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FORCE MAJEURE AND EXTRAORDINARY MECHANISMS FOR THE IMPLEMENTATION OF CONTRACTS: UKRAINE'S EXPERIENCE IN THE WAR WITH RUSSIA

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War in Ukraine, a challenge for legal normality

12 mai 2023

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Ce volume propose la publication de plusieurs interventions issues des rencontres scientifiques entre chercheurs français et ukrainien qui se sont tenus à l'Université Paris Nanterre, le 12 mai 2023. Ces rencontres étaient composées de 4 panels.

Descriptif des panels

1st panel: *Functioning of justice during the war: national judicial system and ECHR*

Boris Babin, Kiyv National university of Taras Shevchenko: *The ECtHR, Crimea and Russia's withdrawal from the CoE*

Nataliia Glinka, National Academy of Law science: *Criminal procedure in time of war*

2rd panel: *Relations between Ukraine and the EU in the context of the Russian-Ukrainian war*

Yuliia Chystiakova, Paris Nanterre University: *Challenges for the EU in the aspect of Ukrainian membership negotiations*

Roman Yedeliyev, Educational and Scientific Institute of International Relations: *Reforming Ukrainian labour legislation in the context of European integration*

Marjolaine Roccati, Paris Nanterre University, *Relation between Ukraine and the EU*

3rd panel: *Adaptation of Ukrainian private law to the conditions of war*

Yuliia Akymenko, National University "Odessa Academy of Law", *The practical issues of implementation of Civil Code during the martial law*

Anatoliy Kostruba, Precarpathian National University, *The force majeure and war: Supremes court practice in contract law*

Aurore Chaigneau, Paris Nanterre University, *The implementation of private law: the ownership issue*

4th panel: *War crimes: peculiarities of legal qualification and persecution*

Svitlana Andreichenko, International Humanitarian University, Odesa, Karl Franzens University of Gratz, *Pro special international tribunal*

Anne-Laure Chaumette, Paris Nanterre University, *International Criminal Court and Universal competence of European courts*

Nataliia Hendel, Geneva Academy of international humanitarian law and Human Rights, *Ukrainian cultural values as an object of war crimes*

REMOTE CRIMINAL PROCEEDING IN UKRAINE DURING WAR VS ENSURING THE RIGHT OF THE
INDIVIDUAL TO EFFECTIVE ACCESS TO JUSTICE

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Abstract. The article is devoted to the problematic issues of providing in Ukraine during the war key guarantees of fair trial in context article 6 of the Convention on Human Rights - a right of the individual to a court. It is summarized and illustrated factors that complicate (limit) a person's right to access the court during war. The war accelerated the digital transformation of criminal proceedings - the Ukrainian lawmaker promptly reacted to the situation and introduced a number of digital changes. However, the war posed many challenges regarding the expansion of remoteness both in trial and the pre-trial investigation, which have not yet found their solution in legislation. The author has considered in detail on the actual issues of remote procedure for obtaining statements from witnesses and victims during the pre-trial investigation and remote hearing during court proceedings. It is resumed that although pre-trial investigation bodies make all possible efforts to document war crimes, interact with witnesses and victims, judges in a turbulent regime try to use all possible information technologies, tools to ensure the effectiveness of justice, the current situation requires certain legislative decisions to ensure the effectiveness of justice on the way of building proper online justice in Ukraine.

Key words: criminal proceeding, remote hearing, digitalization, videoconference, interrogation, witnesses, victims, war crimes

Résumé. L'article est consacré aux garanties possibles d'un procès équitable conformément à l'article 6 de la Convention européenne des droits de l'homme pendant la guerre à travers une question en particulier : l'accès au tribunal. La guerre a accéléré la transformation numérique des procédures pénales - le législateur ukrainien a rapidement réagi à la situation et a introduit un certain nombre de changements par la dématérialisation des procédures. Ceci pose de nombreux défis du fait de l'allongement de l'instruction et de la procédure, qui n'ont pas encore trouvé leur solution dans la législation. L'auteur a examiné en détail les problèmes réels de la procédure à distance pour obtenir les déclarations des témoins et des victimes pendant l'enquête préliminaire et l'audience à distance pendant les procédures judiciaires. Bien que les organes d'enquête préliminaire déploient des efforts possibles pour documenter les crimes de guerre, interagir avec les témoins et les victimes, bien qu'ils essaient d'utiliser toutes les technologies d'information possibles pour assurer l'efficacité de la justice, la situation actuelle exige certaines initiatives législatives pour renforcer le cadre de la justice dématérialisée.

Mots clés: procédure pénale, audition à distance, numérisation, visioconférence, interrogatoire, témoins, victimes, crimes de guerre

In accordance with national and international legislation a person's right to access the court cannot be limited under martial law conditions, quite the contrary, sufficient conditions must be created for the participants in the judicial process for a high-quality and effective solution to the dispute. European Court of Human Rights emphasizes fulfilment of a duty to ensure the right to effective access to justice under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is ... no room to distinguish between acts and omissions". The obligation to secure an effective right of access to the courts falls into this category of duty (p. 25 *Case of Airey v. Ireland*).

The factors that complicate (limit) a person's right to access the court during war are :

- constant danger to life and health of participants in the process, judges and court staff;
- destruction of court buildings and pre(o)mises of law enforcement agencies on the territory of Ukraine;
- temporary occupation of Ukraine made it impossible for courts, law enforcement agencies and centers providing free legal aid to be physically located there (however, it is essential to ensure citizens' access to the Ukrainian justice system);
- mass displacement of citizens from their place of permanent residence, including moving abroad.

Today under 5 million internally displaced persons are officially registered in Ukraine, and according to international estimates, the number of internally displaced persons exceeds 7 million citizens. More than 4 million people have registered for temporary protection in Europe.

And although the law prohibits to cut or acceleration of any form of judicial proceedings during martial law, in practice it is very difficult to ensure uninterrupted justice. The complexity of the situation with the courts turned out to be hetero-generous and depended on the geography of the court, the characteristics of the building, the availability of the bomb shelter, the available technical capabilities, etc.

The law provided a change of territorial jurisdiction for courts in case of impossibility to administer justice. mostly this concerns judges who were in temporarily occupied territories or in territories where active military operations are taking place. Some courts changed their location and were transferred to the places least affected by the war, others reduced the frequency or time of consideration of cases in court sessions, some courts stopped to dispense justice. Some judges have joined the ranks of the armed forces and defend our homeland with weapons in their hands.

The information on the number of court buildings that were damaged, as well as judges and court staff suffered as a result of military aggression, is shocking.

According to statistical data more than 8% of court building are destroyed, partially damaged and unusable; nearly 16% of court buildings are located in temporarily occupied territories, so temporarily stop the administration of justice; territorial jurisdiction was changed for 22% of courts.

At the same time, the courts still try to organize their work even in such difficult conditions. However, it turned out to be extremely difficult to carry out a high-quality hearing of criminal cases in such a turbulent regime.

Moreover, in dangerous regions, the question of the legitimacy of stopping dispense justice by the judges themselves turned out to be problematic. So, for example, in the city of Kharkiv, which was not occupied, but was subject to constant shelling, only 3 of the 9 local court continued to fulfill their constitutional duty, while the others suspended their work. The legality of such decisions is questionable, since the head of the military administration did not make the decision to evacuate state institutions from the city. Moreover, law enforcement actively performed their duties, helped people with food and medicine; resettled those who lost their homes; transported specialists of critical infrastructure facilities with their own transport; people were taken to hospitals.

At the same time, due to the absence of judges in 6 district courts and the appellate court of the region, the cases were transferred to the Poltava courts. Therefore, investigators and prosecutors had to travel at least 150 km one way in order to apply for petition to conduct the appropriate investigative action or to apply for a bill of indictment to the court for consideration. The same situation in Donetsk region - it is necessary to overcome a distance of 300 km in order to get to the investigating judge (city of Lyman).

So, in fact, there was a collapse, as a result of which people not only did not get access to justice, but in general lost hope of finding their court files, which contain original documents, receipts for paid court fees, etc.

Both the right to access to justice and the effectiveness of criminal proceedings which are the basis for a fair solution to criminal cases, including war crimes, were under threat. After all, as the Roman maxim says, "Justice delayed is in fact justice denied."

Under wartime conditions, when the personal participation in trial is highly inadvisable, but also often impossible or dangerous for life and health, there was a need to enforce e-Justice: further expansion of opportunities to use the benefits and achievements of remote hearing in criminal proceeding, in particular, using technology of videoconference through remote participation in a court session using one's own technical. So the question of activating remote hearing in national criminal proceedings has arisen. After all, the development of technologies, world trends and the global pandemic promote access to justice even remotely.

So the war actually accelerated the digital transformation of criminal proceedings. The Ukrainian lawmaker promptly reacted to the situation and introduced a number of digital changes. Some of the changes relate to a certain simplification of the procedure for access and use digital information as evidence in criminal proceedings. But they can be potentially questionable for the ordinary procedure because of being intrusive for human rights. For example, the right of the investigator during the search to overcome the logical protection system on gadgets and copy information. However, in view of the shock regime of investigation during the war, such changes are in demand at the moment.

Important legal decisions were made on the way to electronic document circulation in criminal proceedings (from now, the investigator and the prosecutor can make decisions in electronic form), the materials of criminal cases must be stored in electronic form.

Certain steps were also taken in the direction of expanding remote hearing during pre-trial and trial. Thus, an important stage in the transformation of the "military" changes was the return to the general terms of person detention without a court decision. The proposed term of 216 hours outraged human rights defenders, which is why the rule of 72 hours returned. The law establishes that, if it is not possible to bring the detained person to the investigating judge within this period, consideration of the petition for the selection of a preventive measure against him is carried out using

available technical means of video communication in order to ensure the remote participation of the detained person. In practice, any available technical means for video communication are used. If it is impossible to bring the detained person to the court within 72 hours or to ensure his remote participation during the consideration of the relevant petition, such person shall be released immediately.

The law also recognized that the consent of the accused to hold a court hearing in the mode of video conference is not mandatory.

However the war posed many challenges regarding the expansion of remoteness both in trial and the pre-trial investigation, which have not yet found their solution in legislation. Therefore, judicial practice developed spontaneously in response to challenges and for the benefit of justice.

For example, at the beginning of the war in March 2022, for the judges of the High Anti-Corruption Court, located in Kiev, who collegially dispense justice in criminal cases, remote mode was the only possible way to resolve the issue of transferring bail sums to a special account of the armed forces at the initiative of mortgagors. Although this was not directly allowed by law.

So I will focus on the actual issues of the needs of digitization in criminal proceeding as the most rational tool to provide the efficiency of justice during wartime.

1. Remote procedure for obtaining statements from witnesses and victims during the pre-trial investigation.

Oral statements obtained during an investigative act such as interrogation are potentially valuable and usually key evidence in war crimes cases. After all, it is possible to establish the subjective side of the crime only with the help of oral testimony. As shows the analysis of the still few verdicts in cases of collaborative activity, (cooperation of individuals with the aggressor state), they are mostly based on the testimony of witnesses and documents. The testimony of witnesses and victims is the main evidence base in numerous violent crimes, crimes related to sexual violence, committed by the Russian military against citizens of Ukraine.

At the same time, obtaining statements from witnesses and victims who are in the temporarily occupied territory of Ukraine or have left their place of permanent residence due to the war, including being abroad, has become one of the problematic issues.

According to national legislation, testimony can be provided both at the stage of pre-trial investigation and during the trial of the case.

For ten years now, statements received during pre-trial interrogation have no independent value, and therefore any person, regardless of whether he is a suspect, witness or victim, is cross-examined in a trial, since the judge must directly perceive all the evidence. This standard is an attempt to get rid of the practices that existed in the Soviet criminal justice system, which had a bias towards the inquisition process and were guided by the principle of Roman law "confessio est regina probtionum". As a result, nothing was neglected to obtain a confession. psychological and physical pressure was the norm.

In the current law, this rule is unconditional for the suspect, and exceptions exist only for the witness and the victim. When there is a threat that a witness or a victim due to illness, danger to life or other circumstances will not be able to testify during trial on the merits, the legislation provides for the so-called procedure of judicial deposition of evidence during pre-trial - the interrogation is

carried out in a court session at the court or person location in the presence of parties in compliance with the rules of interrogation during a trial. Testimony recorded in this way can be taken into account by the court when deciding the case.

The war made adjustments. By law, the court was given the right to justify its decisions with pre-trial statements from suspect witnesses and victims provided during pre-trial to the investigator or prosecutor in criminal proceedings conducted under martial law. Such testimony can be used as evidence in court only if the course and results of such interrogation were recorded using available technical means of video recording. In case of interrogation of the suspect, the participation of the defence counsel -is also mandatory.

So, in fact, a video recording of testimony, which was the result of interrogation of a witness, victim or suspect by the prosecution, can be used as evidence in court. Moreover, the use of such video recording in court is not limited by the duration of martial law. That is, testimony on video obtained during martial law can be evidence in court after its end.

However, this mechanism is designed for a personal, physical interview of person by the investigator, prosecutor. And this creates a lot of problems if the person is in the occupied territory or outside of Ukraine.

After all, due to the law, the investigation body can receive statements from such persons via video conference only from the building of another court or in the order of providing international legal assistance (if the person is abroad).

If a person is in occupied territory due to the realities of war, it is quite understandable that he is deprived of the possibility to reach a national court physically, even if such persons have an interest to help the investigation.

For these purposes, the law only provides a remote interview procedure by an investigator, a prosecutor in the mode of a video or telephone conference of a person who, due to being in a place remote from the place of the investigation. However, the information that can be obtained in the course of such a procedure is only indicative and has no evidentiary value.

However, in conditions of constant risk to the life and health of witnesses and victims who are in the occupied territories, territories close to military action, it is difficult to hope on the participation of such persons in the future trial. Therefore, receiving evidentiary information from them, which in the future will be used not only within national, but also international jurisdiction during the trial of war crimes cases, cannot be delayed. At the same time, the procedure for obtaining such testimony should be as simplified as possible and provided by national legislation.

As for obtaining statements from persons who are abroad, corresponding procedure is not operational. In addition, the investigator conducting the investigation does not have the opportunity to directly perceive the situation of the procedural action and evaluate the credibility of the testimony provided. This can have a negative impact on establishing the circumstances of the crime.

Therefore, the existing regulatory procedure for remote interrogation of witnesses and victims during martial law is complicated and does not satisfy the need for the investigation to "act here and now". It seems appropriate to allow interrogation of such persons in the mode of a video conference with the use of their own technical means of communication by the victims and witnesses from any room.

Simplification of procedural requirements for extrajudicial interrogation of witnesses and victims during pre-trial investigation is permissible both in view of the lack of strict standards from international institutions, and in view of permissible deviations from procedural rites during emergency situations in order to balance the procedural guarantees of participants in criminal proceedings and the interests of the investigation (proportionality test taking into account the priority of national security interests during martial law).

However, even under existing legal conditions, investigative bodies are making unprecedented efforts to document war crimes in Ukraine.

One of the options for obtaining information from witnesses and victims is to send them self-recorded video testimonies. According to the law, such testimony is recognized as the document - a type of evidence. Such a video recording of testimony can be used in the investigation.

However, it can be used as court evidence only in case 1) if, at the time of the court hearing, the danger to a person's health or life remains in connection with military operations in the region of his residence, and he cannot testify before the court neither in the court premises, nor in video conference mode; 2) the absence of motivated objections or doubts in the testimony from other participants in the criminal proceedings.

Therefore, from the point of view of a fair procedure, such information is less reliable, and in case of certain doubts about the identification of the person who testified on the video, or about the truthfulness of his testimony, it cannot be used in the guilty verdict.

There are many other questions related to the interrogation in wartime, which already concern the prospect of enforcement of fair procedure in view of certain curtailments of the principle of immediacy. But they are interesting more from the point of view of the rule of law.

2. Remote hearing during court proceedings.

There had arisen 2 problems:

- 1) the uncertainty of the law about allowing judges to dispense justice while being in a undangerous place (outside the court premises);
- 2) the uncertainty of the law about allowing person in criminal proceedings to participate in a video conference using their own technical tools.

In general, it should be noted that criminal justice in Ukraine is certain conservative in relation to case hearings by video conference. In 10 years since this institution in the new Criminal Procedure Code of Ukraine was regulated, there has been no quality legal breakthrough in using the advantages of videoconferencing as a product of modern IT and guarantees of the right to a fair trial. However, in view of the outlined objective factors, it is very common for the participants in the process to effectively reach justice only by staying in places far from the court premises and using their own technical means. This is also applied to judges, whose presence in the premises of court buildings can also be extremely dangerous for their life and health.

However, the law does not contain a direct permission, it does not contain a direct prohibition either.

- 1) *Regarding the first problem.* The current legislation does not contain a direct permission for a judge to hear the case by video conference outside the court premises (meeting hall), including at home or in another undangerous place using his own technical tools. To resolve the issue of the uninterrupted functioning of justice, the High Council of Justice of Ukraine recommended, in

particular, if the proceedings are considered collegially and the panel of judges cannot meet in one room, then it is permissible to hear cases from different court rooms, including using their own technical tools. However, although these recommendations are valuable guidelines, they do not replace the law. After all, the High Council of Justice has already received several disciplinary appeals against judges who dispense justice outside of court premises.

However, currently there is no completely safe place in Ukraine, and sirens sound almost every day in every area of our country, which implies the need for a person (judge, court staff) to move to a bomb shelter. Ignoring these instructions can have dangerous consequences. Unfortunately, in the Mykolaiv region, as a result of a rocket attack on the building in which the court was located, court staff were killed. Thus, during air raids, it is necessary to interrupt the court session to stay in the shelter. The number of such forced "interruptions" per day can be different, as well as their duration. Each judge has the right to decide, based on the currently existing threats, whether it is safe to be in the premises of a particular court and dispense justice. If we weigh the traditions routings of justice against the likelihood of sustaining non-life-threatening injuries under conditions of real threat, the choice is obvious.

In addition, one of the most controversial military innovations was the possibility for the prosecutor to exercise certain powers of the investigating judge in the event that the judge objectively cannot exercise them. However, this narrowing of judicial control is a greater departure from the standards of fair procedure than allowing a judge to dispense justice online.

2) *Regarding the second problem.* In today realities, the further hearing of some criminal proceedings in a reasonable time is physically possible only under the conditions of using video conference, including using own technical tools. Thus, judges are faced with forced long breaks in court proceedings due to -the stay of the accused, witnesses, experts in the temporarily occupied territories; -the impossibility of questioning witnesses, experts due to their actual location not being established; - internal movement of persons, etc. At the same time, the terms of bringing to criminal responsibility are not suspended, which later will be the basis for exemption from criminal responsibility.

As of now, one can only imagine how many people will permanently change their country of residence as a result of military chaos, will be deprived of the opportunity to live at the place of registration, will lose their home or even their life and health. That is why it is extremely important to use any possibility (even with the use of own technical tools, Zoom platforms, messengers, etc.) to ensure the participation of the accused, witness, expert who are in the occupied territory or who are unable to reach the court premises for other reasons. Moreover, groundless refusal to grant petition for participation in court hearings using one's own technical tools may hypothetically lead to the impossibility of questioning such witnesses, experts, etc. in the future.

However, due to the uncertainty of the law judges often demonstrate a diametrically opposed approach to allowing person in criminal proceedings to participate in a video conference using their own technical tools. But it is extremely harmful from the point of view of the principle of the rule of law.

Thus, in the 150 analysed court decisions regarding the petition of parties to the process to conduct remote hearing during martial law, in 20 percent of cases the judges refused to conduct remote hearings. In most cases, judges refuse due to the lack of proper justification, such as the failure of the defence attorney to provide any evidence to confirm the impossibility of appearing at the trial.

At the same time, the only fact of the martial law is not considered in judicial practice as sufficient grounds for the needs of remote court proceedings.

Such "restraint" of judges is partially explained by their unwillingness to perceive electronic justice as full and alternative.

However, in approximately 25 percent of numbers of refusals, judges refused parties to hold a video conference using their own technical tools due to the lack of direct Law permission for this. So, for example, in one of the decisions, the judge noted: "The court takes into account paragraph 10 of the recommendations of the Council of Judges of Ukraine regarding the work of courts in martial law dated March 2, 2022, according to which, if under objective circumstances a party in the proceedings cannot participate in a court session in the mode of video conference with the help of technical tools, determined by the PDA, as an exception to allow to participate in the video conference mode using any other technical tools, including their own. The court also takes into account paragraph 7 of the letter of the Supreme Court No. 1/0/2-22 dated 03.03.2022 "Regarding certain issues of conducting criminal proceedings under martial law". However, such clarifications do not have the force of law."

Therefore, because of the imperative method of legal regulation in the criminal procedure, certain legislative decisions are in demand.

Finally, I would like to note that pre-trial investigation bodies make efforts to document war crimes, quickly interact with witnesses and victims, using all available national and international tools for this purpose. Judges in a turbulent regime try to use all possible information technologies, tools to ensure the effectiveness of justice, while relying on advanced European practice in respect of digitalization.

Although the current situation in our country, more than ever, requires non-standard law solutions and ideas in order to ensure the effectiveness of justice and advance in building proper online justice in Ukraine. After all, excessive formalism in such circumstances will undermine the authority of the judicial power, which is to protect the interests of citizens in any conditions. Remote justice requires not only a technical, but first of all a normative basis - legal certainty regarding its permissible format.

Today, it can be definitely stated that in such an extraordinary time, Ukraine, with its concrete activity, has finally confirmed the format of a truly legal state, in which human rights are the highest value, and its movement towards European integration.

CHALLENGES FOR THE EU IN THE ASPECT OF UKRAINIAN MEMBERSHIP NEGOTIATIONS

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Abstract. The article examines the phenomenon of Ukrainian European integration, which has significantly intensified over the past two years. Against the background of the full-scale invasion of Russia on the territory of Ukraine, the Ukrainian authorities made a significant breakthrough in relations with the Union. Currently, the EU has decided to start negotiations on the terms of Ukraine's admission to the Union. Ukrainian integration into the EU is accompanied by significant challenges both for Ukraine itself and for the Union itself. The article examines the most significant challenges for the EU in granting Ukraine full membership.

Key words: Ukraine, EU, euro integration, war, candidate for membership of the EU, negotiations on the accession to the EU.

Résumé. L'article examine le phénomène d'intégration européenne ukrainienne, qui s'est considérablement accéléré au cours des deux dernières années. Dans le contexte de l'invasion de la Russie sur le territoire ukrainien, les autorités ukrainiennes ont réalisé une avancée significative dans leurs relations avec l'Union. Actuellement, l'UE a décidé d'entamer des négociations sur les conditions d'adhésion de l'Ukraine à l'Union européenne mais cette intégration s'accompagne de défis importants tant pour l'Ukraine elle-même que pour l'Union. L'article propose d'analyser les enjeux de cette intégration.

Mots clés: Ukraine, UE, guerre, candidat à l'adhésion à l'UE, négociations d'adhésion à l'UE.

Introduction

Euro integration of the Ukraine is the long-term vector of state's development which was identified by Ukrainian society as the dominant and literally vital for Ukraine. The question of geopolitical choice was always an issue in Ukrainian history, and it has got a new actuality after the collapse of the Soviet Union. Newly established state started to work out its own international politics. For many years it was the strategy of balancing between East and West, considering interests of Russian Federation and establishing relations with countries and organizations of so-called West, including the EU¹.

With no doubt we can consider that the events of the Revolution of Dignity (Euromaidan) in 2013-2014 and the beginning of full-scale Russian invasion as turning points in relations between Ukraine and the EU².

During quite long period the European integration of Ukraine was and still is considered as the most difficult challenge for the country and its authorities. Ukrainian specialist and scientists underline that its Ukrainian obligation to adapt to the existing system of the EU and all the steps that should have been done were perceived as a "homework" for national Parliament and government³. Following the criteria for membership in the European Union established in Maastricht Treaty 1992 and in The declaration of the June 1993 European Council in Copenhagen (Copenhagen criteria), Ukraine was evaluated and level of its readiness was determined. The EU and its economical, legal, institutional systems were considered as some kind of standard that should be reached by Ukraine.

But the European integration by itself in last decades went through hard period, marking the questions of further development and manners of this development. Many of these problems were lightened brightly during the Brexit⁴. So today in 2024 it is very logical not only to put the question

¹ See more, for example: Per Ekman, Painful Moments and Realignment: Explaining Ukraine's Foreign Policy, 2014–2022, Problems of Post-Communism, 2023, URL: <https://uu.diva-portal.org/smash/get/diva2:1797528/FULLTEXT01.pdf>; Shyrokykh, Karina, The Evolution of the Foreign Policy of Ukraine: External Actors and Domestic Factors. Europe Asia Studies, 2018 URL: <https://www.tandfonline.com/doi/full/10.1080/09668136.2018.1479734>; Taras Kuzio Longing for Europe, Nostalgic for Russia: Ukraine's Foreign Policy. Konrad-Adenauer-Stiftung Online-Dokumentation. URL: https://www.kas.de/c/document_library/get_file?uuid=d4c97819-645d-f9dc-03c9-afc99d7ddc68&groupId=265553

² See more, for example: Åslund, Anders. "The Maidan and Beyond: Oligarchs, Corruption, and European Integration". Journal of Democracy, vol. 25, no. 3, July 2014, pp. 64-73. URL: <https://www.journalofdemocracy.org/articles/the-maidan-and-beyond-oligarchs-corruption-and-european-integration/>; Ilona Sologoub. Ukraine's EU Integration: A Long Way Home. Intereconomics, 2022, 57(4), 218-224, URL: <https://www.intereconomics.eu/contents/year/2022/number/4/article/ukraine-s-eu-integration-a-long-way-home.html>; Maryna Rabinovych. EU's development policy vis-à-vis Ukraine after the Euromaidan: securitisation, state-building and integration. East European Politics, 2019, № 3, p. 332-350, URL: <https://www.tandfonline.com/doi/abs/10.1080/21599165.2019.1604338>

³ "Ukraine's Sectoral Integration into the EU: Preconditions, Prospects, Challenges" report was prepared by the team of authors: M.Pashkov (Head of Project), Co-director of Foreign Policy and International Security Programmes of the Razumkov Centre; K.Markevych, Razumkov Centre Leading Expert on Economic and Social Programmes; V.Sidenko, Razumkov Centre Scientific Consultant on Economic Issues; P.Stetsiuk, Razumkov Centre Scientific Consultant on Legal Issues. URL: https://razumkov.org.ua/uploads/article/2021_sektor_eu_eng.pdf

⁴ Hall, Peter A.. "The Euro Crisis and the Future of European Integration." In The Search for Europe. Contrasting Approaches. Madrid: BBVA, 2015. URL: <https://www.bbvaopenmind.com/en/articles/the-euro-crisis-and-the-future-of-european-integration/>; Marek. Louzek, Lubos. Smrcka, The European integration crisis : an economic analysis. Newcastle-upon-Tyne : Cambridge Scholars Publisher, 2020, 1 URL: [https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU\(2018\)604973_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604973/IPOL_STU(2018)604973_EN.pdf); Luo C-M. Brexit and its Implications for European Integration. European Review. 2017;25(4):519-531. doi:10.1017/S1062798717000308.

“Is Ukraine ready to become a part of the EU?”, but also to have an answer for the question “Can the EU manage its enlargement and what challenges such enlargement will bring”?

I. The main landmarks in the development of bilateral relations between Ukraine and the EU

It should be noted that the question of the EU integration of Ukraine for many years was an issue of debates not only in Ukrainian domestic level, but as well it was a matter of discussions among the EU politicians. And it can be illustrated through the chronology and pace of relationships development between two parties: the speed and intensity of cooperation were different from time to time.

The first official bilateral treaty was signed on June 14, 1994 – Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine, and it entered into force four years later – March 1, 1998. But, as it mentioned by O. Tragniuk, the development of bilateral relations at this stage was complicated by Brussels demands on Ukraine’s nuclear-free status. The EU had put fundamental conditions for development of the cooperation and the signing of the Agreement – withdrawal of nuclear weapons from Ukraine and accession of the state to the Treaty on the nonproliferation of nuclear weapons.⁵ And from nowadays historical perspective we can say that this demand to Ukrainian authorities can barely be considered as reasonable one. But on December 5, 1994, Ukraine with Russia, Great Britain and the USA has signed Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the non-proliferation of nuclear weapons (so-called Budapest memorandum).⁶

Turning back to the Partnership and Cooperation Agreement between Ukraine and the EU it established several important principles of cooperation: political dialogue between the parties; promotion of trade and investment and the development of harmonious economic relations between the parties; creation of basis for mutually advantageous economic, social, financial, scientific, technical and cultural cooperation; support for Ukraine's efforts to strengthen democracy and the end of the transition to market economy.⁷

But the EU by itself was focused mainly on its enlargement by the big group of post-socialistic and post-soviet states, that occurred in 2004 and 2007. So, the relations with Ukraine were not the main priority. After the enlargement Ukraine has become one of the EU’s biggest neighboring country. That pushed to a new stage of relations between parties – the EU has proposed new initiative “Eastern Partnership”. It was an approach that aimed to strength relations with the EU's eastern neighbors and besides Ukraine included Moldova, Belarus, Georgia, Armenia, and Azerbaijan. The initiative was launched at the Prague Eastern Partnership Summit on 7 May 2009.⁸

⁵ Tragniuk, Olesia. “European Union and Ukraine: Some Issues of Legal Regulation of Relations – From Partnership and Cooperation Agreement to Association Agreement –.” *KritV, CritQ, RCrit. Kritische Vierteljahresschrift Für Gesetzgebung Und Rechtswissenschaft / Critical Quarterly for Legislation and Law / Revue Critique Trimestrielle de Jurisprudence et de Législation*, vol. 99, no. 1, 2016, pp. 44–63. URL: https://www.nomos-elibrary.de/10.5771/2193-7869-2016-1-44.pdf?download_full_pdf=1

⁶ Memorandum on security assurances in connection with Ukraine’s accession to the Treaty on the Non-Proliferation of Nuclear Weapons, URL: <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280401fbb>

⁷ Partnership and Cooperation Agreement between the European Communities and their Member States, and Ukraine, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A21998A0219%2802%29>

⁸ Joint Declaration of the Prague Eastern Partnership Summit Prague, 7 May 2009 URL: https://www.consilium.europa.eu/media/31797/2009_eap_declaration.pdf

This gave a new impetus to the process of preparation the new bilateral agreement between the EU and Ukraine. The official start took place on 2007 and it was decided that this agreement will be called the Association Agreement. The final version of the treaty's draft was ready December 19, 2011. On November 21, 2013, the Cabinet of Ministers of Ukraine decided to suspend the process of preparation for the signing of this agreement with the European Union. And this caused massive anti-governmental and anti-presidential movement – Euromaidan, which turned into a Revolution of Dignity and caused the first stage of the Russian invasion – the annexation of Crimea and formation of the Moscow-controlled “republics” in certain territories of the Donetsk and Luhansk regions.

For Ukraine 2014 has become the turning point, when euro-integration was proclaimed as the only possible international vector of development. It was confirmed on the highest legislative level, as on February 7, 2019, Verhovna Rada, Ukrainian parliament, established the irreversibility of the state's strategic course towards full membership in the European Union and the North Atlantic Treaty Organization in the Constitution of Ukraine.

On March 21, 2014, during the Extraordinary Ukraine-EU Summit, the political part of the Agreement and the Final Act of the Summit were signed. On June 27, 2014, during the EU Council meeting, the President of Ukraine P. Poroshenko and the leadership of the European Union and the heads of state and government of 28 EU member states signed the economic part of the Agreement”, which, together with the rest of the text of the Agreement, form a single document. Until now this is the treaty that regulates bilateral relations and provides basis for Ukrainian adaptation to the EU's standards in different spheres.

But all this time, even after 2014, Ukrainian full integration as a member state was not considered inside the EU as axioma. For example, on March 3, 2016, then European Commission President Jean-Claude Juncker said that it would take Ukraine at least 20 to 25 years to join the European Union and NATO,⁹. In 2018 for many analytics it was clear that there was an emerging consensus that Ukraine was not liable to be quickly fixed by EU-sponsored reforms, and frustration was growing that the country was returning to business as usual and still had many features of a captured state.¹⁰ The general level of the discourse from the EU side showed very careful approach and did not provide optimism for Ukrainian side.¹¹

But the full-scale invasion on February 24, 2022 of the Russia Federation to Ukraine has changed the rhythm of relations between the country and the EU. On February 28, 2022, the sixth President of Ukraine Volodymyr Zelensky signed an application for Ukraine's accession to the EU. On March 1, 2022, the European Parliament voted almost unanimously in favor of a resolution that called on the EU institutions to work towards granting Ukraine candidate status for EU membership. On June 17, 2022, the European Commission recommended that the European Council should grant Ukraine the status of a candidate for EU membership. On June 23, 2022, the European Council granted Ukraine the status of a candidate for EU membership¹². But there was not given a clear perspective on the question will or not Ukraine be invited to the negotiations. The 7 blocks of reforms were determined as obligatory for fulfillment in order to maintain the status of a candidate. Brussels

⁹ Juncker Says Ukraine Not Likely To Join EU, NATO For 20-25 Years. RadioFreeEurope, URL: <https://www.rferl.org/a/juncker-says-ukraine-not-likely-join-eu-nato-for-20-25-years/27588682.html>

¹⁰ The EU and Ukraine: Taking a Breath: Balázs Jarábik, Gwendolyn Sasse, Natalia Shapovalova, Thomas De Waal. Carnegie endowment for international peace, FEBRUARY 27, 2018. URL: <https://carnegieendowment.org/files/CEIPJ5999-EU-Ukraine-180228-WEB.pdf>

¹¹ Natorski Michal United we stand in metaphors: EU authority and incomplete politicisation of the crisis in Ukraine. Journal of european integration 2020, VOL. 42, NO. 5, 733–749, URL: <https://doi.org/10.1080/07036337.2020.1792461>

¹² European Union leaders set to grant Ukraine candidate status. Le Monde, June 23, 2022, URL: https://www.lemonde.fr/en/international/article/2022/06/23/european-union-leaders-set-to-grant-ukraine-candidate-status_5987778_4.html

also reserved the right to withdraw this status at any time. But on November 8, 2023, the European Commission recommended starting accession negotiations with Ukraine. On December 14, 2023, the European Council agreed to open these negotiations.¹³

So, we see that two years of full-scale Russian aggression against Ukraine have led to the extremely quick progress of the country's euro integration. The average time between signing association agreement to candidate status for other states was about seven years.¹⁴ This path took approximately the same time for Ukraine. But the period between receiving candidate status and launching the accession negotiations in the Ukrainian case can be considered as very rapid, especially taking into account the Russian aggression and all the impact it brings. For example, Poland applied for EU membership on April 5, 1994, and the start of accession negotiations took place three and half years later – December 12-13, 1997.

It should be underlined, that despite such decisive actions of the EU's institutions, some member states have promptly rejected any "fast-track accession" on grounds that formally there is no such special procedure in EU law, and that the watering down of entry conditions would be dangerous for the Union, as well as problematic for its relations with other applicants. Indeed, candidate states from the Western Balkans have warned against the proposition that Ukraine should get accession priority, as that would (further) undermine their own accession perspective. As is well known, some of the applicant countries from the Balkans experienced bloody civil wars and military intrusion by third countries, and have since, at least in some cases, made considerable efforts to be able to join, though without always getting much support from the EU in return.¹⁵

However, the EU institutions made their decision, and our days reality is that the EU has opened negotiations with Ukraine on the accession conditions. This all is taking place on the background of the most intensified and cruel war in Europe after the World War II, after the massive Euroscepticism crisis inside the EU and other international challenges. Obviously Ukrainian people have showed their willingness to protect and fight for the main European values, that are mentioned in the EU's fundamental treaties, – respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. But is it enough for successful integration? And would not such integration bring the huge damage to the EU by itself.

II. The spectrum of challenges for the EU in case of Ukrainian membership

Ukraine is interested to integrate into strong community that will bring benefits to its economy and will help to come over devastating consequences. That is why to consider challenges of the EU that such integration brings is very important for both parties. Ukraine is the biggest European country (if we don't consider Russia Federation) and even without Russian aggressive war always had very complex and difficult problems, some of which have roots in its soviet past. And for the EU is crucial to consider all of them, not to collapse by itself as a result of Ukraine's accession. Such

¹³ EU greenlights accession talks with Ukraine but Orbán vetoes €50-billion aid package: Jorge Liboreiro, Mared Gwyn Jones, Alice Tidey. Euronews, 14/12/2023. URL: <https://www.euronews.com/my-europe/2023/12/14/eu-greenlights-accession-talks-with-ukraine-and-moldova>

¹⁴ Vilpišauskas Ramūnas. The final stage of the EU-accession game: The Baltic states – the likely victims of their own success? A draft paper for the EUSA conference (March 27-29, 2003), the panel on EU enlargement, URL: https://webcache.googleusercontent.com/search?q=cache:NIMiZlqO_BwJ:aei.pitt.edu/427/1/EUSA-2003-vilpisauskas-draft.doc&hl=uk&gl=fr

¹⁵ Petrov Roman. Applying for EU Membership in Time of War: "Accession through War" of Ukraine. IAI Papers, 23/09. URL: <https://www.iai.it/sites/default/files/iaip2309.pdf>

acknowledgement is important part of the EU's integration capacity – possibility by the EU to integrate new members. While the acceding countries must be ready and able to fully assume the obligations of membership, the Union must be able to function effectively and to develop.¹⁶

Economic problems

Of course, the most apparent question is the capacity of the EU to include Ukrainian economy that is totally damaged by the war. The peculiarity of Russian aggression against Ukraine is that the aggressor's army purposely damages the various types of the civil infrastructure and civilians.¹⁷ In 2022, the national economy lost 29.2% of real GDP, and 13.5 million people were forced to leave their homes. More than 7 million people were below the poverty line, and the poverty level reached 24% of the population¹⁸.

However, thanks to the broad support of the allies, including the EU, the Ukrainian economy in 2023 has demonstrated quite high resilience to negative factors, which are still the majority. In 2023, the national economy after the outbreak of a full-scale war, had growth – almost 5 percent GDP during the last year. Ukrainian business adapted relatively quickly to the complex and rapidly changing conditions, reconfiguring business processes, reorganizing logistics routes, etc. Despite many negative factors and a high degree of uncertainty, analysts expect the Ukrainian economy to grow by 3-5% in 2024.¹⁹

Experts from the World Bank in The Rapid Damage and Needs Assessment, released in March 2023, estimated that the cost of reconstruction and recovery stands at \$411 billion over the next 10 years and combines both needs for public and private funds.²⁰ The Report evaluated war impacts across 20 sectors. This analysis is helping the Government of Ukraine and donors to identify the priorities for recovery while continuing to support the provision of core services like health, education, and social protection. The highest estimated needs are in transport, housing, energy, social protection and livelihoods, explosive hazard management, and agriculture. However, this amount doesn't include what is needed to help the government meet the basic needs of its citizens like paying pensions, keeping hospitals open, and keeping kids in schools.

But the mentioned evaluation was made only for the consequences of the one year since Russia's invasion, from February 2022 to February 2023. It does not include for instance the damages after destruction of the Kakhovka's dam. The next round of damage evaluation is underway, and a new report will be released in February 2024.

Ukraine has very strong potential in number of economic sectors and combining it with much lower salaries and social standards for the workers it leads to the problem of some competitive advantages on the European market. As an example, we can cite the agricultural sector, which is already experiencing significant opposition from domestic EU producers against Ukrainian goods. Integrating Ukraine to the EU will add another 30mn hectares to the EU's existing 100mn, but the structure of the Ukrainian agricultural business differs from the EU countries – it is mainly

¹⁶ Integration capacity. An official website of the European Union. URL: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/integration-capacity_en

¹⁷ Report on Damages to Infrastructure Caused by Russia's War against Ukraine One Year after the Start of the Full-Scale Invasion March 2023. Kyiv school of economy. URL: https://kse.ua/wp-content/uploads/2023/03/ENG_FINAL_Damages-Report_.pdf

¹⁸ Bohdan Tatyana. Financial and economic consequences of the war (Богдан Тетяна Фінансово-економічні наслідки війни). LB, March 31, 2023, URL: https://lb.ua/blog/tetiana_bohdan/550614_finansovoeconomichni_naslidki.html

¹⁹ Grigorenko Yuriy. Ukraine's economy is forecast to grow by 3-5% in 2024. GMK center, 29 December 2023. URL: <https://gmk.center/en/posts/ukraines-economy-is-forecast-to-grow-by-3-5-in-2024/>

²⁰ The World Bank In Ukraine. December 15, 2023. URL: <https://www.worldbank.org/en/country/ukraine/overview>

concentrated in the hands of big companies. So, Ukraine cannot join the Union at all unless the EU first reforms its Common Agricultural Policy. Under current CAP rules, admitting the agricultural powerhouse of Ukraine will put enormous strain on the EU budget.²¹ On December 11, 2023, Agriculture Commissioner J. Wojciechowski said there was a “problem” with agrifood imports from Ukraine. He called on the EU to instigate “some appropriate safeguard instruments to react if import[s are] too high and disruptive for [the EU] market” and added the EU should “further debate” the potential prolongation of full trade liberalization with Ukraine, due to end in June 2024.²² And this problem is evident for the local producers. Earlier the same point was underlined by J. Rukwied, the president of the German Farmers’ Association. He said that EU membership of agricultural powerhouse Ukraine would result in the “death” of family farming in Europe.²³

Another economic and social challenge is related to the amount of Ukrainian population (nearly 40 million people) and its social differentiation. Even before the war that ruined its economy, Ukraine was one of the poorest countries in Europe. It had a GDP per capita of \$4,800 (€4451) in 2021 – more than ten times less than advanced European economies such as the UK, France and Germany.²⁴ Of course under the influence of war the situation became worse.

Currently 4.2 million people from Ukraine benefit from the temporary protection mechanism in the EU countries (data up to September 2023).²⁵ They mostly include the least protected segments of the population: children, the elderly, and women who take care for them. In case of full membership, we can predict continuing of the movement of people from Ukraine to other EU countries. But experts underline that the characteristics and consequences of Ukrainian migration are different from previous migration crisis Europe was affected by. Not only do refugees from Ukraine possess higher formal qualification levels than most other refugee groups, but they also benefitted from the support of large diaspora networks in host countries and had immediate access to the labor market.²⁶

In general, it should be agreed that migrants create additional challenges for state finances in the short run, they are likely to make a positive impact on the budget and economy of recipient countries if migrants stay in these countries longer than several years and actively participate in the labor market.²⁷

For sure Ukrainian economic integration will be a huge challenge for the EU and its institutions. As demonstrated on the agricultural example, we can see that the debate how the EU should react on those problems is still a matter of discussion.

²¹ Aris Ben. Ukraine can't join the EU until the Common Agricultural Policy is reformed. bne IntelliNews, September 23, 2023. URL: <https://www.intellinews.com/ukraine-can-t-join-the-eu-until-the-common-agricultural-policy-is-reformed-293872/>

²² Arboleas Maria Simon, FooteNatasha Tensions mount over Ukraine agri imports amid mixed messages from Commission. Euractiv, 13 December 2023. URL: <https://www.euractiv.com/section/agriculture-food/news/tensions-mount-over-ukraine-agri-imports-amid-mixed-messages-from-commission/>

²³ Dahm Julia. German farmers: Ukraine membership would spell end of EU farming system. Euractiv, 17 November 2023. URL: <https://www.euractiv.com/section/agriculture-food/news/german-farmers-union-warns-against-eu-accession-for-ukraine/>

²⁴ <https://www.euronews.com/2023/03/21/what-would-actually-happen-if-ukraine-joined-the-eu>

²⁵ Infographic - Refugees from Ukraine in the EU. Official website of the Council of the EU and the European Council. URL: <https://www.consilium.europa.eu/en/infographics/ukraine-refugees-eu/>

²⁶ What we know about the skills and early labour market outcomes of refugees from Ukraine. OECD, 6 January 2023. URL: <https://www.oecd.org/ukraine-hub/policy-responses/what-we-know-about-the-skills-and-early-labour-market-outcomes-of-refugees-from-ukraine-c7e694aa/>

²⁷ How Ukrainian migrants affect the economies of European countries: Olga Pogarska Olga Tucha Inna Spivak Olga Bondarenko. CEPR, 7 Mar 2023. URL: <https://cepr.org/voxeu/columns/how-ukrainian-migrants-affect-economies-european-countries>

The need of institutional changes for the EU

Of course, the enlargement of the EU will bring to significant institutional changes in the Union. Especially if we are talking not only about accepting Ukraine, but as well Moldova, Balkan countries, and Georgia. All recent enlargements in 2004, 2007 and 2013 were prepared in advance by the chain of amendments to the EU agreements: the treaty of Nice and Lisbon. The main purpose of institutional changes was determined to the goal of more effective functioning of the EU bodies and to achieve an optimal balance of representativeness of member states at the EU level. The same preparation should occur before the next enlargement of the Union.

The problem of institutional reforms is well recognized by the European leaders. For example, French-German declaration posted on 22 January 2023 states: “To strengthen the EU as a geopolitical actor and in order to prepare the EU for future enlargements, we need to work on the reform of the European institutions. For the functioning of an enlarged European Union, we have to ensure efficient decision making... For the short term, we need to widen the fields where qualified majority voting applies in the Council to overcome the deadlocks that have been observed, such as on certain areas of Common Foreign and Security Policy and taxation. To this end, we advocate the use of the respective passerelle clauses and constructive abstention as possible ways forward within the framework of the existing treaties.”²⁸

The issue with decision making was highlighted because of the Russian aggression against Ukraine. The Common Foreign and Security Policy as well as membership of the Union are two of few remaining policy areas of the European Union that still require unanimity—meaning the agreement of all twenty-seven member states. Until now, it was possible to somehow avoid blocking Ukrainian integration and imposing sanctions against Russia. So, for example, during the discussions among EU leaders on Ukraine’s accession to the bloc on December 14, 2023, the German chancellor proposed to Hungarian Prime Minister Viktor Orbán: Grab a coffee outside the room, perhaps.²⁹ That allowed the 26 EU leaders who remained to approve Ukraine’s road to accession with the required unanimity. But such such tricks cannot be used on a permanent basis.

A group of nine EU member states, Germany Belgium, Finland, France, Italy, Luxembourg, Netherlands, Slovenia and Spain, on May 4, 2023, issued an appeal to overhaul voting on the EU’s Common Foreign and Security Policy. They aim to improve effectiveness and speed of the EU’s foreign-policy decision-making in light of Russia’s war of aggression against Ukraine and the growing international challenges the EU is facing.³⁰

But except unanimous voting, Ukrainian membership will bring significant shift in other decision-making processes. As already mentioned, almost 40 million of Ukrainian citizens after enlargement will have the right to for EU Parliament. The Council’s qualified majority voting will be as well influenced by Ukrainian membership.

Institutional reforms are crucial for EU’s effective functioning. And they should be performed not only to stabilize the Union, but to continue fulfill the principle of representation of interests of member states, including newly excepted ones.

²⁸ French-German declaration Posted on 22 January 2023, URL: <https://www.elysee.fr/en/emmanuel-macron/2023/01/22/french-german-declaration>

²⁹ Scholz gets Orbán out the room to open Ukraine’s membership talks. Politico, URL: <https://www.politico.eu/article/olaf-scholz-gets-viktor-orban-out-the-room-to-approve-ukraine-accession-talks/>

³⁰ Nine EU members states renew push to change foreign policy decision-making. Euroactiv, URL: <https://www.euractiv.com/section/global-europe/news/nine-eu-members-states-renew-push-to-change-foreign-policy-decision-making/>

Security issues

With no doubts aggressive Russian war against Ukraine has influenced the security situation in all Europe. It was a matter of long-term discussions how far should the Union develop its The Common Security and Defence Policy³¹. But the existence of the article 42.7 of the Treaty on the EU, which says: "If a member state is a victim of armed aggression on its territory, other member states are obliged to provide it with assistance and assistance by all means available to them"³², in combination with future Ukrainian membership brings a new aspect of this EU policy and options of application of this article. And as the acceptance of Ukraine to the NATO is much more difficult question, that involves stakeholders outside the Europe, the problem of resistance against Russia's invasion to territories of Ukraine and hypothetically territories of other member states should be overviewed according to the reality. As it mentioned in some researches, the EU has neither the experience nor the military planning and command and control assets of NATO. Most European governments had no interest in discussing how Article 42.7 would apply in a classic territorial defense scenario, much less in investing in the ability to back up this commitment militarily. EU member states have done little planning or resourcing to make the article credible, in large part because the EU has always outsourced questions of continental defense and deterrence to NATO.³³

It is clear that EU's defense policy will evolve. This is one of the priorities identified by the Commission.³⁴ In its communication On the Defense Investment Gaps Analysis And Way Forward Commission stated: "The return of war to Europe has underlined the effects of years of defense underspending, which has led to an accumulation of gaps and shortfalls in the collective military inventories as well as reduced industrial production capacity."³⁵

So, we see that security aspect, and not only in its defense dimension, should be considered as one of dominant, especially if we are talking about future Ukrainian membership. Enlargement of the EU with post-soviet countries such as Ukraine, Moldova, Georgia automatically will bring a threat that this member states in one or another way will be attacked by Russia, indeed a part of territories of these three counties is now under the Russian control.

Conclusions

The development of bilateral relations between Ukraine and the EU with the beginning of the brutal Russian aggression obviously reached a new, more intense level. Starting negotiations on the terms of Ukraine's accession to the EU, the Union must clearly monitor not only Ukraine's compliance with the requirements for adaptation, but also its own preparation for such an expansion. The Ukrainian case will probably be the most difficult in the history of EU enlargement. After all, we have not just a large country with powerful sectors of the economy that were formed during the Soviet

³¹ Göler Daniel, « The Current CSDP-Reform Debate and German Strategic Culture: Between Restraint and European Ambition », *L'Europe en Formation*, 2019/2 (n° 389), p. 141-160. DOI : 10.3917/eufor.389.0141. URL : <https://www.cairn.info/revue-l-europe-en-formation-2019-2-page-141.htm>

³² Consolidated version of the Treaty on European Union. An official website of the European Union. URL: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

³³ Besch Sophia, Ciaramella Eric, Ukraine's Accession Poses a Unique Conundrum for the EU. Carnegie Endowment for International Peace, October 24, 2023. URL: <https://carnegieendowment.org/2023/10/24/ukraine-s-accession-poses-unique-conundrum-for-eu-pub-90838>

³⁴ Stronger European defence. European Commission. URL: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/stronger-european-defence_en

³⁵ Joint communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions On The Defence Investment Gaps Analysis And Way Forward. European Commission. URL: https://commission.europa.eu/system/files/2022-05/join_2022_24_2_en_act_part1_v3_1.pdf

Union and developed specifically after that, but now must be integrated into the common market. We also have country in the midst of a brutal and devastating war, whose population, suffering from constant attacks, is constantly on the move.

This creates unprecedented and significant challenges for the EU. However, at the same time, this is an impetus for reforming the Union, which has long been evident on the background of increasing Euroscepticism. It was the war in Ukraine and the resistance of the Ukrainian people in defense of European values that returned the popularity of the ideas of European unification.

RELATIONS BETWEEN UKRAINE AND THE EU: CROSSED CHALLENGES

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The context of the Russian-Ukrainian war has undoubtedly accelerated the process of accession of Ukraine to the European Union. On February 24, 2022, Russia invaded Ukraine. Four days later, Ukraine formally applied for membership of the European Union. President Zelensky asked for immediate admission. He received support from European authorities on the principle of accession. The European Commission president Ursula von der Leyen immediately told Euronews that Ukraine was “*one of us and we want them in*”³⁷. But becoming a EU member is a lengthy process. Even if the usual length of this process has been sped up, final accession requires to rise to a certain number of challenges, for Ukraine (I) as well as for the European Union (II)

I. Challenges for Ukraine

The European Council decided to grant the status of candidate country to Ukraine in June 2022³⁸, a few days after the Commission had issued its opinion, listing seven requirements having to be met by Ukraine as a prerequisite to accession negotiations³⁹. These short-term specific requirements from the EU have to be distinguished from the long-term expectations usually associated with the candidate status. The Council has actually granted the status of candidate country, but has asked the European Commission to report on the fulfilment of these seven requirements. A group of Ukrainian think tanks and analysts have regularly analysed their implementation⁴⁰. The Commission issued its report in November 2023, assessing them step by step⁴¹. The report has paved the way to accession negotiations, which were opened by the European Council in December 2023⁴².

Among these requirements, the first one which deals with the process of selecting the judges of the Ukraine Constitutional Court is worth noting. It aims at fighting politically motivated appointments to such an institution, in line with the Venice Commission recommendations. This may seem quite surprising for a French scholar, since there is indeed no such expectation from the EU, as regards the French Constitutional Council, despite the fact that its selection process is highly political. Nonetheless, in Ukraine, this issue probably has to be connected to the constitutional crisis that

³⁶ L'autrice tient à remercier Séverine Letalleur pour sa relecture.

³⁷ See the interview published on 27/02/2022 [<https://www.euronews.com/2022/02/27/ukraine-is-one-of-us-and-we-want-them-in-eu-ursula-von-der-leyen-tells-euronews>]

³⁸ [Conclusions of the European Council meeting \(23 and 24 June 2022\)](#), § 12

³⁹ [European Commission, Communication, 17 June 2022, pp. 20-21](#) ; the requirements are about the process of selecting judges of the Constitutional Court (1st requirement), other judicial reforms, concerning the High Council of Justice and the High Qualification Commission of Judges (2nd requirement), fighting against corruption and completing the appointment of a new head of the Specialised Anti-Corruption Prosecutor's Office (SAP) and the Director of the National Anti-Corruption Bureau of Ukraine (NABU) (3rd requirement), ensuring that anti-money laundering legislation is in compliance with the standards of the Financial Action Task Force (FATF), an international policy-making and standard-setting body dedicated to combating money laundering and terrorist financing (4th requirement), limiting “*the excessive influence of oligarchs in economic, political, and public life*” (5th requirement), tackling the influence of vested interests in medias and empowering the independent media regulator (6th requirement) and protecting national minorities (7th requirement).

⁴⁰ See the “Candidate Check”, that is to say five independent monitoring of Ukraine's implementation of EU recommendations carried out by specialized Ukrainian think-tanks and NGOs under the coordination of the New Europe Center, from August 2022 to September 2023.

⁴¹ [European Commission, Ukraine 2023 Report, 8 November 2023, SWD\(2023\) 699 final, pp. 9-11](#)

⁴² [European Council, Conclusions of the meeting, 15 December 2023, § 15.](#)

occurred in October 2020, when the Constitutional Court of Ukraine invalidated most of Ukraine's 2014 anti-corruption reform as unconstitutional⁴³. At that time, President Zelensky asked the Venice Commission to issue an opinion on the Court's compliance with the due process of law in hearing the case and resolving the matter. In response, the Venice Commission expressly acknowledged that the decision “*lacks clear reasoning, has no firm basis in international law, and was possibly tainted with a major procedural defect – an unresolved question of conflict of interest of some judges*”⁴⁴.

The background of such a decision, the fight against corruption, is one of the major issues among the seven requirements. To give a symptomatic overview of the situation, a report submitted to the French Senate in May 2010 stated: “*Corruption takes various forms, more or less severe: intervention of “relations”, privatization of security forces, classic payment of “bribes”. Everything can be bought in Ukraine: diplomas, driving licenses, nominations for elections... A certificate required to go to the swimming pool can be bought on the black market for 50 hryvnas, or around 5 euros*”⁴⁵. Time of course has elapsed since this report, and the fight against corruption has become crucial. Lately, top-level corruption has been successfully investigated: the National Anti-Corruption Bureau of Ukraine (NABU) and the Prosecutor's Office (SAPO) have maintained a high level of activity. The High Anti-Corruption Court (HACC) began its work in September 2019 and decisions, including convictions, have been handed down. Nonetheless, the war against Russia has hindered progress in this area. Indeed, as a senior official in the office of the Defence Department Inspector General has argued, “*they are fighting a two-front battle: the Russians and internal corruption. [...] Many of the people that would normally have helped fight the corruption battle on the frontlines are fighting the Russians*”⁴⁶. Thus, the 2022 Corruption Perceptions Index (CPI) devised by the NGO Transparency International shows that Ukraine is still perceived as Europe's most corrupt country in the world with a score of 33/100, ranking 116/180, in a space shared with Algeria, El Salvador, and Zambia⁴⁷.

While pursuing reforms on this short-term agenda, Ukraine must also think about long-term expected measures from the European Union. Broadly speaking, it means integrating the whole “*Acquis Communautaire*”, that is to say the full body of European law as expressed in the Treaties and secondary legislation.

In that regard, the European Commission also assessed Ukraine's overall capacity to uphold the obligations of membership in its report issued in November 2023. For each chapter, the Commission has analysed the level of preparation of Ukraine. To mention two examples, as regards the area of the free movement of goods, Ukraine is said to be “*moderately prepared*” and must complete its alignment with the EU *acquis*, especially concerning market surveillance⁴⁸. As for the freedom of movement of workers, Ukraine remains “*at an early stage of preparation*”, with no

⁴³ Constitutional Court of Ukraine, decision n°13-R/2020, 27 October 2020

⁴⁴ European Commission for Democracy through law (Venice Commission), Opinion n°1012/2020, 9 December 2020, CDL-PI(2020)018, § 73.

⁴⁵ Sénat, rapport d'information n° 448 (2009-2010) de MM. Simon Sutour et Gérard César, fait au nom de la commission des affaires européennes, déposé le 12 mai 2010 : « *La corruption prend des formes variées et plus ou moins graves, allant de l'intervention de « relations » à la privatisation des forces de sécurité - les policiers sont sous-payés - en passant par le classique versement de « pots-de-vin ». Tout s'achète en Ukraine : les diplômes, les permis de conduire, les investitures aux élections... Un certificat requis pour aller à la piscine peut s'acheter au marché noir pour 50 hryvnas, soit environ 5 euros* ».

⁴⁶ Reported by Patrick Tucker, “A War on Two Fronts: Ukraine Takes On Corruption As It Fights Russia”, *Defense One*, 11 April 2023, explaining: “fighting on one front means pulling resources from the other”.

⁴⁷ See the index on Corruption perceptions here: <https://www.transparency.org/en/cpi/2022/>

⁴⁸ See European Commission, Ukraine 2023 Report, 8 November 2023, p. 89-91.

progress made over the reporting period on ensuring that EU workers and their family members are treated in the same way as Ukrainian nationals⁴⁹.

If all the work remaining to be done to become a member of the European Union may seem discouraging, the importance of reforms that have been implemented in the first year of the war, despite such a context, must be kept in mind.

Furthermore, it is worth mentioning that when they joined the European Union on January 1st 2007, Romania and Bulgaria still had to make progress in the fields of judicial reform, corruption and (for Bulgaria) organised crime. The European Commission has set up the Cooperation and Verification Mechanism (CVM) as a transitional measure to assist the two countries⁵⁰. Assessments and formal reports on progress made have regularly been issued. Considering the progress made was sufficient, the Commission formally closed the Cooperation and Verification Mechanism in September 2023⁵¹.

Ukraine's accession to the European Union also depends on steps to be taken by the European Union itself.

II. Challenges for the European Union

Together with Ukraine, there are eight other States that are recognised candidates for membership of the European Union: Turkey (since 1999), North Macedonia (2005), Montenegro (2010), Serbia (2012), Albania (2014), Moldova (2022), Bosnia and Herzegovina (2022) and Georgia (2023). Twenty years ago, the 2003 European Council summit in Thessaloniki set the integration of the Western Balkans as a priority of EU expansion⁵². In a communication given in Strasbourg in 2018, the Commission stated that Montenegro and Serbia “*could potentially be ready for membership in a 2025 perspective*”⁵³. However, the Commission also stressed the fact that “[t]he Union must be stronger and more solid, before it can be bigger”⁵⁴. The European Commission has added a bit further the necessity to strengthen the enforcement of the Rule of Law in the European Union. Effective measures must indeed be taken to tackle a systemic breach of European values by any one of the Member States. The European Union cannot have big expectations towards candidates while failing to enforce the Rule of Law within its borders.

As regards the situation in Hungary and Poland for instance, there have been ongoing violations of European values. In a resolution adopted in March 2022, the European Parliament “*underline[d] that it [was] high time for the Commission to fulfil its duties as the guardian of the EU*”

⁴⁹ *Ibid.*, pp. 91-93.

⁵⁰ See https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en

⁵¹ Commission Decision (EU) 2023/1786 of 15 September 2023 repealing Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, C/2023/5653, JO L 229, 18.9.2023, pp. 94-96; Commission Decision (EU) 2023/1785 of 15 September 2023 repealing Decision 2006/929/EC establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, C/2023/5652, JO L 229, 18.9.2023, pp. 91-93.

⁵² Thessaloniki European Council, 19 and 20 June 2003, Presidency conclusions

⁵³ [European Commission, “A credible enlargement perspective for and enhanced EU engagement with the Western Balkans”, Communication, 6 February 2018, COM\(2018\) 65 final.](#)

⁵⁴ *Idem*

*Treaties and to instantly react to the ongoing severe violations of the principles of the rule of law*⁵⁵. In particular, the European Court of Justice had issued decisions regarding judicial independence in Poland⁵⁶, and thereafter, the Polish Constitutional Court has expressly ruled to disregard such decisions⁵⁷. In response, the ECJ finally imposed fines⁵⁸, and Poland was blocked from receiving its share of the EU covid-19 recovery funds⁵⁹. These measures were fruitful but arrived quite late. A key for successful enlargements should be to ensure the Rule of law is respected “at home”. Tools to this end already exist, for instance procedures under Article 7 of the Treaty on European Union.

Beyond ensuring the respect of the Rule of Law within its borders, the European Union also faces other challenges, related to the decision-making process. A good example is to be found with the unilateral decisions taken in April 2023 by 5 Member States, namely Poland, Hungary, Slovakia, Romania and Bulgaria, to prohibit or limit importations of Ukrainian goods. These decisions did clearly contradict agreements signed by the European Union with Ukraine. And in such an area, the European Union has exclusive competence to intervene. In reaction to these unilateral decisions, the European Commission had to intervene. But as the media have reported it, the Commission did not intervene before although these Member States “*had for weeks complained that low-cost Ukrainian grain was flooding their markets, filling up storage and putting local producers at a disadvantage*”⁶⁰. In reaction to such import bans, the European Commission has announced it has taken measures, among which a financial support for farmers in mostly impacted countries bordering Ukraine⁶¹. This grain crisis reveals how difficult it is to implement solidarity measures within the European Union before the occurrence of crises. Such a solidarity is nonetheless necessary to enhance trust in the decision-making process and in the further implementation of EU decisions.

Such an expression of solidarity should be shown not only between Member States but also at national level, within Member States, to avoid the regional disparities that EU membership can cause. To take the example of Lithuania, a Scottish scholar, Prof. Michael Keating, has underscored the fact that those living in the area around the capital Vilnius have a GDP per capita nearly three times higher than in the country's poorest region⁶². EU membership should not increase regional disparities. That is also a very challenging issue for the European Union, closely linked to that of solidarity.

To conclude, let us refer to the title of this symposium: “War in Ukraine, a challenge for legal normality”. Is there a legal normality within the European Union? Rules are framed by Member States, and evolve with them. Therefore, let us hope that the perspective of accession of Ukraine to the European Union may trigger a shift within the European Union towards more solidarity among its Member States. The context of war has revealed their ability to act in such a manner towards Ukraine. This specific behaviour should become legally normal, within the European Union.

⁵⁵ European Parliament resolution of 10 March 2022 on the rule of law and the consequences of the ECJ ruling, (2022/2535(RSP)), § 2.

⁵⁶ ECJ, Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, 19 November 2019, ECLI:EU:C:2019:982; ECJ, Case C-791/19, *European Commission v. Republic of Poland*, Interim Order, 8 April 2020 ECLI:EU:C:2020:277 ; the Decision was rendered on 15 July 2021, ECLI:EU:C:2021:596.

⁵⁷ Polish Constitutional Tribunal, 14 July 2021, Ref. n° P 7/20; see also decision of the 7 October 2021, Ref. n° K 3/21.

⁵⁸ ECJ, Order, Case C-204/21 R, *European Commission v. Republic of Poland*, 27 October 2021, ECLI:EU:C:2021:878.

⁵⁹ A. Silver, “Poland’s share of EU Covid fund set to remain on hold”, *Research Professional News*, 11 August 2022.

⁶⁰ J. Liboreiro, “Talks to lift bans on tariff-free Ukrainian grain fail, despite new pitch from Brussels”, *Euronews*, 19 April 2023.

⁶¹ European Commission, Directorate-General for Neighbourhood and Enlargement, “Commission adopts exceptional and temporary preventive measures on limited imports from Ukraine”, 2 May 2023.

⁶² J. Askew, “What would actually happen if Ukraine joined the EU?”, *Euronews*, 21 March 2023.

FORCE MAJEURE AND EXTRAORDINARY MECHANISMS FOR THE IMPLEMENTATION OF
CONTRACTS: UKRAINE'S EXPERIENCE IN THE WAR WITH RUSSIA.

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Abstract. The article examines force majeure as a ground for exemption from liability for breach of contractual obligations. The relevant events (acts, phenomena) are caused by objective factors independent of the will of the parties and are of an extraordinary and inevitable nature.

The institution of force majeure is of great scientific and practical importance, and these issues are particularly relevant due to the military actions resulting from the armed aggression of the Russian Federation, which caused the destruction of industrial facilities, suspension of operations of enterprises, restrictions on export/import and settlement operations, etc.

The author analyses the concept and signs of force majeure and notes that such circumstances differ from the grounds for termination of a contract or reduction of penalties in the course of court proceedings. The legal positions on the qualification of force majeure are presented, taking into account the case law of the Supreme Court. The article focuses on the procedure for documenting force majeure and the consequences of violating the established procedure, noting the need for proper documentation of each case of such circumstances and proof of a direct causal link between the relevant events and the failure to fulfil a specific contractual obligation.

The author examines the mechanisms of state intervention in the economic sphere with the aim of protecting the most vulnerable sections of the population. One such mechanism is the presumption of force majeure for certain consumer contracts.

Keywords: force majeure, force majeure, extraordinary circumstances, termination of the contract, certificate of force majeure, Russian military aggression against Ukraine.

The ongoing situation in Ukraine has made it impossible for us to fulfill our contractual obligations due to the military actions of the Russian Federation against Ukraine. In this context, the concept of 'force majeure' arises, which is commonly referred to as 'force majeure' in the Ukrainian legal system.

The presence of the force majeure provision allows for the balancing of contractual obligations. The legal construct of force majeure allows a party to claim that there has been a material change in circumstances in the contractual relationship, which is the basis for termination, amendment of the contract, or release of the party from liability for breach of contract⁶³.

It is worth noting that the term 'force majeure' is not defined in the civil legislation of Ukraine. As per Article 617 of the Civil Code of Ukraine, it is possible for a person to be exempted from liability for breaching an obligation if they can demonstrate that the breach was due to an accident or force majeure.

The definition of force majeure is elaborated in Article 218 of the Commercial Code of Ukraine. As per this article, a business entity may not be held responsible for violating a business obligation if it can prove that the obligation's proper performance was impossible due to extraordinary and unavoidable circumstances under the circumstances of the business activity, as defined by law or contract.

According to Article 14-1 of the Law of Ukraine 'On Chambers of Commerce and Industry in Ukraine'⁶⁴, force majeure is defined as exceptional and inevitable circumstances that objectively render it impossible to fulfil obligations under the terms of an agreement, contract, or other regulatory acts. Force majeure may result in a significant change in circumstances, which serves as the basis for the termination or amendment of the agreement, and ultimately leads to the termination of the obligation or its modification.

It has been observed that in some foreign jurisdictions, modifications to a contract may be permitted in cases where the original terms would lead to unfair outcomes due to unforeseen circumstances⁶⁵.

The Ukrainian government is currently exploring options to adapt the standard methods of fulfilling contractual obligations in light of the ongoing conflict with Russia. The legislation underwent several amendments at the legislative level in order to align the country's economy with military requirements.

For example, the Law of Ukraine No. 2120-IX of 15 March 2022 "On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine with Respect to the Validity of Provisions for the Period of Martial Law"⁶⁶ supplemented, inter alia, the section "Final and Transitional Provisions" of the Civil Code of Ukraine with paragraph 18.

⁶³ Kostruba, A. (2023). Fulfillment of Civil Obligations During War: Empirical Findings from Ukraine. Theory and Legal Practice. Osnabruck Research Forum 2023, Osnabruck, Germany. <https://doi.org/10.5281/zenodo.10250844>

⁶⁴ On Chambers of Commerce and Industry in Ukraine: Law of Ukraine of 02 December 1997, No. 671/97-VR. Access: <https://zakon.rada.gov.ua/laws/show/671/97-VR#Text>. (Accessed 01.12.2023).

⁶⁵ Fulfilment of the terms of the contract due to force majeure during martial law. Scientific Bulletin of Uzhhorod National University 2022. Issue 74 (1). 98-102.

⁶⁶ On Amendments to the Tax Code of Ukraine and Other Legislative Acts of Ukraine on the Validity of Norms for the Period of Martial Law: Law of Ukraine dated 15 March 2022 No. 2120-IX. Access: <https://zakon.rada.gov.ua/laws/show/2120-20#Text> (Accessed 01.12.2023).

In particular, this clause currently stipulates that during the period of martial law or a state of emergency in Ukraine and within thirty days after its termination or cancellation, in case of a delay in the performance by the borrower of the monetary obligation under the agreement under which the borrower was granted a loan by a bank or other lender, the borrower is released from liability for breach of the term of performance, as well as from the obligation to pay a penalty (fine, penalty) for such delay in favour of the lender. The said clause also stipulates that the penalty (fine, penalty) and other payments provided for in the relevant agreements that have accrued until 24 February 2022 inclusive for delayed performance (non-performance, partial performance) under such agreements shall be written off by the lender (creditor).

In addition, the Law No. 2120-IX added paragraph 6 to Section IV "Final and Transitional Provisions" of the Law of Ukraine "On Consumer Credit"⁶⁷.

This clause stipulates that during the period of martial law or state of emergency in Ukraine and within thirty days after its termination or cancellation, in case of the consumer's delay in fulfilling his obligations under a consumer credit agreement, the consumer is exempted from liability to the creditor for such delay.

If such a delay is allowed, the consumer is released, in particular, from the obligation to pay the lender a penalty (fine, penalty) and other payments stipulated in the consumer loan agreement for the delay (non-fulfilment, partial fulfilment) of the consumer's obligations under such an agreement.

In addition, Law No. 2120-IX also amended Section VI "Final Provisions" of the Law of Ukraine "On Mortgage"⁶⁸.

This clause suspends certain provisions of the Law of Ukraine "On Mortgage" concerning the exercise of the mortgagee's right to acquire ownership of the mortgaged property, the exercise of the mortgagee's right to sell the mortgaged property and the eviction of tenants from residential buildings and premises mortgaged. During the period of martial law and within 30 days of its termination (cancellation), the lender's rights are significantly restricted. In particular, the lender is not entitled to

- ✓ *Increase the interest rate (except when the variable interest rate is fixed in the contract);*
- ✓ *impose fines, penalties, 3% per annum, inflation losses or other types of liability in the event of late payment;*
- ✓ *demand repayment of the debt in full or, even worse, in advance (if the agreement provides for certain specific repayment terms);*
- ✓ *prevent the mortgagee from taking possession of the mortgaged property, selling the property or evicting the tenants during this period.*

In effect, the borrower is given the option of defaulting on the loan (not making payments according to the schedule) and there are no penalties for doing so.

The outbreak of armed aggression against Ukraine and the imposition of martial law throughout the country have had a significant impact on the regulation of labour relations.

⁶⁷ On consumer lending: Law of Ukraine of 15 November 2016 No. 1734-VIII. Access: <https://zakon.rada.gov.ua/laws/show/1734-19#Text> (Accessed 01.12.2023).

⁶⁸ On mortgage: Law of Ukraine of 05 June 2003, No. 989-IV. Access: <https://zakon.rada.gov.ua/laws/show/898-15#Text>. (Accessed 01.12.2023).

In particular, in order to adapt labour legislation to the realities of war, Law No. 2136 of 15 March 2022 "On the Organisation of Labour Relations under Martial Law"⁶⁹ was adopted. As a general rule, the Labour Code of Ukraine stipulates that an employee has the right to terminate an employment contract concluded for an indefinite period by giving two weeks' written notice to the employer (Article 38), whereas during martial law, according to Law No. 2136, an employee may terminate an employment contract at any time on his or her own initiative. During the period of martial law, an employee may be dismissed at the employer's initiative during the period of his temporary incapacity to work, as well as during the period of leave. The new concept of suspension of an employment contract is introduced.

Suspension of an employment agreement is a temporary cessation by the employer of providing the employee with work and a temporary cessation by the employee of performing work under the concluded employment agreement in connection with armed aggression against Ukraine, which excludes the possibility of both parties to the employment relationship performing the duties stipulated in the employment agreement.

Based on the analysis of the above amendments, it can be concluded that the consequences of delaying the performance of an obligation in the area of high public interest are now sufficiently clearly regulated.

In addition to the above-mentioned legal structures, there are a large number of other civil law contracts: sale and purchase agreements, lease agreements, contractor agreements, etc. The situation in legal relations under such contracts is quite different. The legislator has not created a special mechanism for such contracts in times of war. Therefore, unlike in the case of loan agreements, in the case of other agreements the parties must apply the general principles of proving the facts to which the party refers in support of its position. In other words, the party to the agreement has to prove that the obligation was not fulfilled because of martial law, which can be the basis for exemption from liability. In this case, however, there is no presumption of force majeure.

In summary, it is worth recalling the following. The national legislation of Ukraine provides for extraordinary rules for the operation of special agreements, the subject matter of which is related to the high public interest and the need to protect human rights. This exceptional character is based on the presumption of force majeure and the unilateral adjustment of the content of the agreement in the interests of the individual. This is done through the legislative influence of the State on private relations.

On the other hand, there is a reasonable limit to state intervention in the economic processes of society. This limit is exclusively the public interest. For this reason, the majority of agreements do not contain any relevant exceptional provisions. This means that the parties must prove the existence of force majeure.

It can be observed that while loan agreements automatically relieve the borrower of any liability in the event of default, regardless of whether it was directly affected by the military operations, other agreements require the party to prove not only the inability to fulfil its obligations but also the causal link between the inability to fulfil the obligation and the military operations.

⁶⁹ On the organisation of labour relations under martial law: Law of Ukraine of 15 March 2022 No. 2136-IX. Access. <https://zakon.rada.gov.ua/laws/show/2136-20#Text>. (Accessed 01.12.2023).

In this context, not only the completeness of the legal consolidation of the fact of establishing force majeure (*force majeure*), but also the practice of applying the relevant legal provision becomes relevant.

In its practice, the Supreme Court has identified the following elements of force majeure

- ✓ *they are independent of the will of the participants in civil relations and are of an extraordinary nature;*
- ✓ *unavoidable;*
- ✓ *make the impossibility of fulfilment of obligations under the given conditions of economic activity.*

An important detail is that even the occurrence of an event of force majeure does not release the other party forever from fulfilling its previous contractual obligation, but only for a certain period of time while the extraordinary or insurmountable circumstance is in force.

In other words, force majeure is considered to be a circumstance beyond the control of the obligor. The national legal system recognises armed conflict, hostilities and undeclared war as force majeure. Accordingly, the improper performance of the contract is not a consequence of unlawful acts and excludes the existence of fault as a prerequisite for liability. Notice of force majeure must be given in writing and in accordance with the procedure laid down in the contract.

In accordance with its Rules of Procedure, the Ukrainian Chamber of Commerce and Industry, as an authorised institution, decided in February 2022 to simplify the procedure for certifying force majeure during martial law and published a general official letter on the certification of force majeure on its website. This populist decision certainly draws attention to the existence of extraordinary circumstances in the Ukrainian economy. At the same time, it cannot in itself be a proper proof of force majeure in a particular case. We can explain our opinion by the fact that the relevant letter does not specify the persons, the subject of the agreements and the conditions of force majeure in a particular case.

This leads to the first conclusion. Military aggression alone cannot serve as an unconditional condition for exemption from liability on the grounds of force majeure. In other words, the debtor must prove not only the existence of such circumstances of force majeure per se, but also that these circumstances constituted force majeure for the particular contract.

The correctness of the idea of individualising the issue of exemption from liability and determining whether the impossibility of performance is conditioned by specific force majeure circumstances is confirmed by the court's reasoning.

In the period from March to November 2023, the courts issued about 300 decisions in cases related to the subject of the discussion, about 50 of which were reviewed by the appellate courts, with 90% of the cases in which the first instance and appellate courts confirmed the arguments based on the following criteria⁷⁰.

- ✓ *lack of direct causal link between the war and the breach of obligations (court decisions in cases No. 910/4001/22, No. 910/7967/22, No. 910/7141/22, No. 910/7134/22);*

⁷⁰ Martsenko N. S., Hera V. O., Force Majeure in the Private Law of the European Union and Ukraine: Comparative Legal Analysis. Problems of Civil and Commercial Law 2022. Issue 4 (2). 149- 156.

- ✓ *the reference of the Ukrainian Chamber of Commerce and Industry does not meet the requirements for force majeure certificates according to the legal criteria (court decisions in cases No. 910/4879/22, No. 917/353/22, No. 912/2427/21);*
- ✓ *lack of proper notification of force majeure (court decision in case 912/507/22).*

Such legal conclusions were summarised by the Supreme Court over several years and formed in the form of the legal position of the court in 2018-2022⁷¹ in the resolution of the Supreme Court of 14 February 2018 in case No. 926/2343/16, the resolution of the Supreme Court of 16 July 2019 in case No. 917/1053/18⁷², the resolution of the Supreme Court of 17 December 2020 in case no. 913/785/17, the resolution of the Supreme Court of 25 November 2021 in case no. 905/55/21, the resolution of the Supreme Court of 25 January 2022 in case no. 904/3886/21⁷³, the resolution of the Supreme Court of 19 August 2022 in case no. 908/2287/17, etc.

In the Resolution of the Supreme Court of 28 October 2022 in case No. 904/3910/21⁷⁴, the Resolution of the Supreme Court of 14 September 2022 in case No. 420/143/22⁷⁵ assessed the introduction of martial law in Ukraine and the existence of force majeure in relation to the validity of the grounds for failure to meet procedural deadlines.

The Court stated that the mere introduction of martial law, without the participant in the proceedings proving a causal link between its introduction and the missed procedural deadline, does not indicate the validity of the reasons for such a missed deadline and therefore does not constitute a basis for its extension.

In the resolution of the Supreme Court of 16 July 2019 in case No. 917/1053/18, the court stated that circumstances of force majeure are not prejudicial, and if they occur, the party relying on them as a basis for the impossibility of proper performance of the obligation must prove not only their existence, but also that they constitute force majeure in this particular case⁷⁶.

The court did not take into account the defendant's arguments on the existence of force majeure, as evidenced by the letter from the Ukrainian Chamber of Commerce and Industry, because this evidence does not in any way confirm the fact that the defendant was unable to perform its obligations under the contract as a result of the military aggression of the Russian Federation against Ukraine, which led to the imposition of martial law.

⁷¹ Review of the case law of the Economic Court of Cassation as part of the Supreme Court (current case law 2022). Access: https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/oglyady/Oglyad_KGS_07_08.pdf (Accessed 01.12.2023).

⁷² Resolution of the Supreme Court of 16 July 2019 in case No. 917/1053/18. Access. <https://verdictum.ligazakon.net/document/83087003>. (Accessed 01.12.2023).

⁷³ Resolution of the Supreme Court of 25 January 2022 in case No. 904/3886/21. Access. https://verdictum.ligazakon.net/document/102797678?utm_source=biz.ligazakon.net&utm_medium=news&utm_content=bizpress01&_ga=2.2224624.1717085491.1705755238-321090010.1700739015#_gl=1*6h50zt*_gcl_au*MzUwMjc5OTU2LjE3MDA3MzkwMTQ. (Accessed 01.12.2023).

⁷⁴ Resolution of the Supreme Court of 28 October 2022 in case No. 904/3910/21. Access. <http://iplex.com.ua/doc.php?regnum=107049505&red=100003d28996ee81cdad7c6ff251784024d28a&d=5>. (Accessed 01.12.2023).

⁷⁵ Resolution of the Supreme Court of 14 September 2022 in case No. 420/143/22. Access. <http://iplex.com.ua/doc.php?regnum=106243160&red=1000030b0cb562d079d93031d03b24e3621010&d=5>. (Accessed 01.12.2023).

⁷⁶ Boyarchukov M., Force majeure during the war: judicial practice, Yurydychna Gazeta Online, 22 November 2022. Access: <https://yur-gazeta.com/dumka-eksperta/forsmazhor-pid-chas-viyni-sudova-praktika.html> (Accessed 01.12.2023).

This leads to the second conclusion. Circumstances of force majeure must be proven in each case of their occurrence.

The martial law on the territory of Ukraine does not in itself mean that the defendant is unable to carry out its business activities and raise funds. The defendant has not provided evidence that the company has ceased to operate as a result of martial law, that all (or part of) the employees, the head of the company, other officials have been mobilised and are part of the Armed Forces of Ukraine, that they are temporarily not performing professional duties in connection with military operations, that all or part of the movable property of the company is involved in certain activities, which would prevent the business entity from carrying out business activities during martial law.

Special attention should be paid to the importance of notifying the other party of the occurrence of force majeure in the manner prescribed by the contract. Failure to do so may result in the loss of all legal privileges of force majeure.

The third conclusion to be drawn from the above is that, in order for force majeure to apply, it is important that there be a causal link between the force majeure and the impossibility of performing the contract.

Thus, the imposition of martial law in Ukraine does not mean that a party to a legal relationship is deprived of the possibility of its proper performance.

Force majeure as a circumstance of force majeure requires proof and proper legal registration by the parties in court. The mere existence of such extraordinary and unavoidable circumstances does not exempt a party from liability for breach of its obligations.

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THE IMPLEMENTATION OF CIVIL LAW: THE OWNERSHIP ISSUE

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Ukraine is now facing the Russian invasion for two years and the occupation of four regions by Russian army. This occupation is still contested by Ukrainian authorities who are denying any legal effect to the decisions on integration of these regions in the Russian legal order. In consequences, Kyiv refuses to consider the normative effects of local legislations adopted since 2022 and even since 2014 at the time of first annexation of Crimea. Since then, two different legal orders are coexisting in these regions which are implemented by two different states, Ukraine in the one hand, and Russian Federation on the other hand. In these times of war, this legal dualism makes it even more difficult to protect civils rights as those on land and ownership. The Ukrainian local powers and civil servants were forced to move away from battle fields and Russian soldiers. Civilians have a few accesses to publics services as Courts or Civil registration. Offices are closed, legal data not available.

I- Sovereignty and property, two sides of the same coin: the constitutional weapon of annexation

The annexation is an act of sovereignty, with consequences on civil rights. The individual rights have been more conditioned by Russian citizenship.

The annexation of part of Ukrainian territories created a legal dualism.

On the 16th of March 2014, the local authorities of Crimea, loyal to the Russian Federation, organized a referendum after which the Russian Federation annexed this autonomous region and Sevastopol city as two new subjects of the Russian Federation. Then, according to article 67§2 of Russian Constitution, Crimean territory became part of the Russian Federation, and Russian law became applicable throughout the annexed territory.

A further complicating factor is that the so-called annexed territories following the referendum in September 2022 remain partly under Kyiv's control and partly under Moscow's authority. In fact, none of the four mainland oblasts of Ukraine recently annexed is fully controlled by the Russian authorities. This situation runs counter to the self-definition of the Russian state and is a partial violation of the Russian Constitution, which includes these oblasts in the official territory of the Russian Federation.

If the Russian head of state was to ratify the current situation through peace agreements, he would run the risk of being accused of high treason by accepting a national territorial division, which would violate the principle of territorial integrity defended in the Russian Constitution. Conversely, the Ukrainian head of state is also bound by the Constitution to restore as quickly as possible the full territorial integrity and political sovereignty of Ukraine, within the borders established by the Budapest agreement in 1994, Crimea included.

Russia's annexations in 2014 and 2022 have therefore created structural obstacles to meaningful peace negotiations with Ukraine. But they have also created a legal dualism in these territories which will have strong consequences on the rule of law because Ukrainian authorities are still applying Ukrainian law in legal situation linked to these regions as for example, personal status or legal rules of ownership.

Moreover, both Ukrainian and Russian authorities have progressively adopted new rules to seize or to expropriate enemy's assets, belonging to both private or public persons close to authorities. From 3rd March 2022, the Law of Ukraine 2116-IX, *On the Basic Principles of the Forcible Seizure of Objects of Property Rights of the Russian Federation and its Residents in Ukraine*⁷⁷ was adopted. It regulates the procedure on the forcible seizure of property directly or indirectly owned by the Russian Federation, residents and legal entities controlled directly or indirectly by the Russian Federation as a state. The law allows to seize property rights that require registration under Ukrainian law – i.e. movable and immovable property, funds, bank deposits, securities, corporate rights, other property (assets) located (registered) in Ukraine ; and other property rights.

The main aim of the Law, according to its preamble, is to "*protect the sovereignty and territorial integrity of Ukraine, its national interests, national security, and to ensure its economic independence, the rights, freedoms and legitimate interests of Ukrainian citizens, society and state*" and to provide an "*immediate and effective response to existing threats to the national interests of Ukraine*". Nationalization of so-called "Russia-tied" property is effectuated in the public interest, including military necessity.

The Law concerns the Russian Federation as state as well as its citizens, and more broadly its residents, currently defined as legal entities, including their branches and subsidiaries operating in Ukraine according to Ukrainian law, which are controlled directly or indirectly by the Russian Federation as a state. For example, following Law 2116-IX, the assets of two Russian banks have been confiscated so far based on the National Security and Defense Council's decision issued on May 11, 2022, which was put into effect by the Decree of the President of Ukraine and later endorsed by the Ukrainian Parliament.

At the same time, Russia, has also decided to take control of legal entities controlled by foreigners and located on annexed territories or even located inside other subjects of Russian Federations. The process is different, but the aim is to take control over economical assets and to push out foreigners' control on economy. This process started in 2014 in Crimea, when local legislation acted transfer of assets. Russian-installed authorities in Crimea have nationalized land and properties formerly belonging to Ukrainians.

In Crimea for example, in the period from March 17 to September 3, 2014, «State Council of the Republic of Crimea» adopted 15 resolutions according to which the property of the Ministry of Infrastructure of Ukraine, the Ministry of Agrarian Policy and Food of Ukraine, the State Emergency Service of Ukraine, the Ministry of Ecology and Natural Resources of Ukraine, Ministry of Education and Science of Ukraine, and property of many enterprises have been nationalized. Then, during 2014, the property of the largest enterprises and financial institutions operating on the peninsula was also nationalized: a list of property was approved by Resolution of the State Council of the Republic of Crimea No. 2085-6/14 dated April 30, 2014 *On Issues of Property Management of the Republic of*

⁷⁷ <https://zakon.rada.gov.ua/laws/show/2116-20#Text>. As stated in the preamble of the Law, the international law grounds for its adoption were the provisions of the Hague Convention IV with Respect to the Laws and Customs of War on Land and Ukraine's inherent ('sovereign' in the literal translation) right of self-defense. The earlier Law № 1644-VII, adopted on August 4, 2014 after annexation of Crimea, also refers to the inherent (sovereign) right of Ukraine of self-defense and its exercise *inter alia* through the imposition of special economic and other restrictive measures (sanctions).

*Crimea*⁷⁸. On 18th October 2022 the State Council of Crimea modified the resolution entitled, *On managing the property of the Republic of Crimea*, to allow foreign-owned assets to be declared the property of the republic. The changes have affected land plots and other moveable and immovable property owned by foreign entities and individuals as of February 24, 2022.

The expropriation also affected the private property of individuals and legal entities. During 2014-2017, at least 3,800 land plots were confiscated in the territory of the Autonomous Republic of Crimea and the city of Sevastopol due to the fact that the occupation authorities reconsidered the decisions of the state authorities of Ukraine to grant them ownership⁷⁹.

Moreover, this legislation is not only a local one. On the contrary, it is framed by Federal Russian authorities. An example of such policy was the Decree of the President of the Russian Federation dated 20.03.2020 N° 201⁸⁰, which included almost the entire territory of the occupied peninsula in the list of border areas where foreign citizens, stateless persons and foreign legal entities cannot own the land⁸¹.

II- Control of goods by reinforcing control on people.

Russification

In occupied Ukrainian regions, where civil law is in force for more than 30 years now, land and assets have been partially privatized and civil law is now applying to property relations. However, since the invasion, the civil rights of ownership started to be partially contested. Occupying authorities seem particularly focused on taking control on economical asset and land ownership. One way to take control on crucial assets is a transfer of ownership, as by nationalization; another way consists in transferring assets to entities loyal to the state. Russian authorities do use both methods.

Since Crimean annexation in 2014, and later in other regions, Russian passports were distributed to Ukrainian population. Ukrainians were forced to adopt Russian citizenship. “Passeportization process” has been progressively tightened since 2022. Maintaining the same political goal, Putin signed a decree on 27th April 2023 to impose Russian citizenship on the Ukrainian people residing in the occupied/annexed territories of Ukraine (Donetsk, Luhansk, Kherson and Zaporizhia)⁸². The most significant aspect of this legislation is the explicit threat of deportation for Ukrainians in the Occupied Territories who do not take Russian citizenship. Deportation is a way not only to displace people, but also to recover control over their estate.

⁷⁸ It was also reported that in April 2022 the Crimean State Council submitted a Duma bill amending Russia's Civil Code regarding the confiscation of assets from citizens of unfriendly countries. The Russian Presidential Council for Codification and Enhancement of Civil Legislation rejected the initiative, having deemed it unconstitutional.

⁷⁹ <https://crimea-platform.org/en/news/illegal-expropriation-property-ukraine-and-its-citizens-crimea/>

⁸⁰ On January 9, 2011, the President of the Russian Federation issued a Decree No. 26 which approved the list of border territories where foreign nationals and foreign legal entities, as well as stateless persons, are prohibited to own land plots. On March 20, 2020, by the Decree of the President of the Russian Federation No. 201, the territories of the Autonomous Republic of Crimea and Sevastopol were added to the aforementioned list, and also amendments were introduced to the list of territories of Kaliningrad and Astrakhan regions of the Russian Federation. <http://publication.pravo.gov.ru/Document/View/0001202003200021>

⁸¹ <https://crimea-platform.org/en/news/illegal-expropriation-property-ukraine-and-its-citizens-crimea/>

⁸² Указ Президента Российской Федерации от 27.04.2023 № 307 · Официальное опубликование правовых актов · официальный интернет-портал правовой информации (2023), <http://publication.pravo.gov.ru/Document/View/0001202304270013?index=0&rangeSize=1>.

Staying in these territories without Russian citizenship carries significant risk and consequences for Ukrainians, first for their security, secondly for their rights. Refusing to accept Russian citizenship in violation of the Citizenship Decree may cause Ukrainians in the occupied territories to be viewed as Ukrainian sympathizers. Those concerned have already reported suffering a loss of rights and also acts of violent repressions⁸³. Refusing Russian passport effectively has led to deprivation of social and civil rights.

Since Russia, as invader and occupying state, is treating Ukrainians as "foreign nationals", the law effectively strips Crimean Tatars and other Ukrainians who have not acquired Russian citizenship of their land rights. These land were expropriated and given or resold to Russian people or legal entities closed to pro-Russian authorities. Gradually, Crimea becomes effectively a "Russian land", not only through an act of sovereignty (the referendum in occupied regions is contested by the international community) but by the control over property rights of land to Russian or new pro-Russian persons.

These legal measures have allowed authorities to draw a legal separation between part of the population loyal to pro-Russian authorities, and the other part. Then it has justified to different civil status in the local population (even if a large part has moved abroad or in western part of Ukraine) a Russian one and a Ukrainian one.

This phenomenon of "*passportization*" has to be related to the transfer of ownership explained before. In this period Russian authorities also encourage the "russification" of economical assets in Russian Federation. Russian business entities are gradually taking control over foreign assets. It is observed in Crimea, in Donbass but also in Russia itself. In October 2023, the Russian government has for example tightened restrictions on foreign companies trying to sell their Russian subsidiaries, placing *de facto* caps and deadlines on transactions forcing Foreign companies to sell their assets to Russian legal entities under special conditions.

This russification of land and property is typical of a process observed in colonial empire where civil rights differ according to the status of individuals. One should consider the possible contradiction of this legal order with principles of equality protected by the constitution of the Russian Federation and the proclamation of the constitutional right of ownership. Nevertheless, this restricting access to ownership based on citizenship is a way to control the territory through public but also private ownership. The property rights have become a political tool of control whatever the owner is public or private.

Confiscation as a broad sanction

In the civil and penal Code adopted after the fall of URSS, confiscation of goods had become a quite marginal sanction. But since several years, this sanction has developed as a more common way of sanctioning illicit behaviour. In the context of war, confiscation is even becoming a systematic sanction for any act contrary to the interests of the State. This brings us back to an application of this sanction more similar to that of the Soviet period.

On January 2024, the Russian State Duma passed a bill which was promulgated on the 14th February 2024⁸⁴ enabling confiscation of the property and valuables of opponents and critics of

⁸³ Forced citizenship and deportations and forced citizenship carried out pursuant to the Citizenship Decree would violate international laws and norms, including the 1949 Geneva Convention (IV) for the Protection of Civilian Persons in Time of War.

⁸⁴ <https://www.garant.ru/news/1682220/>

Russian army. Specifically, 30 misdemeanors or crimes are listed, primarily of a political nature or explicitly linked to the "special operation" in Ukraine. One personal asset could be confiscated by discrediting or spreading false information about the army's actions, calls for separatism, calls for extremism, calls for actions threatening state security, participation in an undesirable or extremist organization, rehabilitation of Nazism, desertion, sabotage, smuggling and treason. All these actions are now interpreted very extensively.

One might question the compatibility of such measures with the spirit of the 1993 Constitution (free choice of nationality in Article 26 and protection of property rights in Article 35). However, the interpretative context has changed considerably since the annexation of Crimea in 2014.

III -Difficulties to protect civil rights protected by Ukrainian law

The Ukrainian authorities refusing annexation do not recognize the legal effect of the above-mentioned reforms. Several measures have been taken to ensure the continuity of the Ukrainian rule of law since 2014. As the application of the law required the continued operation of the administrations, some of them were moved to the other side of the front line (to the west and north).

The martial law was imposed in Ukraine by the Decree of the President of Ukraine No. 64/2022 as of 24 February 2022. The territorial jurisdiction of courts and administrative services has been modified to ensure the continuity of public services. For example, the judicial map has been adapted. Judicial procedures have been largely dematerialized. The judiciary and other authorities have taken important steps to ensure the continued operation of the judicial system during the very difficult circumstances of the conflict, including use of remote hearings, and transfer of cases between regions. However, a shortage of judges, a lack of financial resources for the courts, and the cessation of the work of crucial judicial governance bodies since before the start of the conflict, have made the work of the courts more difficult.

To help people to protect their rights in court, the system of evidence has been deeply simplified to enable people to prove violation of their rights. However, the high level of population displaced. The focus on more immediate needs and material problems have pushed the issue of defending rights into the background.

Therefore, illegal expropriation, spoliations and other violation property rights are difficult to judge and to stop. The practical impossibility to protect immovable assets in annexed regions cannot be resolved for the moment. The new owners in possession of goods are now protected by local authorities. These land disputes and property conflicts could be more probably resolved by future treaties ending the war, which must contain restitution and reparation dispositions.

PROSECUTING THE CRIME OF AGGRESSION AGAINST UKRAINE: LEGAL POSSIBILITIES

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Abstract. The most expedient (and the only possible) option to bring the highest political and military leadership of Russia to international responsibility for committing the crime of aggression in the near future is to create a Special tribunal for the crime of aggression against Ukraine. This paper draws attention to possible legal ways to create a Special international criminal tribunal for the crime of aggression against Ukraine. Namely, the following options are examined: creation of a Special international tribunal through an agreement between Ukraine and the United Nations, on the recommendation of the UN General Assembly; creation of a Special tribunal through an agreement between Ukraine and international organization (the UN, the EU, the CoE), based on Ukrainian legislation; creation of a Special tribunal through an agreement between Ukraine and other states. Certain problematic issues of a theoretical and practical nature that arise due to the creation of the Tribunal are considered, primarily the issue of legitimacy and immunity.

Key words: russian aggression, russian-ukrainian war, prevention of impunity, Special tribunal for the crime of aggression.

Résumé. La création d'un tribunal spécial pour crime d'agression contre l'Ukraine est l'option la plus opportune (et la seule possible) pour amener les plus hauts dirigeants politiques et militaires de la Russie à assumer leur responsabilité internationale dans un avenir proche. Cet article étudie la possibilité de créer un tribunal pénal international spécial pour le crime d'agression contre l'Ukraine. Les options suivantes sont examinées: création d'un tribunal international spécial par le biais d'un accord entre l'Ukraine et les Nations Unies, sur recommandation de l'Assemblée générale des Nations Unies; la création d'un tribunal spécial par le biais d'un accord entre l'Ukraine et une organisation internationale (les Nations Unies, l'UE, le Conseil de l'Europe), sur la base de la législation ukrainienne; la création d'un tribunal spécial par le biais d'un accord entre l'Ukraine et d'autres États.

Mots clés: agression russe, guerre russo-ukrainienne, prévention de l'impunité, Tribunal spécial pour le crime d'agression.

1. Introduction

Russia's aggression against Ukraine which began in 2014 and gained full scale form in February 2022, fuels all other atrocities committed on the territory of Ukraine and challenges the international order. This is evidenced by the numerous facts of torture, murder, rape and other terrible atrocities discovered after the liberation of the occupied territories of Ukraine. Impunity and depersonalization largely provoke mass crimes committed during the war. It is the inevitability of punishment as a guiding principle that must be ensured. This will contribute to the prevention of new atrocities by the Russians in Ukraine and the protection of basic human rights, which are the basis of the international security system.

It quickly became clear that although the well-established system of transnational justice – developed and put in place after World War II – could respond to genocide, war crimes, and crimes against humanity committed in Ukraine, there was still a gap. The crime of aggression – or crime against peace – was left out. The crime of aggression – the «mother of crimes» – is a stand-alone crime under international law, and is different from war crimes, crimes against humanity, and genocide⁸⁵. Now it is impossible to hold the highest state military and political leadership, in other words – persons «in a position effectively to exercise control over or to direct the political or military action of a State» – accountable for the crime of aggression. «This gap should be addressed by setting up the Special international tribunal, which would be mandated to investigate and prosecute the alleged crimes of aggression committed against Ukraine by the political leaders and military commanders of Russia and its allies»⁸⁶.

One of the key tasks of international criminal law is the prevention of impunity. Actually, all international criminal courts are created for work that national legal systems cannot cope with. For a possible tribunal on aggression against Ukraine, the problem of impunity is a risk that most of the perpetrators of the crime of aggression will avoid responsibility due to the impossibility of applying international criminal law norms.

The crime of aggression is being committed before our eyes and is capable of being investigated and prosecuted without much difficulty, if there is political will⁸⁷. Ukraine, represented by its main bodies and civil society representatives, asks the world to support the creation of a Special international criminal tribunal for the crime of aggression against Ukraine («Special international tribunal», «Tribunal»). The purpose of the Tribunal is to bring to international criminal responsibility the higher political and military leadership of Russia and those who are aiding the war for committing the crime of aggression against Ukraine. The call for the Special international tribunal «forms part of Ukraine's «lawfare» campaign against Russia»⁸⁸.

The creation of the new tribunal raised many complex legal issues. The creation of such a tribunal touches upon rules of international law whose interpretation is neither uniform nor

⁸⁵ I. Liniova, «*We have a dream: why the world needs a Special Tribunal for the Crime of Aggression against Ukraine*», 8 April 2022. URL: <https://euromaidanpress.com/2022/11/01/we-have-a-dream-why-the-world-needs-a-special-tribunal-for-the-crime-of-aggression-against-ukraine/>

⁸⁶ European Parliament resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine (2022/2655(RSP)). URL: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0218_EN.pdf

⁸⁷ P. Sands, «*Why we need a new Nuremberg trial to make Putin pay: From Britain's leading expert on crimes against humanity Philippe Sands, a powerful personal plea for the world to hold a tribunal like the one which condemned Hitler's henchmen*», Daily Mail, 4 March 2022. URL: <https://www.dailymail.co.uk/news/ukraine/article-10579137/PHILIPPE-SANDS-need-new-Nuremberg-trial-make-Putin-pay.html>

⁸⁸ E. Chang, «*Why Ukraine is Calling for a Special Tribunal to prosecute Putin*», Lawfire, 10 March 2022. URL: <https://sites.duke.edu/lawfire/2022/03/10/eric-chang-on-why-ukraine-is-calling-for-a-special-criminal-tribunal-to-prosecute-putin/>

universally accepted. A survey of existing literature reveals different - and sometimes opposed - opinions about the possibility of creating such a judicial body. Moreover, even among those who support such a creation, there is no unanimity about the modalities of its creation or the exercise of its jurisdiction.

These and other issues, on the one hand, can be solved by drawing upon previous experiences in the creation and functioning of international criminal institutions, and on the other hand, they require the implementation of new approaches to solving emerging problems through the use of flexible approaches and an expanded vision of the functions of the existing international legal instruments. Solution of existing problems will require further conscious painstaking work and, one can assume, political decisions, which will be influenced not only by lawyers but also by civil society. As rightly noted, «One does not give up on justice only when it becomes difficult»⁸⁹.

Russia's war on Ukraine is not the only ongoing armed conflict worldwide, where many culprits must be held accountable. The Tribunal paves the way for the establishment of similar institutions to serve justice to the victims of other evil individuals and shows dictators worldwide, that wars and war crimes are always punishable – even if it takes time to complete the task⁹⁰. The establishment of the Tribunal is not only about Ukraine. The danger of disregarding the crime of aggression against Ukraine is in establishing a legal precedent. In the future, totalitarian regimes might be able to successfully and confidently repeat the experience of the Russian Federation, thus proving that physical force is a primary driver of change. The lack of reaction now will render the system of international law weak: democratic and less militarized countries will become irreversibly sceptical about international law and its architecture which turned a blind eye towards aggression. The world is choosing its future now. Ukraine is asking to once again choose the rule of law, freedom, and democracy⁹¹.

II. Creation of the International special tribunal for the crime of aggression against Ukraine: general rationale

Scientists and practitioners were faced with the question under which conditions international law allows the creation of an international tribunal in order to prosecute for committing the crime of aggression against Ukraine.

Given the fact that at the moment it is impossible to create an international tribunal based on the relevant resolution of the UN Security Council, it is necessary to find another international legal way, the most effective under existing conditions, to create a new tribunal. Several models for the creation of *ad hoc* tribunal have been proposed, based on the previous experience of establishing international and mixed tribunals: the creation of a Special tribunal regarding the crime of aggression against Ukraine by an international treaty or a treaty between the UN and Ukraine or a treaty with final approval by the UN General Assembly; creation of the Special tribunal regarding the crime of aggression against Ukraine by resolution of the UN General Assembly within the framework of the «Unity for Peace» mechanism; creation of a hybrid tribunal regarding the crime of aggression against

⁸⁹ J. Trahan, «U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model», 7 March 2022. URL: <https://www.justsecurity.org/80545/u-n-general-assembly-should-recommend-creation-of-crime-of-aggression-tribunal-for-ukraine-nuremberg-is-not-the-model/>

⁹⁰ Special Tribunal Against Russia, Explained, 3 November 2022. URL: <https://www.kyivpost.com/ukraine-politics/special-tribunal-against-russia-explained.html>

⁹¹ I. Liniova, «We have a dream: why the world needs a Special Tribunal for the Crime of Aggression against Ukraine», op. cit.

Ukraine and others. Each of the options has its pros and cons. The most important thing is not to lose sight of the fact that the world community should react here and now, and not wait for the end of the armed conflict, because the purpose of the special tribunal is not to judge the defeated, but a fair trial in which the main attention is paid to the victims⁹².

As M. Gnatovsky, judge to the ECHR in respect of Ukraine noted, the Tribunal should be international, primarily from the standpoint of legitimacy. In this case, it could not be perceived to come from one side in a conflict. «There isn't a perfect solution... This has to be done by those who are able and those who are willing»⁹³. A. Korynevych, ambassador-at-large of the ministry of foreign affairs of Ukraine, also emphasizes that various legal structures for establishing the Tribunal are possible. The main thing is that the tribunal has the necessary legitimacy in the eyes of the world community. For this reason, it is advisable to create it with the participation of an authoritative international organization, as well as to include representatives of different legal systems and different civilizations in its composition. That is, the composition of the tribunal should be as representative as possible and not be perceived as purely Western⁹⁴. Korenevych says: «so far, for a number of countries, the question of what exactly the model for creating the tribunal should be is difficult». «But regardless of which model will be chosen, we need the support of this tribunal from the UN and the General Assembly...», Koronevych adds⁹⁵.

Oona A. Hathaway highlights the following three reasons why the Tribunal should be international: 1) symbolic and expressive: Russia's war of aggression has harmed not just Ukraine but the international community as a whole, 2) practical: there are immunities that would likely interfere with domestic prosecution of a small number of Russian and Belarusian officials, 3) the Ukrainian Constitution: Article 125 of the Ukrainian Constitution states that «[t]he establishment of extraordinary and special courts shall not be permitted.» The tribunal should also be explicitly auxiliary, not complementary, to the domestic courts (to avoid conflict with Article 124 of the Ukrainian Constitution)⁹⁶.

It is important to pay attention to such an issue as the qualification of the criminal court as «international». It is necessary to answer the question of which tribunals can be considered «international». And in what legal way would a Tribunal for the crime of aggression against Ukraine be created so that it is considered «international» in particular, regarding the purpose of bringing to justice persons with immunity *ratione personae*. The process of creating a tribunal will affect its legitimacy and international recognition.

⁹² O. Senatorova, «Analyse: Welche Rolle ein "Sondertribunal zum Verbrechen der Aggression gegen die Ukraine" für die Opfer des Krieges spielen könnte», 21 July 2022. URL: <https://www.bpb.de/themen/europa/ukraine-analysen/nr-272/511103/analyse-welche-rolle-ein-sondertribunal-zum-verbrechen-der-aggression-gegen-die-ukraine-fuer-die-opfer-des-krieges-spielen-koennte/>

⁹³ J. Anderson, «Ukraine: The momentum is there for a tribunal on aggression», Interview of Mykola Gnatovsky, professor of international law at the University of Kyiv and special advisor to Ukraine's Ministry of Foreign Affairs, JusticeInfo.net, 12 April 2022. URL: <https://www.justiceinfo.net/en/90566-ukraine-momentum-tribunal-aggression.html>

⁹⁴ O. Мережко, «Міжнародний трибунал для Путіна і його поплічників: як можна їх покарати», 1 червня 2022. URL: <https://zn.ua/ukr/LAW/mizhnarodnij-tribunal-dlja-putina-i-joho-poplichnikiv-jak-mozhna-jikh-pokarati.html>

⁹⁵ І. Соломко, «Спеціальний трибунал щодо злочину агресії проти України: коли і як він буде створений – експерти», 27 грудня 2022. URL: <https://ukrainian.voanews.com/a/oon-resolutsia-trybunal-agressia/6892413.html>

⁹⁶ Oona A. Hathaway, «The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)», 20 September 2022. URL: <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>

The international tribunal should be established under international law. There are two ways of establishing an international criminal court or tribunal under international law: directly based on a source of international law, or on the basis of authority derived from a source of international law⁹⁷.

Regarding the first option - creation based on the source of international law, namely an international treaty. An international criminal tribunal or court can be created: firstly, based on a multilateral treaty between States. By means of this method, the ICC was created on the basis of the Rome Statute; secondly, on the basis of the bilateral treaty between a state and an international organization. In such a way SCSL (internationalized or hybrid court) was created on the basis of Agreement between the United Nations and the Government of Sierra Leone on the establishment of the Special Court for Sierra Leone⁹⁸. SCSL «was the first international criminal tribunal created by the UN in a treaty with one of its member states»⁹⁹.

Internationalized or hybrid courts can offer a broad level of flexibility regarding applicable law, the composition of staff, or financial contributions. However, the establishment of a tribunal as such cannot be «hybrid»; a hybrid tribunal is either established under international law or under domestic law. Against this background, among frequently cited examples of contemporary internationalized or hybrid courts and tribunals, only the SCSL meets the criteria of a hybrid or internationalized court established by international treaty law (Article 1 of the Agreement between the United Nations and the Government of Sierra Leone on the establishment of a SCSL clearly announces «[t]here is hereby established the Special Court for Sierra Leone ... »). By contrast, the Extraordinary Chambers in the Courts of Cambodia were established on the basis of domestic law. The ECCC's domestic status is recognized by the accompanying bilateral Agreement, which regulates «the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible » (Art. 1 of the Agreement). Similarly, the Kosovo Specialist Chamber was established under domestic law, after an exchange of letters that may amount to an international treaty.¹⁰⁰

Regarding the second option, creation based on authority derived from a source of international law, this could be done through a decision of an organ of an international organization acting within the competencies given to that organ under the treaty establishing the organization. The most prominent examples of such an establishment are the creation by the UN Security Council of the ICTY, the ICTR and the STL¹⁰¹.

With regard to the requirement that the tribunal must sufficiently reflect the will of the international community as a whole to enforce crimes under customary international law¹⁰². «In view of criticisms voiced against the distinction between national and international criminal proceedings, it will be important...to specify that that distinction only holds if the jurisdiction of the international

⁹⁷ [A. R. Coracini, J. Trahan](https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/), «Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities», November 8, 2022. URL: <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>

⁹⁸ Statute of the Special Court for Sierra Leone, <http://www.rscsl.org/Documents/scsl-statute.pdf>

⁹⁹ David C. Steelman, «Book Review: *The Legal Legacy of the Special Court for Sierra Leone* (2020)», by Charles C. Jalloh, P. 2. URL: <https://storage.googleapis.com/jnl-up-j-ijca-files/journals/1/articles/433/submission/proof/433-1-2343-2-10-20220422.pdf>

¹⁰⁰ [Astrid Reisinger Coracini, Jennifer Trahan](#), «Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI), op. cit.

¹⁰¹ [Astrid Reisinger Coracini, Jennifer Trahan](#), «Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI), op. cit.

¹⁰² [Astrid Reisinger Coracini, Jennifer Trahan](#), «Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI), op. cit.

criminal court in question transcends the delegation of national criminal jurisdiction by a group of States and can instead be convincingly characterized as the direct embodiment of the international community for the purpose of enforcing its *ius puniendi*. This is not only the case where an international criminal court has been established or otherwise endorsed by the Security Council. Rather, it is also true, and perhaps even more so, where such a court has been established on the basis of an international treaty which constitutes the legitimate attempt to provide the international community as a whole with a judicial organ to directly enforce *its ius puniendi*.¹⁰³ «[T]he absence of a rule of customary international law recognizing Head of State immunity *vis-à-vis* an international court is also explained by the different character of international courts when compared with domestic jurisdictions. While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole»¹⁰⁴. As Kress notes, a court should be considered «international» if it «can make a convincing claim to directly embody the collective will».¹⁰⁵

The source of the jurisdiction that the court is meant to exercise is the ultimate element of its character as an international court. That source of jurisdiction is the collective sovereign will of the enabling States, expressed directly or through the legitimate exercise of the mandate by an international body or an international functionary. An international court exercises the jurisdiction of no one sovereign. It exercises the jurisdiction of all the concerned sovereigns *inter se*, for their overall benefit¹⁰⁶.

If the tribunal represents the international community (particularly when it is the result of a decision made by the UN or the ICC), the legitimacy will be high; if, by contrast, the tribunal is the mere result of an agreement between States or an agreement between Ukraine and a regional organisation to which Russia is not a member, like the Council of Europe or the EU, the legitimacy will be low. The legitimacy of a tribunal created by States is relative and should be strengthened by recourse to international institutions. It appears thus crucial to involve universal international organisations or institutions, taking into account the legitimacy they embody¹⁰⁷.

Next, proceed to examine the main proposals for the creation of a Special international criminal tribunal on the crime of aggression against Ukraine.

¹⁰³ C. Kreß, «Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral *re Al-Bashir Appeal*», p. 17. URL: <https://www.toaep.org/ops-pdf/8-kress>

¹⁰⁴ ICC, the Appeals Chamber, Situation in Darfur, Sudan, In the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir, para. 115. URL: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF

¹⁰⁵ C. Kress, «The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute», in *State Sovereignty and International Criminal Law*, eds. Morten Bergsmo and Ling Yan (Beijing: Torkel Opsahl Academic EPublisher, 2012), p. 247.

¹⁰⁶ Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa, 6 May 2019, ICC-02/05-01/09-397-Anx1, P. 25. URL: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-397-anx1>

¹⁰⁷ Olivier Corten, Vaios Koutroulis. «Tribunal for the crime of aggression against Ukraine - a legal assessment». December 2022, p. 36. URL: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf).

III. Creation of a Special international tribunal through an agreement between Ukraine and the United Nations, on the recommendation of the UN General Assembly

One of the possible options for the creation of an International tribunal to try the crime of aggression is through a bilateral agreement between Ukraine and the United Nations on the recommendation of the General Assembly. Such a Tribunal will have the quality of an «international» criminal tribunal before which immunity will not be granted, because it will be established: at the request of the Government of Ukraine; by resolution of the UN General Assembly; UN General Assembly would ask the UN Secretary General to initiate negotiations between the Government of Ukraine and the UN; the tribunal will be finally established by a bilateral agreement concluded between the Government of Ukraine and the UN¹⁰⁸.

An international criminal tribunal recommended by the UN General Assembly would carry the greatest legitimacy. It would best express the ideal of an international tribunal enforcing international criminal law, the criminal law of the international community as a whole¹⁰⁹. «This would send a powerful message that the crime of aggression is a crime whether committed in Europe or elsewhere. Indeed, a key purpose for prosecuting the crime of aggression is to repair an international system that Russia has now damaged and to signal to all countries that they must not follow in Russia's footsteps. That repair is limited indeed if it applies to Europe alone», – Oona A. Hathaway points out¹¹⁰.

Unlike the United Nations Security Council, the General Assembly cannot establish an international criminal court, but it can, on behalf of the United Nations, express the desire of the international community to do so. The General Assembly has the right to authorize the Secretary General to cooperate with Ukraine in order to establish a tribunal, and Ukraine gives voluntary consent to the establishment of such a tribunal through an international agreement. That would be of utmost importance concerning the legitimacy of such a tribunal. Then the UN Secretary-General could conclude an international treaty with Ukraine on the establishment of the tribunal¹¹¹.

J. Trahan highlighted the following advantages of the Tribunal, established on the recommendation of the General Assembly: the General Assembly is the most appropriate body to turn to when the Security Council is paralyzed by the veto power of the Russian Federation; this would be the most multilateral approach from the General Assembly; there is the precedent of the Special Court for Sierra Leone, formed by the agreement between Sierra Leone and the UN; a mixed (or international) tribunal avoids certain immunity issues that are decided at the national level or that might arise if the jurisdictions of national countries were combined¹¹².

A. Komarov and Oona A. Hathaway emphasize that «creating the court through an agreement between Ukraine and the UN on the recommendation of the UNGA would ensure that the new court is on the firm international legal ground and safeguard the court's legitimacy». Some have raised the concern that creating an independent *ad hoc* court could exceed the powers of the General

¹⁰⁸ A. R. Coracini, J. Trahan, «Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI)», op. cit.

¹⁰⁹ A. R. Coracini, «The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part II): Jurisdiction and Composition», 23 September 2022. URL: <https://www.justsecurity.org/83201/tribunal-crime-of-aggression-part-two/>

¹¹⁰ Oona A. Hathaway, «The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)», op. cit.

¹¹¹ C. Kress, «Putin 'is not the only suspect' in Ukraine crimes», 11 September 2022. URL: <https://www.dw.com/en/vladimir-putin-is-not-the-only-suspect-in-ukraine-crimes/a-63683192>

¹¹² J. Trahan, «U.N. General Assembly Should Recommend Creation of Crime of Aggression Tribunal For Ukraine: Nuremberg Is Not The Model», op. cit.

Assembly¹¹³. But that does not present a concern as long as there is an agreement with the state on whose territory the crimes were committed – here Ukraine. There are two precedents for this approach. The Extraordinary Chambers in the Courts of Cambodia were created by agreement between the United Nations and Cambodia, upon the recommendation of the General Assembly (the Chambers were domestic, not international, but the same procedure could be used to create an international court). The Special Court for Sierra Leone was created by agreement between the United Nations and Sierra Leone, upon recommendation by the Security Council¹¹⁴. In establishing the SCSL, the Security Council did not act under Chapter VII of the UN Charter, but requested the Secretary-General to negotiate an agreement with Sierra Leone despite the lack of a binding Chapter VII decision (UNSCR 1315). Accordingly, the SCSL was an international criminal court but it did not benefit from the Security Council's mandatory enforcement powers over all UN Member States¹¹⁵.

The Appeals Chamber of the Special Court for Sierra Leone noted that «the Agreement between the United Nations and Sierra Leone is thus an agreement between *all* members of the United Nations and Sierra Leone. This fact makes the Agreement an expression of the will of the international community. The Special Court established in such circumstances is truly international»¹¹⁶. «[T]he Special Court is not a national court of Sierra Leone and is not part of the judicial system of Sierra Leone exercising judicial powers of Sierra Leone»¹¹⁷. «Accordingly, there is no reason to conclude that the Special Court should be treated as anything other than an international tribunal or court, with all that implies for the question of immunity for a serving Head of State»¹¹⁸.

While the General Assembly, unlike the UN Security Council, can only make recommendations, this does not prevent it from recommending the establishment of an international criminal court or tribunal by way of a treaty concluded between one or more States and the UN. Such a court or tribunal would not have mandatory enforcement powers over all States, as the General Assembly cannot delegate powers that it does not possess. Therefore, States that do not become a party to the treaty are under no obligation to cooperate with the court or tribunal, including carrying out an arrest warrant. Yet, such a court or tribunal would be in a position to exercise criminal jurisdiction over individuals for crimes under customary international law¹¹⁹.

One of the main criticisms of this approach is whether «overwhelming endorsement could be secured» for such a resolution of the UN General Assembly. For example, C. McDougall¹²⁰ expresses

¹¹³ D. Jinks, «Does the U.N. General Assembly have the authority to establish an International Criminal Tribunal for Syria?», 22 May 2014. URL: <https://www.justsecurity.org/10721/u-n-general-assembly-authority-establish-international-criminal-tribunal-syria/>

¹¹⁴ A. Komarov, O. A. Hathaway, «The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law», 11 April 2022. URL: <https://www.justsecurity.org/81063/the-best-path-for-accountability-for-the-crime-of-aggression-under-ukrainian-and-international-law/>

¹¹⁵ A. R. Coracini, J. Trahan, «Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities», November 8, 2022. URL: <https://www.justsecurity.org/84017/the-case-for-creating-a-special-tribunal-to-prosecute-the-crime-of-aggression-committed-against-ukraine-part-vi-on-the-non-applicability-of-personal-immunities/>

¹¹⁶ Special Court for Sierra Leone, Appeals Chamber, 31 May 2004, *Taylor (Decision on Immunity from Jurisdiction)*, SCSL-2003-01-AR72(E), para 38. URL: http://www.worldcourts.com/scsl/eng/decisions/2004.05.31_Prosecutor_v_Taylor.htm

¹¹⁷ *Ibid.*, para 40.

¹¹⁸ *Ibid.*, para 41.

¹¹⁹ Astrid Reisinger Coracini, Jennifer Trahan, «Special Tribunal to Prosecute the Crime of Aggression Committed Against Ukraine (Part VI): On the Non-Applicability of Personal Immunities», *op. cit.*

¹²⁰ C. McDougall, «Why Creating a Special Tribunal for Aggression Against Ukraine is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics», *Opinio Juris*, 15 March 2022. URL:

doubts that the resolution regarding the Special Tribunal for the crime of aggression will have a similar level of support as the UN General Assembly resolution condemning the aggression against Ukraine, when there were only 5 votes «against». «Any effort to go down this path would thus require extensive consultation among Member States to determine whether a strong outcome could be secured, lest efforts to hold Putin and Lukashenko to account, and to strengthen the prohibition of the use of force, be set backwards»¹²¹.

Indeed, the task of establishing the Tribunal is complicated, first of all, by political difficulties and considerations. This is a task that must be completed in the near future. The international community should join all efforts to establish a tribunal against aggression in Ukraine. The UN General Assembly should take this step from the perspective of geopolitics and global security.

IV. Creation of a Special tribunal through an agreement between Ukraine and international organization (the UN, the EU, the CoE), based on Ukrainian legislation

Another proposed legal way is the establishment of a mixed or «hybrid» tribunal based on Ukrainian legislation, but with the support of international organizations through an international agreement. An international organization, for example, the UN, the EU or CoE could provide practical, financial or other support to the tribunal. The peculiarity of such courts is that they are temporary, special, become part of the national judicial system, and their jurisdiction is limited in relation to categories of crimes and persons who are held criminally liable.

If the possibility of an agreement with the UN is being considered, this option is similar to the creation of extraordinary chambers in the courts of Cambodia. Cambodia expressed a desire to establish such a tribunal and asked the UN to participate. The UN Secretary General was authorized by the UN General Assembly to conduct the relevant negotiations and conclude an agreement on behalf of the UN.¹²² An agreement with the United Nations, detailing how the international community would assist and participate in the Extraordinary Chambers, was ultimately reached in June 2003. While this special court was created by the Cambodian government and the United Nations, it is independent of them. It is a Cambodian court with international participation that applies international standards¹²³.

There is the possibility of creating a Tribunal based on the agreement between Ukraine and the EU. The EU has quite broad powers in the field of foreign and security policy of the Union. The EU has experience in creating a Special tribunal based on the agreement between Kosovo and the EU, it is about the Kosovo Specialist Chambers and the Specialist Prosecutor's Office. On 3 August 2015, the Kosovo Assembly adopted Article 162 of the Kosovo Constitution and the Law on Specialist Chambers and Specialist Prosecutor's Office, following the Exchange of Letters between the President of Kosovo and the High Representative of the European Union for Foreign Affairs and

<https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>

¹²¹ Ibid.

¹²² Extraordinary Chambers in the Courts of Cambodia, Legal Documents. URL: <https://www.eccc.gov.kh/en/document/legal/agreement>

¹²³ Introduction to the ECCC. URL: <https://www.eccc.gov.kh/en/introduction-eccc>

Security Policy in 2014. The Specialist Chambers are attached to each level of the court system in Kosovo – Basic Court, Court of Appeals, Supreme Court and Constitutional Court¹²⁴.

Another possible option which was proposed - is the creation of a tribunal on the basis of an agreement with the Council of Europe¹²⁵.

The creation of the Extraordinary African Chambers by agreement between Senegal and the African Union certainly seems to constitute a precedent in favour of establishing an *ad hoc* tribunal by agreement between Ukraine and an organisation such as the Council of Europe. The process is similar regarding the creation of the tribunal by virtue of an agreement with the UN: an agreement needs to be concluded between Ukraine and the organisation and Ukraine will then enact the relevant legislation in its domestic law¹²⁶. The tribunal would not be a CoE creation, but rather a CoE-supported mechanism which nonetheless remains part of Ukraine's judicial system¹²⁷.

The option of creating a hybrid tribunal established as part of the Ukrainian judicial system with the support of the Council of Europe, according to K. Jon Heller, would maximise the benefits of the other options «while largely (though not completely) avoiding their costs». In support of this way of creating the Tribunal, K. Jon Heller puts the following arguments. A EUCA would have numerous practical advantages. It could likely be established very quickly, given that it would be part of Ukraine's (admittedly beleaguered) judicial system. It could function during the conflict as long as it was physically located outside of Ukraine. And the support and involvement of CoE members would compensate for the legal, technical, and financial limitations Ukraine would face if it acted alone. After all, a number of CoE members, such as Germany and France, have significant experience investigating, prosecuting, and judging international crimes committed in conflict situations. Moreover, given that all of the members of the EU are members of the CoE, a EUCA could take advantage of EuroJust's Joint Investigation Teams¹²⁸.

K. Jon Heller expressed the view that such a tribunal «would be part of the ordinary judicial system of Ukraine – preferably a chamber of one of Ukraine's Higher Specialised Courts – and would not be the Special or extraordinary court the establishment of which is in any case prohibited under Article 125 of Ukraine's Constitution»¹²⁹. Heller argues that the new court falls under the Article 125, Part 4, which establishes that «higher specialised courts may function in accordance with the law». In Ukraine, the High Anti-Corruption Court belongs to a «high specialized court»¹³⁰. However, this type of internationalized court (established by Ukrainian law) would obviously be contrary to Article 125 of the Constitution of Ukraine. There are significant differences between the High Anti-Corruption Court of Ukraine (HACC) and the alleged tribunal for aggression against Ukraine, which does not allow them to be identified: the HACC is part of the Ukrainian judiciary and is not a hybrid

¹²⁴ The Specialist Chambers and Specialist Prosecutor's Office have jurisdiction over crimes against humanity, war crimes and other crimes under Kosovo law in relation to allegations reported in the [Council of Europe Parliamentary Assembly Report of 7 January 2011](https://www.scp-ks.org/en/background). URL: <https://www.scp-ks.org/en/background>

¹²⁵ O. Owiso, «An Aggression Chamber for Ukraine Supported by the Council of Europe», 30 March 2022. URL: <https://opiniojuris.org/2022/03/30/an-aggression-chamber-for-ukraine-supported-by-the-council-of-europe/>, Olivier Corten, Vaios Koutroulis, «Tribunal for the crime of aggression against Ukraine - a legal assessment», December 2022, P.13. URL: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA\(2022\)702574_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702574/EXPO_IDA(2022)702574_EN.pdf)

¹²⁶ Olivier Corten, Vaios Koutroulis, «Tribunal for the crime of aggression against Ukraine - a legal assessment», December 2022, op. cit., p. 18.

¹²⁷ O. Owiso, «An Aggression Chamber for Ukraine Supported by the Council of Europe», op. cit.

¹²⁸ K. Jon Heller, «The Best Option: An Extraordinary Ukrainian Chamber for Aggression», 16 March 2022. URL: <http://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/>

¹²⁹ O. Owiso, «An Aggression Chamber for Ukraine Supported by the Council of Europe», op. cit.

¹³⁰ Закон України «Про Вищий антикорупційний суд» від 07.06.2018, Стаття 1. URL: <https://zakon.rada.gov.ua/laws/show/2447-19#Text>

court; only citizens of Ukraine can be judges in the HACC; the HACC is a permanent court established to deal with the Special category of cases (corruption involving high-ranking officials); the HACC as a national court of Ukraine can only be financed by the State Budget of Ukraine; Significant international participation in the creation of the HACC and its operation was aimed at supporting the exclusively internal Ukrainian process¹³¹.

The proposed model of an internationalized court (established by Ukrainian law) is not suitable for Ukraine for several reasons. First, internationalized courts are clearly special and extraordinary courts. According to Article 125 of the Constitution of Ukraine, «Creation of extraordinary and special courts is not allowed.» In order for such a court to be created, changes should be made to the Constitution of Ukraine. According to Art. 157 of the Constitution of Ukraine, the Constitution «cannot be changed under conditions of war or state of emergency». Secondly, it is the immunity of officials of a foreign state who are subject to criminal prosecution for the crime of aggression. The legal status of an internationalized court does not remove this legal obstacle, since such a court is not an international judicial body. Even if an agreement is concluded with an international organization on the creation of a court, on the one hand, this will add legitimacy to such a court, but, on the other hand, such a court would be a part of the judicial system of Ukraine. Thirdly, only a small number of states will participate in the establishment of the tribunal. Fourthly, such an approach would require «unanimity among the members of the CoE, including Hungary and Serbia»¹³².

V. Creation of a Special tribunal through an agreement between Ukraine and other states

The creation of an *ad hoc* tribunal under an agreement between Ukraine and other states was proposed based on the precedent of the Nuremberg Tribunal¹³³. One of the explanations for turning to the experience of the Nuremberg Tribunal is the fact that this tribunal was the only one that established international responsibility for crimes against peace. The important achievement of the Nuremberg precedent is to show that the seemingly impossible is still possible.

The Ukrainian Criminal Code already includes crimes that cover aggression committed against Ukraine and Ukraine has the sovereign right to delegate the exercise of this jurisdiction to a tribunal established by treaty. The same would apply to States that provide for universal jurisdiction over the crime of aggression which may participate in the creation of such a tribunal, as it has been suggested¹³⁴. A UNGA resolution recommending the conclusion of such an agreement may offer additional legitimacy to the enterprise, but it will not alter the legal status of the agreement¹³⁵.

¹³¹ A. Komarov, Oona A. Hathaway, «*The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*», 11 April 2022, op. cit.

¹³² Ibid.

¹³³ See: G. Brown, D. Akande, et al., Statement calling for the Creation of a Special Tribunal for the Punishment of the Crime of Aggression against Ukraine, 4 March 2022; P. Sands, «Why we need a new Nuremberg trial to make Putin pay: From Britain's leading expert on crimes against humanity Philippe Sands, a powerful personal plea for the world to hold a tribunal like the one which condemned Hitler's henchmen», Daily Mail, 4 March 2022; United Nations Security Council, Speech made by President of Ukraine Volodymyr Zelenskyy – Verbatim Record, UN Doc. S/PV.9011, 5 April 2022, p. 9. URL: <https://documents-dds-ny.un.org/doc/UNDOC/PRO/N22/309/35/PDF/N2230935.pdf?OpenElement>

¹³⁴ S. Vasiliev, «Aggression against Ukraine: Avenues for Accountability for Core Crimes», *EJIL:Talk!*, 3 March 2022. URL: <https://www.ejiltalk.org/aggression-against-ukraine-avenues-for-accountability-for-core-crimes/>

¹³⁵ Olivier Corten, Vaios Koutroulis, «*Tribunal for the crime of aggression against Ukraine - a legal assessment*», op. cit, p. 19.

The question arose: how many member states should a multilateral treaty have in order to legitimately create a truly «international» criminal court or tribunal and be an expression of the will of the international community as a whole?

From the point of view of theory, the participation of three or more states is enough to create an international criminal court. However, the questions of the legality and legitimacy of such a court arise, namely, the legitimacy of three or more states to act on behalf of the entire international community. If the tribunal is formed by three or more states, the relations between them and the aggressor state remain interstate.

The criticism of this way of establishing a tribunal, and consequently of its activities, is an accusation of bias and allegations that certain states will act in their own capacity. «Given the specificities of this situation, in particular the force of the reaction generated by this violation, an exceptional creation could be envisaged. In this case, though, we submit that all should be done to avoid the impression of a tribunal created by (some) States acting on their own capacity. On the contrary, to the greatest possible extent a strong implication of universal international organizations should be sought»¹³⁶. Also, it is important to note that the IMT was created before the United Nations was formed. Indeed, the group of states that founded the IMT went on soon after to found the United Nations. Today, the Special tribunal formed by a group of states outside the United Nations is less likely to be viewed as legitimate. Such the Special tribunal would likely also face charges of selective justice¹³⁷.

Another argument that «plays» against this way of creating a tribunal is that such a tribunal would not be able to prosecute top leadership of the aggressor state for committing the crime of aggression due to their personal immunity. As Claus Kreß points out, «Indeed, the evolution of the conversation since the end of the Great War suggests that States have not come to see a bilateral or a regional criminal court, despite their being international in the technical sense, as capable of giving rise to such a strong perception of objectivity that the traditional customary Head of State immunity *ratione personae* should not extend to it when adjudicating crimes under international law. All this reflects the recognition by States of a genuine conflict of principles, which are both protected by the international legal order, and the attempt by those same States to strike a proper balance. This conflict of principles exists between the effective enforcement of the *ius puniendi* of the international community over those allegedly most responsible for the commission of crimes under international law and the need to protect States and the stability of international relations from the risk of an abusive (hegemonic) use of the criminal law instruments in politically motivated proceedings»¹³⁸. The reason there was no immunity at the Nuremberg process is that «the Allied Control Council was the government of Germany. And as the government of Germany, they waived all of the immunity of its officials»¹³⁹. However, this option seems unrealistic at the moment. Thus, a tribunal created by several states will not have the same legitimacy as a tribunal created on behalf of the international community with the support of the UN.

¹³⁶ Ibid., p. 36.

¹³⁷ A. Komarov, Oona A. Hathaway, «*The Best Path for Accountability for the Crime of Aggression Under Ukrainian and International Law*», op. cit.

¹³⁸ C. Kreß, «*Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal*», p. 17. URL: <https://www.toaep.org/ops-pdf/8-kress>

¹³⁹ K. Jon Heller, «*Everything You Need To Know Or Argue About A Special Tribunal On Russia's Crime Of Aggression*», 13 December 2022. URL: <https://www.justiceinfo.net/en/110201-everything-you-need-to-know-argue-special-tribunal-russia-crime-of-aggression.html>

VI. Conclusion

The creation of the Tribunal is caused by the following circumstances: currently, there is no international court in the world that has jurisdiction over the crime of aggression against Ukraine. The creation of the Special tribunal will eliminate this legal gap and ensure the implementation of the international norm prohibiting aggression; a future special tribunal could be a fundamental legal mechanism for victims of this crime to participate, be heard and seek compensation for their suffering and harm. The Special compensation mechanism or procedure should be provided for when the tribunal is established; this is a question of the authority of international law and a strong message to future generations, a question of conscience and debt to all the innocent tortured victims of Russian aggression. It is necessary to use the potential of international law and for the international community to respond to these terrible atrocities committed against the Ukrainian people.

An important mission of the future Tribunal is to ensure reliable deterrence and punishment for the crime of aggression that violates *jus cogens* norms. The impasse of the UN Security Council and the narrow jurisdiction of the International Criminal Court should not become a legal obstacle to the responsibility of the highest political and military leadership of Russia for the crime of aggression.

If from the very beginning of Russia's full-scale war against Ukraine, the idea of establishing the Special Tribunal for crimes of aggression against Ukraine seemed somewhat unrealistic, now it has received support from a wide range of various subjects: major international intergovernmental organizations (Parliamentary Assembly of the Council of Europe, the European Parliament, the OSCE Parliamentary Assembly, the NATO Parliamentary Assembly), individual states (as of December 2023, there are 40 member states of the Core Group on options for the establishment of a tribunal on the crime of aggression against Ukraine), the scientific community (hundreds of European and world intellectuals, leading international lawyers, public figures signed the Statement on the need to establish the Tribunal).

Various legal constructions are possible for the establishment of the Tribunal. The main thing is for the tribunal to be international, first of all from the point of view of legitimacy. An international tribunal must be established in accordance with international law on the basis of a multilateral agreement between states or on the basis of a bilateral agreement between a state and an international organization. The tribunal must sufficiently reflect the will of the international community as a whole to enforce crimes under customary international law. The established tribunal must be «international», which will ensure the deprivation of immunity of the highest officials, who are related to the aggression against Ukraine.

The legitimacy of a tribunal created by states is relative and should be strengthened by appealing to international institutions. It is expedient to create a tribunal with the participation of an authoritative international organization, as well as to include representatives of different legal systems and different civilizations in its composition. Regardless of which model is chosen, the support of this tribunal from the UN and the General Assembly will be necessary.

From the point of view of international judicial practice and experience, there are necessary legal and moral grounds for the establishment of the Tribunal regarding aggression against Ukraine and the implementation of its jurisdiction. The key challenge remains the political side of the process of establishing the tribunal and its support by the international community at the UN level.

To date, the international community has rich legal and political experience in the creation of international judicial institutions. This experience with its strengths and weaknesses allows for taking into account the difficulties that stand in the way of international justice and is of great importance

for the creation of a new international tribunal. Indeed, many practical and legal questions arise in the establishment of the Tribunal on Aggression, but justice is not denied on the grounds that it is difficult. Active work is currently underway to determine the optimal format for establishing the Tribunal. Consultations are being held with states and international organizations. If there is a desire and political will to bring individuals to justice for the crime of aggression at the international level, then legal opportunities will be sought. The flexibility and adaptability of international law make it possible to find and apply international legal mechanisms in the fight against aggression.