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LEGAL REGULATION OF PUBLIC ADMINISTRATION AND HUMAN RIGHTS

IMPLEMENTATION OF FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS UNDER MARTIAL LAW IN UKRAINE

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LIST OF ABBREVIATIONS

UN - United Nations

ECHR - European Court of Human Rights

NATO - North Atlantic Treaty Organisation

EU - European Union

European Convention - Convention for the Protection of Human Rights and Fundamental Freedoms

Covenant - International Covenant on Civil and Political Rights

INTRODUCTION

1. Research problem:

Today, observance and protection of human rights and freedoms is an integral element of any democratic and civilised country. The issue of ensuring human rights is receiving a lot of attention both from legal scholars and international human rights NGOs, as well as from politicians. The importance of observance of human rights and freedoms is evidenced by the establishment of international intergovernmental human rights organisations (UN Human Rights Council, UN Human Rights Committees, ECHR, etc.), securing fundamental rights and freedoms for people through the adoption of international acts and treaties (Universal Declaration of Human Rights, International Covenant on Political and Civil Rights, International Covenant on Economic, Social and Cultural Rights, European Convention on Human Rights, etc.), making human rights the main focus of the UN and its Member States (since the adoption of the UN Charter on 26 June 1945), which automatically removes human rights issues from the 'shadow' of internal affairs of UN member states and makes it the object of consolidation of the international community and the main direction of development of states.

According to the interpretation of the basic principle that underlies the activities of many democratic countries of the world - the rule of law, respect for human rights (the rule of law), which is its integral element, enshrines the theory that human rights are inherent (those directly related to the essence of man) and natural (those that arise in a person from birth). In addition, human rights, which in turn act as a means of limiting public authorities in their powers, preventing their arbitrariness, are the phenomenon that determines the direction of the state's activities, its functional orientation, and, accordingly, it is the state that is responsible for the implementation and guarantee of human rights and freedoms.

Nevertheless, along with the concept of inalienability of human rights, there are legal mechanisms that still allow the state to restrict the exercise of human rights when the interests of society require it.

In its case law, the ECtHR, when assessing a possible violation of human rights by a High Contracting Party, has repeatedly emphasised that interference with human rights is not always an automatic violation of the provisions of the European Convention on Human Rights, and in some circumstances recognises measures resulting from interference with human rights as those that are really necessary in society, as they protect the public interest (the rights of others).

At the same time, one of the significant and substantial grounds for restricting human rights is the existence of a threat to the national security and territorial integrity of the state,

which is accompanied by the introduction of a special regime of state functioning and law - martial law.

In most countries, martial law results in significant restrictions on the exercise of many fundamental rights and freedoms due to the need to protect the population and organise national resistance and defence against armed aggression by another country or other military actions on the territory of the country, which includes both a ban on the exercise of a number of fundamental rights and, conversely, creates additional obligations for individuals that are not imposed on individuals in peacetime.

In addition, the very threat to the national security of the country, which leads to the introduction of martial law, including uprisings, military unrest, encroachment on the territorial integrity of the country with the use of military force, etc. and their consequences, create both obstacles for the state itself to effectively protect human rights, and deprive the victims of such events of the opportunity to exercise and protect their rights, in particular those who find themselves in the epicentre or near the place of hostilities, or even in the territory controlled by the rebels or the country that is attacking with military force.

In this regard, the problem of this study is the functioning of human rights and freedoms under martial law, its impact on their implementation, which manifests itself in the form of restrictions on human rights, and the establishment of a balance and expediency between martial law measures aimed at protecting national security and fundamental human rights and freedoms in accordance with the practice of the ECHR. In addition, this master's thesis will pay attention to the problems of human rights protection, namely the impact of martial law on the provision of proper and fair justice in Ukraine in the context of Article 6 of the European Convention, and will also address the problematic issues of compensation for damage caused by the armed aggression of the Russian Federation.

2. Relevance of the master's thesis:

Since the beginning of the full-scale invasion of Ukraine by the Russian Federation on 24 February 2022, which has affected absolutely all spheres of life of the Ukrainian people, Ukraine has continued to heroically repel the unprovoked and unjustified armed aggression of the Russian Federation.

Nevertheless, despite the Ukrainian government's focus on military defence and the "mobilisation" of the international community around the issue of international security and law and order, Ukraine continues to be committed to the values of the civilised world, which is recognised as one of the main goals of repelling the aggression of the Russian Federation and

bringing it to justice, and around which the countries of the democratic world have united, as evidenced by the political, humanitarian and military assistance provided to Ukraine.

One of these values, which is recognised as fundamental by the UN and the Council of Europe in their regulations, is the observance and protection of human rights, which Ukraine continues to implement on the basis of its obligations under international instruments: International Covenants on Human Rights and the European Convention on Human Rights, etc.

It is also worth noting that despite the martial law, Ukraine is steadily implementing the chosen strategic national course towards full membership of the EU and NATO, which is enshrined in the Constitution of Ukraine, which requires Ukraine to fulfil the relevant requirements, including those related to human rights.

At the same time, the European integration process in Ukraine accelerated during the Russian-Ukrainian war, as evidenced by Ukraine's obtaining the status of a candidate for membership in the European Union on 23 June 2022, the European Council's decision to start negotiations on Ukraine's accession to the European Union on 14 December 2023, and the actual start of negotiations at the intergovernmental conference in Luxembourg on 25 June 2024.

As a result of Ukraine's accession to the EU, the list of international human rights instruments will include another document that will become binding on Ukraine, as it is one of the main legal acts of the European Union - the Charter of Fundamental Rights of the European Union.

In addition, the Constitution of Ukraine explicitly stipulates that human rights and freedoms and their guarantees determine the content and direction of the state's activities[1].

In view of the above, both the need to organise effective defence of Ukraine in the context of the Russian-Ukrainian war and the provision and guarantee of human rights and fundamental freedoms in the light of international obligations and European integration processes are currently a priority for Ukraine, and accordingly, the chosen topic of the master's thesis is relevant.

In addition, the observance of the principle of proportionality between the restrictions applied during martial law and the observance of human rights and freedoms is strategically important for Ukraine, as it affects the legal order in the territory controlled by Ukraine, namely social stability and internal unity of the Ukrainian population, which can prevent internal unrest and weakening of Ukraine's defence capabilities in the context of the Russian-Ukrainian war.

[1] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, July 28, 1996, Article 3, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

3. Scientific novelty and overview of the research on the chosen topic:

Many scholars, including Ukrainian ones, have paid attention to the general theory of human rights during martial law: Obushko V.V., Mernyk A.M., Kuzmina V.O., Burlakov V.M., Kornienko M.V., Kubko A.E., etc. and foreign scholars: Oren Gross, David Dyzenhaus, Kim Lane Scheppele, Frank R. Barnett, Markus Kotzur, E.W. Killam, etc., however, given the actual introduction of martial law in Ukraine on 24 February 2022, it is necessary to analyse and investigate the practical aspects and current problems related to the implementation and protection of human rights in Ukraine under martial law, given the lack of sufficient experience of the functioning of the Ukrainian authorities in emergency circumstances, and to propose ways to solve problems and eliminate shortcomings that have arisen during the martial law, which accordingly constitutes the scientific novelty of this master's thesis.

4. Significance of the research:

The topic of this master's thesis is important for several reasons:

Firstly, the results of the study can be used in the context of improving the system of ensuring human rights and freedoms under martial law in Ukraine in order to create the most favourable conditions for people's lives, on the one hand, and to take the necessary measures to repel the armed aggression of the Russian Federation, on the other hand, i.e. to ensure proportionality of interference with human rights and determine the actual need for restrictive measures.

Secondly, proper respect for human rights during martial law has a significant impact on the country's defence capability, especially during the war in Ukraine, as the state's respect for human rights is important:

- creates appropriate living conditions for people, which will facilitate the return of Ukrainians who have left abroad as a result of the armed aggression of the Russian Federation and have been granted refugee status, which will have a positive impact on increasing Ukraine's human resource and improving the country's economy;

- creates an attractive and favourable investment climate for private companies, including international ones, and their investments, whose presence in the Ukrainian market will significantly increase the state budget revenues through the collection of taxes and fees, which can be further spent on the country's defence.

Thirdly, the establishment of a proper system for ensuring fundamental human rights and freedoms during martial law is critical for Ukraine in light of meeting the requirements of the European integration process, which will strengthen Ukraine's status and reputation

internationally as a civilised, legal and democratic country, which is a prerequisite for continued financial, humanitarian and military assistance from Western bloc countries.

5. The aim of the research:

The purpose of the master's thesis is to study and identify practical problems and peculiarities of observance and protection of human rights under martial law in Ukraine in the context of the Russian-Ukrainian war, and, based on the results of the study, to formulate recommendations for improving the functioning of the legal regime of martial law in Ukraine, to propose new approaches to maintaining a balance (principle of proportionality) between restrictions and measures necessary during martial law to protect the sovereignty of the state and its territorial integrity.

6. Objectives of the research:

To fulfil the aim of the master's thesis, the following research objectives are set:

- to analyse and establish the role and legal nature of martial law, procedural aspects of its operation on the basis of national and international legislation and the experience of foreign countries;

- to establish the scope of human rights restrictions and criteria for compliance with the principle of proportionality of human rights restrictions during martial law based on the results of the study of international legislation and case law of the European Court of Human Rights;

- to provide a legal assessment of Ukraine's measures that result in interference with human rights in terms of compliance with the principle of proportionality;

- to analyse the national legislation of Ukraine in the context of human rights restrictions during martial law for compliance with international human rights law;

- to assess the organisation of justice in Ukraine under martial law in the light of Ukraine's fulfilment of its obligations under Article 6 of the European Convention;

- to study the mechanisms of legal protection aimed at compensation for damage caused by the armed aggression of the Russian Federation, in terms of their effectiveness.

7. Research methodology:

The following main research methods were used to fulfil the objectives of this master's thesis:

- a theoretical method aimed at studying national and international legal acts, recommendations of non-governmental and governmental organisations on human rights,

explanations (interpretations) on legal issues, research of scientific literature in the context of theory and doctrine, historical aspects in the context of the development of the object of study;

- a practical method aimed at researching statistical data, court practice, and reports of human rights organisations to identify practical problems.

In addition, the methodological basis of the study was formed by the content analysis method, analytical, systemic and structural, dialectical, formal legal and logical research methods.

8. The structure of the research:

This master's thesis consists of five chapters.

The first section is devoted to the study of the legal nature and consequences of such a phenomenon as martial law, during which the State and law have a special mode of operation. With a view to a comprehensive and in-depth analysis of the martial law regime, this chapter examines the historical aspects of martial law application by countries of the world in order to identify the problems faced by the States and their populations, and takes into account both international legal acts establishing legal regulation and requirements for the implementation and operation of martial law, and legal acts of foreign countries in the context of comparison with the legal regulation of such a legal phenomenon in Ukraine.

The second section, which deals directly with the specifics of restrictions on human rights and freedoms under martial law, is divided into 2 subsections:

- The first subsection (theoretical aspect) is devoted to the study of the peculiarities of ensuring human rights and fundamental freedoms in an emergency situation, given that the main consequence of the introduction of martial law is restrictions on the exercise of such rights and freedoms. This subsection will examine the permissible scope of human rights restrictions according to the ECHR case law, the procedure for derogation from international human rights obligations and the criteria for assessing the legality of interference with human rights in an emergency situation by the ECHR.

- the second subsection (practical aspect) will provide a legal assessment of the actual measures and restrictions applied by the Government of Ukraine, established in the previous subsection, i.e. the subject of research in the second subsection is the practical aspects of human rights restrictions in Ukraine through the prism of the conclusions drawn in the first subsection.

The third section, which is devoted to the peculiarities of protection and restoration of violated human rights and freedoms under martial law in Ukraine, is divided into 2 subsections:

- the first subsection focuses on the peculiarities of protection of human rights and freedoms under martial law in Ukraine, in the context of which the impact of the Russian-Ukrainian war on the organisation of justice in Ukraine is studied, and how this affects Ukraine's

compliance with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

- the second subsection assesses the available mechanisms of legal protection aimed at compensation for damage caused by the armed aggression of the Russian Federation in terms of their effectiveness.

9. Defence statements:

The main hypothesis of the master's thesis is that despite Ukraine's priority task of countering the aggression of the Russian Federation in order to restore territorial integrity and ensure national security, the protection of human rights and fundamental freedoms remains critically important. This is necessary not only to fulfil Ukraine's international obligations, but also to ensure stability and law and order in the controlled territories, which directly affects the country's defence capability and overall security. Given the uncertainty of the duration of the war and the need to adapt to the new realities of life, Ukraine should pay more attention to the protection of human rights and freedoms under martial law, improving the relevant legislation to adequately respond to current challenges and problems, and to ensure the development of Ukraine as a civilised, democratic and rule-of-law state.

SECTION 1: THE ROLE, ESSENCE AND LEGAL REGULATION OF MARTIAL LAW. HISTORICAL OVERVIEW AND EXPERIENCE OF MARTIAL LAW APPLICATION BY COUNTRIES OF THE WORLD.

To date, given the destabilisation of the security situation in the world and the escalation of many conflicts, as evidenced by confrontation between countries with the use of military force or armed provocations (the Russian-Ukrainian war, the escalation of the conflict between China and Taiwan, the armed conflict between Palestine and Israel, the completed conflict between Armenia and Azerbaijan over Nagorno-Karabakh, the attempted escalation of the conflict between Serbia and Kosovo, etc, destabilisation of the situation between the Democratic People's Republic of Korea and the Republic of Korea, etc.), which in turn leads to significant human losses and changes in the territorial structures of sovereign states, the issue of protecting national security, territorial integrity and human rights is quite relevant and important against the background of the threat of ending the long-term and stable peace in the world that has lasted since the end of World War II.

The consequences of the introduction of martial law and the repulsion of armed aggression, suppression of uprisings or the fight against other threats to national security inevitably affect all spheres of life of the civilian population of the country concerned, as well as the operation of the state system, which also affects the fulfilment by the state of its obligations to ensure and protect fundamental human rights and freedoms.

It should be noted that the study of the peculiarities and problems of the implementation of human rights and freedoms under martial law cannot be comprehensive and complete without analyzing the functioning of the legal regime of martial law, namely its essence, consequences of its introduction, importance in the context of ensuring national security and protection of sovereignty from internal and external threats, since the historical experience of many countries and analysis of the current international and national legislation of Ukraine and other countries shows that the introduction of martial law is often accompanied by significant restrictions on human rights and freedoms, which raises serious legal and ethical debates.

In addition, given that on 24 February 2022, as a result of the outbreak of full-scale armed aggression by the Russian Federation, which provoked the Russian-Ukrainian war, which, according to analysts and international media, is considered the largest armed conflict since World War II [2] [3], Ukraine has introduced a legal regime of martial law, which continues to this

[2] Council on Foreign Relations, *Ukraine: Conflict at the Crossroads of Europe and Russia*, last updated February 6, 2024, https://www.cfr.org/backgrounder/ukraine-conflict-crossroads-europe-and-russia
[3] RAND Corporation, *Russia–Ukraine War: In-Depth Analysis and Commentary*, https://www.rand.org/topics/featured/russia-ukraine.html

day, and therefore this study is particularly relevant, and its results may contribute to improving its operation in Ukraine, including in terms of its impact on the exercise of fundamental human rights and freedoms, given the need for the state and society to adapt to new realities and challenges, given the lack of clear forecasts and timelines for the end of the Russian-Ukrainian war.

The study should begin with an analysis of theoretical and scientific approaches to the definition of the concept of "martial law", since this is key to further understanding of the essence, grounds and legal regulation of such a regime.

According to various online dictionaries, the concept of "martial law" (which is derived from the word "Mars" - the name of the ancient Roman god of war) has the following definitions:

- a system of complete control by the armed forces of a country over all activities, including civilian activities, in a theoretical or actual war zone or during a state of emergency caused by a disaster such as an earthquake or flood, with dictatorial powers of the military commander[4];

- a law enforced by military forces and applied by the government in emergency situations when civilian law enforcement agencies are unable to maintain public order and security[5];

- a law implemented in a defeated country or occupied territory by the military forces of the occupying power[6];

- temporary rule of military authorities over a designated territory in the event of a state of emergency, during which ordinary civilian rights and freedoms are suspended and the civilian population is subject to military proceedings (jurisdiction of military tribunals) and military law[7].

Given these unofficial definitions, different approaches to understanding martial law can be traced, and each of them reflects its own peculiarities regarding the conditions and consequences of the introduction of martial law, in particular, according to one definition, it is seen that the condition for the introduction of the regime may be not only armed aggression, but also other emergency situations, such as natural disasters, while another definition emphasises that martial law is introduced under the condition when civilian law enforcement agencies are unable to maintain public order and security, which indicates a certain criterion (prerequisite) for the introduction of martial law, the third definition mentions the functioning of military tribunals during martial law, which indicates one of the consequences of the introduction of such a regime,

[4] *Law.com Legal Dictionary*, s.v. “Martial Law”, https://dictionary.law.com/Default.aspx?typed=martial%20law&type=3
[5] *Merriam-Webster Legal Dictionary*, s.v. “Martial Law”, https://www.merriam-webster.com/dictionary/martial%20law#legalDictionary
[6] *Dictionary.com*, s.v. “Martial Law”, https://www.dictionary.com/browse/martial-law
[7] *Encyclopedia Britannica*, s.v. “Martial Law”, https://www.britannica.com/topic/martial-law

which gives grounds to conclude that there is no uniform interpretation and understanding of such a legal phenomenon.

In turn, the domestic and international academic community also has different views and approaches to understanding martial law:

S.I. Tserkovnyk in his works points out that martial law is an emergency regime characterised by temporary restriction of constitutional rights and freedoms of citizens, as well as imposition of additional duties on them to ensure national security[8].

M.V. Kornienko considers martial law as a measure aimed at restoring the situation in the country in which a person can freely and effectively exercise his or her rights and freedoms, taking into account the primary focus of the state, which respects the rule of law, to ensure human rights and freedoms[9].

Other scholars provide a broader definition of martial law, arguing that it is a special legal regime that is introduced in the event of armed aggression, as well as in other cases provided for by law, and provides for the granting of the relevant authorities with the powers necessary to repel armed aggression and ensure national security[10].

Mark Neocleous argues that martial law has undergone many changes in its understanding and manifestation over the period of historical development: from the understanding that martial law is certain rules of command of the armed forces in the field, which apply exclusively to the military of their own and the enemy army (i.e., the concept of martial law was equated with the concept of martial law), to the wider application of martial law, which consisted in extending its effect by place: to the occupied territories of another state; and by the circle of persons: not only to the military, but also to civilians. In addition, during the 19th century, there were many discussions among American scholars about the definition of martial law: some believed that martial law was a remedy applied when civilian institutions and bodies were unable to function due to a military threat, i.e. it was a kind of military authority that replaced the civilian government headed by a military command. Others have argued that martial law is a suspension of the common law (i.e. a derogation from the provisions of the common law) in order to grant broad powers to the military to effectively combat threats[11].

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[8] S. I. Tserkovnyk, "The Theoretical and Legal Analysis of the Law's Operation During Martial Law in Ukraine." *Visnyk of Uzhhorod University. Series: Law*, no. 1 (2024): 14-19. http://journal-app.uzhnu.edu.ua/article/view/303011

[9] Mykola V. Korniienko, "Human Rights in Martial Law Terms: General and Legal Discourse," *Pivdennoukrainskyi Pravnychyi Chasopys* 1–2, no. 1 (2022): 27–31, https://doi.org/10.32850/sulj.2022.1-2.5

[10] Vita Panasiuk et al., "Constitutional Human Rights under Martial Law: Legal Realities," *Amazonia Investiga*, no. 54 (2022): 76–83, https://doi.org/10.34069/AI/2022.54.06.8

[11] Mark Neocleous, "Whatever Happened to Martial Law? Detainees and the Logic of Emergency," *Radical Philosophy,* no. 143 (May 2007): 13–22, https://www.researchgate.net/publication/291857621

It should be noted that the demonstrated multiplicity in the definitions of martial law is due not only to theoretical differences, but also to the practical needs of states that formed the relevant legal mechanisms based on their own experience of warfare, internal conflicts and crisis situations. Thus, the variability of approaches to the regulation of martial law is a natural consequence of historical development, legal traditions and peculiarities of public administration, which will be analysed in more detail below.

The historical development of martial law demonstrates the tension between the state's need for power in times of emergency and the protection of civil liberties. Its use has evolved from the broad, often arbitrary powers of ancient and medieval rulers to more regulated, legally limited use in modern states, reflecting changes in governance, human rights norms and international law in general.

The first precedent for the application of a legal phenomenon similar to martial law took place in the times of Ancient Rome, since, unlike now, countries used to be more inclined to resolve interstate conflicts exclusively by the "language of force and weapons", and therefore the concentration of wars in historical times was much higher, which required states to create a special procedure for the work of the state apparatus to ensure prompt response and take effective measures to successfully repel armed aggression.

The Roman Constitution is a unique document, as it consisted of rules and regulations that still form the basis of many modern constitutions of democratic countries that promote the rule of law, provided for such concepts as elections, impeachment, veto, quorum requirements, separation of powers, and envisaged the principle of checks and balances among political officials and public authorities, which is quite important for democratic countries. These principles were deliberately created to avoid the establishment of tyranny and despotism, in which all powers and unlimited authority are concentrated in the hands of one person. Nevertheless, in times of emergency, in particular war, the Constitution of Ancient Rome provided for a special procedure for reorganising the state system, which consisted in transferring executive power for up to 6 months to one official (officer), called a dictator, in order to be able to quickly govern the state to repel an external armed threat. The peculiarity of the legal status of this official was that the dictator was not limited by the Constitution in his actions and measures, the legislature could not veto such actions, and after the expiry of his term of office, he could not be held accountable for any actions committed during the war[12].

Such unlimited and absolute power was given the Roman term *"imperium"*, which described the concept of unlimited power, characterised by the "last word" in military matters,

[12] Bonner, Robert J., “Emergency Government in Rome and Athens”, *The Classical Journal* 18, no. 3 (1922), http://www.jstor.org/stable/3289221

the sole exercise of executive power, and even the transfer of the judicial role, under which it was legal to impose the death penalty on military and civilians[13].

J. V. Capua, studying the first references to the application of martial law in England, namely in the period from the 14th century, noted that martial law in England at that time meant a special simplified procedure for the administration of criminal justice during wars or civil uprisings under the authority of the military or police, which was carried out bypassing the procedures established for general courts. Describing martial law, the author recalled the words of the famous English lawyer Matthew Hale, who stressed that martial law is not a set of legislatively enshrined substantive law, but rather the possibility of using simplified powers and derogations from certain rules when ordinary law is suspended, i.e. it is not a collection of rules and regulations, but *"is something lenient rather than permitted by law ... and then only in cases of necessity"*. The most striking example of a derogation from the general rules in England during the 14th century was that during the repulsion of civil uprisings, the military and police were authorised to detain rebels and immediately find them guilty of treason against the king, which automatically allowed for the execution of persons on the spot without charge before a court, and the property of executed rebels was automatically transferred to the Crown[14].

At the same time, John M. Collins disagrees with the above statement, instead pointing out that martial law in those times was not a certain unregulated exception, but had its place among English law. In particular, this was indicated by special regulatory norms on military discipline and liability for violation of these norms. At the same time, special attention in this context should be paid to the rules that prohibited the administration of justice by military tribunals when civilian courts were able to function. In fact, one can argue about the first manifestations of guaranteeing the right to a fair trial in order to prevent abuse of military powers[15].

At the same time, in the first half of the 19th century, the United Kingdom increasingly began to use martial law as a means of controlling the local population of the colonies to establish order and suppress uprisings, namely in Barbados (1805, 1816), Jamaica (1831-1832, 1865), Canada (1837-38), etc. Justifying the adoption of such measures, military commanders stated that "the presence of at least some power (meaning military) is much better than its absence."[16].

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[13] *Encyclopaedia Britannica*, s.v. "Imperium (Roman Law), https://www.britannica.com/topic/imperium-Roman-law
[14] Capua, J. V. “The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right.” *The Cambridge Law Journal* 36, no. 1 (1977), http://www.jstor.org/stable/4505983
[15] Oren Gross and Fionnuala Ní Aoláin, “*Law in Times of Crisis: Emergency Powers in Theory and Practice”* (Cambridge: Cambridge University Press, 2006), https://doi.org/10.1017/CBO9781316143513
[16] Mark Neocleous, “Whatever Happened to Martial Law? Detainees and the Logic of Emergency,” *Radical Philosophy,* no. 143 (May 2007): 13–22, https://www.researchgate.net/publication/291857621

In turn, in the United States of America, martial law was introduced by the General Assembly at the level of the state of Rhode Island in 1842, after an attempt by some residents of the state, led by Thomas Dorr, to adopt a new constitution and recognise themselves as the real authorities at the state level, contrary to the established procedures. The attempted seizure of power was suppressed, and the protesters were detained without the use of habeas corpus (as the main consequence of the introduction of martial law in the United States), and later, the US Supreme Court recognised the introduction of martial law as lawful[17].

Another historical event worthy of attention is the attempted *"coup d'état"* in Turkey on the night of 15-16 July 2016. A part of the military (a faction) of the Turkish Armed Forces announced a coup d'état to overthrow the regime of Recep Tayyip Erdogan, aiming, according to their statements, to protect democracy and secularism in Turkey. As a result of these events, martial law and a curfew were immediately imposed, and the bulk of the Turkish Armed Forces were put on alert to suppress the coup. As a result, closer to the morning of 16 July, the military who initiated the coup, due to low public support and strong military resistance, began to surrender to the current government[18].

The analysis of scientific approaches to understanding martial law and historical cases of its application shows a variety of grounds for its introduction (coup d'état, seizure of power, suppression of uprisings, establishment of power in the occupied territories, external armed threat), as well as its consequences (abolition of civilian power and its transfer to military authorities; abolition of civilian courts and establishment of military tribunals; imprisonment of persons without trial; restrictions on the right to move freely, etc.).

Nevertheless, all the above cases had one thing in common: the goal was to ensure national security (interests) and law and order.

Vita Panasiuk, Yuliia Poliuk, Illia But, Iryna Zhyvotovska, Pavlo Synytsyn agree with this and point out that the essence of the legal regime of martial law is to ensure the operational ability to avert threats, repel armed aggression and restore national security[19].

Within the framework of this master's thesis, it is important to study the specific range of grounds and consequences of its introduction, given its negative impact on human rights and freedoms, and therefore it is worth analysing the legal regulation of martial law at the international level and at the level of national legislation of some countries.

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[17] Supreme Court of USA, *Luther v. Borden, 48 U.S. 7 How. 1 1 (1849)*, https://supreme.justia.com/cases/federal/us/48/1/

[18] BBC News, "Turkey's Coup Attempt: What You Need to Know," *BBC News*, July 18, 2016, https://www.bbc.com/news/world-europe-36816045

[19] Panasiuk Vita, Yuliia Poliuk, Illia But, Iryna Zhyvotovska, Pavlo Synytsyn, "Constitutional Human Rights under Martial Law: Legal Realities", *Amazonia Investiga* 11, June 22, 2022, (54):76-83, https://doi.org/10.34069/AI/2022.54.06.8.

It is worth noting that there are no direct references to the concept of martial law at the level of international acts, treaties or conventions, which again indicates the absence of a unified approach to its understanding and, accordingly, regulation. At the same time, given that for a long time the concept of "martial law" was identified with the concept of "military law", and that some countries understood martial law as "occupation power" in the territories of other states (colonies), it is worth analysing international acts regulating the laws and customs of war for the presence of relevant provisions.

The first attempt to regulate the rules of warfare at the international level was the consideration of a draft international treaty on the laws and customs of war on the initiative of Alexander II in Brussels on 27 July 1874, but given that most countries were not ready to ratify this act as binding, the rules were formalised in the form of a Declaration.

It should be noted that the first 8 articles of the Brussels Declaration relate specifically to the duties of the occupying power, which, among other things, oblige the occupiers to take all appropriate measures to restore public order and security. In addition, the occupiers are obliged to uphold local laws, and it is prohibited to change, replace or suspend them.

Particular attention should be paid to the provisions of Articles 36-39 of the Brussels Declaration, which establish certain obligations for humane treatment of the local population, namely

- prohibition of coercion to participate in hostilities against one's own country;

- a ban on forcing people to swear allegiance to the occupiers;

- the obligation of the occupiers to respect the honour and rights of the family, life and property of people, as well as religious beliefs and confessions;

- prohibition of looting[20].

It is noteworthy that at the time of consideration of this Declaration, there was neither a generally binding principle of protection of fundamental human rights and freedoms at the international level, which was implemented only after the adoption of the UN Charter in 1945, nor provisions of international humanitarian law. Nevertheless, the provisions of the Declaration largely provided for the protection of such fundamental rights as the right to life, the prohibition of slavery and forced labour, the right to freedom of thought, conscience and religion, respect for honour and dignity, the right to peaceful enjoyment of property, etc. which later became key provisions of international human rights law.

As you know, the Declaration was later used as a basis for the development of the Hague Convention of 1899, which was ratified by a large number of states and, accordingly, became

[20] International Committee of the Red Cross, *Declaration of Brussels, 1874*, https://ihl-databases.icrc.org/ru/ihl-treaties/brussels-decl-1874

binding. Subsequently, in 1907, the Convention was slightly amended, while all of the above provisions governing the humane treatment of the local population were fully enshrined[21].

The next international act that deserves attention in the context of legal regulation of the occupation authorities (martial law) relates directly to international humanitarian law, namely the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, which contains quite detailed and broad obligations of the occupying power to respect fundamental human rights, in addition to those contained in the Brussels Declaration of 1874, namely:

- prohibition of any physical or moral coercion against civilians, as well as measures that may cause physical suffering or destruction (torture, murder, mutilation, medical or scientific experiments, etc.). Special attention in the context of treatment is paid to women (prohibition of rape, forced prostitution) and children;

- ensuring the operation of educational institutions;

- prohibition of destruction of private property;

- prohibition of any forced labour and compulsory military service;

- a large number of obligations to ensure the right to a fair trial, especially in the context of criminal proceedings, etc[22].

Only the next year, at the regional European level, the Council of Europe adopted the first act binding on its member states to protect fundamental human rights and freedoms - the Convention for the Protection of Human Rights and Fundamental Freedoms, which, in addition to general provisions on human rights, regulated their implementation in special emergency circumstances, namely war or other public danger that threatens the life of the nation[23].

Although the Act does not directly mention the concept of "martial law", derogation from obligations under Article 15 of the European Convention is permitted in cases where countries generally impose a state of emergency or martial law, and therefore this provision, and any positions and principles arising from the interpretation of this provision, are applicable in martial law.

It is important to note that in this case, martial law is not considered as an occupation authority / authority in the occupied (occupied) territories, but as one of the country's self-defence measures, which is carried out on its own territory in response to a threat to national security or law and order.

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[21] International Committee of the Red Cross, *Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907*, https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907

[22] International Committee of the Red Cross, *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949*, https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949

[23] Council of Europe, *European Convention on Human Rights*, 1950, Article 15, https://www.echr.coe.int/documents/d/echr/convention_ENG

The same principle was applied at the United Nations level to the implementation of fundamental human rights and freedoms in a state of emergency (including martial law):

- The International Covenant on Civil and Political Rights[24];

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[25].

These norms have a common principle of operation: they define the minimum range of fundamental human rights and freedoms that must be strictly ensured by the state even in a state of emergency or martial law, as well as the limits of permissible restrictions on other rights in accordance with the severity of the situation.

Based on the analysis of international legislation on the regulation of the legal regime of martial law, it is logical to assume that the lack of uniform standards and requirements for the application of martial law and measures related to the introduction of such a regime is due to the following:

- since martial law is a measure of self-defence, and it is known that issues related to national security, defence and armed forces are exclusively related to the internal affairs of a sovereign state, which excludes international regulation of these issues[26];

- different understanding, interpretation and use of the term "martial law", taking into account different historical and political aspects and customs of warfare, in view of the above analysis, which is why the international community avoids using this term.

At the same time, given that since the adoption of the UN Charter after the end of World War II, the issue of human rights has become "a matter of international concern"[27], international law has established restrictions on the organisation of defence to the extent that it affects human rights.

In the author's opinion, despite the absence of legal regulation of martial law at the international level, the provisions of national legislation on the issue under consideration should be analysed for the purpose of a comprehensive study.

The first attempt to codify the laws and customs of war at the national level took place in 1863 in the United States of America, which was called the Lieber Code. Even though the Lieber

[24] United Nations General Assembly, *International Covenant on Civil and Political Rights*, December 16, 1966, Article 4, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

[25] United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, Article 2, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading

[26] International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of June 27, 1986, Case No. 70, https://www.icj-cij.org/case/70

[27] United Nations, *Charter of the United Nations*, 1945, Chapter I, Article 1, paragraph 3, https://www.un.org/en/about-us/un-charter/chapter-1

Code was applied to the American armed forces, it was later considered as a basis for the development of other national and international codifications of the laws and customs of war[28].

It was the first to contain a definition of martial law, which was enshrined in Article 1, according to which martial law is a direct, immediate effect and consequence of occupation or conquest. In other words, a place, area or country occupied by the enemy, as a result of occupation, is under martial law by the occupying or invading army. In other words, as established earlier, martial law was initially considered as an "occupation power" in the captured/occupied territory, exercised in accordance with the laws and customs of war. At the same time, Article 4 of the Lieber Code stipulates that the abuse of martial law in the occupied territory is a true manifestation of military oppression, and calls on those who impose it to be guided by the principles of justice, honour and humanity - virtues that adorn the soldier even more than other people, for the very reason that he possesses the power of his weapon against unarmed people[29].

It should be noted that, in general, the provisions of the Lieber Code are very similar to the provisions of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, as they set out the requirements for humane treatment of the local population and the specifics of legal regulation in the occupied territory, and therefore, in the author's opinion, there is no need for a detailed study of this act.

Since this master's thesis examines martial law as a measure of self-defence of a country, which is carried out on its own territory in response to a threat to national security or law and order, and the legal relations of the state and its citizens during such a state in the context of ensuring human rights, it is worth paying attention to the legal regulation of countries that do not apply martial law as an "occupation power".

In the modern world (since the end of the Second World War), the legal nature of martial law has changed dramatically. When analysing national legislation, the formation of a unified approach to the application of martial law, namely in self-defence, can be traced among countries. This is due to the fact that modern international law calls for avoiding the resolution of any conflicts by the threat of force and resolving them exclusively by peaceful means (diplomacy, mediation, arbitration)[30], taking into account the consequences of the First and Second World Wars.

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[28] European Court of Human Rights, *Al-Jedda v. the United Kingdom*, no. 27021/08, Grand Chamber Judgment, July 7, 2011, HUDOC, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-98669%22]}

[29] International Committee of the Red Cross, *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, April 24, 1863, https://ihl-databases.icrc.org/en/ihl-treaties/liebercode-1863

[30] United Nations, *Charter of the United Nations*, 1945, Chapter I, Article 2, https://www.un.org/en/about-us/un-charter/chapter-1

For example, the Constitution of the Republic of Lithuania provides for the introduction of martial law (*karo padėtis*) in case of necessity for the defence of the homeland or fulfilment of the international obligations of the State of Lithuania (meaning obligations arising from the Charter of the United Nations). The Lithuanian parliament, the Seimas, has the power to declare martial law, while in the event of an armed attack, in order to respond quickly to the threat, the Constitution grants the power to declare martial law to the President of the Republic with the subsequent approval of martial law by the Seimas. The consequences of martial law include the possibility of restricting a number of fundamental rights: the right to respect for private life, the right to inviolability of the home, the right to freedom of expression, the right to freedom of movement, the right to participate in meetings and associations, the right to establish or be a member of a society, party or association. In addition to the restrictions on human rights, elections are prohibited during martial law, and the terms of office of the Sejm and the President of the Republic are extended for the duration of martial law, as well as amendments to the Constitution are prohibited[31].

In turn, in Germany, in the event of an armed attack or threat of attack, there is a procedure for introducing a martial law-like "state of defence" (*Verteidigungsfall*). The state of defence is initiated by the Federal Government and adopted by the Bundestag with the consent of the Bundesrat. Given the lengthy declaration process, the Constitution stipulates that in the event of a sudden attack and the inability to declare a state of defence in time, it is introduced automatically from the moment the state is attacked. In the context of human rights restrictions, the Constitution enshrines the possibility of interference with only two human rights: the right to personal integrity (the period for which a person may be detained without a court order is extended) and the right to peaceful enjoyment of property (the possibility of expropriation of property, i.e., the forced alienation of property). At the same time, the federal government is granted the authority to make decisions on issues that fall within the discretion of the Land[32].

At the same time, there are also atypical cases, in particular, in Austria there is no concept of a state of emergency or martial law at all, and in case of a threat to national security, the Federal President has the right to issue special orders that are equivalent to law. The Austrian Constitution does not provide for separate regulation of human rights and freedoms in the event of an armed attack, restrictions on rights and freedoms are based on the principle of proportionality and necessity[33].

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[31] Republic of Lithuania, *The Constitution of the Republic of Lithuania*, 1992, Articles 142, 143, 145, 147, https://lrkt.lt/en/about-the-court/legal-information/the-constitution/192

[32] Federal Republic of Germany, *Basic Law for the Federal Republic of Germany*, 1949, Articles 115a, 115c, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0688

[33] Republic of Austria, *Federal Constitutional Law*, 1992, https://constitutionnet.org/sites/default/files/Austria%20_FULL_%20Constitution.pdf

The legal regulation in the United States of America is also worthy of attention, as, like in the case of Austria, it does not provide for a martial law regime within the federal legislation, including the Constitution. Moreover, the scope and limits of restrictions on human rights and freedoms in the event of an attack on the state are not provided for. The only reference in the US Constitution to restrictions on human rights concerns the deprivation of the right to *habeas corpus* in the event of an insurrection or attack on the state[34]. At the same time, given that the US is dominated by the Anglo-Saxon legal system (common law), in which the main source of law is judicial precedent, it is worth considering a number of fundamental decisions interpreting measures applied in a state of war:

- in the «Ex parte Milligan» decision, the US Supreme Court described the specifics of the functioning of military tribunals in wartime. The Court established the fundamental position that the administration of justice by military courts in places where civilian courts operate is unconstitutional. The court also noted that *habeas corpus* may be suspended in cases of extreme necessity[35];

- in the case of «Hamdi v. Rumsfeld», the US Supreme Court ruled that even if enemy combatants are detained, they must be granted the right to a trial to challenge their detention[36].

Thus, the state of war in the United States may result in restrictions on the right to judicial control over the detention of a person (*habeas corpus*), as well as the introduction of military courts in places where civilian courts are unable to function.

Comparing the legislative regulation of the martial law regime in other countries, it is worth noting that martial law in Ukraine is quite regulated, as evidenced by the existence of relevant provisions in the Constitution of Ukraine and other laws and governmental acts.

The analysis of Ukrainian legislation should begin with an understanding of the importance of ensuring national security and defence in Ukraine. Clause 1 of the National Security Strategy of Ukraine states that the main goal of the state national security policy is a person, his/her life and health, honour and dignity, inviolability and security. One of the priorities of Ukraine's national interests is the protection of the rights, freedoms and legitimate interests of Ukrainian citizens[37].

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[34] United States Senate, *Constitution of the United States*, 1788, Article 1, Section 9, https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.htm

[35] Supreme Court of USA, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), https://supreme.justia.com/cases/federal/us/71/2/

[36] Supreme Court of USA, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), https://supreme.justia.com/cases/federal/us/542/507/

[37] President of Ukraine. *Decree No. 392/2020 "On the Decision of the National Security and Defense Council of Ukraine of September 14, 2020 'On the National Security Strategy of Ukraine'"*, para. 1, 5, https://zakon.rada.gov.ua/laws/show/392/2020#n12

At the same time, the Military Security Strategy of Ukraine states that Ukraine's military security is the basis for ensuring the country's sustainable development based on the highest values of democracy and the rule of law, one of the elements of which is respect for human rights and freedoms[38].

In other words, ensuring national security and the ability to defend oneself is a prerequisite for a decent existence of people, development of the state, and promotion of the values of the civilised and democratic world.

Thus, it can be concluded that in the context of protecting democratic values and the rule of law, which include human rights, the introduction of martial law as one of the mechanisms to counter threats to Ukraine is important and necessary in the context of preserving the Ukrainian nation and the state of Ukraine.

Martial law as one of the main mechanisms (measures) of self-defence in response to a potential threat, which is characterised by a special period of functioning of the national economy, public authorities, other state bodies, local self-government bodies, the Armed Forces of Ukraine, other military formations, civil defence forces, enterprises, institutions and organisations[39].

Comprehensive defence of Ukraine is a set of measures that envisages the use of the entire potential of the state and society (military, political, economic, international legal (diplomatic), spiritual, cultural, etc.) to repel aggression[40].

At the same time, the characteristic radicality of the martial law regime in the context of the functioning of the state, and its adverse consequences in the form of restrictions on human rights and freedoms, raises justified questions about the sufficiency and clarity of the regulation of such a process.

The study of the legal regulation of the procedure for the introduction of martial law in Ukraine or in certain areas of Ukraine should begin with a review of the Constitution of Ukraine as the Basic Law of Ukraine with the highest legal force, which, in addition to the fundamental provisions on the state structure of Ukraine and the system of government, also regulates some key aspects of martial law, in particular:

1. Procedure and powers for the introduction of martial law in Ukraine. The power to initiate the introduction of martial law in Ukraine belongs to the President of Ukraine[41], as the

[38] President of Ukraine, *Decree No. 121/2021 "On the Decision of the National Security and Defense Council of Ukraine of March 25, 2021 'On the Military Security Strategy of Ukraine'"*, March 25, 2021, https://zakon.rada.gov.ua/laws/show/121/2021#n15

[39] Verkhovna Rada of Ukraine, *Law of Ukraine "On the Legal Regime of Martial Law" No. 389-VIII, Article 4, para 8*, https://zakon.rada.gov.ua/laws/show/389-19#Text

[40] President of Ukraine, *Decree No. 121/2021 "On the Decision of the National Security and Defense Council of Ukraine of March 25, 2021 'On the Military Security Strategy of Ukraine'"*, March 25, 2021, para. 3, https://zakon.rada.gov.ua/laws/show/121/2021#n15

guarantor of state sovereignty and territorial integrity of Ukraine[42]. In turn, martial law depends not only on the will of the President of Ukraine. Taking into account that Ukraine is a parliamentary-presidential republic, the "last word" on the issue of martial law remains with the Parliament of Ukraine - the Verkhovna Rada of Ukraine, which must either approve or cancel the decree of the President of Ukraine on the introduction of martial law within 2 days[43].

It should be noted that this procedure for the introduction of martial law is observed in many countries, including Germany and Lithuania, and is a manifestation of the system of checks and balances aimed at avoiding the usurpation of power by abusing martial law. At the same time, on the other hand, the President of Ukraine loses the opportunity to effectively exercise his powers in terms of ensuring national security. At the same time, while the Constitutions of Germany and Lithuania provide for the possibility of declaring martial law without the approval of the relevant body in case of the need for a prompt response, the Constitution of Ukraine does not provide for such provisions, which may affect the effectiveness of the rebuff in case of impossibility of forming a quorum in the Parliament to approve martial law, despite the existence of the obligation of public authorities to facilitate the arrival of MPs of Ukraine to the Parliamentary session for the approval of martial law[44].

2. Conditions and consequences of the introduction of martial law. The Constitution of Ukraine specifies a clear list of rights and freedoms that cannot be restricted, and accordingly, those rights that are not listed in this list can be restricted[45]. However, this list of rights will be examined in more detail in the next section. Like in other countries, elections are prohibited during martial law, while the provision on the extension of the term of office of elected bodies applies exclusively to the Parliament of Ukraine[46], while the provision on the extension of the term of office of the President of Ukraine is not contained in the Constitution of Ukraine, but in the Law of Ukraine «On the Legal Regime of Martial Law»[47], which is causing a lot of debate among the media and foreign politicians about the legitimacy of extending the term of the current president.

3. Peculiarities of legal regulation of martial law. The Constitution of Ukraine expressly provides that the issue of regulatory and legal regulation of martial law is the exclusive

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[41] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, 1996, Article 106 (1)(20), https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#n4603
[42] Ibid, Article 102
[43] Ibid, Article 85 (1) (31)
[44] Verkhovna Rada of Ukraine, *Law of Ukraine "On the Legal Regime of Martial Law" No. 389-VIII*, Article 5, para. 5, https://zakon.rada.gov.ua/laws/show/389-19#Text
[45] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, 1996, Article 64, https://zakon.rada.gov.ua/laws/show/254к/96-вр#n4381
[46] Ibid, Article 83 (4)
[47] Verkhovna Rada of Ukraine. *Law of Ukraine "On the Legal Regime of Martial Law" No. 389-VIII*, Article 11, para. 3, https://zakon.rada.gov.ua/laws/show/389-19#Text

competence of the Parliament, which excludes the possibility of regulating this issue by acts of the Cabinet of Ministers of Ukraine and other ministries[48].

Although the provisions described above are not the only ones regulating martial law in Ukraine, their presence in the Constitution of Ukraine, and not in the Laws of Ukraine, makes it impossible for the Parliament to abuse its lawmaking powers to make appropriate changes to the regulation of martial law for its own political purposes, given the impossibility of making any amendments to the Constitution of Ukraine under martial law[49].

In its turn, the above provisions do not fully regulate the legal regime of martial law, and the Constitution of Ukraine empowers the Parliament of Ukraine to provide regulatory framework by adopting laws of Ukraine.

The study of the Laws of Ukraine should begin with the study of what, in the opinion of the national legislator, constitutes martial law. It should be noted that the term "martial law" is defined in two Laws of Ukraine: “The Law on Defence of Ukraine” and “The Law on the Legal Regime of Martial Law”, and it is noteworthy that although these definitions are essentially the same, they are not identical.

Martial law is a special legal regime introduced in Ukraine or in certain areas of Ukraine in the event of armed aggression or threat of attack, threat to the state independence of Ukraine, its territorial integrity and provides for the provision of the relevant state authorities, military command (, military administrations) and local self-government bodies with the powers necessary to avert the threat (, repel armed aggression) and ensure national security, (eliminate the threat to the state independence of Ukraine, its territorial integrity,) as well as temporary restrictions on constitutional rights and freedoms of man and citizen and rights and legitimate interests of legal entities caused by the threat, indicating the duration of these restrictions.

The above definition, without the information in brackets, is contained in the Law of Ukraine «On Defence of Ukraine»[50], and the definition with the information in brackets is contained in the Law of Ukraine «On the Legal Regime of Martial Law»[51].

It should be noted that, compared to scientific definitions of martial law and definitions of martial law contained in the laws of other countries, the above concept is quite detailed, which traces both the grounds and purpose of martial law and its consequences.

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[48] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, 1996, Article 92, para. 1 (19), https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text
[49] Ibid, Article 157, para. 2
[50] Verkhovna Rada of Ukraine, *Law of Ukraine "On Defense of Ukraine" No. 1932-XII*, Article 1, December 6, 1991, https://zakon.rada.gov.ua/laws/show/1932-12#Text
[51] Verkhovna Rada of Ukraine. *Law of Ukraine "On the Legal Regime of Martial Law" No. 389-VIII*, Article 1, https://zakon.rada.gov.ua/laws/show/389-19#Text

In view of this definition, the following grounds for the introduction of martial law in Ukraine can be distinguished:

- armed aggression;
- threat of attack;
- threat to Ukraine's state independence;
- threat to the territorial integrity of Ukraine.

At the same time, the concept of "armed aggression" is understood by the legislator to mean a fairly broad list of cases: invasion or attack of the armed forces of another state with the use of armed force against Ukraine; occupation and annexation of a part of the territory of Ukraine; blockade of ports, coasts, airspace, disruption of communication of Ukraine by other armed forces; an attack by other armed forces on the military land, sea and civilian forces or on the civilian or naval fleets of Ukraine; actions of a third state aimed at the use of its resources and territory by third countries to commit the actions listed above; the use of armed forces of another state that are on the territory of Ukraine in accordance with international agreements against a third state, or the continuation of the stay of these forces on the territory of Ukraine after the expiration of the relevant international agreement[52].

It should be noted that V.I. Teremetskyi and S.V. Vasyliev rightly pointed out a certain inconsistency between the provisions of the Constitution of Ukraine and the provisions of the Law of Ukraine "On the Legal Regime of Martial Law", since the Constitution of Ukraine grants the President of Ukraine the right to impose martial law only in case of a threat of attack and a threat to the state independence of Ukraine, while "armed aggression", as one of the grounds defined in the Law of Ukraine "On the Legal Regime of Martial Law", is not included in the provisions of the Constitution of Ukraine, which requires appropriate amendments to the legislation to harmonise these provisions. At the same time, scholars propose to supplement the Law of Ukraine "On Defence of Ukraine" with a definition of the concept of "threat of attack" as a demonstration of military force by a third state and the build-up of military presence near the borders of Ukraine[53].

The purpose of martial law can be distinguished:

- averting the threat of attack;
- repelling armed aggression;
- ensuring the national security of Ukraine;
- eliminating the threat to Ukraine's state independence and territorial integrity.

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[52] Verkhovna Rada of Ukraine. *Law of Ukraine "On Defense of Ukraine" No. 1932-XII*, Article 1, December 6, 1991, https://zakon.rada.gov.ua/laws/show/1932-12#Text

[53] Teremetskyi, V. I., S. V. Vasyliiev. "Martial Law: Grounds for Putting into Operation in Ukraine." *ScienceRise: Juridical Science*, no. 2 (2022): 4–7. https://doi.org/10.15587/2523-4153.2022.256829

The consequences of the introduction of martial law are the granting of an appropriate range of powers to state authorities and military commanders in order to achieve the purpose of martial law, accompanied by restrictions on constitutional human rights and freedoms.

The list of key powers is provided for in the Law of Ukraine "Legal Regime of Martial Law", which includes measures typical of martial law in many countries: curfews, labour service, expropriation of property, bans on peaceful assemblies, etc[54].

Thus, it can be concluded that the restriction of human rights and freedoms during martial law is due to the adoption of special and radical measures to effectively repel aggression or avert other threats, in other words, the restriction of human rights is an adverse consequence and manifestation of a certain measure of martial law, and accordingly, the restriction of human rights cannot be an end in itself of the relevant measure of the legal regime of martial law. This conclusion is in line with the provisions of the Law of Ukraine "On the Legal Regime of Martial Law", which stipulates that the use of torture and cruel treatment that degrades human honour and dignity cannot be the basis for the introduction of martial law[55], and the Constitution of Ukraine, according to which the Armed Forces of Ukraine cannot be used to restrict human rights and freedoms[56].

Given the analysis of the national legislation of Ukraine, it can be argued that the legal regime of martial law is regulated in a sufficiently detailed manner, since the provisions on its functioning are contained in the Basic Law of Ukraine - the Constitution of Ukraine, and many laws of Ukraine, which actually prevents the possibility of misinterpretation of the grounds for the introduction of martial law for its abuse. At the same time, in general terms, the manifestations of martial law in Ukraine are quite similar to the countries of the European continent (Lithuania, Germany).

Thus, it is logical to distinguish 2 main models of martial law functioning:

- the European approach to settlement (clear and regulated, including in terms of restrictions on human rights and freedoms, in order to prevent arbitrariness and usurpation of power, aimed at self-defence);

- the approach of the countries of the Anglo-Saxon (common) legal system (characterised by the regulation of legal relations on the basis of custom and legal precedent, as well as the functioning of military courts/tribunals; this approach is characterised by the imposition of martial law both for the purpose of self-defence and for the purpose of organising power within the occupied territories of other states).

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[54] Verkhovna Rada of Ukraine. *Law of Ukraine "On the Legal Regime of Martial Law" No. 389-VIII*, Article 8, https://zakon.rada.gov.ua/laws/show/389-19#n173

[55] Ibid, Article 22

[56] Verkhovna Rada of Ukraine. *Constitution of Ukraine*, 1996, Article 17, https://zakon.rada.gov.ua/laws/show/254к/96-вр#n4235

In turn, despite the important role of martial law in the context of defence, which is also aimed at protecting human rights, on the other hand, this regime can be a potential threat to democratic values and the rule of law, given its negative consequences, especially if this tool is used to satisfy political ambitions[57].

The ECtHR, in considering cases of interference with human rights in the context of derogation from obligations as a result of an emergency, has repeatedly emphasised that the basis for the application of Article 15 of the European Convention should be an exceptional emergency that actually threatens the existence of the organised life of the nation, which requires the adoption of appropriate countermeasures that may also restrict human rights[58].

This position should also be taken into account when deciding on the introduction of martial law, since if one of the cases that is the basis for the introduction of martial law, for example, an attack on a civilian vessel (as one of the grounds for the introduction of martial law in Ukraine) is allowed to occur, will this be the basis for the introduction of martial law throughout Ukraine with the use of the full range of measures of this legal regime and restriction of human rights? The question is rhetorical.

It should also be noted that some of the territories of Ukraine, namely the Autonomous Republic of Crimea, partially Donetsk and Luhansk regions, have been under occupation since 2014[59], which actually gave the President of Ukraine a legal reason to introduce martial law, but this was not done, which indicates a rational and balanced approach of Ukraine in the context of the possible application of martial law and the impact of its consequences on the population of Ukraine.

At the same time, history shows that there is a real and present danger to human rights in case of abuse of the right to impose martial law.

The most famous historical case of explicit abuse of martial law took place in Taiwan in 1949, when, after the end of the civil war between the forces of the Republic of China and supporters of communism, the conservative political party of the Republic of China, the Kuomintang, led by Chiang Kai-shek, was forced to leave the mainland of China and evacuate to Taiwan. In connection with the threat of Mao Zedong's seizure of the island, Chiang Kai-shek declared martial law to counter any threats from the Communist Party of China. At the same time, despite the reduction of the obvious threat of invasion from China over time, with the support of

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[57] Baek, Seong-Uk. "Declaration of Martial Law in South Korea: A Threat to Democracy." *The Lancet* 405, no. 10474 (January 18, 2025): 195. https://doi.org/10.1016/S0140-6736(24)02792-2

[58] European Court of Human Rights. *Lawless v. Ireland (No. 3)*, Application No. 332/57, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57518%22]}

[59] Verkhovna Rada of Ukraine. *Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine" No. 1207-VII*, April 15, 2014, Article 1, Part 2 https://zakon.rada.gov.ua/laws/show/1207-18#Text

the United States, martial law was not lifted, instead it created the basis for the authoritarian rule of the Kuomintang, during which opposition parties were banned, and oppositionists, both Communists and Democrats, were repressed (number of victims: 140,000 convicted; 4,000 killed), which became known as the "White Terror Period". Martial law in Taiwan lasted from 1949 to 1987 (38 years). Among other things, measures that violated human rights included:

- listening to all calls, surveillance of citizens;

- restrictions on publications, any publications must be approved by the military, and strict censorship;

- detailed inspection of all mail items;

- torture and inhuman treatment of opposition members[60].

Also quite unexpected for the whole world was the situation when the President of South Korea imposed martial law in December 2024, which, according to him, was due to the alleged anti-state activities of the opposition party and their cooperation with North Korea. Fortunately, it was the manifestation of the system of checks and balances, which allows the parliament to overturn the president's decision to impose martial law, considering such a measure to be clearly unjustified, that saved democracy in the country and prevented the full impact of martial law on society[61].

These cases once again confirm the need for a rational approach to the application of martial law and the most detailed regulation of the grounds for its introduction. Thus, the lawfulness and legitimacy of the introduction of the martial law regime directly depends on the objectivity and detail of the assessment of the potential threat to the existence of the nation. In view of these risks, the Law of Ukraine "On the Legal Regime of Martial Law" provides for liability for any attempts to use martial law to seize power[62]. The existence of parliamentary control over the activities of the President of Ukraine and the control of the National Security and Defence Council of Ukraine over the activities of the military command under martial law[63] plays a crucial role in the context of combating the possible usurpation of power in Ukraine.

There is no doubt that the imposition of martial law on 24 February 2022 in response to the beginning of a large-scale invasion of Ukraine by the armed forces of the Russian Federation was justified and necessary given the military power of the enemy, its aggressive policy towards Ukraine since 2014 aimed at destroying the Ukrainian nation, and the threat to the life and safety

[60] Kagan, Richard C. "Martial Law in Taiwan." *Bulletin of Concerned Asian Scholars* 14, no. 3 (1982): 48–54, https://doi.org/10.1080/14672715.1982.10412657

[61] Baek, Seong-Uk. "Declaration of Martial Law in South Korea: A Threat to Democracy." *The Lancet*, December 18, 2024, https://doi.org/10.1016/S0140-6736(24)02792-2

[62] Verkhovna Rada of Ukraine. *Law of Ukraine "On the Legal Regime of Martial Law" No. 389-VIII*, Article 22, https://zakon.rada.gov.ua/laws/show/389-19#n187

[63] Ibid, Article 27

of the population of Ukraine. It is also worth noting that the Government of Ukraine was aware of the possibility of further escalation of the armed aggression to an international conflict, due to the aggressive foreign and military policy of the Russian Federation[64].

Moreover, the imposition of martial law was justified by the international community's condemnation of the Russian Federation's armed aggression against Ukraine, followed by its expulsion from the relevant international organisations (Council of Europe[65], UN Human Rights Council[66]) and the recognition of Ukraine`s right to self-defence under Article 51 of the UN Charter[67].

The measures of the martial law regime, which have been applied since the beginning of the full-scale invasion, despite their radical nature, certainly play an important role in the context of countering the Russian Federation (detection of sabotage and reconnaissance groups, organisation of law and order in society, prevention of the spread of information and psychological operations, etc.), and therefore martial law cannot be underestimated in the light of protecting the fundamental values of the state: human rights and freedoms, democracy and the rule of law.

[64] President of Ukraine. *Decree No. 121/2021 "On the Decision of the National Security and Defense Council of Ukraine of March 25, 2021 'On the Military Security Strategy of Ukraine'"*, Article 15. Official Website of the Verkhovna Rada of Ukraine, https://zakon.rada.gov.ua/laws/show/121/2021#n15

[65] Council of Europe. "CM/Del/Dec(2022)1428ter/2.3 - Consequences of the Aggression of the Russian Federation Against Ukraine: Procedure under Article 8 of the Statute." Council of Europe, March 16, 2022. https://search.coe.int/cm#{"CoEIdentifier":["0900001680a5d7d9"],"sort":["CoEValidationDate%20Descending"]}

[66] United Nations General Assembly. *Resolution ES-11/3: Suspension of the Rights of Membership of the Russian Federation in the Human Rights Council*. April 7, 2022. https://docs.un.org/A/RES/ES-11/3

[67] United Nations General Assembly. *Resolution ES-11/1: Aggression against Ukraine*. March 2, 2022. https://docs.un.org/en/A/RES/ES-11/1

SECTION 2. RESTRICTIONS ON HUMAN RIGHTS AND FREEDOMS UNDER MARTIAL LAW

2.1. Restrictions on human rights and freedoms under martial law in the context of the case law of the European Court of Human Rights.

Having examined in the first section the legal essence of martial law and the importance of such a measure in the context of self-defence, this section focuses on the aspect of the impact of martial law on the exercise of human rights and freedoms, which is associated with their restriction.

It is worth noting that many discussions and scientific papers have been devoted to the issue of observance of human rights and freedoms and the importance of the functioning of the human rights institution in a civilised and democratic world, especially after the events of the Second World War, considering human rights as a necessary component for ensuring sustainable peace, security and the fundamental existence of humanity as a whole. The increased attention to human rights and the importance of their observance is evidenced by the establishment of relevant international human rights organisations at the international level: UN Human Rights Council, UN Human Rights Committees, etc.; and at the regional level: European Court of Human Rights, Inter-American Court of Human Rights, African Court on Human and Peoples' Rights.

International institutions recognise the importance of human rights alongside the principles of democracy and the rule of law, and consider them to be inseparable. The Charter of the Council of Europe directly states that respect for and promotion of the rule of law, democracy and human rights is a fundamental task of its member states, of which Ukraine is a member[68].

Tsuvina T.A. points out that the substantive component of the rule of law, in view of the ECHR case law, is the requirement to respect human rights and freedoms and their recognition as a priority in the activities of the state. This principle is broadly interpreted as the supremacy of human rights and freedoms, according to which human rights cannot be perceived as existing solely on the basis of their enshrining in legislation[69].

[68] Council of Europe. *Statute of the Council of Europe*. Article 3, May 5, 1949. Accessed April 9, 2025, https://rm.coe.int/1680306052

[69] Tetyana Tsuvina, "The Principle of the Rule of Law in the Practice of the European Court of Human Rights," Journal of the Kyiv University of Law, no. 4 (2019): 373–379, https://doi.org/10.36695/2219-5521.4.2019.66

Scholars also often trace the idea of the naturalness of human rights and their inseparability from the very nature of the human being, which implies the inalienability and inalienability of human rights[70].

The opinion of M.V. Kornienko is also correct, who noted that the recognition of inalienable rights and freedoms of people entails the need to implement the principle of "state for man", not "man for the state", and also emphasises that as a result, there is a phenomenon according to which the state is responsible for the implementation of human rights and freedoms, which establishes human rights as the main activity of the state and its functional orientation[71].

It is worth noting that the opinions of scholars are fully reflected in the legislation of Ukraine, in particular in the Constitution of Ukraine:

- Article 3 of the Constitution of Ukraine stipulates that human rights and their guarantees determine the content and direction of the state's activities;

- Article 22 of the Constitution of Ukraine does not allow the adoption of new laws or amendments to existing legislation that narrow the content and scope of existing human rights;

- Article 157 of the Constitution of Ukraine prohibits amendments to the Constitution of Ukraine if such amendments provide for the abolition or restriction of human rights[72].

In its practice, the ECtHR has noted that one of the ideas of the existence of human rights and the definition of human rights as a goal of the state is aimed at protecting a person from arbitrary actions of the state aimed at violating human rights, i.e. creating a certain "framework" for the state's activities[73].

In view of the above, it is logical to conclude that the assignment of rights and freedoms to people is fully consistent with the emergence of corresponding human rights obligations of the state.

Analysing the case law of the European Court of Human Rights, a certain triad of such obligations can be distinguished:

- to fulfil (ensure) human rights, i.e. to actively promote the realisation of human rights;

- to respect human rights, i.e. refrain from unreasonable interference with human rights;

- to protect human rights, i.e. to protect human rights from encroachment by third parties and to create effective means of their protection[74].

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[70] Forte, David F. "Natural Law and Universal Human Rights." *Emory International Law Review* 36, no. 4 (2022): 693–712, https://scholarlycommons.law.emory.edu/eilr/vol36/iss4/6

[71] Korniienko, M. V. (2022). *Human Rights in Martial Law Terms: General and Legal Discourse*. Problems of the Formation of a Legal Democratic State, 1-2(2022), 27-31. Available at: https://doi.org/10.32850/sulj.2022.1-2.5

[72] Verkhovna Rada of Ukraine. *Constitution of Ukraine*, https://zakon.rada.gov.ua/laws/show/254к/96-вр#n4235

[73] European Court of Human Rights, *Golder v. the United Kingdom*, Application No. 4451/70, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57496%22]}

[74] Tripkovic, Bosko, and Alain Zysset. "Allocating Human Rights Obligations in the ECHR." *Human Rights Law Review* 24, no. 1 (2024): 1–28. https://doi.org/10.1093/hrlr/ngad030

In turn, according to the official classification of obligations under the ECHR practice, there are two main obligations:

- positive obligation, indicates active actions of the state to ensure human rights ("to do something", "to act actively") - correlates with the obligation to protect and fulfil human rights;

- negative obligation, indicates refraining from interfering with a certain right ("not to do", "not to interfere") - correlates with the obligation to respect human rights[75].

These classifications of obligations do not contradict, but rather complement each other: while the first classification is functional, the second describes the legal nature of the state's actions.

At the same time, despite the principle of respect for human rights and the prohibition of their violation, human rights are still subject to restrictions, provided that such restrictions are necessary in a democratic society and meet a pressing social need. At the same time, the ECtHR notes that the restriction of human rights should be considered as an exception, if there are appropriate grounds, rather than a rule[76].

It is worth noting that the institution of human rights restriction, according to scholars[77], fully complies with the spirit of law, which is also reflected in the Universal Declaration of Human Rights, Article 29 of which provides that everyone, in addition to rights, also has duties towards society, and states that everyone may be subject to limitations on the exercise of his or her rights in order to ensure due recognition and respect for the rights of others and to meet the requirements of public morality and law and order[78].

A similar provision is also found in Article 23 of the Constitution of Ukraine, which states that "everyone has the right to free development of his or her personality, provided that the rights and freedoms of others are not violated, and has duties to the society in which the free and comprehensive development of his or her personality is ensured".

D.D. Hrynio argues that the restriction of human rights and freedoms is a necessary element of any legal and democratic country, including Ukraine, and at the same time he points out the need for a balanced application of such an instrument in cases where it is necessary in a democratic world in compliance with the principle of proportionality and proportionality. At the same time, the scholar emphasises the absence of a legislative definition of the concept of

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[75] Akandji-Kombe, Jean-François. *Positive Obligations under the European Convention on Human Rights*, Human Rights Handbooks No. 7. Strasbourg: Council of Europe, 2007. https://rm.coe.int/168007ff4d

[76] European Court of Human Rights. *Silver and Others v. the United Kingdom*, Application Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57577%22]}

[77] Mernyk A.M., Kuzmina V.O., Burlakov, B.M. "Restrictions on Human Rights and Freedoms in Modern Conditions: Theoretical and Practical Aspects" *Legal Scientific Electronic Journal*, no. 2 (2020): 42–46. https://doi.org/10.32782/2524-0374/2020-2/9

[78] UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217A (III), UN Doc. A/RES/217(III) (December 10, 1948), art. 29, https://www.un.org/en/about-us/universal-declaration-of-human-rights

"restriction of human rights and freedoms" in Ukraine, which may cause the Ukrainian authorities to misunderstand the essence of such an instrument, and as a result, this may lead to an increase in the number of cases of unacceptable restriction of human rights[79].

In turn, some domestic scholars put forward their own vision of the definition of "restriction of fundamental human rights and freedoms", noting that it is a lawful, purposeful quantitative and/or qualitative reduction in the process of lawful exercise of those possible models of behaviour (powers) that constitute a fundamental human right (freedom) by other persons[80].

At the same time, despite the absence of legislative consolidation of the concept of "restriction of human rights and freedoms" in Ukrainian legislation, the Constitutional Court of Ukraine, when interpreting the Constitution of Ukraine, understands this institution as a narrowing of the content and scope of existing rights and freedoms[81].

In the context of this definition, it is important to note that under martial law, there is a special procedure for the exercise of human rights and freedoms, which is generally characterised by rather broad powers of the authorities to restrict human rights and freedoms. At the same time, it should be noted that not all human rights and freedoms can be restricted, some of them are even non-derogable under martial law. When studying the scientific sources and practice of the ECHR, three categories of rights should be distinguished according to the criterion of the possibility of narrowing their content (restriction) under martial law:

I. Absolute rights;

II. Human rights, which may be restricted in exceptional cases, but derogation from which is prohibited under martial law;

III. Human rights that may be restricted in exceptional cases and in respect of which derogation is allowed under martial law.

I. It is worth noting that no international act contains a provision that would characterise the essence of an absolute right, instead, this category of rights was distinguished by scholars and the ECtHR, having a common understanding of the nature of absolute rights - a characteristic feature of such rights is that under no circumstances can such a right be limited, i.e. there is no purpose in a democratic society that would require limitation of such a right.

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[79] Dmytro Hrynio, "Restrictions of Human Rights and Freedoms under Martial Law in Ukraine," *Journal of the Kyiv University of Law* 2 (2023): 45–47, https://doi.org/10.36695/2219-5521.2.2023.08

[80] Panasiuk, Vita, Yuliia Poliuk, Illia But, Iryna Zhyvotovska, and Pavlo Synytsyn. 2022. "Constitutional Human Rights under Martial Law: Legal Realities". *Amazonia Investiga* 11 (54):76-83. https://doi.org/10.34069/AI/2022.54.06.8.

[81] Constitutional Court of Ukraine, Decision No. 5-rp/2005, September 22, 2005, https://zakon.rada.gov.ua/laws/show/v005p710-05

Mavronicola Natasa states that a right is absolute when it can never be cancelled or limited, regardless of the circumstances of the case[82].

The same conclusion is reached by Stijn Smet, who notes that any interference with an absolute right is considered a violation, as it can never be justified[83].

Similar conclusions can be found in the case law of the ECtHR, in particular in the case of Thomasi v. France: The applicant, who was detained in connection with suspected terrorist activities, was subjected to inhuman treatment, which consisted of his being beaten by police officers and the prolonged absence of water and food during his detention. The ECtHR stated that the fight against terrorism should not in any way affect the exercise of the right to physical integrity and may not violate the absolute provision of Article 3 of the European Convention[84].

Moreover, the absoluteness of Article 3 of the European Convention is indicated by the imposition of a positive obligation on the state to protect persons from inhuman treatment and to organise proper investigation of violations of this right, and therefore the provisions of Article 3 apply to cases of use of force by both government officials and private individuals[85].

In the case of Soering v. the United Kingdom, the ECHR recognised that interference with the right under Article 3 of the European Convention (prohibition of torture) is not allowed even to obtain important information or in case of a threat to the state[86].

In addition, the absoluteness of the prohibition of torture and inhuman treatment is indicated by Article 2, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[87].

This prohibition is also enshrined at the national level in Article 22 of the Law of Ukraine "On the Legal Regime of Martial Law", according to which the introduction of martial law cannot be a ground for the use of torture, cruel or degrading treatment or punishment[88].

Absolute rights also include:

- prohibition of slavery;

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[82] Natasa Mavronicola, *Torture, Inhumanity and Degradation under Article 3 of the ECHR: Absolute Rights and Absolute Wrongs* (London: Bloomsbury Academic, 2021), https://library.oapen.org/handle/20.500.12657/62913

[83] Stijn Smet, "The 'Absolute' Prohibition of Torture and Inhuman or Degrading Treatment in Article 3 ECHR: Truly a Question of Scope Only?" in *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, eds. Eva Brems and Janneke Gerards (Cambridge: Cambridge University Press, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999518

[84] European Court of Human Rights, *Tomasi v. France*, no. 12850/87, Judgment of August 27, 1992, https://hudoc.echr.coe.int/eng?i=001-57796

[85] European Court of Human Rights, *H.L.R. v. France*, no. 24573/94, Judgment of April 29, 1997, https://hudoc.echr.coe.int/eng?i=001-58041

[86] European Court of Human Rights, *Soering v. the United Kingdom*, no. 14038/88, Judgment of July 7, 1989, https://hudoc.echr.coe.int/eng?i=001-57619

[87] United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-against-torture-and-other-cruel-inhuman-or-degrading

[88] Verkhovna Rada of Ukraine, Law No. 389-VIII, "On the Legal Regime of Martial Law," May 12, 2015, Article 22, https://zakon.rada.gov.ua/laws/show/389-19#n187

- prohibition of punishment without law;

- the right not to be punished twice (*non bis in idem*);

- Prohibition of the death penalty[89].

To summarise, these rights cannot be subject to interference both in peacetime and under martial law.

2. Another category of rights is human rights, which may be restricted in exceptional cases, but are prohibited under martial law.

In other words, these are human rights that, regardless of the circumstances, including martial law, can be restricted only within the limits provided for by the European Convention and the case law of the ECHR, without any special exceptions (derogations).

Such a list is directly provided for in Article 15 of the European Convention, which establishes the procedure for derogation from obligations under the European Convention. According to part 2 of the said article, the right to life is not subject to derogation (Article 2), except in cases of death as a result of lawful hostilities. That is, interference with the right to life to a greater extent than established by the ECHR practice is prohibited, namely: cases of protection from unlawful violence, use of force during the apprehension of a criminal and the use of force legitimately used to suppress riots[90]. In addition, the list also includes the absolute rights mentioned above, as interference with them is prohibited under any circumstances.

It is noteworthy that in general, the list of rights and freedoms from which derogation is prohibited differs both at the national level and at the international level among human rights instruments.

For example, part 2 of Article 4 of the International Covenant on Civil and Political Rights establishes a wider range of rights from which derogation is prohibited: the right to life (Article 6), prohibition of torture and inhuman treatment (Article 7), prohibition of slavery (Article 8), the prohibition of deprivation of liberty due to the impossibility of fulfilling a contractual obligation (Article 11), the prohibition of punishment without law (Article 15), the right to recognition as a person before the law (Article 16), the right to freedom of thought, conscience and religion (Article 18)[91].

The list in the Constitution of Ukraine is much broader than those in international instruments. Part 2 of Article 64 of the Constitution of Ukraine also provides for a similar list of rights that cannot be restricted even under martial law and a state of emergency: equality before

[89] Council of Europe, *European Convention on Human Rights*, November 4, 1950, Article 4(1), 7, 4 Protocol, 1 Protocol 13, https://www.echr.coe.int/documents/d/echr/convention_ENG

[90] Ibid, Article 2(2)

[91] United Nations General Assembly, *International Covenant on Civil and Political Rights*, December 16, 1966, Article 4(2), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

the law (Article 24), citizens cannot be deprived of citizenship and the right to change citizenship (Article 25), the right to life (Article 27), respect for dignity (Article 28). 25), the right to life (Art. 27), respect for dignity (Art. 28), the right to liberty and security of person (Art. 29), the right to make individual and collective appeals to public authorities (Art. 40), the right to housing (Art. 47), the right to marriage (Art. 51), equality of rights of children (Art. 52), the right to a fair trial (Art. 55), the right to compensation for material and moral damage as a result of unlawful actions of the state (Art. 56), the right to be informed of rights and freedoms (Art. 57), prohibition of retroactive effect of laws (Art. 58), the right to legal aid (Art. 59), no one shall be obliged to execute manifestly criminal orders (Article 60), no one shall be held liable for the same act twice (Article 61), presumption of innocence (Article 62), the right not to incriminate oneself and family members and the right to defence (Article 63)[92].

At the same time, it is noteworthy that in this article, instead of the term "derogation" used in international instruments, the domestic legislator used the usual concept of "restriction of rights and freedoms", which may cause some inconsistencies, given that "restriction of rights and freedoms" is not identical to the concept of "derogation". Thus, the wording is not sufficiently correct, as most of the mentioned rights can be restricted even under normal circumstances according to the ECHR case law. The phrase "rights and freedoms cannot be restricted", taking into account the position of the Constitutional Court of Ukraine in its judgment No. 5-rp/2005[93], should be applied exclusively to absolute rights, the narrowing of the content and scope of which is indeed not allowed under any circumstances.

Accordingly, in order to avoid inconsistencies between the concepts of "derogation" and "restriction of human rights and freedoms", part 2 of Article 64 of the Constitution of Ukraine should be rewritten to state that *"in the conditions of martial law and state of emergency, no derogation from the rights and freedoms provided for in Articles ..."*.

As it was established above, since the assignment of rights and freedoms to a person creates corresponding obligations for the state to ensure them, it is natural to argue that in case of narrowing of the content and scope of an individual right (restriction of the right), the scope of the state's obligations in respect of an individual right is correspondingly reduced.

At the same time, in the author's opinion, it is inappropriate to argue that in this case the State reduces the scope of its obligations to ensure individual rights of a person, but it is more appropriate to point out that in exceptional cases the State faces a choice between ensuring the rights and freedoms of a particular person or ensuring the rights and interests of society as a

[92] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, June 28, 1996, Article 64, https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#n4378
[93] Constitutional Court of Ukraine, Decision No. 5-rp/2005, September 22, 2005, https://zakon.rada.gov.ua/laws/show/v005p710-05

whole, that is, there is a competition between the obligation to respect the rights of a particular person and the obligation to respect the rights and freedoms of people (ensuring the interests of society), in which the state must give priority to either the individual right of a person or the interest of society.

The European Convention in its articles expressly provides for cases in which rights may be restricted, i.e. situations where a certain public interest prevails over the individual right of a certain person. Analysing the provisions of the European Convention, we can distinguish the following:

1. Specific cases, for example: the right to life (it is possible to interfere with this right in the case of lawful actions to suppress an uprising, to protect against unlawful violence and during lawful arrest), the right to liberty and security of person (lawful arrest or detention on the basis of a court decision, etc.)

2. General (non-specific) cases, for example: the right to respect for private and family life (interference is allowed in cases necessary in a democratic society in the interests of national security and public safety); freedom of thought, conscience and religion (interference is allowed in cases necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others).

These cases can also be traced in the Constitution of Ukraine, as indicated by the Constitutional Court of Ukraine in its decision of 15 June 2022 No. 4-p(II)/2022: a number of provisions of the Basic Law of Ukraine refer to "national security interests", "economic security", "public order" and other phenomena, the need to protect which is a legitimate (legitimate) purpose of applying restrictions on constitutional rights and freedoms of a person and citizen[94].

The second group of cases covers a certain public interest that cannot be determined in advance, and therefore the High Contracting Parties are given a certain discretion to classify certain cases as "national security interests", "protection of public order", "protection of the rights and freedoms of others", etc.

It is the existence of the second group of grounds for restricting human rights that prompted the ECtHR in its practice in assessing the admissibility of interference with human rights to implement the relevant test to verify whether a measure is indeed "necessary in a democratic world" and whether it meets a "pressing public need", since it is this discretion that is often used by High Contracting Parties in violation of the European Convention and the ECtHR case law[95].

[94] Constitutional Court of Ukraine, Decision No. 4-rp/2022, July 20, 2022, https://zakon.rada.gov.ua/laws/show/v004p710-22

[95] European Court of Human Rights, *S.A.S. v. France*, no. 43835/11, Judgment of July 1, 2014, https://hudoc.echr.coe.int/eng?i=001-145466

Failure to comply with this requirement would mean that the restriction of human rights and freedoms is applied for purposes other than those established by the European Convention, which is expressly prohibited by Article 18 of the European Convention[96].

At the same time, it should be noted that the pursuit of a certain public interest while restricting human rights and freedoms does not automatically give grounds for recognising such a measure as admissible.

As the ECtHR itself notes, the entire European Convention is characterised by a fair balance between the requirements of the general interest of society and the protection of individual fundamental rights[97]. In other words, the pursuit of a genuine "pressing public need" when interfering with human rights is not a sufficient basis for recognising the interference as permissible, but rather the principle of proportionality between the measure, which represents an interference with the rights of a particular individual, and a particular public interest is important.

The doctrine of proportionality of human rights restrictions is key in determining the validity of the respective restriction. In other words, the task of the ECtHR in cases of proportionality of the respective measure is to determine whether the rights were violated without the existence of a genuine need[98].

Although the Constitution of Ukraine does not contain a provision enshrining the principle of proportionality, it follows from the rule of law, which are interrelated fundamental principles of the entire legal system of Ukraine. According to the case law of the Constitutional Court of Ukraine, the principle of proportionality is seen as a certain balance between the requirements of the general interest and the need to ensure individual human rights. At the same time, the proper application of the principle of proportionality is recognised if the purpose of restricting human rights is really significant, and the means of interfering with the right is reasonable and minimally burdensome for the persons whose rights are restricted[99].

In addition, the application of this principle by the European Court in its practice is based on Article 17 of the European Convention, according to which no provision of the Convention may be interpreted in such a way as to permit any action aimed at restricting rights or freedoms to a greater extent than is provided for by the European Convention[100].

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[96] Council of Europe, *European Convention on Human Rights*, November 4, 1950, Article 18, https://www.echr.coe.int/documents/d/echr/convention_ENG

[97] European Court of Human Rights, *Öcalan v. Turkey*, no. 46221/99, Judgment of May 12, 2005, http://hudoc.echr.coe.int/eng?i=001-69022

[98] Yan Bernazyuk, "Principle of Proportionality in the Practice of the European Court of Human Rights," *Expert: Paradigms of Law and Public Administration*, no. 6(18) (December 2021): 197–214, https://constitutionalist.com.ua/pryntsyp-proportsijnosti-u-praktytsi-ievropejskoho-sudu-z-prav-liudyny/

[99] Constitutional Court of Ukraine, Decision No. 3-r(II)/2021, July 21, 2021, https://zakon.rada.gov.ua/laws/show/v003p710-21#Text

[100] Council of Europe, *European Convention on Human Rights*, November 4, 1950, Article 17, https://www.echr.coe.int/documents/d/echr/convention_ENG

In addition to the above, the Grand Chamber of the ECHR, while assessing the interference for its admissibility and justification in the case of Muhammad and Muhammad v. Romania on the basis of the "proportionality test", also stressed the importance of checking the interference to see whether the very essence of the right was violated in such circumstances. The dissenting opinion of Judge Pinto De Albuquerque in this case is also worthy of note, which pointed to the need to implement the so-called "respect for the essence of the right" test in the ECtHR case law, which should take precedence over the "proportionality test". In other words, the prohibition of violation of the essence of the right implies that it is inadmissible to reduce the level of protection of fundamental rights / narrow the content of the right below a certain minimum threshold set for each right separately, including during the state of emergency. According to the "test of respect for the essence of the right", any measure that affects the essence of the right is automatically unacceptable in itself, and therefore there is no need to further "carry out the proportionality test"[101].

An example of a violation of the essence of the right is the case when the state, having confiscated real estate in the public interest, did not provide the owner with proportionate compensation for the property, thereby violating the essence of the right to peaceful enjoyment of property[102].

Thus, to summarise the above, when considering cases on the admissibility and lawfulness of interference by a High Contracting Party with the fundamental rights of a certain person, the ECtHR uses a certain test, which provides for the following requirements, to recognise the interference as lawful:

1.) Measures aimed at restricting human rights and the procedure for intervention should be clearly regulated by law;

2.) the pursued goal of restricting a right must be legitimate and necessary in a democratic world;

3.) the restriction of the right must be proportionate to the goal pursued, i.e., compliant with the principle of proportionality (maintaining a reasonable balance between private interests and the interests of society) and not violate the essence of the right.

A similar test for the admissibility of interference is used by the Constitutional Court of Ukraine, which has emphasised that restrictions on the exercise of constitutional rights and freedoms cannot be arbitrary and unfair; they must be established exclusively by the Constitution

[101] European Court of Human Rights, *Muhammad and Muhammad v. Romania*, no. 80982/12, Judgment of October 15, 2020, https://hudoc.echr.coe.int/eng?i=001-205509
[102] European Court of Human Rights, *Maksymenko and Gerasymenko v. Ukraine*, no. 49317/07, Judgment of May 16, 2013, https://hudoc.echr.coe.int/eng?i=001-119688

and laws of Ukraine, pursue a legitimate aim, be conditioned by social necessity, proportionate and justified[103].

Thus, this category of human rights and freedoms is subject to interference in a similar manner to that applied in peacetime.

III. The third category of rights provides for the possibility of derogation under martial law in accordance with the procedure provided for in Article 15 of the European Convention, Article 4 of the International Covenant on Civil and Political Rights and Article 64 of the Constitution of Ukraine.

This category of rights includes all other rights that are not prohibited by derogation in the relevant articles, such as the right to security of person, the right to respect for private and family life, freedom of expression, freedom of assembly and association, etc.

To begin with, it is worth establishing what derogation from obligations to ensure human rights and freedoms entails.

Pursuant to Article 15(1) of the European Convention, in a public emergency (war or other public danger threatening the life of the nation), a High Contracting Party may take measures that do not comply with the requirements and principles of its obligations under a particular right under the Convention, only to the extent required by the exigencies of the situation and provided that such measures do not contravene its other obligations under international law. In other words, a High Contracting Party has the right not to comply with the procedure and scope of interference with human rights established by the European Convention and the case law of the ECtHR to the extent required to ensure the security of the nation.

Olga Taran and Maria Gryga, studying the peculiarities of human rights in the context of application of Article 15 of the European Convention, conclude that derogation from obligations does not give the High Contracting Party the right to absolutely refuse to ensure human rights, but only establishes certain peculiarities of the implementation and protection of human rights in the context of public danger threatening the nation. In this case, the emphasis is on the limits of derogation, which are determined by the seriousness of the situation and the need for the state to comply with other obligations under international law[104].

It is worth noting that derogation cannot be understood as a certain absolute refusal to ensure and protect human rights under the European Convention. By making a notification of

[103] Constitutional Court of Ukraine, Decision No. 2-rp/2016, June 1, 2016, https://zakon.rada.gov.ua/laws/show/v002p710-16#Text

[104] Olena Taran and Mariia Hryha, "Application of International Humanitarian Law by the European Court of Human Rights," *Scientific Journal of the National Academy of Internal Affairs* 29, no. 2 (2024): 9–17, https://doi.org/10.56215/naia-herald/2.2024.09

derogation, a High Contracting Party merely makes it clear that its measures restricting human rights may not be in line with the requirements of the European Convention[105].

Scholars are also of the opinion that martial law in a democratic state cannot be used to "abandon" its obligation to ensure human rights[106].

The legal nature of derogation from human rights under Article 15 of the European Convention was described very correctly during a seminar organised by the Council of Europe for Ukrainian judges on this issue. The seminar emphasised that a declaration of derogation by a High Contracting Party does not constitute an indulgence from liability for human rights violations, i.e. it does not fully exempt from the obligation to ensure human rights. Court decisions, the content of which contradicts the Convention in one way or another, must be substantiated in such a way as to rebut the presumption of the need to comply with the obligations under the European Convention and provide convincing arguments that would indicate the impossibility of complying with the obligations under the Convention or demonstrate that overcoming the threat to the life of the nation is impossible without specific derogations from the Convention in specific circumstances[107].

At the same time, the UN Human Rights Committee, which oversees the observance of the International Covenant on Civil and Political Rights by the States Parties (which is similar in content to the European Convention), in its fourth periodic report on the US compliance with the International Covenant, stated that indeed, time of war does not suspend the Covenant in matters within its scope, and on this basis recommended that the United States of America recognise the extension (applicability) of the International Covenant in time of war[108].

At the same time, in the context of implementation of Article 15 of the European Convention, it is worth paying attention to 4 aspects arising from the said article:

1. Condition for the application of derogation: *"...in time of war or other public danger that threatens the life of the nation..."*.

Since the concept of war is quite clear and does not require special attention, it is necessary to analyse what, in the opinion of the ECtHR, constitutes another public danger that threatens the life of the nation. Under this concept, the ECtHR understands a certain crisis situation that

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[105] European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency*, updated August 31, 2024, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_15_eng

[106] M.V. Korniienko, "Human Rights under Martial Law: Common Law Discourse," *South Ukrainian Legal Journal*, no. 1-2 (2022): 27–31, https://doi.org/10.32850/sulj.2022.1-2.5

[107] Council of Europe, "Workshop for Judiciary on the Issues of Derogation and the Application of the European Convention on Human Rights during War in Ukraine or Other Public Danger," May 11, 2023, https://www.coe.int/uk/web/kyiv/-/workshop-for-judiciary-on-the-issues-of-derogation-and-the-application-of-the-european-convention-on-human-rights-during-war-in-ukraine-or-other-public-danger

[108] United States Department of State, *Fourth Periodic Report of the United States of America to the United Nations Human Rights Committee Concerning the International Covenant on Civil and Political Rights*, December 30, 2011, https://2009-2017.state.gov/j/drl/rls/179781.htm

affects the entire population and threatens the organised life of the community that makes up the state[109]. In other words, the crisis situation must be so exceptional that the usual measures aimed at maintaining the security of the nation and law and order, which are applied under normal circumstances, are disproportionate and unable to fully satisfy the goal pursued[110].

At the same time, the ECtHR respects the High Contracting Party's margin of appreciation in determining whether certain circumstances threaten the life of the nation, as the ECtHR cannot have all the information on the circumstances that actually constitute a threat, but the High Contracting Parties cannot enjoy wide discretion in this regard, and therefore the ECtHR's task is to exercise European supervision over derogations from the obligations of the European Convention[111].

There is no doubt that the full-scale armed aggression of the Russian Federation meets the conditions for the application of derogation from the provisions of the European Convention, since war is a direct basis for the application of Article 15 of the European Convention.

2. Limits of derogation from obligations: *"...take measures ... to the extent required by the exigencies of the situation".*

The ECtHR, considering the first case concerning the restriction of human rights, formed a fundamental position (test), which is used to assess the permissibility of derogation from obligations under Article 15 of the European Convention. In this case, three main issues are considered:

- whether a certain situation threatens the "life of the nation";

- whether it is possible to overcome the situation without derogating from the provisions of the European Convention;

- if compliance with the European Convention does not fully avert the threat to the nation, what extent of derogation from the provisions of the European Convention is necessary and proportionate to overcome the crisis situation that threatens the nation (i.e., the measure must be proportionate to the severity of the situation);

- whether the interference measure relates to rights in respect of which no derogation is allowed[112].

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[109] European Court of Human Rights, *Lawless v. Ireland (No. 3)*, no. 332/57, Judgment of July 1, 1961, https://hudoc.echr.coe.int/eng?i=001-57518

[110] European Commission of Human Rights, *The Greek Case* (Denmark v. Greece; Norway v. Greece; Sweden v. Greece; Netherlands v. Greece), nos. 3321/67, 3322/67, 3323/67, 3344/67, Report of November 5, 1969, https://hudoc.echr.coe.int/eng?i=001-167795

[111] European Court of Human Rights, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, Judgment of March 20, 2018, https://hudoc.echr.coe.int/eng?i=001-181862

[112] European Court of Human Rights, *Ireland v. the United Kingdom*, no. 5310/71, Judgment of January 18, 1978, https://hudoc.echr.coe.int/eng?i=001-57506

It is worth noting that the third question reflects the principle of proportionality, which is used to limit the rights that are not subject to derogation under Article 15 of the European Convention. However, in this case, the balance must be struck between the threat to the life of the nation and measures aimed at averting the threat, and the Court's task in such cases is to determine whether such measures are proportionate to the urgency of the situation and the need (pressing public need).

Jean-François Renucci noted that the concept of proportionality of human rights restrictions is particularly important in cases of derogation from obligations during an emergency, regardless of the duration and conditions of their application[113].

At the same time, with the development of the ECHR case law, additional issues have been formed that the Court should pay attention to when considering such disputes:

- whether these measures are a genuine response to the emergency;

- whether the measures were applied for the purpose for which they were applied;

- whether the state has reconsidered the issue of retreat;

- whether judicial control over measures providing for derogation from the European Convention was possible[114].

3. Exceptions to the application of derogation: *"...such measures are not inconsistent with its other obligations under international law."*

In addition to checking whether the measure in question is proportionate to the exigencies of the situation, the Court must take into account the government's compliance with other obligations under international law and whether the derogation is not inconsistent with such provisions.

It is important to note that the ECtHR, when examining cases of potential human rights violations in the context of martial law or armed conflicts, is not limited to the provisions of the European Convention and its Protocols, but is also forced to refer to the provisions of international humanitarian law and formulate its own positions on its application.

For example, the ECtHR, in the well-known case of Georgia v. Russia, despite the absence of derogation under Article 15, considered a case concerning the armed conflict around South Ossetia and Abkhazia. Within the framework of this case, numerous violations of human rights

[113] Jean-François Renucci, *Introduction to the European Convention on Human Rights: The Rights Guaranteed and the Protection Mechanism* (Strasbourg: Council of Europe Publishing, 2005), https://www.echr.coe.int/documents/d/echr/Pub_coe_HFfiles_2005_01_ENG

[114] European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency*, updated August 31, 2024, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_15_eng

and freedoms committed by the Russian Federation were also assessed in the context of international humanitarian law applicable during such a conflict[115].

In its judgment in the case of Bankovic and Others v. Belgium and 16 Other Contracting States, the ECtHR stressed that the principles enshrined in the European Convention cannot exist and be interpreted in isolation, but must be read in conjunction with other acts and principles protecting human rights. The Court is obliged to take into account the principles and provisions of international law when establishing state responsibility[116].

In support of this approach, it is worth mentioning that the European Convention was based on the provisions of the Universal Declaration of Human Rights, as stated directly in the preamble of the Convention, and when considering cases, the ECtHR often takes into account the provisions of the International Covenants and Conventions on Human Rights, together with the relevant opinions and positions of international intergovernmental human rights organisations[117].

At the same time, if the court establishes a different scope of application of the European Convention and international humanitarian law (i.e., certain contradictions between the norms arise), the court applies the common principle of law "*lex specialis derogat generali"*, which is characterised by the preference (priority) of special legislation in armed conflicts (international humanitarian law) on an equal footing with general human rights norms (European Convention)[118].

This position is fully in line with the position of the International Court of Justice, which has stated that some issues of human rights violations may be exclusively issues of international humanitarian law, others may be exclusively issues of human rights law, and still others may relate to both of these branches of international law[119].

However, the ECtHR does not actually apply international humanitarian law directly in its standard of review, rather it seeks to ensure that the European Convention is interpreted as far as

[115] European Court of Human Rights, *Georgia v. Russia (II)*, no. 38263/08, Judgment of January 21, 2021, https://hudoc.echr.coe.int/eng?i=001-207757
[116] European Court of Human Rights, *Banković and Others v. Belgium and Others*, no. 52207/99, Decision of December 12, 2001, https://hudoc.echr.coe.int/eng?i=001-22099
[117] European Court of Human Rights, *Kononov v. Latvia*, no. 36376/04, Judgment of May 17, 2010, https://hudoc.echr.coe.int/eng?i=001-98669
[118] Olena Taran and Mariia Hryha, "Application of International Humanitarian Law by the European Court of Human Rights," *Scientific Journal of the National Academy of Internal Affairs* 29, no. 2 (2024): 9–17, https://doi.org/10.56215/naia-herald/2.2024.09
[119] International Court of Justice, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, Advisory Opinion of July 19, 2024, https://www.un.org/unispal/document/summary-of-the-icj-order-icj-19jul24/

possible in the light of international humanitarian law, which plays an indispensable and universally recognised role in mitigating the "cruelty and inhumanity of armed conflict"[120].

4. The procedural aspect of derogation from the obligations under the European Convention, which is enshrined in part 3 of Art. 15, and provides for the obligation to notify the Secretary General of the Council of Europe of the measures taken by the High Contracting Party related to the derogation, since in the absence of such notification, the High Contracting Party cannot refer to the derogation as a ground for interference with human rights[121].

To understand how these provisions are implemented in practice, it is necessary to analyse a number of ECHR judgments:

1. Ireland v. United Kingdom (1978).

The essence of the case lies in the use by the British authorities of the "five techniques" interrogation method (the use of cruel interrogation methods: deprivation of food and water, interrogation in an uncomfortable position, sleep deprivation, etc.) against terrorist suspects during the conflict in Northern Ireland, which actually violated the right under Article 3 of the European Convention. At the same time, the ECtHR recognised that although derogation from obligations was permissible under Article 15, at the same time, the measures were not considered necessary and proportionate, even in a state of emergency, given the absoluteness of the right under Article 3[122].

2. Brannigan and McBride v. the United Kingdom (1993).

In response to terrorist threats in Northern Ireland, the British authorities detained suspects without charge or trial for up to seven days, invoking derogation from Article 5 of the European Convention. The Court found that there was a public emergency that threatened the life of the nation and that the measures were proportionate and met the requirements of Article 15. The interference was found to be lawful[123].

3. Aksoy v. Turkey (1996).

The Turkish authorities detained Mr Aksoy, suspected of having links to a terrorist organisation, for 14 days without access to a court or a lawyer, invoking a state of emergency, which is considered to be an interference with Article 5 of the European Convention. At the same time, unlike in the previous case, the Court found that although Turkey was entitled to derogation under Article 15, the detention for such a long period without judicial control and the use of

[120] European Court of Human Rights, *Varnava and Others v. Turkey*, nos. 16064/90 et al., Judgment of September 18, 2009, https://hudoc.echr.coe.int/eng?i=001-94162
[121] European Court of Human Rights, *M.C. and Others v. Italy*, no. 5376/11, Judgment of September 3, 2013, https://hudoc.echr.coe.int/eng?i=001-104211
[122] European Court of Human Rights, *Ireland v. the United Kingdom*, no. 5310/71, Judgment of January 18, 1978, https://hudoc.echr.coe.int/eng?i=001-57506
[123] European Court of Human Rights, *Brannigan and McBride v. the United Kingdom*, nos. 14553/89 and 14554/89, Judgment of May 26, 1993, https://hudoc.echr.coe.int/eng?i=001-57819

torture were not necessary and proportionate measures. The intervention was declared unlawful[124].

Thus, even in the context of an armed conflict and the introduction of martial law, the state is not exempt from its obligations to ensure and protect human rights and freedoms. The European Court of Human Rights has consistently emphasised that law does not disappear in the shadow of war, but is only transformed in accordance with the principles of legality, necessity and proportionality, taking into account the severity of the situation and the level of threat to the existence of the nation.

2.2. Practical aspects and current issues of restriction of human rights and freedoms under martial law in Ukraine.

Following the study of theoretical and legislative aspects of martial law in the previous sections, as well as the main aspects of the exercise of human rights and freedoms under martial law, namely the limits and scope of permissible interventions, in the light of the European Convention, the purpose of this section is to apply the acquired knowledge and conclusions to assess the practical aspect of the exercise of human rights and freedoms under martial law in Ukraine in terms of compliance with international law and identify relevant problems.

In this context, it should be noted that the procedure of derogation from obligations to ensure human rights and freedoms is not new for Ukraine. Ukraine has been in a state of armed conflict with the Russian Federation since 20 February 2014, when the first cases of violation of the rules of crossing the state border of Ukraine by the armed forces of the Russian Federation in the Kerch Strait area were recorded, which subsequently led to the occupation and annexation of the Autonomous Republic of Crimea. In addition, in April 2015, organised criminal groups, with the support of the armed forces of the Russian Federation, usurped local authorities within the territories of Luhansk and Donetsk regions, with the subsequent proclamation of the so-called Luhansk People's Republic and Donetsk People's Republic[125].

The above-mentioned events forced Ukraine to launch an anti-terrorist operation in eastern Ukraine, which is part of the exercise of Ukraine's inherent right to individual self-defence against aggression within the meaning of Article 51 of the UN Charter[126].

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[124] European Court of Human Rights, *Aksoy v. Turkey*, no. 21987/93, Judgment of December 18, 1996, https://hudoc.echr.coe.int/eng?i=001-58003

[125] Verkhovna Rada of Ukraine, *Resolution on the Statement of the Verkhovna Rada of Ukraine 'On Repulsing the Armed Aggression of the Russian Federation and Overcoming its Consequences'* 337-VIII, dated April 21, 2015, https://zakon.rada.gov.ua/laws/show/337-19#n8

[126] President of Ukraine, Decree No. 405/2014, "On the Decision of the National Security and Defense Council of Ukraine dated April 13, 2014, 'On Urgent Measures to Overcome the Terrorist Threat and Preserve the Territorial Integrity of Ukraine'," April 14, 2014, https://www.president.gov.ua/documents/4052014-16886

Despite the fact that as a result of these events, Ukraine did not impose martial law, they nevertheless forced Ukraine to retreat from its obligations under the European Convention and the International Covenant on Civil and Political Rights.

On 21 May 2015, the Parliament of Ukraine, the Verkhovna Rada of Ukraine, adopted a resolution approving the statement of the Verkhovna Rada of Ukraine "On Ukraine's derogation from certain obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms"[127], which states that the Government of Ukraine has recognised the armed aggression of the Russian Federation as constituting a public danger and threatening the life of the nation within the meaning of Article 15 of the European Convention and Article 4 of the International Covenant on Civil and Political Rights. In order to effectively repel the threat, the Government of Ukraine is forced to take measures that constitute a certain derogation from the provisions of the European Convention and the Covenant, namely

- On 12 August 2014, the Verkhovna Rada of Ukraine introduced relevant amendments to the Law of Ukraine "On Combating Terrorism", which provided that persons suspected of involvement in terrorist activities could be detained with the consent of the prosecutor and without a court decision for more than 72 hours as provided for by the Constitution of Ukraine, but not more than 30 calendar days, which is in fact an interference with Article 2, paragraph 3, Article 9 and Article 14 of the Covenant and Article 5, Article 6 and Article 13 of the European Convention;

- On 12 August 2014, the Verkhovna Rada of Ukraine introduced certain amendments to the Criminal Procedure Code of Ukraine concerning the special regime of pre-trial investigation in the conditions of martial law and state of emergency or in the area of the anti-terrorist operation, which consist in the temporary transfer of powers of investigating judges provided for by the Code to the relevant prosecutors who acquire additional procedural rights. These peculiarities apply exclusively within the territory where martial law or a state of emergency is declared, or within the territories where an anti-terrorist operation is being conducted. These changes are in fact an interference with Article 2, paragraph 3, Article 9, Article 14 and Article 17 of the Covenant and Article 5, Article 6, Article 8 and Article 13 of the European Convention;

- On 12 August 2014, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Administration of Justice and Criminal Proceedings in connection with the Anti-Terrorist Operation", which provided for a change in the territorial jurisdiction of courts and the

[127] Verkhovna Rada of Ukraine, *Resolution on the Declaration of the Verkhovna Rada of Ukraine 'On Ukraine's Derogation from Certain Obligations Under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms'* 462-VIII, dated May 21, 2015, https://zakon.rada.gov.ua/laws/show/462-19#Text

jurisdiction of pre-trial investigation bodies, in case justice and pre-trial investigation cannot be carried out within the territories where the anti-terrorist operation is taking place. These changes are in fact an interference with Article 14 of the Covenant and Article 6 of the European Convention;

- On 03 February 2015, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Military-Civilian Administrations", which establishes military-civilian administrations on the territory of the anti-terrorist operation, which are empowered to impose curfews, restrict freedom of movement in certain areas, check identity documents, inspect the belongings and vehicles of individuals and conduct searches in the offices and homes of citizens. The application of these measures constitutes an interference with Articles 9, 12 and 17 of the Covenant and Article 2 of Protocol No. 4 to the European Convention.

These measures are necessary to avert the threat of destruction of the nation by the armed aggression of the Russian Federation.

At the same time, given that the boundaries of the anti-terrorist operation are not stable and may change depending on the specific situation, the Government of Ukraine undertook to notify the Secretary General of the Council of Europe of the extension of the derogation from the European Convention to new territories.

In this context, it is relevant to note that in the light of the interpretation of Article 1 of the European Convention, the ECtHR noted that the obligation to promote and protect human rights in a particular territory depends on the existence of actual, effective and general control of the government in the relevant territory[128]. Thus, the derogation provision, and the European Convention in general, does not apply to the territories over which Ukraine does not have effective control (temporarily occupied territories), meaning the territory of the so-called unrecognised Luhansk People's Republic and Donetsk People's Republic.

Assessing these measures for compliance with the provisions of the European Convention, the Parliamentary Assembly of the Council of Europe in its report[129] recognised that the grounds invoked by the Government of Ukraine for derogation from the provisions of the European Convention certainly fall within the definition of "public emergency threatening the life of the nation", once again condemning the armed aggression of the Russian Federation against Ukraine, which is a direct violation of international law and the principles and values promoted by the Council of Europe, at the same time, we are concerned about Ukraine's failure to comply with

[128] European Court of Human Rights, *Georgia v. Russia (II)*, no. 38263/08, Judgment of January 21, 2021, https://hudoc.echr.coe.int/eng?i=001-207757

[129] Parliamentary Assembly of the Council of Europe, "State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights," Doc. 14506, January 4, 2018, https://pace.coe.int/en/files/24505/html#_TOC_d19e174

the principle that measures derogating from the provisions of the European Convention must be proportionate and appropriate to the gravity of the situation, namely:

- the possibility of detaining persons suspected of terrorist activity without a court order within 30 days. Representatives of the Parliamentary Assembly of the Council of Europe, assessing this measure, appropriately pointed to the ECHR judgment "Aksoy v. Turkey"[130] which was discussed in the previous section, in which the ECtHR recognised the detention of Mr Aksoy, a suspected terrorist, without appropriate judicial control and access to a lawyer for 14 days as disproportionate and incompatible with Article 15 of the European Convention. The experts noted that the detention of suspected terrorists in the territory of anti-terrorist activities in accordance with the Law of Ukraine "On Combating Terrorism" without appropriate judicial control for 30 days is clearly disproportionate and not proportionate to the severity of the situation.

- The organisation of checkpoints by the civil-military administrations seriously restricted the rights of tens of thousands of civilians who are forced to cross the contact line on a daily basis, given the long queues and strict permit system;

- The change of territorial jurisdiction of the courts was a matter of serious concern, as their organisation was inefficient and at a rather low level, which led to the overload of other courts to which the case was transferred and the reduction of the number of judges. The premises to which the courts were relocated clearly did not meet the requirements for the efficient and effective administration of justice.

As a result of the study, the Parliamentary Assembly of the Council of Europe adopted Resolution No. 2209[131], according to which the Government of Ukraine was invited to

- to reconsider the need for a provision allowing for the use of thirty-day detention without a court decision for a person suspected of terrorist activity and to initiate an assessment of this provision for compliance with the Constitution of Ukraine by applying to the Constitutional Court of Ukraine for relevant conclusions;

- revise the policy of control on the line of contact to create more favourable conditions for people to pass through the checkpoint;

- make efforts to ensure proper conditions for the functioning of the courts whose jurisdiction has been changed due to the measures taken by Ukraine.

Since then, the Government of Ukraine has addressed the Secretary General of the Council of Europe with the following communications in the context of derogation from its obligations[132]:

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[130] European Court of Human Rights, *Aksoy v. Turkey*, no. 21987/93, Judgment of December 18, 1996, https://hudoc.echr.coe.int/eng?i=001-58003

[131] Parliamentary Assembly of the Council of Europe, Resolution 2209 (2018), "State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights," April 24, 2018, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24680&lang=en

1. Note verbale dated 3 November 2015 from the Permanent Mission of Ukraine clarifying the specific territories covered by the derogation;

2. Note verbale dated 29 June 2016 from the Permanent Mission of Ukraine on the need to extend the derogation due to the further escalation of the conflict in eastern Ukraine;

3. Declaration of the Permanent Mission of Ukraine of 31 February 2017 on the need to extend the derogation due to the further escalation of the conflict in eastern Ukraine;

4. Note verbale of the Permanent Mission of Ukraine of 29 November 2019, according to which the scope of the directives under which the Government of Ukraine derogated was partially reduced due to the end of the anti-terrorist operation and the beginning of the joint forces operation, which included certain changes related to interference with human rights:

- empowering the military-civilian administrations to: restrict the presence on the streets without proper documents at certain times of the day, temporarily restrict or prohibit traffic, organise the verification of identity documents, conduct searches of individuals and conduct searches of vehicles and homes or office premises;

- empowering law enforcement agencies to use weapons in cases of emergency, detain and bring relevant persons to the offices of the National Police of Ukraine, conduct personal searches of citizens, temporarily restrict traffic, access and search residential and other premises, and seize vehicles and communications equipment from individuals and legal entities;

- a new procedure for determining the jurisdiction of court cases has been established, namely on the basis of the relevant decision of the Chief Justice of the Supreme Court. This novelty has led to the cancellation of derogation from the obligations under Article 6 of the European Convention and Article 14 of the Covenant, justifying it by the formation of the relevant ECHR practice, which allows changing the territorial jurisdiction of courts as necessary;

- the derogation measure, which was of particular concern to the Council of Europe, regarding the possibility of detaining persons suspected of terrorist activities without a court order for a period of 30 days, in connection with the start of the Joint Forces Operation is no longer applicable, as this provision relates to the anti-terrorist operation, which has been cancelled. For the same reason, the provisions of the Criminal Procedure Code of Ukraine regarding the transfer of powers of investigating judges to prosecutors do not apply during the Joint Forces Operation.

These measures still led to derogations from the obligations under Articles 9, 12, 17 of the Covenant and Articles 5, 8 of the European Convention and Article 2 of Protocol No. 4 to the European Convention.

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[132] Council of Europe, Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005), https://www.coe.int/en/web/conventions/by-non-member-states-of-the-coe-or-the-european-union?module=declarations-by-treaty&numSte=005&codeNature=10&codePays=U

5. Note verbale dated 16 April 2021 from the Permanent Mission of Ukraine on the need to extend the derogation due to the further escalation of the conflict in eastern Ukraine.

It is also important to note that despite the derogation from the obligations of the Convention since 2015 at the international level, there has been no derogation from the provisions of the Constitution of Ukraine in terms of human rights at the national level, as such derogation is provided only in the case of a state of emergency or martial law. Thus, the interference with human rights (measures) that caused the derogation at the international level could potentially be declared unconstitutional by the Constitutional Court of Ukraine, however, due to the peculiarities of constitutional justice and the political interest of the subjects of the right to apply to the Constitutional Court of Ukraine with relevant submissions, these norms were not submitted for assessment by the Constitutional Court of Ukraine.

Subsequently, the derogation from the obligations of the European Convention was due to the beginning of the full-scale invasion of Ukraine by the armed forces of the Russian Federation on 24 February 2022.

Drawing parallels with the derogations from obligations before and after 24 February 2022, the Russian-Ukrainian war provoked the introduction of martial law and derogations from a fairly large range of obligations both at the level of the European Convention and the Constitution of Ukraine. In addition, the difference is also evident in the procedural aspect of derogation from obligations under martial law, which is worthy of further attention.

Pursuant to Article 64 of the Constitution of Ukraine, derogation from human rights and freedoms is allowed only in the case of martial law or a state of emergency. At the same time, it is the decree of the President of Ukraine that establishes an exhaustive list of human rights and freedoms that are subject to restriction in connection with martial law[133]. This leads to a rather logical conclusion that the mere fact of martial law does not give the right to derogate from absolutely all rights and freedoms provided for in Article 64 of the Constitution of Ukraine, but the fact that a specific article from which the derogation is made is included in the relevant list of the Decree of the President of Ukraine on the introduction of martial law is decisive. This conclusion is fully consistent with the conclusion of the Constitutional Court of Ukraine set out in its decision of 18 July 2024 No. 8-p(II)/2024, according to which the Court recognised part 6 of Article 615 of the Criminal Procedure Code of Ukraine (which provides that in case of impossibility of a court hearing on the expediency of extending a preventive measure in the form of detention, such a measure is automatically extended without court consideration for two months) as violating the applicant's right to liberty and security of person, the right to judicial

[133] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, June 28, 1996, Article 64, https://zakon.rada.gov.ua/laws/show/254к/96-вр#n4378

protection, the right to defence (legal assistance) and contrary to the presumption of innocence, since the possibility of interference with such rights was not provided for by the Presidential Decree on the introduction of martial law[134].

As established in the first section, the President of Ukraine issues a decree on the introduction of martial law, which is approved by the Verkhovna Rada of Ukraine.

After the beginning of the full-scale invasion of Ukraine by the Russian Federation, President of Ukraine Volodymyr Zelenskyy issued Decree No. 64/2022 of 24 February 2022, which was approved by Law of Ukraine No. 2102-IX[135]. According to this Decree, during the martial law on the territory of Ukraine, the fundamental human rights and freedoms provided for in Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine may be restricted, which are necessary for the introduction of measures of the martial law regime set out in Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law". In addition, the Decree obliges the Ministry of Foreign Affairs of Ukraine to ensure that the UN Secretary-General and foreign officials are informed of restrictions on human rights and freedoms that are a deviation from the obligations under the International Covenant on Civil and Political Rights and the extent of these deviations.

It is worth noting that the above Decree does not contain information on the need to notify the Secretary General of the Council of Europe of derogations from the obligations of the European Convention. At the same time, Article 24 of the Law of Ukraine "On the Legal Regime of Martial Law"[136] provides for the obligation to notify only the UN Secretary-General of restrictions on rights and freedoms that are a deviation from the obligations under the International Covenant on Civil and Political Rights in the event of martial law. Given that, in addition to the obligations to ensure human rights and freedoms under the International Covenant on Civil and Political Rights, Ukraine also has relevant obligations under the European Convention, Article 24 should be supplemented with an obligation to notify the Secretary General of the Council of Europe of derogations from the obligations under the European Convention, which corresponds to the procedural aspect defined in part 3 of Article 15 of the European Convention.

In addition, the wording about the possibility of "restriction of human rights and freedoms under martial law" is not entirely correct and consistent with the understanding of the concept of "derogation from obligations", as mentioned in the first subsection of the second section, since

[134] Constitutional Court of Ukraine, Second Senate, Decision No. 8-p(II)/2024, July 18, 2024, https://zakon.rada.gov.ua/laws/show/v008p710-24#Text
[135] President of Ukraine, Decree No. 64/2022, "On the Imposition of Martial Law in Ukraine," February 24, 2022, https://zakon.rada.gov.ua/laws/show/64/2022#Text
[136] Verkhovna Rada of Ukraine, *Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law"*, May 12, 2015, Article 24, https://zakon.rada.gov.ua/laws/show/389-19#n19

rights and freedoms can be restricted in peacetime, but derogation from obligations is typical for an emergency situation, when the limits of restriction of rights and freedoms can be expanded.

With regard to the procedural aspect of the Government of Ukraine's notification of derogation from international obligations in connection with the introduction of martial law, the following should be noted.

The Government of Ukraine notified the Secretary General of the Council of Europe of its derogation from the Convention by note verbale No. 31011/32-017-3 of the Permanent Mission of Ukraine to the Council of Europe of 28 February 2022[137].

According to the content of this note verbale, the Council of Europe's notification is limited to copying the text of the Decree of the President of Ukraine on the introduction of martial law and the list of measures that lead to derogation from the obligations of the European Convention (Articles 8, 9, 10, 11, 14 of the European Convention; Articles 1, 2, 3 of Protocol No. 1 to the European Convention; Article 2 of Protocol No. 4 to the European Convention), namely copying Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law".

It should be emphasised that, unlike the notifications of derogation from the obligations of the European Convention, which were made by Ukraine until 22 February 2022, which detailed the measures that would constitute a derogation (in particular, a change in the jurisdiction of courts, the possibility of detaining persons without a court order for a period of 30 days, etc.), this notification contains mainly a general list of measures that the military command of the Armed Forces of Ukraine is potentially entitled to apply. This approach is explained by the fact that since the full-scale invasion of the territory of Ukraine by the armed forces of the Russian Federation, the level of threat to the existence of the nation has been extremely high and dynamic, which makes it impossible for the Government of Ukraine to objectively determine the scope of measures that will be necessary to avert the threat to the existence of the Ukrainian nation.

Subsequently, the Secretary General of the Council of Europe was notified by note verbale No. 31011/32-119-46585 of the Permanent Mission of Ukraine dated 4 April 2024[138] of the partial cancellation of the derogations from the obligations under Article 9 (freedom of thought, conscience and religion) and Article 14 (prohibition of discrimination) of the European Convention.

While the scope of human rights for which derogations have been made remains unchanged, the Interagency Commission on Derogations from Ukraine's Obligations under the

[137] Council of Europe, Notification JJ9325C Tr./005-287, "Ukraine – Derogation Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)," March 2, 2022, https://rm.coe.int/1680a5b0b0

[138] Council of Europe, Notification JJ9498C Tr./005-288, "Ukraine – Revised Derogation Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)," April 4, 2024, https://rm.coe.int/1680af452a

International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms[139] continues to analyse updated information on the security situation in Ukraine to determine whether the relevant derogations can be cancelled.

Thus, in order to properly assess Ukraine's application of Article 15 of the European Convention on Human Rights, each individual measure taken by the military command that derogates from its obligations under the European Convention must be subject to a proportionality test, as well as to a justification test in the context of the degree of threat existing at the time of its application.

The cumulative analysis of the provisions of the Presidential Decree No. 64/2022 of 24 February 2022 on the legal regime of martial law[140] gives grounds to assert that derogation from the obligations to ensure human rights and freedoms in accordance with Article 64 of the Constitution of Ukraine and Article 15 of the European Convention applies exclusively to measures applied in accordance with Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law", and only within the limits:

- the list of constitutional rights and freedoms specified in the Presidential Decree (at the national level), and

- a list of articles of the European Convention from which the Secretary General of the Council of Europe has been notified (at the international level).

According to Articles 3 and 8 of the Law of Ukraine "On the Legal Regime of Martial Law" [141] , the military command (Commander-in-Chief of the Armed Forces of Ukraine, Commander of the Joint Forces of the Armed Forces of Ukraine, commanders of branches and separate services of the Armed Forces of Ukraine, commanders (chiefs) of military administration bodies, commanders of formations, military units of the Armed Forces of Ukraine) together with military administrations (if established) in Ukraine or in its separate localities, where martial law has been introduced, may, within the limits of temporary restrictions on constitutional rights and freedoms of man and citizen, as well as rights and legitimate interests of legal entities, provided for by the decree of the President of Ukraine on the introduction of martial law, implement the following measures of the legal regime of martial law:

- strengthen the protection of critical infrastructure facilities;

- introduce labour compulsion;

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[139] Cabinet of Ministers of Ukraine, Resolution No. 281, "On the Establishment of the Interagency Commission on Ukraine's Derogation from Obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms," April 19, 2017, https://zakon.rada.gov.ua/laws/show/281-2017-п#Text

[140] President of Ukraine, Decree No. 64/2022, "On the Imposition of Martial Law in Ukraine," February 24, 2022, https://zakon.rada.gov.ua/laws/show/64/2022#Text

[141] Verkhovna Rada of Ukraine, *Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law"*, May 12, 2015, Article 3, 8, https://zakon.rada.gov.ua/laws/show/389-19#n16

- to compulsorily alienate property for defence purposes;
- use the property and labour resources of enterprises for defence purposes;
- introduce a curfew;
- introduce a special regime for entry and exit to the territory of Ukraine;
- prohibit peaceful assemblies, rallies and demonstrations;
- raise the issue of banning the activities of political parties;
- restrict the right to determine permanent residence;
- to regulate the media;
- carry out forced evacuation of the population, etc.

It is noteworthy that the current Law of Ukraine "On the Legal Regime of Martial Law" does not contain provisions that would oblige the military command and military administrations to adhere to the principle of proportionality. In particular, there is no requirement that the measures of the legal regime of martial law be applied within the limits objectively necessary to avert a threat to the existence of the nation. In this regard, in the author's opinion, the said Law needs to be supplemented with a provision that would directly provide for the application of the principle of proportionality in the implementation of the provisions of the Law of Ukraine "On the Legal Regime of Martial Law".

In addition, part 4 of Article 17 of the Constitution of Ukraine[142] is worthy of attention, according to which the Armed Forces of Ukraine and other military formations cannot be used by anyone to restrict the rights and freedoms of citizens. At first glance, there appears to be a certain conflict between Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law", which allows the military command to take appropriate measures restricting human rights and freedoms, and Article 17(4) of the Constitution of Ukraine, which prohibits the use of the Armed Forces of Ukraine to restrict human rights and freedoms. However, in the author's opinion, these provisions do not contradict each other, as they establish different conditions of application. The provision of the Constitution of Ukraine is aimed at prohibiting the use of the Armed Forces of Ukraine directly for purposes other than those intended (to ensure national security and territorial integrity of Ukraine), namely, to restrict human rights, i.e. in the case when the restriction of human rights and freedoms is the very purpose of using the Armed Forces of Ukraine. On the other hand, Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law" provides for the application of measures to ensure national security and defence, which in turn are accompanied by adverse consequences in the form of restriction of human rights and freedoms, i.e. in this case, the restriction of rights is not the purpose of such measures.

[142] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, June 28, 1996, Article 17, para. 4, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

Domestic scholars argue that national legislation on the legal regime of martial law provides for certain guarantees of human rights protection in such circumstances:

- human rights are restricted solely for reasons of applying specific measures characteristic of a given legal regime;

- the rights and freedoms subject to restriction are exhaustive and not subject to broad interpretation;

- the period of application of such restrictions may not exceed the period of martial law[143].

At the same time, one can hardly fully agree with the statement that "the duration of restrictions on human rights and freedoms is limited to the duration of the legal regime of martial law" is a sufficient guarantee of their protection. After all, the example of Ukraine shows that martial law can be extended for a potentially unlimited number of times, which effectively eliminates the temporary nature of such restrictions.

Having examined the procedural and legislative aspects of the restriction of human rights and freedoms under martial law in Ukraine, it is worth considering the practical aspects of the implementation of the above provisions.

To date, the state authorities, military command, and the Parliament of Ukraine have adopted many decisions, laws and acts that may be subject to discussion in the context of restrictions on human rights and freedoms under martial law, so the author believes that it is worth focusing on the most relevant and controversial issues and decisions.

The most typical measure applied under the legal regime of martial law is the introduction of a curfew, which is regulated by the “Procedure for Implementing Measures during the Introduction of Curfew and the Establishment of a Special Light Camouflage Regime in Certain Areas where Martial Law has been Introduced[144]. According to this procedure, curfews and special light camouflage regime are imposed only if there is a real threat to the life and safety of individuals, the interests of society or the state, as well as to ensure public order.

This measure enjoys the possibility of derogation from the obligation under Article 2 of Protocol No. 4 to the European Convention.

For example, in the capital of Ukraine, Kyiv, a curfew is imposed from 00:00 to 05:00 on the basis of the Order of the Kyiv City Military Administration No. 1 of 20.03.2023[145].

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[143] Panasiuk, Vita, Yuliia Poliuk, Illia But, Iryna Zhyvotovska, and Pavlo Synytsyn. 2022. “Constitutional Human Rights under Martial Law: Legal Realities”. *Amazonia Investiga* 11 (54): 76-83. https://doi.org/10.34069/AI/2022.54.06.8.

[144] Cabinet of Ministers of Ukraine, Resolution No. 573, "On the Introduction and Implementation of Certain Measures of the Legal Regime of Martial Law," July 8, 2020, https://zakon.rada.gov.ua/go/573-2020-%D0%BF

[145] Kyiv City Military Administration, *Order No. 1*, January 1, 2023, https://svyat-2023.kyivcity.gov.ua/done_img/f/Наказ%20КМВА%20№%201.PDF

Given the circumstances caused by the Russian-Ukrainian war, such a measure is fully permissible, despite the interference with the right to freedom of movement, due to the need to detect sabotage and reconnaissance groups and organise the secret redeployment of military equipment (including air defence) and personnel of the Armed Forces of Ukraine at night.

Internationally, the observance of the right to freedom of expression and violations of media freedom in Ukraine is increasingly becoming the subject of lively debate due to the existence of the only national TV marathon, “The United News”, a rotating platform of channels that follow the government's line of reporting on the war.

Many international experts and human rights organisations point out that the organisation of the telethon is a manifestation of an unprecedented level of control over television news, which is seen as an organisation of severe censorship in times of war. This situation was assessed by the United States Department of State in its assessment of the human rights situation in Ukraine. In the course of its investigation, it was found that the Ukrainian government banned, blocked or imposed sanctions on media outlets and individual journalists who were considered a threat to national security or who expressed positions that, in the opinion of the authorities, undermined the country's sovereignty and territorial integrity. The US Department of State pointed out the need to ensure the right to freedom of expression and called on the Government of Ukraine to reduce interference with this right[146].

In light of the above, it is worth paying attention to the very relevant judgment of the ECtHR in the case of Novaya Gazeta and Others v. Russia[147], in which Court assessed the use of the concepts of "national security", "territorial integrity" and "civil security" as the pursued aim in the context of restrictions on the right to freedom of expression, which is enshrined in Article 10 of the European Convention. The case concerned independent Russian media and journalists who, at the beginning of the full-scale invasion of the armed forces of the Russian Federation, took an active pacifist position with condemnations of the outbreak of the Russian-Ukrainian war. The rights of the above-mentioned subjects were restricted by the Russian Federation in various ways: from imprisonment and imposition of administrative penalties to revocation of the relevant media licences. The Court noted that freedom of expression is the foundation of any democratic society and a condition for the self-realisation and development of every individual[148], but the protection of territorial integrity and national security may constitute a legitimate aim for restricting the right to freedom of expression. At the same time, it should be applied with

[146] U.S. Department of State. *2023 Country Reports on Human Rights Practices: Ukraine*. 2023. https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/ukraine/
[147] European Court of Human Rights, *Novaya Gazeta and Others v. Russia*, Application No. 41810/19, Judgment of November 16, 2021, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-241738%22]}
[148] European Court of Human Rights, *Handyside v. the United Kingdom*, Application No. 5493/72, Judgment of December 7, 1976, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57499%22]}

restraint, interpreted restrictively, and used only if the need to suppress the publication of information is proved[149]. In assessing the measures taken by the Russian Federation, the Court stated that the applicants' actions did not go beyond expressions that could actually threaten national security and territorial integrity, and the national courts had erroneously assumed that criticism of military actions and disagreement with official sources were detrimental to national security, and therefore the measures of the Russian Federation were regarded as a manifestation of a policy of suppressing dissent and were not aimed at countering security threats.

This case is also useful for Ukraine, as in this case the Court stated that even a derogation from the obligations under Article 15 of the European Convention is not a ground for limiting political debate or criticism of the current government , as the actions and inactions of the government should be checked not only by the legislative and judicial authorities, but also by the press and society, and even sharp criticism of the government will still be protected under Art. 10 of European Convention[150].

In the context of the application of the derogation from the obligations under Article 10 of the European Convention on the organisation of a telethon, it is interesting that there is no official decision of the military command. Moreover, there is no regulatory act that would regulate the functioning of a single telethon, but according to human rights organisations[151], its functioning is conditioned by the implementation of the decision of the National Security and Defence Council of Ukraine of 18 March 2022 "On Neutralising Threats to the Information Security of the State"[152]. At the same time, this body is not included in the list of military command bodies that have the right to apply measures that are derogated from the obligations of the European Convention.

Thus, the measure should be assessed in the light of the right to freedom of expression without derogating from the obligations under the European Convention.

The goal pursued can indeed be considered necessary in a democratic world (ensuring national security, given the circumstances of the Russian-Ukrainian war). The Ukrainian Parliament Commissioner for Human Rights noted that the threat of abuse of the professional rights of journalists and media experts who have chosen the path of collaboration, as well as attempts by "Kremlin mouthpieces" to infiltrate Ukraine under the guise of journalists, forces the

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[149] European Court of Human Rights, *Stoll v. Switzerland*, Application No. 69698/01, Judgment of December 10, 2007, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-83870%22]}

[150] European Court of Human Rights, *Ozgur Gundem v. Turkey*, Application No. 23144/93, Judgment of 16 March 2000, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58508%22]}

[151] Oprishko, L. (2022). *Freedom of Expression: International Standards, European Court of Human Rights Practice, and National Legislation of Ukraine in Conditions of Martial Law*. Ukrainian Center for Independent Political Research. Retrieved from http://ucipr.org.ua/images/files/1750/1750_file.pdf

[152] National Security and Defence Council of Ukraine, *Decision On neutralising threats to the state's information security*, n0003525-22, dated March 18, 2022, https://zakon.rada.gov.ua/laws/show/n0003525-22#Text

state to establish rules and restrictions that are binding[153].

However, in the author's opinion, the requirement of proportionality in this case is not met in light of the above-mentioned case law of the ECtHR. Moreover, the complete deprivation of the media's freedom to determine the essence, nature and amount of information to be disclosed is a violation of the very essence of the right (excessive narrowing of the content of the right) to freedom of expression, and therefore such interference cannot be considered permissible.

In addition, the importance of respecting the right to freedom of expression in emergency situations was emphasised by the Parliamentary Assembly of the Council of Europe, referring to the Guidelines of the Committee of Ministers of the Council of Europe on the Protection of Freedom of Expression and Information in Times of Crisis (2007)[154]. These principles state that the reporting of facts and expression of opinions in the languages of a state of emergency cannot be considered as threatening national security, except in circumstances that must be clearly regulated by the court. The limitations of this right should be clear and not subject to broad interpretation. It is also emphasised that even in a state of emergency, the public should have constant access to independent media.

Another situation that has received wide publicity in the context of the Russian-Ukrainian war and is worth paying attention to is the ban of the well-known pro-Russian political party “Opposition Platform - For Life”.

Based on the articles of the Law of Ukraine "On Political Parties in Ukraine"[155] and the Code of Administrative Procedure of Ukraine[156], the Ministry of Justice of Ukraine, having established that a political party is taking actions aimed at eliminating Ukraine's independence; changing the constitutional order by force, violating the sovereignty and territorial integrity of the state; undermining its security; unlawful seizure of state power; propaganda of war; disseminating information containing justifications, recognition of the legitimacy, denial of the armed aggression of the Russian Federation against Ukraine, files a claim with the administrative court to ban the relevant political party.

As described above, the Ministry of Justice of Ukraine filed a lawsuit with the Eighth

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[153] Ombudsman of the Verkhovna Rada of Ukraine. "The Ombudsman Informed About Media Restrictions in Ukraine During the Full-Scale War." *Official Website of the Ombudsman of the Verkhovna Rada of Ukraine*, May 3, 2023. https://www.ombudsman.gov.ua/uk/news_details/upovnovazhenij-rozpoviv-pro-obmezhennya-roboti-media-yaki-diyut-v-ukrayini-pid-chas-povnomasshtabnoyi-vijni

[154] Council of Europe, "Guidelines of the Committee of Ministers of the Council of Europe on Protecting Freedom of Expression and Information in Times of Crisis," adopted September 26, 2007, https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/guidelines-of-the-committee-of-ministers-of-the-council-of-europe-on-protecting-freedom-of-expression-and-information-in-times-of-crisis

[155] Verkhovna Rada of Ukraine, *Law of Ukraine No. 2365-III "On Political Parties in Ukraine"*, April 5, 2001, https://zakon.rada.gov.ua/laws/show/2365-14#n327

[156] Verkhovna Rada of Ukraine, *Code of Administrative Court Procedure of Ukraine*, July 6, 2005, No. 2747-IV, https://zakon.rada.gov.ua/laws/show/2747-15#Text

Administrative Court of Appeal (as the court of first instance) to ban the activities of the political party "Opposition Platform - For Life". Following consideration of the case, the claim was upheld.

Following consideration of the appeal against the decision of the Eighth Administrative Court of Appeal by the Administrative Court of Cassation of the Supreme Court (as a court of appeal), the appeal was dismissed and the decision of the Eighth Administrative Court of Appeal was upheld. In this case, the courts made the following conclusions[157]:

The panel of judges took into account that the prohibition of a political party is an extreme measure that must be necessary in a democratic society, meet a legitimate aim and be proportionate (proportionate) to that aim. Following the case law of the European Court of Human Rights, the panel of judges stated that the adjective "necessary" in this context means "an urgent social need". At a time when the Armed Forces of Ukraine, in fulfilment of their constitutional duty, are defending the territorial integrity and inviolability of Ukraine and its sovereignty from the Russian occupiers, democratic institutions must also show their "belligerence", but in the legal field. Protecting Ukraine's state sovereignty and territorial integrity, as well as the democratic constitutional order, from the influence of political parties that implement the ideological and political narratives of the aggressor country is such an urgent public need to protect a democratic society and protect the rights and freedoms of citizens. This restriction of the freedoms available to the Party is aimed at ensuring the stability of the country as a whole, and therefore, the extreme measure of influence applied to the political party is justified.

At the same time, when assessing the implementation of martial law measures in Ukraine in general, one can argue that the system of restrictions on human rights is relatively lenient. Despite the existence of powers to impose labour service, such measures have not been applied since the start of the full-scale invasion. The expropriation of individuals' property is carried out in exceptional cases, so this can be seen as an exception rather than a rule.

In any case, the "last word" on the recognition of the measures of the martial law regime in Ukraine as meeting the urgent needs of society remains with the ECtHR.

It should be noted that to date, the case law of the European Court of Human Rights does not contain any judgments that would provide a legal assessment of the restrictive measures taken by Ukraine during martial law in view of the provisions of Article 15 of the European Convention on Human Rights. This is due, in particular, to the length of time it takes for cases to

[157] Supreme Court of Ukraine, *Decision in Case No. P/857/8/22*, September 15, 2022, Unified State Register of Court Decisions, https://reyestr.court.gov.ua/Review/106339460

be considered by the Court, which averages 5-6 years[158] due to the heavy workload of the European Court, and therefore, at present, the actions of the Government of Ukraine under martial law can be analysed mainly within the framework of academic discourse.

[158] European Court of Human Rights. *Annual Report 2021*. Strasbourg: Council of Europe, 2021. http://www.echr.coe.int/documents/d/echr/Annual_report_2021_ENG

SECTION 3: PECULIARITIES OF PROTECTION AND RESTORATION OF VIOLATED HUMAN RIGHTS AND FREEDOMS UNDER MARTIAL LAW IN UKRAINE

3.1 Organisation of justice in Ukraine under martial law in the context of Article 6 of the European Convention on Human Rights.

As established in the second section, one of the obligations of the state in the light of ensuring fundamental human rights and freedoms is the obligation to protect human rights, i.e. the obligation to protect human rights from encroachment by third parties and to create effective means of their protection, which places it in the category of a positive obligation that requires the state to take active steps (organise justice, formulate legislation that protects human rights and provides remedies).

In its judgment in the case of The Sunday Times v. the United Kingdom[159], the ECtHR stressed that Article 6 of the European Convention is central to other human rights, as it reflects the manifestation of the fundamental principle of the rule of law.

The state's obligation is enshrined in Article 6 of the European Convention[160], which establishes that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, to determine the rights and obligations of a civil nature or to establish the validity of any criminal charge against him. This provision applies to both civil and criminal proceedings.

In addition, the article establishes additional requirements relating to exclusive criminal justice:

- ensuring the presumption of innocence;

- ensuring that defendants have the following rights: to be informed of the nature and reasons for the charges in an understandable language, to have the opportunity to prepare their own defence, the right to (free) legal aid, to have witnesses examined by the prosecution and the defence, and to have an interpreter provided free of charge.

Within the meaning of Article 15 of the European Convention, the right to a fair trial is not absolute, moreover, this right may be subject to derogation.

However, despite the possibility of derogation from the obligation to comply with Article 6 of the European Convention, the Government of Ukraine did not exercise this right, and

[159] European Court of Human Rights. *The Sunday Times v. The United Kingdom (No. 1)*, Application No. 6538/74, Judgment of April 26, 1979. Accessed April 9, 2025. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57584%22]}

[160] Council of Europe, *European Convention on Human Rights*, November 4, 1950, Article 6, https://www.echr.coe.int/documents/d/echr/convention_ENG

therefore, under martial law, the right to a fair trial and the scope of interference with this right should be ensured exclusively in accordance with the provisions of the European Convention and the practice of the ECHR without the possibility of derogation[161].

It should be noted that at the national level, the principles arising from Article 6 of the European Convention are reflected in several articles of the Constitution of Ukraine[162]:

- Article 55 of the Constitution of Ukraine guarantees that human rights and freedoms are protected by the courts, and everyone is guaranteed the right to appeal against unlawful decisions, actions and inaction of public authorities;

- Article 124 of the Constitution of Ukraine provides that justice in Ukraine is administered exclusively by courts, and delegation of court functions to other bodies is prohibited;

- Article 129 of the Constitution of Ukraine establishes the general principles of judicial proceedings: independence of a judge (impartiality), reasonable time limits for consideration of a case by the court, publicity of the trial, etc.

Other principles of the administration of justice in the context of Article 6 of the European Convention are enshrined in the relevant procedural codes of Ukraine.

According to the Decree of the President of Ukraine on the introduction of martial law No. 64/2022 of 24 February 2022[163], none of the above-mentioned articles of the Constitution of Ukraine is contained in the list of rights from which derogation is made in accordance with Article 64 of the Constitution of Ukraine. Moreover, the said article expressly prohibits derogation from Article 55 of the Constitution of Ukraine.

The Venice Commission of the Council of Europe in its report on the respect for democracy, human rights and the rule of law in times of crisis[164] noted that despite the possibility of derogation from Article 6 of the European Convention, judicial guarantees are increasingly seen as non-derogable.

Thus, it is logical to conclude that the organisation of justice in Ukraine under martial law should be carried out in accordance with the general rules of Article 6 of the European Convention, without the possibility of derogation from this right.

At this stage, it is worth focusing on the aspect of the establishment of temporary military courts and tribunals as one of the typical consequences of the introduction of martial law, for

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[161] Council of Europe, Notification JJ9498C Tr./005-288, "Ukraine – Revised Derogation Related to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5)," April 4, 2024, https://rm.coe.int/1680af452a

[162] Verkhovna Rada of Ukraine, *Constitution of Ukraine*, June 28, 1996, Article 55, 124, 129, https://zakon.rada.gov.ua/laws/show/254к/96-вр#n4381.

[163] President of Ukraine. *Decree No. 64/2022 "On the Imposition of Martial Law in Ukraine"*, February 24, 2022. https://zakon.rada.gov.ua/laws/show/64/2022#Text

[164] Venice Commission. *Respect for Democracy, Human Rights and Rule of Law during States of Emergency: Reflections*. CDL-PI(2020)005rev, May 26, 2020. https://www.coe.int/en/web/venice-commission/-/CDL-PI(2020)005rev-e

example, in the United States of America[165]. In this context, it should be emphasised that no legal act provides for the possibility of establishing military tribunals, despite the fact that their existence is not prohibited in the light of the European[166]. However, in its case law, the ECtHR has noted that it is highly suspicious of ad hoc tribunals due to problems with their impartiality and impartiality[167].

Nevertheless, the establishment of temporary tribunals is expressly prohibited at the level of national legislation of Ukraine by Article 125 of the Constitution of Ukraine (establishment of emergency and special courts is not allowed). As for the Law of Ukraine "On the Legal Regime of Martial Law", Articles 12-2 and 26[168], which regulate justice under martial law, do not provide for specific features for the functioning of courts, but instead emphasise the principle of the judiciary acting solely on the basis, within the powers and in the manner determined by the Constitution of Ukraine and the laws of Ukraine, and duplicate the wording of the Constitution of Ukraine that the establishment of emergency courts is not allowed. The same is stated in Article 3 of the Law of Ukraine "On the Judiciary and the Status of Judges"[169].

In the author's opinion, this underscores the commitment of the Government of Ukraine to upholding the basic standards and principles of the right to a fair trial, even in the context of the Russian-Ukrainian war.

In this context, it is worth noting the decision of the Constitutional Court of Ukraine of 18 July 2024 No. 8-r(II)/2024 [170], by which the Constitutional Court of Ukraine declared unconstitutional and cancelled part 6 of Art. 615 of the Criminal Procedure Code of Ukraine (which regulates the peculiarities of court proceedings and pre-trial investigation under martial law), which stipulated that if the court cannot consider the issue of extending the term of a preventive measure in the form of detention, such term is automatically extended for a period of two months.

The Constitutional Court of Ukraine acknowledged that the legislator's regulation of the procedure for resolving the issue of extending the term of detention as a preventive measure in a manner that does not involve the participation of a court (judge) results in a violation of the constitutional right of everyone to judicial protection (part one of Article 55 of the Constitution

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[165] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), https://supreme.justia.com/cases/federal/us/71/2/
[166] European Court of Human Rights, *Case of Çıraklar v. Turkey*, no. 70/1997/854/1061, Judgment of 28 October 1998, https://hudoc.echr.coe.int/fre?i=001-58253
[167] European Court of Human Rights, *Perinçek v. Switzerland*, no. 27510/08, Judgment of 15 October 2015, https://hudoc.echr.coe.int/eng?i=001-58197
[168] Verkhovna Rada of Ukraine, *Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law,"* Articles 12-2 and 26, adopted May 12, 2015, last amended February 8, 2025, https://zakon.rada.gov.ua/laws/show/389-19#n199
[169] Verkhovna Rada of Ukraine, *Law of Ukraine No. 1402-VIII "On the Judiciary and the Status of Judges,"* Article 3, adopted June 2, 2016, last amended March 26, 2025, https://zakon.rada.gov.ua/laws/show/1402-19#Text
[170] Constitutional Court of Ukraine, *Decision No. 8-p(II)/2024*, July 18, 2024, https://zakon.rada.gov.ua/laws/show/v008p710-24#n116

of Ukraine) in connection with the right to liberty and security of person (part one of Article 29 of the Constitution of Ukraine) and the right of the accused to defence (part two of Article 63 of the Constitution of Ukraine).

In addition, the court explicitly stated that the existence of this provision contradicts Article 6 of the European Convention, and based on the ECHR case law, added that the importance and necessity of judicial review stems from the rule of law, one of the fundamental principles of a democratic society, which is explicitly mentioned in the preamble to the European Convention and which aims to minimise the risk of arbitrariness.

Nevertheless, Section 9-1 of the Criminal Procedure Code of Ukraine[171] contains a large number of provisions which, in the light of the above-mentioned conclusions of the Constitutional Court of Ukraine, may be declared unconstitutional and in breach of Article 6 of the European Convention, in particular, in accordance with paragraph 2 of part 1 of Art. 615 of the Criminal Procedure Code of Ukraine, if the investigating judge is unable to exercise the powers provided for in Articles 140, 163, 164, 170, 173, 206, 219, 232, 233, 234, 235, 245-248, 250 and 294 of the Criminal Procedure Code of Ukraine, such powers shall be transferred to the relevant prosecutor's office.

In the light of the above provision, it is worth mentioning Article 124 of the Constitution of Ukraine, according to which delegation of court functions, as well as appropriation of these functions by other bodies or officials, is not allowed.

In view of the above, the author believes that the legislator should review the provisions of the Criminal Procedure Code which are contrary to the Constitution of Ukraine and the European Convention, and instead of delegating the powers of judges to other officials, pay attention to organisational issues to ensure the continuous operation of courts and, accordingly, ensure access to court, which is one of the elements of Article 6 of the European Convention.

Nevertheless, it is worth noting that the full-scale aggression of the Russian Federation has left a tangible mark on the organisation of justice in Ukraine and compliance with the requirements of Article 6 of the European Convention.

According to Supreme Court Judge Vitaliy Urkevych, the invasion of Ukraine by the Russian Federation, which began in late February 2014, and the conditions of Russia's full-scale war against Ukraine have undoubtedly affected the functioning of the Ukrainian judicial system. Constant air raids, lack of power supply, shortage of judges and court staff, destruction of court

[171] Verkhovna Rada of Ukraine, *Criminal Procedure Code of Ukraine*, Section 9-1, adopted April 13, 2012, last amended December 26, 2024, https://zakon.rada.gov.ua/laws/show/4651-17#n5092

premises by rocket attacks, occupation of large parts of Ukraine are factors that have a negative impact on the administration of justice[172].

Following the full-scale invasion of Ukraine by the armed forces of the Russian Federation, the Council of Judges of Ukraine (a judicial self-government body of Ukraine), in circumstances caused by the armed conflict, has issued recommendations on organisational issues of the administration of justice[173]:

- if it is necessary to ensure the safety of participants in the trial, court staff and judges, to postpone the consideration of cases;

- pay more attention to cases that are considered urgent under procedural law;

- to give preference to holding a court hearing by video conference;

- take into account the fact that a large number of litigants do not always have the opportunity to file an application for postponement of the case or participate in the trial;

- to take a balanced approach to issues related to the return of various procedural documents, leaving them without movement, setting various deadlines, and, if possible, extending them at least until the end of martial law.

Moiseenko D.M., studying the civil proceedings in Ukraine under martial law, noted that there were numerous cases of court adjournments several times without applying the consequences of failure to appear in court (consideration *in absentia*), referring to the above-mentioned recommendations of the Council of Judges of Ukraine and Article 6 of the European Convention. The author pointed out that repeated postponements of court hearings may be regarded as an abuse of the above recommendations, which in turn violates the right of another party to the case to access to court in the light of Article 6 of the European Convention[174].

Indeed, such recommendations should be taken into account, given the need to ensure the safety of participants in court proceedings and the ability to participate in court hearings in times of war.

Nevertheless, some of these recommendations, and the corresponding consequences of the war, namely

- frequent rocket attacks, and, accordingly, cases of air alert, as a result of which all employees of state institutions are obliged to go to civilian protection sites (shelters), including judges;

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[172] Supreme Court of Ukraine, *"Secretary of the Grand Chamber of the Supreme Court Gave a Lecture to an International Audience,"* September 7, 2023, https://supreme.court.gov.ua/supreme/pres-centr/news/1663697/

[173] Council of Judges of Ukraine, *"To All Courts of Ukraine! The Council of Judges Published Recommendations on the Work of Courts under Martial Law,"* March 2, 2022, https://rsu.gov.ua/ua/news/usim-sudam-ukraini-rsu-opublikuvala-rekomendacii-sodo-rooti-sudiv-v-umovah-voennogo-stanu

[174] Moiseyenko, D. M. *"Civil Justice: Access under Martial Law." Scientific Bulletin of Uzhhorod National University. Law Series* 71 (2022): 366–369. https://doi.org/10.24144/2307-3322.2022.71.62

- cases of prolonged power outages due to the destruction of generation facilities by the armed forces of the Russian Federation, which completely disrupted the judicial process (inability to hold hearings via video conferencing, shutdown of electronic document management systems and registers);

- damage to court buildings as a result of the use of appropriate means of destruction by the armed forces of the Russian Federation, etc. - have an impact on one of the main requirements of the judicial process in the light of Article 6 of the European Convention, namely *"consideration of the case within a reasonable time"*.

The Council of Europe emphasises that the state is obliged to organise its legal system in such a way that the courts can ensure that cases are heard within a reasonable time, even in times of emergency, and accordingly the state should make every effort to minimise delays and ensure the efficient functioning of the judicial system[175].

Indeed, in order to comply with this requirement, the relevant procedural codes contain specific time limits within which the case must be considered:

- The Civil Procedure Code of Ukraine[176]: Art. 210 provides that the case must be considered within 30 days from the date of commencement of the case on the merits;

- The Code of Administrative Procedure of Ukraine[177]: Article 193 provides that the case must be considered within 30 days from the date of commencement of the case on the merits.

However, unfortunately, statistics show systematic and regular violations of the deadlines.

According to the official statistics of the High Council of Justice of Ukraine, the standard time required for judges to consider cases received by district administrative courts, as reported for the first quarter of 2023, is on average 274 days for each full-time judge within Ukraine[178].

In addition, the reform of the District Administrative Court of Kyiv, which is taking place in the light of high-profile corruption scandals, is worthy of attention. It is worth noting that it was the District Administrative Court of Kyiv that had territorial jurisdiction over claims against central executive authorities located in Kyiv, and therefore this court was particularly important in light of challenging relevant acts of the Government of Ukraine (the Cabinet of Ministers of Ukraine, ministries, etc.). Pursuant to the Law of Ukraine "On Liquidation of the District Administrative Court of Kyiv and Establishment of the Kyiv City District Administrative Court"

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[175] Council of Europe. *Right to a Trial Within a Reasonable Time: Comparative Overview*. December 2022. https://rm.coe.int/right-to-a-trial-within-a-reasonable-time-hfii/1680aa3886

[176] Verkhovna Rada of Ukraine, *Civil Procedure Code of Ukraine*, Law No. 1618-IV, adopted March 18, 2004, last amended April 9, 2025, https://zakon.rada.gov.ua/laws/show/1618-15#n7635

[177] Verkhovna Rada of Ukraine, *Code of Administrative Procedure of Ukraine*, Law No. 2747-IV, adopted July 6, 2005, last amended April 9, 2025, https://zakon.rada.gov.ua/laws/show/2747-15#n10995

[178] High Council of Justice of Ukraine, *"The HCJ Seconded Seven Judges to the Kyiv District Administrative Court,"* March 22, 2024, https://hcj.gov.ua/news/vrp-vidryadyla-simoh-suddiv-do-kyyivskogo-okruzhnogo-administratyvnogo-sudu

dated 13.12.2022[179], the said court was liquidated and the procedure for establishing the Kyiv City District Administrative Court was initiated. The Law provides that until the Kyiv City District Administrative Court starts operating, cases under the jurisdiction of the district administrative court with territorial jurisdiction over the city of Kyiv (i.e., the liquidated court) shall be considered and resolved by the Kyiv District Administrative Court. The territorial jurisdiction of the Kyiv District Administrative Court extends to the Kyiv region. Thus, currently, the territorial jurisdiction of the Kyiv District Administrative Court covers both the city of Kyiv and the Kyiv region. In addition, the pending cases of the liquidated court are transferred to the Kyiv District Administrative Court.

According to the official statistics of the High Council of Justice of Ukraine, in the Kyiv District Administrative Court, the standard time required to consider cases is 546 days for one full-time judge, which gives grounds to assert that there is an excessive workload. In addition, about 64,000 cases and materials that were in the proceedings of the Kyiv District Administrative Court (liquidated court) were to be transferred to the court[180]. In the first half of 2024, the Kyiv District Administrative Court received 34,771 cases, which is the highest number among the district administrative courts of Ukraine[181].

In addition, in general, the capacity of Ukrainian courts is much lower than the volume of relevant court applications (lawsuits, petitions, applications, complaints), which only complicates the situation over time.

Thus, in aggregate, the circumstances of the war, which force frequent postponements of cases, an excessive number of cases and low court capacity create a catastrophic problem in light of the principle of reasonableness of time under Article 6 of the European Convention, which requires decisive action by the Government of Ukraine.

In addition, the ECtHR has repeatedly emphasised the need to establish effective judicial supervision over measures that lead to derogation from obligations in the light of Article 15 of the European Convention, as the existence of such supervision is crucial in assessing the High Contracting Party's compliance with the requirements of Article 15 of the European Convention[182].

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[179] Verkhovna Rada of Ukraine, *Law No. 2825-IX "On the Liquidation of the District Administrative Court of Kyiv and the Establishment of the Kyiv City District Administrative Court,"* adopted December 13, 2022, last amended September 26, 2024, https://zakon.rada.gov.ua/laws/show/2825-20#Text

[180] High Council of Justice of Ukraine, *"The HCJ Seconded Seven Judges to the Kyiv District Administrative Court,"* March 22, 2024, https://hcj.gov.ua/news/vrp-vidryadyla-simoh-suddiv-do-kyyivskogo-okruzhnogo-administratyvnogo-sudu

[181] *"Judges of the Kyiv District Administrative Court Will Have Two Assistants, but Temporarily – Council of Judges," Judicial and Legal Newspaper*, August 3, 2024, https://sud.ua/uk/news/publication/307206-u-sudey-kievskogo-okruzhnogo-administrativnogo-suda-budet-po-dva-pomoschnika-no-vremenno-sovet-sudey

[182] European Court of Human Rights, *Brannigan and McBride v. the United Kingdom*, nos. 14553/89 and 14554/89, Judgment of 26 May 1993, https://hudoc.echr.coe.int/eng?i=001-57819

Given that the measures provided for in Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law", which "benefit" from the derogation of the European Convention, are subject to assessment of their legality by administrative courts (there are no permanent military courts in Ukraine), it is therefore difficult to speak of effective judicial oversight in light of the gross violation of the principle of reasonableness of terms.

Attention should also be paid to the functioning of courts located in the temporarily occupied territories of Ukraine or in close proximity to the contact line (frontline). This issue is regulated by Article 12 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine"[183], which establishes that in case of impossibility of administration of justice by courts located in the temporarily occupied territories, the territorial jurisdiction of cases considered by such courts is determined in accordance with Article 147 of the Law of Ukraine "On the Judicial System and Status of Judges"[184]. According to the said article, if certain courts cannot administer justice due to objective reasons (in particular, military operations), by decision of the High Council of Justice, adopted upon the proposal of the Chief Justice, cases under the jurisdiction of such court shall be transferred to the nearest functioning court with simultaneous transfer of pending cases.

The issue of access to justice in the non-government controlled areas was considered by the ECtHR in the case of Khlebik v. Ukraine[185], in which the ECtHR stated that the applicants' inability to apply to the court at their place of residence did not violate the essence of the right of access to court and ruled that there was no violation of Article 6 of the Convention. In paragraph 52 of the judgment, the ECtHR acknowledged that the state authorities may sometimes experience certain difficulties in ensuring the proper functioning of the judicial system in certain regions due to the ongoing military operations in those regions.

Thus, the measures to change the territorial jurisdiction of Ukrainian courts in connection with the hostilities do not contradict the provisions of the European Convention.

Instead, the question of the practical aspects of the implementation of this provision arises again, given the court case No. 757/52523/20-ц. In November 2020, the plaintiff filed a claim for child support with the Kherson City Court of the Kherson Region. By a ruling dated 06 September 2021 (before the full-scale invasion of the armed forces of the Russian Federation), the proceedings were opened and the case was scheduled for consideration. Instead, due to the

[183] Verkhovna Rada of Ukraine, *Law No. 1207-VII "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine,"* Article 12, adopted April 15, 2014, last amended May 19, 2024, https://zakon.rada.gov.ua/laws/show/1207-18#Text
[184] Verkhovna Rada of Ukraine, *Law No. 1402-VIII "On the Judiciary and the Status of Judges,"* Article 147, adopted June 2, 2016, last amended March 26, 2025, https://zakon.rada.gov.ua/laws/show/1402-19#n145
[185] European Court of Human Rights, *Khlebik v. Ukraine*, no. 2945/16, Judgment of 25 July 2017, https://hudoc.echr.coe.int/eng?i=001-175656

rapid offensive of the Russian armed forces at the beginning of the war, the city of Kherson and part of the Kherson region were occupied. Therefore, this case should have been transferred to a new court to continue its consideration, but this was not done, given the unified state register of court decisions. Only after the de-occupation of the city of Kherson, on 03 March 2025, a decision was made to recover child support[186]. Almost four and a half years passed from the time the plaintiff filed the lawsuit (November 2020) to the time the court decision was made (03 March 2025).

This again raises the issue of the importance of the Government of Ukraine taking measures to improve the organisational processes of the administration of justice to ensure proper implementation of the provisions of national legislation and the European Convention.

Thus, taking into account the analysis of the organisation of justice in Ukraine under martial law, it should be noted that despite the full-scale invasion of the territory of Ukraine by the armed forces of the Russian Federation, Ukrainian courts continue to perform their tasks within the framework and on the basis of the current legislation of Ukraine, but it is worth highlighting the inadequacy of the judicial system to the current realities, which affects the proper implementation by Ukraine of the requirements of Article 6 of the European Convention, especially with regard to the principle of reasonableness of the time limits for consideration of court cases. The above requires decisive action by the Government of Ukraine both at the level of legislative changes and at the level of organisational issues of the administration of justice.

3.2. Peculiarities of compensation for damage caused by the armed aggression of the Russian Federation.

It is undisputed that the armed aggression of the Russian Federation against Ukraine is not only groundless, but also violates the fundamental norms and principles of international law, in particular the Charter of the United Nations. It is accompanied by particular cruelty and systematic disregard for international humanitarian law, as evidenced by numerous facts of loss of civilian life, torture of civilians, inhuman treatment of prisoners of war, deliberate destruction of civilian infrastructure, etc.

One of the largest and most tangible consequences of this aggression is the enormous material damage caused to Ukraine and its population. The massive destruction of residential buildings, critical infrastructure, industrial enterprises, educational and medical facilities, as well as environmental damage caused by the hostilities, has created an objective need for a fair and

[186] Kherson City Court of Kherson Region, *Case No. 757/52523/20-ts*, Judgment of March 3, 2025, https://reyestr.court.gov.ua/Review/126110172

effective mechanism for compensation for damages to the state, legal entities and individuals. As of December 2024, direct damage to Ukraine's infrastructure is estimated at USD 176 billion[187].

Given that the issue of compensation for damage caused by war (reparations) is subject to legal regulation by international law, this section will analyse, in addition to the provisions of the European Convention and the case law of the ECHR, the provisions of other public international law acts. The main issue of this section is to study the legal and organisational framework for compensation for damage caused by the armed aggression of the Russian Federation.

It should be emphasised at the outset that historical experience shows that reparations for war-related damage were made "semi-voluntarily" under pressure from the respective states. For example, after Germany's surrender in 1945, it did not have sovereignty, as its territory was controlled by the USSR, the USA, Britain and France, yet the Potsdam Conference in 1945 resolved the issue of Germany's payment of reparations, i.e. Germany was forced to make reparations as a condition of the post-war period. In the same manner, the Luxembourg Agreement of 1952 was signed, according to which Germany pledged to pay 3 billion German marks as compensation for the persecution of Jews during the Nazi regime[188].

At the same time, in the case of the Russian Federation, the prospects for voluntary payment of reparations, as was the case with Germany after World War II, are extremely unlikely, as the aggressor state is not a victor in the war and does not recognise its responsibility. The international sanctions imposed on Russia, although aimed at deterring its aggressive policy, have not led to an end to the armed aggression, which, in turn, complicates the implementation of mechanisms for compensation for the damage caused. The above requires the creation of appropriate ways to compensate for damage without the permission of the Russian Federation itself.

Currently, in the author's opinion, there are 3 main ways that can serve as a kind of legal remedy aimed at compensation for the damage caused by the armed aggression of the Russian Federation:

I. Filing an individual application with the European Court of Human Rights;

II. Filing a claim with a Ukrainian court;

III. Recourse to compensation mechanisms.

It is worth considering each of them in more detail.

I. Filing an individual application with the European Court of Human Rights.

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[187] World Bank, *"Updated Ukraine Recovery and Reconstruction Needs Assessment Released,"* February 15, 2024, https://www.worldbank.org/en/news/press-release/2024/02/15/updated-ukraine-recovery-and-reconstruction-needs-assessment-released

[188] Lerner, Adam B., and Pauline Heinrichs. 2024. “The Paradox of International Reparations.” *Review of International Political Economy* 32 (1): 126–53. https://doi.org/10.1080/09692290.2024.2399034

It should be emphasised that direct damage to property is a violation of the negative obligation under Article 1 of Protocol No. 1 to the European Convention, and therefore, persons who have suffered damage as a result of direct actions of the Russian Federation (e.g. destruction of property as a result of a missile hit) may apply to the ECHR with a corresponding individual application.

At the same time, there are a number of issues that may potentially arise at the stage of assessing whether an individual application meets the admissibility criteria, in particular: "*ratione loci*", "*ratione temporis*" and the requirement to exhaust all domestic remedies[189].

a.) the "*ratione loci*" criterion, which is enshrined in Article 1 of the European Convention, requires that the alleged violation of the Convention must have taken place within the jurisdiction of the respondent State or in the territory under its effective control[190]. In view of the above, at first glance, the applicants may claim a violation of Article 1 of Protocol No. 1 by the Russian Federation only if the damage to property occurred in the territory over which the Russian Federation exercises effective control, for example, in the temporarily occupied territory of Ukraine. At the same time, the ECtHR does not always apply this criterion literally. In the context of the Russian-Ukrainian war, it is worth paying attention to the ECtHR judgment in Pad v. Turkey[191], which dealt with the circumstances of the killing of Iranian citizens who were 500 metres from the Turkish border by soldiers of the Turkish Border Guard Service. In this case, the ECtHR found an individual complaint admissible under the *ratione loci* criterion, stating that although the words "within their jurisdiction" in the light of Article 1 of the Convention should be understood to mean that the jurisdictional competence of the state is predominantly territorial, but in exceptional circumstances, the actions of the Contracting States which are carried out outside their territory ("extraterritorial act") may mean that they exercise jurisdiction within the meaning of Article 1, and accordingly, the State may be held liable for violations of the Convention rights and freedoms of persons located in the territory of another State.

Thus, taking into account the above position of the ECHR, persons whose property was damaged as a result of military actions of the Russian Federation (for example, by a missile, unmanned aerial vehicles, etc.), and such property is located on the territory of Ukraine controlled by the Russian Federation, can count on consideration of their application, and such application will not be declared inadmissible in terms of compliance with the *ratione loci* requirement.

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[189] European Court of Human Rights, *Practical Guide on Admissibility Criteria*, updated August 31, 2024, https://www.echr.coe.int/documents/d/echr/admissibility_guide_eng

[190] European Court of Human Rights, *Case of Cyprus v. Turkey*, no. 25781/94, Judgment of 10 May 2001, https://hudoc.echr.coe.int/eng?i=001-59454

[191] European Court of Human Rights, *Pad and Others v. Turkey*, no. 60167/00, Judgment of 28 June 2007, https://hudoc.echr.coe.int/eng?i=001-81672

At the same time, it is also worth taking into account other conclusions of the ECtHR in this context, in particular in the case of Georgia v. the Russian Federation (II)[192], in which the ECtHR concluded that in the case of hostilities, including, for example, armed attacks, bombardments or artillery shelling carried out during an international armed conflict, it is impossible to speak of "effective control" over the territory at all. The very reality of armed confrontation and hostilities between the enemy's armed forces seeking to establish control over the territory in chaos means that there is no such control, and therefore the ECtHR decided that the events that took place during the active phase of hostilities (8-12 August 2008) do not fall within the jurisdiction of the Russian Federation in the context of Article 1 of the European Convention.

Thus, the ECtHR may declare inadmissible statements of persons regarding the circumstances of the destruction of property that occurred during the active phase of hostilities, for example, if the property was destroyed or damaged directly on the contact line.

b.) the criterion of "*ratione temporis*", which provides that the provisions of the Convention do not bind a Contracting Party in respect of any act or fact that took place or any situation that ceased to exist before the date of entry into force of the Convention for that Party[193]. Accordingly, by the same token, the ECtHR cannot consider cases concerning circumstances that occurred after the denunciation of certain provisions or the European Convention as a whole entered into force. The ECtHR reached a similar conclusion in the case of Greece v. the United Kingdom[194], in which it stated that the denunciation of the Convention does not relieve the state of liability for violations that occurred before the denunciation entered into force. This means that the ECtHR retains jurisdiction over events that occurred before the date of the state's official withdrawal from the European Convention.

As a result of the recognition of the actions of the Russian Federation regarding the full-scale invasion of the territory of Ukraine as contrary to the norms and principles of international law and contrary to the values of the Council of Europe by the Resolution of the Committee of Ministers of the Council of Europe CM/Del/Dec(2022)1428ter/2.3 of 16.03.2022 [195], the membership of the Russian Federation was terminated in accordance with Art. 8 of the Statute of the Council of Europe, which resulted from the termination of the European Convention and the

[192] European Court of Human Rights, *Georgia v. Russia (II)*, no. 38263/08, Judgment of 21 January 2021, https://hudoc.echr.coe.int/fre?i=001-207757
[193] European Court of Human Rights, *Blečić v. Croatia*, no. 59532/00, Judgment of 29 July 2004, https://hudoc.echr.coe.int/eng?i=001-72688
[194] European Commission of Human Rights, *Greece v. the United Kingdom*, no. 176/56, Decision of 2 June 1956, https://hudoc.echr.coe.int/eng?i=001-142534
[195] Committee of Ministers of the Council of Europe, *Decision CM/Del/Dec(2022)1428ter/2.3*, March 17, 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5d7d9

jurisdiction of the ECtHR over the Russian Federation in accordance with Article 58(3) of the European Convention.

At the same time, according to part 1 of Article 58 of the European Convention[196], the denunciation of the European Convention takes place six months after the notification of the Secretary General of the Council of Europe (in the case of the Russian Federation, from the moment of its expulsion from the Council of Europe, namely on 16 March 2022).

In view of the above, persons whose property was damaged as a result of military actions of the Russian Federation may apply to the ECtHR only in respect of the destruction or damage to such property that occurred before 16 September 2022.

Given that the full-scale invasion of the territory of Ukraine by the Russian Federation continues to this day, causing enormous damage as a result of hostilities on a daily basis, recourse to the ECtHR is not available to persons whose property has been affected after 16 September 2022.

c.) the requirement to exhaust all available national remedies before applying to the ECtHR is set out in part 1 of Article 35 of the European Convention[197]. The existence of this requirement is due to the fact that applying for protection to the ECtHR should be a subsidiary body in relation to national systems of human rights protection, so it is advisable that national courts first have the opportunity to decide on the compatibility of national legislation with the Convention[198].

At the same time, how should this provision be interpreted in the context of damage caused by the military actions of the Russian Federation? Does this provision require recourse to the national courts of the Russian Federation? In answering this question, it is worth paying attention to the case of Isyeva v. Russia[199], in which the court recognised that in the context of an armed conflict or occupation, the requirement of exhaustion of remedies does not apply if these remedies do not provide equal protection. It is quite obvious to recognise that the hostile policy against Ukraine and the Ukrainian nation, which extends to all authorities of the Russian Federation, is the reason for the absence of objectively fair and effective national remedies, and, accordingly, in the context of cases concerning the destruction or damage to property by military actions of the Russian Federation, does not apply, given the above position of the ECtHR.

Thus, in the context of the assessment of individual applications for violation by the Russian Federation of Article 1 of Protocol No. 1 to the European Convention for compliance

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[196] Council of Europe, *European Convention on Human Rights*, Article 58(1), opened for signature November 4, 1950, European Treaty Series No. 5, https://www.echr.coe.int/documents/d/echr/convention_ENG
[197] Ibid, Article 35
[198] European Court of Human Rights, *Burden v. the United Kingdom*, no. 13378/05, Judgment of 29 April 2008, https://hudoc.echr.coe.int/eng?i=001-86146
[199] European Court of Human Rights, *Isayeva v. Russia*, no. 57950/00, Judgment of 24 February 2005, https://hudoc.echr.coe.int/eng?i=001-68381

with the admissibility criteria, most applications can be successfully declared admissible, but the events of damage to property should be limited in time - until 16 September 2022.

At the same time, just satisfaction, which is awarded in case of violation of the European Convention by a High Contracting Party, also provides for compensation for actual damages suffered, while the applicants bear the burden of proof regarding the violation:

- a causal link between the violation and the damage caused;

- the amount of losses incurred[200].

However, obtaining a positive judgment of the ECHR recognising the violation by the Russian Federation of Article 1 of Protocol No. 1 to the European Convention with the simultaneous award of just compensation does not guarantee actual receipt of compensation.

The peculiarity of international human rights mechanisms is that their jurisdiction extends to the state only if it consents, which is usually provided by ratifying the relevant international legal acts. In this regard, the effectiveness of such mechanisms largely depends on the voluntary implementation by the state of decisions of international bodies, which, in turn, reduces the effectiveness of human rights protection in cases of refusal of a state party to implement the relevant decisions, as is the case with the Russian Federation.

At the same time, the relevant ECHR judgments may be of particular importance as a legal basis for further recourse to international compensation mechanisms and initiatives for compensation for damage caused as a result of armed aggression, which will be mentioned below, but there are no grounds to consider the mechanism of applying to the ECHR with a statement on the violation by the Russian Federation of Article 1 of Protocol 1 to the European Convention as effective.

II. Filing a claim with a Ukrainian court.

In the context of consideration of this issue, it is worth exploring a number of international legal acts on the concept and principle of judicial immunity, namely the European Convention on State Immunity of 1972[201] and the UN Convention on Jurisdictional Immunities of States and Their Property of 2004[202].

In view of the content of these acts, the rule of judicial immunity operates at the international level, according to which any state enjoys immunity in respect of itself and its property from the jurisdiction of the courts of another state.

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[200] European Court of Human Rights, *Practice Direction: Just Satisfaction Claims (Article 41 of the Convention)*, March 28, 2007, amended June 9, 2022, https://www.echr.coe.int/documents/d/echr/pd_satisfaction_claims_eng

[201] Council of Europe, *European Convention on State Immunity*, ETS No. 074, opened for signature May 16, 1972, entered into force June 11, 1976, https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=074

[202] United Nations General Assembly, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, adopted December 2, 2004, https://legal.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf

A violation of judicial immunity is recognised if a court of another state:

- designated a particular state as a party to the court case;

- considers a case concerning the property, rights, obligations and interests that a particular state has.

Thus, according to international law, Ukrainian courts have no right to consider disputes where the Russian Federation is a defendant, nor can they consider cases concerning property, rights and obligations belonging to the Russian Federation.

At the same time, in connection with the large-scale armed aggression of the Russian Federation against Ukraine, the Supreme Court has formed a judicial practice (precedent) in which it has deviated from international principles on the judicial immunity of the Russian Federation, effectively "unleashing" national courts to consider disputes against Ukraine for compensation for damage caused as a result of armed aggression.

The Civil Court of Cassation of the Supreme Court in case No. 308/9708/19[203] for the first time stated the position on non-application of judicial immunity in relation to the Russian Federation. In the decision, the court was guided by the fact that in case of application of the "*tort exception"*, any dispute arising in the territory of Ukraine, even with a foreign country, including the Russian Federation, may be considered and resolved by a Ukrainian court as a proper and competent court. Therefore, when considering a case in which the Russian Federation is identified as a defendant, the court has the right to ignore the immunity of this state and consider cases on compensation for damage caused to an individual as a result of the armed aggression of the Russian Federation. In addition, the court drew attention to an important aspect in the context of the European Convention, stating that upholding the jurisdictional immunity of the Russian Federation would deprive the plaintiff of effective access to court to protect his rights and the right to an effective remedy, which is contrary to the provisions of Articles 6 and 13 of the European Convention.

Currently, there is a very large number of decisions made by Ukrainian courts to recover material and non-pecuniary damage from the Russian Federation on the basis of the civil legislation of Ukraine.

In addition to this legal position, victims of the military actions of the Russian Federation also actively apply the *"alter ego"* principle in court disputes, according to which a legal entity (a company that actually performs the functions of a state, state body, or other public institution) may be liable for the obligations of the state (in particular, for compensation for damage caused by the armed aggression of the Russian Federation).

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[203] Supreme Court of Ukraine, *Case No. 308/9708/19*, Judgment of April 14, 2022, https://reyestr.court.gov.ua/Review/104086064

In its ruling of 20 July 2022 in case No. 910/4210/20[204], the Commercial Court of Cassation of the Supreme Court, in order to avoid abuse of this principle in favour of other foreign companies, which may affect the formation of a favourable investment climate for foreign companies in Ukraine, clearly defined the criteria to be taken into account for the application of the *"alter ego*" principle:

- whether the company is established for commercial purposes;

- whether the company performs functions inherent in government agencies;

- whether such a company carries out other activities and whether they are primary or independent of its public functions;

- the degree of state control over the company;

- whether the company's property is separated from the state's property.

It is worth noting that *the "alter ego*" principle was also the subject of consideration by the European Court of Human Rights in the case of Liseytseva and Maslov v. Russia[205], in which the applicants claimed non-payment of wages by companies that had significant state control. The ECtHR ruled that Russia should be held liable for the unpaid wages, as these companies acted as de facto state institutions.

However, despite the existence of effective remedies at the national level, the stage of enforcement of such decisions remains unregulated, which makes it ineffective in the following respects.

Currently, the Government of Ukraine compensates for the damage caused by the armed aggression of the Russian Federation by paying financial assistance on its own initiative at the expense of the budget, but only individuals can count on compensation[206]. This law is designed primarily to support the population of Ukraine whose housing was destroyed in order to provide them with the conditions for a decent life, while the Ukrainian budget is currently not sufficient to compensate for all material damage to the population of Ukraine.

At the same time, the Government of Ukraine is taking active steps to use the property and funds of the Russian Federation and its residents located in Ukraine as compensation payments, for which purpose the Law of Ukraine "On the Basic Principles of Compulsory Seizure in

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[204] Supreme Court of Ukraine, *Case No. 910/4210/20*, Judgment of July 20, 2022, https://reyestr.court.gov.ua/Review/105612017

[205] European Court of Human Rights, *Liseytseva and Maslov v. Russia*, nos. 39483/05 and 40527/10, Judgment of 9 October 2014, https://hudoc.echr.coe.int/eng?i=001-146774

[206] Verkhovna Rada of Ukraine, *Law No. 2923-IX "On Compensation for Damage and Destruction of Certain Categories of Real Estate Objects as a Result of Hostilities, Terrorist Acts, Sabotage Caused by the Armed Aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of Hostilities, Terrorist Acts, Sabotage Caused by the Armed Aggression of the Russian Federation against Ukraine,"* adopted February 23, 2023, last amended December 11, 2024, https://zakon.rada.gov.ua/laws/show/2923-20#Text

Ukraine of Property of the Russian Federation and its Residents"[207] was adopted. However, the problem with the implementation of the provisions of this Law is that the compulsory seizure of property of the Russian Federation is carried out in the ownership of Ukraine, while the defendants in national cases for compensation for damage caused by the armed aggression of the Russian Federation are the Russian Federation and companies on the *"alter ego*" principle, which requires additional regulation of the procedural aspects of the enforcement of decisions of national courts.

According to the ECtHR case law, the lack of possibility to enforce a court judgment may be regarded as a violation of Article 6 of the European Convention. Although the enforcement of judgments against a foreign state, in particular the Russian Federation, is extremely difficult, Ukraine should demonstrate active efforts to create compensation mechanisms, whether through domestic funds, special legislation or participation in international initiatives. Otherwise, lawsuits against Russia may turn into "symbolic justice", which contradicts the very nature of the right to a fair trial. The above follows from the following legal opinions of the ECtHR:

- the lack of enforcement of court decisions indicates a systemic problem that requires legislative intervention[208];

- the right to judicial protection would be illusory if the legal system allowed a final and binding court decision to remain unenforced to the detriment of the party[209];

- the state has positive obligations to ensure the rights and freedoms guaranteed by the European Convention to all persons under its jurisdiction, including the duty to take diplomatic, economic, judicial or other measures to secure those rights, even where violations are committed by third parties or other states[210].

At the same time, the question arises as to the legality of the seizure of property of residents of the Russian Federation without appropriate compensation in light of Ukraine's fulfilment of its negative obligation under Article 1 of Protocol No. 1 to the European Convention.

Although such a practice may be justified in light of the armed aggression, the absence of any further compensation raises doubts as to compliance with the principle of proportionality, which is key to the Court's case law, as follows from the following positions of the ECtHR:

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[207] Verkhovna Rada of Ukraine, *Law No. 2116-IX "On the Basic Principles of Compulsory Seizure in Ukraine of Objects of Property Rights of the Russian Federation and Its Residents,"* adopted March 3, 2022, last amended December 1, 2023, https://zakon.rada.gov.ua/laws/show/2116-20#Text

[208] European Court of Human Rights, *Burdov v. Russia*, no. 59498/00, Judgment of 7 May 2002, https://hudoc.echr.coe.int/eng?i=001-60449

[209] European Court of Human Rights, *Hornsby v. Greece*, no. 18357/91, Judgment of 19 March 1997, https://hudoc.echr.coe.int/eng?i=001-58020

[210] European Court of Human Rights, *Ilascu and Others v. Moldova and Russia*, no. 48787/99, Judgment of 8 July 2004, https://hudoc.echr.coe.int/fre?i=001-61886

- In the case of Lithgow and Others v. the United Kingdom[211] the Court emphasised that deprivation of property without any form of compensation can be justified only in exceptional circumstances;

- In the case of Holy Monasteries v. Greece[212], the Court emphasised that it was opposed to the complete deprivation of property without compensation, even in extraordinary circumstances.

It is also worth paying attention to the mechanism of recognition and enforcement of court decisions in other countries, which is provided for by the procedural legislation of the respective countries. This mechanism should be used in the case of:

- confidence in the presence of the relevant property and funds of the Russian Federation on the territory of Ukraine;

- the relevant national legislation does not contradict the provisions on which the Ukrainian court's decision was based;

- the political will of the state in which the property of the Russian Federation is located to cooperate with Ukraine in the implementation of court decisions, in particular in terms of compensation for damage caused by armed aggression.

It is worth emphasising that the most significant barrier to the recognition of court decisions on compensation from the Russian Federation in other countries is the existence of judicial immunity, as mentioned above, and the willingness of the courts of the respective countries to derogate from the application of immunity, as is currently being done by Ukrainian courts.

An example is the decision of the International Court of Justice in Germany v. Italy: Greece intervening (2012)[213], which recognised the need for Italian national courts to apply judicial immunity to Germany in cases involving claims of victims of the Second World War. However, it is noteworthy that Italy does not comply with the aforementioned judgment of the International Court of Justice.

Thus, despite the formation of a new case law by the Supreme Court, which allows Ukrainian courts to consider disputes over compensation for material damage from the Russian Federation, the legal framework regulating the stage of enforcement of court decisions is currently not adapted to the current realities, which affects the effectiveness of the national remedy.

III. Recourse to compensation mechanisms.

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[211] European Court of Human Rights, *Lithgow and Others v. the United Kingdom*, nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, and 9405/81, Judgment of 8 July 1986, https://hudoc.echr.coe.int/eng?i=001-57526

[212] European Court of Human Rights, *The Holy Monasteries v. Greece*, nos. 13092/87 and 13984/88, Judgment of 9 December 1994, https://hudoc.echr.coe.int/fre?i=001-57906

[213] International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, https://www.icj-cij.org/case/143

In the context of establishing international compensation mechanisms, the following international instruments are worth paying attention to.

On 28 January 2001, the UN General Assembly Resolution No. A/RES/56/83 approved the draft articles on the Responsibility of States for Internationally Wrongful Acts[214], which states that every internationally wrongful act of a state entails its international responsibility, including, inter alia, compensation for damage (reparations).

On 14 November 2022, the UN General Assembly adopted Resolution No. A/RES/ES-11/5[215], which contains the following:

- recognises that the Russian Federation must be held accountable for any violations of international law that have been committed in Ukraine and against Ukraine;

- recognises the need to establish an international mechanism for compensation for losses, damages and harm caused by the armed aggression of the Russian Federation;

- recommended that member states, in cooperation with Ukraine, establish an international register of losses to record in documentary form the evidence and information contained in the statements regarding losses, damage or injury caused by the armed aggression of the Russian Federation.

In addition, the acts of the Committee of Ministers of the Council of Europe are worthy of attention (Resolution CM/Del/Dec(2022)1442/2.3 of 15.09.2022 [216] and Resolution CM/Res(2023)3 of 12.05.2023[217]), aimed at establishing a compensation mechanism and a register of losses to implement the above-mentioned UN General Assembly Resolution.

Currently, the register of damages is already actively functioning and is available for registration of all facts of damage and losses caused to Ukraine and its citizens[218]. Among other things, the grounds for entering the relevant information on the fact of damage are the relevant decisions of national courts and judgments of the ECHR.

At the same time, no compensation is currently being paid from the funds, property and assets of the Russian Federation seized by countries around the world in response to the outbreak of a full-scale war, as there are many questions about legislative changes and procedures that may affect compensation, which are currently the subject of active international discussions.

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[214] United Nations General Assembly, *Responsibility of States for Internationally Wrongful Acts*, A/RES/56/83, adopted December 12, 2001, https://docs.un.org/A/RES/56/83

[215] United Nations General Assembly, *Resolution ES-11/5 "Furtherance of Remedy and Reparation for Aggression against Ukraine"*, adopted November 14, 2022, https://undocs.org/A/RES/ES-11/5

[216] Committee of Ministers of the Council of Europe, *Decision CM/Del/Dec(2022)1442/2.3*, 1442nd meeting, 14–15 September 2022, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a8135a

[217] Council of Europe, Committee of Ministers. *Resolution CM/Res(2023)3 establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine*. Adopted 12 May 2023. https://rm.coe.int/0900001680ab2595

[218] Council of Europe, *Register of Damage for Ukraine – Homepage*, accessed April 10, 2025, https://rd4u.coe.int/uk/

It should be emphasised that the establishment of the Compensation Fund and the Compensation Commission for consideration of applications for compensation and the need for the Government of Ukraine to take active steps in this regard are in fulfilment of its positive obligation under Article 1 of Protocol No. 1 to the European Convention, which provides for the need to ensure an effective legal mechanism through which a person may seek protection or compensation for damage to his or her property.

The analysis of national and international legislation, as well as the practice of national courts and the ECHR, gives grounds to conclude that there are currently no effective remedies aimed at compensating for the damage caused by the Russian Federation, while the Government of Ukraine, in cooperation with other countries, is taking active steps to regulate the use of frozen assets of the Russian Federation by foreign states as compensation for losses caused by armed aggression.

CONCLUSIONS

The main conclusion that emerges from the results of the study is that despite the difficulties faced by Ukraine in the context of the Russian-Ukrainian war, human rights and freedoms continue to be a priority for the state. Nevertheless, it is undeniable that the full-scale armed aggression of the Russian Federation against Ukraine is making adjustments to the context of Ukraine's human rights and freedoms, creating new challenges for the proper implementation of the provisions of the Constitution of Ukraine and the Convention for the Protection of Human Rights and Fundamental Freedoms, which consist of both violations of human rights and freedoms by the Russian Federation as a result of a full-scale invasion and forced restrictions on human rights and freedoms by Ukraine in order to take defence measures to ensure the security of the country. The study revealed a number of legislative and procedural shortcomings that affect the proper protection of human rights and freedoms by Ukraine, even in the context of derogation from obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms due to martial law, which was the purpose of this master's thesis. The author outlines the ways in which the shortcomings can be remedied in the Recommendations section.

In addition, this master's thesis makes it possible to draw the following conclusions:

1. The study of the historical aspect of the application of the martial law regime by countries around the world gives grounds to conclude that there is no common approach to understanding the concept of martial law, which was considered by some countries as a means of self-defence, and by others as a way of organising power in the captured (occupied) territories of other countries. The imposition of martial law was often accompanied by the granting of broad powers to the military without appropriate legislative restrictions to effectively counter threats to national security, while such powers were often abused by the military, leading to the brutal and inhumane treatment of the local population. Over time, as countries developed and the international recognition of fundamental human values, including human rights and freedoms, through the introduction of new branches of international law (international humanitarian law and international human rights law), countries were forced to clearly regulate the powers of the military to prevent unjustified violations of human rights and freedoms. In addition, some countries (in particular, Austria), in order to avoid cases of abuse of martial law, have refused to apply this legal regime in emergency situations. At the same time, most countries, in order to avoid cases of abuse of the right to introduce martial law, apply a system of checks and balances, which requires coordinated actions of several authorities or officials to introduce such a regime.

At present, most countries, including Ukraine, consider martial law as a legal regime introduced to ensure national security, territorial integrity of the state and repel armed aggression, which is accompanied by a number of powers to the military command to take appropriate measures to fulfil the purpose of martial law, which have adverse consequences in the form of restriction of human rights and freedoms.

2. When studying the practice and legal positions of the European Court of Human Rights on the need for High Contracting Parties to respect human rights and freedoms in emergency situations, it was found that derogation from the obligations of the Convention under Article 15 does not release the State Party from the obligation to ensure human rights and freedoms, but instead makes it possible to derogate from obligations only to the extent required by the extreme necessity to avert a threat to the existence of the nation, and only in respect of those rights, derogation from which does not Thus, during martial law, provided that Ukraine uses the right to derogate from the obligations of the Convention, 3 groups of human rights and freedoms are distinguished:

- Absolute rights that cannot be restricted under any circumstances (prohibition of slavery, prohibition of torture, prohibition of the death penalty, prohibition of punishment without law, the right not to be punished twice);

- rights and freedoms that can be restricted only to the extent permitted by the Convention (prohibition of derogation), including in an emergency situation (all absolute rights and the right to life, except in cases of death as a result of lawful military action);

- rights and freedoms from which derogation is possible (right to personal integrity, right to a fair trial, right to respect, freedom of expression, freedom of thought, conscience and religion, freedom of assembly and association, right to an effective remedy, etc.)

According to the ECHR case law, the Court, in order to assess the compliance of a High Contracting Party with Article 15 of the European Convention when interfering with human rights (justification of interference with the right, compliance with the principle of absolute necessity), takes into account the following criteria:

- whether the High Contracting Party has notified the derogation in accordance with the procedure set out in Article 15 of the European Convention;

- whether a certain situation threatens the "life of the nation";

- whether it is possible to overcome the situation without derogating from the provisions of the European Convention;

- if compliance with the European Convention does not fully avert the threat to the nation, what extent of derogation from the provisions of the European Convention is necessary and

proportionate to overcome the crisis situation that threatens the nation (i.e., the measure must be proportionate to the severity of the situation);

- whether the interference relates to rights in respect of which no derogation is allowed;

- whether the derogation from the obligations to ensure human rights and freedoms does not contradict other international obligations of the state.

3. For Ukraine, in the light of the Russian-Ukrainian war, derogation from the obligations of the European Convention is not a novelty. Ukraine has been applying the right of derogation since 2015, due to the armed conflict in eastern Ukraine, but the derogation applied exclusively to the territory of the anti-terrorist operation and the Joint Forces Operation. Since the beginning of the full-scale invasion of the territory of Ukraine by the Russian Federation, Ukraine has applied the right of derogation under Article 15 of the European Convention, which applies to the entire territory of Ukraine and is still in force, in respect of the following articles:

- Article 8 of the Convention: the right to respect for private and family life;

- Article 10 of the Convention: freedom of expression;

- Article 11 of the Convention: freedom of assembly and association;

- Article 1 of Protocol No. 1 to the Convention: the right to peaceful enjoyment of possessions;

- Article 2 of Protocol No. 1 to the Convention: the right to education;

- Article 3 of Protocol No. 1 to the Convention: the right to free elections;

- Article 2 of Protocol No. 4 to the Convention: the right to freedom of movement.

According to the national legislation of Ukraine, it is the Decree of the President of Ukraine "On the introduction of martial law" that determines the list of rights from which derogation may be made in accordance with Article 64 of the Constitution of Ukraine. Derogation from human rights applies exclusively to measures applied by the military command and provided for in Art. 8 of the Law of Ukraine "On the Legal Regime of Martial Law", namely to strengthen the protection of critical infrastructure facilities, introduce labour service, compulsorily alienate property for defence purposes, use property and labour resources of enterprises for defence purposes, introduce curfews, introduce a special regime of entry and exit to the territory of Ukraine, prohibit peaceful assemblies, rallies, demonstrations, raise the issue of banning the activities of political parties, restrict the right to determine the permanent place of residence, and restrict the right to freedom of expression.

Based on the analysis of the national legislation of Ukraine and the European Convention, it can be concluded that derogation from the obligations to ensure human rights and freedoms under Article 64 of the Constitution of Ukraine and Article 15 of the European Convention

applies only to measures applied in accordance with Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law", and only within the limits:

- the list of constitutional rights and freedoms specified in the Presidential Decree (at the national level), and

- the list of articles of the European Convention from which the Secretary General of the Council of Europe has been notified (at the international level).

In other circumstances, the Government of Ukraine cannot invoke derogation under Article 15 of the European Convention and Article 64 of the Constitution of Ukraine, namely by adopting relevant laws or regulations that result in interference with human rights.

In the course of the study of the Constitution of Ukraine on the possibility of derogation from obligations to ensure human rights and freedoms (Article 64 of the Constitution of Ukraine), it was found that the domestic legislator, instead of the term "derogation" used in international acts, used the usual concept of "restriction of rights and freedoms", which may cause certain inconsistencies, given that "restriction of rights and freedoms" is not identical to the concept of "derogation". Thus, the wording is not sufficiently correct, as most of the mentioned rights can be restricted even under normal circumstances according to the ECHR case law. Taking into account the position of the Constitutional Court of Ukraine in its decision in case No. 1-17/2005, the wording "rights and freedoms may not be restricted" should be applied exclusively to absolute rights, the narrowing of the content and scope of which is indeed not allowed under any circumstances. This requires appropriate amendments to the legislation of Ukraine, which will be discussed in more detail in the Recommendations section.

At present, there are no decisions in the ECHR case-law assessing compliance with Article 15 of the European Convention by the Government of Ukraine in the context of the Russian-Ukrainian war due to the long duration of the proceedings, which averages 5-6 years, and, accordingly, the issue of human rights observance is still a subject of academic debate.

4. According to the ECHR case law, the organisation of judicial supervision (control) in an emergency situation is crucial in the context of observance of human rights and freedoms, especially in the case of derogation by the Government under Article 15 of the European Convention.

Despite the possibility of derogation from Article 6 of the European Convention (which is not prohibited by Article 15), Ukraine ensures the right to a fair trial under general conditions, even during martial law, as Article 64 of the Constitution of Ukraine expressly prohibits derogation from this right.

Undoubtedly, the full-scale invasion of the territory of Ukraine by the Russian Federation has affected the administration of justice by Ukrainian courts through regular and prolonged air raids, prolonged power outages, damage or destruction of court buildings, etc.

According to the Recommendations of the Council of Judges of Ukraine, Ukrainian courts are recommended to postpone consideration of cases and give preference to holding court hearings via videoconference if necessary, if it threatens the lives of judges and litigants. At the same time, the above-mentioned consequences of the Russian-Ukrainian war have added to the problem of excessive court workload and, as a result, the long duration of the consideration of cases that took place even before the full-scale invasion of Ukraine by the Russian Federation.

The main problem that arises in the context of the implementation of Article 6 of the European Convention is the violation of the principle of reasonableness of terms, which is affected by the consequences of the Russian-Ukrainian war. It has been established that on average, the consideration of one case takes 1-2 years (despite the fact that the relevant procedural codes contain specific time limits for consideration of cases), depending on the territorial, institutional and substantive jurisdiction, which makes judicial protection ineffective, especially in light of the need for judicial oversight of interference with human rights that enjoy derogation under Article 15 of the Convention. This requires decisive and immediate action by the Government of Ukraine.

In addition, gross violations of the Constitution of Ukraine were found in Section 9-1 of the Criminal Procedure Code of Ukraine (which regulates the peculiarities of conducting trials and pre-trial investigations under martial law), which provides that if an investigating judge cannot perform the functions established by the Criminal Procedure Code of Ukraine, such functions are transferred to the prosecutor's office, which is a violation of Article 55 of the Constitution of Ukraine and Article 6 of the Convention (right to a fair trial). In addition, such provisions are a gross violation of Article 124 of the Constitution of Ukraine, which provides that the delegation of court functions, as well as the appropriation of these functions by other bodies or officials, is not allowed.

5. The main consequence of the Russian-Ukrainian war is the large losses caused by the hostilities to both Ukraine and individuals.

Based on the results of the study of the available ways to compensate for the damage caused by the military aggression of the Russian Federation, the existence of 3 main mechanisms was established:

- by filing an application with the ECHR;
- by filing a claim with a national court to recover damages from the Russian Federation;
- applying for compensation to an international compensation mechanism.

At the same time, none of them is currently effective due to the problems of enforcement of the relevant decisions (of the ECHR and Ukrainian courts), as voluntary compliance by the Russian Federation is unlikely. Thus, the Government of Ukraine faces the issue of the possibility of obtaining appropriate compensation (reparations) from the frozen assets of the Russian Federation by other states.

At present, both the UN and the Council of Europe recognise the need to bring the Russian Federation to justice by paying reparations. In pursuance of the relevant decisions, in cooperation with foreign partner countries, the Register of Damages was successfully established, which records the amount of damage caused to Ukraine and its citizens, while the international compensation mechanism (establishment of a Compensation Commission to review applications and a Compensation Fund) is still under development, as it requires the adaptation of foreign laws to regulate the procedures for the use of frozen assets of the Russian Federation.

RECOMMENDATIONS

Based on the results of the research conducted within the framework of this master's thesis, it is recommended:

1. To amend Article 5 of the Law of Ukraine "On the Legal Regime of Martial Law", according to which the Decree of the President of Ukraine on the introduction of the legal regime of martial law shall enter into force from the moment of its issuance, with the mandatory subsequent approval or cancellation of the Decree by the Verkhovna Rada of Ukraine;

2. To restate paragraph 20 of part 1 of Article 106 of the Constitution of Ukraine in a new wording: *"The President of Ukraine decides, in accordance with the law, on general or partial mobilisation and the introduction of martial law in Ukraine or in certain areas of Ukraine in the event of a threat of attack, a threat to the state independence of Ukraine, or armed aggression against Ukraine*."

3. Amend Article 64 of the Constitution of Ukraine and the relevant articles of the Law of Ukraine "On the Legal Regime of Martial Law" to replace the wording *"restriction of human rights and freedoms"* with the wording *"derogation from the obligation to ensure human rights and freedoms*" in order to implement the legal nature of derogation within the meaning of Article 15 of the European Convention in national legislation;

4. To supplement Article 22 of the Constitution of Ukraine with part four as follows: *"Human rights and freedoms may be restricted if the interests of society so require, in compliance with the principle of proportionality."*

5. To supplement Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law" with part three as follows: *"The measures of the legal regime of martial law set forth in part 1 of this Article, which stipulate derogation from the obligations to ensure human rights and freedoms, shall be applied within the objectively necessary limits to avert a threat to the existence of the Ukrainian nation and to effectively repel armed aggression."*

6. To implement Article 15(3) of the European Convention amend Article 24 of the Law of Ukraine "On the Legal Regime of Martial Law" to establish the obligation of the Government of Ukraine to notify the Secretary General of the Council of Europe of the derogation from the obligations of the European Convention in connection with the introduction of the legal regime of martial law;

7. Under the legal regime of martial law, the Government of Ukraine should refrain from disproportionate and unjustified interference with the right to freedom of expression and ensure freedom of media activity;

8. To review Section IX-1 of the Criminal Procedure Code of Ukraine "Special regime of pre-trial investigation and court proceedings under martial law" to ensure that the provisions of the section regarding the transfer of powers of investigative courts to the relevant prosecutor's offices comply with Article 6 of the European Convention and Article 124(2) of the Constitution of Ukraine (prohibition of delegation of court functions to other authorities);

9. To the Government of Ukraine to take immediate and decisive action in the context of the systematic failure of Ukrainian courts to comply with the principle of reasonableness of the time limits for consideration of a case, enshrined in Article 6 of the European Convention, in particular by increasing the number of judges;

10. In order to counteract the consequences of the armed aggression of the Russian Federation and ensure the effective and uninterrupted administration of justice in Ukraine, provide Ukrainian courts with appropriate technical means to consider cases via video conferencing, provide Ukrainian courts with autonomous means of generating electricity in light of periodic power outages and improve the system of electronic justice (Unified Judicial Information and Telecommunication System);

11. To the Government of Ukraine to accelerate the process of establishing the Kyiv City District Administrative Court pursuant to the Law of Ukraine "On Liquidation of the District Administrative Court of Kyiv and Establishment of the Kyiv City District Administrative Court";

12. Develop a regulatory framework to enable the enforcement of Ukrainian court decisions on compensation for damage caused by the armed aggression of the Russian Federation at the expense of assets and funds belonging to the Russian Federation and its residents that have been forcibly alienated by the Government of Ukraine in accordance with the Law of Ukraine "On the Basic Principles of Forcible Seizure of Property Rights of the Russian Federation and its Residents in Ukraine";

13. To the Government of Ukraine to use all possible diplomatic measures to encourage countries to participate in the establishment of an international compensation mechanism (Compensation Commission for the Review of Applications and the Compensation Fund) aimed at compensating for the damage caused by the armed aggression of the Russian Federation.

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ABSTRACT

The master's thesis examines the legal nature of the martial law regime, the impact of the armed aggression of the Russian Federation on the implementation and protection of fundamental human rights and freedoms in Ukraine, as well as the issue of compliance with the principle of proportionality of restrictions applied in an emergency situation, in particular under martial law. The work covers both theoretical and practical aspects: from the historical experience of martial law in different countries of the world to the assessment of actual measures taken in Ukraine during the martial law. Particular attention is paid to the analysis of Ukraine's derogation from its obligations under the European Convention on Human Rights, as well as to the problems of exercising the right to a fair trial and the possibilities of compensation for damage caused as a result of armed aggression of Russian Federation. The work contains the author's recommendations for improving the legislative regulation and mechanisms for the protection of human rights during the armed conflict.

Keywords: derogation, restriction of human rights and freedoms, martial law, justice, compensation for damage.

SUMMARY

The master's thesis is devoted to the study of mechanisms for ensuring human rights and freedoms under martial law, in particular in the context of the armed aggression of the Russian Federation against Ukraine. The first chapter examines the essence and legal regulation of martial law, as well as the experience of its application in other states. In the second section, the author analyses the peculiarities of human rights restrictions during martial law based on the case law of the European Court of Human Rights and assesses the legality of the measures taken by Ukraine. The third section examines the challenges associated with the organisation of justice in times of war and explores the ways of compensation for the damage caused by hostilities through international and national mechanisms. The work emphasises the importance of preserving human rights standards even in a state of emergency, taking into account Ukraine's international obligations and its strategic course towards European integration. The author proposes a number of specific amendments to the legislation aimed at improving the effectiveness of the martial law regime and human rights protection mechanisms during armed conflict.