9] that documents will be submitted in electronic form through a personal account on the Unified State Web Portal of Electronic Services. At the same time, some of the documents will be generated by the system itself from various databases, state registers, and information systems. Also, documents that future adopters will receive during the adoption procedure (for example, a certificate of completion of a training course on raising orphans and children deprived of parental care) will be automatically displayed in their personal account. As such, it is not necessary to receive and submit such documents separately. This will allow the bypassing of some of the bureaucratic processes associated with obtaining and submitting paper documents, which

8 Postanova Kabinetu Ministriv Ukrayiny pro vnesennya zmin do deyakyh postanov Kabinetu Ministriv Ukrayiny shchodo cyfrovizaciyi procesiv vlashtuvannya ditey u simeyni formy vyhovannya Resolution of the Cabinet of Ministers of Ukraine No. 636 of 31.05.2022 'On Amendments to Certain Resolutions of the Cabinet of Ministers of Ukraine Regarding Digitalization of the Processes of Placement of Children in Family Forms of Education' <https://zakon.rada.gov.ua/laws/show/636-2022-п#Text> accessed 15 October 2022.

9 *Usynovlennya v Ukrayini: shcho zminylosya za voyennogo stanu* 'Adoption in Ukraine: what changed during martial law' (2022) <https://legalaid.gov.ua/publikatsiyi/usynovlennya-v-ukrayini-shho-zminylosya-za-voyennogo-stanu/> accessed 15 October 2022.

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will speed up and facilitate the adoption process without changes in the adoption procedure itself.

Currently, citizens of Ukraine already have the opportunity to apply for consultation on the adoption of a child on the Diya portal in the "Family" section[10]. From September 9, 2022, Diya also provided the opportunity to apply for the status of a candidate for adoption, as reported by the Ministry of Digital Transformation.

3.3 Conditions for adoption and registration of children during martial law

The latest changes to the Procedure were approved by Resolution No. 907 of the Cabinet of Ministers of Ukraine dated August 16, 2022[11]. In particular, the Procedure has been supplemented with the section "Peculiarities of conducting adoption activities during martial law".

In accordance with the latest innovations of this Section, the registration of children who can be adopted, the registration of citizens of Ukraine who permanently reside in the territory of Ukraine and wish to adopt a child, and the implementation of adoption activities are carried out according to the standard procedure, and also subject to compliance *with two important conditions*:

1) if, during martial law, the children's service of the district, district in the city of Kyiv state (military) administration, the executive body of the city, district in the city (if formed) council exercises its powers, and

2) if the life circumstances of the parents of the children who can be adopted or their other relatives have been established.

As we can see, the Cabinet of Ministers emphasised at the regulatory level that there is no question of changing the procedure for conducting adoption activities during martial law. Only additional procedures for *registration of children and potential adopters related to the territory of their stay* have been established. In particular, one can see the distinction in the features of such accounting for children and candidates for adoption depending on their stay within or outside of Ukraine.

Thus, children who live (stay) in the territory temporarily occupied by the Russian Federation, are registered for adoption *after the resumption of activities* of local executive authorities and local self-government in the respective territories, if there are grounds for their registration.

In the event that such children are already registered for adoption, their adoption activities are carried out after the resumption of work of local executive bodies and local self-government in the respective territories.

A child who is on local registration can be placed on centralised registration without being on regional registration, if the service for children's affairs of the regional or Kyiv city state (military) administration cannot exercise its powers in connection with the conduct of military (combat) operations or being under temporary occupation or encirclement (blockade).

10 *Usynovlennya v Ukrayini: shcho zminylosya za voyennogo stanu* 'Adoption in Ukraine: what changed during martial law' (2022) <https://legalaid.gov.ua/publikatsiyi/usynovlennya-v-ukrayini-shho-zminylosya-za-voyennogo-stanu/> accessed 15 October 2022.

11 Postanova Kabinetu Ministriv Ukrayiny pro vnesennya zmin do poryadku provadzhennya diyalnosti z usynovlennya ta zdiysnennya naglyadu za dotrymannyam prav usynovlenyh ditey Resolution of the Cabinet of Ministers of Ukraine No. 907 of 16.08.2022 'On Amendments to the Procedure for Implementation of Adoption Activities and Supervision of Observance of the Rights of Adopted Children' <https://zakon.rada.gov.ua/laws/show/907-2022-п#Text> accessed 15 October 2022.

During martial law, children who temporarily moved (evacuated) to another administrative-territorial unit of Ukraine and were not registered locally, but acquired the right to be adopted, are registered locally by the children's affairs service at the place of their temporary relocation (evacuation). We can see, with these innovations, the government emphasised the impossibility of carrying out adoption activities in occupied territories and territories where hostilities are taking place.

Children who were temporarily relocated (evacuated) outside of Ukraine and acquired the right to be adopted during their stay abroad are registered locally after their return to Ukraine.

An important aspect of limiting the adoption of children who are temporarily evacuated abroad is that such children, as well as children of Ukrainian citizens found on the territory of other states who are subject to return to Ukraine, are not subject to the effect of this Order in the part that regulates adoption of a child who is a citizen of Ukraine but lives abroad. Adoption of such children is carried out after their return to Ukraine. Such a restriction is intended to protect children staying abroad from violation of their rights and interests, as well as abuse of the situation in which such children find themselves.

3.4 Registration of candidates for adopters

Another practical point in adoption activities is the registration of candidates for adopters. This process also underwent certain changes due to the introduction of martial law on the territory of Ukraine. In particular, during the state of war, the records of citizens of Ukraine who permanently reside on its territory and wish to adopt a child are kept by the children's services of district state (military) administrations, and executive bodies of city councils at the place of residence of such citizens.

If such citizens moved to another part of Ukraine for temporary residence, they can contact the children's affairs service at the place of temporary relocation or evacuation to get acquainted with information about children who are on the regional register. For this, it is necessary to provide the necessary package of documents and a conclusion about the possibility of being adoptive parents. This can be done in order of priority, taking into account the date of registration of candidates for adoptive parents by place of permanent residence.

In the case of temporary relocation, citizens of Ukraine who have not previously been on the register of candidates may be registered at the place of temporary relocation or evacuation. For this, one of the key documents that must be submitted, in addition to the standard package of documents, is a certificate confirming the status of an internally displaced person who wishes to become a candidate for adoption. If the housing of the candidates for adoption, where they lived before being registered, is destroyed, they must provide documents confirming the possibility of living together with the adopted child in another residential premises that belongs to them by right of ownership or use. Such a provision is extremely important, as it eliminates possible discrimination of prospective adoptive parents and their deprivation of the opportunity to realise their sincere desire to adopt a child due to the lack of their own housing, which was destroyed as a result of the military aggression of the Russian Federation.

Citizens of Ukraine who temporarily moved or evacuated outside of Ukraine during martial law are registered as adoptive parents after they return to their permanent place of residence in Ukraine. Citizens of Ukraine who live or are in the temporarily occupied territories are registered as adoptive parents after the authorities of Ukraine resume work in such territories.

As a consequence of military action in part of the territory of Ukraine, some state bodies have temporarily stopped their activities. Due to this, it was necessary to introduce some

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compromise *solutions regarding the package of documents* for persons wishing to adopt a child to acquire the status of adopter candidates. For example, during martial law, citizens of Ukraine who wish to adopt a child can be registered as potential adopters without completing a training course on raising orphans and children deprived of parental care if candidate training is suspended during martial law in the region of the adopter. At the same time, such prospective adoptive parents are required to undergo an appropriate training course after the resumption of such training, which they are informed about by the children's affairs service at the place of registration.

During martial law, the validity period of the documents of candidates for adoption and the opinion on the possibility of being adopters is 18 months from the date of issue. If, during martial law, the term of validity of the conclusion on the possibility of being adoptive parents has expired, candidates for adoption who are in the territory of Ukraine can apply to the children's affairs service at the place of their registration or to the affairs service at the place of their relocation (evacuation) with a statement about continuation of the conclusion. In the event that the place of registration of adopter candidates is a temporarily occupied territory, the conclusion on the possibility of being an adopter is not continued. In this case, prospective adoptive parents have the right to apply for inclusion in the register of prospective adoptive parents to the children's affairs service at the place of their relocation (evacuation).

3.5 Entities that can be adopters

In our opinion, one of the most important restrictions on adoption activities during martial law is *the limitation of the range of entities that can adopt children.* During martial law and for three months after its termination or cancellation, the activity of adopting children by citizens of Ukraine who temporarily or permanently reside outside Ukraine, and by foreigners, is not carried out. This applies, among other things, to registering such persons as potential adopters, and issuing them referrals for getting to know and establishing contact with the child. However, exceptions to this rule are cases where the adopter is a relative of the child, or the adoption of a child who is a biological brother/sister of a previously adopted child is being decided. Establishing such a restriction is a safeguard against possible trafficking of children abroad.

Another exception to the above-mentioned rule are cases when citizens of Ukraine who temporarily or permanently live outside of Ukraine, and foreigners, met and established contact with a child based on the referral of the National Social Service, which was issued before the introduction of martial law in Ukraine. Such prospective adopters can complete the adoption of a child in accordance with the legislation of Ukraine, regardless of the established restrictions[12].

3.6. Institute of Temporary Placement of Children in Ukraine

During martial law, the issue of *placement of children who were left without parental care*, including children who were separated from their families as a result of the armed aggression of the Russian Federation, became acute. The Cabinet of Ministers of Ukraine tried to settle these issues by making changes to the Procedure for the Proceedings of Guardianship Authorities in Activities Related to the Protection of Children's Rights. During a state of

12 Poryadok provadzhennya diyalnosti z usynovlennya, zatverdzhenyy Postanovoyu Kabinetu Ministriv Ukrayiny The Procedure for carrying out adoption activities, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 905 of 08.10.2008 <https://zakon.rada.gov.ua/laws/show/905-2008-п#Text> accessed 15 October 2022.

emergency or war on the territory of Ukraine, *children left without parental care, including children separated from their families*, are temporarily accommodated in functioning foster families and family-type children's homes under the conditions of temporary placement within the stipulated maximum number of children, which can be arranged for such forms of education.

If it is not technically possible to issue an order of the children's affairs service at the place of operation of the respective foster family or family-type orphanage, children are accommodated according to the orders of the children's affairs service of the relevant regional and Kyiv city military administration[13].

Foster families and family-type children's homes are family forms of education where children left without parental care can be accommodated under the conditions of temporary placement. A foster family is a family that voluntarily take from 1 to 4 children from institutions for orphans and children deprived of parental care to live together and be raised. A family-type orphanage is considered to be a separate family, created at the request of a spouse or an individual who is not married, who take in at least 5 orphans and children deprived of parental care for education and cohabitation[14].

The purpose of creating such forms of education is to ensure proper conditions for the education of orphans and children deprived of parental care in a family environment. Based on the analysis of the changes made to the legislative framework, as well as the current practice of placement of children left without parental care, it can be seen that the legislator gave priority to the institution of temporary placement of children over the institution of adoption during martial law in Ukraine, relying on the fact that in most cases caused by the consequences of military actions, it is impossible to carry out the adoption procedure (for example, it is not possible to establish the life circumstances of the parents of the children who wish to be adopted, etc.). Although it is fair to note that family forms of education were quite relevant and actively used even before the beginning of the war, and are also predominant over residential forms of education.

It is known that as of December 31, 2020, 1,235 family-type children's homes and 3,172 foster families were operating in Ukraine[15]. At the same time, there was a tendency to increase the number of family-type orphanages and decrease the number of foster families. At the moment, statistics regarding the quantitative changes during martial law of these family forms of education remain unknown.

It should be emphasised that the category of *"children left without parental care"* is mentioned in the order almost for the first time. This category is different from the concept of "children who are deprived of parental care", as it refers to children who are only temporarily left without parents under circumstances that do not depend on the will of the parents and on which they have no influence. Once there is a restoration of the previous state, which existed before the occurrence of these circumstances or their termination, the children will be reunited with their parents (both children and parents are victims of war). For such children, it is possible to apply only temporary forms of placement, which include family forms of education.

13 Poryadok provadzhennya organamy opiky ta pikluvannya diyalnosti, povyazanoyi iz zahystom prav dytyny, zatverdzhenyy Postanovoyu Kabinetu Ministriv Ukrayiny The Procedure for the proceedings of guardianship authorities in activities related to the protection of children's rights, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 866 of 24.09.2008 <https://zakon.rada.gov.ua/laws/show/866-2008-п#Text> accessed 15 October 2022.

14 Zakon Ukrayiny pro ohoronu dytynstva Resolution of the Verkhovna Rada of Ukraine No. 2402-III of 26.04.2001 'On the protection of childhood', VVR 2001, No. 30, p. 142.

15 *Zahyst prav ditey ye odnym iz priorytetiv Minsocpolityky* 'Protection of children's rights is one of the priorities of the Ministry of Social Policy' (2021) Ministry of Social Policy <https://www.msp.gov.ua/news/20075.html> accessed 15 October 2022.

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In the event that a temporarily placed child acquires the status of *an orphan child or a child deprived of parental care*, such a child is placed in foster families and family-type children's homes on general grounds with the appointment of state social assistance. The status of an orphan child is acquired by a child whose parents have died. The status of a child deprived of parental care is acquired by a child whose parents do not fulfill their parental duties for the reasons specified by law, and the fact of deprivation of parental care established by the children's affairs service on the basis of the documents collected by it[16].

3.7 Institute of guardianship and care during martial law

The institution of guardianship and care works effectively in Ukraine. *The establishment of guardianship and care* represents the placement of orphans or children deprived of parental care in the families of citizens of Ukraine who are mainly family or family relations[17]. Guardianship is established over a child who has not reached the age of 14, and custodianship over a child between the ages of 14 and 18. The guardian or custodian is the legal representative of the child's interests and is responsible for his/her life, health, physical and mental development.

A person who is in a family relationship (including godparents) with an orphaned child or a child deprived of parental care may express a desire to take him or her into custody. To do this, such a person must submit a package of documents to the children's affairs service at his/her place of residence or at the place of discovery of the child, defined in the Procedure for proceedings by guardianship and authorities in activities related to the protection of children's rights[18]. It is worth noting that during the martial law, some requirements for this package of documents were relaxed. In particular, if it is impossible to obtain a certificate of no criminal record, a candidate for guardian, custodian who is in a family relationship with the child (including godparents), submits a statement that he is not held criminally liable. The responsibility for the accuracy of the information provided to the children's affairs service regarding the absence of a criminal record rests with the guardians or custodians.

On September 10, 2022, the government again made changes to the Procedure for proceedings by guardianship authorities in activities related to the protection of children's rights[19], namely, *the grounds for granting the status of an orphan child or child deprived of parental care, and the grounds for losing such status* were expanded. In accordance with the changes made, the status of a child deprived of parental care is granted, in particular, to children whose parents do not fulfill their duties to raise and support the child for reasons that cannot be ascertained in connection with the parents' stay in an occupied territory

16 Poryadok provadzhennya organamy opiky ta pikluvannya diyalnosti, povyazanoyi iz zahystom prav dytyny, zatverdzhenyy Postanovoyu Kabinetu Ministriv Ukrayiny, The Procedure for the proceedings of guardianship authorities in activities related to the protection of children's rights, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 866 of 24.09.2008 <https://zakon.rada.gov.ua/laws/show/866-2008-п#Text> accessed 15 October 2022.

17 Simeynyy kodeks Ukrayiny, *Family Code of Ukraine*, No. 2947-III of 10.01.2002, VVR 2002, No. 21-22, p. 135.

18 Poryadok provadzhennya organamy opiky ta pikluvannya diyalnosti, povyazanoyi iz zahystom prav dytyny, zatverdzhenyy Postanovoyu Kabinetu Ministriv Ukrayiny, The Procedure for the proceedings of guardianship authorities in activities related to the protection of children's rights, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 866 of 24.09.2008 <https://zakon.rada.gov.ua/laws/show/866-2008-п#Text> accessed 15 October 2022.

19 Postanova Kabinetu Ministriv Ukrayiny pro vnesennya zmin do Poryadku provadzhennya organamy opiky ta pikluvannya diyalnosti, povyazanoyi iz zahystom prav dytyny, Resolution of the Cabinet of Ministers of Ukraine No. 1013 of 10.09.2022 'On Amendments to the Procedure for the proceedings of guardianship authorities in activities related to the protection of children's rights' <https://zakon.rada.gov.ua/laws/show/1013-2022-п#Text> accessed 15 October 2022.

or where active hostilities are conducted, which is confirmed by an act drawn up by the children's affairs service. After the termination or abolition of martial law, the child's status must be confirmed or denied on the basis of documents provided for by law.

Orphans and children deprived of parental care, by the decision of the body of guardianship and care at the place of stay (evacuation) or detection of such a child, may be placed in another foster family or family-type orphanage under guardianship or care in the event that their legal representatives do not fulfill their responsibilities for raising and maintaining a child for the following reasons:

- the presence of legal representatives in territories located in the area of military (combat) operations, temporarily occupied or encircled (blockaded) territory
- are wanted as missing or recognised as missing under special circumstances
- are prisoners of war (held captive by the aggressor state)
- are deprived of personal freedom (detained, taken hostage) by the authorities of the aggressor state (occupation administrations and armed formations)

Such an arrangement takes place until such legal representatives are able to fulfill their responsibilities for the upbringing and maintenance of the child.

In cases of orphans and children deprived of parental care placed under guardianship or care with persons who are family or family relations (including godparents), a training course on raising such children in the center of social services is not required[20].

In addition, the Cabinet of Ministers determined *grounds for termination of guardianship and care* by legal representatives of orphans and children deprived of parental care. In particular, if the legal representatives refuse the mandatory evacuation of orphans, children deprived of parental care, guardianship or care of such children shall be terminated. Guardianship bodies can unilaterally terminate agreements on the placement of such children in a foster family on the organisation of a suitable family-type orphanage and the patronage of such a child[21].

During martial law, 1) children who are in difficult life circumstances, 2) children who were left without parental care, 3) orphaned children and 4) children deprived of parental care who live or are enrolled in institutions of various types and forms of ownership and subordination for round-the-clock stay, can be temporarily arranged in other institutions, where children are provided for round-the-clock stay, or in settlements where it is possible to ensure the safety of children, taking into account their age and state of health[22]. Thus, the issue of temporary placement of children identified by guardianship and guardianship

20 Postanova Kabinetu Ministriv Ukrayiny pro vnesennya zmin do Poryadku provadzhennya organamy opiky ta pikluvannya diyalnosti, povyazanoyi iz zahystom prav dytyny, Resolution of the Cabinet of Ministers of Ukraine No. 1013 of 10.09.2022 'On Amendments to the Procedure for the proceedings of guardianship authorities in activities related to the protection of children's rights' <https://zakon.rada.gov.ua/laws/show/1013-2022-п#Text> accessed 15 October 2022.

21 Postanova Kabinetu Ministriv Ukrayiny pro vnesennya zmin do deyakyh postanov Kabinetu Ministriv Ukrayiny shchodo udoskonalennya mehanizmu provedennya evakuaciyi, Resolution of the Cabinet of Ministers of Ukraine No. 940 of 23.08.2022 'On Amendments to Certain Resolutions of the Cabinet of Ministers of Ukraine Regarding Improvement of the Mechanism of Evacuation' <https://zakon.rada.gov.ua/laws/show/940-2022-п#Text> accessed 15 October 2022.

22 Postanova Kabinetu Ministriv Ukrayiny pro vnesennya zmin do Poryadku provadzhennya organamy opiky ta pikluvannya diyalnosti, povyazanoyi iz zahystom prav dytyny, Resolution of the Cabinet of Ministers of Ukraine No. 1013 of 10.09.2022 'On Amendments to the Procedure for the proceedings of guardianship authorities in activities related to the protection of children's rights' <https://zakon.rada.gov.ua/laws/show/1013-2022-п#Text> accessed 15 October 2022.

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authorities and in need of such placement is resolved. As we can see, the legislation provides for a fairly wide list of alternatives to adoption, which allows the needs and protection of the interests of the child to be ensured.

3.8 Procedure for trial of adoption cases

Adoption in Ukraine is carried out on the basis of a court decision[23]. Martial law was not the reason for the creation of exceptions to this rule. Trial of adoption cases takes place in the order of a separate proceeding. Peculiarities of judicial proceedings regarding this category of cases are defined in the Civil Procedure Code of Ukraine. The existing procedure for trial of adoption cases has not undergone any changes since the beginning of Russia's full-scale war against Ukraine. All adoption cases initiated before the introduction of martial law in Ukraine, as well as court proceedings which were already opened during the period of martial law, are considered by the courts in the order of separate proceedings according to the standard rules established for this category of cases. The end of the adoption process is the adoption of a decision on the case by the court.

As of today, according to information received from the official state web portal "Unified State Register of Court Decisions", in the period from February 24 to October 15, 2022, 773 cases of adoption by citizens of Ukraine living in Ukraine and 35 cases of adoption either by citizens of Ukraine living outside the territory of Ukraine or by foreigners were considered and decisions were made[24]. In 447 out of 773 cases and 21 out of 35 cases, information is prohibited for publication, as the case was considered in a closed court session in order to ensure the secrecy of adoption in accordance with the Resolution of the Verkhovna Rada of Ukraine «On Access to Court Decisions»[25]. Out of 371 adoption cases by Ukrainian citizens living on the territory of Ukraine, the decisions of which are published in the Unified State Register of Court Decisions, *only 7 cases* were considered in the mode of video conference, the rest in closed or open court sessions in the courtroom. Similarly, *7 cases* of adoption by Ukrainian citizens living outside Ukraine or foreigners were considered in the video conference mode. This is an indicator of the fact that, despite the ongoing war, courts in Ukraine are functioning normally where possible.

Among the foreign adopters, according to open information from the Unified State Register of Court Decisions, were citizens of the Republic of Italy (8 cases), citizens of the United States (6 cases), citizens of the Czech Republic (1 case), and citizens of the Federal Republic of Germany (1 case).

It should also be noted that decisions in adoption cases made between February 24 and November 13, 2022, were never appealed.

3.9 National control mechanisms for displaced children

Within the scope of the research topic, it is also necessary to mention the state control mechanisms for displaced children within and outside of Ukraine. In accordance with the Procedure for the proceedings of guardianship and guardianship authorities in activities related to the protection of children's rights during a state of emergency or war in Ukraine,

23 Simeynyy kodeks Ukrayiny, Family Code of Ukraine, No. 2947-III of 10.01.2002, VVR 2002, No. 21-22, p. 135.

24 *Yedynyy derzhavnyy reyestr sudovyh rishen*, Unified State Register of Court Decisions <https://reyestr.court.gov.ua/Page/52> accessed 15 October 2022.

25 Zakon Ukrayiny pro dostup do sudovyh rishen, Resolution of the Verkhovna Rada of Ukraine No. 3262-IV of 22.12.2005 'On the access to court decisions' VVR 2006, No. 15, p. 128.

entries of orphans; children deprived of parental care; children raised in foster families who are also ensured educators; and children who do not belong to the previously listed categories and are enrolled in institutions of various forms of education, and who are temporarily relocated (evacuated) on the territory of Ukraine where hostilities are not taking place, or outside of Ukraine. Such control is carried out by the children's affairs services of the regional and Kyiv city military administrations according to the place of origin, residence (stay) of children before temporary transfer (evacuation), and location of the institution in which they lived or were enrolled for a 24-hour stay. In the event that such services for children are unable to ensure the registration of a child in connection with hostilities, the registration of the child is carried out by the service for children's affairs at the place of temporary relocation (evacuation) of the child with the note «child from another region». In some cases, accounting can be carried out by the National Social Service Service of Ukraine[26].

Today, the issue of control over illegally deported children from the areas of military (combat) operations and temporarily occupied territories of Ukraine is painful. For this purpose, the Ministry of Social Policy of Ukraine has developed a special algorithm for interaction and exchange of information regarding children who were illegally deported from areas of military (combat) operations or temporarily occupied territories of Ukraine to the Russian Federation and illegally relocated to the occupied territories of Luhansk, Donetsk Oblasts and Crimea AR. Within this algorithm, a number of state authorities, in particular, the Ministry of Internal Affairs of Ukraine, the Office of the Prosecutor General, the National Police of Ukraine, the Advisor to the President of Ukraine on Children's Rights and Child Rehabilitation, the Human Rights Commissioner of the Verkhovna Rada of Ukraine, the National Information Bureau, and the National Social Service of Ukraine interact with each other, process, generalise, verify and check the facts of deportation and illegal movement of children. In accordance with the established procedures for coordination of foreign policy activities of the state, the National Information Bureau transmits the processed information to the International Committee of the Red Cross. The Ministry of Foreign Affairs of Ukraine must be constantly informed about all processes of international cooperation regarding the control of illegally deported and displaced children and their return[27].

3.10 Foreign experience regarding the problem of "children of war"

Unfortunately, this is not the first time we have faced the problem of "children of war" in modern history. Children in Syria, Georgia (in particular, Abkhazia and South Ossetia), Yugoslavia, Iraq, and Israel had a similar experience at different times.

During the decade of civil war in Syria, 28,000 children died, more than 800,000 became orphans and semi-orphans, and millions became refugees[28]. Young Syrians who lost their parents during the war live in orphanages on the territory of Turkey and Syria. In Turkey, the

26 Poryadok provadzhennya organamy opiky ta pikluvannya diyalnosti, povyazanoyi iz zahystom prav dytyny, zatverdzhenyy Postanovoyu Kabinetu Ministriv Ukrayiny, The Procedure for the proceedings of guardianship authorities in activities related to the protection of children's rights, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 866 of 24.09.2008, <https://zakon.rada.gov.ua/laws/show/866-2008-п#Text> accessed 15 October 2022.

27 *Informatsiya shchodo zabezpechennya prav ditey v umovah viyny* 'Information on ensuring the rights of children in wartime' (2022) <https://ukurier.gov.ua/uk/articles/informaciya-shodo-zabezpechennya-prav-ditej-v-umov/#:~:text=Станом%20на%2001.09.2022%20вже,виховуються%20в%20сімейних%20формах%20виховання> accessed 15 October 2022.

28 Samchuk, T., *Yak dolaly syritstvo i bezprytulnist pislya dvoh svitovyh voyen* 'How orphanhood and homelessness were overcome after two world wars' (2022) <https://media.zagoriy.foundation/velyka-istoriya/vtrachene-dytynstvo-yak-dolaly-syritstvo-i-bezprytulnist-pislya-dvoh-svitovyh-voyen/#:~:text=Упродовж%20десятиліття%20громадянської%20війни%20у,та%20напівсиротами%2C%20мільйони%20—%20біженцями> accessed 15 October 2022.

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practice of caring for Syrian orphans and children deprived of parental care by volunteers and the provision of humanitarian funds is widespread[29]. Volunteers usually reimburse the costs of housing rent for orphans and provide them with food and moral and psychological support. Millions of children became forced refugees in Yugoslavia during the 1990s and in Georgia during the events of 1992-1993 and 2008, and illegal deportation of children was also established.

Another option for solving the problem of orphanhood arose after the Second World War and is successfully functioning in countries in Europe, America, Asia and Africa[30]. This is the activity of the international federation of charitable non-governmental organisations SOS Children`s Villages International (SOS Kinderdorf). A member of this federation operates in Ukraine - the charitable non-governmental organization "SOS Children's Villages". A network of these organisations works for the prevention of orphanhood, the development of family forms of education for children deprived of parental care, and support for youth who leave care. The ideologue and founder of SOS Kinderdorf was the Austrian Hermann Gmeiner, who argued that for orphaned children it is necessary to create an environment that is as similar to a family as possible. The idea of the organisation is that children in such towns are not isolated from society - they attend school together with all other children, can freely move around the town, play with other children or do household chores. Over a long period of time, this model of children's towns was able to prove its effectiveness as a good alternative for raising children in conditions as close as possible to family ones.

4 CONCLUSIONS

Having studied the above changes in the national legislation regarding the adoption procedure, it can be concluded that the adoption procedure in conditions of the military aggression of the Russian Federation will continue to follow the standard procedure, without simplifying or complicating this process. However, it is logical that due to the objective realities caused by the war and the occupation of part of the territory of Ukraine, the procedures related to adoption activities required changes that would regulate auxiliary accompanying issues that contribute to the implementation of the adoption process during martial law. These can be summarised as follows.

One of the first changes was to settle the issue of reunification of adoptive parents and a child who was adopted before the introduction of martial law and who was temporarily evacuated abroad until the moment of reunification. For this, the Cabinet of Ministers defined a special procedure and established it at the regulatory level.

The possibility of adopting children was determined depending on their place of stay. First of all, it is emphasised that children who were temporarily relocated (evacuated) outside of Ukraine can be adopted only after their return to Ukraine, and children who are in the war zone and occupied territories cannot be adopted.

The registration of candidates for adoptive parents and children who can be adopted was adapted to territorial changes of the place of residence or stay of these categories. In addition, the requirements for the submitted documents were eased (in particular, regarding

29 Zhinochyy Konsorcium Ukrayiny, *Za chas viyny v Syriyi 600 tysyach ditey staly syrotamy* 'During the war in Syria, 600,000 children became orphans' (2016). <https://wcu-network.org.ua/ua/Zaxist_prav_dtei/news/Za_chas_vini_v_Siri_600_tisjach_dtei_stali_sirotami> accessed 15 October 2022.

30 Samchuk, T., *Yak dolaly syritstvo i bezprytulnist pislya dvoh svitovyh voyen* 'How orphanhood and homelessness were overcome after two world wars' (2022) <https://media.zagoriy.foundation/velyka-istoriya/vtrachene-dytynstvo-yak-dolaly-syritstvo-i-bezprytulnist-pislya-dvoh-svitovyh-voyen/#:~:text=Упродовж%20десятиліття%20громадянської%20війни%20у,та%20напівсиротами%2C%20мільйони%20—%20біженцями accessed> 15 October 2022.

the certificate of no criminal record for some candidates for guardians, custodians), the possibility of applying for the status of a candidate for adopter through Diya was digitized, the validity period of the documents of a candidate for adopter was extended, and cases of the possibility of its extension were determined.

The circle of entities that can adopt children during martial law was limited. In particular, a ban has been established on the adoption of children by foreigners and citizens of Ukraine living outside its borders, except for cases when the adoption by these subjects was started before the introduction of martial law, and when these subjects are relatives of the child or have previously adopted his/her siblings.

During the state of war, preference is given to the institution of temporary placement over the institution of adoption due to the impossibility of carrying out the adoption procedure in most cases caused by war. Temporary placement of children left without parental care is carried out in family forms of education - foster families and family-type children's homes.

The list of reasons for acquiring the status of a child deprived of parental care, as well as the reasons for which orphans and children deprived of parental care, who were under guardianship or care, can be temporarily placed in family forms of education, was supplemented. Also, special grounds and procedures were established for termination of guardianship and care in case of refusal of legal representatives of orphans and children deprived of parental care from mandatory evacuation.

During martial law, no changes were made to the judicial procedure for consideration of adoption cases. Court consideration of adoption cases will be carried out in the order of a separate proceeding, taking into account the peculiarities of this category of cases defined by the Civil Procedure Code.

During martial law, a large number of children were moved from the territory of Ukraine in various ways (evacuation or illegal deportation). These children are monitored by state bodies in cooperation with international institutions in ways determined by approved procedures and developed algorithms.

The issue is simple: civilised society depends on a high level of social protection of children. The protection of orphans and children deprived of parental care is one of the most urgent problems to be solved during the conditions of martial law in Ukraine, as we are talking about processes on which the future of the Ukrainian nation depends.

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Case Note

DEATH PENALTY IN SO-CALLED DONETSK AND LUHANSK PEOPLES REPUBLICS: ARBITRARY EXCESSES OF PRO-RUSSIAN REBELS OR "BACK TO THE SOURCES"?

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ABSTRACT

The article raises the issue of formal "justification" and direct practice of the death penalty in certain areas of Donetsk and Luhansk regions (hereinafter ORDLO) of Ukraine affected by the uprising and subjected to Russian aggression. The first cases of executions of Ukrainian patriots by rebels and their Russian curators (Igor Girkin, Arseniy Pavlov (Motorola), etc.) date back to April 2014. The massacres were carried out mainly out of court – on the orders of field commanders. However, collective courts were seldom held for propaganda purposes, where "saboteurs" and banal marauders and rapists were sentenced by show of hands. In August 2014, the so-called "Criminal Code" was "enacted", Article 58 of which established the death penalty for "especially serious crimes" without specifying their list. Instead, life imprisonment officially became the highest punishment in the self-proclaimed neighbouring Luhansk People's Republic. At the same time, the leadership of both "republics" announced that the current legislation of the Russian Federation is taken as the basis of their criminal legislation. Instead, death sentences are handed down and enforced de facto out of court in both the DPR and the LPR. This practice of dividing death sentences into relatively small de jure and mass ones, de facto uncontrolled sentences (by decision of field commanders or security officials), has been characteristic of Soviet practice since the dawn of the 20th century – late 1917 to be precise. The concern of global human rights structures with the issues of observance of the fundamental human right – the right to life – in the ORDLO was reflected in a special Report of the Office of the UN High Commissioner for Human Rights (2020). It is noted that the death penalty is maintained in temporarily occupied territories, and sentences are handed down and enforced.

1 INTRODUCTION

Examination of the "legislation" of the self-proclaimed Donetsk People's Republic and Luhansk People's Republic remains something of a taboo in the scientific thought of domestic researchers. These pseudo-state formations have been unconstitutional from the very beginning of their existence, therefore illegitimate, therefore illegal, etc., with all the attendant consequences for the academic scientist (however, unfortunately, the author of this scientific research does not have access to classified publications in special editions of services of Ministry of Internal Affairs and Security Service of Ukraine). There is nothing special to investigate here because it is not a "law" in its classical sense but the pseudo-legal efforts of the marginalized.

Even in the USSR, where official political doctrine and related scientific thought considered an organized crime ("thieves in law") to be absolute marginals and "cursed heritage" of the previous era, law enforcement officers-professionals were actively investigating the ideology and customary norms (so-called ***ponyatiya*** – concepts) of the criminal world. These studies had already been widely disseminated at the beginning of the 1990s. The practical value of such research surpassed the forced need for the scientist to actively "dig in the shit" of criminal society and its ideological statements, as well as theoretical justifications of "**ponyatiya**".

Without claiming the specific scientific novelty of the historical and legal research proposed to the reader's attention, we insist on its certain practical importance. We hope that the results of this scientific research will be compelling not only for the domestic reader but also to the world community, interested in eliminating as soon as possible the threats to peace created by Russia's aggression against Ukraine in 2014. It is interesting to consider and understand how and why the death penalty appeared in the criminal «legislation» of the self-proclaimed republics and how much of its roots lie in Soviet law. Where else, apart from the

self-proclaimed republics of the post-Soviet space, the death penalty remains, and for which criminal acts is it envisaged?

We think that the possibility of using the death penalty in the rebel-held regions of South-Eastern Ukraine can be explained by a constellation of reasons. First, it is an attempt to appeal to public opinion of the population. For example, in the neighbouring Russian Federation in 2021, about 41% of the population considers as possible to use the death penalty for several crimes, such as rape of minor, serial murders, terrorism and coup preparation, premeditated murders, drug trafficking (41% of Russians are not against the reintroduction of the capital punishment – poll, 2021). Another factor that works on the popularity of the death penalty in the rebel-held region is propaganda. Waging war against Ukraine, the rebels impose on marginalized groups the stereotype of "punisher", a criminal in uniform. Moreover, the war zone often becomes a place of various criminal offences – murders, robberies, rapes (including rapes of minors), etc. To absolve themselves from responsibility for this state of affairs and their inaction, the leadership of the self-proclaimed republics demonstrates uncompromisingness by demanding that criminals be punished "under the laws of war".

Repeated statements were made in the Donetsk People's Republic about the need to practice the death penalty, including in the fight against economic crimes (O. Zakharchenko in July 2017). The so-called DPR prosecutors demanded using the death penalty in sentencing Ukrainian patriots (E. Chudnetsov's trial). However, real death sentences and their execution were relatively infrequent[1]. In Luhansk People's Republic, death sentences have not been officially handed down by courts in recent years[2], as this is not provided for by the "legislation" of the quasi-state. Finally, the influences of the Soviet past and the legislative norms of the neighbouring Russian Federation and the Republic of Belarus on the "legislation" of the ORDLO (Separate districts of Donetsk and Lugansk regions) cannot be written off.

Even in Ecclesiastes, we find an indisputable opinion: "9. What was, it will be, and what was done, it will be done – and there is nothing new under the sun! … 10. Sometimes people say about him: "Look, this is [something] new!". But it has been since the ages before us!"[3].

For all reasons, it would be interesting to see how the so-called law of the so-called "People's Republics" exists an independent phenomenon, and so – a kind of legal tracing of repressive legislation (legal terror) of Soviet Russia and its practical application.

We suggest that the ideology, morality and law of the so-called DPR and LPR are not an independent phenomenon and, therefore, not original, and we will try to prove and scientifically substantiate this assumption. Moreover, we believe that the ideologists and "jurists" of ORDLO are deliberately copying Soviet models, particularly in the general approaches and legal constructions generated by them. This is done in part by giving appeals to its electoral base – the so-called "ohlos", which are always present in all countries, without exception, from the ultra-totalitarian DPRK to the exemplary democratic United States, and partly from the poverty of their scientific thought, represented primarily by "narrow" practices of law enforcement agencies rather than conceptual legal theorists. In a matter of brevity, we will limit ourselves to only one, essentially narrow, issue – the maximum penalty, in the realities of ORDLO – the death penalty (or life imprisonment).

1 DPR terrorists have decided to impose the death penalty in the occupied territories (2014) 24 Channel <https://news.24tv.ua/teroristi_dnr_virishili_zaprovaditi_smertnu_karu_na_zahoplenih_teritoriyah_n521251> date of access 15 Aug 2022.

2 O Stryzhova, 'The 'DPR' grouping allowed the death penalty, and the 'LPR' punishes with life imprisonment' (2016) Radio Svoboda <https://www.radiosvoboda.org/a/27825663.html> accessed 15 August 2022.

3 *The Bible or the Scriptures of the Old and New Testaments* (Publication of the Moscow Patriarchate 1988).

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We have a sufficient amount of empirical material on ORDLO (most of it, to some extent, is used in the proposed attention of the reader to scientific intelligence). Instead, the systematization of this empirical material and certain theoretical generalizations or attempts at comparative law studies in domestic and world scientific thought have not yet been identified.

In turn, historical and legal works on the introduction and application of the death penalty in the USSR, including theoretical developments, are so numerous (K. Kautsky[4], S. Melgunov[5], A. Terne[6], O Solzhenitsyn[7] etc.) that to mention some of them - by the inevitable default of many others – we consider unacceptable.

2 DEATH PENALTY OFFICIAL "LEGALIZATION" IN DPR AS A STEP BACK TO THE USSR

The death penalty in temporarily occupied territories was officially established by Article 58 of the so-called Criminal Code (Criminal Code of the Donetsk People's Republic, 2014). Donetsk People's Republic in August 2014, i.e., less than six months after the uprising (we wonder if the drafters of the "code" knew about the infamous Article 58 of the Criminal Code of the RSFSR from the Stalin era, which provided punishment for various types of "counter-revolutionary" crimes? – Author).

Quotes in the original language (Russian) translated into English:

> "1. The death penalty, as an exceptional measure of punishment, may be imposed only for particularly serious crimes against life, as well as for certain crimes committed in wartime or combat situation.
>
> 2. The death penalty shall not be imposed on women, as well as on persons who have committed crimes before the age of eighteen and on men who have reached the age of sixty-five by the time the court is sentenced.
>
> 3. The death penalty shall not be imposed on a person extradited to the Donetsk People's Republic by a foreign state in accordance with an international treaty of the Donetsk People's Republic or on the basis of reciprocity unless in accordance with the law of the extraditing foreign state-provided or non-application of the death penalty is a condition of extradition, or the death penalty may not be imposed on him on other grounds.
>
> 3. (So, in the text of the document, where paragraph 3 is repeated twice. – Author. The death penalty by pardon may be replaced by life imprisonment or imprisonment for a term of twenty-five years"[8].

In Soviet Russia, the official "legalization" of the death penalty was somewhat slower than in the DNR, but with the same uncertainty as to the *corpus delicti* as in paragraph 1 of Article 58 of the DNR Criminal Code. Created by the Second All-Russian Congress of Soviets (where the so-called Soviet power was officially proclaimed), the Sovnark announced in one of the first orders of October 26, 1917, the abolition of the death penalty – to implement the decision

4 K Kautsky, *Terrorism and communism* (J. Ladyschnikow Verlag G.m.b.H. 1919).

5 S P Melgunov, *The red terror in Russia* (PUIKO 1990).

6 A M Terne, 'In the kingdom of Lenin: Essays of modern life in R.S.F.S.R' (1922). <https://topknig.pro/nauka-i-obrazovanie/chelovek/73415-v-tsarstve-lenina-ocherki-sovremennoy-zhizni-v-rsfsr.html> accessed 15 August 2022.

7 AI Solzhenitsyn, 'The Gulag Archipelago' (1973) <https://librebook.me/arhipelag_gulag> date of access 15 Aug 2022.

8 O Stryzhova, 'The 'DPR' grouping allowed the death penalty, and the 'LPR' punishes with life imprisonment' (2016) Radio Svoboda <https://www.radiosvoboda.org/a/27825663.html> date of access 15 Aug 2022.

of the Congress[9]. According to some scholars, the first official death sentence in Soviet Russia was announced on June 21, 1918 (a little more than six months after the October coup. – Auth.) against the commander of the Baltic Navy A. Shchastny. A. Shchastny was tried in the Kremlin, and his pre-trial detention cell was located in the next room to Ulyanov-Lenin's office. The defendant was charged with counter-revolutionary agitation, connivance in the navy, non-compliance with the orders of the Soviet government and its systematic discretion in the eyes of sailors. "After a 5-hour (Note it – the Authors.) Meeting, the members of the tribunal found it proven that "Happy" consciously and openly prepared the preconditions for a counter-revolutionary coup d'etat". However, long before June 1918, the death penalty was applied de facto out of court.

Already in February 1918, the announcement of the All-Russian Emergency Commission (VCHK), which was published in the press, warned that all "(…) counter-revolutionary agitators (…) all fleeing to the Don to join the counter-revolutionary troops (…) would be mercilessly shot by commission units ... at the scene of the crime"[10]. The scientific literature often mentions the mass fusillade in Kyiv by Muravyov's Red troops after Central Rada had left the city (February 1918). A similar situation took place at that time in other cities of the former Russian Empire. S.P. Melgunov points to the so-called revolutionary creativity of the masses: "It is characteristic that orders to execute are issued not only by the central body but by all sorts of revolutionary committees: in Vyatka "for leaving home after 8 o'clock"; in Bryansk for drunkenness; in Rybinsk – for congestion on the streets and at the same time "without warning"[11]. On July 16, 1918, the NKVD of the RSFSR pointed out that the revolutionary tribunals were not bound by restrictions in choosing measures to combat counterrevolution, sabotage, and others[12]. The famous decree on the Red Terror of September 5, 1918, established that: "all persons involved (to the White Guard organizations, conspiracies and riots (…)) are subject to execution"[13]. In June 1919, the German Social Democrat K. Kautsky pointed out the following: "Revolutionary tribunals and emergency commissions were the creatures of terror. Both of them ruled terribly, not to mention punitive expeditions, the number of which cannot be established. Furthermore, the number of "extraordinary" people who died at their hands is unlikely ever to be found. In any case, it reaches thousands. The minimum statistic identifies them at 6,000. Some indicate twice, even three times that number. In addition, an infinite number of people are thrown arbitrarily into dungeons, tortured to death and executed"[14]. Disagreeing with the digital calculations of the German theorist of the social democratic idea (they seem understated to us), we agree that the bulk of the victims of the Red Terror were those who fell under the flywheel of extrajudicial repression of the Cheka and various "revolutionary tribunals". Essentially, these were bodies of the political massacre, not justice.

In the "Basic Principles", as well as in the Criminal Code of the RSFSR in 1922, note 2 to Article 13, we may find that "temporarily, as the highest measure of social protection, until its complete abolition, the Central Executive Committee of the USSR is to combat the most serious crimes, threatening the foundations of Soviet power and the Soviet system, [herewith]

9 The newspaper of the Provisional Workers and Peasants Government (1917) <http://nlr.ru/res/inv/ukazat55/kw_records.php?kw_s=газета%20временного%20рабочего%20и%20крестьянского%20правительства%20петроград&ids=130387&kw_t=ГАЗЕТА%20ВРЕМЕННОГО%20РАБОЧЕГО%20И%20КРЕСТЬЯНСКОГО%20ПРАВИТЕЛЬСТВА%20(Петроград)> date of access 15 Aug 2022.

10 The first death sentence in Soviet Russia. (2013). Pravo.ru. https://pravo.ru/process/view/95518/ date of access 15 Aug 2022.

11 Izvestia on 1918 year. No 27. (1918). <http://nlr.ru/res/inv/ukazat55/record_full.php?record_ID=181482 > date of access 15 Aug 2022.

12 ibid, 8

13 *Criminal law* (Legal publishing house of the Ministry of Justice of the USSR 1948).

14 Collections of legalizations and orders of the Workers' and Peasants' Government (1918). <https://www.prlib.ru/item/728927> date of access 15 Aug 2022.

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execution is allowed". The authors of the Soviet textbook on Criminal Law[15] stated in this regard the following: "As we can deduct from this wording, the scope of the application of capital punishment was limited to only the most serious types of crimes. In addition, the fusillade was not allowed for those under eighteen and women who were pregnant" (Part 3, Note 2 to Article 1)[16]. As a modern Russian source points out: "From 1920 to 1950, maximum sentences were imposed for various crimes: concluding unprofitable contracts, passing an unjust sentence, illegal detention, receiving a bribe, mismanagement of labour in wartime, non-fulfilment of contractual obligations, theft from state warehouses..."[17].

It is immediately obvious that the so-called anonymous legislator followed the same path. Donetsk People's Republic. Complete blurring in the question of the composition of the crime punishable by the death of a "criminal" – as we will see in the future, will lead to new steps in intensifying criminal repression. And not only in the Stalinist Union of the USSR but also in the newly formed DPR.

The rhetoric with which the leaders of the October 1917 coup d'etat of 1917 and the uprising in eastern Ukraine in 2014 "justified" the death penalty turned out to be very similar.

3 DEATH PENALTY AS THE HIGHEST DEGREE OF SOCIAL PROTECTION OR A DUTY TO PROTECT THE PEOPLE?

The press service of the self-proclaimed DPR on the introduction of the Criminal Code on Sunday, August 17, 2014, stated that "at the first meeting (so-called - Author) of the Presidium of the DPR Council of Ministers adopted a resolution "On approval of the Criminal Code of the Donetsk People's Republic". The regulatory framework of the Russian Federation is taken as a basis. The DPR Criminal Code provides for the death penalty for particularly serious crimes. "When we end the war, we will follow the path of humanizing our criminal legislation", promised DPR Deputy Prime Minister Oleksandr Karaman. In turn, the First Deputy Prime Minister of the DNR, Volodymyr Antyufeyev explained that "the introduction of the death penalty is not revenge, but the highest degree of social protection, as a duty to protect the people"[18] . In this "Statement", as they say, everything is decent – and already well-known to domestic historians of law, the infamous term "highest degree of social protection" ("supreme measure of social protection") and the identity of the imposter, and the unsubstantiated promise of a distant, undefined at the time of "humanization" the question of the death penalty. However, the initiative of Donetsk dignitaries to introduce the death penalty was not supported by their Luhansk colleagues, who also referred to "the need to bring their own legislation to the standards of the Russian Federation."[19].

At the same time, both self-proclaimed "republics" emphasized[20] that the main reference point for them is the (modern) Russian legislation. In particular, this was announced at the end of 2014 by the chairman of the so-called People's Council of Luhansk People's Republic, Oleksiy Karyakin: "Yes, we are adapting to Russian legislation. Because Russia supports us

15 Ibid, 17

16 Ibid, 4

17 The death penalty: from the USSR to modern Russia (2018) Pravo.RU <https://pravo.ru/story/206498/> date of access 15 Aug 2022.

18 Ibid, 17

19 The DPR's leader Zakharchenko has announced his intention to introduce the death penalty for corruption (2017) GordonUA. <https://gordonua.com/ukr/news/war/-zaharchenko-zajaviv-pro-namir-vvesti-v-dnr-smertnu-karu-za-koruptsiju-200638.html> date of access 15 Aug 2022.

20 DPR militants have introduced the death penalty – UN report (2020) GordonUA. <https://gordonua.com/ukr/news/society/bojoviki-dnr-vveli-smertnu-karu-dopovid-oon-1515648.html> date of access 15 Aug 2022.

and because, at the same time, we understand that living with Ukraine will be difficult for us. But this does not mean we blindly copy these documents - we take the best we have, both in the Russian Federation and in such republics as Belarus and Crimea" (marked by the Authors)[21]. It is known that since August 1996, in the Russian Federation, death sentences have not been executed owing to a moratorium. However, the death penalty has not been abolished by law in this country, and only the aforesaid moratorium has been imposed on it.

Under the new Criminal Code, which entered into force in January 1997, the list of offences punishable by death has been reduced from 27 to 5:

Article 105, part 2 – murder under aggravating circumstances;

Article 277 – encroachment on the life of a statesman and public figure:

Article 295 – encroachment on the life of a person administering justice or a preliminary investigation;

Article 317 – encroachment on the life of a law enforcement officer:

Article 357 – genocide[22].

Here we will briefly point out that the moratorium on the death penalty in the Russian Federation does not mean its actual legislative abolition, which senior Russian officials constantly emphasize. In particular, the head of the Investigative Committee of the Russian Federation, Alexander Bastrykin, said in October 2017 that the moratorium on the death penalty in Russia could be lifted only on the basis of a referendum. In his opinion, in this case, "this measure of punishment should be applied in exceptional cases"[23].

It should be noted that of the 15 republics of the former USSR, 12 abolished the death penalty by law. Azerbaijan, Armenia, Estonia and Lithuania were the first to do so in 1998, followed by Turkmenistan in 1999, Ukraine in 2000 (after the decision of the Constitutional Court of Ukraine of December 29, 1999), Moldova in 2005, Kyrgyzstan in 2007, Uzbekistan in 2008, Latvia in 2012[24]. In 2021 death penalty was abandoned in Kazakhstan[25]. Currently, the criminal legislation for capital punishment is prescribed in two former union republics only: Russia (moratorium) and Belarus.

The current national constitution of Belarus provides this punishment for particularly serious crimes (atrocity crimes). Subsequent laws have specified the crimes for which the death penalty may be used. The death penalty can be imposed for crimes committed against the state or individuals. As of 2020, Belarus is the only country in Europe that uses the death penalty as a severest punishment. In 2019, at least two death sentences were carried out[26]. The last death sentence in this country was handed down in 2021. On January 15 2021[27].,

21 The DPR have imposed the death penalty. The militants approved their Criminal Code (2018) LB.UA <https://lb.ua/news/2014/08/18/276497_dnr_vveli_smertnuyu_kazn.html> date of access 15 Aug 2022.

22 Criminal Code of the Russian Federation (1996) <http://www.consultant.ru/document/cons_doc_LAW_10699/> date of access 15 Aug 2022.

23 Russia has noted a condition for lifting the moratorium on the death penalty (2017) RBK Ukraine <https://www.rbc.ua/ukr/news/rossii-nazvali-uslovie-otmeny-moratoriya-1507992021.html> date of access 15 Aug 2022.

24 D V Skrynka, 'The death penalty' L.V. Gubersky (Ed.), *Ukrainian diplomatic encyclopedia: in 2 volumes* (Znannia Ukrainy 2004).

25 A Sheremet, 'The death penalty has been officially abolished in Kazakhstan. Babel' (2021) <https://babel.ua/news/74747-u-kazahstani-oficiyno-skasuvali-smertnu-karu> date of access 15 Aug 2022.

26 Constitution of the Republic of Belarus (1994) <https://pravo.by/pravovaya-informatsiya/normativnye-dokumenty/konstitutsiya-respubliki-belarus/> date of access 15 Aug 2022.

27 The first death sentence in 2021 was handed down in Belarus (2021) Ukrinform <https://www.ukrinform.ua/rubric-world/3171557-u-bilorusi-vinesli-persij-u-2021-roci-smertnij-virok.html> date of access 15 Aug 2022.

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the Minsk Regional Court handed down a verdict against Viktor Skrundik and three other Slutsk residents accused of killing pensioners and an attempt to kill an 85-year-old woman.

In Tajikistan, according to the current Criminal Code, as amended in 2021, the death penalty may be imposed for premeditated murder under aggravating circumstances – Article 104, paragraph 2; rape under aggravating circumstances – Article 138, paragraph 2 and terrorism – Article 179, paragraph 3[28]. Interestingly, the current Criminal Code does not provide for the death penalty for crimes against the state: at least, regarding this, the Asian republic has taken a balanced approach.

So, it is difficult to determine which of them is «more Catholic than the Pope». We can talk about the influence of Lukashenko's Belarus with a stretch; as for the Criminal Code of Tajikistan as amended in 2021 – there are doubts about the fact that anything has been known about it by "lawmakers"-rebels. As we can see, both Donetsk and Luhansk separatists have their own "right" despite some differences in approach. It is difficult to establish which of them is "a bigger papist than a pope."

4 HUMAN RIGHTS VIOLATIONS AND TRAGIC HUMAN TOLL CAUSED BY L / DPR LEADERSHIP

We should denote that passing death sentences in ORDLO, even for especially serious crimes, grossly contradicts norms of international law and the general moods of the world community, which has continued to recognize Ukraine's territorial integrity since the beginning of 2014. As you know, on May 1, 2000, for Ukraine Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty. This Protocol categorically prohibits the application of this measure of punishment: "No one shall be condemned or executed". Since certain districts of Donetsk and Luhansk oblasts, temporarily occupied by the self-proclaimed L / DPR, are an integral part of Ukraine, the death penalty extends to these districts as well, despite terrorist attempts to appeal to Soviet or modern Russian legislation.

In December 2014, the self-proclaimed Donetsk People's Republic announced the gradual introduction of the death penalty in its controlled territories. However, according to the militant's representative O. Khodakovsky, an appropriate legal framework is needed to introduce this type of punishment. O. Khodakovsky did not rule out that the question of the possibility of the official introduction of the death penalty on the territory of the DNR could be brought up for public discussion. He stressed that the death penalty had not yet been used as an official punishment in militant-controlled areas[29].

However, like Soviet Russia in the first months and years of its existence, the death penalty, de jure abolished, was widely used de facto. Uncertainty over the use of the death penalty did not prevent militants. DPR and LPR to carry out extrajudicial killings of Ukrainian patriots – and not only with them. It is enough to name the names of the deputy of the Horlivka city council V.I. Rybak, tortured on the orders of Bezler and Girkin in April 2014[30], or a young football player S. Chubenko[31], who was shot in July of the same year. In a video interview with D. Gordon,

28 Criminal Code of the Republic of Tajikistan (1998) <http://continent-online.com/Document/?doc_id=30397325#pos=8;-144> date of access 15 Aug 2022.

29 DPR terrorists have decided to impose the death penalty in the occupied territories (2014) 24 Channel <https://news.24tv.ua/teroristi_dnr_virishili_zaprovaditi_smertnu_karu_na_zahoplenih_teritoriyah_n521251> date of access 15 Aug 2022.

30 Book of Remembrance of the Dead for Ukraine. Chubenko Stepan Viktorovych (2021) <https://memorybook.org.ua/27/chubenko.htm > date of access 15 Aug 2022.

31 Book of Remembrance of the Dead for Ukraine. Rybak Volodymyr Ivanovych (2021) <https://memorybook.org.ua/20/rybakvol.htm> date of access 15 Aug 2022.

I. Girkin, the Minister of War of the self-proclaimed DNR, admitted that during the fighting in eastern Ukraine in 2014, at his personal order (my selection), at least four Ukrainian citizens were shot dead. He called them "saboteurs" in an interview. Also, on Girkin's order, several "militiamen" of DPR were shot for looting and torturing. He shot one of them personally. "Sometimes we hid without even knowing who", he admitted without the slightest sign of remorse[32].

A report prepared by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in the spring of 2020 stated that armed groups of militants had repeatedly carried out executions in the early stages of the conflict. Illegal formations operating in the self-proclaimed "republics" were conducted by "military tribunals" or "people's courts" to hold demonstrations either without any legal basis or on the basis of the USSR legislation on martial law in force during the Second World War – it was specified in the report. The UN Office stressed that these "trials" led to arbitrary or extrajudicial executions and international human rights law violations. The given OHCHR findings are difficult not only to challenge but also to call into question. In particular, independent journalists identified seven of the nine participants in the executions by militants in Slovyansk[33].

Executions at that time were carried out not only in the DPR (and not only by Igor Girkin and his accomplices) but also in the LPR. Thus, in 2014, the media reported that in the city of Alchevsk, which at that time was already in the uncontrolled territory, the so-called people's court of 300 locals sentenced the accused to rape by a show of hands. It was decided to send another suspect to the "front line" so that he could "die with dignity"[34]. Here we briefly recall that the opportunity to "wash away the blood" conviction from September 1942 to June 1945 was given to those Soviet soldiers and officers who committed criminal offences but expressed readiness to "defend the homeland" on the front line. The maximum period of stay in penal companies and (for officers) in penal battalions was only three months, after which the soldier received a full exemption from criminal punishment and all previously awarded state awards[35]. It should be noted that the death penalty in the territories subject to fake "L / DPR" was carried out not only by verdicts of self-proclaimed courts, including military courts but also by direct orders of "commanders", i.e., avoiding even imitation of court proceedings.

Informed about the real state of affairs in ORDLO (both DNR and LNR), the then (as of May 2018) Deputy Minister for the Temporarily Occupied Territories and Internally Displaced Persons of Ukraine G. Tuka categorically stated that: "in psychopathic "LPR" and "DPR" there is a death penalty"[36].

Obviously, the Deputy Minister means the use of the death penalty by the separatists not only (and not so much!) de jure, but de facto, which, in turn, should be qualified as a common murder. The death penalty is applied according to the verdict of the "court", i.e., following a certain judicial procedure by authorized persons in accordance with the legislation (as in the Republic of Belarus) or its imitation (DPR). In contrast, the execution of a captive, a hostage, an intelligence agent, a partisan, or even a marauder or a rapist out of court by the armed people's will must be qualified as murder with aggravating circumstances, regardless of the fact whether the death penalty is enshrined in the current "legislation" or not.

32 Girkin – to Gordon: On my order, citizens of Ukraine were shot (2020) Radio Svoboda. <https://www.svoboda.org/a/30619397.html > date of access 15 Aug 2022.

33 Ibid, 21

34 Is the death penalty in L/DPR lawful? (2018) DonbasSOS. <https://www.donbasssos.org/smertna_kara/> date of access 15 Aug 2022.

35 Regulations on Penalty Battalions of the Army in the Field (1942) <https://history.wikireading.ru/4030> date of access 15 Aug 2022.

36 G Tuka, 'In the psychopathic "LPR" and "DPR" the death penalty exists' (2019) 5 Channel. <https://www.youtube.com/watch?list=PL5eQ15vxDEVxVGn5t6ME9xN_P0M1bEQ1d&v=-W5ttDnHEB0> date of access 15 Aug 2022.

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The term "exists" has been used by the official now, so it was at least 2018, not the first months of the uprising in the East. This statement of the official was repeatedly confirmed by prisoners of secret prisons of "young independent republics". These cases involved mostly extrajudicial repression. For example, Azov combatant Ye. Chudnetsov, who was released after being exchanged from captivity by militants, said on charges of allegedly repenting on Russian TV: "It was important for me to be on camera. Any otherwise you will become one of those who are considered missing in our country"[37]. However, there have always been infrequent cases of the use of the death penalty by court decisions. Thus, in 2017, a self-proclaimed DPR sentenced a man to death for raping and killing a child. Also, on July 18, 2018, the death sentence was handed down to one of the members of the "Cossacks" formation, which in 2014-2015 was engaged in brutal robberies. According to the Ukrainian human rights' electronic publication, these sentences have been enforced. At the same time, we recognize that the official judicial institutions of the DPR, unlike the self-proclaimed tribunals, generally avoid the death penalty. Probably also because they consider Ukraine's official position and world public opinion. The administration of justice by judges of the self-proclaimed republics qualifies Ukraine as a criminal act. For example, the head of the so-called The Supreme Court of the DPR, E. Yakubovsky, was sentenced in absentia in Ukraine to 12 years in prison for participating in a terrorist organization. He was accused of passing illegal sentences as part of the judicial system of the self-proclaimed DPR, including the passing of death sentences[38].

However, this firm position of the Ukrainian authorities does not mean that the judicial institutions of the regions affected by the cowardly uprising show feigned humanity or some goodwill, as they are trivially afraid of repression for betraying the Ukrainian oath of allegiance. For example, the already mentioned Azov combatant Ye. Chudnetsov, the so-called DNR Supreme Court, sentenced him to 30 years in prison[39]. A native of Makeyevka, he was captured as a prisoner in February 2015. the DPR "prosecutor" demanded the death penalty. The verdict stated that the defendant was sentenced to serve a sentence in a maximum-security colony with loss of rights and all the ensuing consequences for "participation in an attempt to seize power by force" in the territory of the DPR. The "DPR prosecutor" demands the death penalty. Judge "mercifully" gives thirty years of imprisonment in a maximum-security colony.

At the end of July 2017, speaking in the video program of the odious Russian writer Z. Prilepin from "Donetsk Front", the then-leader of the DPR, A. Zakharchenko, said that he already had a decree on the table to introduce the death penalty, if necessary, and corruption will also fall under it, depending on the damage caused by the official to society. Zakharchenko stated that he had a "tough" position on corruption: "It is a disease of any society, a disease of any state, there is no specific recipe for this disease, but the approaches to eradication are, in fact, all their own. I suppose I support a firm position – at one point, I decided to try and imprison these people despite my rank, position and merit before my homeland. I have tightened the laws on corruption, and the punishment will be very severe. We have a decree on introducing the death penalty in case of need; more precisely, it concerns its application. I think that corruption will also fall under it, depending on the damage people (who are at fault) have done to society"[40].

37 N Dvali, 'Ex-hostage of the "DPR" Chudnetsov: Why did they knock out teeth? And what's the point of drilling a knee? They might frighten, but after teeth I had no doubts: if it is needed – they will drill' (2018) GordonUA <https://gordonua.com/publications/eks-zalozhnik-dnr-chudnecov-zachem-zuby-vyryvali-a-kakoy-smysl-kolenku-sverlit-mozhet-pugali-no-posle-zubov-ya-ne-somnevalsya-nado-prosverlyat> date of access 15 Aug 2022.

38 Ibid, 35

39 Ibid, 38

40 Ibid, 20

The video was then posted on the YouTube channel named News-Front. However, for some reason, it did not go beyond populist statements. And a year later, in August 2018, O. Zakharchenko himself passed away, bypassing the courtroom, whose death sentence was passed by an unknown person. Probably, even its Russian curators – for all the same ruthless large-scale corruption.

More than a year has passed since the death of the Donetsk follower of the renewal of the death penalty. The Report of the Office of the United Nations High Commissioner for Human Rights (Spring 2020) states without emotion as follows:

"103. OHCHR is concerned that the Code of Criminal Procedure of the Donetsk People's Republic in its current form leads to an imbalance in favour of "prosecution" in violation of the right to a fair trial. It is important to note that this "legislation" does not provide for judicial control over pre-trial investigation and pre-trial detention, which is decided exclusively by the "prosecutor's office". OHCHR is also concerned that "the Donetsk People's Republic has introduced the death penalty. OHCHR is aware of two cases in which the Donetsk People's Republic "court" sentenced him to death, but as of the date of this report, these sentences had not been carried out. Nevertheless, they continue to be of concern because armed groups had already carried out executions in the early years of the conflict (see paragraph 104 below).

104. Both self-proclaimed "republics" established "local courts" based on the territorial structure of Ukraine's judicial system, which operated in that territory until November 2014.

105. Both self-proclaimed "republics" have taken steps to create a three-tier "judicial system": the "Supreme Court" of the Donetsk People's Republic began functioning on January 9, 2015, the Supreme Court of the Luhansk People's Republic began operating as the Appeal-Cassational court on October 25, 2018.

106. Prior to the establishment of these systems, military formations operating in the self-proclaimed "republics" conducted ad hoc "military tribunals" or "people's courts" to conduct demonstrations either without any legal basis or under the laws of the USSR on martial law, which operated during World War II. These trials have led to arbitrary or extrajudicial executions and other violations of the international human rights law and international humanitarian law" (Office of the United Nations High Commissioner for Human Rights, 2020)"[41].

5 CONCLUSION

The sources of the law of the self-proclaimed "people's republics" (DPR and LPR), including criminal law, are the "legal developments" of the RSFSR and the USSR of the so-called October Revolution, the construction of socialism, and the Great Patriotic War (1941-1945), as well as legislation of the modern Russian Federation.

Application of the death penalty is a rather dangerous practice, especially for the separatists themselves. Even the most orthodox supporter of the so-called "Russian world" could be executed under such sanction. After all, this has already happened in Soviet history – and during the so-called "Great Terror" of 1937–1938, and after Marshal Lawrence Beria, the first (and last) in the state security system of the USSR, was declared an "enemy of the people".

Part of the so-called liberal public democratic world habitually continues to look at the

41 Office of the United Nations High Commissioner for Human Rights. (2020). Human rights in the context of the administration of justice criminal cases related to the conflicts in Ukraine April 2014 - April 2020. <https://ukraine.un.org/sites/default/files/2020-08/Ukraine-admin-justice-conflict-related-cases-ukr_0.pdf> date of access 15 Aug 2022.

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eastern Ukrainian separatists with tolerance because of the European perception of national liberation movements such as the Scottish (UK), Catalan (Spain) or Lombard (Italy). This is not even a bona fide mistake but an outright and often deliberate crime against European identity and commitment to human rights. The legal consciousness of the ORDLO separatists has nothing to do with the European one; its roots are in the Bolshevik terror.

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Opinion Article

THE RECOVERY OF UKRAINE IN THE FIELD OF JUSTICE: CHALLENGES AND PRIORITY GOALS

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ABSTRACT

Background: *Currently in Ukraine, a significant objective is to promote the construction of a peaceable and open society, ensuring access to justice for all. Such a system must be effective, accountable, and based on the broad participation of institutions at all levels. This article highlights some of the priority steps in the recovery of the justice system in Ukraine. Special attention is given to the priority goals and problematic aspects of the functioning of the institutions of the national justice system, given the declared aim of forming a sustainable justice system. Current challenges in the field of national justice, priority goals and appropriate measures for their achievement have all been analysed.*

Methods: *To achieve the goals of the research, general and special scientific research methods were applied, such as comparative-legal and semantic-structural methods and the method of grouping, analysis, synthesis, and generalisation.*

Results and Conclusions: *It has been established that the first priority goal of ensuring proper functioning of the judiciary is structural modernisation and optimisation of judicial authorities, including a comprehensive audit of the powers of bodies and institutions of the justice system in order to eliminate duplication of functions and ensure procedures for the effective use of resources.*

The following were substantiated as risks for achieving such a goal: controversial recognition of the impossibility of the state to be solely responsible for the duration of processes for updating the authorised composition of judicial governance bodies; proposals for the transformation of the system of professional training and professional development of judges; the lack of objective justification for the determination of judicial jurisdiction for the consideration of certain categories of cases; and proposals for recognising the long-term consideration in the parliament of the Draft Law on abolition of the Bar monopoly.

Current trends in the development of functions of advocacy in Ukraine have been highlighted, including selective and inconsistent implementation of bar monopoly on representation of another person in court; restriction of the rights of the Bar self-government bodies in the field of forming judicial corps, extension of the state's control powers advocacy; and the search for an optimal model of governance of the advocacy profession. The key challenges of the prosecutor's office, and priority goals and measures for their achievement, have been highlighted. The possible risks of further reform of this institution due to the disputed constitutionality of its personnel, which were reset as a result of previous priority reform measures, have been emphasised, which may call into question the legitimacy of the new staff of the prosecutor's office and does not allow the assertion of the final completion of these processes.

1 INTRODUCTION

The large-scale armed aggression of the Russian Federation against Ukraine exacerbated existing challenges and caused new issues in the field of judiciary. The attempts to resolve such matters have been reflected in the Draft Plan for the Recovery of Ukraine (hereinafter referred to as the Draft Plan)[1], prepared by the experts of the working group "Justice" of the National Council for the Recovery of Ukraine from the war.

In this document, one of the most important directions of work in the field of judiciary has been defined as bringing the Russian Federation to international legal responsibility for the armed aggression, violation of human rights, and breach of other norms of international

1 Draft Ukraine Recovery Plan <https://uploads-ssl.webflow.com/625d81ec8313622a52e2f031/62dea471331181b583d43ec5_Юстиція.pdf> accessed 2 November 2022.

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law. This requires the formulation of fundamentally new international agreements and the creation of new institutions with the ability to settle existing jurisdictional problems and ensure the principle of inevitability of punishment for the committed offenses.

At the same time, recovery of the work of the High Council of Justice (hereinafter referred to as the HCJ), the High Qualification Commission of Ukrainian Judges (hereinafter referred to as the HQCUJ), and digitisation of the judiciary have all been singled out as priority areas to overcome the consequences of the war, given that judicial reform is one of the main indicators for assessing Ukraine's readiness for integration with the European Union (hereinafter referred to as the EU). In this context, we should be mindful that the European Council granted candidate status to Ukraine at the Summit in Brussels on 23 June 2022 on the condition that Ukraine must first carry out several important reforms, the second priority among which (after the reform of the Constitutional Court of Ukraine) is the completion of the procedure for formation of a new staff of the HQCUJ and the HCJ.

Continuation of the previously initiated reform of the prosecutor's office as a body, focused on the needs of the state and society, is also recognised as a real challenge in the Draft Plan. Attention is focused on the need to eliminate gaps in normative legal acts in order to improve the implementation of constitutional powers by prosecutors.

In the conditions of the post-war recovery of Ukraine, the legal profession is recognised as one of the important guarantors of both observing and ensuring the rights of the citizens, in particular the victims of the consequences of the armed aggression. The key goals in this area are to bring the organisation and activities of the legal profession to the best standards of the Council of Europe countries and the wider international community; guarantee the institutional independence of the legal profession; create favourable conditions for providing effective and high-quality legal aid to war victims; and ensure full access to justice both in Ukraine and abroad.

At the same time, given the controversy, the defined goals, tasks and stages of their achievement require additional research in order to develop effective components of the justice system in Ukraine with the declared goal of forming a sustainable justice system. Currently, one of these goals is to promote the construction of a peaceable and open society, ensure access to justice for all - and make it effective, accountable, and based on the broad participation of institutions at all levels.

2 FAIR, INDEPENDENT AND ACCESSIBLE COURT

2.1 Priority Goals of Judicial Reform

Since the beginning of the war in Ukraine, courts, bodies and institutions in the justice system have faced many serious and large-scale challenges to the point that there is no objective possibility for the proper administration of justice. Such a situation requires immediate and effective decisions. In search of a solution to this problem, the scientific legal literature officially mentions the introduction of the idea of a more flexible approach and wider discretion of the judicial powers, which under such conditions contribute to full human rights protection [2].

The primary task at this stage in the Draft Plan is to restore the work of the HCJ, without an authorised composition of which it is impossible to form the HQCUJ. The latter depends

2 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 237.

on the replenishment of the judicial corps with professional and honest personnel, as well as the Disciplinary Inspectors Service, absence of which leads to the accumulation of disciplinary complaints against the actions of judges that require consideration and adoption of appropriate decisions within the terms specified by law.

Based on the identified problem areas, both priority goals and appropriate measures for their achievement have been agreed upon, including:

- recovery of the full-fledged work of the newly formed HCJ and HQCUJ of Ukraine.
- structural modernisation and optimisation of judicial authorities, including conducting a comprehensive audit of the powers of bodies and institutions of the justice system (the HCJ, the HQCUJ of Ukraine, the State Judicial Administration of Ukraine, the Judicial Security Service, the National School of Ukrainian Judges, etc.) in order to eliminate duplication of functions and ensure procedures for efficient use of resources.
- filling full-time vacancies for the positions of judges in the busiest courts of first instance and appeals.
- improvement of the procedures for appointment, dismissal, and disciplinary action of judges.
- optimisation of the existing network of general courts in accordance with the new administrative-territorial system; existing challenges; development and adoption of relevant Draft Laws on liquidation (reorganisation); and formation of local general and specialised courts, in which the number of local general courts is planned to be decreased by a third;
- digitisation of the judicial process, development of remote judicial proceedings, etc.[3]

2.2 Risks for Achieving the Set Goals

One of the risks for achieving the defined priority goals for renewing the composition of the HCJ and HQCUJ of Ukraine in the Draft Plan is the inability of the State to be solely responsible for the duration of these processes, taking into account the fact that formation of the authorised composition of these bodies shall be carried out in an equal partnership with independent subjects – International partners and judicial self-government (clause 2.1.4).

In this context, it should be noted that these measures in the field of reforming judicial governance bodies are aimed at eliminating the dysfunction of the judicial system, because due to the shortcomings of the legislation[4] on termination of the powers of the entire composition of the SQJ of Ukraine, selection of candidates for judicial positions and qualification assessment of judges stopped, which made it impossible to fill judicial vacancies in courts. At the same time, the Law of Ukraine of 14 July 2021 No. 1635-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning the Procedure for Election (Appointment) to the Positions of Members of the High Council of Justice and Activities of Disciplinary Inspectors of the High Council of Justice" (hereinafter referred to as the "Law

3 Draft Ukraine Recovery Plan (n1).

4 Law of Ukraine of 16 October 2019 № 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 2 November 2022.

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No. 1635-IX")[5] was aimed at improving the procedure for the election (appointment) of members of the HCJ for the practical implementation of the principle of the rule of law; ensuring compliance of the candidates for the position of a member of the HCJ with the criteria of professional ethics and integrity; increasing the institutional capacity of the HCJ; and increasing the level of public trust in bodies of judicial governance in particular, and the judiciary in general. In fact, this Law was at the request of a number of public expert organisations regarding the need in the process of judicial reform to reboot the HCJ by terminating the powers of some its members. This was based on the results of an inspection conducted by public and international experts, as well as the involvement of international experts and public representatives in the procedure for selecting new members of the HCJ[6].

Therefore, the Ukrainian state consciously and voluntarily chose the format of involving international experts in the specified processes, despite the ambiguous perception of this decision by the legal community, until the Supreme Court appealed to the Constitutional Court of Ukraine (hereinafter referred to as the CCU) with a constitutional submission regarding conformity of some provisions of Law No. 1635-IX[7][8] with the Constitution of Ukraine. Against this background, the argument that there is a risk of non-achievement of this goal of the reform appears to be, to a certain extent, controversial, and one that is rather aimed at finding an adequate reason for the inability to ensure functioning of the institution of the selection and qualification evaluation of judges for more than three years.

Moreover, such determinants provoke complaints about political populism and fuel public opposition and judgement, which allows for the effective preservation of the hierarchical structure of justice. The reason for which is a recognition of the expert environment of traditional paternalism as being an overly populist simplification of the fundamental foundations of a democratic system. As a consequence, the real substance of the reform is narrowed down to formal content such as regulatory and personnel procedures, and not to systemic changes, which, according to the laws of social psychology, is threatened by the fact that the system traditionally defeats personalities[9]. As a confirmation of this thesis, it resulted in an assessment by expert public organisations of some decisions of the Ethics Council, which was created with the aim of qualitatively updating the HCJ, and caused both surprise and a negative reaction (despite the overwhelming voice of international experts) up to the point of creating a threat to modern reform[10][11].

5 Law of Ukraine № 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 2 November 2022.

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7 Meeting of the Panel of Judges was held to consider the issue of commencement of constitutional proceedings <https://ccu.gov.ua/novyna/vidbulosya-zasidannya-kolegiyi-suddiv-z-rozglyadu-pytannya-shchodo-vidkryttya-konstytuciynyh> accessed 2 November 2022.

8 On approval of the Explanations of the High Council of Justice in the case by constitutional submission of the Supreme Court: Decision of the High Council of Justice of Ukraine of 18 January 2022 No. 53/0/15-22 <https://zakon.rada.gov.ua/rada/show/v53_0910-22#Text> accessed 2 November 2022.

9 'Psychology of judicial justice and the resource of open dialogue. Reflection from under the judge's mantle' <https://lb.ua/blog/kostjantyn_harakoz/528348_psihologiya_sudovoi_spravedlivosti.html/> accessed 3 November 2022.

10 'Judicial reform on the brink of disaster: the Ethics Council admits dubious candidates to the High Council of Justice, blocks worthy candidates and does not explain its decisions' <https://dejure.foundation/tpost/uafsk9opu1-sudova-reforma-na-mezh-katastrofi-etichn> accessed 3 November 2022.

11 'One of the demands of the EU is implementation of judicial reform, which Ukraine has not been able to implement for years. What is the problem and is it possible to implement it' <https://forbes.ua/inside/odna-z-vimog-es-sudova-reforma-yaku-ukraina-ne-mozhe-vprovaditi-rokami-v-chomu-problema-i-chi-realno-tse-zrobiti-27062022-6821> accessed 3 November 2022.

In the aspect of conducting a comprehensive audit of the powers of bodies and institutions of the justice system, one of the institutions - according to the ideologues of the modern stage of judicial reform - that is not effective in the organisational forms in which they exist today, and that spends large budgetary funds, is called the National School of Judges of Ukraine (hereinafter referred to as the NSJU) and there is a proposal to transform it into an educational centre within the HQCUJ[12]. Such a proposal quite rightly arouses disapproval amongst experts and is characterised as being aimed at depriving the NSJU of its autonomy and budget and turning it into a division of the apparatus of the HQCUJ. This is inconsistent with the Recommendations of the Advisory Council of European Judges, in particular regarding proper training and professional development of judges[13], the mission of the Judicial Council at the service of society[14], as well as dominant practice of the organisation of judicial education in EU countries, to which Ukrainian society aspires to become a member[15].

In the context of the systemic nature of the judicial reform, attention is also drawn to the meticulous attention to the jurisdiction of the High Anti-Corruption Court (hereinafter referred to as the HACC), which was embodied, in particular, in the constitutional submission with regard to conformity of the Constitution of Ukraine (constitutionality) with the Law of Ukraine "On High Anti-Corruption Court" of 7 June 2018[16]. The existence of the grounds for justifying the external specialisation of the HACC is questioned, and attention is also focused on the lack of clarity in determining the jurisdiction of the HACC cases and other courts.

At the same time, the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine with regard to Increasing of Effectiveness of the Sanctions Related to the Assets of Individuals"[17] of 12 May 2022 added a new type of Law of Ukraine "On Sanctions" (hereinafter referred to as the "Law No. 1644-VII")[18]. This entails seizure into the state revenues of the assets belonging to an individual or legal entity, as well as assets in respect of which such an individual or entity may directly or indirectly (through other individuals or entities) perform actions identical in content to the exercise of the right to dispose of them (clauses 1-1 Part 1, Article 4 of the Law). The purpose of such legislative changes is to prevent the use of economic assets being used to the detriment of the national security of Ukraine, attract assets that are the basis for activities aimed at preparing, inciting and waging an aggressive war (including aggressive propaganda) to strengthen the defence of Ukraine, and provide compensation for damages caused. Taking into account the requirements of Art. 41 of the Basic Law of Ukraine, the judicial procedure for making a decision on the application of this sanction and the procedure for its appeal has been exclusively established. Thus, in the

12 'How Ukraine will reboot the judicial system to European standards.' Interview with Deputy Head of the Office of the President Andriy Smirnov <https://forbes.ua/inside/rule-of-law-klyuchoviy-punkt-dlya-otrimannya-bud-yakoi-dopomogi-yak-kraina-bude-perezavantazhuvati-sudovu-reformu-intervyu-z-zastupnikom-kerivnika-op-andriem-smirnovim-04072022-6960 > accessed 3 November 2022.

13 CCEJ Opinion № 4 (2003) on training for judges <https://rm.coe.int/1680747d37> accessed 3 November 2022.

14 CCEJ Opinion n°10 (2007) on 'Council for the Judiciary in the service of society' <https://rm.coe.int/168074779b> accessed 3 November 2022.

15 'Why liquidation of the National School of Judges turned out to be a bad idea, especially in wartime' <https://interfax.com.ua/news/blog/845225.html> accessed 3 November 2022.

16 Constitutional submission with regard to compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine "On the High Anti-Corruption Court" of 7 June 2018. No. 2447-VIII < URL: https://ccu.gov.ua/sites/default/files/3_349_2020.pdf> accessed 3 November 2022.

17 On Amendments to Some Legislative Acts of Ukraine with regard to Increase of Effectiveness of the Sanctions Related to the Assets of Individuals: Law of Ukraine of 12 May 2022 No. 2257-IX <https://zakon.rada.gov.ua/laws/show/2257-20/sp:max50:nav7:font2#Text> accessed 3 November 2022.

18 On Sanctions: Law of Ukraine of 14 August 2014 No. 1644-VII <https://zakon.rada.gov.ua/laws/show/1644-18#Text> accessed 3 November 2022.

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presence of the appropriate grounds and conditions, the central executive authority, which ensures implementation of state policy in the field of seizure of the assets of persons subject to sanctions – currently the Ministry of Justice of Ukraine – applies to the HACC with a statement on application of the sanctions to the relevant individual or legal entity, provided for in clause 1-1h. 1 Art. 4 of Law 1644-VII, in accordance with the procedure specified by the Code of Administrative Procedure of Ukraine (hereinafter referred to as the CAPU).

At the same time, the CAPU was supplemented with the provisions that a) it is the HACC that decides administrative cases regarding the application of the sanction provided for in clause 1-1, Part 1 of Article 4 of the Law of Ukraine "On Sanctions" as a court of first instance (Part 5 of Article 22 of the CAPU), and b) the Appellate Chamber of the HACC reviews the decisions of the HACC in an appeal procedure as a court of appeal (Part 4 of Article 23 of the CAPU). In the end, the CAPU was supplemented by Art. 283-1, which defines the specifics of proceedings in the cases involving application of the sanctions.

Incidentally, it should be noted that in the first edition of the Law of Ukraine "On High Anti-Corruption Court", CAPU's task was defined as administration of justice in accordance with the principles and procedures of judicial proceedings defined by law with the aim of protecting individuals, society and the state from corruption and related crimes; judicial control over pre-trial investigation of these crimes; and observance of the rights, freedoms and interests of persons in criminal proceedings. With the changes introduced by the Law of Ukraine dated 31 October 2019 No. 263-IX "On Amendments to Certain Legislative Acts of Ukraine with regard to Seizure of Illegal Assets of the Persons Authorised to Perform the Functions of the State or Local Self-Government and Punishment for Acquiring Such Assets"[19], its task was supplemented by a decision on the issue of recognition of the assets as unsubstantiated and their seizure into state revenues in cases provided for by the law, in civil proceedings.

In the end, the changes introduced by the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving the Effectiveness of Sanctions Related to the Assets of Individuals" assigned to HACC the task of administration of justice in cases involving application of the sanction in connection with seizure of the assets belonging to in individual or legal entity, as well as assets in respect of which such an individual or legal entity may directly or indirectly (through other individuals or legal entities) perform the actions identical in content to the exercise of the right to dispose of them, in the order of administrative proceedings. The Explanatory Note to the corresponding Draft Law does not clearly state the arguments for assigning this category of cases to the jurisdiction of the HACC rather than the existing network of administrative courts. In this context, with some probability, it can be argued that by analogy with the argumentation of referring to the jurisdiction of the HACC consideration of the cases of recognition of assets as unfounded and their seizure into state revenues under the expected guarantees of impartial consideration of such cases[20], the same argumentation is embedded in the decision to refer to the jurisdiction of the HACC of administrative cases regarding application of the sanction provided for in clause 1-1 part 1 of Article 4 of Law No. 1644-VII.

In the expert environment, taking into account the specialisation that is embodied in the name of this court, it is noted that the tasks of the HACC do not relate to implementation

19 On Amendments to some Legislative Acts of Ukraine with regard to Seizure of Illegal Assets of the Persons Authorised to Perform the Functions of the State or Local Self-Government, and Punishment for Acquiring Such Assets: Law of Ukraine of 31 October 2019 No. 263-IX <https://zakon.rada.gov.ua/laws/show/263-20/sp:max50:nav7:font2#n247> accessed 3 November 2022.

20 Explanatory note to the Draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine with regard to Seizure of Illegal Assets of Persons Authorised to Perform Functions of the State or Local Self-Government and Punishment for Acquisition thereof" <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=1031&skl=10> accessed 3 November 2022.

of the policy and purpose of applying the sanctions, but to the administration of justice in order to protect the individual, society and the state from corruption and related criminal offenses. Highly appreciating the independence and professionalism of the HACC, experts recognise the undeniable fact that the HACC judges do not have a well-formed practice for assessing threats to national security, which may negatively affect the quality of the decisions made. At the same time, they proposed establishing the authority to consider applications for sanctions in the form of seizure of assets by the Supreme Court. As the highest court in the judicial system of Ukraine, the Supreme Court will be able to ensure stability and unity of judicial practice, which is critically important when applying such an exclusive and completely new mechanism for the Ukrainian legal system[21].

Against this background, *assignment of new categories of cases to the jurisdiction of the HACC requires a more in-depth justification and an expectation of guarantees of impartial consideration of such cases. The lack of substantive justification for assigning this category of cases to the jurisdiction of the HACC, to a certain extent undermines trust in other courts, as an objective and impartial consideration of this category of cases is considered unattainable.* In search of a concept to justify the criterion by which judicial jurisdiction could be determined, it should be noted that consideration of this category of cases could be referred to the jurisdiction of administrative courts, which, as in some other categories of cases, actually authorise the right of the subject of power to exercise the powers defined by the law.

3 BAR

3.1 Key Challenges: Controversial Approaches

The modern development of the legal profession in Ukraine may with some probability be characterised as not fully consistent and systematic, despite complex scientific studies devoted to the problems of the organisation of the legal profession and advocates' activity, and taking into account the relevant legislative initiatives. Indicative of this is the very recent introduction of a truncated bar monopoly on representation of another person in court, and already now there is a strongly marked tendency to abolish it. In addition to being an important institution of the justice system in Ukraine, the Bar is empowered in the field of forming judicial and prosecutorial bodies governance, and therefore authorised to participate in the processes of formation of professional staff of state functionaries of this system. The latter however, are not endowed with such a privilege in the processes of formation of the advocate corps of the justice system. The issue of effectiveness of the current governance model of the legal profession is also debatable. As a result, one of the main problems that determines the need for further improvement of administration of justice, at the current stage of reforming the system in Ukraine, is the functional imperfection of the legal system[22]. Moreover, in the Draft Plan, in the conditions of post-war reconstruction, the legal profession is recognised as one of the important guarantees of ensuring the rights of the citizens who suffered from the consequences of the armed aggression. One of the current goals of the system of sustainable justice in Ukraine is to promote the building of a peaceable and open society, ensure access to justice for all and create effective, accountable

21 Analysis of the Ukrainian model of application of the sanctions in the form of seizure of assets under Draft Law No. 7194: Advantages, Risks, Controversial Points <https://izi.institute/wp-content/uploads/2022/05/analiz_7194_izi-2.pdf> accessed 3 November 2022.

22 On the Strategy for Development of the Justice System and Constitutional Judiciary for 2021-2023: Decree of the President of Ukraine of 11 June 2021 No. 231/202 <https://zakon.rada.gov.ua/laws/show/231/2021#Text> accessed 2 November 2022.

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and participatory institutions at all levels[23]. However, there is insufficient effectiveness of state policy in the field of bar and advocacy. In particular, the legislation regulating the specifics of organisation and activity of the advocacy has a significant negative impact on the advocacy's performance of its special social role in society and therefore requires additional research in order to strengthen the system of sustainable justice.

Among the main problems of the notion of the Bar in Ukraine that need to be solved, the Draft Plan outlines the following:

- incomplete compliance of the principles of the Bar in Ukraine with the basic principles of the EU bar profession, which will in the long run lead to abolition of the Bar monopoly on provision of professional legal aid
- strengthening of qualification requirements for the persons who intend to gain access to the profession of an advocate; the introduction of a transparent procedure for conducting a qualification exam; and improvement of the internship institute, which will prospectively provide for the regulation of admission of advocates of foreign states and advocates of aggressor countries (the Russian Federation, Republic of Belarus) to legal practice in Ukraine
- the need to expand the professional rights of advocates and guarantees of advocates' activity, which in the future will involve ensuring a) implementation of the principle of competition in the judiciary; b) equality of procedural rights of the parties, in particular, providing advocates with identified access to state registers; c) an increase in the level of protection of attorney-client privilege; d) provision of access to the work of advocate's assistant for the persons who have acquired a higher legal education at the "Bachelor" level or above; and e) regulation of the issue of success fees in certain categories of cases, in particular to facilitate access to legal aid for the persons who have suffered damages as a result of war
- the imperfection of self-government of the Bar, which in the future will involve decentralisation of the Bar self-government; a change in the status of the Ukrainian National Bar Association (hereinafter referred to as the "UNBA"); creation of alternative professional organisations of advocates; ensuring the right to participate in the Bar self-government for all advocates; bringing the terms of tenure in the self-governing bodies of advocates in line with the practice of the EU countries; and recovery of the activities of the self-government bodies of advocates in the temporarily occupied regions in the territories controlled by Ukraine
- the imperfection of bringing an advocate to disciplinary responsibility, which will in the long term involve introduction of a transparent procedure for such by increasing the statute of limitations for bringing to disciplinary responsibility; determining the requirements for the form and content of a statement (complaint) regarding the improper behaviour of the advocate; the content of a decision in a disciplinary case; and creation of a single resource for collection, storage, protection, accounting and search of disciplinary practice
- non-compliance of individual provisions of the rules of advocate ethics with international standards of advocate deontology, which will prospectively foresee

23 *About the Sustainable Development Goals of Ukraine for the period until 2030: Decree of the President of Ukraine of 30* September 2019 No. 722/2019 <https://zakon.rada.gov.ua/laws/show/722/2019#Text> accessed 2 November 2022.

> an update in accordance with international standards of professional deontology and ensure uniform practice in their application[24]

The Bar Council of Ukraine characterised the changes proposed in the Draft Plan as a risk for European integration in the field of the Bar. In general, the reform plan of the "Justice" Working Group, in its opinion, leads to a complete imbalance of a single independent professional self-governing, self-regulated organisation of advocates, since instead it proposes the creation of separate small professional regional bar associations that are unable to ensure the uniform rules of the profession and its self-government. As a result, implementation of the proposals of the Working Group will lead to the destruction of the self-governance and self-regulation of advocates according to the uniform rules of the profession[25]. Current scientific legal literature also emphasises that 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, it is emphasised that the principles of its organisation 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 [26].

Given the certain controversy of the highlighted views on improvement of the notion of the Bar in Ukraine, the modern trends in development of this institution require a legal analysis, primarily in the functional aspect, in attempts to identify its most promising direction.

3.2 Modern Trends in Development of Bar in Ukraine: Functional Aspect

Based on the legal analysis of the provisions of the Law of Ukraine "On Bar and Advocate`s Activity", as well as doctrinal developments in this area, professional legal aid, which is implemented in the types of advocate`s activity as defined by the law, claims to be recognised as the domain that determines the priority direction of the development of advocacy during system reform justice.

Moreover, taking into account constitutional provisions, this area of competence and responsibility within the justice system may in all likelihood be further narrowed exclusively to defense against criminal charges and representation of another person in court. This has even become a reason for the emergence of a legal category that is new for the national legal system - a "bar monopoly" for the provision of these types of legal aid. Regarding the latter however, it is possible to assert with some probability the attitude of the state regarding the presence of defects in this function due to a clear legislative tendency to abolish the Bar monopoly on representation of another person in court. At the same time, it is possible to state certain doubts regarding such an attitude, given the fact that for a long period of time there has been no further active consideration of the corresponding Draft Law (regarding the abolition of the attorney monopoly), despite it being recognised as urgent as far back as 2019. This state of affairs suggests that the flaw may not lie in the function of the Bar itself, but in a certain unfortunate phenomenon where law is mostly a service tool of politics, rather than its guiding and driving force.

Therefore, at the constitutional level, the right of everyone to professional legal aid is currently enshrined in systematic connection with Art. 131-2 of the Basic Law of Ukraine.

24 Draft Ukraine Recovery Plan (n1).

25 On appeal of the Bar Council of Ukraine to international and Ukrainian institutions on the issues of reforming the Bar of Ukraine: Decision of the Bar Council of Ukraine of 01.08.2022 No. 49 <https://unba.org.ua/assets/uploads/legislation/rishennya/2022-08-01-r-shennya-rau-49_62fcf79a9d7e7.pdf> accessed 2 November 2022.

26 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 154.

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This includes, among other things, the obligations assumed by the state to guarantee to everyone representation of his/her interests in court as a type of legal aid, which acquires the characteristics of professional legal aid in the case of being providing it by an advocate.

In view of the enshrined constitutional guarantee of the right to professional legal representation of another person in court, the provisions of the Law of Ukraine dated 18.12.2019 No. 390-IX "On Amendments to Certain Legislative Acts of Ukraine on Extending Opportunities for Self-Representation in Court by State Authorities, Bodies of the Autonomous Republic of Crimea, local self-government bodies, other legal entities, regardless of the procedure of their creation"[27], (given that any attempts to circumvent the state's fulfilment of its obligation to ensure everyone's right to professional legal aid, in particular by extending the range of persons who can carry out self-representation of a legal entity) can be considered as limiting such a right, and are due to the need to regulate relations of representation differently than in the Constitution, and without making changes to it. Moreover, in all likelihood, such legal regulation gives grounds to assert a violation of the constitutional principle of equality before the law, which is a logical continuation of the principle of justice, and therefore needs revision.

Under such circumstances, one of the current tendencies in the development of the functions of the legal profession in Ukraine may be defined as *the selective and inconsistent introduction of the Bar monopoly on representation of another person in court, which contains the potential danger of turning the constitutional guarantees of everyone's right to professional legal aid into a component of the political situation.* In this context, a unified solution to this problem is seen as promising. This is that the state should regulate the right to access to court, taking into account the requirements of the principles of equality and justice, in order to influence the cost of representation services, not only in the interests of the court, but also taking into account the needs and resources of individuals. In this regard, one of the stages of the reform of the legal profession in the Draft Plan perceives abolition of the Bar monopoly on provision of professional legal aid by the end of 2025 (with a note on the long-term consideration of the relevant Draft Law in the Parliament) as a possible risk of achieving this goal. However, it is worth questioning the reasonableness of the specified deadline and formulation of the risk given the fact that the Draft Law was previously approved by the majority of the constitutional composition of the Verkhovna Rada of Ukraine on 14 January 2020 No. 434-IX, and the Committee on Legal Issues that politicians recommended to the Verkhovna Rada of Ukraine submitted by the President of Ukraine as an urgent draft of the Law on Amendments to the Constitution of Ukraine (Regarding Abolition of the Bar Monopoly), reg. No. 1013 of 29 August 2019[28]. On the other hand, in the scientific legal literature it is noted that returning to an unregulated representation will be a step backwards, reflecting on the quality of the trial, the length of the case, the state of justice, and more'[29].

Carrying out a legal analysis of the functional load of the Bar under the current legislation of Ukraine, legal professionals also draw attention to the endowment of this institution with the functions that are not inherent to it, which is observed in relation to the provisions of the country's Law "On Prevention and Counteraction to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass

27 On appeal of the Bar Council of Ukraine to international and Ukrainian institutions on the issues of reforming the Bar of Ukraine: Decision of the Bar Council of Ukraine of 01.08.2022 No. 49 <https://unba.org.ua/assets/uploads/legislation/rishennya/2022-08-01-r-shennya-rau-49_62fcf79a9d7e7.pdf> accessed 2 November 2022.

28 Conclusion of the Committee of the Verkhovna Rada of Ukraine on Legal Policy of 02.05.2020. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66242> accessed 2 November 2022.

29 Bakaianova N, Svyda, O, Demenchuk, M, Dzhaburiya, O, & Fomina, 'Advocacy of Ukraine under constitutional reform' 2019 8(22) Amazonia Investiga 576.

Destruction"[30], whereby advocates received the legal status of being the subjects of primary financial monitoring of the suspicious transactions (activities) of their clients. Extension of the advocate`s activity, in particular in fiduciary activities and mediation, was also reflected in a number of draft laws[31] [32]regarding development of the notion of the Bar. These were accompanied by an active expert discussion, which only emphasises the relevance of the issue of the functional workload of the Bar at various stages of reforming the justice system. The above makes it possible to single out another trend in development of the functions of the Bar in Ukraine – *the extension of the powers of the state regarding advocacy in view of the potential of advocacy as a profession, which could create a risk of conflict with both the tasks and essence of advocacy*. In this aspect, it is considered promising to avoid such a conflict by determining the priority of the principle of confidentiality of advocacy.

One of the modern trends in development of the functions of the legal profession in Ukraine, related to the formation of prosecutorial and judicial governance bodies, is *limitation of the rights of the legal self-government bodies in the formation of the judicial corps due to changes in the legislative approach to formation of judicial governance bodies, according to which the powers of the legal profession in this field lose the symbol of immediacy and become subjectively mediated*. At the same time, despite the fact that the legal profession, as one of the defining elements of the justice system, is authorised to participate in the processes of forming the professional staff of state functionaries of this system (prosecutors directly and judges indirectly), it does not, however, have such privilege in the formation of the advocate corps of the same justice system, which appears to be somewhat unsystematic.

In this context, it is also worth paying attention to the research of the experts of the "New Justice" Justice Sector Reform Program, who in 2017 (after the amendments to the Constitution of Ukraine regarding justice) published a report entitled "Best Practices in Governance of the Legal Profession". The report singled out so-called "best practices", despite recognition of the fact that, internationally, the choice of a model of regulation of the legal profession depends on the specific system of justice (of which such a legal profession is a constituent part) and that justice is one of the few phenomena to which it is impossible to apply a single international standard because it depends on many factors in local communities. The 'best practices' outline in the report are as follows: the functions of regulation of the legal profession and its representation must be clearly demarcated - the Bar association serves advocates, and the regulatory body must serve the interests of the society; independence of the persons responsible for qualification assessment and admission to the profession from representatives of the legal profession and the government is absolutely necessary; qualification assessment and disciplinary systems should not be part of a professional association; and systems of qualification assessment and disciplinary responsibility must be provided with sufficient funding and staffed by professional employees[33].

Under such circumstances, one can single out another modern trend in the development of the functions of the legal profession - *the search for an optimal model of governance of the legal profession, which is due to the need to modernise the governing bodies of the legal*

30 On Preventing and Counteracting to Legalization (Laundering) of the Proceeds from Crime, Financing of Terrorism and Financing of Proliferation of Weapons of Mass Destruction: Law of Ukraine of 6 December 2019 No. 361-IX <https://zakon.rada.gov.ua/laws/show/361-20#n831> accessed 2 November 2022.

31 Draft Law of Ukraine "On Amendments to the Law of Ukraine "On Bar and Advocate`s Activity" and some other legislative acts of Ukraine (with regard to the status and guarantees of advocacy, formation and work of self-governing bodies of advocates)" No. 1794-1 of 4 February 2015. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53817> accessed 2 November 2022.

32 Draft Law of Ukraine "On Bar and Advocate`s Activity" No. 9095 of 6 September 2018. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64557> accessed 2 November 2022.

33 Best practices in governance of the legal profession <https://newjustice.org.ua/wp-content/uploads/2017/09/New-Justice_Report_Bar_Hawley_Feb_2017_UKR.pdf> accessed 2 November 2022.

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profession, in which the possibility of participation of state representatives in the formation of the legal corps is proposed.

4 KEY CHALLENGES OF THE NOTION OF PUBLIC PROSECUTOR'S OFFICE, PRIORITY GOALS, MEASURES AND RISKS OF THEIR ACHIEVEMENT

In the Draft Plan, the key challenges of the notion of the Public prosecutor's Office are summarised in three main areas: improving implementation of the constitutional powers by prosecutors; introduction of the system tools for formation of criminal policy; and ensuring a transparent and objective consideration of a complaint about a prosecutor committing a disciplinary offense and the inevitability and proportionality of the prosecutor's disciplinary responsibility.

Based on the identified problem areas, priority goals and appropriate measures for their achievement have been agreed upon, including:

- bringing the Law of Ukraine "On Public Prosecutor's Office", the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPCU), and other legislative acts into compliance with the Constitution of Ukraine in terms of ensuring implementation of the functions of the prosecutor's office in relation to organisation and procedural management of pre-trial investigations and maintenance of public prosecution
- introducing amendments to the Law of Ukraine "On Public Prosecutor's Office" and the CPCU aimed at regulating the procedural content of the function of the Public Prosecutor's Office regarding organisation of pre-trial investigation
- determination of the priority areas of formation and implementation of criminal policy; formation of the policies regarding prioritization of criminal proceedings; and granting the relevant powers to the prosecutor regarding their application
- establishment of clear objective criteria for distribution of the workload between prosecutors, including the criterion of specialisation; and implementation of restorative justice mechanisms at the pre-trial stage of criminal proceedings
- further development of the mechanism of transparent and competitive (on the basis of objective criteria) selection and appointment of prosecutors
- digitalisation of disciplinary procedures; raising the level of awareness and external communications; and implementation of the annual evaluation system of the prosecutor's work quality[34]

In demand for a long time, the identified priority goals and measures deserve support in order to bring the provisions of Ukrainian legislation in this area into compliance with the principle of legal certainty. In this regard, we should recall the comments on the Draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for the Reform of the Public Prosecutor's Offices" of the Main Legal Department of the Verkhovna Rada of Ukraine. The title of this Draft Law did not fully correspond to its content, since the so-called priority measures defined in it were primarily related to personnel reloading of the Public Prosecutor's Office through certification of current prosecutors[35]. These remarks are relevant even now as the provisions of the Law of Ukraine

34 Draft Ukraine Recovery Plan (n1).

35 Comments to the Draft Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures to Reform the Prosecutor's Office" <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=66266> accessed 3 November 2022.

"On Prosecutor's Office" have not yet been brought into line with the amendments to the Constitution of Ukraine regarding justice adopted on 2 June 2016, and therefore remain one of the primary and necessary legislative steps to improve the organisation and activities of the Public Prosecutor's Office.

Among the current challenges of reforming the Public Prosecutor's Office, we should also be reminded of the long-awaited and requested Decision of the CCU on the constitutionality of the reform of the Public Prosecutor's Office in 2019 - a case that has been under consideration by the Grand Chamber of the CCU for a long time. Thus, the board of judges of the CCU commenced constitutional proceedings in case No. 3/116(20), which was considered by the Grand Chamber of the CCU from 24.12.2020[36]. It is noteworthy that the representatives of this body of constitutional jurisdiction highlight the potential of the decision in this case. The court of the constitutional jurisdiction has the opportunity to form legal positions regarding the role and place of the Public Prosecutor's Office in the system of state authorities and the justice system[37], which deserves support.

At the same time, in the absence of a legal position of the CCU in this case, the problematic aspects of personnel overloading of the Public Prosecutor's Office are resolved in both the legal positions of the Supreme Court and the Decisions of the CCU on constitutional complaints regarding the conformity with the Constitution of certain provisions of the Law of Ukraine of 19 September 2019 No. 113-IX "On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for Reforming Public Prosecutor's Offices" (hereinafter referred to as the "Law No. 113-IX")[38]. The complainants base their claims on violation of the constitutional guarantees against illegal dismissal, significant interference in their private and professional life, lack of reasonable (proportional) means of interference with their rights, and failure to take into account the requirements of constitutional prescriptions regarding the content and direction of state activity. All of which are determined by human rights, freedoms and their guarantees. The main duty of the state is to assert and ensure human rights and freedoms, and create conditions for citizens to fully exercise their right to work.

Such arguments were given by the court of constitutional jurisdiction in one of the Decisions on the constitutional appeal, concluding that the provisions of Clause 8 of Chapter XI "Final and Transitional Provisions" of the Law of Ukraine "On National Police" of 2 July 2015 No. 580-VIII are unconstitutional. It noted that the Verkhovna Rada of Ukraine cannot notify individual employees or certain categories of employees about their possible future dismissal by passing laws (which are normative acts) [39]. This gives reason to expect a similar legal position of the CCU in cases of constitutional complaints[40] regarding recognition of unconstitutional provisions of Section 6 of Section II "Final and Transitional Provisions"

36 Constitutional submissions < https://ccu.gov.ua/novyna/konstytuciyni-podannya> accessed 3 November 2022.

37 Separate opinion of Judge of the Constitutional Court of Ukraine O.O. Pervomayskyi in case No. 1-223/2018(2840/18) on constitutional submission of 50 People's Deputies of Ukraine with regard to compliance with the Constitution of Ukraine (constitutionality) of a separate provision of Clause 26 of Chapter VI "Final and Transitional Provisions" of the Budget Code of Ukraine" < https://zakon.rada.gov.ua/laws/card/na06d710-20> accessed 3 November 2022.

38 Law of Ukraine of 19 September 2019 № 113-IX 'On Amendments to Certain Legislative Acts of Ukraine Regarding Priority Measures for Reforming Public Prosecutor's Office' <https://zakon.rada.gov.ua/laws/show/113-20#Text> accessed 3 November 2022.

39 In the case under the constitutional complaint of Bohdan Viacheslavovych Bivalkevych with regard to compliance with the Constitution of Ukraine (constitutionality) of Clause 8 of Chapter XI "Final and Transitional Provisions" of the Law of Ukraine "On the National Police": Decision of the Second Senate of the Constitutional Court of Ukraine on 21 July 2021 No. 4-p(II) /2021. Case No. 3-107/2020(221/20) <https://zakon.rada.gov.ua/laws/show/v004p710-21/conv#Text> accessed 3 November 2022.

40 Constitutional complaints <https://ccu.gov.ua/novyna/konstytuciyni-skargy> accessed 3 November 2022.

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of Law No. 113-IX, according to which all prosecutors were warned of a possible future dismissal from office.

Thus, one of the risks of achieving the priority goals of further reform of the Public Prosecutor's Office is the the controversial constitutionality of the personnel reset according to Law No. 113-IX. This will certainly present the CCU the task of finding a balance between the socially significant interests in support of the legitimacy of the new personnel of the Public Prosecutor's Office and the private interests of the subjects of the right to a constitutional complaint. In any case, before the final formation of court positions in cases regarding constitutionality of this reform, the statement proposed in the Draft Plan that "before the war, a complete staffing of the Public Prosecutor's Office was carried out by persons who *did not meet the requirements of integrity and professionalism*"[41] deserves revision in search of a more correct wording.

5 CONCLUSIONS

One of the primary steps in recovery of Ukraine in the field of judiciary is to overcome the problematic aspects of the functioning of the institutions of the national justice system, as they are key elements of the national human rights mechanism.

In order to ensure proper functioning of the judiciary, there are plans to carry out the structural modernisation and optimisation of the judicial authorities; restore the full-fledged work of judicial governance bodies; and conduct a comprehensive audit of the powers of the bodies and institutions of the justice system in order to eliminate duplication of the functions and ensure the procedures for the effective use of resources.

In order to restore the full-fledged work of the bodies of judicial governance, the Ukrainian state consciously and voluntarily chose the format of involving international experts, which gives the grounds for recognising as controversial the identification of risk for achieving this goal, and the impossibility of the State being solely responsible for the duration of these processes, taking into account the fact that formation of the authorised composition of these bodies is carried out in equal partnership with such subjects.

On the issue of carrying out a comprehensive audit of the powers of bodies and institutions of the justice system and the system of judicial reform, the proposals regarding the transformation of the system of professional training and professional development of judges (without taking into account the guidelines of the relevant European standards), as well as the demonstrative recognition of certain subjects of the justice system as guarantors of the impartial consideration of certain categories of cases, appear to be controversial, which is a clear substantive justification for the determination of court jurisdiction.

One of the main problems that determines the need for further improvement of the administration of justice is the functional imperfection of the Bar system, as well as the insufficient effectiveness of state policy in the field of the Bar and advocacy. As a result, new trends in the development of the legal profession in Ukraine have appeared. These include the selective and inconsistent introduction of the Bar monopoly on representation of another person in court, restriction of the rights of self-governing bodies of advocates in the forming of the judicial corps, extension of the state's control powers over the legal profession, and a search for an optimal governance model of the legal profession.

Currently, the key challenges of the Public Prosecutor's Office are the need to improve implementation of constitutional powers by prosecutors; the introduction of the system tools for formation of criminal policy; and ensuring a transparent and objective consideration

41 Draft Ukraine Recovery Plan (n1).

of a disciplinary complaint about a prosecutor committing a disciplinary offense and the inevitability and proportionality of the prosecutor's disciplinary responsibility. One of the risks for achieving priority goals in the field of further reform of the Public Prosecutor's Office is the questionable constitutionality of the personnel reset of the Public Prosecutor's Office, as a result of previous priority reform measures, which may call the legitimacy of the new personnel into question and does not provide an opportunity to assert the final completion of these processes. Therefore, recovery of Ukraine in the field of judiciary is mainly determined by the reform of the justice system, which currently requires systemic changes rather than formal regulatory and personnel procedures. This should determine the prospective directions of further scientific research.

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Opinion Article

MEDIATION IN POST-WAR RESTORATION IN UKRAINE

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ABSTRACT

Background: *This article addresses the challenges of developing mediation in Ukraine, the lack of effective coordination between courts and mediators, and issues of low awareness in Ukrainian society about mediation. It is argued that Ukrainian courts and mediation in Ukraine are going concurrent ways so that mediation is not integrated into or reinforcing the court-based litigation system. Meanwhile, the national mediation community must mature through the organization of high-quality interaction with the judicial system. Moreover, the war and post-war period will cause a new workload of civil and commercial disputes that are generally suitable for mediation, especially when the disputants residing in different regions after fleeing from war. This article is aimed at finding sustainable and fast solutions for raising*

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awareness of mediation in Ukrainian society and effective coordination between courts and mediators based on the progress already achieved.

Methodology: *This article used doctrinal legal research to evaluate the options of cooperation between courts and mediation, empirical analysis to examine judicial system performance and the mediation community status quo, analyse options for closer cooperation of courts and mediators, and find sustainable solutions for promoting mediation.*

Results and Conclusions*: Courts and the mediation community must work together to break the general reliance on traditional litigation; courts should actively promote mediation through sustainable means, and the mediation community should improve the quality control of mediation services, develop a complaint-handling procedure, and further progress with online platforms for choosing a mediator.*

1 INTRODUCTION

The resolution of civil and commercial disputes in Ukraine remains centred on courts, despite the gradual amendments to the legal framework that promote settlement and the presence of a mature national mediation community. Moreover, the war-related problems of the national judicial system have emphasised the long-lasting one – the undeveloped system of cooperation between courts and mediation.

The community of mediators in Ukraine, which has been on the rise since before the war, seems to have dispersed while fleeing from war, although efforts have been made to maintain the ties and abilities to provide mediation services. Even so, the eternal problems of mediation in Ukraine – especially the lack of demand due to low levels of awareness in Ukrainian society – have remained, constraining the potential of mediation in providing access to justice as a viable alternative or supplement to judicial dispute resolution.

Due to the above-mentioned circumstances, this paper proposes implementing a concerted action of the judicial system and community of mediators to better address the needs of Ukrainian citizens in settling civil and commercial disputes. The paper argues that the positive developments in mediation in Ukraine within the last five years, some of them caused by the Covid-19 pandemic, could be amplified to meet the challenges of the war and post-war periods.

2 THE STATUS QUO

2.1 The legal framework for promoting settlement in civil and commercial disputes

Settlement is undoubtedly the primary way in which civil disputes are concluded worldwide, even if its frequency varies widely from jurisdiction to jurisdiction.[1] Ukrainian legislation expressly provides for certain alternative dispute resolution methods in civil and commercial disputes in the Civil Procedural Code of Ukraine (CPC), Commercial Procedural Code of Ukraine, Laws of Ukraine 'On Mediation',[2] 'On Arbitration Courts',[3] 'On Enforcement Proceeding',[4] etc.

1 T Allen, *Mediation law and civil practice* (Bloomsbury Professional 2019) 1.

2 Law of Ukraine 'On Mediation' No 18675-IX of 16 November 2021, *Vidomosti of the Verkhovna Rada* 7/51 <https://zakon.rada.gov.ua/laws/show/1875-20#Text> accessed 22 August 2022.

3 Law of Ukraine 'On Arbitration Courts' No 1701-IV of 11 May 2004, *Vidomosti of the Verkhovna Rada* 35/412 <https://zakon.rada.gov.ua/laws/show/1701-15#Text> accessed 22 August 2022.

4 Law of Ukraine 'On Enforcement Proceeding' No 1404-VIII of 1 June 2016., *Vidomosti of the Verkhovna Rada* 30/542 <https://zakon.rada.gov.ua/laws/show/1404-19#Text> accessed 22 August 2022.

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However, the principle of legal centralism and inextricable linkage of the administration of justice and courts have remained the dominant approaches for understanding the concept of justice in Ukraine.[5] The post-Soviet rules on mandatory pre-trial attempts for commercial disputes[6] were abandoned due to the Judgement of Constitutional Court of Ukraine No. 15-рп/2002 dated 9 July 2002, because 'prescribing by a law a mandatory pre-trial settlement procedure limits exercising the right to judicial protection'.[7] The main paradigm shift took place in 2016 with the amendments to Art. 124 of the Constitution of Ukraine, when the judicial jurisdiction was complemented with the possibility of mandatory pre-trial settlement procedures.[8]

Regarding civil and commercial disputes, the CPC and the Commercial Procedural Code include a number of provisions incentivising settlement:

1) during the consideration of the case on the merits, the court facilitates the reconciliation of the parties[9]
2) the parties may reconcile, in particular by means of mediation, at any stage of proceedings; the result of the reconciliation may be formalised by a settlement agreement[10]
3) some incentives for reconciliation exist in the form of the possibility of returning 50% of the court fee and 60% of the court fee if the settlement has been reached by mediation[11]
4) the court announces a break in the preparatory session if the parties have agreed to settle the dispute out of court through mediation[12]
5) the court must suspend the proceedings in the case if both parties have filed the relevant request to engage in a mediation procedure[13]
6) the clause on the apportionment of court costs provides that the court considers the actions of the party regarding the pre-trial settlement of the dispute and the peaceful settlement of the dispute during the case proceedings, the stage of the case proceedings at which such actions were taken.[14]

However, this clause is rarely used due to the absence of algorithms and practice.

In 2017, the mechanism of settling disputes with the participation of a judge was introduced in the procedural codes, though in the last five years, it has not managed to

5 V Komarov, T Tsuvina, 'International standard of access to justice and subject of civil procedural law' (2021) 28(3) *Journal of the National Academy of Legal Sciences of Ukraine* 197-208.

6 T Kyselova, 'Pretenziia Dispute Resolution in Ukraine: Formal and Informal Transformation' (2015) 40(1) Review of Central and East European Law 57-95 doi:10.1163/15730352-40012000. See also Yu Prytyka, I Izarova, S Kravtsov, 'Towards Effective Dispute Resolution: A Long Way of Mediation Development in Ukraine' (2020) 29(1) ALS 389-399; I Izarova, Yu Prytyka, T Tsuvina, B Karnaukh, 'Case Management in Ukrainian Civil Justice: First Steps Ahead' (2022) 1 *Cuestiones Políticas* 927-938 doi:10.46398/cuestpol.4072.56.

7 Case No 15-рп/2002 [2002] The Constitutional Court of Ukraine <https://zakon.rada.gov.ua/laws/show/v015p710-02?lang=en#Text> accessed 22 August 2022.

8 Constitution of Ukraine of 28 June 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> accessed 22 August 2022.

9 Art 211(5) of CPC, Art 196(7) of the Commercial Procedural Code of Ukraine.

10 Art 49 of CPC, Art 46 of the Commercial Procedural Code of Ukraine.

11 Art 142(1,2) of CPC, Art 142(1,2) of the Commercial Procedural Code of Ukraine. There are no official statistics on amounts of repaid court fees.

12 Art 198 of CPC, Art 183 of the Commercial Procedural Code of Ukraine.

13 Art 251 of CPC, Art 227 of the Commercial Procedural Code of Ukraine.

14 Art 141 of CPC, Art 129 of the Commercial Procedural Code of Ukraine.

positively influence the administration of justice due to infrequent usage. The reasons for this lie in deficiencies of procedural frameworks and the cautious attitudes of judges towards new mechanisms,[15] though minor amendments to the procedural codes may enhance the popularity of settling disputes with the participation of a judge.[16] For example, in 2021, there were 66 attempts to trigger the mechanism in civil proceedings (0.01% of opened proceedings and only 12 out 66 were successful) and 30 attempts in commercial proceedings (0.04% of opened proceedings, though 15 out 30 were successful).[17]

According to the opinion of commercial and civil jurisdiction judges, the low popularity of the mechanism is caused by several factors – the imperfection of legal regulation (the procedure can be used to change the judge); the lack of necessary training for the majority of judges; low awareness of the parties to the dispute and their representatives regarding the essence of the procedure, as well as the low inclination of the population and business entities towards reconciliation, low bargaining power and, in general, a lack of a culture of resolve disputes and conflicts through reconciliation and reaching agreements.[18]

Obviously, Ukraine has not succeeded in effectively fitting alternative (out-of-court) and pre-trial settlement of disputes into the organisation of the functioning of the judiciary and the administration of justice. The National Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023[19] acknowledges that, recognising the introduction and development of the institution of mediation as a component of enhancing access to justice. The draft document 'Ukraine Recovery Plan'[20] also contains a provision on 'encouraging the use of out-of-court methods of dispute settlement, for certain categories of cases, establishing a mandatory pre-trial dispute settlement procedure using mediation and other practices'. Such a purposive approach is one more confirmation that the Ukrainian system of justice has a new, 'settlement-driven and mediation-centered paradigm'.

So, it may be concluded that within two last decades, Ukraine has travelled the path from the point where 'mandatory pre-trial settlement procedure creates obstacles in access to justice' to the point where the 'absence of effective mechanisms of alternative (out-of-court) dispute resolution and pre-trial settlement procedures are among the downsides of the system of justice' and 'mandatory pre-trial mediation is needed for certain categories of disputes'.

International experiences prove that within a certain jurisdiction, the sustainable development of mediation as an alternative way of resolving disputes rests on the 'three

15 'Settlement of disputes with the participation of a judge: "What?" and "How?"' (Legal Newspaper Online 2020) <https://yur-gazeta.com/publications/practice/sudova-praktika/vregulyuvannya-sporiv-za-uchastyu-suddi-shcho-i-yak.html> accessed 22 August 2022.

16 L Romanadze 'Dispute resolution with the participation of a judge and other procedural novelties: impact on the development of mediation' <http://mediation.ua/wp-content/uploads/2017/05/Stattya-pro-Mediatsiyu-v-proektah-protses-kodeksiv-2.pdf> accessed 22 August 2022.

17 2021 Data Reporting (State Court Administration 2022) <https://court.gov.ua/inshe/sudova_statystyka/zvitnist_21> accessed 22 August 2022.

18 Draft Report 'Mediation in civil and Commercial Cases' (EU-funded Project 'Pravo-Justice' 2021) <https://www.pravojustice.eu/storage/app/uploads/public/615/5ac/7a6/6155ac7a6e5a3765926585.pdf> accessed 22 August 2022.

19 Decree of the President of Ukraine No 231/2021 'On Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <https://www.president.gov.ua/documents/2312021-39137> accessed 22 August 2022.

20 Ukraine Recovery Plan (Cabinet of Ministers of Ukraine 2022) <https://www.kmu.gov.ua/storage/app/sites/1/recoveryrada/eng/justice-eng.pdf> accessed 22 August 2022.

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pillars': (1) infrastructure, (2) the availability of mediation services for all segments of the population, and (3) a significant degree of public awareness of the possibilities of dispute resolution in the order of mediation.[21]

These components are available in Ukraine, but, at the same time, they are at the initial stages of their development, and it is the low awareness of the population about mediation that limits the development of the infrastructure of mediation services due to the lack of stable demand. In turn, ensuring the availability of mediation services for all segments of the population is possible only under the conditions of a developed mediation infrastructure, as well as effective legislative regulation.

Moreover, one might expect that the workload of inheritance and family cases would drastically increase among Ukrainians as inevitable consequences of human losses and migration. These kinds of disputes – among heirs, divorcing spouses over their children and property, disputes regarding children taken abroad under a simplified procedure in order to ensure their safety, disputes over debts, labour disputes, business relocation and corporate issues disputes – are most suitable for mediation, and this underlines the necessity of establishing the cooperation of courts and mediators in order to direct the flows of disputing parties to a venue where they may find a viable option for effective dispute resolution.

This leads to the presumption that the community of mediators in Ukraine being on the rise could reduce the court's workload on the condition of effective and systematic communication between the court system and mediators, especially via the active engagement of courts in raising awareness of the society about the opportunities that mediation provides.

The courts and their websites remain the centre of gravity for parties to a dispute – that is why there is a need to consider the risks and opportunities of the enhanced role of courts promoting mediation, based on the legislation favouring settlement and using the available means.

2.2 The community of mediators

The question is whether the status quo of the Ukrainian community of mediators is capable of mediating a large number of disputes, meeting quality and ethical standards, and using videoconferencing. Just before the Russian invasion, the Ukrainian community of mediators was on the rise:

1) There have been nearly 30 years of development, resulting in structured and developed mediation centres and mediation training centres all over Ukraine. In 2018, N. Mazaraki emphasised that mediation in Ukraine already constituted a social and legal institute[22] with its own organisational structure and ethical rules and that there was a continuous increase in the number of mediators and mediation spheres. A consistent community of mediators has made an effective contribution to national law-making processes and developing its own self-regulation.

21 See European Commission for the Efficiency of Justice (CEPEJ) Mediation Development Toolkit CEPEJ(2018)7REV <https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52> accessed 22 August 2022; V Nekrošius, V Vėbraitė, I Izarova, Y Prytyka, ' Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 Teisė 8-23.

22 N Mazaraki, 'Mediation in Ukraine as a Social and Legal Institute' (2018) 3 Law Review of Kyiv University of Law 169. See also the Mediation Gap Analysis Report (EU-funded Project 'Pravo-Justice' 2021) <https://www.pravojustice.eu/storage/app/uploads/public/5f7/435/116/5f743511604ec221015187.pdf> accessed 22 August 2022.

2) There is also the long-awaited Law of Ukraine 'On Mediation',[23] which was adopted in November 2021. The concept and text of the law have been praised by the Ukrainian community of mediators and international experts for providing the minimum regulations and needed flexibility and by academics for adherence to international mediation standards and its well-balanced approach towards meeting the interests of all stakeholders.[24] The absence of a legal framework for mediation in Ukraine used to be considered the key obstacle to the development of mediation and to building trust in this dispute resolution method in Ukrainian society.

3) Lastly, there is the Code of Professional Ethics of the Mediator,[25] created by the Ukrainian community of mediators and representing different mediators' organisations. The document had been thoroughly discussed and developed with the aim of setting reference points for ethics and quality standards for mediators and mediation parties.

The general principles of training for basic mediator skills[26] were developed by the community of mediators (representing the greater part of mediation training centres) to set high standards for mediator training. The Ukrainian mediation centres engaged in training family mediators developed the principles of training basic family mediator skills[27] based on national and international experiences in family mediation.

The list of Ukrainian mediators' achievements included here is certainly not the full one, though the points allow us to show that mediation in Ukraine does exist, advances its self-regulation with concerted actions, and is capable of taking some of the workload of the judicial system. It is also worth mentioning that the Russian invasion has hampered a number of important initiatives for the further development of mediation in Ukraine: a) the implementation of the Law of Ukraine 'On mediation' (approving the state standard for the provision of social service of mediation, amending the Tax Code of Ukraine to enable the taxation of mediators as self-employed persons, the inclusion of the mediator's profession in the National Classification of Professions to set up a qualification framework for the mediator's profession etc., and amendments to the Criminal Procedural Code concerning the impossibility of interrogating mediators); b) the further development of the mediation community (for example, establishing the body for processing questions of professional ethics, etc.); c) the ratification of United Nations Convention on International Settlement Agreements Resulting from Mediation, signed by Ukraine in August 2019.

It should be mentioned that the Ukrainian community of mediators has experience cooperating with courts to enhance access to mediation through numerous pilot projects (predominantly financed by foreign donor organisations), judges and judicial staff training, etc.[28] Likewise, Ukrainian mediators have had extensive experience cooperating with

23 Law of Ukraine 'On Mediation' (n 3).

24 T Tsuvina, T Vakhonieva, 'Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine' 2022 1(13) Access to Justice in Eastern Europe 142-153 doi:10.33327/AJEE-18-5.1- n000104.

25 The Code of Professional Ethics of Mediator (non-governmental organization 'National Association of Mediators of Ukraine', 19 February 2022) <http://namu.com.ua/ua/info/mediators/nseyenf-yekhyny-pyeekakhsua/> accessed 22 August 2022.

26 The general principles of training basic mediator skills (non-governmental organization 'National Association of Mediators of Ukraine', 2 September 2019) <http://namu.com.ua/ua/info/mediators/sfrsvrk-iafaey-ravarrya-baisvyp-ravynap-pyeekakhsua/> accessed 22 August 2022.

27 The principles of training basic family mediator skills (non-governmental organization the Association of Family Mediators, 3 June 2020) <http://afmu.org.ua/for-mediators/zasady-navchannya-osnovam-simeynoyi-mediatcii/> accessed 22 August 2022.

28 Mediation Gap Analysis Report (n 23).

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centres for free legal aid and state social services providing mediation for socioeconomically challenged parties.

In substantiating the capability of national mediators to reduce the workload of civil and commercial disputes, we should also mention that mediation is not as extensively connected with certain premises as courts are. Moreover, Ukrainian mediators have had a good experience mediating online and training online. The Covid-19 pandemic has forced mediators to use videoconferencing and thus to elaborate certain quality standards that led to the adoption of recommendations for mediators regarding the preparation and conduct of online mediation.[29]

After the Russian invasion, the Ukrainian community of mediators has been dispersed, fleeing from the war along with millions of other Ukrainians. Both the mediators and their prospective clients left their permanent places of life and work, losing jobs and opportunities to solve disputes.

A dedicated platform seemed a viable solution, and the website www.mediation-help.com[30] was developed and launched to provide information and support to Ukrainians, who, while being abroad, fall into various conflict situations, as well as to support Ukrainian mediators, whose experience and skills may be useful in the settlement of conflicts and disputes, and to promote greater interaction between mediators and expand the network of mediators.

It may be concluded that the Ukrainian community of mediators has all the preconditions and capacity to effectively collaborate with courts, providing online and offline mediation services, taking some of the courts' workload, and helping Ukrainians resolve their disputes and maintain relationships.

3 CHANGING ROLES

3.1 Courts actively providing information about mediation

As discussed above, courts and mediation in Ukraine are going concurrent ways, so mediation is not integrated and does not reinforce the court-based litigation system as much as it does in matured jurisdictions (USA, EU member countries, UK, Canada, etc.).[31]

Over the past 50 years, there has been significant growth in and use of alternative forms of dispute resolution throughout Europe, resulting in a patchwork quilt of ADR provision,[32] with mediation usually taking the central place. The USA's experience provides extensive frameworks for the integration of mediation and courts.[33] Moreover, the increased use of mediation and other alternative dispute resolution methods in civil and commercial disputes over the last decades has predefined a progressive change in the role of the courts.

29 The Recommendations for mediators regarding the preparation and conduct of online mediation (the non-governmental organization 'National Association of Mediators of Ukraine', 10 November 2021) <http://namu.com.ua/ua/info/mediators/uyenspyereashchkl-ses-sroamr-pyeekashchkl-/> accessed 22 August 2022.

30 This website was created and maintained with the financial support of the European Union within the Project 'CONSENT' implemented by the PU 'Ukrainian Academy of Mediation'.

31 Allen T (n 1) 71-94; H Brown et al, ADR Principles and Practice (Sweet & Maxwell 2018) 67-91.

32 The Relationship between Formal and Informal Justice: the Courts and Alternative Dispute Resolution Report of the European Law Institute and of the European Network of Councils for the Judiciary (2018) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ADR_Statement.pdf> accessed 22 August 2022.

33 H Brown et al (n 32) 72-72.

In order to rationalise the scheme of integration for courts and mediation in war and post-war periods, there is a need to formulate this patchwork into a system and analyse practices through the prism of efficacy and sustainability.

The most comprehensive model is a multi-door courthouse model, wherein a courthouse, as a dispute resolution centre, offers multiple options, enabling the quick resolution of legal disputes.[34] This model is obviously not widespread, though it should be described here, as its introduction by Franck Sander[35] in the 1970s predetermined a shift in cooperation between courts and ADR not only in the USA but throughout different jurisdictions. Within the multi-door courthouse model, this or that dispute would be directed to the 'doors' of trial, arbitration, mediation, negotiation, or other dispute resolution methods, considering such rational criteria as the nature of the dispute, the relationship between the parties to the dispute, the value of the dispute, and the expectations of the parties regarding the cost and speed of dispute resolution. It should be noted that Frank Sander's idea has mostly been implemented in a narrower format of court-attached mediation programs offering mediation and case evaluation due to political, practical, and economic reasons, the last of these determined by the budget funds allocated for such programs.[36] Under circumstances of deficiency of resources in the Ukrainian system of justice, a multi-door courthouse is virtually impossible, so the main focus should be placed on mediation for the reasons presented above.

The design of developments in cooperation between the court and mediation throughout the jurisdictions differs to some extent, and this has led to a variety of terms, e.g., court-related, court-annexed, court-attached, or court-connected mediation. The term used is of minor importance – we would rather focus on the criteria that are important for rationalising the solution for Ukraine.

3.1.1. Who conducts mediation (a judge, a court official, an independent (private) mediator or a mediator working under a court-connected mediation program)?

Judges act as mediators in Germany, Australia, Finland, and a number of other countries.[37] Judicial mediation raises arguments both in favour (broader options for parties to settle without paying fees to a private mediator, stable respect for judges and their profession, inherent impartiality and confidentiality) and against such a mechanism (mediation is not a proper exercise of the judicial function, judges have different skills set and entirely different way of exercising personal authority).[38] The Ukrainian procedural framework provides for the settlement of disputes by a judge (addressed above), so the introduction of judicial mediation is not needed, and the judges who have had mediation training may exercise their skills and promote settlement within the existing procedure.

Some court officials in Ukraine have been trained in mediation, though obviously, for the reasons presented in part 2.1, additional functions of court officials could not be introduced as well.

34 M Malacka, 'Multi-Door Courthouse Established through the European Mediation Directive?' (2016) 16(1) ICLR 127-142, 135.

35 FEA Sander, 'Varieties of Dispute Processing', in AL Levin, RR Wheeler (eds), The Pound Conference: Perspectives on Justice in the Future (1979) 75-76.

36 TJ Stipanowich, 'The Multi-Door Contract and Other Possibilities' (1998) 13(2) Ohio State Journal of Dispute Resolution 303-304; G Kessler, LJ Finkelstein, 'The Evolution of a Multi-Door Courthouse' (1988) 37 Catholic University Law Review 582-584.

37 Allen T (n 2) 26.

38 H Brown et al (n 32) 73.

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Mediators working in a court-connected mediation program are usually included in a register (a roster) of mediators established by the court based on certain requirements for training and qualification. There are different approaches to maintaining court-connected mediation programs, and the USA's experience is extensive and worth analysing here. The USA's national standards for court-connected mediation programs provide for the next levels of court responsibility for mediators:

> The degree of a court's responsibility for mediators or mediation programs depends on whether a mediator or program is employed or operated by the court, receives referrals from the court, or is chosen by the parties themselves:
>
> a. The court is fully responsible for the mediators it employs and the programs it operates.
>
> b. The court has the same responsibility for monitoring the quality of mediators and/or mediation programs outside the court to which it refers cases as it has for its own programs.
>
> c. The court has no responsibility for the quality or operation of outside programs chosen by the parties without guidance from the court.[39]

Bearing the responsibility for the quality of mediators and monitoring and evaluating the court-attached mediation program's performance is the fee a court pays for the advantages the program provides for the court (saving costs and court time) and for society (empowering people to settle their disputes maintaining control on the process and the outcome). Moreover, a court-connected mediation program fully operated by the court requires relevant resources, and currently, the Ukrainian system of justice obviously lacks additional funds.

The involvement of private mediators broadens the opportunities for parties to find a mediator, but raises questions of quality assurance of mediation services, support for socioeconomically challenged parties, maintaining mediator's ethics, etc. When parties can choose mediators whom they believe are best suited to handle their cases, particularly complex cases, they are likely to be more satisfied with the process. For voluntary mediation, quality assurance rests predominantly with the community of mediators. As mentioned above, the Ukrainian community of mediators is actively working to meet this challenge. In current Ukrainian conditions, a viable solution seems to be a roster of mediators formed by the mediators themselves, although this approach bears certain risks as regards quality assurance.

3.1.2. Who makes the decision to refer a dispute to mediation (a judge, a court official, parties to a dispute)?

The essence of this question lies in the differences between voluntary and mandatory mediation. However, only voluntary mediation will be discussed further for Ukraine because the aim of the paper is to rationalise the cooperation between courts and mediation in war and post-war periods, and mandatory mediation has not yet been prescribed by Ukrainian law.

When a judge or a court official recommends mediation or parties to a dispute make a decision to engage in mediation, they should consider the criteria for suitability of disputes for mediation. The clear and reasonable criteria for choosing the appropriate dispute resolution

39 M Shaw, L R Singer, E A Povich, 'National Standards for Court-Connected Mediation Programs' (1993) 31 Family & Conciliation Courts Review 164 <https://doi.org/10.1111/j.174-1617.1993.tb00293.x> accessed 22 August 2022.

method should be made available to parties so they can make a proper decision and not waste time and aggravate the dispute by using an inappropriate procedure. The development of clear and well-founded criteria for the mediability of a dispute is the key to the effective establishment of mediation as an alternative method of dispute resolution and the formation of public trust in mediation through an understanding of its essence and nature.[40]

The Ukrainian community of mediators[41] and academics[42] have elaborated different approaches to the mediability criteria that can be used to create information materials and self-test questionnaires that can be made available in courts and on court websites.

3.1.3. In case of voluntary mediation, what is the role of a court?

Courts may serve purely as information sources about mediation, displaying materials about mediation and mediators within their premises and on websites, or enclosing the relevant information about mediation and mediators in envelopes with litigation documents, etc. Court officials and judges may inform disputants about the mediation procedure. Courts may serve an informational and organisational role, providing office space for mediation rooms. One of the pilot projects in courts of different jurisdictions in Odesa, on the basis of which mediation offices have been launched, where volunteers provide a mediation procedure on a free basis, has worked very well. This experience is an example of effective mediation interaction with the court.[43]

In Ukraine, there have been different pilot projects wherein courts have engaged in providing mediation services,[44] using 'judges as mediators' and 'referrals to an independent mediator'. Those projects have enjoyed relative success with personal support from judicial authorities and financial and organisational support from donor organisations, thus providing mediation free of charge for parties. It must be admitted that these projects were also based on highly motivated volunteer mediators who were providing mediation services on a *pro bono* basis. However, certain projects have enjoyed long-lasting effects, multiplying their goals. Nevertheless, it was extremely difficult to break the general reliance on the traditional court process, highlighting the need for stronger promotion of this alternative dispute resolution method.

A. Koo quotes a number of judgments to illustrate the active role of the UK courts in promoting ADR:

> Recent cases have revealed that judges become more proactive and vigorous in exercising their case management power as the circumstances require. In addition to facilitating the appointment of neutrals, they may direct the parties to take all reasonable steps to resolve the dispute before preparing for a trial. They may ask the parties to explain what steps towards ADR have been taken, why such steps have failed, and why some other form of ADR has not been used. They

40 L Romanadze, 'Criteria of mediability in the context of the dispute resolution system' (2020) 3(35) Subcarpathian Law Herald 8-13; N Mazaraki, 'On the essence of mediability of a dispute' (2018) 12 Entrepreneurship, Economy and Law 258-262.

41 'When mediation is possible' (Ukrainian Mediation Academy 2022) <https://mediation.ua/> accessed 22 August 2022; 'The family mediation deals with…' (Association of Family Mediators of Ukraine, 2022) <http://afmu.org.ua/pro-simeynu-mediaciyu/z-yakymy-putanniamy-patsiuye/ > accessed 22 August 2022.

42 L Romanadze, N Krestovska et al (eds), Mediation in professional activity of a lawyer (Ecology 2019) 239-240.

43 Mediation Gap Analysis Report (n 23).

44 T Kyseliova 'Policy paper. Integration of Mediation into Ukrainian Court System' <https://rm.coe.int/kyselova-t-mediation-integartion-ukr-new-31-07-2017/168075c3c5> accessed 22 August 2022.

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> may also compel the parties to agree to submit some issues to the jurisdiction of ADR, even if certain matters remain the subject matter of litigation.[45]

Any type of cooperation between courts and ADR requires strong support from the national judicial authority and every single national court.[46] The Council of Europe placed emphasis on the important role of courts in promoting mediation.[47] The European Commission for the Efficiency of Justice 'Mediation Development Toolkit' stresses that judges have an important role in the development of mediation. They should be able to give information, arrange information sessions on mediation and, where applicable, invite the parties to use mediation and/or refer cases to mediation. H. Brown et al. communicates the need for the 'wholehearted commitment of judges' when courts are adopting or recommending ADR.[48]

The primary role of courts in promoting mediation is true in the Ukrainian reality as well. Regardless of the fact that the trust in courts remains quite low among Ukrainian citizens (recent polls have shown that only 10-15% of respondents expressed trust in the courts[49]), the courts remain the centre of gravity for disputants, if for no other reason than because other options, like mediation, are almost unknown in society.[50]

This is why the awareness campaign should be built primarily around the courts (not underestimating the importance of work with lawyers, academia, the general public, public servants, the work already done and that is underway by the community of mediators, donor organisations, the state court administration, etc.). The courts may promote mediation as well as other ADRs (negotiations, arbitral tribunals) in different forms, both online and offline, guided by principles of timeliness, objectivity, and neutrality.

The results of the project 'Increasing awareness of judges, defence attorneys and the public on mediation in order to improve access to justice and enhance effectiveness and efficiency of the judiciary' and connected social poll conducted in 2018 in Odesa have shown the efficiency of promoting mediation in courts and the need to provide extensive information on mediation on court websites and in court premises.[51]

The launch of any court-connected mediation scheme requires a large amount of preparatory work, and it has yet to be done in Ukraine. Under the current circumstances, the national justiciary needs swift solutions, and a viable option seems to be 'courts actively promoting mediation': providing information on mediation, mediation providers, and mediators,

45 A Koo, 'The role of the English courts in alternative dispute resolution' (2018) 38(4) Legal Studies 680 doi:10.1017/lst.2018.13.

46 Mediation Development Toolkit (n 22).

47 Council of Europe Committee of Ministers Recommendation Rec (2002)10 of the Committee of Ministers to member States on mediation in civil matters <https://rm.coe.int/16805e1f76> accessed 22 August 2022.

48 H Brown et al (n 32) 90.

49 Public trust barometer (USAID New Justice program 2021) <https://newjustice.org.ua/wp-content/uploads/2021/03/Public_Trust_Barometer_Report_1st_Stage_2020_UKR.pdf> accessed 22 August 2022; Ukraine's population survey regarding confidence to judicial and other branches of government, judicial independence and responsibilities, perceptions of corruption and readiness to notify about its manifestations (USAID New Justice program 2021) <https://newjustice.org.ua/wp-content/uploads/2021/06/2021_Survey_Population_Report_UKR.pdf> accessed 22 August 2022.

50 Challenges of mediation and dialogue in Ukraine: distrust in procedures and dysfunctional market (Centre for Peace Mediation 2016) <http://www.peacemediation.de/uploads/7/3/9/1/73911539/dp_challenges_dialogue_ukraine_ukrainian.pdf> accessed 22 August 2022; Mediation Gap Analysis Report (n 23).

51 The report of the project implemented by PU Ukrainian academy of mediation 'Increasing awareness of judges, defense attorneys and the public on mediation in order to improve access to justice and enhance effectiveness and efficiency of the judiciary' (USAID New justice, 2018) <https://drive.google.com/file/d/1YERg5sKAPH1124_JGm6bC2ZoUnmri3mI/view> accessed 22 August 2022.

retaining the right of access to court under Art. 6 of the European Convention on Human Rights after utilising mediation or other ADR methods.

The parties of a dispute should obtain enough information to have realistic expectations about the mediation, its procedure, its principles, and the rights and duties of the mediator(s), parties, their representatives, and possible participants. The European Commission for the Efficiency of Justice 'Mediation Development Toolkit' provides a list of important points about how mediation should be delivered to the parties to a dispute, including requirements such as: the voluntariness and equality of the parties, the confidentiality of the process, the non-admissibility of statements and evidence in court proceedings due diligence and impartiality of the mediator, the role of the mediator, the role of lawyers, the postponement of court proceedings, the mediator's fee, the agreement of the parties, and what should be done to get the mediation started.[52] Disputing parties are to be provided with the information to enabling them to reach an informed decision as to the appropriate dispute resolution process for them to follow in light of their needs and expectations regarding speed, cost, process, and outcome.[53]

The Ukrainian courts may inform disputants about mediation by:

1) displaying materials about mediation, mediators, and the mediability of disputes[54] within court premises and on official websites, enclosing in envelopes or electronically the relevant information about mediation with litigation documents (a decision about opening the procedure, a decision about suspension of the claim, a decision about dismissal the claim without consideration, court judgements etc.). The community of mediators has developed relevant materials and could provide the court administration with them.[55] This method would require minimum resources from courts and would allow the information to reach a wide range of disputants;

2) information for disputants provided by court officials. As mentioned above, certain court officials have been trained in mediation, as have participants in the relevant programs by the EU-funded Project 'Pravo-Justice', the USAID 'New Justice' program, etc.;

3) information for disputants provided by judges. As was mentioned above, civil procedural law and commercial procedural law provide for the duty of the court to promote settlement. The information from the judge may be perceived well by the disputants due to the credibility of the judges. There have been numerous projects regarding mediation awareness training for judges within the last decade, so at least some judges are able to provide such information.

This multi-faceted approach may allow the wider public to discover information about mediation and help to draw some disputants from courtrooms to mediation rooms, where they and the judicial system can benefit from the advantages of mediation.

52 Mediation Development Toolkit (n 22).

53 'The Relationship between Formal and Informal Justice: The Courts and Alternative Dispute Resolution' (n 33).

54 L Romanadze (n 41) 11-12.

55 Information on possibility of settlement in court (The EU-funded Project 'Pravo-Justice', 2021) <https://www.pravojustice.eu/storage/app/uploads/public/603/758/4f1/6037584f1942d154434120.pdf> accessed 22 August 2022; Quick reference card on securing access to mediation in a court (The EU-funded Project 'Pravo-Justice' 2021) <https://www.pravojustice.eu/storage/app/uploads/public/603/75d/361/60375d3614c1f465648197.pdf> accessed 22 August 2022.

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3.2 Mediators cooperating closely with courts

The earlier part of the paper has substantiated that the Ukrainian community of mediators has completed an impressive amount of work on the development of self-regulation and ethics documents, setting up quality standards for mediation training and mediation services. Nevertheless, even more, work has yet to be done and completed. The Russian invasion and martial law have created certain challenges and set up new priorities: advancing online mediation, completing the framework for complaints procedures regarding a mediator or mediation provider in respect of the service they have provided, and quality assurance for mediation training programs and mediation services.

It is obvious that in war and immediate post-war periods, mediations will be held in a videoconferencing mode in the majority of cases, and disputants will predominantly seek and choose mediators online. The mediation providers and mediator associations normally maintain registries of mediators so that prospective clients can choose from and check a mediator's credentials. The Law of Ukraine 'On Mediation' obliges mediation organisations to maintain such registries. Thus, in Ukraine, there are a number of mediator registries. Until recently, the court and court staff, when informing court visitors about mediation, could only suggest that they use Google as a possible way to find a mediator. Because there were so many registries belonging to different organisations, an official could not give preference to any one organisation or recommend it as a resource for finding a mediator.

Most mediation programs connected to foreign courts provide rosters of qualified mediators for the disputants whose cases have been referred to mediation or the disputants who engage in voluntary mediation. The rosters and registries enable the parties to make an informed choice of a mediator (considering such criteria as qualification, area of specialisation, languages spoken, fee rates, etc.) and play a role in ensuring the quality of mediation services.

The court-connected mediation programs in the USA's courts employ the following methods to screen the qualifications of mediators before including them on the roster: paper screening (mediators submit filled-out questionnaires, a curriculum vitae), individual interviews, involvement of outside organisations to certify mediators, mentoring programs, etc.[56]

Every method of filling and managing a registry or roster has its own advantages and disadvantages,[57] and in the case of Ukraine, there is an obvious need to find a method that would effectively balance the efficient allocation of court resources, quality control, and equitable standards of mediators.

At the moment, the Ukrainian courts have very limited resources and a number of challenges, so it would be irrational to burden the judicial system further with the responsibility for screening mediators' qualifications. This is why the formation of a roster should be completed by mediators themselves based on the procedure agreed upon by Ukrainian mediator associations and organisations. The new website (www.mediators.com.ua) and others recently developed with the financial support of the EU present very promising solutions for disputants to find a suitable and qualified mediator. However, the presence of a mediator on a platform is certainly not an assurance of competence *per se* but rather an assurance that the information submitted by the mediator her/himself has been checked and meets the basic criteria of credibility. So, it may be presumed that these platforms serve a communicative function, providing enough information for disputants to choose a suitable

56 M Shaw, L R Singer, E A Povich (n 40) 187.

57 See D Noce, 'Communicating Quality Assurance: A Case Study of Mediator Profiles on a Court Roster' (2008) 84(3) North Dakota Law Review 770-771; P Maida, 'Rosters and Mediator Quality' (2001) 8 Dispute Resolution Magazine 17-21.

mediator. It should be noted that the Law of Ukraine 'On Mediation' sets only minimal requirements for mediators' qualifications: 'basic mediation training of 90 hours, including minimum 45 hours of practical training'.

Such platforms with an inter-organisational list of mediators allow courts to give parties better information concerning mediation and provide them with a specific information resource to find a mediator through different filters. The judicial system could provide links to these platforms on its official websites along with information about mediation.

The above-mentioned platforms, together with registries of Ukrainian mediator associations and organisations, obviously need to develop mechanisms for quality control and handling complaints. Indeed, the development of the complaints handling procedure is mandatory for Ukrainian mediator associations,[58] and the mediation community is working to build the relevant framework.

Another challenge for the Ukrainian mediation community is the development of mediation rules and standards that would complete the national mediation framework alongside the Law of Ukraine 'On Mediation' and the Code of Professional Ethics of Mediators. The mediation rules should be adopted by mediator associations to provide parties to mediation with clear parameters for the conduct of participants in the mediation procedure.

Mediations in videoconferencing mode require certain skills and relevant guidelines for mediators and parties on, for example, securing privacy and confidentiality. This would require relevant amendments to mediation training programs and the introduction of 'digital' professional development programs for mediators.

Last but not least seems to be the need to develop statistical and feedback systems to monitor and analyse the demand for mediation, the performance of mediators, the satisfaction of parties to mediation, and characteristics of completed and non-completed mediation to provide a basis for future development of mediation programs and mediation quality assurance mechanisms.

4 CONCLUDING REMARKS

This paper concludes with Winston Churchill's famous suggestion: *'Never let a good crisis go to waste'*. The Russian invasion has not put the administration of justice in Ukraine in crisis but rather emphasised the long-lasting problems of the undeveloped system of cooperation between the courts and mediation. The Ukrainian courts and mediation in Ukraine are going concurrent ways so that mediation is not integrated and does not reinforce the court-based litigation system. Meanwhile, the mediation community in Ukraine shows potential – even during the war, mediators have kept working to advance the normative framework and web resources for mediation.

The Ukrainian procedural laws are sufficiently favourable to settlement at any stage of court proceedings, including the enforcement, and there is a mature mediation community, ready to help parties settle their disputes. Moreover, one might expect that the workload of inheritance and family cases will drastically increase among Ukrainians as inevitable consequences of human losses and migration. These kinds of disputes – among heirs, divorcing spouses over their children and property, disputes regarding children taken abroad under a simplified procedure in order to ensure their safety, disputes over debts, labour disputes, business relocation and corporate issues disputes – are very suitable for mediation, and this underlines the necessity of establishing the cooperation of courts and

58 The Law of Ukraine 'On Mediation', Art. 13.4 (n 3).

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mediators in order to direct the flows of disputing parties to a venue where they can find a viable option for effective dispute resolution.

The unsolved problem remains the low awareness in society about mediation and the correlated lack of trust in this dispute resolution method. This 'new wave of disputes' may be effectively dealt with only on the basis of timely and appropriate preparatory work.

This paper has substantiated that under the current circumstances, the courts should actively promote mediation by all reasonable and sustainable means, including official websites and court premises, enclosing information about mediation in litigation documents and informing the disputants about the advantages and limits of mediation. There is an obvious need to develop a unified communicative strategy for mediation with a focus on different target audiences.

These activities should be complemented with active work in the mediation community on quality assurance, the development of complaint-handling procedures, and the further advancement of online platforms for finding a mediator. The concerted action of the courts and the mediation community in developing their cooperation would create the necessary basis to effect statutory provisions on mandatory pre-trial dispute settlement in certain categories of disputes.

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