MINISTRY OF INTERNAL AFFAIRS OF UKRAINE
NATIONAL ACADEMY OF INTERNAL AFFAIRS

# SCIENTIFIC JOURNAL

## OF THE NATIONAL ACADEMY OF INTERNAL AFFAIRS

*Scientific Journal*

**Volume 29, No. 3**
2024

Kyiv
2024

ISSN 2410-3594
E-ISSN 2786-7382
DOI: 10.56215/naia-herald/3.2024

**Co-founders:**
National Academy of Internal Affairs,
LLC "Scientific Journals"

**Year of foundation: 1996**

*Recommended for printing and distribution*
*via the Internet by the Academic Council*
*of National Academy of Internal Affairs*
*(Minutes No. 18 of August 27, 2024)*

**Media identifier in the Register of Media Entities R30-02450**
Decision of the National Council of Ukraine
on Television and Radio Broadcasting
of 11 January 2024 No. 26

**The collection is included in the list of professional publications of Ukraine**
Category "B". Branch of sciences – legal, specialty – 081 "Law"
(order of the Ministry of Education and Science of Ukraine of October 15, 2019, No. 1301)

**The collection is presented international scientometric databases, repositories and scientific systems**: Index Copernicus International, ERIH PLUS, Google Scholar, Vernadsky National Library of Ukraine, Electronic repository NAIA, DOAJ, Polska Bibliografia Naukowa, UCSB Library, Dimensions, Cambridge University Library, Leipzig University Library, European University Institute, SOLO – Search Oxford Libraries Online, University of Hull Library, University of Oslo Library, Zendy, OUCI (Open Ukrainian Citation Index), Worldcat

Scientific Journal of the National Academy of Internal Affairs / Ed. by S. Cherniavskyi (Editor-in-Chief) et al. Kyiv: National Academy of Internal Affairs, 2024. Vol. 29, No. 3. 96 p.

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МІНІСТЕРСТВО ВНУТРІШНІХ СПРАВ УКРАЇНИ
НАЦІОНАЛЬНА АКАДЕМІЯ ВНУТРІШНІХ СПРАВ

# НАУКОВИЙ ВІСНИК
## НАЦІОНАЛЬНОЇ АКАДЕМІЇ ВНУТРІШНІХ СПРАВ

*Науковий журнал*

**Том 29, № 3**
2024

Київ
2024

ISSN 2410-3594
E-ISSN 2786-7382
DOI: 10.56215/naia-herald/3.2024

**Співзасновники:**
Національна академія внутрішніх справ,
ТОВ «Наукові журнали»

**Рік заснування: 1996**

*Рекомендовано до друку та поширення*
*через мережу Інтернет Вченою радою*
*Національної академії внутрішніх справ*
*(протокол № 18 від 27 серпня 2024 р.)*

**Ідентифікатор медіа в Реєстрі суб'єктів у сфері медіа R30-02450**
Рішення Національної ради України
з питань телебачення і радіомовлення
від 11 січня 2024 року № 26

**Збірник входить до переліку фахових видань України**
Категорія «Б». Галузь наук – юридичні, спеціальність – 081 «Право»
(наказ Міністерства освіти і науки України від 15 жовтня 2019 р. № 1301)

**Збірник представлено у міжнародних наукометричних базах даних, репозитаріях та пошукових системах**: Index Copernicus International, ERIH PLUS, Google Scholar, Національна бібліотека України імені В. І. Вернадського, Електронний репозитарій НАВС, DOAJ, Polska Bibliografia Naukowa, UCSB Library, Dimensions, Cambridge University Library, Leipzig University Library, European University Institute, SOLO – Search Oxford Libraries Online, University of Hull Library, University of Oslo Library, Zendy, OUCI (Open Ukrainian Citation Index), Worldcat

Науковий вісник Національної академії внутрішніх справ : наук. журн. / [редкол.: С. Чернявський (голов. ред.) та ін.]. – Київ : Нац. акад. внутр. справ, 2024. – Т. 29, № 3. – 96 с.

**Адреса редакції**:
Національна академія внутрішніх справ
03035, пл. Солом'янська, 1, м. Київ, Україна
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**SCIENTIFIC JOURNAL**
OF THE NATIONAL ACADEMY OF INTERNAL AFFAIRS
Volume 29, No. 3

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# НАУКОВИЙ ВІСНИК
НАЦІОНАЛЬНОЇ АКАДЕМІЇ ВНУТРІШНІХ СПРАВ
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Том 29, № 3

## ЗМІСТ

UDC 343.9
DOI: 10.56215/naia-herald/3.2024.09

# The system of prevention of offences in the field of public procurement during martial law in Ukraine in comparison with the European Union

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■ **Abstract.** The issue of public procurement, particularly in the defence sector, has become especially pressing during the period of Russian aggression in Ukraine. The risk of corruption in this area is significant and can have fatal consequences for the state. The purpose of this article was to review the system for countering and preventing violations in the field of public procurement, which was created in response to the challenges of martial law in Ukraine. A comparison of this system with the corresponding mechanisms of the European Union was conducted. The methodological basis of the article was a dialectical approach to analysing the crime prevention system in the field of public procurement in Ukraine and worldwide. The study employed methods of formal logic, as well as systemic-structural, systematisation, generalisation, forecasting, phenomenological, comparative-legal, and comparative analysis. Scientific approaches to preventing offences in the field of public procurement in several foreign countries were examined, as well as the main rules and standards introduced in the European Union in this field. It was substantiated that the system for preventing offences in the field of public procurement under martial law in Ukraine is not optimal, and this also applies to EU countries, despite the collective international and national measures taken. It was argued that public procurement is inextricably linked with politics and is used as a tool for achieving the strategic objectives of a particular state. The issue of preventing corruption offences in the field of public procurement is extremely relevant for researchers, and the results of its thorough study will enable Ukraine to achieve significant progress in combating this phenomenon, in addition to the measures already taken by the state during martial law

■ **Keywords:** counteraction; Prozorro system; criminality; corruption; public procurement organisation

■ **Suggested Citation:**
Busol, O., & Romaniuk, B. (2024). The system of prevention of offences in the field of public procurement during martial law in Ukraine in comparison with the approaches of the European Union. *Scientific Journal of the National Academy of Internal Affairs,* 29(3), 9-26. doi: 10.56215/naia-herald/3.2024.09.

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■ Received: 01.06.2024; Revised: 02.08.2024; Accepted: 27.08.2024

## Introduction

In modern society, the demand for the inadmissibility of corruption has increased significantly. Accordingly, tolerance to corruption is decreasing. Public procurement is no exception in this context. Notably, an increase in high-profile cases of corruption committed by renowned top-ranked political actors is observed around the world, as stated by international organisations. This is why the present study is relevant, apart from the fact of absence of research papers that address the issues of public procurement in Ukraine as an integral system that cannot function effectively without considering the rules established in the European space.

Corruption in Ukraine is a systemic phenomenon that occurs in economic, financial, environmental, labour, and civil legal relations. Corruption crimes, despite the punitive measures taken by the government, have become a genuine threat to Ukraine's national security. They threaten the stability of society, causing severe damage to its socio-economic development and the country's political image on the global stage.

This is due to chaotic processes, specifically privatisation, which began in 1992, with the real banking reform starting only in 2014-2015, which is still underway. Therefore, Ukraine has not been able to become a rich country with a market economy and a prominent level of social security for its population, while analogous reforms in Poland, the Czech Republic, the Baltic states, and other countries of the former socialist camp were carried out in the main industries within only 2-5 years. For instance, in Poland, systemic changes to stabilise the economy began simultaneously with the introduction of well-known unpopular financial steps – the so-called "shock therapy" in the banking sector. However, Poland managed to achieve significant political and economic outcomes in a matter of some years and become a member of the European Union and NATO (Leszek Balcerowicz: the expression…, 2015).

Having started the fight against corruption, including as a response to the demands of Western countries, Ukraine directed its efforts towards introducing punitive measures, and combating this phenomenon at the domestic and bureaucratic levels. However, steps to tackle political corruption as the tip of the iceberg and the need to take systemic preventive actions were ignored. Being ignored, political corruption has strengthened over the years and considerably weakened the political foundations of the Ukrainian state, government authorities, economy, and state institutions for ensuring its security. As a result, Ukraine had become exposed to the threat of encroachment on its sovereignty and independence by a neighbouring aggressor state.

A.M. Cheredarchuk (2021b) addressed the issue of criminal law support for the protection of public procurement. C. Falvo & F. Lichère (2023) investigated local public procurement in France with special reference to foods, namely, the tools that exist in French legislation. A. Iurascu (2023) described and compared the development of green public procurement (GPP) criteria in the EU, specifically in Italy. D. Rathi *et al.* (2024) addressed gender issues in procurement. W. Janssen & R. Caranta (2023) offered an in-depth assessment of the shift towards mandatory sustainability requirements in EU public procurement legislation. M. Andhov & F. Muscaritoli (2023) addressed the issue of climate change in the context of public procurement in legal discourse. T. Karabin & A. Bilash (2021) considered public procurement in the context of special administrative law and concluded that the institute of public procurement's legal regulation in Ukraine is at the development stage. Various aspects of organised crime in public procurement were also considered by M. Fazekas *et al.* (2021), E. Bosio *et al.* (2022), D. Rathi (2024). The findings of the cited researchers formed the basis for the present study.

To identify the key characteristics of the system of combating and preventing offences in public procurement in Ukraine, which was built in a short period of wartime, the novel approaches were compared with the established ones, as well as with the EU approaches that are undergoing improvement. The findings of this study will be helpful at the national level both today and in the future.

## Materials and Methods

The methodology of this study was based on a dialectical approach, which helped to analyse and identify contradictions in the system of prevention of crimes in the field of public procurement in the world. The study employed the general scientific methods of analysis, synthesis, induction, deduction, analogy, and abstraction. Along with these methods of formal logic, the study also used systemic and structural methods, forecasting, comparative legal, synergetic, phenomenological, and comparative methods. The investigation of the effectiveness of the system of rules by identifying advantages and disadvantages in compliance with public procurement legislation was based on the concept of legal effectiveness adopted as a foundation in most European Union states. The content analysis used in the study of sources, the terminology established in the EU and Ukraine, and the phenomenological method revealed a paradox in the useful nature of corruption for some states.

The phenomenological method was employed to elucidate the mechanism of individual criminal behaviour among corrupt officials, the impact of factors corruption in individual states. The comparative method enabled the identification of commonalities

and differences between different socio-cultural systems through comparison. The comparative legal method was used to compare certain provisions of Ukrainian and international anti-corruption legislation. Based on the results of the study, its respective conclusions were formulated using the method of generalisation.

The method of generalisation and comparison emphasised the innovations that have been recently introduced in public procurement in Ukraine and highlighted the differences with EU approaches. The method of legal analysis outlined the ways of development of Ukrainian and international legislation in this area. The systematisation method helped to classify the types of state control over compliance with the requirements of legislation in public procurement in Ukraine. Thanks to the analysis of EU Directives[1,2,3] regulating the procurement process, the effectiveness of the process of preventing offences in public procurement in EU countries was determined, with the rules and regulations vulnerable to corruption offences identified. The study also reviewed and analysed relevant scientific papers of Ukrainian and foreign researchers on the investigated subject. The conclusions drawn in previous studies have become the basis for comprehensive research of the effectiveness of anti-corruption in Ukraine. Furthermore, public information from official representations of state and international bodies and organisations on the respective websites provided the basis for the conclusions of this study.

## Results and Discussion

Public procurement is defined as a monetary contract concluded between a public procuring entity and a private economic operator, which is intended to procure works, products, or services necessary to achieve institutional goals. The public procurement sector is characterised by one of the highest levels of corruption and other related criminal offences. Unlawful actions in this area lead to negative consequences for the state budget, namely the diversion of budget funds into the shadow economy. This represents a significant threat to the national security of the state, as defined in "Strategy for the Development of the Defence Industry of Ukraine"[4]. A study by the National Agency for the Prevention of Corruption revealed that in 2022, 12,345 public procurements were made in Ukraine under the simplified procedure through the Prozorro system, with a total value of UAH 123 billion. Of these, 28% were related to the defence and security needs of the state. The NACP identified 456 violations in these procurements, including instances where the procurement item did not align with the contractor's qualification criteria, where the terms of the contract were not adhered to, and instances of conflict of interest between the procuring entity and the contractor. Furthermore, the Office of the Prosecutor General of Ukraine reported that between January and August 2023, law enforcement agencies in Ukraine registered 132 criminal offences in the Unified Register of Pre-trial Investigations for committing offences under Article 191 of the Criminal Code of Ukraine, namely misappropriation, embezzlement, or seizure of property through abuse of office committed on a particularly large scale (Kolomiiets, 2023). Ukraine's modern public procurement system is implemented primarily through the Prozorro system, which has been recognised by the World Bank as meeting its transparency requirements. In 2023, the volume of procurement through this system increased and reached UAH 480 billion, a threefold increase compared to 2022. Thus, as of the beginning of 2024, over 80% of procurement funds were spent through the Prozorro system, even in the context of a full-scale war. The UK aid TAPAS project was the inaugural entity to utilise the Prozorro system for the tenders pertaining to procurement of donor funds. It is anticipated that the EBRD and other international partners will take part in this process and utilise the Prozorro system to facilitate the reconstruction of Ukraine. In 2022-2024, the system underwent certain changes caused by the influence of wartime requirements. This has involved a reduction in the duration of procedures, the ability to conceal sensitive information, and the scaling up of a procurement tool such as Prozorro (Ministry of Economy of Ukraine, 2023).

It can be observed that almost every case of a public procurement crime related to the Ministry of Defence of Ukraine during martial law becomes a high-profile case, falling under the scrutiny of a diverse range of active members of society, including journalists, non-governmental organisations (NGOs), and international partners. Despite the implementation of reforms, law enforcement agencies continue

[1] Directive of the European Parliament and of the Council No. 2014/23/EU "On the Award of Concession Contracts". (2014, February). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023.
[2] Directive of the European Parliament and of the Council No. 2014/24/EU "On Public Procurement and Repealing Directive 2004/18/EC". (2014, February). Retrieved from https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjimy7tt61z3.
[3] Directive of the European Parliament and of the Council No. 2014/25/EU "On Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC". (2014, February). Retrieved from https://eur-lex.europa.eu/eli/dir/2014/25/oj.
[4] Resolution of the National Security and Defence Council of Ukraine No. 372/2021 "Strategy for the Development of the Defence Industry of Ukraine". (2021, August). Retrieved from https://zakon.rada.gov.ua/laws/show/372/2021#Text.

to detect and investigate corruption offences in public procurement committed by senior officials during martial law. One example is the performance of the High Anti-Corruption Court, which placed the former First Deputy Head of the Economic Support Department of the Security Service of Ukraine under nightly house arrest. He is suspected of embezzling UAH 26 million for fuel procurement for the service in 2022. The Appeals Chamber of the High Anti-Corruption Court ordered that the former head of the Defence Ministry's Military and Technical Policy Department be held in custody until 8 April. He is one of the suspects in the embezzlement of UAH 1.5 billion for the purchase of ammunition for the Ukrainian Armed Forces[1].

Corruption in public procurement within the Ministry of Defence of Ukraine was already occurring prior to the imposition of martial law. However, the introduction of martial law made it easier for such acts to be committed, as a sizeable proportion of procurements are now conducted in secrecy. One illustrative example is the procurement agreement for catering services in 2023 between the Ministry of Defence of Ukraine and Active Company LLC. This agreement stipulates that the cost of certain food products for the needs of the military in some regions increased by 266% compared to 2021. This figure, even when adjusted for inflation at 26%, appears to be excessive. Furthermore, journalists and researchers are interested in the choice of the contractor (Active Company LLC) by the Ministry of Defence of Ukraine. Notably, this legal entity has a charter capital of one thousand hryvnias. Furthermore, in 2021, the tax service cancelled the VAT payer certificate of this legal entity due to the lack of supplies and failure to submit tax returns. In 2019, Active Company LLC was involved in a criminal proceeding when it allegedly submitted a forged certificate to take part in a tender for the supply of beef for penitentiary institutions and pre-trial detention centres of the State Criminal Enforcement Service (Nikolov, 2023).

The National Anti-Corruption Bureau of Ukraine (NABU) has corroborated the existence of a corruption scheme that permits the significant overpricing of specific product categories. In this manner, dishonest contractors can accrue excessive profits, which enable them to profit from the army during the full-scale aggression of the Russian Federation. According to official data of the National Anti-Corruption Bureau of Ukraine, certain goods were procured at prices that were considerably higher than the market value. Other categories of products that were procured were not included in the military's diet. The current procurement system permits suppliers to engage in abusive pricing practices for popular product groups: eggs are sold at a premium price, while salmon and blueberries, which are not included in the military diet, are sold at prices that are several times lower than the market price (NABU, 2023).

In 2023, a scandal erupted concerning the purchase of summer jackets for the Ukrainian Armed Forces at the price of winter jackets. Journalists later discovered that one of the owners of the Turkish company that the Ministry of Defence of Ukraine had signed a contract with was the nephew of a member of parliament. In the wake of the revelation of billions of dollars in embezzled public funds in procurement, the Ministry of Defence of Ukraine established its own anti-corruption unit, the Department for the Prevention and Detection of Corruption. The primary objective of the recently established unit is to advocate and operationalise the tenet of absolute intolerance towards corruption (Romanyk, 2023).

On 29 December 2023, the NABU and the Specialised anti-corruption prosecutor's office submitted a case to the court on charges of abuse of power in the procurement of food services for the Armed Forces of Ukraine in 2021 (National Anti-Corruption Bureau of Ukraine, 2023). The case was submitted with the qualification of the crime under Part 2 Art. 28, Part 1 Art. 114-1, Part 2 Art. 28, Part 2 Art. 364 of the Criminal Code of Ukraine[2]. The court determined that the state sustained damages amounting to UAH 12 million as a consequence of obstruction by officials of the activities of the Armed Forces of Ukraine during a specific period (State Bureau of Investigation, 2023).

On 23 January 2024, the National Anti-Corruption Bureau of Ukraine and the Specialised Anti-Corruption Prosecutor's Office concluded their investigation into the criminal proceedings concerning the misappropriation of funds belonging to the Ministry of Defence of Ukraine, amounting to over UAH 312 million (National Anti-Corruption Bureau of Ukraine, 2024). The suspects included a Member of Parliament of Ukraine of the 8th convocation and his assistant; a former First Deputy Chief of the General Staff of the Armed Forces of Ukraine; a director of a controlled company; two former and current senior and higher military officers. The classification of the crime was as follows: Part 5 Art. 191 and Part 3 Art. 209 of the Criminal Code of Ukraine[3].

Corruption, in the form of bribery and embezzlement, can have a detrimental impact on a country's

[1] Decision of the High Anti-Corruption Court of Ukraine in Case No. 991/733/24. (2024, March). Retrieved from https://opendatabot.ua/court/117209187-57e78619826cade12bd671fe90dfd166.
[2] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[3] Ibidem, 2001.

defence capability. This is due to the dangerous deterioration in the quality and effectiveness of military equipment and services that result from such practices. Such consequences endanger the lives of servicemembers and the security of the entire country (Bondarenko, 2023). Entities that are customers ordering goods and services are created by the state or the united communities to meet the citizens' needs, which must be provided with state budgetary and public financial resources channelled for the implementation of such orders (Karabin & Bilash, 2021).

The efficacy of anti-corruption measures in public procurement in Ukraine necessitates an appropriate and expedient response to instances of corruption, the formulation and implementation of efficacious countermeasures, and the foreknowledge of shifts in societal dynamics. Consequently, Ukraine needs a concrete plan for post-war reconstruction. In terms of the methods of preventing corruption in public procurement, which are likely to be effective in Ukraine during martial law and in the defence sector, there are two main approaches – repressive measures and the total use of information technology. It can be argued that the best solution to these problematic situations is to alter the legal consciousness of citizens towards corruption-free practices. This is a subject to be addressed in a separate study.

**Innovations in defence procurement in Ukraine.** Since its independence, Ukraine has sought to implement transparent public procurement procedures at the legislative level[1]. However, this has not always been successful. In 2016, a fundamental reform of the procurement in Ukraine was implemented. Specifically, the term "state procurement" was replaced with "public procurement", and the procurement process itself was transformed from a paper-based system to an electronic one, with the introduction of an electronic auction procedure, the qualification of participants, and the electronic verification of customer reporting documents[2]. Consequently, novel approaches to the control of public procurement were necessitated.

According to L. Skalozub (2015) and A.M. Cheredarchuk (2021a), 50-75% of budget allocations during the public procurement procedure in Ukraine were used in a manner that contravened a series of regulations. Corruption in public procurement results in the loss of 10-15% of the state budget annually. According to the Federation of Employers of Ukraine, the amount of kickbacks and bribes that the entrepreneurs are obliged to pay to officials to take part in a particular tender is approximately UAH 80 billion per year.

Recently, Ukraine has revised the charters of two procurement agencies within the Ministry of Defence: The State Operator for Non-Lethal Acquisition and the Defence Procurement Agency (Ministry of Defence of Ukraine, 2024a). They stipulate the establishment of supervisory boards within the corporate structure. The supervisory boards will comprise independent members. According to the Ministry, this is a significant step towards the establishment of a modern and transparent corporate governance system for the enterprises of the Ministry of Defence of Ukraine. The next step is anticipated to be the formation of the personal composition of the supervisory boards with the involvement of independent recruitment agencies. Both these steps are positioned as part of the implementation of a new procurement system, which is comprised of two distinct tiers. The first tier comprises the Procurement Policy Department of the Ministry of Defence of Ukraine, which is responsible for developing the procurement policy, coordinating the financial activities of the agencies and developing regulations. The second tier is made up of the two newly created state-owned enterprises mentioned above, which are directly responsible for conducting procurement. The State Operator for Non-Lethal Acquisition is responsible for procuring logistical equipment for the army, including food, ammunition, fuel, and lubricants. In contrast, the Defence Procurement Agency is tasked with purchasing weapons and ammunition for the Armed Forces of Ukraine. Notably, in 2003, the Defence Procurement Agency was allocated a budget of UAH 335 billion for 2003. A further 2.75% of this amount, or UAH 9.7 billion, is allocated for the maintenance of the agency itself (Korohodskyi, 2023). This led to a lively debate in the wider society about the necessity of distributing such an outsize proportion of the budget to the maintenance of an agency with only 150 employees. According to O.S. Bondarenko (2023), such an approach may give rise to the emergence of corruption-prone factors in the activities of this agency and in the wider defence sector.

The regulation of public procurement in the defence sector in Ukraine has reached an international standard. The Defence Procurement Forum, which took place on 5 April 2024 in Kyiv, was organised by the Ministry of Defence of Ukraine, the Defence Procurement Reform Project, CIDS – a project of the Norwegian Ministry of Defence, the Office for Support of Change at the Ministry of Defence of Ukraine, and the State Operator for Non-Lethal Acquisition, with the assistance of the NGO "Foundation for

[1] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.
[2] Ibidem, 2015.

Support of Reforms", within the framework of the support programme of the Special Adviser on Defence, funded by the UK Government. At the Defence Procurement Forum, the Ministry of Defence of Ukraine articulated transparency, enhanced oversight, and advantageous conditions for competition as the primary tenets of its procurement strategy (Ministry of Defence of Ukraine, 2024b).

The Defence Procurement Agency has signed a memorandum of understanding and cooperation in defence procurement with the Danish Ministry of Defence Acquisition and Logistics Organisation (DALO) (Ministry of Defence of Ukraine, 2024c). One of the primary objectives of the state-owned enterprise is the acquisition of contemporary weaponry in collaboration with international partners. On 23 May 2023, the Cabinet of Ministers of Ukraine adopted a resolution under which the Defence Procurement Agency has become a service of the Ministry of Defence of Ukraine. This resolution mandates that the Defence Procurement Agency will purchase weapons and military equipment for the Armed Forces of Ukraine. At the end of December 2023, the Ministry of Defence of Ukraine announced the launch of a new procurement mechanism based on NATO standards, which will completely replace the post-Soviet procurement system. For instance, the Defence Procurement Agency of the Ministry of Defence of Ukraine procured 20,000 unmanned aerial vehicles for approximately UAH 3 billion through the Prozorro system for the first time.

Furthermore, the Ministry is endeavouring to establish a dedicated procurement role within military units. To achieve this, effective cooperation has been established with the Armed Forces of Ukraine, specifically with the General Staff and the Logistics Forces of the Armed Forces of Ukraine. The Procurement Policy Department believes that the procurement process should be professionalised and decentralised. Furthermore, it is their contention that a special procurement officer should become the institutional basis for implementing transparent and efficient procurement procedures in military units on an annual basis (Ministry of Defence of Ukraine, 2024b). Nevertheless, the concentration of procurement powers in the hands of a single individual raises concerns about the potential for corruption.

**Regulatory framework for public procurement in Ukraine.** The principles of public procurement in Ukraine are governed by the Law of Ukraine "On Public Procurement"[1]. The law defines ways to ensure efficiency and transparency in procurement. A prominent aspect of this Law is the provisions on ensuring fair competition and, admittedly, preventing corruption in this area. The law also considers the significance of adapting state legislation to the standards and requirements of the European Union following the Association Agreement[2] between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand.

The public procurement process in Ukraine was affected by the introduction of martial law due to the military aggression of the Russian Federation, which was established by the Decree of the President of Ukraine No. 64/2022 dated 24 February 2022[3]. According to Article 1 of the Law of Ukraine "On the Legal Regime of Martial Law"[4], martial law is defined as a special legal regime that may be introduced in Ukraine or specific regions in response to armed aggression, a threat of attack, or a threat to the country's independence and territorial integrity. This regime grants additional powers to state authorities, military command, military administrations, and local self-government bodies to counter threats, repel aggression, and ensure national security. It also allows for temporary restrictions on constitutional rights and freedoms of individuals and the rights and interests of legal entities, specifying the duration of such restrictions. Article 12-1 of the Law[5] outlines the specifics of the Cabinet of Ministers of Ukraine's functions during martial law. Specifically, Paragraph 5 of Part 1 of this Law mandates that the Cabinet of Ministers, when martial law is declared in Ukraine or in specific regions, must establish the details of defence and public procurement processes to safeguard state clients and customers from military threats.

The Cabinet of Ministers of Ukraine, in its Resolution No. 1178[6], established the specific rules for

[1] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.

[2] Association Agreement Between Ukraine, on the one Hand, and the European Union, the European Atomic Energy Community and their Member States, on the Other Hand. (2014, March). Retrieved from https://www.kmu.gov.ua/storage/app/sites/1/uploaded-files/ASSOCIATION%20AGREEMENT.pdf.

[3] Decree of the President of Ukraine No. 64 "On the Introduction of Martial Law". (2022, December). Retrieved from https://www.president.gov.ua/documents/642022-41397.

[4] Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law". (2015, May). Retrieved from https://zakon.rada.gov.ua/ laws/show/389-19#Text.

[5] Ibidem, 2015.

[6] Resolution of the Cabinet of Ministers of Ukraine No. 1178 "On Approval of the Specifics of Public Procurement of Goods, Works and Services for Customers, Provided for by the Law of Ukraine "On Public Procurement". (2022, October). Retrieved from https://zakon.rada.gov.ua/laws/show/1178-2022-%D0%BF#Text.

public procurement of goods, works, and services under the Law of Ukraine "On Public Procurement"[1] during martial law and for 90 days following its termination or cancellation ("the Special Provisions"). The Resolution of the Cabinet of Ministers of Ukraine No. 1495[2] amended the special provisions for public procurement of goods, works, and services as outlined in the Law of Ukraine "On Public Procurement"[3]. The Special Provisions were amended to mandate that open tenders shall be held temporarily (until 3 July 2023) without the use of an electronic auction. According to Clause 23 of the Special Provisions[4], the State Audit Service and its interregional territorial bodies are tasked with overseeing procurement procedures. This includes monitoring contracts for which reports are published in the electronic procurement system, even if those contracts were concluded outside of the electronic system, following the process outlined in Article 8 of the Law. In applying the data of automatic risk indicators, consideration must be given to these specific circumstances. From 19 October 2022, during the period of martial law, customers obliged to carry out public procurement of goods, works, and services are required to conduct such procurement following the Special Provisions[5]. Notably, the Special Provisions do not mandate the use of the negotiations in the procurement procedure. The instrument provides detailed information on the procurement methods that must be employed following the Special Provisions, depending on the anticipated value of the procurement item[6].

For the territories of possible hostilities, as determined by the Resolutions of the Cabinet of Ministers of Ukraine No. 1364[7] and No. 45[8], there are no restrictions on access to public electronic registers and auctions for the sale of small-scale privatisation objects. At the same time, in the territories of active hostilities and temporarily occupied territories, registers are blocked, and relevant tenders are prohibited (Zaiets, 2023). Depending on the frequency with which such control is carried out, it can be divided into three main types: preliminary, current, and subsequent. Preliminary control is carried out prior to the execution of a business transaction with the goal of preventing illegal actions, the inefficient use of funds, and unreasonable decisions. Preliminary control is a preventative measure, carried out by the customer's internal services. Current control is operational and exercised in business operations. The current control is primarily exercised by the internal control services and the State Treasury Service (in relation to the utilisation of budgetary funds). Its function is to promptly identify and halt any violations or deviations that may occur during the course of business operations or production tasks.

One of the types of current control is procurement monitoring, which was introduced by the Law on Public Procurement[9]. Subsequent control is conducted after the conclusion of business operations, at the expiration of the specified reporting period. The objective of this process is to ascertain the legitimacy, legality, and economic viability of business transactions, as well as to identify any shortcomings in the company's operations, instances of malpractice and instances of theft. Based on the results of the analysis, measures are developed to eliminate the identified deficiencies and to eliminate the causes and conditions of their occurrence.

[1] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.
[2] Resolution of the Cabinet of Ministers of Ukraine No. 1495 "On Amendments to the Peculiarities of Public Procurement of Goods, Works and Services for Customers Provided for by the Law of Ukraine "On Public Procurement" for the Period of Martial Law in Ukraine and within 90 Days from the Date of its Termination or Cancellation". (2022, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1495-2022-%D0%BF#Text.
[3] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.
[4] Resolution of the Cabinet of Ministers of Ukraine No. 1178 "On Approval of the Specifics of Public Procurement of Goods, Works and Services for Customers, Provided for by the Law of Ukraine "On Public Procurement". (2022, October). Retrieved from https://zakon.rada.gov.ua/laws/show/1178-2022-%D0%BF#Text.
[5] Ibidem, 2022.
[6] Letter of the Ministry of Economy No. 3323-04/70997-06 "On the Peculiarities of Public Procurement for the Period of Martial Law and within 90 Days from the Date of its Termination or Cancellation". (2022, October). Retrieved from https://document.vobu.ua/doc/15435.
[7] Resolution of the Cabinet of Ministers of Ukraine No. 1364 "On Some Issues of Forming the List of Territories where Military Operations are (were) Conducted or Temporarily Occupied by the Russian Federation". (2022, December). Retrieved from https://zakon.rada.gov.ua/laws/show/1364-2022-%D0%BF#Text.
[8] Resolution of the Cabinet of Ministers of Ukraine No. 45 "On Amendments to Clause 1 of Resolution of the Cabinet of Ministers of Ukraine No. 1364 dated 6 December 2022". (2022, December). Retrieved from https://zakon.rada.gov.ua/laws/show/45-2023-%D0%BF#Text.
[9] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.

**Table 1.** Control of public procurement in Ukraine

| | | |
|---|---|---|
| Accounting Chamber of Ukraine. | Control-analytical and expert activity on the implementation of the State budget.<br>Scheduled inspection of the Authorised Body and Antimonopoly Committee of Ukraine. | Preliminary control.<br>Current control. |
| State Audit Service. | Planned and ongoing audits of spending of state funds. Financial audit.<br>Internal audit control of customers.<br>Monitoring of purchases. | Subsequent control. |
| State Treasury Service. | Operational control during registration and payment of contracts.<br>Monitoring the compliance of concluded contracts with the procurement plan and the report on procurement results in the electronic system. | Current control. |
| Antimonopoly Committee of Ukraine. | Complaints in the public procurement system, Operational control of detection of collusion at auctions based on complaints. | Current control;<br>Subsequent control. |
| Ministry of Economic Development, Trade and Agriculture. | Implements state policy in the field of procurement as a specially authorised body. | Current control. |
| Law enforcement agencies (State Bureau of Investigation, NABU, Security Service of Ukraine, National Police). | Combating corruption and committing economic crimes. | Current control;<br>Subsequent control. |
| Judicial bodies. | Review of complaints after completion of the procurement procedure.<br>Reviewing the decision of the Antimonopoly Committee of Ukraine. | Subsequent control. |
| Public. | Analysis and monitoring of information at all stages of public procurement. | Preliminary control;<br>Current control;<br>Subsequent control. |

**Source:** compiled by the author of this study based on public procurement legislation

The controlling bodies are defined in Article 7 of the Law of Ukraine No. 922-VIII[1]. Specifically, this stipulation outlines that the Accounting Chamber, the Antimonopoly Committee of Ukraine, and the central executive body responsible for state financial control are to oversee public procurement within the scope of their authority as defined by the Constitution of Ukraine[2] and relevant Ukrainian legislation.

According to the findings of S. Yaremenko (2017) on the DOZORRO monitoring portal, the following issues were identified in the activities of the authorities in supervision and control of public procurement and combating abuse of office and corruption:

- the absence of an efficacious mechanism for interaction between law enforcement and controlling authorities in combating corruption offences in public procurement;
- the lack of consistency in the activities of law enforcement agencies in conducting supervision and control in the procurement sector resulted in the duplication of functions by law enforcement agencies. This is exemplified by the initiation of criminal cases for the same types of offences by both the internal affairs and security services of Ukraine and prosecutors;
- the insufficient number of highly qualified employees with practical experience in procurement is also due to significant changes in the legislation in this area;
- the mechanism of procurement monitoring is unclear, which may lead to unjustified influence on procuring entities' decisions.

The National Agency for the Prevention of Corruption conducted a comprehensive analysis of the public procurement sector, identifying 25 distinct corruption risks. These risks are inherent in all customers of goods, works, and services required to meet the needs of the state and territorial communities (National Agency for the Prevention of Corruption, n.d.).

In Ukraine, most public procurements are conducted electronically via the Prozorro (n.d.) system. The purpose of this initiative is to minimise the occurrence of corruption schemes and to ensure fair competition. The Prozorro system has been identified as a leading example of best practice in global rankings of public procurement transparency. Conversely, while electronic procurement may appear to be a solution to corruption, it is not a complete solution. It is therefore clear that public procurement represents an area with an elevated level of corruption risks (Yemelianov, 2009).

One of the most striking examples of the consequences of crime in public procurement is the threat of unfair competition. It is the duty of the state to guarantee and maintain a competitive environment on the market following the rules and regulations it issues. Specifically, the Law of Ukraine "On Protection against Unfair Competition"[3] is aimed at

[1] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.
[2] Constitution of Ukraine. (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text.
[3] Law of Ukraine No 236/96-BP "On Protection Against Unfair Competition". (1996, June). Retrieved from https://zakon.rada.gov.ua/laws/show/en/236/96-%D0%B2%D1%80.

"establishing, developing, and ensuring trade and other fair competition practices in the conduct of business in a market environment". Furthermore, the primary objective of the Law of Ukraine No. 922-VIII[1] is to "create a competitive environment in public procurement, prevent corruption in this area, and develop fair competition". However, criminal offences committed in the field of public procurement and unfair competition are interrelated phenomena and are characterised by a cause-and-effect relationship.

Corruption in the public procurement system results in significant losses for the state. The estimated budget losses in this area amount to approximately 10-15% (UAH 35-52.5 billion) expenditure part of the state budget annually (Ivashova & Ivashov, 2019). The losses incurred by the state and society as a consequence of corrupt practices in placing a public procurement order can be categorised into four distinct types:

1. Financial losses may be incurred as a result of the conclusion of agreements on unfavourable financial terms for the state and society. Firstly, there is an overestimation of prices for the purchased products in comparison to the current market level. Secondly, there is an inclusion of prepayment instead of deferred payment in the terms of public contracts.

2. Quantitative losses may occur due to the overstatement or understatement of the amount of materials supplied or services rendered compared to what was actually required. This can also include cases where goods and services are purchased for the personal use of responsible officials instead of addressing public needs.

3. Qualitative damages may arise from entering into agreements that violate required technical conditions, leading to the supply of goods, performance of work, or provision of services of substandard quality. Additionally, factors such as inadequate warranty and post-warranty service conditions, insufficient quality control measures for work and services, and analogous issues can also be regarded as qualitative damages.

4. Political damage includes various negative impacts on the investment climate within the country, a decline in public trust in government agencies and the state overall, the weakening of the country's economic and financial system, and breaches of competition principles, among other consequences.

**Prevention of public procurement offences in EU countries.** Irregularities in public procurement in the European Union (EU) represent a significant source of administrative errors and financial losses associated with the European Structural and Investment Funds. Such irregularities are observed at all stages of the procurement process. According to C. Falvo & F. Lichère (2023), despite favourable European and French policies, one can still observe legal and institutional obstacles, especially in the area of public procurement. Concurrently, the EU underscores the susceptibility of public procurement to corruption, associating this phenomenon with the exploitation of public office for personal gain and the financing of political parties. In recent years, total expenditure on public works in the EU has increased, and together with goods and services, it accounts for a fifth of EU GDP annually (Beke, 2018).

The role of public procurement in the EU economy is significant, with public expenditure on works, goods, and services accounting for approximately 13.1% of EU GDP in 2015 (Neubauer *et al.*, 2017) and 29% of total public expenditures (OECD, 2016). Therefore, a well-functioning and efficient public procurement system is crucial for governments to prevent mismanagement and ensure the prudent use of public funds (OECD, 2016; Ravenda, *et al.*, 2020).

There is a broad consensus that public authorities should strive to achieve "value for money" in public procurement management (Zdyrko, 2020; Psota, 2021), what was discussed at the Congress of Local and Regional Authorities Council of Europe (2019). In this regard, the Ukrainian researcher A.M. Cheredarchuk (2021b) points out that the area of public procurement of goods, works and services should be studied not only as an independent economic structure, but also as an area that acts as an object of criminal encroachments on the part of criminals, including organised crime syndicates. Of particular danger are sophisticated technologies that involve long-term, multi-episode criminal activities of criminal groups and criminal organisations. Such groups are intentionally created from among the officers of budgetary institutions for the purpose of systematic stealing of budget funds.

Studies have proved that there is significant potential for cost-effective Green Public Procurement (GPP), especially in sectors where green products do not exceed the cost of non-green alternatives when considering the product's life cycle cost. Since "greener" goods are evaluated based on their entire life cycle, GPP impacts the entire supply chain and encourages the adoption of green standards in private procurement as well[2]. Yet, the significance of public procurement extends beyond its role as a financial instrument. It can also be regarded as a policy tool

[1] Law of Ukraine No. 922-VIII "On Public Procurement". (2015, December). Retrieved from https://zakon.rada.gov.ua/laws/show/922-19#Text.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions No. COM(2008) 400 final "On Public Procurement for a Better Environment". (2008, July). Retrieved from https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0400:FIN:EN:pdf.

for achieving government strategic goals, such as promoting domestic economic growth, innovation, engaging small and medium-sized enterprises, social responsibility, and sustainability (Flynn, 2017). In this context, the EU Directives of 2014/23/EU[1], 2014/24/EU[2] and 2014/25/EU[3] which came into force in April 2016, announced that social objectives, along with measures to ensure the highest levels of efficiency and transparency, would be incorporated into the national public procurement regulations of EU Member States (Baldi *et al.*, 2016).

These Directives constitute a single system for regulating the process of public procurement in the European Union states. Thus, Directive No. 23[4] regulates the concession issues, Directive No. 24[5] provides general rules for public procurement, which are recommended for compliance by bidders, whereas Directive No. 25[6] contains recommendations to entities that conclude relevant contracts in such areas as energy, water supply, transport, postal, etc. However, not all the 28 countries started the process of implementing these Directives on time, according to the established date, which is before April 2016. The Kingdom of Spain, the Portuguese Republic, The Republic of Austria, and the Grand Duchy of Luxembourg were in no great hurry with the corresponding implementation until 2018, for assorted reasons that require separate research.

These three Directives[7,8,9] directly apply to procurement procedures with a contract value exceeding the corresponding EU threshold, which, starting from 1 January 2024 makes up: EUR 5,538,000 for work contracts; EUR 143,000 for contracts concluded by central public authorities; EUR 221,000 for contracts concluded by local and regional administrations; EUR 750,000 for contracts stipulating the provision of social and other specific services. If such a threshold is lower than the established one, then the national rules are to be applied, which must follow the general principles prescribed in the Directives. For contracts with the value exceeding EU thresholds, all tender announcements and contract award notices must be published on the Tenders Electronic Daily (TED) platform. Customers can also publish on the platform information about contracts that cost below EU thresholds. In 2020, over 640,000 messages regarding 226,000 public procurement procedures were published on the TED platform, with the total value of these contracts making up about EUR 800 billion. Therefore, Ukraine's objective is to place data from Prozorro electronic system on this platform under the EU Directives.

The Public Procurement Reform of 2014 was supposed to streamline the access of small and medium-sized enterprises to procurement, make the rules and requirements for transparency and integrity more effective to reduce corruption risks. To avoid mistakes in this area on the path to membership in the European Union, Ukraine should take into consideration the Report of the European Court of Auditors (2023). An audit was conducted on the strategic use of public procurement, streamlining of its procedure, and increasing accessibility for small and medium-sized small enterprises for 2011-2021.

The report shows that the established standards may not work when applied in the absence of implementation mechanisms, i.e., the EU has both a positive experience in public procurement, and a negative one. By using the established standards, Ukraine has acquired the potential to demonstrate its certain positive experience to the EU countries. The findings of the analysis made by the Court's auditors establish the following:

- reduced competition in EU public procurement over the past decade;
- the presence of differences in customer approaches to public procurement in different EU member states and regions and in different sectors of the economy, which is a negative trend;

[1] Directive of the European Parliament and of the Council No. 2014/23/EU "On the Award of Concession Contracts". (2014, February). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023.
[2] Directive of the European Parliament and of the Council No. 2014/24/EU "On Public Procurement and Repealing Directive 2004/18/EC". (2014, February). Retrieved from https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjimy7tt61z3.
[3] Directive of the European Parliament and of the Council No. 2014/25/EU "On Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC". (2014, February). Retrieved from https://eur-lex.europa.eu/eli/dir/2014/25/oj.
[4] Directive of the European Parliament and of the Council No. 2014/23/EU "On the Award of Concession Contracts". (2014, February). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023.
[5] Directive of the European Parliament and of the Council No. 2014/24/EU "On Public Procurement and Repealing Directive 2004/18/EC". (2014, February). Retrieved from https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjimy7tt61z3.
[6] Directive of the European Parliament and of the Council No. 2014/25/EU "On Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC". (2014, February). Retrieved from https://eur-lex.europa.eu/eli/dir/2014/25/oj.
[7] Directive of the European Parliament and of the Council No. 2014/23/EU "On the Award of Concession Contracts". (2014, February). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0023.
[8] Directive of the European Parliament and of the Council No. 2014/24/EU "On Public Procurement and Repealing Directive 2004/18/EC". (2014, February). Retrieved from https:/ /www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjimy7tt61z3.
[9] Directive of the European Parliament and of the Council No. 2014/25/EU "On Procurement by Entities Operating in the Water, Energy, Transport and Postal Services Sectors and Repealing Directive 2004/17/EC". (2014, February). Retrieved from https://eur-lex.europa.eu/eli/dir/2014/25/oj.

- low percentage of cross-border purchases. Thus, in 2011-2021, only three countries transferred more than 10% of the total number of orders to foreign companies, namely: the Kingdom of Belgium – 10%, the Republic of Ireland – 15%, the Grand Duchy of Luxembourg – 30%.

According to the auditors' findings, it is impossible to determine the extent to which the decline in competition affected the prices of public procurement for works, goods, and services, since the European Commission does not monitor price data. The 2014 Directive Reform[1] has not yet led to significant improvements in the way customers conduct procurement procedures. The introduction of the European Single Procurement Document[2] and electronic forms speaks for the fact that the European Commission is committed to simplifying public procurement procedures and reducing the administrative burden. However, to make the procedures implemented effective, they must be widely used, which requires the European Commission to provide ongoing support.

Other objectives of the 2014 Reform have not been achieved as well. An analysis of the data conducted by the auditors showed that the situation differed between member states. For example, in the Republic of Austria and the Republic of Lithuania, the number of small and medium-sized enterprises taking part in procurement procedures increased, while in the Kingdom of Sweden and the Republic of Finland it decreased. However, in most member states, the relevant indicators stayed unchanged. For example, A. Iurascu (2023) concluded that the use of the inefficiency of the contract as a general and well-established remedy has proven to be an effective method for ensuring the enforcement of minimum environmental criteria (MECs).

Considering the system of regulating the process of public procurement in the EU states, we should also emphasise the significance and need for Ukraine to consider such new and innovative documents as "On the Professionalisation of Public Procurement – Building an Architecture for the Professionalisation of Public Procurement"[3]; "On Public Procurement Rules in Connection with the Current Asylum Crisis"[4]; Guidance on Innovation Procurement[5]. An in-depth analysis of the effectiveness of the application of these EU documents will be the purpose of our further research.

**Global trends in researching and combating crimes in public procurement.** Considering the potential financial damage, the European Union is promoting various initiatives to address and prevent corruption. This encompasses training for officials, the utilisation of e-procurement, and the imposition of conditions for public procurement with the goal of enhancing administrative capacity. Specifically, in terms of the combating corruption, the EU promotes the use of the ARACHNE tool (ARACHNE risk scoring…, n.d.), which helps public authorities in assessing control systems and identifying red flags in public procurement.

The ARACHNE project aims to offer national and local authorities managing Structural Funds an operational tool to identify high-risk projects. It supports the implementation of management and control systems for operational programs (OPs) to reduce error rates and improve fraud detection. Additionally, ARACHNE promotes the ongoing monitoring and review of both internal and external data concerning projects, beneficiaries, and contracts/contractors. Furthermore, the EU is seeking to engage civil society organisations in the promotion of transparency in public procurement. To achieve this objective, the European Commission is seeking to identify a suitable tool known as Integrity. The European Commission has commissioned regional development organisations to pilot the Integrity Pact for European Structural and Investment Funds (New guidelines for a better…, 2015).

First adopted in 2013, the Commission's Action Plan on Public Procurement (2020) outlines a series of concrete actions designed to increase the efficiency of administrations and beneficiaries in using public procurement for cohesion policy investments. For the 2021-2027 programming period, the plan supports strategic policy objectives by contributing to the European Green Deal through the promotion of strategic procurement (green, social, and innovative) within Cohesion policy programs. It also includes the monitoring of Horizontal Enabling Conditions for Public Procurement across all policy programs for 2021-2027.

[1] Directive of the European Parliament and of the Council No. 2014/24/EU "On Public Procurement and Repealing Directive 2004/18/EC". (2014, February). Retrieved from https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vjimy7tt61z3.
[2] Implementing Regulation of the European Commission No. (EU) 2016/7 "On Establishing the Standard form for the European Single Procurement Document". (2016, January). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0007.
[3] Recommendation of the European Commission No. (EU) 2017/1805 "On the Professionalisation of Public Procurement – Building an Architecture for the Professionalisation of Public Procurement". (2017, October). Retrieved from https://op.europa.eu/en/publication-detail/-/publication/94421013-ab20-11e7-837e-01aa75ed71a1/language-en.
[4] Communication from the Commission to the European Parliament and the Council No. COM (2015)454 final "On Public Procurement Rules in Connection with the Current Asylum Crisis". (2015, September). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0454&from=EN.
[5] Notice of the European Commission No. 2021/C 267/01 "Guidance on Innovation Procurement". (2021, July). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021XC0706(03)&rid=6.

According to W. Janssen & R. Caranta (2023), mandatory "green" and social requirements mean that to achieve the sustainable development goals and mitigate the consequences of climate change, the EU restricts this discretion of state buyers, encouraging them to purchase more sustainable goods and services. That is, in Ukraine, when making public procurement and assessing the life-cycle cost, it is important to consider not only the prices of goods (services), but also the "green" criteria used in EU countries. To reduce the problems with greater involvement of contractors in conducting simplified public procurement, it is advisable to increase the threshold of simplified public procurement annually, according to inflation rates.

The overarching goal of this EU initiative is to cultivate a positive reputation for contracting authorities, conserve resources, and facilitate competition through improved procurement practices. In terms of anti-corruption, the rules include a series of measures. In addition, Member States are obliged to comply with monitoring and submit reports to the EC[1]. Therefore, some of the objectives of the 2014 Reform do not promote growth and even hinder competition. Some aspects of the public procurement's effectiveness are simply ignored by the system.

These decisions can be expected to take the form of a pan-European action plan. Notably, the deadline for completing the reforms is the end of 2025. As a positive thing for Ukraine, the effectiveness of the tool for collecting and organising procurement data should be highlighted – bi.prozorro, which is considered beneficial to be implemented in all EU countries. Instead of the previous excessive duration of procurement procedures in Ukraine, now the minimum period for open bidding makes up 7 calendar days, which is not enough to have a high-quality offer prepared by all potential participants.

Low level of competition at bidding is a common drawback for all EU countries and Ukraine. The latter should especially focus on this area. Overall, the state's approach to system construction and public procurement regulation is primarily driven by economic considerations, with the objective of securing the lowest tender price. However, this method of procurement has gradually evolved to permit the integration of additional non-economic objectives, including social and environmental considerations. This approach, as outlined by L. Treviño-Lozano & O. Martín-Ortega (2023), appears to be an intriguing and hitherto understudied topic. Human rights due diligence (HRDD) is a set of business processes for addressing, preventing, and accounting for human rights impacts that companies may have or contribute to (Bonnitcha & McCorquodale, 2017). This approach gave rise to the term "sustainable public procurement". As for the close relationship between Human Rights and Environmental Due Diligence (HREDD) and public procurement, HREDD is a means of ensuring sustainable procurement. Apart from eliminating the negative impact on human rights and the environment, HREDD contributes to its protection. L. Treviño-Lozano & E. Uysal (2023) note an ongoing debate about incorporating human rights and environmental due diligence into public procurement, highlighting that this area is still underdeveloped.

In summary, the UNGPs include six key steps that companies must take to integrate human rights and environmental considerations into their operations. This process includes identifying, assessing, and addressing any adverse human rights and environmental impacts, and monitoring, transparency, and reporting on the entire process (OECD, 2023). D. Rathi *et al.* (2023) highlight that gender issues are a pressing concern in procurement research, with current studies falling into four main themes. Research on the glass ceiling effect has shown that gender-related disadvantages hinder career advancement in organisations and pose barriers to procurement. These barriers include poor job design, male-dominated environments, negative stereotypes, extensive travel demands, and a competitive procurement culture. The glass ceiling continues to exist, with men often holding higher management roles, while women face obstacles in reaching senior positions. Additionally, female entrepreneurs, especially those in smaller businesses, struggle to secure financial resources and support, limiting their market access and productivity. Discrimination in credit terms, along with a lack of experience, knowledge, and awareness of opportunities, further impedes women's success as suppliers. Addressing these challenges and promoting gender equality in procurement requires dedicated efforts and supportive policies. At the same time, empirical evidence shows that gender plays a role in shaping perceptions, preferences, and negotiation dynamics in buyer-seller relationships. Overall, the inclusion of both women and men in procurement teams has positive consequences, as women have advantages in dealing with supply chains and demonstrate a greater commitment to ethical standards.

In Ukraine in 2012 the socio-demographic profile of individuals who perpetrated criminal acts reveals a clear gender imbalance, with 70% of offenders being male and 30% female (Rufanova, 2012), in 2021 – 87.6% of offenders being male and 12.4%

[1] Directive of the European Parliament and of the Council No. (EU)2019/1153 "On Laying Down Rules Facilitating the Use of Financial and Other Information for the Prevention, Detection, Investigation or Prosecution of Certain Criminal Offences, and Repealing Council Decision 2000/642/JHA". (2019, June). Retrieved from https://eur-lex.europa.eu/eli/dir/2019/1153/oj.

female (PGO provides gender statistics…, 2021). This is because in Ukraine, men are predominantly the heads of regional and district administrations, heads of state-owned enterprises and contractors, which is relevant now and indirectly arise from the research (Makeiev, 2023). According to the World Economic Forum (2022), the gender gap in Ukraine in 2022 was 29%. In the gender gap index, Ukraine ranks 81st out of 147 countries surveyed. Thus, the problem of gender inequality is still relevant for Ukrainian society, which naturally affects the public procurement sector. In terms of intellectual level of development, educational level, life experience, and the range of interests of the perpetrators of crimes in the field of public procurement, it can be argued that men can be classified as the most "intellectual" criminals, considering that most of them have higher education (Cheredarchuk, 2021b).

As correctly observed by D. Rathi (2024), the diversity within the EU indicates that there is no single, universal approach to combating corruption. Nevertheless, agent-based anti-corruption measures may prove effective in some countries or sectors where corruption is less prevalent, whereas collective action initiatives may be more appropriate in others where corruption is more systemic. The EU's funding structure enables EU member states to combat corruption in public procurement more effectively through collective action. In his doctoral research, M.B. Beke (2018) identified the following elements, which are difficult to dispute and are reproduced here with abbreviations.

The integrity pacts cover several key criteria for fighting corruption in the field of public procurement, including transparency, professionalism, and accountability (Arrowsmith *et al.*, 2010). These objectives align with the goals of public procurement in the EU, which aim to ensure fair competition among participants and deliver value for money by preventing corruption. As a result, businesses operating in corrupt environments face the challenge of competing with companies that are likely to engage in bribery (Arrowsmith *et al.*, 2010), giving those companies an unjust advantage over those that adhere to ethical practices. The typical reaction from businesses is to disavow responsibility, arguing that if they refrain from bribery, others will exploit the opportunity. The Integrity Pact is designed to eliminate the corrupt practices employed by companies. A company may find itself in a quandary when it decides to operate a clean business on its own, while its competitors continue to pay bribes (Beke, 2018).

Considering that the potential for dishonesty exists throughout the entirety of the public procurement process, it is imperative to adopt a comprehensive approach to the prevention of corruption to mitigate the associated risks. Consequently, transparency represents a pivotal instrument employed by the OECD to advance good governance within the public sector. The OECD Recommendation on Public Procurement (OECD, 2015) suggests that countries that have signed up to the document should ensure a suitable degree of transparency in their public procurement system at all stages of the procurement cycle.

While there is a close relationship between civil service transparency and integrity and anti-corruption, it is not absolute. To ensure effective accountability, it is necessary to consider several conditional factors. For individuals and organisations to fulfil the role of a watchdog, it is necessary to consider the availability of data in conjunction with the timeliness, quality, processing capacity, effectiveness of reporting channels and whistleblowers (Effective measures in…, 2016). The combating of crimes in public procurement is a matter of national concern that has both economic and socio-political implications. The pervasive involvement of organised criminal groups in this domain signifies the erosion of social and legal control over the situation in Ukraine, which is confirmed in the works of such researchers as M.A. Dzhelilova (2023), as well as in the study of the Global Initiative Against Transnational Organized Crime (2023). Causes and conditions of organised crime under martial law: regional aspect also reflects the convergence of representatives from the executive, legislative, and judicial branches with criminal entities, which is indicative of challenges in the management sphere.

Considering the above, the international practice has developed four main approaches that have proven to be effective in combating corruption. These include psychological methods; technical methods; process regulation; and repressive measures. Psychological methods are employed to influence the root cause of corruption, namely the desire of employees to enrich themselves illegally at the expense of their employer, or alternatively, at the expense of the state and, consequently, all citizens. Technical methods serve to eliminate or significantly reduce the likelihood of collusion between procurement departments and sellers. This is achieved by eliminating the possibility of personal contacts between the parties to the transaction or increasing the risk of a corrupt official being caught. Regulatory (procedural) methods are designed to ensure that all procurements are conducted according to formalised internal rules and procedures, thereby reducing the risk of corruption. Repressive measures are employed with the objective of creating conditions under which the corrupt actions of employees responsible for placing public orders are disadvantageous.

In conclusion, international defence cooperation can play a pivotal role in reducing corruption for several reasons. 1. Increased transparency. 2. Joint implementation of financial monitoring in the

defence sector; 3. Harmonisation of the legislative framework. 4. Strengthening institutional capacity. 5. International cooperation can create a collective "pressure" on countries to adhere to higher standards of integrity and transparency. 6. Combating transnational networks. Corruption in the defence sector often involves transnational networks that exploit the weaknesses inherent in governance systems and cross-border operations. International cooperation enables countries to collaborate in the investigation and dismantling of transnational networks engaged in illicit activities such as money laundering, the illicit arms trade, and corruption. International cooperation creates the conditions for joint action, knowledge sharing and mutual support in the fight against corruption in the defence industry. Such cooperation strengthens the integrity of defence personnel, promotes transparency in procurement processes, and creates an environment where corruption is less likely to occur (Bondarenko, 2023).

The problem of cross-border participation may lie in the language barrier and different requirements for tender-related documentation for each country. Strategic procurement practices outlined by the European Commission in the articles "Making socially responsible public procurement work – 71 good practice cases" (European Commission *et al.*, 2020) and "Public procurement in the context of Ukraine's European integration" (Mykhailyk, 2022) could also be helpful for Ukraine. The European Commission is creating an electronic opportunity to exchange practices through tools such as the Public Buyers Community Platform. The Ministry of Economy of Ukraine can also perform such a function for interaction between the EU and customers from Ukraine. It is quite clear that after the implementation by Ukraine of all international documents regulating the area of public procurement, a necessary prerequisite to acquire the EU membership will be the cessation of hostilities and the abolition of martial law.

## Conclusions

The subject of this study was the system of prevention of offences in public procurement during martial law in Ukraine as compared with the approaches of the European Union states. Overall, the regulatory framework in public procurement in Ukraine meets the basic needs of participants, and it has been actively developing with due regard for the best practices of the EU. The scientific originality of this study is that it is the first study in Ukraine to outline the system of counteraction and prevention of offences in public procurement during martial law for 2022-2024. A comparison of the national system with the methods of preventing offences in the field of public procurement in foreign countries enabled the identification of both its advantages and disadvantages. Based on a comparison of this system's functioning for compliance with the EU approaches, and the efficiency and effectiveness of international documents, specifically, using the comparative method, the following conclusions were drawn.

EU researchers are already considering the problems of corruption in public procurement in a new context, namely that of social, environmental, gender, and human rights. There is no truly uniform approach to preventing corruption in public procurement, although attempts are being made to standardise such approaches for use by all EU Member States. This is hampered by the different historical conditions and levels of development of each Member State. Therefore, the influence of the dominant international organisation on these countries is fundamentally different and does not always meet the interests of some countries. The paradox is that sometimes corruption is useful and becomes a choice for some EU member states to solve national problems. In the European Union, public procurement is regarded as a political instrument for the achievement of the strategic objectives of the state. The European system is confronted with significant challenges in ensuring an adequate degree of transparency in procurement at all stages of the procurement cycle.

In general, we may claim the effectiveness of the Ukrainian public procurement system, although Ukraine and the EU have both shortcomings and best practices that can be taken as an example, with due accommodation of the specific national aspects. There is a lack of official published information and data in Ukraine regarding high-ranking officials who committed crimes in public procurement as part of organised crime syndicates, which would provide more accurate results of the study. The absence of court rulings or judgments and some procedural findings regarding officials who hold responsible positions in Ukraine and who have committed crimes in public procurement from the Unified State Register is partly explained by the specific features of maintaining the Register during martial law, and mostly by restricting access based on the decisions of investigative agencies. Promising areas for further research on public procurement include countering organised criminal groups with international ties and mafia structures.

## Acknowledgements

The author of this study is indebted to the researchers who laid the foundation for further development of the criminological basis for combating offences in the field of public procurement and minimising corruption.

## Conflict of Interest

The author of this study declares no conflict of interest.

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# Система запобігання правопорушенням у сфері публічних закупівель в умовах воєнного стану в Україні та в Європейському Союзі

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■ **Анотація.** Питання державних закупівель, передусім в оборонному секторі, гостро постали в період російської агресії в Україні. Ризик корупції в цій сфері є значним і може мати фатальні наслідки для держави. Метою цієї статті був огляд системи протидії та запобігання правопорушенням у сфері публічних закупівель, яку було створено у відповідь на виклики воєнного стану в Україні. Проведено порівняння цієї системи з відповідними механізмами Європейського Союзу. Методологічною основою статті став діалектичний підхід до аналізу системи запобігання злочинам у сфері публічних закупівель в Україні та світі. У дослідженні використано методи формальної логіки, а також системно-структурний, систематизації, узагальнення, прогнозування, феноменологічний, порівняльно-правовий та компаративний. Досліджено наукові підходи до запобігання правопорушенням у сфері публічних закупівель у низці зарубіжних країн, а також основні правила та стандарти, запроваджені в Європейському Союзі в цій сфері. Обґрунтовано, що система запобігання правопорушенням у сфері публічних закупівель в умовах воєнного стану в Україні не є оптимальною, що стосується і країн Євросоюзу, попри вжиті колективні міжнародні та національні заходи. Аргументовано, що публічні закупівлі нерозривно пов'язані з політикою, їх використовують як засіб досягнення стратегічних завдань конкретної держави. Проблематика запобігання корупційним правопорушенням у сфері публічних закупівель є надзвичайно актуальною для науковців, результати її ґрунтовного дослідження дадуть змогу Україні досягти значних результатів у протидії цьому явищу додатково до вже вжитих державою заходів під час воєнного стану

■ **Ключові слова:** протидія; система Prozorro; злочинність; корупція; організація публічних закупівель

UDC 341.171
DOI: 10.56215/naia-herald/3.2024.27

# Role of court precedents in the development of EU law and the legal systems of the candidate states: Examples of Ukraine and Moldova

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■ **Abstract.** The judgements of the Court of Justice of the European Union play a fundamental role in shaping the EU *acquis*. The relevance of this study lies in their impact not only on the law enforcement practice within the Union, but also on the trends in the development and amendment of the EU regulations. Considering the above, the purpose of this study was to determine the role of judgements of the Court of Justice of the European Union in shaping the law of the European Union and the legal systems of the candidate states. The methodological framework of this study was based on general scientific and special research methods, such as analysis and synthesis, induction, interpretation, formal logical, and comparative legal methods. The study established the existence of a link between the structural and functional evolution of the Court of Justice of the European Union and the increasing weight of its judgements; the study identified the channels of influence of its judgements on the establishment and development of European Union law. The study outlined the current challenges faced by the judges of the Court of Justice of the European Union and which affect the efficiency of its work. Based on the analysis of the judicial practice of Ukraine and Moldova regarding the use of judgements of the Court of Justice of the European Union, the study substantiated the general significance of judicial precedent in the context of European integration of the candidate states, as well as potential problems of their widespread use in the judicial practice of these states. The practical significance of the findings obtained is that they can be used in educational programmes for training specialists in the field of European law, to develop strategies and policies aimed at integrating candidate states into the EU, ensuring their compliance with the legal standards of the Union

■ **Keywords:** European Union law; Court of Justice; judgements of the Court of Justice; interpretation of European Union law; judicial practice

■ **Suggested Citation:**
Mazur, T., & Korolchuk, V. (2024). Role of court precedents in the development of EU law and the legal systems of the candidate states: Examples of Ukraine and Moldova. *Scientific Journal of the National Academy of Internal Affairs,* 29(3), 27-41. doi: 10.56215/naia-herald/3.2024.27.

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■ Received: 25.05.2024; Revised: 30.07.2024; Accepted: 27.08.2024

## Introduction

The Court of Justice of the European Union (CJEU) occupies a prominent place in the legal system of the European Union (the EU), playing a key role in the interpretation and application of EU law. The CJEU has a considerable impact not only on the trends in the adoption of legal acts but also on the institutional structure of the EU. The establishment and development of the CJEU is directly linked to the establishment and development of the EU as a whole. In its practice, the CJEU has defined and elaborated on such principles of EU law as the direct effect of EU law, the primacy of EU law over national law of the Member States, which has created a *sui generis* legal order. Considering this, the CJEU's judgements resonate not only within the EU, but also have a significant impact on international relations with third countries and international organisations and are an invaluable source of law for EU candidate states. Thus, the intensification of discussions on the Eastern Partnership policy in the wake of the war in Ukraine, the protests in Georgia, and the strengthening of Euro-Atlantic and European integration of new potential member states as of 2024, requires strengthening the protection and guarantee of human and civil rights and freedoms. The status of a candidate state implies full harmonisation of national legislation of candidate states with EU law, which necessitates the investigation of the role of the CJEU's precedents in this context.

On November 8, 2023, the European Commission (EC) adopted the Expansion Package until 2023[1,2], which assesses in detail the current state and progress made by Ukraine, Moldova, and Georgia on their path to EU accession. Specifically, the EU focused on progress in implementing fundamental reforms in Ukraine and Moldova, as well as on providing clear guidance on future reform priorities. Considering the progress made by Ukraine and Moldova, as well as ongoing reform efforts, the EC recommended that accession negotiations with both countries be launched as early as 2024. That is why the present study focused on the significance of the CJEU's judgements for such candidate states as Ukraine and Moldova.

Certain aspects of the subject under study have attracted the attention of foreign and Ukrainian researchers. The legal nature and specific features of the CJEU's precedents are the subject of a series of academic studies. Thus, A. Boin & S.K. Schmidt (2020) and T. Pavone & R.D. Kelemen (2019) have retrospectively analysed the establishment of the CJEU, the relationship between this and other institutions of the EU, the crises in its work that have led to reforms in its structure and composition since the 1970s, and its potential vulnerability. The essence of the conclusions of A. Boin & S.K. Schmidt (2020) is expressed in the metaphor that is included in the title of the study: "The EU Court of Justice – the Guardian of European Integration and Social Values". At the same time, A.W. Ghavanini (2023), move away from absolutising the role of the CJEU in European integration processes and propose to consider its interaction with other European as well as national institutions and the influence of the general public on its decisions as crucial factors in facilitating the CJEU's mission.

In the context of Ukraine's intensification of its European integration movement, an important aspect of the topic is the CJEU's cooperation with national courts of the Member States. The study of its mechanism and implementation of the results obtained in the practice of Ukrainian courts will contribute to the enhancement of the efficiency of the Ukrainian judicial system. Considering the above, the study by J.A. Mayoral & M. Wind (2022) is of interest, which examines preliminary ruling cases in the context of highlighting the interaction between the CJEU and national constitutional courts. The researchers concluded that the level of independence of the judiciary in a state determines the frequency of courts' appeals to the CJEU in case of doubt, for instance, regarding the interpretation of a particular EU act. Consequently, the legal systems of those states where the courts are not fully independent will be less influenced by the CJEU and will be less Europeanised.

A series of academic studies have focused on the analysis of the CJEU's landmark judgements and their impact on the functioning of other institutions and agencies of the EU and Member States. For example, C. Adam *et al.* (2020) reviewed the Court's judgements in cases concerning claims for invalidation of certain EU legal acts in the context of the EU's multi-level system of governance. This study demonstrated that the initiation of such lawsuits has a political component and identifies, using the examples of many relevant cases, the motives of political actors who make efforts to transform political conflicts into lawsuits for the cancellation of regulations. According to the results of the cited study, court decisions in cases of this type are identified as constitutive elements of the multi-level struggle in the EU policy-making process.

The study of individual judgements of the CJEU also suggests that they have a definitive impact on the

[1] Opinion of Directorate-General for Neighbourhood and Enlargement Negotiations "On Ukraine's Application for Membership of the European Union". (2022, June). Retrieved from https://neighbourhood-enlargement.ec.europa.eu/opinion-ukraines-application-membership-european-union_en.
[2] Ibidem, 2022.

development of EU law. M. Ovádek (2023) examined the significance of judicial precedent on the example of a landmark case on the issuance of a preliminary ruling, which was conventionally called "Portuguese judges". The study emphasised its far-reaching consequences. The CJEU's interpretation of Article 19 of the Treaty on the Functioning of the European Union[1] (TFEU) and Article 47 of the Charter of Fundamental Rights of the European Union (Charter of Rights) (right to an effective judicial remedy)[2], which was provided by the CJEU[3], was subsequently used to take unprecedented measures to counter democratic retreat in Poland and Hungary. This case and a series of other cases considered by the CJEU are appropriately used as weighty arguments in the study by L. Koen (2020) to substantiate the thesis on the role of the CJEU in European integration. The researcher insists on the only possible way of further development of the EU – integration through the rule of law, which includes the independence of the judiciary. This study by the President of the Court is also interesting for its convincing arguments and style of presentation, which is both clear/comprehensible and academic.

Despite the academic consensus on the influence of judicial precedent as a factor in the development of EU law, researchers also address the challenges in the CJEU's work. A. Komanovics (2022), specifically, focused on the role of this institution in combating the derogation from the rule of law in Hungary and concluded on the presence of certain institutional and procedural limitations set by the TFEU that hinder the CJEU's ability to provide a consistent response to systemic threats to European values. T. von Danwitz (2024) raised the contemporary issue of calls by some Member States to reduce the CJEU's jurisdiction at the expense of its control over the observance of fundamental rights and rule of law standards. In this way, the scope of obligations under the *acquis communautaire* will be reduced, while member states will have additional opportunities to act independently, specifically, to restrict asylum and residence rights. In conclusion, the researcher emphasised that, in the context of the challenge he identified, the CJEU's special responsibility to apply the *acquis communautaire* when it comes to ensuring that the rule of law and respect for fundamental rights are respected in the actions of European institutions and governments of the Member States is strengthened.

Ukrainian researchers began to actively develop the subject of the specific features of the functioning of the EU judicial institutions after Ukraine signed the Association Agreement between Ukraine[4], on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand (the Association Agreement). It is advisable to pay special attention, in the context of the subject under study, to the monograph by T. Komarova (2018), which is fundamental for Ukrainian legal science and is based on an extensive source base. The researcher focused on a wide range of issues that are to some extent related to the subject of the present study. Specifically, the T. Komarova (2018) examined the history of the EU judicial system, the mechanism of cooperation between the CJEU and national courts of the Member States, and the impact of judicial practice on the interpretation of the *acquis communautaire*, European integration processes, institutions, and law. As a result, the researcher identified the current trend of democratisation of the procedure for the formation of the judiciary in the EU, defined the CJEU's practice as a determinant of the constitutionalisation of EU law, and the main achievement – the possibility for individuals to use primary and secondary EU law to protect their rights directly in national courts. The conclusion about the CJEU's attempts to strike a balance between the economic interests of integration, the interests of individual Member States, and the interests of individuals is of fundamental significance for the implementation of the judicial practice of the candidate states. Researchers in Moldova are less active in addressing the CJEU's problematic. Considering this, it is relevant to address the study of a young Moldovan researcher M. Toncoglaz (2021), who analysed the role of this institution for the EU legal system and came to conclusions consistent with well-known research trends. The researcher acknowledged the exceptional integrative role of the CJEU, which it plays due to its broad competence.

The purpose of this study was to determine the role of judicial precedents in the establishment and development of EU law and the legal systems of the candidate states by analysing the CJEU judgements and judgements of courts of Ukraine and Moldova.

[1] Consolidated Version of the Treaty on the Functioning of the European Union. (2012, October). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT.
[2] Charter of Fundamental Rights of the European Union. (2000, December). Retrieved from https://www.europarl.europa.eu/charter/pdf/text_en.pdf.
[3] Judgment of the Court (Grand Chamber) in Case No. C64/16. (2018, February). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=199682&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10821084.
[4] Association Agreement Between Ukraine, of the One Part, and the European Union, the European Atomic Energy Community and their Member States, of the Other Part. (2014, June). Retrieved from https:// zakon.rada.gov.ua/laws/show/984_011?lang=en#Text.

## Materials and Methods

The study employed general philosophical, general scientific, and special research methods. Using the analysis method, the subject of the study was divided into its constituent elements and each of them was analysed separately. The CJEU's judgements were examined to determine their role in the establishment and development of EU law. The judgements of the courts of Ukraine and Moldova, wherein the CJEU's judgements were used, were considered in the context of clarifying the significance of judicial precedent for the development of the national legal systems of these states. The use of the synthesis method helped to combine the findings obtained during the analysis of the individual components of the subject of research into a single whole. Preference was given to induction rather than deduction, since the study of individual judgements led to several generalisations, for instance, the role of the CJEU's case law in the establishment and development of EU law, as well as its significance for the development of the legal systems of Ukraine and Moldova. The application of the interpretation method helped to establish links between various aspects of determining the content of evaluative concepts that characterise the CJEU's acts and determine their role in shaping the trends in the development of EU law. Any legal research, considering the specifics of its source base, which consists largely of legal acts, requires recourse to special methods, specifically, formal legal methods. Therefore, the texts of all court decisions, EU founding acts, and international treaties were examined using this method. To understand their content, the provisions of the court decisions were studied with a focus on their formal structure and the presence of a logical relationship. The comparative legal method was used to compare the practice of application of the CJEU's judgements by the courts of Ukraine and Moldova, and thus the general significance of judicial precedent in the context of European integration of the candidate states was clarified.

To fulfil the purpose of this study, five groups of sources were used. The main array of sources included judgements, which were divided into two subgroups: judgements of the CJEU[1,2] and judgements of the courts of Ukraine and Moldova[3,4]. The need to investigate these sources was a priority to fulfil the purpose of this study – to determine the role of judicial precedents in the establishment and development of EU law and the legal systems of the candidate states. Particular attention was paid to the CJEU's decisions, which are generally considered to be definitive. In addition, the CJEU uses the corresponding gradation in its summary materials posted on the official website of this judicial institution (Court of Justice of the European Union, 2024b). Among the judgements of Ukraine and Moldova, the study thoroughly examined and analysed those containing references to the CJEU's judgements. The Ukrainian case included several decisions of the Supreme Court delivered in commercial and administrative proceedings, as well as two decisions of the Constitutional Court of Ukraine. The Moldovan case included several decisions of the Constitutional Court of Moldova.

The other four groups were smaller in size, but no less important for fulfilling the purpose of this study. The EU founding acts, namely the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community (the Lisbon Treaty)[5], which were necessary to consider the structural and functional evolution of the CJEU. When investigating the significance of the CJEU's decisions for the development of the legal systems of Ukraine and Moldova as candidate states, it was necessary to analyse the conclusions of the EC regarding the application of Ukraine and Moldova for EU membership[6,7]. Furthermore, such an international treaty as the Association Agreement was examined[8].

[1] Judgment of the Court of Justice of the European Union (Second Chamber) in Case No. C 575/2125. (2023, May). Retrieved from https://curia.europa.eu/juris/document/document.jsf;jsessionid=2EF6C8C92CBE9D965453B1EE93704C34?text=&docid=274102&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2362610.

[2] Judgment of the Court of Justice of the European Union (Eighth Chamber) in Case No. C-329/17. (2018, August). Retrieved from https://eur-lex.europa.eu/eli/reg/2023/1115/oj.

[3] Judgement of the Supreme Court in Case No. 640/12095/21. (2023, November). Retrieved from https://reyestr.court.gov.ua/Review/114735837.

[4] Judgement of the Supreme Court in Case No. 910/12326/20. (2022, September). Retrieved from https://reyestr.court.gov.ua/Review/106658261.

[5] Treaty of Lisbon Amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon. (2007, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT.

[6] Opinion of Directorate-General for Neighbourhood and Enlargement Negotiations "On Ukraine's Application for Membership of the European Union". (2022, June). Retrieved from https://neighbourhood-enlargement.ec.europa.eu/opinion-ukraines-application-membership-european-union_en.

[7] Opinion of Directorate-General for Neighbourhood and Enlargement Negotiations "On Moldova's Application for Membership of the European Union". (2022, June). Retrieved from https://neighbourhood-enlargement.ec.europa.eu/opinion-moldovas-application-membership-european-union_en.

[8] Association Agreement Between Ukraine, of the One Part, and the European Union, the European Atomic Energy Community and their Member States, of the Other Part. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011?lang=en#Text.

The institutional and functional changes in the CJEU were analysed, specifically, based on statistical data set out in the relevant materials of this institution, for instance, on the number of cases considered in 2019-2023 (Court of Justice of the European Union, 2024a), in the consolidated collection of completed cases for 2023 that are "significant" for the interpretation of certain acts of EU law (Court of Justice of the European Union, 2024b). The fifth group of sources included various materials, specifically, press releases of the CJEU (Court of Justice of the European Union, 2024c), which were used to obtain the most up-to-date information on the CJEU's decisions and specific features of its functioning.

## Results

**Establishment of the Court of Justice and its functions.** Until the late 1980s, this institution was the only court with jurisdiction over the EU. With the entry into force of the Lisbon Treaty[1] in 2009, the CJEU was composed of the Court of Justice and the General Court[2]. The fundamental mission of the CJEU is to ensure the uniform interpretation of EU law and to provide the parties to litigation with the best possible judicial protection. The mission statement provides an understanding of the CJEU's role and functions, which have evolved since its establishment under the influence of various factors, including changes in the EU legal and political environment, including the multilingualism of the proceedings, the adversarial nature of the proceedings, and the issuance of so-called preliminary judgements containing interpretations of certain rules of EU law.

The CJEU has become a multilingual institution, which has no analogue in any other court in the world, as each of the official languages of the EU can be the language of the case. This rule is implemented by translating the CJEU's judgements into all official languages of the Member States, and some judgements even into the languages of the candidate states. This practice ensures accessibility and inclusiveness, allowing individuals and Member States to take full part in court proceedings regardless of their native language. However, it also poses logistical challenges and requires considerable resources.

The adversarial nature of the litigation process promotes a thorough examination of legal issues and a dynamic exchange of opinions, which ultimately contributes to the development of EU law. Adversariality is particularly important for the Court's preliminary rulings. The ability to issue preliminary rulings on questions of EU law raised by national courts is a unique aspect of the CJEU's jurisdiction. This mechanism, known as the preliminary examination procedure, allows national courts to seek guidance from the CJEU on the interpretation and application of EU law in particular cases. By ensuring uniformity and consistency in the interpretation of EU law across Member States, this practice strengthens the EU legal framework. An example is the preliminary judgement of the CJEU in case No. C-575/2125 dated 25 May 2023 on the interpretation of certain provisions of Directive 2011/92[3] on the environmental impact assessment of urban development projects[4]. This judgement expands and clarifies the understanding of the Directive to ensure that its provisions are properly implemented by Member States. The importance of this CJEU judgement is also conditioned by the practical implementation of the Directive, which is aimed at achieving the EU objectives set out in Article 191 of the TFEU[5], specifically, preserving, protecting, and improving the quality of the environment.

That is why precedents (the CJEU judgements) become part of the EU *acquis*. The CJEU has also consistently interpreted the Constituent Treaties. Its most famous judgements (e.g., Van Gend en Loos and Costa[6]) set out the principle underlying the functioning of the EU – EU acts are directly applicable to the citizens of Member States and prevail over national laws.

Subsequently, the CJEU has revealed other principles in its case law, including the role of the Constituent Treaties. It is worth addressing the CJEU's judgement dated 7 August 2018 in Case No. C-329/17, which states that when interpreting a provision of

[1] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon. (2007, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT.

[2] Treaty on European Union. (1992, July). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.C_.1992.191.01.0001.01.ENG&toc=OJ%3AC%3A1992%3A191%3ATOC.

[3] Directive of the European Parliament and of the Council No. 2011/92/EU "On the Assessment of the Effects of Certain Public and Private Projects on the Environment (Codification)". (2011, December). Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32011L0092.

[4] Judgment of the Court of Justice of the European Union (Second Chamber) in Case No. C 575/2125. (2023, May). Retrieved from https://curia.europa.eu/juris/document/document.jsf;jsessionid=2EF6C8C92CBE9D965453B1EE93704C34?text=&docid=274102&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2362610.

[5] Consolidated Version of the Treaty on the Functioning of the European Union. (2012, October). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FTXT.

[6] Judgment of the Court of Justice of the European Union in Case No. 26-62 "NV Algemene Transport – and Forwarding Company van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a Preliminary Ruling: Tariff Commission". (1963, February). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026.

an EU law, it is necessary to consider not only its wording, but also the context in which it occurs, as well as the purpose pursued by certain rules[1]. Thus, in performing this function, the CJEU carries out an extended interpretation of the rules. The CJEU has issued a large number of decisions fundamental to the EU institutions and its legal system, some of which will be discussed below.

Therefore, the following changes in the role of the CJEU can be identified as the expansion of its jurisdiction, and thus an increase in the number of cases, the development of its control function, and the assertion of fundamental rights proclaimed in the EU. The CJEU's jurisdiction has expanded considerably to cover new areas such as personal data protection and digital rights. This reflects the growing complexity of EU law and the need for judicial oversight in new policy areas. Thus, the number of applications to the CJEU has increased noticeable, reflecting the expansion of EU law and the growing number of legal disputes involving EU institutions, Member States, and individuals. According to the CJEU's statistics for 2019-2023, the CJEU confirms a steady increase in the number of cases referred to the Court of Justice and the General Court (Court of Justice of the European Union, 2024a). This has increased the burden on the Court's resources and now urgently requires measures to increase efficiency and simplify procedures. The CJEU also plays a leading role in upholding the rule of law and ensuring the consistency and coherence of EU law. Its judgements are becoming increasingly influential in shaping not only EU law but also EU policies, as the CJEU factually exercises judicial oversight over the actions of EU institutions and Member States. As of the end of 2023, according to the CJEU's consolidated judicial statistics for 2019-2023, the largest number of lawsuits were related to the protection of fundamental rights and freedoms, especially in cases concerning issues such as non-discrimination, rule of law, consumer protection, interpretation of the provisions of the Founding Treaties, environmental protection, etc. This reflects the CJEU's commitment to upholding the values prescribed in the Founding Treaties and the Charter of Rights[2]. Overall, while the CJEU's core functions as the guardian of EU law stay unchanged, its role has evolved in response to changing legal, political, and societal dynamics within and outside the EU.

**The role of the CJEU's judgements in shaping EU law**. In addition to its role as an interpreter of EU law, the CJEU actively contributes to its development through landmark judgements and case law. By setting legal precedents and clarifying the scope of EU law, the CJEU plays a crucial role in shaping the evolution of the EU legal framework. Its decisions have far-reaching implications, affecting not only Member States but also the wider legal community in the EU and beyond. This is reflected in all areas of EU law.

For example, in the area of data protection and privacy, the Schrems II judgement[3] invalidated the EU-US Privacy Shield agreement, citing concerns about the adequacy of data protection standards in the United States. The decision underlined the EU's commitment to protecting the privacy of its citizens and set a precedent for cross-border data transfers. Furthermore, the CJEU plays a crucial role in ensuring compliance with competition law and combating monopolistic practices. Notable decisions include the imposition of large fines on tech giants such as Google for anti-competitive behaviour, which demonstrates the EU's determination to ensure a level playing field in the digital market[4]. This decision had an impact on the CJEU's subsequent practice in assessing data transfer mechanisms to third countries with a prominent level of personal data protection. Thus, the CJEU used its own judgement in Schrems II in subsequent cases to consider complaints and appeals related to data transfers to countries that do not enjoy the same level of protection as the EU. For instance, in the judgement in case No. C-311/18 "Facebook Ireland and Schrems"[5] in 2020, the invalidity of the Privacy Shield mechanism in the context of data transfer to the United States was again recognised.

The protection of the principles of citizenship and free movement in the EU is another key area of the CJEU's work. Landmark judgements, including the Lounes case, have confirmed the right of EU citizens and their families to reside and move freely within the EU, strengthening the concept of European citizenship as a fundamental aspect of EU law[6]. In the

[1] Judgment of the Court of Justice of the European Union (Eighth Chamber) in Case No. C-329/17. (2018, August). Retrieved from https://eur-lex.europa.eu/eli/reg/2023/1115/oj.

[2] Charter of Fundamental Rights of the European Union. (2000, December). Retrieved from https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

[3] Judgment of the Court of Justice of the European Union (Grand Chamber) in Case No. C-311/18. (2020, July). Retrieved from https://curia.europa.eu/juris/liste.jsf?num=C-311/18.

[4] Judgment of the General Court (Ninth Chamber, Extended Composition) in Case No. T612/1710. (2021, November). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=249001&pageIndex=0&doclang=EN.

[5] Judgment of the Court of Justice of the European Union (Grand Chamber) in Case No. C311/18. (2020, July). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=228677&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3666002.

[6] Judgment of the Court of Justice of the European Union (Grand Chamber) in Case No. C-165/16. (2017, November). Retrieved from https://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=c-165/16.

era of digital transformation, the CJEU has addressed numerous legal issues related to digital rights and the regulation of online platforms. Decisions such as the Google Spain case[1], which established the "right to be forgotten", underline the CJEU's efforts to strike a balance between freedom of expression and the rights of citizens to privacy and personal data protection in the digital sphere. For instance, in 2016, the aforementioned judgement was used to resolve the issues in case No. C-440/14 P "GC and Others v Commission"[2] concerning access to documents in the context of personal data protection.

In its summary of 2023, the CJEU of Justice of the European Union highlighted several completed court cases that are "significant" for the interpretation of certain acts of EU law (Court of Justice of the European Union, 2024b). Some of these decisions have direct references to the obligations of candidate states. See, for example, the judgement in case No. C-204/21[3] dated 5 June 2023 in the EC's action against Poland concerning the independence and respect for the private life of judges. In the judgement, the CJEU emphasises that the EU is based on values common to the Member States and that respect for these values is a prerequisite for accession. Thus, the EU comprises states that have voluntarily committed themselves to these values, and respect for and promotion of these values is a fundamental prerequisite for mutual trust among Member States. Consequently, a Member State's compliance with these values is a condition for the enjoyment of all rights arising from the application of the Founding Treaties to that Member State and cannot be reduced to an obligation that a candidate state must perform to join the EU and which it may ignore after accession. In this regard, the CJEU notes that Article 19 of the TFEU[4] specifies the value of the rule of law set out in Article 2 of the TFEU[5] and prescribes that it is for Member States to determine the system of remedies and procedures to ensure that individuals can enjoy their right to an effective judicial remedy in the areas covered by EU law.

The review also highlights the CJEU's judgement concerning the EU's sanctions policy towards certain Russian citizens in connection with Russia's full-scale armed aggression against Ukraine. Judgement in Case No. T-193/22[6] dated 15 November 2023 contains an interpretation of the criteria by which a person may be subject to EU sanctions. The CJEU also notes that these criteria, interpreted in the light of the legislative and historical context in which they were adopted, are not manifestly disproportionate considering the purpose of the restrictive measures and the overriding importance of maintaining peace. This decision had a considerable impact on the further introduction of the EU sanctions policy against Russian citizens as a justified instrument of foreign political influence on persons involved in the outbreak of hostilities on the territory of Ukraine on 24 February 2022. Since the application of such measures is not a regular practice of the EU, the CJEU's judgement confirmed the legality of the measures imposed by the Union. Thus, as the "guardian" of EU law, the CJEU plays a key role in upholding the fundamental principles of the EU and ensuring the effective functioning of its legal system.

**Challenges in the work of the CJEU and the formation of judicial precedents.** While the CJEU plays a crucial role in upholding the rule of law and ensuring the uniform application of EU law, it faces a series of challenges, as illustrated in Figure 1. According to J.C. Fjelstul *et al.* (2022), the CJEU faces a sizeable backlog of cases, which leads to delays in resolving legal disputes. This backlog could undermine the prompt administration of justice and reduce the efficiency of the EU judiciary. The CJEU's proceedings are complex and lengthy due to their multi-stage nature. This complexity can deter individuals and legal entities from bringing cases to the CJEU, specifically because of the costs involved: the cost of legal representation and procedural barriers can limit access to justice, especially for individuals and small businesses with limited resources. This factually creates inequality and impedes the observance of the rights and freedoms of EU citizens.

Another challenge is the problem of law enforcement. Although the CJEU has the power to interpret EU law, the enforcement mechanisms are left to the Member States, which must follow the judgements. In some cases, Member States may not

[1] Judgment of the Court of Justice of the European Union (Grand Chamber) in Case No. C131/1213. (2014, May). Retrieved from https://curia.europa.eu/juris/liste.jsf?num=C-131/12.

[2] Judgment of the Court of Justice of the European Union (Grand Chamber) in Case No. C440/14 P. (2016, March). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=174656&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3666002.

[3] Judgment of Justice of the European Union (Grand Chamber) in Case No. C-204/21. (2023, June). Retrieved from https://curia.europa.eu/juris/document/document.jsf;jsessionid=FAA57A7554B89A9107F9D9F7785529FD?text=&docid=274364&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=3648032.

[4] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon. (2007, December). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12007L%2FTXT.

[5] Ibidem, 2007.

[6] Judgment of the General Court in Case No. T-193/22. (2023, November). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=281984&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3666002.

follow the CJEU's judgements, leading to problems in the enforcement of judgements, which is unacceptable in the context of the EU's values. For instance, in 2020, the EC filed a complaint with the Court of Justice against Hungary regarding legislative measures that restrict the possibility of foreign funding for non-profit organisations working to support migrants and refugees. Hungary's actions were recognised as a violation of EU law. In such cases, the CJEU may impose financial sanctions against a Member State that fails to follow its judgements (Court of Justice of the European Union, 2024c).

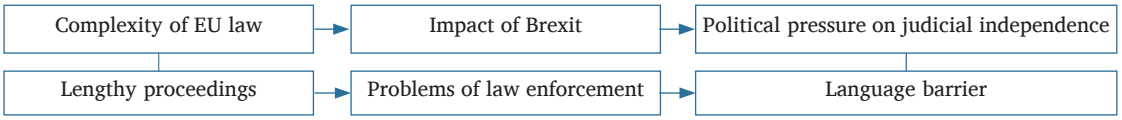


**Figure 1.** Challenges in the work of the CJEU
**Source:** compiled by the authors of this study

A considerable challenge in the CJEU's work is the language barrier. CJEU proceedings are conducted in several languages, which creates difficulties for both judges and litigants, especially for those who do not speak the official languages of the EU. Language barriers can impede the effective presentation of arguments and access to justice.

The problem of political pressure on judicial independence is significant. This concerns not only the judges of the CJEU, as this problem is global for all judges elected to office. The significance of this issue is highlighted in the European Parliament's 2023 briefing (Mańko, 2023). In recent years, the CJEU's case law has played an increasingly vital role in the development of common minimum standards of judicial independence, which are binding on EU Member States under EU law. The CJEU's judgements may be subject to scrutiny and criticism by various stakeholders, including Member States, interest groups, and the public. Political pressure and public opinion may affect the independence of judges and the impartiality of judicial decisions.

An additional challenge for the CJEU's work is the considerable increase in the body of EU law, which is vast and complex, covering a wide range of areas from antitrust to environmental regulations. Judges must ensure consistency and coherence in their judicial practice, which can be challenging considering the evolving nature of EU law and judicial practice.

The impact of Brexit on the functioning of the CJEU is noticeable. The UK's withdrawal from the Union has raised questions about the CJEU's jurisdiction over UK law and the enforcement of judgements. This transition creates practical challenges and uncertainty for legal practitioners and litigants. Addressing these challenges requires measures to improve the efficiency, accessibility and effectiveness of the CJEU, including reforms aimed at simplifying procedures, improving access to justice, and strengthening oversight and accountability for non-compliance with court decisions. Furthermore, promoting transparency, accountability, and independence of the judiciary is essential to ensure the integrity and legitimacy of the EU legal system.

**The significance of the CJEU's judgements for Ukraine and Moldova as candidate states.** Attention to the CJEU's judgements is crucial when adapting national legislation. This refers to the obligation to consider the explanations provided in the CJEU's judgements. The CJEU's judgements are binding on all EU member states. This means that national courts must follow the CJEU's judgements when interpreting and applying EU law, including the provisions of EU treaties, directives, and regulations. Ignoring the CJEU's judgements may lead to legal uncertainty and potential conflicts between national legislation and EU law.

As the highest interpreter of EU law, its judgements clarify the meaning and scope of EU legal norms, providing guidance on how to apply them in practice. Considering the CJEU's opinions helps to ensure consistency and coherence in the application of EU law and enhances the protection of fundamental human rights and freedoms. Court rulings often deal with issues related to fundamental rights and freedoms of EU citizens. The adaptation of national legislation of the candidate countries to these decisions helps to protect the rights of individuals and legal entities, ensuring that they enjoy the full benefits of EU law and are not subject to arbitrary or discriminatory treatment. Furthermore, the CJEU's decisions increase legal certainty. Compliance with them increases legal certainty for citizens, businesses, and public authorities. Judicial decisions provide clear guidance on the rights and obligations arising from EU law, reducing ambiguity and potential conflicts in legal interpretation. This helps to create a stable and predictable legal environment conducive to economic growth and social cohesion.

The study of the CJEU's judgements can significantly contribute to the European integration of candidate states, especially at the stage of the negotiation process. As fairly noted by V. Lomaka *et al.* (2023), the case law of the CJEU has numerous Europeanisation effects. Following them is essential for advancing

European integration and upholding the rule of EU law. This demonstrates respect for the EU legal order and commitment to the common values and goals of the Union. The adaptation of Ukrainian legislation in line with the CJEU's judgements strengthens the overall cohesion and effectiveness of the EU legal system.

The Association Agreement[1] prescribes Ukraine's obligation to harmonise the provisions of national legislation to those of EU law. The legislation is adapted in stages and in this process due regard should be paid to the relevant case law of the CJEU, as stated, for instance, in Article 153 of this Agreement. Judicial practice of Ukraine contains references to certain judgements of the CJEU. A series of cases from the Unified State Register of Court Decisions of the Supreme Court of Ukraine contain references to the CJEU's case law: Case No. 910/9627/20[2] (FENS spol. s r.o. v. Slovak Republic[3]); Case No. 640/12095/21[4] (CJEU's cases of "Bundesamt Fremdenwesen und Asyl"[5]; "Commissaire gnral aux rfugis et aux apatrides"[6]; "Staatssecretaris van Justitie en Veiligheid"[7]); Case No. 910/12326/20[8] (CJEU's case of FENS spol. s r.o. v. Slovak Republic[9]); Case No. 910/14489/20[10] (CJEU's case of FENS spol. s r.o. v. Slovak Republic[11]); Case No. 818/399/17[12] (CJEU's case of Yvonne van Duyn v. Home Office[13]); Case Nos. 9901/636/18 and 9901/186/19[14] (CJEU's case of Commission v. Poland[15]), etc. The list of such solutions is inexhaustible and constantly updated.

Notably, the Supreme Court's decisions under study were delivered within the framework of commercial and administrative proceedings. The subjects of consideration in these cases were as follows: ensuring public order and security, national security and defence of Ukraine, specifically regarding refugees; energy carriers; gas supply; export of electricity; functioning of the gas distribution system; architectural and construction control; state regulation in the energy and utilities sectors; qualification assessment of judges, etc.

Thus, in administrative proceedings, it is usually pointed out that the CJEU's case law is applied in a general context, without specifying cases. In commercial proceedings, there are references, mainly to the case of FENS spol. s r.o. v. Slovak Republic No. C-305/17 dated 6 December 2018[16] (regarding the interpretation of the provisions of Directive No. 2003/54/EC[17] on common rules for the internal electricity market). The case of Yvonne van Duyn v.

[1] Association Agreement Between Ukraine, of the One Part, and the European Union, the European Atomic Energy Community and their Member States, of the Other Part. (2014, June). Retrieved from https://zakon.rada.gov.ua/laws/show/984_011?lang=en#Text.

[2] Judgement of the Supreme Court in Case No. 910/9627/20. (2022, August). Retrieved from https://reyestr.court.gov.ua/Review/105852859.

[3] Judgment of Justice of the European Union (Grand Chamber) in Case No. C305/17. (2018, December). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=208551&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3550687.

[4] Judgement of the Supreme Court in Case No. 640/12095/21. (2023, November). Retrieved from https://reyestr.court.gov.ua/Review/114735837.

[5] Judgment of the Court (Seventh Chamber) in Case No. C-231/21. (2022, March). Retrieved from https://eur-lex.europa.eu/legal-content/bg/TXT/?uri=CELEX%3A62021CJ0231.

[6] Judgment of the Court (Grand Chamber) in Case No. C-573/14. (2017, January). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0573#t-ECR_62014CJ0573_EN_01-E0001.

[7] Judgment of the Court (Grand Chamber) in Case No. C-69/21. (2022, November). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62021CJ0069.

[8] Judgement of the Supreme Court in Case No. 910/12326/20. (2022, September). Retrieved from https://reyestr.court.gov.ua/Review/106658261.

[9] Judgment of Justice of the European Union (Grand Chamber) in Case No. C305/17. (2018, December). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=208551&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3550687.

[10] Judgement of the Supreme Court in Case No. 910/14489/20. (2024, January). Retrieved from https://reyestr.court.gov.ua/Review/116888006.

[11] Judgment of Justice of the European Union (Grand Chamber) in Case No. C305/17. (2018, December). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=208551&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3550687.

[12] Judgement of the Supreme Court in Case No. 818/399/17. (2018, April). Retrieved from https://reyestr.court.gov.ua/Review/73173405.

[13] Judgment of the Court in Case No. 41-74. (1974, December). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61974CJ0041.

[14] Judgement of the Supreme Court in Case No. 9901/636/18. (2019, March). Retrieved from https://reyestr.court.gov.ua/Review/80783425.

[15] Judgment of the Court (Grand Chamber) in Case No. C-192/18. (2019, November). Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A62018CJ0192.

[16] Judgment of Justice of the European Union (Grand Chamber) in Case No. C305/17. (2018, December). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=208551&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3550687.

[17] Directive of the European Parliament and of the Council No. 2003/54/EC "On Common Rules for the Internal Market in Electricity and Repealing Directive 96/92/EC – Statements Made with Regard to Decommissioning and Waste Management Activities". (2003, June). Retrieved from https://eur-lex.europa.eu/eli/dir/2003/54/oj.

Home Office[1] is notable, which describes the terms "legal certainty" and "reasonable expectations". The case of Berlioz Investment Fund S.A. v Directeur de l'administration des Contributions directes is considered relevant for use in judicial practice concerning taxation[2]. However, no reference to this case was found in the Supreme Court's decisions. Therewith, there is an ambiguous practice of the Supreme Court: case No. 910/9627/20[3] ignored in the decision in case No. 910/14489/20[4].

In terms of the use of the CJEU's judgements in the practice of the Constitutional Court of Ukraine (the CCU), only two judgements of the Constitutional Court of Ukraine mention the CJEU's case law. This refers to the Decision of the Second Senate of the CCU No. 6-p(II)/2021 dated 16 September 2021 in case No. 3-349/2018 (4800/18, 1328/19, 3621/19, 6/20)[5] and the Decision of the Second Senate of the CCU No. 9-p(II)/2023 dated 1 November 2023 in case No. 3-53/2022 (126/22)[6]. The Judgement dated 16 September 2021 in its reasoning part is substantiated, inter alia, by the CJEU's interpretation of the concept of human dignity as a key element in its practice, the Judgement dated 1 November 2023 – by the CJEU's confirmation of the obligation of competent national authorities to follow the principle of proportionality. Notably, in these decisions of the CCU, apart from the CJEU's practice, the practices of the European Court of Human Rights (the ECHR), constitutional courts of some states, specifically the USA, Germany, Lithuania, and Hungary, are also considered.

In some cases, when it is necessary to interpret the provisions of EU law implemented in the national legislation of Moldova, the Constitutional Court also uses the judgements of the CJEU when considering the case on the merits and rendering a final decision. An example of such decisions is the Decision on the constitutional application regarding the unconstitutionality of certain provisions of Part 2 of Article 126 (2) of the Criminal Procedural Code[7] (application No. 49g/2023)[8] ("In its judgement in Tele Sverige and Watson and Others, Nos. C-203/15 and C-698/15[9] dated 21 December 2016, which was based on previous references by the Administrative Court of Appeal of Stockholm, Sweden, and the Court of Appeal of England and Wales, the Court of Justice held that Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council dated 12 July 2002 on the processing of personal data and the protection of privacy in the electronic communications sector[10] excludes legislation allowing authorities to access traffic data and stored location data if: (a) the purpose for which it is intended is not limited to the fight against serious crime and (b) such access is not subject to prior review by a court or other independent body. These findings were confirmed in the CJEU's subsequent practices on access to traffic data. For instance, in Case No. C-746/18[11] dated 2 March 2021, the CJEU clarified that Article 15(1) of Directive 2002/58/EC[12] allows access to traffic data or location data held only to combat serious crime or a serious threat to security, regardless of the length of the period for which access to the traffic data is requested or the amount of data available in that respect..."). The relevant reference to the CJEU's judgement is also contained in the

[1] Judgment of Justice of the European Union in Case No. 41/74. (1974, December). Retrieved from https://curia.europa.eu/juris/showPdf.jsf?text=&docid=88751&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3551522.

[2] Judgment of Justice of the European Union (Grand Chamber) in Case No. C682/15. (2017, May). Retrieved from https://curia.europa.eu/juris/document/document.jsf?text=&docid=190721&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3552442.

[3] Judgement of the Supreme Court in Case No. 910/9627/20. (2022, August). Retrieved from https://reyestr.court.gov.ua/Review/105852859.

[4] Judgement of the Supreme Court in Case No. 910/14489/20. (2024, January). Retrieved from https://reyestr.court.gov.ua/Review/116888006.

[5] Judgement of the Second Senate of the Constitutional Court of Ukraine No. 6-p(II)/2021 in Case No. 3-349/2018 (4800/18, 1328/19, 3621/19, 6/20). (2021, September). Retrieved from https://zakon.rada.gov.ua/laws/show/v006p710-21#Text.

[6] Judgement of the Second Senate of the Constitutional Court of Ukraine No. 9-p(II)/2023 in Case No. 3-53/2022(126/22). (2023, November). Retrieved from https://zakon.rada.gov.ua/laws/show/v009p710-23#Text.

[7] Criminal Procedural Code of the Republic of Moldova. (2003, March). Retrieved from https://www.legis.md/cautare/getResults?doc_id=123540&lang=ro.

[8] Judgment of Constitutional Court of the Republic of Moldova in Case No. 49g/2023 "On the Exception of Unconstitutionality of Certain Provisions of Article 126 para. (2) of the Code of Criminal Procedure (Safeguards for the Collection of Information on Telephone Conversations). (2023, December). Retrieved from https://www.constcourt.md/public/ccdoc/hotariri/h_22_2023_49g_2023_rou.pdf.

[9] Judgment of the Court (Grand Chamber) in Cases Nos. C-203/15 and C-698/15. (2016, December). Retrieved from https://curia.europa.eu/juris/liste.jsf?num=c-203/15.

[10] Directive of the European Parliament and of the Council No. 2002/58/EC "On the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector". (2002, July). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002L0058.

[11] Judgment of the Court (Grand Chamber) in Case No. C-746/18. (2021, March). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62018CA0746.

[12] Directive of the European Parliament and of the Council No. 2002/58/EC "On the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector". (2002, July). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002L0058.

judgement to dismiss the complaint No. 161g/2023[1] challenging the unconstitutionality of certain provisions of Article 232 of the Customs Code (as amended by Law No. 1149 as of 20 July 2000)[2] ("...the CJEU also examined the customs provisions of Bulgaria[3], according to which in case of withdrawal of goods placed under the customs warehousing procedure from customs supervision, the holder of the customs warehousing permit was obliged to pay a financial penalty in the amount of 100% to 200% of the value of the withdrawn goods, as well as the amount corresponding to the value of these goods. The court noted that the fine, which consists of an obligation to pay an amount corresponding to the value of the goods withdrawn from customs control, does not appear to be proportionate. Thus, the fine of this amount exceeds the limits of what is necessary to ensure, specifically, that the goods placed under the customs warehousing procedure are not withdrawn from customs supervision. In such circumstances, the CJEU noted that the penalties in question are intended to punish not any fraudulent or illegal actions, but any violation of customs legislation. The CJEU therefore held that such a sanction was disproportionate...").

Analogous references are contained in the Judgement on the constitutional petition to declare Article 87(2) and (3) of the Labour Code unconstitutional[4] (obligation to obtain the consent of the trade union body upon dismissal) (complaint No. 149g/2019)[5] ("...the Court of Justice of the European Union interpreted Article 7 of Directive No. 2002/14/EC[6] as not requiring that employee representatives be granted enhanced protection against dismissal, but clarified that any measures taken to transpose the Directive must meet a minimum level of protection (Judgment of the Court of Justice of the European Union No. c-405/08[7]"). Another example is the Decision on the Declaration of Certain Provisions of the Civil Procedure Code of the Republic of Moldova of 2003 as Unconstitutional[8] (judicial mediation) (complaint No. 3g/2018)[9] ("In case 317/08, the CJEU considered whether the establishment of a mandatory conciliation procedure as a condition for the admissibility of a lawsuit is compatible with the right to effective judicial protection. The Court ruled that fundamental rights are not absolute prerogatives, but may be subject to restrictions, provided that they are truly in line with the aims of the general interest pursued by the measure in question and do not involve, in terms of the aim pursued, a disproportionate and unacceptable interference that would undermine the very content of the rights thus guaranteed, and the case law cited, as well as the practice of the ECHR, the judgement in Fogarty v. the United Kingdom"[10] dated 21 November 2001, §33").

The position of the Supreme Court of Ukraine in terms of analysing the CJEU's judgements is mainly that the courts consider law enforcement practice, including the CJEU's judgements, when applying the law. At the same time, an analysis of the judgements of the Supreme Court of Justice of Moldova for 2020-2023 revealed no references to the case law of the CJEU. Therewith, the practice of the constitutional courts of the studied states is insignificant (Ukraine – 2 judgements; Moldova – 3 judgements and 1 ruling). The above decisions relate to the interpretation of certain EU law provisions implemented in national legislation. Thus, Ukraine and Moldova are not currently members of the EU and are not subject to the CJEU's judgements on a mandatory basis. Therefore, they cannot be a source of national law; the CJEU's judgements should be regarded as allowing to establish the meaning of the provisions of EU law. Analogously to the practice of applying ECHR judgements,

[1] Judgment of Constitutional Court of the Republic of Moldova in Case No. 161g/2023 "On the Exception of Unconstitutionality of Certain Provisions of Article 232(a) and (h) of the Customs Code (in the Wording of Law No 1149)". (2024, June). Retrieved from https://www.constcourt.md/public/ccdoc/decizii/d_50_2024_161g_2023_rou.pdf.

[2] Customs Code of the Republic of Moldova. (2021, August). Retrieved from https://www.legis.md/cautare/getResults?doc_id=135043&lang=ro.

[3] Law of Bulgaria "On Customs". (1999, January). Retrieved from https://lex.bg/laws/ldoc/2134384640.

[4] Labour Code of the Republic of Moldova. (2003, March). Retrieved from https://www.legis.md/cautare/getResults?doc_id=113032&lang=ro.

[5] Judgment Judgment of Constitutional Court of the Republic of Moldova in Case No. 149g/2019 "On the Exception of Unconstitutionality of Article 87 para. (2) and par. (3) of the Labour Code (Obligation to Obtain the Consent of the Trade Union Body when Dismissing)". (2019, February). Retrieved from https://www.constcourt.md/public/ccdoc/hotariri/h_3_2020_149g_2019_rou.pdf.

[6] Directive of the European Parliament and of the Council No. 2002/14/EC "On Establishing a General Framework for Informing and Consulting Employees in the European Community – Joint Declaration of the European Parliament, the Council and the Commission on Employee Representation". (2002, March). Retrieved from https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L0014.

[7] Judgment of the Court (Third Chamber) in Case No. C-405/08 "The Danish Society of Engineers and the Confederation of Danish Employers". (2010, February). Retrieved from https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62008CJ0405.

[8] Civil Procedural Code of the Republic of Moldova. (2003, May). Retrieved from https://www.legis.md/cautare/getResults?doc_id=110220&lang=ro.

[9] Judgment of Constitutional Court of the Republic of Moldova in Case No. 3g/2018 "On the Exception of Unconstitutionality of Some Provisions of the Code of Civil Procedure of the Republic of Moldova, Adopted by Law No. 225 of 30 May 2003 (Judicial Mediation)". (2018, April). Retrieved from https://www.constcourt.md/public/ccdoc/hotariri/ro-hcc8sesizarea3g2018b26e1.pdf.

[10] Judgment of the European Court of Human Rights in Case No. 37112/97 "Fogarty v. the United Kingdom". (2011, November). Retrieved from https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59886%22]}.

the principles arising from its decisions on comparable issues are to be considered, even if they relate to other states.

The methods and ways of interpreting acts by the CJEU, considering the significant role of case law in the EU legal system, may be useful for the practice of the Constitutional Court of Ukraine and the Constitutional Court of Moldova, as well as other candidate states. Thus, in the performance of its functions, the CJEU carries out an extended interpretation of the provisions of EU law. This method allows filling gaps in the law and is also one of the means by which the competences of the Union's institutions are expanded. Furthermore, the CJEU provides systematic interpretation of EU law, which reflects the inextricable link between a particular rule and the system of the act in which it is contained and the entire system of EU law. Notably, the preamble plays a significant role in the interpretation of an act. The provisions of the preambles to the constituent agreements and the articles establishing the objectives of these agreements shall be interpreted by the CJEU holistically (comprehensively) in such a way as to best promote the objectives of the act.

It is worth noting the problem of the use and application of court precedents as sources of law in states with a continental legal system, including Ukraine and Moldova. This system of law does not prescribe the use of judicial precedents in resolving court cases. Therefore, in the legal understanding of national judges and lawyers, precedents are not an equivalent analogue of substantive law. This may become a considerable obstacle to the correct understanding and application of EU law in the states that become new EU members. As practicing lawyers in countries with continental legal systems understand it, the application of judicial precedent may carry a considerable risk of distorting the idea and letter of a substantive legal rule. In such systems of law, decisions of higher courts may be considered by lower courts only for the sake of uniformity of judicial practice, but not as a reason for making a decision. In this context, following the opinion of M. Eliantonio (2010) that the Court of Justice provides a basic "toolkit" for ensuring compliance with EU law by national courts and authorities throughout the European Union, it should be added that the same "toolkit" can and should be effectively used for the adaptation of legislation by the courts of the Member States at the stage of European integration. Thus, attention to the judgements of the EU Court of Justice when adapting national legislation is essential to ensure compliance with the law, protect fundamental rights and freedoms, avoid violations, enhance legal certainty, and promote European integration. This demonstrates the commitment to the rule of law and the values of the European Union.

## ■ Discussion

The findings of this study in terms of the role of the CJEU's judgements in the development of Union law generally do not contradict the positions of other researchers who have focused on analogous issues. The author of this study agrees with the statements of N. Gierczyk (2005) regarding the integrating and constitutive role of the CJEU, as well as the definition of judicial precedent as an integral part of the evolution of the EU legal system and the EU institution as a whole.

At the same time, this study found an "academic niche" and specified a series of aspects of the general topic of the impact of the CJEU's judgements on EU law. Thus, the study detailed the channels of influence of judicial precedent on the formation and development of the *acquis communautaire*. Judicial interpretation clarifies the meaning and intent of legislative provisions, helping to establish legal principles and standards on which future lawmaking and application of the law is based. CJEU precedents can fill in gaps or ambiguities in legislation by providing solutions to legal issues that are not directly addressed in the text of the act, especially in case of directives. Judicial precedents reflect the evolution of social values, norms, and expectations, influencing the legislative response to new social, economic, and technological changes in European society, thereby adapting the law to social change. CJEU precedents set legal standards and principles that influence not only legislative but also political practice in the EU. Judicial precedents provide feedback to legislators on the effectiveness and adequacy of existing legislation, highlighting shortcomings or inconsistencies in legislation, prompting legislators to review and reformulate legislation to address the shortcomings identified in court decisions. Consistent application of court precedents contributes to the stability and predictability of the legal system, increasing confidence in the rule of law.

Compared to all the studies published previously, this study analysed some of the CJEU's most recent landmark decisions. This refers to two decisions made in 2023. Firstly, the interpretation of the criteria for imposing EU sanctions on a person has substantially influenced the EU's further sanctions policy towards persons involved in the outbreak of hostilities against Ukraine on 24 February 2022. Secondly, the judgement in the EC's lawsuit against Poland on the independence and privacy of judges noted that it is impossible to reduce adherence to EU values to a candidate's obligation to join the Union, which can be ignored after becoming a Member State.

Considering the emphasis on the role of judicial precedent in the development of the legal systems of the candidate states in this study, the following is worth noting on the example of Ukraine and Moldova.

This topic is part of a broader theme. This refers to the application and influence of EU law overall, not just judicial precedent outside the supranational union of states. Supporting the basic findings of, for example, M. Cremona & J. Scott (2019) and A. Reich & H.-W. Micklitz (2020) regarding the impact of the *acquis communautaire* on the legal systems of non-EU states, it should be noted that it is inappropriate to use the provocative hypothesis put forward by F. Casolari & M. Gatti (2022) to investigate the subject of this paper and analogous topics. This refers to the initial interpretation of the extraterritoriality of EU law as a manifestation of distrust in other systems of legal regulation of social relations. The author of this study considers the generally positive assessment of the impact of the *acquis communautaire* on the development of legislation of states outside the EU legal framework, specifically the candidate states, to be paramount and undisputed. For instance, the author of this study supports the opinion of K. Smyrnova (2020), who defined the content of such influence as the Europeanisation of the legal order of Ukraine.

In the context of analysing the impact of the CJEU's judgements on the development of the legal systems of candidate states, it is important to identify the factors that determine it. This study considered the obligations enshrined in the provisions of European integration agreements to be the priority. At the same time, it is appropriate to agree with the approach used by M. Cremona & J. Scott (2019), A. Reich & H.-W. Micklitz (2020), where a wider range of conditioning tools was highlighted, both formal and informal. Therewith, the potential and capabilities of the CJEU's judgements as a factor in the adaptation of national legislation of third countries to EU law are not unlimited and cannot fully/effectively counteract authoritarian tendencies in the system of organisation of state power. An example of research "romanticism" is the study by R. Petrov & P. Kalinichenko (2011), where the authors optimistically combined Ukraine and Russia in their study of the practices of application of the EU *acquis* by national courts of non-EU states. Among the manifestations of the impact of the CJEU's judgements on the legal system of the candidate states, this study emphasises the promotion of European integration, which does not suggest that other relevant manifestations are ignored or underestimated. The conclusion of K. Smyrnova (2014) that the CJEU's decisions contribute to the improvement of the legal culture of business entities in Ukraine is worth further development through new research.

The examples of Ukraine and Moldova show that the role of the CJEU's judgements in the development of the legal systems of the candidate states is of interest at the research level, but the place of such precedents in the legal system of the candidate states is not properly regulated at the regulatory level. Despite the rather fragmentary application of the CJEU's case law outside the EU, neither the EU nor the candidate states have officially spoken out on this issue.

## Conclusions

There is a connection between the structural and functional evolution of the CJEU and the increasing weight of its judgements. In the 21st century, the EU judicial system has undergone considerable reforms, specifically, the entry into force of the Lisbon Treaty led to the expansion of the CJEU's jurisdiction, the introduction of an urgent preliminary ruling procedure, and the development of the control function. These changes have strengthened the role of the CJEU as a factor in the establishment and development of EU law.

The current challenges facing the CJEU include the complexity and length of court procedures, the existence of cases of non-compliance with judgements by Member States, and the language barrier as a hypothetical obstacle to the effective presentation of arguments by litigants and access to justice, pressure on the judiciary from Member States, interest groups and the public, the growing body of EU law, uncertainty, due to Brexit, about the CJEU's jurisdiction over the UK, and the enforcement of relevant judgements. The channels of influence of judicial precedent (CJEU's judgements) on the establishment and development of EU law are defined as interpretation of legislation, filling gaps in legislation, adaptation to social changes in the EU, development of legal standards, creation of a feedback mechanism, and promotion of legislative stability.

The analysis of the case law of Ukraine and Moldova, in the context of the use of the CJEU's judgements, allows summarising the overall significance of judicial precedent in the context of the European integration of the candidate states. While compliance by national courts with the CJEU's judgements in interpreting and applying EU law will contribute to European integration, ignoring them will lead to legal uncertainty and potential conflict between national legislation and EU law. Furthermore, certain judgements of the CJEU serve as guidelines for candidate states and can counteract/warn against manifestations of authoritarianism. For instance, a judgement emphasising the impossibility of reducing compliance with EU values to an obligation of a candidate state that can be ignored after becoming a Member State can be considered as such. It is also worth noting the activity of appeals to the CJEU's judgements in the judicial practice of the two states. The Supreme Court of Ukraine has repeatedly referred to judicial precedent in its decisions, and the list of relevant decisions is constantly updated. At the same time, in administrative proceedings, as a rule, the application

of the CJEU's case law is indicated in a general context, without specifying cases. At the same time, based on the analysis of the materials of the Supreme Court of Justice of Moldova for 2020-2023, its judgements do not refer to concrete judgements or the general practice of the CJEU. However, the Constitutional Court of Moldova, like the Constitutional Court of Ukraine, referred to the decisions of the CJEU in its judgements. Therewith, the respective Moldovan and Ukrainian constitutional cases are small in scope.

It is worth noting the potential problem of widespread use of the CJEU's judgements in the national practice of candidate states whose legal systems belong to the continental family. The legal culture of legal practitioners in these countries is characterised by the perception of judicial precedent as a carrier of a considerable risk of distortion of the idea and letter of a substantive rule of law. Considering this, the dilemma of precedent versus substantive law may be a permanent trigger for judges and lawyers.

Promising areas for further research on the role of judicial precedent in the development of EU law and the legal systems of the candidate states include, specifically, a review of the practices of using the CJEU's judgements by the courts of other candidate states, as well as the study of new decisions of Ukrainian courts containing references to the case law of the CJEU.

## Acknowledgements

None.

## Conflict of Interest

The authors of this study declare no conflict of interest.

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# Роль судових прецедентів у розвитку права ЄС і правових систем держав-кандидатів: приклади України та Молдови

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■ **Анотація.** Рішення Суду Європейського Союзу відіграють одну з фундаментальних ролей у формуванні *acquis* Європейського Союзу. Актуальність дослідження полягає в їх впливі не лише на правозастосовну практику в межах Союзу, а й на тенденції розвитку та зміни правових актів Європейського Союзу. З огляду на зазначене, метою статті є визначення ролі рішень Суду Європейського Союзу у формуванні права Європейського Союзу та правових систем держав-кандидатів. Методологічною основою дослідження є загальнонаукові та спеціальні методи дослідження, такі як аналіз і синтез, індукція, інтерпретація, формально-логічний та порівняльно-правовий. У публікації встановлено наявність зв'язку між структурно-функціональною еволюцією Суду Європейського Союзу та посиленням ваги його рішень; визначено канали впливу його рішень на формування й розвиток права Європейського Союзу. Окреслено сучасні виклики, з якими стикаються судді Суду Європейського Союзу та які впливають на ефективність його роботи. За результатами аналізу судової практики України та Молдови щодо використання рішень Суду Європейського Союзу обґрунтовано загальне значення судового прецеденту в контексті євроінтеграції держав-кандидатів, а також потенційні проблеми їх широкого використання в судовій практиці цих держав. Практичне значення отриманих результатів полягає в тому, що воно може бути використано в освітніх програмах для підготовки фахівців у сфері європейського права, для розроблення стратегій і політик, спрямованих на інтеграцію держав-кандидатів до ЄС, забезпечуючи їх відповідність правовим стандартам Союзу

■ **Ключові слова:** право Європейського Союзу; Суд Справедливості; рішення Суду Справедливості; тлумачення права Європейського Союзу; судова практика

UDC 341.4
DOI: 10.56215/naia-herald/3.2024.42

# Damage to the environment as a sign of genocide

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■ **Abstract.** The actualisation of the problems of causing damage to the environment necessitates the determination of the grounds for international criminal liability for this act in the context of various international crimes, including genocide. The purpose of this study was to highlight the damage to the environment as a sign of the crime of genocide. The study was based on general scientific theoretical methods of scientific cognition, namely systemic, functional, and dogmatic methods, as well as methods of analysis, synthesis, and generalisation. Based on the consideration of the acts covered by the concept of genocide, the study found that damage to the environment in this context can be regarded as intentional creation of such conditions of existence for a national, ethnic, racial, or religious group which, by their qualitative characteristics, are aimed at the complete or partial physical destruction of this group, and the signs of such conditions are considered in the practice of the International Criminal Court, the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda. The study examined the tendency to perceive environmental damage as a sign of genocide in the context of genocide of indigenous peoples, and on this basis formulated the conclusion that it is not impossible to assess environmental damage as genocide outside the context of indigenous peoples' living conditions, since the Statute of the International Criminal Court and the Convention on the Prevention and Punishment of the Crime of Genocide define the characteristics of a social group that may be a victim differently – national, ethnic, racial, or religious groups. The study found that damage to the environment may simultaneously constitute a sign of both ecocide and genocide if the ecocide is aimed at the destruction of a national, ethnic, racial, or religious group. The study identified the signs under which damage to the environment can be qualified as a crime of genocide: 1) deliberate creation of such living conditions for a national, ethnic, racial, or religious group aimed at its physical elimination as a social group; 2) such conditions are created in the context of deliberate physical destruction of a social group (contextual element); 3) genocidal intent, i.e., intent to destroy in whole or in part a social group defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide. The practical significance of this study lies in the possibility of using its findings in the context of international justice, provided that the relevant acts are qualified as genocide, one of the ways of committing which is to cause damage to the environment

■ **Keywords:** crime; ecocide; environmental losses; genocidal intent; living conditions; social group; physical destruction

■ **Suggested Citation:**
Brynzanska, O. (2024). Damage to the environment as a sign of genocide. *Scientific Journal of the National Academy of Internal Affairs,* 29(3), 42-52. doi: 10.56215/naia-herald/3.2024.42.

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■ Received: 21.05.2024; Revised: 26.07.2024; Accepted: 27.08.2024

## Introduction

In modern world, the issue of international criminal liability for environmental damage is one of the most pressing. To a large extent, this is conditioned by the scale of damage caused both within armed conflicts and as a result of environmental crimes. Specifically, on 7 February 2024, the Office of the Prosecutor of the International Criminal Court (the ICC) launched public consultations on the development of a new policy on liability for environmental damage within the framework of the ICC mechanism (Office of the Prosecutor, 2024). Until 16 March 2024, states and other entities were to submit proposals to the Programme Document on environmental crimes that should be within the jurisdiction of the ICC. As of June 2024, sources of international criminal law consider causing damage to the environment mainly in two contexts: 1) in the context of a war crime, the elements of which are defined in sub-item "iv", Item "b" of Article 8 of the ICC Statute[1], namely, as "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated"; 2) in the context of violations of the provisions of Part 3 of Article 35 and Article 55 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977[2], which prohibit the use of methods or means of warfare which cause or are likely to cause widespread or long-term and severe damage to the natural environment, the prohibition of reprisals related to environmental damage, and the obligation to protect the natural environment in the conduct of hostilities from widespread, long-term, and severe damage. This makes it expedient to investigate the environmental damage as a possible feature of other international crimes within the jurisdiction of the ICC, primarily the crime of genocide.

Despite a considerable number of scientific studies on genocide, little attention has been paid to its aspect of environmental damage in the professional literature. Ukrainian researchers D. Azarov *et al.* (2023) consider the damage to Ukraine's environment in the course of Russian aggression as "the creation of living conditions deliberately calculated to bring about the complete or partial physical destruction of the national group – the Ukrainian people", virtually reproducing in their definition the wording of Item "c" of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide[3]. Therewith, damage to the environment is one of the factors that is destroying Ukraine's economic potential.

N. Orlovska (2023), investigating the same topic, notes that in this case, environmental damage is a means of influencing the population, used to destroy it, but is not an independent act. P. Fris & V. Khemych (2024), analysing environmental damage on the scale of ecocide, consider it as a factor in the commission of genocide aimed at causing harmful consequences that can be assessed as catastrophic for the environment. A. Turii (2024) also argues for a link between the crime of genocide and ecocide, which results in an environmental catastrophe that can be a means of genocide. The researcher substantiates his position based on the terminology of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention)[4] and Article 6 of the ICC Statute[5], which lists the intentional creation of living conditions for a group calculated to bring it to total or partial physical destruction as acts that may constitute genocide.

Referring to the works of researchers, it is necessary to note the tendency to perceive damage to the environment as a sign of genocide in the historical and cultural aspect, in the context of the genocide of indigenous peoples. Specifically, K. Reed (2023) considered the damage to the environment as part of the genocide of indigenous peoples by colonial powers, which lied in the depletion of natural resources, rendering it impossible for the indigenous population to continue inhabiting the territory. As a result, this led to the complete or partial destruction of these social groups.

M. Gillet (2017; 2022), analysed the ICC practice in the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir (International Criminal Court, 2021) and other situations where there was damage to the environment with the intent of complete or partial destruction of a national group, but which were not subject to the ICC's assessment (draining of swamps

[1] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. (1977, June). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.34_AP-I-EN.pdf.
[3] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[4] Ibidem, 1948.
[5] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

at the confluence of the Euphrates and Tigris rivers, Southern Iraq, which for several centuries had traditionally been the place of residence of one of the Arab peoples, "Arabs of the Marshlands"). According to the researcher, this practice, which included the destruction of ecosystems, settlements, and water sources, combined with the expulsion of the population or its forced relocation, can be equated with acts of genocide.

L. Wise (2021), exploring the relationship between environmental damage and the destruction of certain social groups, noted that environmental destruction can cause serious harm to members of a social group whose way of life, culture, and livelihoods are inextricably linked to their natural environment, the disappearance of which would constitute a "slow death" for a particular group. A. Dunlap (2021), denying the possibility of a separate legal assessment of ecocide, considers it a way of committing genocide if it is committed with the purpose of destroying a national, ethnic, racial, or religious group. The position "ecocide as an instrument of genocide" is also the main one in the study of the genocide of indigenous peoples by A. Koenning-Rutherford (2023). However, as can be noted from the foregoing, environmental damage in the context of genocide is mostly considered outside the traditional structure of an international crime, which includes its elements: *actus reus*, *mens rea*, and contextual element. Damage to the environment as a specific feature of the international crime of genocide must follow its general features, which are established based on the structure of the international crime.

Thus, the purpose of this study was to highlight the damage to the environment as a sign of genocide. This purpose was fulfilled by completing the following objectives: to analyse the provisions of the ICC Statute[1]; to consider the practice of the ICC and international tribunals in the context of the possibility of understanding environmental damage in the context of genocide not only of indigenous peoples; to identify the key elements of the crime of genocide committed by causing damage to the environment.

## Materials and Methods

The conceptual framework for the study of environmental damage as a sign of genocide, which was used in the investigation of the ICC practice, is the concept of the international crime of genocide, the foundations of which are set out in the ICC Statute[2] and the Elements of Crimes[3], as well as the Genocide Convention[4]. Within this conceptual framework, the study employed general scientific theoretical methods, since they allow for a comprehensive consideration of a legal phenomenon, highlighting its general features and establishing whether these features correspond to other legal phenomena which are conventionally considered in distinct contexts. Based on the systematic and functional methods, the study examined the elements of the international crime of genocide, specifically, the act constituting genocide, namely, the intentional creation for a group of people united on a national, ethnic, racial, or religious basis of such living conditions aimed at the gradual physical destruction of this group; the contextual feature, the feature of intent. The methods of analysis and synthesis became the basis for correlating ecocide and genocide. The dogmatic method was used to interpret the terms "genocide", "ecocide", "damage to the environment". As a result of applying the generalisation method, the key conclusions of the study were formed. Using these methods in conjunction, the study established the signs that can qualify damage to the environment as a manifestation of genocide.

The following sources of international law were analysed to establish the signs of genocide: the ICC Statute[5], Elements of Crimes[6], the Genocide Convention[7], since as of 2024, there are no other sources of international law that would regulate the issue of individual criminal liability for genocide. The study also examined the materials of the International Criminal Tribunal for the Former Yugoslavia (ICTY), namely the judgements in the cases of The Prosecutor v. Milomir Stakić[8], The Prosecutor v. Vujadin

[1] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[2] Ibidem, 1998.
[3] Elements of Crimes. (2002, September). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.
[4] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[5] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[6] Elements of Crimes. (2002, September). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.
[7] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[8] Decision of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-97-24 "The Prosecutor v. Milomir Stakić". (2001, July). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/IT-97-24/MRA1561R0000013780.tif.

Popović *et al.*[1], The Prosecutor v. Radoslav Brđanin[2], The Prosecutor v. Tadić[3], as well as the judgements of the International Criminal Tribunal for Rwanda (ICTR) in the cases of The Prosecutor v. Akayesu[4], The Prosecutor v. Musema[5], The Prosecutor v. Kayishema & Ruzindana [6], which highlight the matters of general features of the destruction of social groups of people as genocide and the materials of the ICC practice regarding the situation in Sudan and in the case of the issuance of an international arrest warrant The Prosecutor v. Omar Hassan Ahmad Al Bashir (International Criminal Court, 2021), as this is the only case where the ICC considered the issue of environmental damage as a manifestation of genocide. The coverage and analysis of the situation in the Dafur region of Sudan was based on a report by Physicians for Human Rights (2006). The study of the above-mentioned acts of international law, decisions of international tribunals, and analytical reports helped to identify the general features of the crime of genocide and project them onto the damage to the environment, suggesting that such damage may be covered by one of the acts constituting the crime of genocide.

## Results and Discussion

Damage to the environment in the context of genocide can be considered as "the deliberate creation of conditions of life for a national, ethnic, racial, or religious group calculated to bring it to total or partial physical destruction" in the terminology of Article 2 of the Genocide Convention[7] and Article 6 of the ICC Statute[8]. Separate provisions on causing damage to the environment as a feature that supports the policy of genocide are contained in the second arrest warrant for A. al-Bashir, the former president of Sudan, issued by the ICC[9]. As part of the unlawful persecution of the Fur, Masalit, and Zaghawa peoples in the Dafur region, Sudanese government forces destroyed wells and other water sources. The report by the international organisation Physicians for Human Rights (2006) states that there were at least three episodes of deliberate poisoning of wells and destruction of water pumping equipment during the long dry season in the specific climatic conditions of Dafur, which has limited natural water resources, resulting in deaths. Furthermore, victims reported repeated deliberate arson attacks on land and vegetation, committed with the intent of preventing them from farming. Representatives of the organisation also recorded images of the remains of burnt trees and fields with no signs of living vegetation, which resulted in forced relocation to the desert, where the group's survival was difficult due to the lack of water and other means of subsistence. These forced living conditions were the result of the destruction of natural objects or the deliberate depletion of components of nature that are necessary for the survival of the victims.

Article 6 of the ICC Statute[10] defines acts committed with intent to destroy in whole or in part any national, ethnic, racial, or religious group, including intentionally creating for such a group conditions of life calculated to bring it to total or partial physical destruction (Item "c"). The same provision is reproduced in Item "c" of Article 2 of the Genocide Convention[11]. However, the Elements of Crimes[12] do not contain the above-mentioned form of genocide, but

[1] Judgement of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-05-88. "The Prosecutor v. Vujadin Popović et al". (2010, June). Retrieved from https://ucr.irmct.org/scasedocs/case/IT-05-88#eng.

[2] Judgment of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-99-36 "Prosecutor v. Radoslav Brđanin". (2004, September). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-99-36/JUD126R0000191299.tif.

[3] Sentence of International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-94-1 "The Prosecutor v. Duško Tadić, AC". (1999, July). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-94-1-A/JUD62R0000067347.TIF.

[4] Judgment of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-04 "The Prosecutor v. Akayesu". (1998, September). Retrieved from https://ucr.irmct.org/scasedocs/case/ICTR-96-04#eng.

[5] Judgment and Sentence of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-13 "The Prosecutor v. Musema". (2000, January). Retrieved from https://ucr.irmct.org/scasedocs/case/ICTR-96-13#eng.

[6] Judgment (Reasons) of International Criminal Tribunal of Ruanda in the Case No. ICTR-95-01 "The Prosecutor v. Kayishema & Ruzindana". (2001, June). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MSC16634R0000621564.PDF.

[7] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December) Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[8] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

[9] Decision of the International Criminal Court No. ICC-02/05-01/09-95 "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir". (2010, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF.

[10] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[11] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

[12] Elements of Crimes. (2002, September). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

only indicate the general features of the act: 1) the perpetrator created such living conditions for one or more persons of a particular group that are calculated to bring about the total or partial destruction of the group; 2) "living conditions" may include, but do not necessarily constitute, deprivation of survival resources such as food, water, medical services, or expulsion from the home.

The issues related to the establishment of signs of living conditions calculated to bring the group to complete or partial physical destruction were investigated during the work of the ICTY and the ICTR. With these decisions, international tribunals have developed a practice of assessing living conditions designed to bring a group to complete or partial physical destruction, which are characterised as methods of slow physical destruction by which the perpetrator does not kill members of the group immediately. In Item 157 of the judgement in Prosecutor v. Milomir Stakić[1], the ICTY described as "living conditions calculated to bring the group to total or partial physical destruction" the use of methods including dietary restrictions; the failure to provide adequate medical care; systematic expulsion of group members from their homes; and generally creating circumstances likely to lead to a slow death, such as lack of adequate food, water, shelter, clothing, sanitation, or subjecting group members to excessive work or physical exertion. Therewith, the deliberate creation of living conditions for a group calculated to bring about its physical destruction in whole or in part according to sub-item (c) of Article 2 of the Genocide Convention[2] does not require proof of the result, i.e., the factual destruction of the group or part of it". An analogous conclusion was reached by the ICTR in Item 502-4 of the judgement in Prosecutor v. Akayesu[3] and in Items 108-109 of the judgement in The Prosecutor v. Kayishema & Ruzindana[4]. In addition, Item 505 of the judgement in Prosecutor v. Akayesu[5] describes the conditions of life as "calculated to bring to physical destruction" – these are "methods of destruction by which the perpetrator does not kill the members of the group immediately but aims at their physical destruction". A comparable conclusion was made by the ICTR in Item 157 of its judgement in the case of The Prosecutor v. Musema[6], noting among the methods of destruction the denial of medical services and the creation of circumstances that would lead to a slow death, meaning the lack of access to adequate housing, clothing, and hygiene, and the organisation of work leading to physical exhaustion. In Items 691 and 692 of the judgement in Prosecutor v. Radoslav Brđanin[7], the ICTY reiterated the above conclusions[8].

In Items 814-817 of the judgement in Prosecutor v. Vujadin Popović *et al.*, which is chronologically later than the above decisions, the ICTY reiterated its findings in the Prosecutor v. Radoslav Brđanin[9], adding that, in the absence of direct evidence that the "living conditions" in question were designed to bring about physical destruction, the Trial Chambers should focus on establishing the objective possibility of this. This involves an assessment of factors such as the nature of the conditions imposed, the length of time that members of the group were exposed to such conditions, and the vulnerability of the group. In addition, in Item 817 of the said judgement, the ICTY stated that "the *mens rea* standard for the intention to create conditions of life for a group calculated to bring about its physical destruction in whole or in part is specified by the adverb "intentionally"[10].

[1] Decision of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-97-24 "The Prosecutor v. Milomir Stakić". (2001, July). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Decision/NotIndexable/IT-97-24/MRA1561R0000013780.tif.

[2] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[3] Judgment of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-04 "The Prosecutor v. Akayesu". (1998, September). Retrieved from https://ucr.irmct.org/scasedocs/case/ICTR-96-04#eng.

[4] Judgment (Reasons) of International Criminal Tribunal of Ruanda in the Case No. ICTR-95-01 "The Prosecutor v. Kayishema & Ruzindana". (2001, June). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01/MSC16634R0000621564.PDF.

[5] Judgment of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-04 "The Prosecutor v. Akayesu". (1998, September). Retrieved from https://ucr.irmct.org/scasedocs/case/ICTR-96-04#eng.

[6] Judgment and Sentence of International Criminal Tribunal of Ruanda in the Case No. ICTR-96-13 "The Prosecutor v. Musema". (2000, January). Retrieved from https://ucr.irmct.org/scasedocs/case/ICTR-96-13#eng.

[7] Judgment of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-99-36 "Prosecutor v. Radoslav Brđanin". (2004, September). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-99-36/JUD126R0000191299.tif.

[8] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[9] Judgment of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-99-36 "Prosecutor v. Radoslav Brđanin". (2004, September). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-99-36/JUD126R0000191299.tif.

[10] Judgement of Trial Chamber II of the International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-05-88. "The Prosecutor v. Vujadin Popović et al". (2010, June). Retrieved from https://ucr.irmct.org/scasedocs/case/IT-05-88#eng.

Thus, the ICTY and ICTR have developed a solid practice of interpreting this form of genocide, which is characterised by the deliberate and purposeful creation of such conditions of existence for a national, ethnic, racial, or religious group that are aimed at its physical destruction.

The broad meaning of the term "conditions of life calculated to bring a group to full or partial physical destruction", the list of which is virtually inexhaustible due to geographical, historical, and political factors, suggests that harm to the environment aimed at the physical destruction of a particular social group may also be covered by the creation of living conditions characterised by the said purpose (Azarov *et al.*, 2023)

The understanding of damage to the environment as a sign of genocide in the context of the genocide of indigenous peoples is acceptable, although the affiliation of a national group with indigenous peoples is not a mandatory feature of a group defined in Article 6 of the ICC Statute[1] or Article 2 of the Genocide Convention[2]. For rural areas, local production, or subsistence farming carried out by particular social groups in certain areas, "ecology is a vital constitutive dimension of culture and identity" (Wise, 2021). In retrospect, this situation has repeatedly occurred in countries with colonial experience or, for instance, in the United States. The movement of settlers across the North American continent has led to the use of violent measures against indigenous peoples aimed at destroying their traditional living conditions. Specifically, these were massive bison shootings organised to destroy economic resources and starvation, to force indigenous peoples to leave certain territories; "gold fevers", in which precious stones or precious metals were obtained by mining methods that led to the depletion of natural resources, rendering further living in the area impossible. The elimination of traditional living conditions has resulted in the complete or partial destruction of indigenous peoples (Reed, 2023).

Another example of the destruction of the environment to destroy a social group of people is S. Hussein's policy of draining the swamps in Southern Iraq. In 1991, in response to an assassination attempt, S. Hussein ordered the draining of the marshes located at the confluence of the Euphrates and Tigris rivers (Southern Iraq), which for several centuries had traditionally been the home of one of the Arab peoples – the Marsh Arabs, whose traditional way of life depended on the flora and fauna of the marshes (Gillet, 2022).

However, the assessment of environmental damage as genocide outside the context of indigenous peoples' living conditions is not impossible, and can be achieved by applying an "environmentally friendly" interpretation to the Genocide Convention[3] and Article 6 of the ICC Statute[4], based on an "evolutionary approach" to provide a legal basis for punishing environmental damage (Aida *et al.*, 2023). The disadvantage of this statement of the above authors is the impossibility to establish what exactly is the "environmentally friendly approach" to the interpretation of international law, since this approach cannot be attributed either to the principles of interpretation of international treaties or to its types and methods.

The indication of the "evolutionary approach" as the basis for the interpretation of "environmentally friendly" suggests that it can be interpreted in the context of *lex ferenda* argumentation – that is, a rule of law that, evolving, should be formed in the future, as opposed to a rule of law currently in force (*lex lata*). There are cases where the UN International Law Commission has used such arguments in its activities in the context of the application of environmental protection norms during armed conflicts (Park, 2018). Specifically, when assessing those certain provisions of written international law on armed conflict relating to the protection of the environment are likely to be inconsistent with customary international law, the UN International Law Commission should consider the extent to which the final outcome will contribute to the development of the *lex ferenda* (Park, 2018).

It should also be considered that, unlike the Genocide Convention[5], which does not contain provisions on its interpretation, except that disputes over its interpretation are referred to the International Court of Justice, the ICC Statute[6], namely Articles 9 and 10 Elements of crimes[7], Article 21 "Applicable law", Article 22 "*Nullum crimen sine lege*", Article 30

[1] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[2] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[3] Ibidem, 1948.
[4] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[5] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[6] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[7] Elements of Crimes. (2002, September). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

"Mental element", Article 75 "Reparations to victims", Article 119 "Settlement of disputes" contain provisions on the specific features of its interpretation. Specifically, Part 2 of Article 22 of the ICC Statute establishes a strictly literal interpretation of the elements of the crime and prohibits analogy. In case of ambiguity, the rule of interpretation applies in favour of the suspect, accused, or convicted person. However, according to Part 3 of Article 22 of the ICC Statute, the provisions of this article shall not affect the characterisation of any conduct as criminal under international law independently of the ICC Statute[1]. This does not refute the possibility of applying the "environmentally friendly" interpretation exclusively within the prescriptions of those acts defined as genocide in Article 6 of the ICC Statute[2] and Article 2 of the Genocide Convention[3] using the types and methods of interpretation used in previous decisions.

When considering ecocide as a potential "tool of genocide" (Orlovska, 2023; Turii, 2024), it should be considered that in such circumstances, ecocide is an act against a social group, not the environment (Koenning-Rutherford, 2023). Moreover, causing damage to the environment is not the purpose in this case, and environmental damage forms an integral part of the overall damage (Malko & Nikolaenko, 2022). Environmental damage is not limited to air, water, and land pollution, but also includes human health and safety (Polukarov *et al.*, 2024). Damage to the environment poses potential risks to the life and health of a social group, including the adverse impact of pollutants, damaged infrastructure and industrial facilities, shortages of clean water, etc. (Harada *et al.*, 2022; Nikolaychuk, 2023). Therefore, in this context, ecocide can be a factor contributing to genocide, i.e., evidence of genocidal intent (Fris & Khemych, 2024). Ecocide can also be considered a form of genocide, being a structural phenomenon that destroys the relationship between humans and nature, i.e., both the ecosystem itself and the human presence in that ecosystem (Lindgren, 2018). Therewith, the term "ecocide" itself is not universal in international legal doctrine, which makes it controversial to characterise the feature of genocide through the term "ecocide" (Dunlap, 2021).

Referring to the origin of the word "ecocide", this term was used to denote a collection of various activities that cause devastation and destruction aimed at destroying the ecosystems of certain territories by harming human, animal, and plant life, and therefore, "ecocidal actions can lead to genocidal consequences", destroying both a certain social group of people and the environment as a "separate victim" (Misko Moribe *et al.*, 2023). Agreeing with this, the term "ecocide" is broader in its meaning than "instrument of genocide", although, admittedly, the damage to the environment on a scale that can be considered as ecocide may be aimed at the destruction of social groups defined in Article 2 of the Genocide Convention[4], and therefore it is possible to consider ecocide as a sign of genocidal intent. However, it is necessary to consider the updated ICC policy on liability for environmental damage, which is investigating the possibility of supplementing the ICC Statute with provisions on international environmental crimes committed through the use of the environment or resulting in environmental damage (Office of the Prosecutor, 2024). These acts account for ecocide. Therefore, in the context of committing both genocide and other international crimes prescribed in the ICC Statute[5], it is more correct to use the phrase "damage to the environment" instead of the term "ecocide".

The characterisation of damage to the environment as genocide in the form of deliberate creation of living conditions for such a group, calculated to bring it to full or partial physical destruction, should include the identification of the characteristics of their elements: the act (*actus reus*), guilt (*mens rea*), and a contextual element between which and the act there must be a connection (nexus) (Klamberg *et al.*, 2023).

The literature periodically identifies only two constitutive elements of genocide: an act as an objective feature (*actus reus*) and guilt in the form of special intent (*dolus specialis*) (Mrazek, 2023) or as a subjective feature (*mens rea*) (Gagro, 2021**)**. However, referring to the Elements of Crimes[6], it can be stated that the description of each form of genocide is accompanied by a common feature – the act takes place in the context of a clear pattern of comparable behaviour directed against this group, or an act that may actually cause such destruction. In addition, in the decision in the case of the arrest warrant for Omar Hassan Ahmad Al Bashir, the First Pre-Trial Chamber of the ICC, analysing the arguments of the

[1] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[2] Ibidem, 1998.
[3] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[4] Ibidem, 1948.
[5] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[6] Elements of Crimes. (2002, September). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

ICC Prosecutor on the presence of a contextual element in the actions of the accused, which consisted of committing acts under Items "a", "b", and "c" of Article 6 of the ICC Statute[1] in the "context of a clear pattern of similar conduct directed against each target group", stated that the contextual element occurs when "the conduct in question poses a concrete threat to the existence of the target group or part of it"[2]. However, this position is debatable, since "the context of a clear pattern of similar behaviour directed against each target group" is based on the correlation between group and individual intent to commit genocide, since the crime of genocide cannot be individual, singular. Overall, the distinction between collective and individual intent to commit genocide was established in the ICTY decision in The Prosecutor v. Radislav Krstic[3], which stated that the scale of genocide implies its preparation by several persons whose motives may be different, but the purpose stays common. In case of collective intent in the commission of genocide, it must be manifested not only in the intentions but also in the actions of the perpetrators. Thus, in this judgement, the International Tribunal factually refused to assess genocidal intent as collective.

The contextual element of genocide is that it is committed within the framework of a specific state policy, and therefore this element should be assessed in the light of the doctrine of "common criminal plan", according to which the perpetrators of a crime are held to the same degree of responsibility if the crime had a common purpose (Carvalho, 2023). Three alternative elements of a "common criminal plan" were formulated by the ICTY Appeals Chamber in the Prosecutor v. Tadić judgement[4]: 1) a common plan within the framework of a single intent, whereby a person does not have to personally commit certain criminal acts, it is sufficient to commit only a certain aspect of them within the framework of a single purpose; 2) a systemic common plan applicable to indictments alleging crimes committed by members of military or administrative units: a) the existence of an organised system of ill-treatment of detainees and repeated crimes; b) the accused is aware of the nature of the system; c) the accused must take an active part in ensuring the functioning of the system; 3) the so-called "extended" common plan, wherein the crimes are generally united by a single plan, but when one or more criminals commit actions that, albeit not established by the common plan, were a natural and foreseeable consequence of achieving this common purpose.

This approach is reasonable because it does not contradict Item "c" of Article 6 of the ICC Statute[5] and the Genocide Convention[6], Article 2 of which states that the acts referred to in Article 2 of this Convention constitute genocide if they are committed with intent to destroy, to a greater or lesser extent, a clearly defined social group based on national, ethnic, racial, or religious grounds, while the commission of such acts by only one person, even if the purpose is stated, is an individual crime committed for reasons of hatred, which is clearly insufficient to constitute an attempt to destroy an entire social group. This approach is also consistent with the description of the elements of genocide in the Elements of Crime[7], one of which is the commission of an act in the context of a clear pattern of similar behaviour. Such behaviour can be the deliberate result of both state policy (e.g., genocides in Rwanda and Iraq) and the policy of a particular political organisation or military administration (former Yugoslavia). The practice of international tribunals and the ICC shows a high threshold for proving the intent to commit genocide, which suggests that genocide is a crime comprising criminal acts united by a single intent, as defined in Item "c" of Article 6 of the ICC Statute[8] and the Genocide Convention[9] – the total or partial destruction

[1] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[2] Decision of the International Criminal Court No. ICC-02/05-01/09-95 "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir". (2010, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF.
[3] Judgment of International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-98-33-A "The Prosecutor v. Radislav Krstic". (April, 2004). Retrieved from https://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf.
[4] Sentence of International Criminal Tribunal for the Former Yugoslavia in the Case No. IT-94-1 "The Prosecutor v. Duško Tadić, AC". (1999, July). Retrieved from https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-94-1-A/JUD62R0000067347.TIF.
[5] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[6] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.
[7] Elements of Crimes. (2002, September). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.
[8] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.
[9] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

of a national, ethnic, racial, or religious group, the implementation of which is ensured by certain state or collective resources.

Considering the above, damage to the environment may qualify as a manifestation of genocide if the following features are present:

1) an act defined in Item "c" of Article 6 of the ICC Statute[1] and Article 2 of the Genocide Convention[2], i.e., the intentional creation of living conditions for a particular national, ethnic, racial, or religious group calculated to bring it to total or partial physical destruction. Such conditions include anthropogenic impacts on various components of the ecosystem (burning or pollution of land, forests, destruction of flora and fauna, destruction of water bodies or other natural features of the area, etc.), which result in the impossibility of the established order of life in these conditions or a substantial complication of survival (*actus reus*);

2) contextual element – if the creation of such conditions is carried out "in the context of a clear pattern of such behaviour", i.e., within a certain plan or state policy, the implementation of which poses a real threat to the existence of the content of which is part of its implementation;

3) special intent, the exhaustive features of which are defined in Item "c" of Article 6 of the ICC Statute[3] and Article 2 of the Genocide Convention, i.e., to destroy in whole or in part any national, ethnic, racial, or religious group[4] (*mens rea* as genocidal intent).

Considering the signs of causing damage to the environment, factoring in the contextual element, which covers the commission of an act in the context of a pattern of behaviour that implements the intent to destroy a national, ethnic, racial, or religious group in whole or in part, taking into account the variety of ways in which acts covered by the crime of genocide can be committed, it can be argued that such means can also include causing damage to the environment.

## Conclusions

In summary, damage to the environment may constitute genocide in the form of deliberate creation of living conditions designed to bring a national, ethnic, racial, or religious group to full or partial physical destruction. In this case, the purpose of the impact on the environment is the complete or partial destruction of a social group of people, while the damage caused is a method of such destruction or is a characteristic of genocidal intent. Considering that environmental damage is a method of destroying a national, ethnic, racial, or religious group whose way of life is inextricably linked to a particular area whose natural resources have been damaged, environmental damage as a way of deliberately creating living conditions aimed at the destruction of a particular social group is mostly considered in the context of genocide against indigenous peoples. Therewith, this does not exclude the possibility of assessing environmental damage as genocide against a national, ethnic, racial, or religious group that does not belong to indigenous peoples.

A series of studies use the term "ecocide" when defining signs of environmental damage, which is considered an "instrument of genocide". However, considering the legal uncertainty of ecocide, the existence of different approaches to its content, as well as the updated ICC policy on liability for environmental damage, which aims to supplement the ICC Statute with norms on international environmental crimes, the use of the wording "environmental damage" instead of the term "ecocide" is more meaningful. Damage to the environment may qualify as a crime of genocide if there is a combination of the elements of genocide defined in Item "c" of Article 6 of the ICC Statute, Article 6 of the Elements of Crime, and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, and the damage to the environment must be caused by the intent to destroy a social group defined in the above international legal instruments.

Prospects for further research include the investigation of cases of environmental damage as a manifestation of other serious international crimes, namely in the context of war crimes and crimes against humanity.

## Acknowledgements

None.

## Conflict of Interest

The author of this study declares no conflict of interest.

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[2] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

[3] Rome Statute of International Criminal Court. (1998, July). Retrieved from https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

[4] Convention on the Prevention and Punishment of the Crime of Genocide. (1948, December). Retrieved from https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf.

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# Заподіяння шкоди навколишньому природному середовищу як ознака геноциду

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■ **Анотація.** Актуалізація проблем заподіяння шкоди навколишньому природному середовищу зумовлює потребу у визначенні підстав міжнародної кримінальної відповідальності за це діяння в контексті різних міжнародних злочинів, серед яких і геноцид. Метою статті було висвітлення заподіяння шкоди навколишньому природному середовищу як ознаки злочину геноциду. Дослідження ґрунтується на загальнонаукових теоретичних методах наукового пізнання, а саме системному, функціональному й догматичному методах, а також методах аналізу, синтезу та узагальнення. На підставі розгляду діянь, охоплюваних поняттям геноциду, встановлено, що заподіяння шкоди навколишньому природному середовищу в цьому контексті можна розглядати як умисне створення для національної, етнічної, расової чи релігійної групи таких умов існування, які за своїми якісними характеристиками мають на меті повне або часткове фізичне знищення цієї групи, причому ознаки таких умов вбачаються з практики Міжнародного кримінального суду, Міжнародного трибуналу щодо колишньої Югославії та Міжнародного трибуналу щодо Руанди. Досліджено тенденцію до сприйняття заподіяння шкоди навколишньому природному середовищу як ознаки геноциду в контексті геноциду корінних народів, на підставі чого сформульовано висновок, що оцінювання заподіяння шкоди навколишньому природному середовищу як геноциду поза контекстом умов життя корінних народів не є неможливим, оскільки в Статуті Міжнародного кримінального суду та Конвенції про запобігання злочину геноциду і покарання за нього ознаки соціальної групи, яка може бути потерпілою, визначено в інший спосіб – це національна, етнічна, расова чи релігійна групи. Встановлено, що заподіяння шкоди навколишньому природному середовищу може одночасно становити ознаку як екоциду, так і геноциду в тому разі, якщо екоцид спрямований на знищення національної, етнічної, расової чи релігійної групи. Визначено ознаки, за яких заподіяння шкоди навколишньому природному середовищу можна кваліфікувати як злочин геноциду: 1) цілеспрямоване створення для національної, етнічної, расової чи релігійної групи таких умов життя, що спрямовані на її фізичну ліквідацію як соціальної групи; 2) створення таких умов здійснюють у контексті цілеспрямованого фізичного знищення соціальної групи (контекстуальний елемент); 3) наявний геноцидний намір, тобто умисел знищити повністю або частково соціальну групу, визначену ст. 2 Конвенції про запобігання злочину геноциду і покарання за нього. Практичне значення дослідження полягає в можливості використання його висновків у контексті міжнародного правосуддя за умови кваліфікації відповідних діянь як геноциду, одним із способів вчинення якого є заподіяння шкоди навколишньому природному середовищу

■ **Ключові слова:** злочин; екоцид; екологічні втрати; геноцидальний намір; умови життя; соціальна група; фізичне знищення

UDC 344.1(477)(497.6)(664)"364"
DOI: 10.56215/naia-herald/3.2024.53

# Criminalising looting in wartime: International and national experiences

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■ **Abstract.** The relevance of this research topic is conditioned by the increasing number of cases of looting during armed conflicts, which requires the improvement of legal mechanisms for criminalising this act. Even though looting is recognised as a war crime at the international level, there are significant differences in approaches to its criminalisation and the determination of liability for such acts in national legal systems. This creates the risk of ambiguous interpretation of legal norms in judicial practice and complicates the administration of justice. The purpose of this study was to analyse the global and national experiences with the criminalisation of looting during armed conflicts, using the cases of Bosnia and Herzegovina, Sierra Leone, and Ukraine, as well as to formulate recommendations for improving Ukraine's national legislation in this area. The study employed the methods of comparative legal analysis, formal legal analysis, and case law analysis. The study compared the criminal law provisions and approaches of different countries to the prosecution of pillage, specifically the concepts of "military necessity" and "spoils of war". The findings of the study showed that the absence of clear legal definitions and criteria for assessing "military necessity" and "gravity of the violation" complicates prosecution for this crime and creates risks of abuse. The study revealed major differences in approaches to the criminalisation of looting, particularly in determining the scope and conditions of liability. The practical value of this study lies in its recommendations for harmonising Ukrainian legislation with international standards. It was suggested that a separate law be drafted to define the mechanisms for criminalising looting during armed conflicts, to establish clear criteria for assessing military necessity, and to unify approaches to judicial practice. This will help to increase the effectiveness of investigations and prosecutions of this type of war crime and strengthen Ukraine's legal framework in armed conflict

■ **Keywords:** justice; spoils of war; military necessity; gravity of the offence; legal regulation

## ■ Introduction

The relevance of the topic of looting in the context of armed conflicts is critical, as this crime violates the basic norms of international humanitarian law. Wartime conflicts are accompanied by many instances of unlawful seizure of property, which poses a threat not only to the rights and freedoms of individuals, but also to the moral and ethical foundations of society. The lack of clear legal mechanisms to regulate looting and its incompatibility with the principles of military necessity underline the need to improve the legal framework. Furthermore, the investigation of this issue will contribute to a better understanding of ways to prevent this phenomenon and to increase accountability for the crimes committed.

The protection of property rights during armed conflicts is a crucial issue that is gaining increasing significance in the modern world. However, war disrupts these rights, impoverishes people, and causes

■ **Suggested Citation:**
Murzo, Ye., & Farynnyk, V. (2024). Criminalising looting in wartime: International and national experiences. *Scientific Journal of the National Academy of Internal Affairs,* 29(3), 53-65. doi: 10.56215/naia-herald/3.2024.53.

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■ Received: 02.06.2024; Revised: 04.08.2024; Accepted: 27.08.2024

grave damage (Matthews *et al.*, 2020). Civilians, civilian populations, and individuals who are no longer taking part in combat are the ones who endure the greatest hardships as a result of war (John, 2024). There is a growing interest among researchers in the issue of looting during armed conflicts, which leads to the need for a comprehensive study of this phenomenon. The current state of the considered problem emphasises the relevance of research on looting. Y. Nuzban (2020) discussed the complexities of legislating for international courts, focusing on the unintended consequences of including a special intent requirement (*dolus specialis*) in the crime of looting under the Rome Statute. The cited study examined the ambiguity around the terms "military necessity" and "necessity" related to pillage and proposed conservative, radical, and pragmatic approaches to address these uncertainties.

J. Isański (2024) analyses the post-war resettlement in Central and Eastern Europe, focusing on the mass migrations and the resulting social chaos marked by lawlessness, including looting. By examining over a thousand memoirs from migrants in western Poland, the cited study explores the complex dynamics of looting during this period, contributing to a better insight into its impact on post-war society and the history of Poland. A. Wierzcholska (2022) also focused her research on looting in Poland. The researcher explores how the German occupation in Tarnów, Poland, disrupted social dynamics, particularly focusing on the rapid expropriation of Jewish property and the involvement of local non-Jewish Poles in this pillaging. The cited study revealed how pre-war ethnic tensions influenced the behaviours and attitudes of Poles during the occupation, highlighting both complicity in and resistance to the looting of Jewish-owned assets.

S. Reddy (2020) examined various acts of plunder and piracy in the 17th century Indian Ocean, focusing on their impact on Mughal imperial authority. Through case studies of pirate raids and battles, the study explores how maritime activities challenged Mughal power and contributed to the shifting dynamics of imperialism and colonialism in the region. A. Al-Ansi *et al.* (2021) provided insights into sustainable tourism and suggest mitigation strategies for looted artifacts to guide international authorities and organisations in addressing this global issue.

From the perspective of looting, combating deforestation in non-international armed conflicts is vital because illegal felling often constitutes a form of pillaging, exploiting natural resources unlawfully. P. Martini & M. Sarlième (2022) explored whether large-scale deforestation in Senegal's Casamance region, occurring during a non-international armed conflict, can be prosecuted as war crimes under the Rome Statute's provisions on looting and destruction of property. The study examined the challenges of establishing a link between deforestation and the conflict and considered whether natural resources can be classified as "property" under these provisions, suggesting ways to determine ownership to meet the Rome Statute's requirements. P. Martini (2024) explores the role of international criminal law (ICL) in environmental protection, emphasising how ICL, including the International Criminal Court (ICC), could prosecute severe violations of environmental rights. The researcher also discusses the potential for addressing looting and destruction of natural resources under ICL, while considering the limitations of ICL in tackling broader environmental impacts, such as climate change, and integrating "Indigenous peoples" Earth-centric perspectives for enhanced environmental protection.

The conducted analysis found that researchers often cover the issue of appropriation of cultural values. H. Liu (2022) investigated the impact of Japanese invasions on Chinese cultural heritage, focusing on the catastrophic loss and the complex issues surrounding the restitution of looted cultural relics. The researcher analysed two cases of recovery efforts, addressing legal challenges related to ownership rights and the legal grounds for reclaiming both state-owned and privately owned cultural relics from Japan.

P. Shydlovskyi *et al.* (2023) examined the challenges in monitoring the destruction of Ukraine's archaeological heritage due to the Russian aggression, emphasising the difficulties posed by limited access and safety risks. The study also discussed the unlawful appropriation of property, commonly referred to as pillage or looting, and highlighted the need for a comprehensive state program to document archaeological losses and update the registration system using international standards.

Despite the extensive scope of studies on this topic, certain aspects are still underexplored, particularly considering current challenges, which is why the present study aims to address these gaps. The contribution consists of analysing the issues faced by Ukraine's national legislation regarding the crime of looting during wartime. This includes a focus on gaps in the legal framework, particularly in the lack of standardised definitions for terms such as "gravity of violation", "military necessity", and "spoils of war". Furthermore, the study was aimed to provide effective recommendations for improving Ukrainian legislation to align it with international standards, ensuring the effective investigation and prosecution of looting cases.

The purpose of this study was to fill the gaps in existing research by providing a detailed analysis of the challenges within Ukraine's national legislation on looting during wartime and to develop recommendations for enhancing this legislation following

international standards. This aimed to ensure a consistent and effective legal response to cases of looting. The primary tasks this study paper were as follows: to examine Ukraine's national legislation and international agreements concerning looting, to differentiate between the concepts of "looting" and "spoils of war", to explore the concepts of "military necessity" and "gravity of violation".

## Materials and Methods

This study employed a comprehensive approach, combining general scientific and specialised methods, to thoroughly analyse the concept of unlawful appropriation of property as a war crime and its legal implications in Ukraine, Bosnia and Herzegovina, Sierra Leone, and within the framework of international conventions. The study used methods of formal logic, including synthesis, analysis, deduction, and induction, to clarify the content of the issues under study and to deepen the understanding of the concept of unlawful appropriation. Through doctrinal research, the study examined the legal interpretation of such acts using various legal literature, the Criminal Codes of Bosnia and Herzegovina and Ukraine, and relevant international treaties. These methods enabled a detailed exploration of the legal frameworks and interpretations of unlawful appropriation in different jurisdictions. This study employed statistical research method to analyse and compare looting in occupied territories. This approach was used to provide a comparative characterisation of looting in different countries, including Bosnia and Herzegovina, Sierra Leone, and Ukraine. It enabled the identification of the items most commonly looted and the impact of these actions on the population during armed conflict.

A comparative research method was employed to analyse the concepts and academic research related to unlawful appropriation, as well as the opinions of different researchers. This method was instrumental in examining and comparing the current criminal codes and other legislative acts of the countries under study. This helped to classify and identify the characteristics of unlawful appropriation and provided a basis for comparing the legal approaches in Bosnia and Herzegovina, Sierra Leone, and Ukraine. The comparative analysis highlighted the similarities and differences in the legal regulation of such acts, thereby assessing the effectiveness and efficiency of these approaches.

The case study method played a crucial role in this study. Court decisions from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL) were selected based on their relevance to the issue of looting, their contribution to the development of legal standards and their significance in shaping international law on war crimes. The choice of cases from Ukrainian courts was made using the keywords "Article 438 of the Criminal Code of Ukraine" and "looting" in Ukrainian language in the Unified State Register of Court Decisions. 23 court decisions from 1995 to 2024 were analysed to reflect the evolution of legal interpretations of looting in different international conflicts. These cases were selected for their importance in shaping international law on war crimes, specifically unlawful appropriation. The case study method enabled an in-depth examination of the legal precedents set by these cases, focusing on the interpretation of concepts such as "military necessity" and "spoils of war", as well as the assessment of the "gravity of violation". This approach allowed for a comprehensive analysis of how different legal systems prosecute unlawful appropriation and the implications of these prosecutions for international humanitarian law (IHL). The selection of cases was based on their relevance to the tasks of the study. Cases from the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone and Ukrainian courts were selected for their contributions to defining the legal boundaries of unlawful appropriation and the application of IHL. These cases were selected to represent a wide range of legal interpretations and outcomes, thus providing a robust basis for comparative analysis.

The experimental basis of the study included a detailed analysis of legal documents, judicial decisions, and international treaties relating to unlawful appropriation during armed conflict. The study focused on the legal frameworks of Ukraine, Bosnia and Herzegovina, and Sierra Leone, as well as the applicable international treaties, such as the Geneva Conventions and the Rome Statute. This experimental basis ensured that the findings of this study were grounded in well-established legal precedents and international norms. The methodology employed in this study provided a valuable insight into the legal challenges associated with the prosecution of unlawful appropriation during armed conflict. By integrating statistical research methods with doctrinal research, comparative analysis and case study approaches, the study yielded an in-depth analysis of the legal implications of unlawful appropriation and outlined the steps necessary to improve the legal framework for effective prosecution and accountability.

## Results and Discussion

**The concept of looting in legislation and practice of the courts of Ukraine, Bosnia and Herzegovina, Sierra Leone, and international law.** Lawyers agree that the defining features of war crimes are as follows: commission of actions during an armed conflict or in connection with it; the gravity of the violation of International Humanities Law (IHL) norms;

the object of encroachment is people and their rights protected by IHL; acts are committed by combatants or persons who can give them orders (Piddubna, 2016). On a global scale, looting is recognised as a war crime; however, different countries interpret this crime in distinct ways, necessitating the harmonisation of legal approaches.

Addressing looting is crucial worldwide due to the increasing number of incidents reported in open sources that have not been thoroughly investigated by law enforcement. This lack of proper registration is partly cause by the challenges of working in occupied areas and distinguishing looting from other crimes, which is caused by the objective impossibility of using conventional approaches to gathering evidence (Shulha *et al.*, 2023).

In Ukraine's criminal law looting specifically refers to stealing things of the killed or wounded persons on the battlefield and is classified as a military offence (Article 432 of the CC of Ukraine)[1]. This interpretation differs significantly from broader acts of looting and robbery against civilians, which are carried out for personal gain. Under the international conventions[2,3], Ukraine is under an obligation to criminalise grave violations of international humanitarian law in domestic legislation. Ukraine achieved it by including Article 438. According to this norm, the appropriation of property can be criminalised by military opponents who invade or occupy the territory. This Article contains a blanket provision.

As of July 2024, there have been 14,161 registered criminal offences under Part 1 of Article 438[4]. It is impossible to determine the exact number of looting cases, as all types of violations of the rules of the warfare under this Article are registered in the Unified State Register of Pre-trial Investigations. According to a selective search in the Unified State Register of Court Decisions, 11 court decisions on looting were issued as of August 2024. These judgements are listed in table 1 below.

**Table 1.** Judgements of Ukrainian courts regarding looting of property according to Article 438 of the CC of Ukraine (as of August 2024)

| Date of judgement | Judgement No. | References to international agreements | | | In person or in absentia |
|---|---|---|---|---|---|
| | | Geneva Convention (IV)[5] (GC (IV)) | Additional Protocol I | Hague Convention (IV)[6] (HC (IV)) | |
| 28 June 2023 | case No. 366/869/23, proceedings No. 1-**кп**/366/140/23[7] | Articles 32, 147 | – | Articles 28, 47 | In absentia |
| 14 September 2023 | case No. 748/855/23, proceedings No. 1-**кп**/748/117/2[38] | Article 33 | – | – | In absentia |
| 06 March 2024 | case No. 367/3486/22, proceedings No. 1-**кп**/756/617/24[9] | Articles 27, 31, 32, 33, 146, 147 | Articles 11, Parts 1, 2 of Article 75 | – | In absentia |
| 17 July 2023 | case No. 751/3261/22, proceedings No. 1-**кп**/743/14/23[10] | Articles 31–32, 34, 147 | Article 75 | – | In absentia |
| 13 August 2024 | case No. 638/11302/23, proceedings No. 1-**кп**/638/915/24[11] | Articles 27, 31, 32, 33, 146, 147 | Article 11, Parts 1, 2 of Article 75 | – | In absentia |
| 15 August 2023 | case No. 361/6215/22, proceedings No. 1-**кп**/361/696/23[12] | Article 33 | Article 75 | Articles 28, 47 | In absentia |

[1] Criminal Code of Ukraine. (2001, April). Retrieved from https://sherloc.unodc.org/cld/uploads/res/document/ukr/2001/criminal-code-of-the-republic-of-ukraine-en_html/Ukraine_Criminal_Code_as_of_2010_EN.pdf.
[2] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://www.legal-tools.org/doc/d5e260/.
[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, June). Retrieved from https://www.refworld.org/legal/agreements/icrc/1977/en/104942.
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[7] Verdict of the Ivankivskyi District Court of Kyiv Region in Case No. 366/869/23, Proceedings No. 1-кп/366/140/23. (2023, June). Retrieved from https://reyestr.court.gov.ua/Review/111894270.
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[9] Verdict of the Obolon District Court of Kyiv in Case No. 367/3486/22, Proceedings No. 1-кп/756/617/24. (2024, March). Retrieved from https://reyestr.court.gov.ua/Review/117778018.
[10] Verdict of Ripkinsky district court of Chernihiv region in Case No. 751/3261/22, Proceedings No. 1-кп/743/14/23. (2023, July). Retrieved from https://reyestr.court.gov.ua/Review/112364078.
[11] Verdict of the Dzerzhinsky District Court of Kharkiv in Case No. 638/11302/23, Proceedings No. 1-кп/638/915/24. (2024, August). Retrieved from https://reyestr.court.gov.ua/Review/120995921.
[12] Verdict of the Brovary city and district court of Kyiv region in Case No. 361/6215/22, Proceedings No. 1-кп/361/696/23. (2023, August). Retrieved from https://reyestr.court.gov.ua/Review/112819115.

*Table 1. Continued*

| | | | | | |
|---|---|---|---|---|---|
| 30 May 2024 | case No. 366/2305/23, proceedings No. 1-**кп**/366/86/24[1] | Article 147 | Article 85 | – | In absentia |
| 13 June 2022 | case No. 554/3864/22, proceedings No. 1-**кп**/554/374/2022[2] | not specified | | | In person |
| 09 June 2022 | case No. 554/3925/22, proceedings No. 1-**кп**/554/387/2022[3] | not specified | | | In person |
| 20 March 2024 | case No. 127/15500/23, proceedings No. 1-**кп**/127/463/23[4] | Article 33 | – | Article 47 | In absentia |
| 28 February 2024 | case No. 743/380/23, proceedings No. 1- **кп**/737/11/24[5] | Articles 27, 31, 32, 33, 147 | Articles 51, 52, 75 | – | In absentia |

**Source:** created by the author of this study based on the judgements

The Criminal Code of Bosnia and Herzegovina[6] states that during the times of war, armed conflict, or occupation, ordering or taking part in looting against civilians in violation of international law is considered a war crime. Article 178 specifies that unlawfully taking belongings from the dead or wounded on the battlefield is punishable by imprisonment ranging from six months to five years, and in cases of particularly cruel conduct, from one to ten years. Additionally, the Code mandates that ordering or violating the laws and customs of war is punishable by imprisonment of not less than ten years or long-term imprisonment, with plundering and looting of public and private property included among these violations. The legislation of the Republic of Sierra Leone guarantees everyone the right to enjoy their property and protects them from being deprived of it without compensation[7].

The lack of a unified international definition of looting complicates criminalising this crime in different countries. It is worth supporting the opinion of A. Zimmermann & R. Geiß (2022), who note that the definition should consider "the unauthorised appropriation or acquisition of property to transfer it to oneself or a third party against the will of the rightful owner during war". According to E. Haye (2020), looting is a theft that takes place during a time of war and this act is designated as "spoliation", "plunder", "looting". None have been sufficiently defined for the purposes of international law (Dormann, 2004), but all these terms involve the unlawful appropriation of property without the owner's consent. It is covered in Articles 23 (g), 28, and 47 of the HC (IV)[8]; Article 33 of the GC (IV); Articles 8 (2) (a) (iv), 8 (2) (b) (xiii), 8 (2) (b) (xvi), 8 (2) (e) (v) of the Rome Statute[9]. The commentary of the GC emphasises that pillage has always been associated with "looting, plunder..." whether it is committed in occupied or other territories, carried out by individual soldiers. Such misappropriation of property should be distinguished from spoils of war, which refers to the seizure of any movable state property on the battlefield (regardless of its military nature) (Pictet *et al.*, 1987).

**Interpretation and use of the concept of the spoils of war**. Capturing and displaying spoils of war has not been considered an international crime since ancient times (Zétola, 2021). Throughout history, there have been countless instances of victorious military forces forcibly appropriating private property, cultural property of their defeated enemies as "spoils of war" that were not used for military purposes – a practice now recognised as plunder (Zhang, 2024). On the other hand, today there are new cases known as the example of the war between Russia and Ukraine, where, according to the investigation, in May the Russian courier service SDEK sent at least 58 tonnes of parcels from points near the Ukrainian border (Fig. 1). The shipments were made by people in military uniform – Russian servicemen or militants in eastern Ukraine. The peak of transportation occurred at the beginning of April, when Russian troops were retreating

[1] Verdict of the Ivankiv District Court of the Kyiv Region in Case No. 366/2305/23, Proceedings No. 1-кп/366/86/24. (2024, May). Retrieved from https://reyestr.court.gov.ua/Review/119382555.
[2] Verdict of the Oktyabrsky District Court of Poltava in Case No. 554/3864/22, Proceedings No. 1-кп/554/374/2022. (2022, June). Retrieved from https://reyestr.court.gov.ua/Review/104739440.
[3] Ibidem, 2022.
[4] Verdict Vinnytsia city court of Vinnytsia region in Case No. 127/15500/23, Proceedings No. 1-кп/127/463/23. (2024, March). Retrieved from https://reyestr.court.gov.ua/Review/117947422.
[5] Verdict of the Kulykiv District Court of the Chernihiv Region in Case No. 743/380/23, Proceedings No. 1-кп/737/11/24. (2024, February). Retrieved from https://reyestr.court.gov.ua/Review/117304451.
[6] Criminal Code of Bosnia and Herzegovina. (2003, June). Retrieved from https://rm.coe.int/bih-criminal-code-consolidated-text/16806415c8.
[7] Constitution of Sierra Leone. (1991, October). Retrieved from https://www.sierra-leone.org/Laws/constitution1991.pdf.
[8] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. (1907, October). Retrieved from https://www.refworld.org/legal/agreements/hague/1907/en/31788.
[9] Rome Statute of the International Criminal Court. (1998, November). Retrieved from https://asp.icc-cpi.int/sites/asp/files/asp_docs/Publications/Compendium/RomeStatute-ENG.pdf.

from the Kyiv region and the north of Ukraine (Syvodied, 2023). So, what are the spoils of war? Diversity of opinion leads to a misunderstanding of the difference between looting and spoils of war.

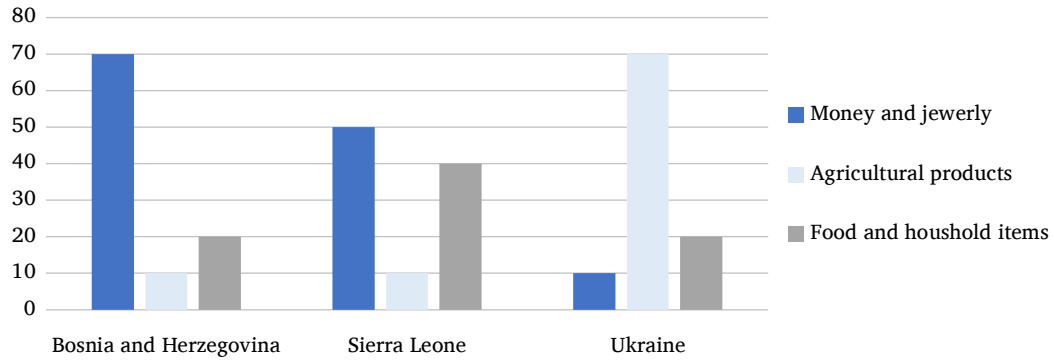


**Figure 1.** Comparison of looted object types by country
**Source:** developed by the author on the basis of courts decisions of Bosnia and Herzegovina[1,2,3,4] Sierra Leone[5,6,7] and Ukraine[8,9,10]

The percentages presented in Figure 1 represent the proportional distribution of diverse types of items looted in each country. In Bosnia & Herzegovina, 70% of the looted property includes money, jewellery, chains, bracelets, watches, livestock, clothing, household appliances, furniture, technical equipment, and gold; 20% includes other types of property, such as building materials, food, and vehicles; 10% accounts for other items. In Sierra Leone, 50% of the looted property includes money, household items, doors, roofs, videos, generators, rice, ammunition, medicine, clothing, and cars; 40% accounts for household items and medical supplies; 10% – other types of property. In Ukraine, 70% of the looted property consists of agricultural products; 20% accounts for household items, such as washing machines, petrol generators, air compressors, and cars; 10% – other types of property. To summarise, cases mainly concern basic items, such as food, money, housewares, and husbandry things.

Pillage is subject to an absolute prohibition without exception. The Elements of Crimes[11] clearly states that military necessity cannot be invoked as a justification for an offence committed with the intent to appropriate property for private or personal use. Misappropriation of property should be distinguished from spoils of war, which refers to the seizure of any movable property belonging to the enemy state on the battlefield (e.g., weapons and military equipment) (Clapham *et al.*, 2015) and other types of property, including private. War plunder is not considered justified if it is taken for personal motives or private gain rather than military necessity (Nuzban, 2023). The item did not serve any military purpose while it

[1] Trial Judgement of the International Tribunal for the former Yugoslavia in the Case No. IT-95-14-T "Prosecutor v. Tihomir Blaskic". (2000, March). Retrieved from https://www.refworld.org/jurisprudence/caselaw/icty/2000/en/19490.
[2] Trial Judgement of the International Tribunal for the former Yugoslavia in the Case No. IT-96-21-T "Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic". (1998, November). Retrieved from https://www.refworld.org/cases,ICTY,41482bde4.html.
[3] Trial Judgement of the International Tribunal for the former Yugoslavia in the Case No. IT-01-47-T "Prosecutor v. Hadzihasanovic and Kubura". (2006, March). Retrieved from https://www.legal-tools.org/doc/8f515a/pdf.
[4] Trial Judgement of the International Tribunal for the former Yugoslavia in the Case No. IT-95-14/2-T "The Prosecutor v. Dario Kordic and Mario Cerkez". (2001, February). Retrieved from https://www.refworld.org/jurisprudence/caselaw/icty/2001/en/19636.
[5] Trial Judgement of the Special Court for Sierra Leone in the Case No. SCSL-04-14-T "The Prosecutor v. Moinina Fofana, Allieu Kondewa". (2007, August). Retrieved from https://www.refworld.org/jurisprudence/caselaw/scsl/2007/en/91923.
[6] Trial Judgement of the Special Court for Sierra Leone in the Case No. SCSL-04-15-T "Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao". (2009, March). Retrieved from https://www.refworld.org/jurisprudence/caselaw/scsl/2009/en/92027.
[7] Trial Judgement of the Special Court for Sierra Leone in the Case No. SCSL-04-16-T "The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu". (2007, June). Retrieved from https://www.refworld.org/jurisprudence/caselaw/scsl/2007/en/91904.
[8] Verdict of the Kulykiv District Court of the Chernihiv Region in Case No. 743/380/23, Proceedings No. 1-кп/737/11/24. (2024, February). Retrieved from https://reyestr.court.gov.ua/Review/117304451.
[9] Verdict of the Ivankivskyi District Court of Kyiv Region in Case No. 366/869/23, Proceedings No. 1-кп/366/140/23. (2023, June). Retrieved from https://reyestr.court.gov.ua/Review/111894270.
[10] Verdict of the Chernihiv District Court of the Chernihiv Region in Case No. 748/855/23, Proceedings No. 1-кп/748/117/23. (2023, September). Retrieved from https://reyestr.court.gov.ua/Review/113458684.
[11] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court "Elements of Crimes". (2010, June). Retrieved from https://www.refworld.org/reference/research/icc/2011/en/87658.

was in the possession of its country of origin (Dibb, 2024) during armed conflict (Walker-Munro, 2024).

The right to take plunder is allowed when there is no requirement for restitution or compensation for such plunder (Power & Kiswanson, 2023). This includes items such as cash, financial assets, securities, military equipment, and military transport vehicles (ICRC, 2002). Lawful appropriation during armed conflict includes requisition, confiscation, and spoils of war (Nuzban, 2020). Owners of property may be persons protected by conventions (civilians, sick and wounded, shipwreck victims, and prisoners of war) (Williamson, 2016) and a combatant or a person who directly took part in military operations[1]. Civilians also commit looting, who may target shops or residences. The breakdown of social structures, lack of efficient law enforcement, and/or economic struggles and unemployment can push individuals towards theft and looting after conflict or environmental catastrophe. This behaviour may occur sporadically on an individual basis or evolve into deliberate, systemic, and occasionally targeted looting orchestrated by organised criminal groups to sustain their illicit activities.

In summary, the framework of international law governing armed conflict suggests that the appropriation of property, such as spoils of war, may be lawful under certain conditions. These conditions are generally based on established international standards, including:

1) distinction between military targets and civilian objects: appropriation is lawful only if the seized property is directly connected to the enemy's military efforts, such as military equipment or transport, and not civilian property; however, the offence of looting occurs when private property belonging to combatants is appropriated without justification by military necessity;

2) proportionality: actions must be proportionate to the military advantage gained. This standard ensures that the harm caused by the appropriation of property is not excessive in relation to the expected military benefit;

3) legitimacy of purpose: property can only be appropriated for a legitimate military purpose, not for personal gain or motives unrelated to military operations;

4) military necessity: appropriation must be justified by legitimate military necessity. This means that the seizure of property must directly contribute to the success of military operations and not be excessive or unnecessary.

**Comparative analysis of ICTY, SCSL & Ukrainian cases.** ICTY had jurisdiction over grave violations of international humanitarian law committed in the former Yugoslavia since 1991. According to Article 3(e) of the ICTY Statute[2], the Tribunal had authority over violations of the laws and customs of war, including the "plunder of public or private property". SCSL was established to prosecute individuals responsible for grave violations of international humanitarian law and crimes under Sierra Leonean law. Article 3 of the SCSL Statute provides jurisdiction over serious violations of common Article 3 of the GC of 1949 and Additional Protocol II of 1977[3], including pillaging.

The ICC, established under the Rome Statute[4], has jurisdiction over pillaging as one of the "other grave violations of the laws and customs of war" applicable in both international and non-international armed conflicts. While these courts may have overlapping jurisdictions concerning the types of crimes they address, their mandates and operational periods are designed to complement rather than contradict each other. Each court defines and prosecutes looting based on the legal frameworks established in their respective statutes. As mentioned above, one of the defining characteristics of war crimes is the gravity of the violation of international humanitarian law. It analysed a series of decisions that can be distinguished by a range of criteria.

Monetary value and impact on victims. In the case of Prosecutor v. Zdravko Mucic *et al.*[5], the charges of plunder of private property in a prison camp were dismissed on jurisdictional grounds. The court found that the stolen items (money, watches, and other property) did not have sufficient monetary value to cause grave consequences for the victims. This decision suggests that for a violation to be considered grave, the appropriated property must have substantial value or impact on the victims.

[1] Trial Judgement of the International Criminal Court in the Case No. ICC-01/04-01/07 "The Prosecutor v. Germain Katanga". (2014, March). Retrieved from https://www.legal-tools.org/doc/f74b4f/pdf.
[2] Statute of the International Criminal Tribunal for the former Yugoslavia. (1993, May). Retrieved from https://legal.un.org/avl/ha/icty/icty.html.
[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). (1977, June). Retrieved from https://www.refworld.org/legal/agreements/icrc/1977/en/14705.
[4] Rome Statute of the International Criminal Court. (1998, November). Retrieved from https://asp.icc-cpi.int/sites/asp/files/asp_docs/Publications/Compendium/RomeStatute-ENG.pdf.
[5] Trial Judgement of the International Tribunal for the former Yugoslavia in the Case No. IT-96-21-T "Prosecutor v. Zdravko Mucic aka "Pavo", Hazim Delic, Esad Landzo aka "Zenga", Zejnil Delalic". (1998, November). Retrieved from https://www.refworld.org/cases,ICTY,41482bde4.html.

Substantial consequences for victims. The case of Prosecutor v. Issa Hassan Sesay *et al.*[1] involved looting funds from the Tankoro Bank by AFRC/RUF fighters. The court found that the amount of funds stolen was sufficient to constitute a grave violation. This shows that the gravity is also measured by the significant negative consequences for the victims, which could be economic or personal. Similarly, in the Prosecutor v. Dusko Tadic[2] appellate decision, the Appeals Chamber stated that a violation must be "grave", meaning it must breach a rule protecting important values and have grave consequences for the victim. For instance, a combatant taking a loaf of bread in an occupied village would not be considered a "grave violation" unless it caused significant harm.

Nature, volume, and collective scale of looting. In the Prosecutor v. Issa Hassan Sesay et al. decision[3], the Trial Chamber noted that while international law does not require the looted items to be of significant value, the court's jurisdiction is only exercised in cases of grave violations. The gravity can be assessed based on the nature, volume, size, or collective scale of the robbery. For instance, looting that affects many people or involves substantial quantities of goods (e.g., vehicles, food) is considered a grave violation.

Personal gain vs. military necessity. In the Katanga case[4], the court ruled that looting conducted for personal gain, even if it involved basic items like food, was grave because it was not justified by military necessity. This case underscores that looting motivated by personal interest rather than military necessity is a grave violation. The scale of appropriation was also one of the criteria. In the case of the Prosecutor v. Jean-Pierre Bemba Gombo[5], the Chamber highlighted that the war crime of looting presupposes the appropriation of property on a rather large scale, which goes beyond isolated acts of theft. This suggests that the extent and scale of looting contribute to its gravity.

Economic and personal impact on victims. In a case decided by the Ivankiv District Court of Kyiv Region (case No. 366/869/23)[6], the court ruled that the theft of property that significantly contributed to a victim's livelihood (worth nearly 15 times the subsistence level) constituted a grave violation. This judgement highlights that if stolen property is essential to a person's daily life and survival, its looting is considered a grave offence. The last criterion was the recurrence and widespread nature of the incidents. In the Katanga case[7], the Chamber noted that the value of the looted items varied significantly, encompassing everything from kitchenware and furniture to livestock, including goats and chickens. Although the items differed in value, they collectively constituted the majority of the owners' possessions and were vital to their daily survival. The Chamber pointed out that the recurring and widespread instances of looting exacerbated the gravity of the violation. This shows that when such acts are recurrent and deprive many people of their essential property, they are regarded as graver.

To summarize, the key features of determining the gravity of a violation are as follows: substantial consequences for the victims: this gravity is assessed even if the consequences are not equally grave for all victims. The focus is on the overall impact on those affected, highlighting that the degree of harm to individuals can vary but still constitute a grave violation; large scale of deprivation: if many people are deprived of their property, the violation is considered graver. This consideration emphasises the collective impact on a community or group, rather than just isolated incidents; economic and personal impact: if the looting involves a substantial portion of a victim's property, especially when it was earned through their personal labour and is crucial for their livelihood, it is considered a grave offence.

The term "gravity of violation" is still evaluative and is determined on a case-by-case basis by examining the concrete circumstances of each case. There is a suggestion to establish clear criteria within the International Criminal Court's Elements of Crimes[8] to better classify looting as "grave". It is proposed to create in Ukraine a clear and objective basis for assessing

[1] Trial Judgement of the Special Court for Sierra Leone in the Case No. SCSL-04-15-T "Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao". (2009, March). Retrieved from https://www.refworld.org/jurisprudence/caselaw/scsl/2009/en/92027.
[2] Appeal Judgement of the International Tribunal for the former Yugoslavia in the Case No. IT-94-1-T "Prosecutor v. Dusko Tadic a/k/a "DULE". (1995, October). Retrieved from https://www.legal-tools.org/doc/866e17/pdf.
[3] Trial Judgement of the Special Court for Sierra Leone in the Case No. SCSL-04-15-T "Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao". (2009, March). Retrieved from https://www.refworld.org/jurisprudence/caselaw/scsl/2009/en/92027.
[4] Trial Judgement of the International Criminal Court in the Case No. ICC-01/04-01/07 "The Prosecutor v. Germain Katanga". (2014, March). Retrieved from https://www.legal-tools.org/doc/f74b4f/pdf.
[5] Trial Judgement of the International Criminal Court in the Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2016, March). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.
[6] Verdict of the Ivankivskyi District Court of Kyiv Region in Case No. 366/869/23, Proceedings No. 1-кп/366/140/23. (2023, June). Retrieved from https://reyestr.court.gov.ua/Review/111894270.
[7] Trial Judgement of the International Criminal Court in the Case No. ICC-01/04-01/07 "The Prosecutor v. Germain Katanga". (2014, March). Retrieved from https://www.legal-tools.org/doc/f74b4f/pdf.
[8] Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court "Elements of Crimes". (2010, June). Retrieved from https://www.refworld.org/reference/research/icc/2011/en/87658.

the seriousness of violations during armed conflicts in Ukraine, based on the following criteria: the level of damage caused, the size and value of the appropriated property, considering the context and circumstances, and the scale of the impact on communities. Concrete examples and precedents need to be included in legislation or judicial practice to help judges apply these concepts in practice, which will contribute to more accurate and consistent judgements.

The concept of military necessity is defined as measures that are genuinely needed to achieve a legitimate military objective and are not prohibited by IHL. According to K. Dormann (2016), military necessity can only be invoked if it is explicitly prescribed by the law and cannot serve as an additional justification outside these provisions. The principle of military necessity must be balanced with the principle of humanity, which limits the use of force to what is necessary to weaken the enemy's military capabilities without causing unnecessary suffering (Senatorova, 2021). The Rome Statute[1] explicitly states that the crime of looting requires intent to deprive the owner ofproperty for private or personal use. It excludes appropriations justified by military necessity from this definition, as these do not fall under looting. This interpretation was upheld in the Prosecutor v. Brima *et al.* decision[2] by the (SCSL), which noted that the term "private or personal use" excludes actions justified by military necessity, reinforcing the view that such appropriations cannot be classified as looting.

The HC[3] permits the requisition of private property "for the needs of the army of occupation" (Article 52), indicating that property necessary for the immediate maintenance of an army, such as food, supplies, or equipment, could be requisitioned. However, this must be strictly for military needs, such as maintaining occupying forces or ensuring the functioning of the occupying power, as seen in The Krupp Judgement[4], which allowed the requisition of supplies essential for military operations (e.g., food, equipment, and transportation means). Examples of justified and unjustified military necessity are listed in Table 2 below.

**Table 2.** Examples of lawful and unlawful appropriation

| Category | Example | Reason |
|---|---|---|
| Justified military necessity | Using medical supplies from a deceased soldier to save lives, stop the bleeding, use the dead soldier's weapons and ammo to continue the fight | Necessary actions to save lives, not for personal gain, not dictated by a selfish component |
| | Using a civilian vehicle to transport wounded soldiers | Necessary action for transporting wounded soldiers, not for personal gain |
| Unjustified military necessity | Destruction or damage to property in Dubrovnik's Old Town[5] | No military facilities nearby; destruction was not necessary for military objectives |
| | Looting of medical supplies and household materials from civilians[6] | Civilians were not participants in the conflict; actions lacked military necessity |

**Source:** created by the author of this study based on the judgements

A special constructive feature, the establishment of which is necessary for the qualification of an act as looting, is the performance of the specified actions out of forced necessity. This issue is vital because forced actions are acts of behaviour of a person in which, being in the specified situation, considering its characteristics and conditions, they could not act otherwise.

The concept of military necessity can be subjective and potentially open to abuse, especially if invoked by an aggressor without clear and legitimate grounds. This concern is clear in cases where the appropriation of property is claimed to be an urgent military necessity, without unambiguous evidence of urgency or necessity, as highlighted by the critique of the Chernihiv District Court of Chernihiv Region

[1] Rome Statute of the International Criminal Court. (1998, November). Retrieved from https://asp.icc-cpi.int/sites/asp/files/asp_docs/Publications/Compendium/RomeStatute-ENG.pdf.
[2] Trial Judgement of the Special Court for Sierra Leone in the Case No. SCSL-04-16-T "The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused)". (2007, June). Retrieved from https://www.refworld.org/jurisprudence/caselaw/scsl/2007/en/91904.
[3] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. (1907, October). Retrieved from https://www.refworld.org/legal/agreements/hague/1907/en/31788.
[4] Trial Judgement of the International Military Tribunal in the Case No. 58 "The Krupp trial". (1948, July). Retrieved from https://www.worldcourts.com/imt/eng/decisions/1948.06.30_United_States_v_Krupp.pdf.
[5] Trial Judgement of the International Criminal Tribunal for the former Yugoslavia in the Case No. IT-01-42-T "Prosecutor v. Pavle Strugar". (January 2005). Retrieved from https://www.refworld.org/cases,ICTY,48ad42092.html.
[6] Trial Judgement of the Special Court for Sierra Leone in the Case No. SCSL-04-14-T "The Prosecutor v. Moinina Fofana, Allieu Kondewa". (2007, August). Retrieved from https://www.refworld.org/jurisprudence/caselaw/scsl/2007/en/91923.

judgement[1]. Here, the appropriation of civilian property, like 22 tonnes of mineral fertilisers and a tractor-trailer, was considered unlawful as it lacked any justification of military necessity and served no military purpose. The GC[2] explicitly states that the large-scale destruction and appropriation of property not justified by military necessity and carried out unlawfully and purposelessly constitute a grave violation. The negotiations for these conventions rejected military necessity as a justification for looting, emphasising that necessary exceptions are already included in regulations such as the Hague Regulations.

To summarise, in international law, military necessity is a principle that allows certain actions during armed conflict to achieve a legitimate military objective, provided they follow international humanitarian law. However, military necessity cannot justify looting of property unless explicitly permitted by law. Courts have consistently ruled that actions motivated by personal gain or without a clear, urgent military necessity are not protected under this principle. Military necessity cannot be an independent and separate justification for looting, primarily because military necessity cannot act as a justification for infringement, unless the term "military necessity" is clearly specified as an exception (e.g., military necessity was already considered when creating exceptions contained in the HC[3]). This does not apply to looting, which is prohibited in absolute terms. Therewith, in the GC[4], Article 147 directly establishes that "large-scale destruction and appropriation of property, not justified by military necessity, and committed illegally and purposelessly, constitutes a grave violation of the Convention", and, therefore, of international humanitarian law as a whole.

Customary norms of the IHL prohibit the destruction and seizure of enemy property in the absence of urgent military necessity (norm 50) (Henckaerts & Doswald-Beck, 2005). It means that the destruction and seizure of the enemy's property is allowed in the presence of an urgent military necessity. At the same time, as a condition of admissibility or inadmissibility of destruction and seizure of the enemy property, urgent military necessity is a subjective and unprovable concept. It is unclear what exactly is the criterion in practice: that the military necessity is exactly urgent; that only by destroying/capturing the enemy's property can such an urgent military necessity be met.

Continuing the already mentioned argument that "urgent military necessity" is a subjective concept, it is relevant to add that such formulations set a wide field for potential abuses by the adversary, especially if such an adversary is an aggressor who started military operations. There is no clear disambiguation between the presence of an urgent military necessity and absence thereof. That is, for an adversary who has already committed acts of aggression, i.e., violated the norms of international law, nothing prevents them from destroying or seizing (confiscating) private property and claiming that this was required by urgent military necessity, the criteria of which are blurred and evaluative.

It would be advisable to develop a separate law regulating the looting during armed conflict, defining the types of property that can be seized and the conditions for such seizure; such law should also clarify the terms "military necessity" and "gravity of the violation" based on international practices, which would standardise approaches to the assessment of crimes and promote unification of judicial practice. It would also be advisable to implement international norms into national legislation, which would ensure that Ukrainian laws follow international standards and promote effective investigation of crimes.

To conclude, a separate law should be drafted and adopted to regulate the looting during armed conflict in Ukraine. This law should specify the types of property that can be appropriated, the conditions for doing so, and how to assess military necessity. It should also update internal military regulations to prohibit the appropriation of personal belongings (e.g., jewellery, money, electronics), as this is not justified by military necessity. Property seizures must be directly related to concrete military objectives, such as protecting military units or providing essential supplies. Any appropriation that does not directly contribute directly to military operations should be considered unlawful looting.

## Conclusions

The study identified significant differences in approaches to the criminalisation of looting in Ukraine, Bosnia and Herzegovina, Sierra Leone, and within the framework of international law. The analysis of judgements and international treaties revealed discrepancies in the interpretation of concepts such as

[1] Verdict of the Chernihiv District Court of the Chernihiv Region in Case No. 748/855/23, Proceedings No. 1-кп/748/117/23. (2023, September). Retrieved from https://reyestr.court.gov.ua/Review/113458684.
[2] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://www.legal-tools.org/doc/d5e260/.
[3] Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land. Second International Peace Conference, The Hague. (1907, October). Retrieved from https://www.refworld.org/legal/agreements/hague/1907/en/31788.
[4] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://www.legal-tools.org/doc/d5e260/.

"military necessity", "spoils of war", and "gravity of the violation". The primary challenge for Ukraine is the absence of clear criteria for assessing the "gravity of the violation" and "military necessity", which creates risks for abuse and complicates the legal regulation of these issues. The findings highlight tendencies to use the term "military necessity" to justify unlawful actions, particularly in the context of armed conflicts.

The interpretation of the findings suggests that existing gaps in Ukrainian legislation may lead to difficulties in ensuring justice and the efficiency of legal proceedings. For example, the lack of a clear definition of "spoils of war" and distinct approaches to this concept across countries complicate the application of uniform international law standards. The identified patterns, such as the mass and systemic nature of looting, suggest that this crime has a substantial impact on the victims and communities affected by armed conflicts. In Ukraine, for instance, a substantial portion of looted property accounts for agricultural products, which differs from other countries like Bosnia and Herzegovina, where looted items are primarily valuables and jewellery.

The significance of the results for the academic community lies in the contribution of this study to highlighting the need for harmonisation of Ukrainian legislation with international standards. Establishing clear legal definitions and standards for evaluating looting crimes will facilitate the unification of judicial practices and improve accountability for these offences. Developing a separate law to regulate looting during armed conflicts would be a crucial step in improving Ukraine's legal system. This law should clearly define the types of property that can be seized, the conditions under which such seizure is justified, and how to assess military necessity. The intricacies of such legislation should be the subject of further research in this area.

## Acknowledgements

This study was made possible due to the support and mentorship of the mentors and directors of the course "Sustaining the Rule of Law and Democracy in Ukraine amidst War and Post-War Reconstruction" within the framework of the Invisible University for Ukraine, Special and Extension Programme at Central European University, Vienna, from 22 February 2024 to 24 May 2024.

## Conflict of Interest

The author of this study declares no conflict of interest.

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# Криміналізація мародерства під час війни: міжнародний та національний досвід

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■ **Анотація.** Актуальність теми дослідження зумовлена збільшенням кількості випадків мародерства під час збройних конфліктів, що потребує вдосконалення правових механізмів криміналізації цього злочину. Попри те, що мародерство визнано воєнним злочином на міжнародному рівні, наявні істотні відмінності в підходах до його криміналізації та визначення відповідальності за такі дії в національних правових системах. Це створює ризики щодо неоднозначного тлумачення правових норм у судовій практиці й ускладнює забезпечення правосуддя. Метою дослідження був аналіз світового й національного досвіду щодо криміналізації мародерства під час збройних конфліктів на прикладі Боснії і Герцеговини, Сьєрра-Леоне та України, а також формулювання рекомендацій щодо вдосконалення національного законодавства України за цим напрямом. У статті використано методи порівняльно-правового аналізу, формально-юридичного аналізу й аналізу судової практики. Здійснено порівняння кримінально-правових норм і підходів різних країн стосовно притягнення до відповідальності за мародерство, зокрема щодо понять «військова необхідність» і «воєнна здобич». Результати дослідження засвідчили, що відсутність чітких правових визначень і критеріїв оцінювання «військової необхідності» та «серйозності порушення» ускладнює притягнення до відповідальності за цей злочин і створює ризики зловживань. Виявлено суттєві відмінності в підходах до криміналізації мародерства, зокрема у визначенні обсягу й умов відповідальності. Практична цінність дослідження полягає в рекомендаціях щодо гармонізації українського законодавства з міжнародними стандартами. Запропоновано розробити окремий закон, який має визначати механізми криміналізації мародерства під час збройних конфліктів, встановлювати чіткі критерії для оцінювання військової необхідності й уніфікувати підходи до судової практики. Це сприятиме підвищенню ефективності розслідування та притягнення до відповідальності за цей вид воєнних злочинів, а також зміцненню правової бази України в умовах збройних конфліктів

■ **Ключові слова:** правосуддя; військові трофеї; військова необхідність; серйозність порушення; правове регулювання

UDC 341.9
DOI: 10.56215/naia-herald/3.2024.66

# Study on cases from national courts and international tribunals related to gender-based violence in armed conflict

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■ **Abstract.** Gender-based violence in armed conflicts is on the rise, destroying the lives of victims, their families, and even communities. Investigating and prosecuting such crimes is not only a step towards justice, but also a powerful tool to prevent analogous cases in the future. The purpose of this study was to research the practice of investigating crimes related to sexual or gender-based violence by national courts and international tribunals. The study analysed the judicial practice of national courts and international tribunals, investigated the relevant scientific literature, and made a comparative analysis of the specific features of national and international legal proceedings. The study identified a series of common challenges faced by national courts and international tribunals in investigating gender-based violence in armed conflict: collecting evidence in dangerous and difficult conditions, and its short-lived existence; ensuring the safety of victims and witnesses, who are often particularly vulnerable, and maintaining their confidentiality when necessary; overcoming stigma and discrimination that prevent victims from seeking help; and proving that violence was committed in armed conflict against civilians or prisoners of war. It was noted that when investigating crimes related to gender-based violence, courts should apply a gender-sensitive approach that considers the specifics of crimes related to this type of violence and its impact on victims. The study proved that a prerequisite for effective investigation of crimes of this category is cooperation at the national and international levels. The findings of the study can contribute to improving the quality of investigations into crimes of sexual or gender-based violence in armed conflict, as well as serve as a basis for developing programmes aimed at preventing these crimes

■ **Keywords:** sexual violence; genocide; war crimes; international organisations; gender equality; human rights

## ■ Introduction

Armed conflicts are a persistent part of reality. Their consequences are devastating not only for the infrastructure and economy of a particular country, but also have a significant impact on the lives of people regardless of sex or gender identity. Armed conflicts are always accompanied by violence against both military and civilians. One of the types of violence that can accompany armed conflict is gender-based violence (GBV). In armed conflict, GBV can take many forms, including sexual violence, physical violence, psychological violence, and economic violence. The relevance of this study lies in the fact that combating GBV, especially in the context of armed conflicts, is one of the crucial humanitarian and social problems of modern time. The pre-trial investigation and prosecution of perpetrators of GBV is crucial to preventing analogous crimes in the future, ensuring justice for victims, and contributing to the restoration of

■ **Suggested Citation:**
Symonova, H. (2024). Study on cases from national courts and international tribunals related to gender-based violence in armed conflict. *Scientific Journal of the National Academy of Internal Affairs,* 29(3), 66-78. doi: 10.56215/naia-herald/3.2024.66.

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■ Received: 19.05.2024; Revised: 31.07.2024; Accepted: 27.08.2024

peace in regions that have been affected by military conflicts. Both national courts and international tribunals play a vital role in this. National courts have jurisdiction on their territory and can try crimes related to GBV committed by nationals of their country or on their territory. International tribunals, such as the International Criminal Court (ICC), have jurisdiction over a limited range of crimes, including war crimes, crimes against humanity, and genocide. Notably, GBV is often not considered a war crime or a crime against humanity, which complicates its investigation and prosecution of perpetrators through international tribunals.

Having analysed a series of recent publications, there are currently no Ukrainian findings related to the study of cases of national courts and international tribunals in the investigation of crimes related to GBV in armed conflicts. At the same time, there are a series of studies in Ukrainian legal science related to manifestations of gender-based violence in general. Thus, A. Politova (2022) investigated combating GBV as a European value. The researcher found that since 2017, Ukraine has begun to develop a proper system of protection for victims of GBV and to give this problem a proper legal assessment by amending existing regulations and adopting new ones. At the same time, it was noted that in the context of the armed conflict in Ukraine, the problem of insufficient effectiveness of the mechanism for preventing and combating GBV and protecting victims stays an urgent issue.

It is worth mentioning the thorough study by A. Politova & M. Hrushko (2023), who were among the first in Ukrainian legal science to determine that the International Criminal Court (ICC) as a legal institution sets precedents and shapes further steps towards building an international mechanism for bringing to justice persons for grave crimes in the field of international law. In the same study, the researchers focused on the need for Ukraine to ratify the Rome Statute, which would "facilitate" the prosecution of individual Russian military personnel and the highest political and military command for crimes on the territory of Ukraine and would in some way simplify Ukraine's access to the ICC's jurisdiction.

In turn, L. Villardón-Gallego *et al.* (2023) investigated the problem of GBV in the educational environment and its impact on the further development of violence in society. The study helped to analyse effective programmes for the prevention of gender-based violence among school-age children. The study was aimed at laying the groundwork for creating a state policy of equality and eradicating gender-based violence from an early age.

E.O. Bazaluk (2023) noted that the international community has been paying increasing attention to the problem of gender-based violence in armed conflicts over the past decade. This is confirmed by a series of international and national regulations governing this area. Notably, the emphasis is on the relationship between gender-based violence and armed conflict. V. Hrytsaniuk (2023) found that women living in the frontline regions of Ukraine are at disproportionately high risk of gender-based violence. This violence, which manifests itself in various forms, often goes unnoticed and unpunished due to a series of factors related to the armed conflict. In this study, the researcher found that gender equality is one of the key aspects in preventing violence against women based on gender stereotypes.

Some researchers have investigated the issue of proper documentation of GBV-related crimes in armed conflicts. O.V. Shcherbanyuk & O.V. Sinkevich (2023) analysed the specific features of pre-trial investigation of international criminal offences and determined the role of non-governmental human rights organisations in this process. The researchers considered new functions assigned to certain non-governmental human rights organisations that have been operating in Ukraine since the beginning of the full-scale invasion.

Based on a doctrinal study, P. Shutava (2023) concluded that the key challenges faced in investigating crimes of sexual and gender-based violence during armed conflict include the lack of competence of law enforcement agencies and the lack of resources caused by the armed conflict. Procedural issues, such as lack of jurisdiction, are often significant obstacles, as well as the collection of evidence and the sensitive nature of such crimes. Furthermore, L. Protosavitska (2023) investigated the terms "gender" and "gender equality" in the definitions of international legal acts and national legislation of Ukraine on gender parity. This study was important for the development of the terminology component of the present research. Furthermore, L. Protosavitska (2023) gave a proper assessment of the transformations of Ukrainian legislation, which brought the concept of gender equality to a new stage of development.

Analysing the practices of other countries in combating gender-based violence in armed conflict, the study by J.-P. Pérez-León-Acevedo (2023) deserves attention, where the author analysed sexual and gender-based violence committed by non-state armed groups against women, girls, and LGBTI+ persons according to international humanitarian law. C.G. Adeyanju (2020) performed a thorough study, noting that due to the exhaustion of militants and the loss of territory, there has been a surge in the mass use of women and girls as material tools of war: fighters, suicide bombers, human shields, bargaining chips, sex slaves, informants, etc. The researcher assessed whether gender factors are responsible for this, identified the motivation for such behaviour, and offered some policy recommendations. When studying GBV in a single country in the context of

armed conflict, one cannot but ignore the study conducted by D.S. Tewabe *et al.* (2024), which assessed GBV and its consequences in war-torn areas in northern Ethiopia. A.V. Ivanov (2024) and V.V. Gutnyk (2024) analyse the current problems of the International Criminal Court, which is of immense importance in the context of the present study, since the ICC cases are being studied.

The purpose of this study is to properly analyse how national courts and international tribunals investigate crimes of gender-based violence in armed conflict; to develop relevant recommendations for national courts to improve the investigation of GBV; and to determine the significance of prosecuting perpetrators of GBV crimes in armed conflict.

## Materials and Methods

This study examined the problem of investigating crimes related to gender-based violence in the context of armed conflict. For this, cases from national courts and international tribunals were analysed. The study was built on the concept of gender-based violence as a form of gender discrimination that manifests itself in the use of force or the threat of force against women and girls, men and boys, with the purpose of controlling them and causing them harm against a background of gender intolerance. This approach is based on the theories that have informed this study: gender equality, which is the study of feminine, masculine, or queer behaviour in various contexts, communities, societies, or academic fields; feminism, which emerged from the feminist movement and gender inequality, which is studied through the lens of social roles and experiences of women and men, which allows for a better understanding of the issue; and human rights overall, which recognise that GBV is a systemic problem that is based on inequality between men and women, is based on gender intolerance and can be directed against any person.

The study employed a comprehensive methodology that combined the methods of analysis, comparison, and description. These methods, considering the specific features of the study, had a series of advantages in the investigation of gender-based violence in armed conflicts. The analysis method helped to examine certain written sources, such as regulations, court cases, reports, news, press releases, academic studies, etc. The comparative method was used to compare and evaluate the decisions of national courts and international tribunals: to identify comparable approaches to prosecuting perpetrators, to focus on the factors that are key in investigating the category of cases related to GBV committed in armed conflicts, and to summarise positive practices in the investigation of this category of cases by courts. The descriptive method helped to provide general characteristics of GBV and consider them in further research of relevant court cases. The research sequence included the following stages: 1) definition of keywords and concepts; 2) literature review; 3) selection of a sample of court cases, collection of data from relevant international reports and studies by NGOs; 4) analysis of the collected data; 5) formulation of relevant conclusions and recommendations.

The study analysed the judgements of national courts and international tribunals relating to GBV in armed conflicts. The study assessed the cases of the International Criminal Court "Prosecutor v. Bosco Ntaganda"[1] (2019), "Prosecutor v. Jean-Pierre Bemba Gombo"[2,3], as well as cases of national courts No. 748/1278/23[4,5] and No. 650/1870/23[6]. Using the comparative legal method, the study identified common and distinctive features of the investigations of GBV by national courts of Ukraine and international tribunals. The results of this analysis were recorded in the form of a comparative table that reflects the key issues.

Furthermore, reports of international agencies and NGOs containing information on GBV and its investigation were used. The study analysed the report of the Rafal Lemkin Centre for Documentation of Russian Crimes in Ukraine (Zhuk *et al.*, 2024) and assessed the report of the UN Secretary-General dated 4 April 2024 (United Nations Security Council, 2024). The study used the relevant information related to the investigation of GBV in armed conflict, which is available on the official Internet resources of the Office of the Prosecutor General (n.d.), the United Nations (n.d.), the International Criminal Court (n.d.), and which was useful in forming the relevant stages of the study, collecting statistical data and forming a proper interpretation of a particular scientific term.

[1] Judgment of the International Criminal Court in Case No. ICC-01/04-02/06 "The Prosecutor v. Bosco Ntaganda". (2019, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.
[2] Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2016, March). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.
[3] Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2018, June). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF.
[4] Judgment of the Chernihiv District Court of Chernihiv Region in Case No.748/1278/23. (2024, March). Retrieved from https://reyestr.court.gov.ua/Review/117537510.
[5] Judgment of the Chernihiv Court of Appeal in Case No.748/1278/23. (2024, May). Retrieved from https://reyestr.court.gov.ua/Review/119350031.
[6] Judgment of the Velyko Oleksandrivskyi District Court of Kherson Region in Case No.650/1870/23. (2024, April). Retrieved from https://reyestr.court.gov.ua/Review/118734665.

The specificity of the studied source base is that not every court case considered by both national courts and international tribunals concerns GBV committed in the context of armed conflicts. Furthermore, not every court case that results in the prosecution of perpetrators for crimes committed in the context of armed conflict will involve GBV or sexual violence. The small number of such cases and the incomplete description of the circumstances under which a conclusion can be made that GBV has been committed created certain challenges for this study. At the same time, the reports of international organisations tend to be based on the study of the specifics of GBV or sexual violence against women and girls, although any person, regardless of biological sex, can be a victim of this type of violence.

## Results

As of 2024, there is no clear and universal definition of GBV in international legal instruments that would cover all its forms and aspects. Existing international instruments, such as the United Nations Convention on the Elimination of All Forms of Discrimination against Women[1], the Istanbul Convention[2], and the Rome Statute of the International Criminal Court[3], contain definitions that focus on violence against women and girls based on their gender. This is conditioned by the fact that for quite a long time it was reasonably believed that "gender-based violence" and "violence against women" were identical in their content. This was primarily explained by the fact that women and girls are disproportionately affected by GBV. However, this definition does not *a priori* cover all forms of violence that may be based on gender identity or expression, such as violence against men and boys, violence against people with non-binary gender identities, and violence against LGBTQ + people. At the same time, international governmental and non-governmental organisations are increasingly using the term "gender-based violence" in their documents (in various forms of its manifestation). Thus, the official website of the European Union defines gender-based violence as violence directed against a person because of their gender or violence that disproportionately affects persons of a particular gender (What is gender-based violence?, n.d.).

For a proper understanding of the specific features of prosecuting perpetrators of crimes committed, inter alia, on the grounds of gender intolerance, it is important to assess the practice of national courts and international courts, specifically the International Criminal Court in The Hague and the separately established International Tribunals. The ICC, pursuant to Article 1 of the Rome Statute, is a permanent body empowered to prosecute individuals for the gravest crimes that pose a serious threat to peace and security and therefore require attention and joint efforts at the global level. The ICC acts as a complement to national criminal justice systems, ensuring that perpetrators of such crimes are held accountable even if they have managed to escape justice in their home countries[4]. According to Article 5 of the Rome Statute, the ICC's jurisdiction is limited to four categories of crimes that constitute a serious threat to international peace and security. According to this Statute, the Court has jurisdiction over the following crimes: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression[5].

Notably, although Ukraine signed the Rome Statute on 20 January 2000, it has not yet been ratified by the Verkhovna Rada of Ukraine. However, the country has twice exercised its right to accept the Court's jurisdiction under Item 3 of Article 12 of the Rome Statute[6]. In 2014, Ukraine recognised the jurisdiction of the ICC over crimes committed on its territory during Euromaidan and the war in Donbas[7,8]. On 31 March 2022, the Prosecutor of the International Criminal Court, Kareem Khan, announced an investigation into alleged war crimes and crimes against humanity committed in the context of the situation in Ukraine since 2014. This announcement was made after 39 states parties to the Rome Statute sent requests for investigation to the ICC (Situation in Ukraine, 2022).

[1] Convention on the Elimination of all Forms of Discrimination Against Women. (1979, December). Retrieved from https://zakon.rada.gov.ua/laws/show/995_207#top.
[2] Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. (2011, May). Retrieved from https://zakon.rada.gov.ua/laws/show/994_001-11#Text.
[3] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[4] Ibidem, 1998.
[5] Ibidem, 1998.
[6] Ibidem, 1998.
[7] Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court No. 790-VII "On the Recognition by Ukraine of the Jurisdiction of the International Criminal Court Over Crimes Against Humanity Committed by Senior State Officials, which Led to Particularly Grave Consequences and Massacres of Ukrainian Citizens During Peaceful Protests Between 21 November 2013 and 22 February 2014". (2014, February). Retrieved from https://zakon.rada.gov.ua/laws/show/790-18#Text.
[8] Resolution of the Verkhovna Rada of Ukraine No. 145-VIII "On the Statement of the Verkhovna Rada of Ukraine "On Ukraine's Recognition of the Jurisdiction of the International Criminal Court Over Crimes Against Humanity and War Crimes Committed by Senior Officials of the Russian Federation and Leaders of the Terrorist Organisations "DPR" and "LPR", which Led to Particularly Grave Consequences and Mass Murder of Ukrainian Citizens". (2015, February). Retrieved from https://zakon.rada.gov.ua/laws/show/145-19#Text.

The ratification of the Rome Statute stays a crucial step for Ukraine in strengthening the rule of law and combating impunity for the gravest crimes. It would also enable Ukraine to take a more active part in the work of the ICC and influence its activities. At the same time, it is important to emphasise that the International Criminal Court is different from national courts. According to the Rome Statute[1], it is the duty of every state to exercise its criminal jurisdiction over persons responsible for international crimes (Understand International Criminal Court, 2023). The International Criminal Court is not a substitute for national courts. In this interaction, they complement each other. The ICC can only investigate and, if warranted, prosecute and hold individuals accountable if the states concerned are unwilling or unable to do so properly. This is in line with the requirements of the Rome Statute, under which the International Court of Justice operates. States retain primary responsibility for prosecuting the gravest crimes (Understand International Criminal Court, 2023). According to the data presented in Table 1 of the comparison of the ICC and national courts, it is possible to identify the key criteria that allow comparing and contrasting the effectiveness of the ICC and national courts in combating the gravest international crimes.

**Table 1.** Comparison of the ICC and national courts of Ukraine

| Criteria for comparison | International Criminal Court | National courts of Ukraine |
|---|---|---|
| Jurisdiction | Investigates and prosecutes the gravest crimes that pose a threat to international peace and security: genocide, crimes against humanity, war crimes, and crimes of aggression | Investigate and prosecute crimes committed on the territory of Ukraine according to the provisions of the Criminal Code of Ukraine, the Criminal Procedural Code of Ukraine, and other national laws. |
| Subjects of jurisdiction | Individuals (not states). | Individuals and legal entities. |
| Investigation procedure | Complex and time-consuming procedures that require considerable resources. | More flexible and faster procedures. |
| Application of the law | Operates based on the Rome Statute and uses other international legal instruments in its activities. | National legislation is applied. |
| Punishment | Prescribed in Article 77 of the Rome Statute.<br>Imprisonment for a fixed term (not exceeding 30 years);<br>Life imprisonment;<br>A fine (additional punishment);<br>Confiscation of income, property, and assets (additional punishment). | Prescribed in Article 12 of the Criminal Code of Ukraine. |
| Openness | Court proceedings are usually open to the public. | Court hearings are usually open to the public at all stages of the proceedings.<br>This means that anyone can be present in the courtroom and observe the trial.<br>Openness of court hearings guarantees transparency of justice and promotes trust in the judiciary |
| Accountability | It is accountable to the UN Security Council and the Assembly of States Parties to the Rome Statute. | Judicial independence is one of the fundamental principles of the rule of law |
| Advantages | Ensures justice when national justice systems do not function properly. | More accessible and familiar to people. |
| Disadvantages | Complex and lengthy procedures | May be biased or ineffective in some countries. |

**Source:** compiled by the author of this study based on research of the Rome Statute[2] and Ukrainian legislation[3,4]

Gender-based violence and sexual violence are increasingly being recognised as gravest crimes at both the national and international levels. The Rome Statute[5] defines rape, forced prostitution, forced pregnancy, sexual slavery, and other forms of sexual violence as separate types of war crimes and is the first international document to formally establish this (Shunevich *et al.*, 2022). Furthermore, in 2014, considering the shortcomings of the Rome Statute in terms of investigating crimes of gender-based violence and bringing perpetrators to justice, a policy paper on sexual and gender-based crimes was issued (Policy Paper on Sexual and..., 2014). The document aims to integrate a gender perspective into the investigation of crimes related to gender-based violence or sexual violence, improve work with witnesses and victims, and minimise mistakes in the investigation of gender-based crimes.

[1] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.
[2] Ibidem, 1998.
[3] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[4] Criminal Procedural Code of Ukraine. (2012, April). Retrieved from https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[5] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

A major step towards the recognition of sexual violence and gender-based violence as war crimes is the study of the ICC case Prosecutor v. Bosco Ntaganda[1]. The case was a landmark in the history of the International Criminal Court, as it was the first time the Court explicitly recognised sexual violence as a weapon of war and a crime against humanity. This case had a considerable impact on the development of international law and practice on the protection of victims of sexual violence in armed conflict. The case was about Bosco Ntaganda, a former commander of the Union des Patriotes du Congo (UPC) and the Free Patriots for the Liberation of the Congo (FPLC) militias, who was indicted by the International Criminal Court for war crimes and crimes against humanity committed in the Democratic Republic of the Congo in 2002-2005. Among other things, children involved in military operations (child soldiers) have suffered from sexual slavery and other forms of sexual violence (Shunevich, *et al.*, 2022).

When examining the gender aspect of the case in relation to Ntaganda's accusation, the following should be noted. Firstly, as noted above, Ntaganda was accused of using child soldiers as sexual slaves. This fact was investigated in the court proceedings and confirmed by numerous witnesses. This highlights the inextricable link between gender inequality and sexual violence in conflict zones. Secondly, in this case, the court recognised that rape and other forms of sexual violence are based on gender inequality and subordination. This was a crucial step towards recognising gender-based violence as a grave crime that has underlying causes. Ntaganda's case also demonstrated the significance of a gender-sensitive approach to the investigation and prosecution of sexual violence cases. This includes protecting survivors from stigmatisation and re-traumatisation and ensuring their participation in the process.

Notably, despite the considerable progress made in the Ntaganda case, there are still many challenges in protecting survivors of sexual violence in armed conflict. This includes stigmatisation of victims, difficulties in accessing justice, and insufficient funding for support programmes. Nevertheless, the Prosecutor v. Bosco Ntaganda case[2] stays a landmark case that paved the way for a better understanding and protection of the rights of survivors of sexual violence and gender-based violence.

Another case that is important for the Ukrainian judiciary and its further application in bringing the guilty to justice for crimes committed based on gender intolerance is the case of Prosecutor v. Jean-Pierre Bemba Gombo[3,4]. Jean-Pierre Bemba Gombo was the Vice President of the Democratic Republic of the Congo (DRC) and a militia leader during the Second Congolese War (1998-2003). In 2006, the International Criminal Court arrested him on charges of war crimes and crimes against humanity committed by his militia in the Central African Republic (CAR) in 2002-2003. In 2018, Bemba was found guilty of war crimes, including murder, rape, and looting, and crimes against humanity, including murder, rape, and torture. This was the first ICC conviction for sexual violence crimes committed by a commander who was not directly responsible for the actions of his subordinates. Bemba was sentenced to 18 years in prison. However, in 2021, the ICC Appeals Chamber overturned some of his convictions and reduced his sentence to 10 years. The Chamber ruled that the prosecutors failed to prove that Bemba had knowledge of the crimes committed by his subordinates or that he failed to take all possible measures to prevent them.

The case is important for shaping Ukraine's legal position against the backdrop of the Russian Federation's military aggression in the International Criminal Court to bring commanders, military commanders, and other persons in a position of authority to justice for committing unlawful acts of gender intolerance by their subordinates. In the case of Prosecutor v. Jean-Pierre Bemba Gombo[5], the guilt of the accused was not proved beyond reasonable doubt. The above should be taken into account by the law enforcement agencies of Ukraine and considered during the trial on a particular charge, as the commission of multiple acts of sexual violence and gender-based violence by Russian military personnel is not an accident and has been used to influence the civilian population, suppress the will of prisoners of war, etc.

Examination of the case of Prosecutor v. Jean-Pierre Bemba Gombo[6,7] contributes to the understanding of the circumstances that must be proven for the persons who hold leadership positions and are

[1] Judgment of the International Criminal Court in Case No. ICC-01/04-02/06 "The Prosecutor v. Bosco Ntaganda". (2019, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.
[2] Ibidem, 2019.
[3] Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2016, March). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.
[4] Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2018, June). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF.
[5] Ibidem, 2018.
[6] Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2016, March). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.
[7] Judgment of the International Criminal Court in Case No. ICC-01/05-01/08 "The Prosecutor v. Jean-Pierre Bemba Gombo". (2018, June). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF.

entitled to issue certain orders to suffer the appropriate punishment for the actions of their subordinates during armed aggression. In connection with the military aggression of the Russian Federation against Ukraine, numerous cases of sexual violence and gender-based violence committed by the military on the territory of Ukraine have now come to light. Victims of such crimes are mostly women, but other categories of people are also targeted, including children of all genders, men, and members of the LGBTQI+ community (lesbian, gay, bisexual, transgender, queer, and intersex people).

The experience of international litigation is essential for the development of judicial practice by the national courts of Ukraine. At the same time, it is not possible to obtain comprehensive and reliable information on the total number of criminal proceedings opened to investigate sexual violence during the Russian army's invasion of Ukraine. Thus, the publicly available report of the Prosecutor General's Office "On Registered Criminal Offences and the Results of their Pre-trial Investigation" (Official website of the Prosecutor General's Office, n.d.) for January–April 2024 shows 8,569 criminal proceedings under Article 438 (Violation of the Laws and Customs of War), 171 proceedings under Article 152 (Rape) and Article 153 of the Criminal Code of Ukraine[1] (Sexual Violence), but it is unknown how many of them relate to sexual violence committed by the Russian military during the conflict (United Nations Security Council, 2024).

An analysis of data from the Unified State Register of Court Decisions revealed two verdicts in which the court, among other things, assessed the facts of sexual and gender-based violence. In the future, the issue of investigating and prosecuting conflict-related sexual violence or GBV committed by the Russian Federation's military personnel may be considered by the International Criminal Court (Shunevich, 2022).

In the verdict of the Chernihiv District Court of the Chernihiv Oblast in case No. 748/1278/23[2,3] it was established and proven that one of the servicemen of the Russian Federation, using his power and desire to satisfy his sexual needs, committed sexual violence against the victim. He forced her to perform unwanted sexual acts, including touching her intimate areas with his hands. These actions humiliated the victim's honour and dignity and grossly violated her sexual inviolability. The court found that the accused had violated the requirements of Article 27 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War[4], and Article 75 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977[5].

The difficulty of proving the guilt of individuals in court at the national level is accompanied by many factors. Firstly, these are material traces of the crime, which may no longer exist at the stage when the crime is discovered and during the subsequent pre-trial investigation and trial. For example, there are no bodily injuries, no witnesses, and no means of committing the crime. Secondly, among the notable features is that survivors of sexual violence or GBV may conceal the fact of unlawful acts due to various circumstances.

To successfully investigate and prosecute sexual violence, it is important to understand the context of the crime. This means investigating where the crime occurred, whether it was linked to other crimes, and what role it played in the overall crime picture. This is important because sexual violence during conflicts is often silenced or tolerated, even if it is not officially encouraged (Shunevich, 2022). In case No. 748/1278/23[6], the court examined and assessed enough evidence to indicate that sexual violence was committed during the armed conflict and with the intent to intimidate the civilian population.

In another case No. 650/1870/23[7], which was considered by the Velyka Oleksandrivka District Court of Kherson Oblast, the court found that the criminal law qualification of the actions of the accused Russian Federation serviceman was determined by the pre-trial investigation body under part one of Article 438 of the Criminal Code of Ukraine as another violation of the laws and customs of war prescribed by international treaties ratified by the Verkhovna Rada of Ukraine, which consisted of rape, the use of physical and moral coercion, including intimidation by threats of physical violence against civilians, i.e., in violation of Part 2 of Article 27 of the Convention

[1] Criminal Code of Ukraine. (2001, April). Retrieved from https://zakon.rada.gov.ua/laws/show/2341-14#Text.
[2] Judgment of the Chernihiv District Court of Chernihiv Oblast in Case No.748/1278/23. (2024, March). Retrieved from https://reyestr.court.gov.ua/Review/117537510.
[3] Judgment of the Chernihiv Court of Appeal, in Case No.748/1278/23. (2024, May). Retrieved from https://reyestr.court.gov.ua/Review/119350031.
[4] Convention Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154#Text.
[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199#Text.
[6] Judgment of the Chernihiv District Court of Chernihiv Oblast in Case No.748/1278/23. (2024, March). Retrieved from https://reyestr.court.gov.ua/Review/117537510.
[7] Judgment of the Velyka Oleksandrivka District Court of Kherson Oblast in Case No. 650/1870/23. (2024, April). Retrieved from https://reyestr.court.gov.ua/Review/118734665.

Relative to the Protection of Civilian Persons in Time of War[1], Part 2 of Article 75, Part 1 of Article 76 of the Protocol Additional to the Geneva Conventions[2] of 12 August 1949.

The existence of direct intent in the actions of the accused to commit the crime charged, namely rape, the use of physical and moral coercion, including intimidation by threats of physical violence against a civilian in wartime, was established by the court based on the totality of the evidence examined, specifically, those confirming the circumstances that testify to the accused's awareness of the need to follow the laws and customs of war relative to the civilian population as a military personnel, namely the provisions of Part 2 of Article 27 of the Convention Relative to the Protection of Civilian Persons in Time of War[3], Part 2 of Article 75, Part 1 of Article 76 of the Additional Protocol to the Geneva Conventions of 12 August 1949[4], as he directly ensured the military occupation on the territory of Ukraine, took part in the seizure of buildings of local and state authorities, military facilities and law enforcement agencies, acted as a military officer who, by virtue of his official duties, had to know and consider during the preparation and conduct of combat (execution of the assigned task) the norms of international humanitarian law, which expressly prohibit the use of terror against the civilian population, including assault against the honour of women, commission of rape.

Furthermore, the court found beyond reasonable doubt that the victim, by her behaviour and circumstances at the time of the crime, met all the criteria of a civilian, i.e., she did not take any part in hostilities, did not perform or facilitate any combat tasks, she wore civilian clothes in everyday life, was engaged in civilian affairs, was in a helpless state caused by the lack of an objective opportunity to resist an armed and specially trained military personnel who also controlled the movement of civilians[5].

International humanitarian law clearly and unequivocally prohibits rape and other forms of sexual violence or gender-based violence under any circumstances. The prohibition of sexual violence is not limited to an outright ban. It is also prohibited as torture or cruel, inhumane, or degrading treatment or punishment. The recognition of rape and other forms of sexual violence as genocide, crimes against humanity, and war crimes is fundamental. This ensures that the perpetrators will be held individually criminally accountable at the international level for these gravest crimes.

According to a report by the Rafal Lemkin Centre for Documentation of Russian Crimes in Ukraine (Zhuk *et al.*, 2024), the Russian army uses sexual violence as a systematic instrument of terror in the occupied territories. Women live in constant fear as Russians use rape and threats of rape to intimidate and control the population. The victims of these crimes are in a state of helplessness and constant terror, as they have no protection from the occupiers.

Furthermore, according to the report of the UN Secretary-General dated 4 April 2024 (United Nations Security Council, 2024), since the full-scale invasion of Ukraine by the Russian Federation, the UN Human Rights Monitoring Mission in Ukraine has documented 85 cases of conflict-related sexual violence against civilians and prisoners of war, affecting 52 men, 31 women, 1 girl, and 1 boy. In cases where sexual violence was used against adult men, such violence took place as a method of torture during their captivity, by representatives of occupation law enforcement agencies or Russian military groups. The violence included rape, threats of rape against the victims and their relatives, electric shocks and beatings of the genitals, electric shocks to the breasts, threats of castration, genital mutilation, unwanted touching, forced undress and nudity.

It is important that GBV investigations are conducted in a gender-sensitive manner. This means that the specific experiences and needs of GBV survivors, the majority of whom are women and girls, should be taken into account. Investigations should be safe and confidential for victims and respect their dignity. In these categories of cases, prosecutors need to prove that the crime was committed with intent and that it is linked to the armed conflict. It is important that the courts can impose severe penalties on perpetrators of GBV-related crimes. National courts and international tribunals should cooperate to ensure that those responsible for such crimes are held accountable, to prevent their recurrence and to ensure justice for all involved. Combating GBV in the context of armed conflict is challenging, but it is an urgent necessity.

[1] Convention Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154#Text.
[2] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199#Text.
[3] Convention Relative to the Protection of Civilian Persons in Time of War. (1949, August). Retrieved from https://zakon.rada.gov.ua/laws/show/995_154#Text.
[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I). (1977, June). Retrieved from https://zakon.rada.gov.ua/laws/show/995_199#Text.
[5] Judgment of the Velyka Oleksandrivka District Court of Kherson Oblast in the Case No. 650/1870/23. (2024, April). Retrieved from https://reyestr.court.gov.ua/Review/118734665.

## Discussion

Notably, in the context of comparing and examining the court cases related to GBV in armed conflicts investigated by international tribunals and national courts, there are no analogous studies conducted by Ukrainian researchers. At the same time, a series of foreign researchers have assessed ICC cases related to sexual violence in the context of their significance for the development of further judicial practice, the identification of gender-based violence and the specific features of gender tolerance by the court.

As O. Oyewole (2023) notes, the prosecution of crimes of sexual and gender-based violence is one of the most pressing, but at the same time extremely complex issues for international criminal justice. The researcher explains this, first of all, by the fact that in the past, crimes of sexual violence in the context of international armed conflict were not considered crimes in themselves. This is confirmed by the fact that the Nuremberg and Tokyo tribunals did not prosecute sexual and gender-based crimes, despite the undeniable use of the "comfort women system" in Tokyo during the Second World War. However, with the emergence of the International Criminal Court, the investigation and prosecution of gender-based crimes should be a key focus. The cases before the Court particularly demonstrate the development and dynamics of the prosecution of crimes committed on the grounds of generalised intolerance at the ICC. The researcher recommends considering a gender perspective in the investigation and prosecution of sexual violence. The study conducted by O. Oyewole (2023) is in line with the research findings of the present study – highlighting the gender approach in prosecution, providing a proper assessment of GBV and sexual violence in armed conflict – and complement each other. it is worth agreeing with the findings of the above-mentioned researcher in full. At the same time, when investigating GBV and gender-based sexual violence, it is important to consider that violence against women and girls is a separate category of violence in the current context that can be part of GBV.

Furthermore, for a proper understanding of the specific features of holding perpetrators accountable for sexual violence or gender-based violence, A. Adamska-Gallant (2023) analysed the characteristics of the judge, personal experience, or gender. The researcher pointed out that in adopting the Rome Statute, which established the International Criminal Court, the need to involve women judges was recognised to better respond to the problems of women who have been victims or witnesses of violence. In this case, the international community tried to implement a gender-sensitive approach at the due level. The Rome Statute provides for equitable representation of women and men judges[1]. For centuries, women and children have been innocent victims of war crimes during armed conflicts. But they did not play a substantial role in the peace negotiations or in the punishment of war criminals. Even the nature of the crimes committed against them, mainly rape, has been disguised in international legal linguistics under general terms such as crimes against honour and dignity. Women have been largely invisible in the prosecution of war criminals (Wald, 2011). Female judges who have experience in dealing with crimes of sexual violence have a better understanding of their victims and the context in which the crime was committed. They also show greater empathy for victims during testimony, especially during cross-examination, making them more active in situations where witnesses testifying about sexual violence may be at risk of undue pressure and even aggression from the defence. By evaluating evidence, female judges avoid harmful stereotypes about the behaviour of victims (Adamska-Gallant, 2023). The findings of the above-mentioned researchers, when compared with the cases examined in the present study, clearly suggest that international justice has made a great step forward. Compared to the present study, A. Adamska-Gallant (2023) assessed the specific circumstances of the ICC proceedings, while this study examined the gender-sensitive approach from the standpoint of the evidence collected and the proper proof of a person's guilt in court. At the same time, one cannot but agree that the empathetic component of a court case may depend on the gender of the judge. At the same time, it cannot be agreed that the involvement of female judges in hearing this category of cases becomes decisive in the final court decision. Moreover, such a formulation may lead to gender inequality in the composition of the courts, both ICC and national courts, as minimising the role of male judges and devaluing their attitude towards victims may imply an expression of toxic masculinity on the part of A. Adamska-Gallant (2023), which the author of this study cannot agree with. However, the ICC, when making the above decisions, assessed the testimony of the victims, even in cases where such testimony differed from the initial testimony (taken at the pre-trial investigation stage).

Within the framework of the present study, the research by M. Sjöholm (2020) was examined for her analysis of sexual violence and gender-based international crimes in Swedish case law. Notably, the Swedish judicial system differs from the Ukrainian one, while the study of M. Sjöholm (2020) is of great practical importance in determining the role of the ICC in shaping the national legal system.

[1] Rome Statute of the International Criminal Court. (1998, July). Retrieved from https://zakon.rada.gov.ua/laws/show/995_588#Text.

Unlike Ukraine, Sweden ratified the Rome Statute in 2001, which greatly facilitated the prosecution and accountability of perpetrators of GBV and sexual violence in armed conflict. M. Sjöholm (2020) concluded that the awareness of international courts that sexual and gender-based crimes are becoming an element of warfare has a positive impact on the further investigation of analogous crimes and the development of case law in national courts. The author of this study agrees with this conclusion, considering that in Ukrainian legislation, GBV in armed conflicts is currently prosecuted in the context of violations of the laws and customs of war, and very often courts do not distinguish sexual violence as a means of warfare.

For the purposes of this study, court cases in which victims of GBV and sexual violence were predominantly women and girls were assessed. The study by S.K. Chynoweth *et al.* (2020) was examined, wherein the authors provided a relevant assessment of the perpetration of gender-based violence and sexual violence in armed conflict against men and boys. According to S.K. Chynoweth *et al.* (2020), the perpetration of sexual violence against men and boys in many conflict-affected regions is becoming increasingly evident. The author of this study fully agrees with the above in the context of the present study. When examining the cases of international tribunals, namely the ICC case of Prosecutor v. Bosco Ntaganda[1], it was found that victims of GBV can be persons of any physiological gender. In the context of this study, the findings of S.K. Chynoweth *et al.* (2020) are of great significance in determining the form, place, and consequences of such violence. Furthermore, little research has been conducted to date on sexual violence against men and boys in the context of displacement.

The majority of this study is based on an analysis of ICC judgements in cases of sexual and gender-based violence. It was found that the ICC currently attaches great importance to the protection of victims and reparations. At the same time, having analysed the study of R. Fowler (2021), wherein the latter argues that although the ICC plays a unique and crucial role in the prosecution of international criminals, it is not the beginning of justice. The researcher criticises the ICC's ability to provide adequate support to victims of GBV and sexual violence and questions its institutional capacity. The author of this study cannot agree with this conclusion, because as of 2024, the ICC is perhaps the only international organisation within its competence to restore justice for victims of GBV. However, as noted by V. Pylypenko (2024), neither the provisions of the Rome Statute nor the provisions of the Rules of Procedure and Evidence and other acts that guide the Court in its activities reflect or specify the content of the forms of compensation for damage: their choice depends solely on the opinions, conclusions, and decisions of the court in each particular case. This may have a certain impact on the fairness of court decisions in the context of victim protection.

## Conclusions

The present study examined the cases of national courts and international tribunals related to gender-based violence in armed conflict. The purpose was to analyse how courts at different levels apply international law and national legislation to protect the rights of GBV victims in the context of armed conflict.

It was found that courts attempt to apply international law and national legislation to protect the rights of GBV victims, but there are considerable difficulties in doing so. One of the main problems is that GBV often goes uninvestigated and unpunished, especially in conflict zones. Victims may be reluctant to come forward out of fear of retaliation, while law enforcement agencies may lack the resources to investigate and prosecute these crimes. An important result of the study is that it demonstrated the need for clearer and more effective mechanisms to protect the rights of GBV victims in armed conflict, to consider a gender-sensitive approach, and to properly qualify the actions of perpetrators. This includes improving the conduct of pre-trial investigations, as well as providing adequate aid and support to victims of sexual violence or GBV committed in armed conflict.

Considering the complexity of investigating and prosecuting GBV cases, especially in the context of armed conflicts, the study explored a series of prominent issues, which constituted its scientific originality. Thus, the study examined the possibility of improving cooperation between national courts and international tribunals for more effective investigation and prosecution of GBV; identified the challenges faced by national courts and international tribunals in investigating GBV; and assessed the possibility of ensuring the protection of victims of GBV during the investigation and trial of their cases.

National courts and international tribunals play a vital role in investigating crimes of gender-based violence committed during armed conflict. Such crimes are grave human rights violations that have a devastating impact on the lives of individuals and society as a whole. It is paramount that the perpetrators of such crimes are held accountable to prevent their recurrence and ensure justice. National courts have the primary responsibility for investigating and prosecuting GBV crimes. They must have the necessary resources and suitably trained staff to conduct

[1] Judgment of the International Criminal Court in the Case No. ICC-01/04-02/06 "The Prosecutor v. Bosco Ntaganda". (2019, July). Retrieved from https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_03568.PDF.

effective litigation and ensure fair trials. International tribunals play a key role in cases where national courts are unable or unwilling to investigate GBV crimes. They also contribute to the development of international law and norms related to GBV. It must be emphasised that the international community should continue to support national courts and international tribunals in their efforts to investigate and prosecute crimes related to GBV.

At the same time, the study was based on a limited number of court decisions and reports of international organisations, no field research was conducted in investigating the topic in the areas of armed conflicts, and the study did not cover all aspects of GBV in armed conflicts. Nevertheless, the findings help to better understand the problem of GBV in armed conflict.

Promising areas for further research may include investigating the role of gender norms and stereotypes in the context of GBV in armed conflicts; analysing the impact of armed conflicts on the availability and quality of rehabilitation measures for GBV victims; studying international practices in preventing GBV and protecting victims' rights in armed conflicts.

## Acknowledgements

The author of this study would like to express her sincere gratitude to her supervisor, Head of the Department of Criminal Procedure and Criminalistics of Odesa State University of Internal Affairs, Doctor of Law, Professor Hanna Kostiantynivna Teteriatnyk, for valuable advice and scientific support, and to the Department of Criminal Procedure and Criminalistics of Odesa State University of Internal Affairs for the opportunity to conduct her research.

## Conflict of Interest

The author of this study declares no conflict of interest.

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# Дослідження справ національних судів і міжнародних трибуналів, пов'язаних із гендерно зумовленим насильством, в умовах збройних конфліктів

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■ **Анотація.** Ґендерно зумовлене насильство в умовах збройних конфліктів набуває стрімкого поширення, руйнуючи життя жертв, їхніх сімей і навіть спільнот. Розслідування таких злочинів і переслідування винних осіб є не лише кроком до справедливості, а й потужним інструментом запобігання подібним випадкам у майбутньому. Метою статті є ґрунтовне дослідження практики розслідування злочинів, пов'язаних із сексуальним або ґендерно зумовленим насильством, національними судами та міжнародними трибуналами. Під час написання роботи було проаналізовано судову практику національних судів і міжнародних трибуналів, вивчено профільну наукову літературу, здійснено відповідний порівняльний аналіз особливостей національного та міжнародного судочинства. Дослідження дало змогу виявити низку спільних викликів, з якими стикаються національні суди та міжнародні трибунали під час розслідування ґендерно зумовленого насильства в умовах збройних конфліктів: збирання доказів у небезпечних і складних умовах, їх недовговічне існування; забезпечення безпеки жертв та свідків, які часто є особливо вразливими, зберігання їх конфіденційності за необхідності; подолання стигматизації та дискримінації, що заважають жертвам звертатися за допомогою; доведення фактів учинення насильства саме в умовах збройних конфліктів до цивільного населення або військовополонених. Зауважено, що під час розслідування злочинів, пов'язаних із ґендерно зумовленим насильством, суди мають застосовувати ґендерно чутливий підхід, який ураховуватиме специфіку злочинів, пов'язаних з таким видом насильства, та його вплив на жертв. Доведено, що передумовою ефективного розслідування злочинів зазначеної категорії є співпраця на національному та міжнародному рівнях. Результати дослідження можуть сприяти підвищенню якості розслідування злочинів сексуального або ґендерно зумовленого насильства в умовах збройних конфліктів, а також слугувати підґрунтям для розроблення програм, спрямованих на запобігання вчиненню цих злочинів

■ **Ключові слова:** сексуальне насильство; геноцид; військові злочини; міжнародні організації; гендерна рівність; права людини

UDC 342:351:94(477)
DOI: 10.56215/naia-herald/3.2024.79

# Law as a tool of collective memory formation: A study of Ukrainian "decommunisation laws"

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■ **Abstract.** Among several issues with Ukrainian collective memory of its Communist period, this study specifically addressed the one of lack of a coherent approach to the formation of such memory. The purpose of this study was to identify whether the "decommunisation laws", adopted in 2015, provided Ukrainian memory entrepreneurs with sufficiently robust tools to build a politics of memory that would be equally applicable across the country. To this end, this study adopted the process tracing method, highlighting the case study of the drafting and adoption of the "decommunisation laws" by relevant stakeholders and the Ukrainian Parliament. Having investigated the preparatory works of these laws and their adoption, it was found that the question of centralisation played a significant role in the establishment of a coherent collective memory of Communism in Ukraine. More specifically, the fact that Members of Parliament pursued a decentralisation-driven agenda resulted in an impediment to the creation of a robust approach to Ukrainian memory of communism. It was also found that the decommunisation package granted Ukrainian memory policymakers several tools to shape the population's memory of Communism, such as the renaming of toponyms related to Communism, opening access to the archives of the Communist regime, demolition of monuments praising Communist "heroes", and institutionalisation of a Remembrance Day for victims of totalitarian regimes. Despite these findings, this study concluded that Ukrainian the "decommunisation laws" require a reform to achieve harmonisation considering the country's aspirations for European integration. The findings of this study can serve as a basis for further recommendatory research on the matter of coherence in Ukrainian memory politics. Researchers might apply these findings to other events with domestically problematic memories or use them to suggest potential reforms to align Ukrainian collective memory of Communism with those of its European partners

■ **Keywords**: memory studies; historical memory legislation; memory policy instruments; decentralisation; reforms

## ■ Introduction

The speech of former President of Ukraine Petro Poroshenko, where he cited Russian poet Lermontov's famous line "Farewell, Unwashed Russia" (2017), was interpreted as a full stop in Ukraine's cultural relations with the Russian Federation. However, this bold political act of P. Poroshenko's marked the beginning of a new chapter in Russian-Ukrainian relations. This time it was a negative one. It started with the Revolution of Dignity (2014), when, in a *vox populi*-like manner, the Ukrainian population showed the world that it had decided to strive for European integration. Nonetheless, by annexing Crimea and backing up Donetsk and Luhansk's secessionists, Russian President Vladimir Putin showed that he would not accept Ukraine's cultural, social, and political departure from Russia. Later intensified by the 2022 full-scale invasion of Ukraine by Russian troops, this chain of events resulted in a shift in Ukrainian

■ **Suggested Citation:**
Patricheev, Iu. (2024). Law as a tool of collective memory formation: A study of Ukrainian "decommunisation laws". *Scientific Journal of the National Academy of Internal Affairs,* 29(3), 79-94. doi: 10.56215/naia-herald/3.2024.79.

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■ Received: 03.06.2024; Revised: 05.08.2024; Accepted: 27.08.2024

collective memory, understood from both governmental (top-down) and people's (bottom-up) perspectives (Dovhopolova, 2019).

Back in 2014, the annexation of Crimea and the Russian hybrid war in Ukraine's Eastern regions led P. Poroshenko to realise that it was time to depart from the Russian cultural influence. While political distancing from Russia was not up to discussion considering a *de facto* state of war between the countries, P. Poroshenko and the government emphasised socio-cultural breaking away from the Communist legacy. The choice of *memory non grata* was not arbitrary: the Communist past was among the building blocks of the positive attitude towards the Russian state among Ukrainians. Furthermore, the Communist regime planned and governed the most traumatic event in recent Ukrainian history – Holodomor – now widely recognised as a genocide of the Ukrainian people (Maslo, 2023). In this context, in 2015, the Ukrainian legislative adopted a series of laws that condemned Communist atrocities and tried to distance modern Ukrainian memory from anything related to totalitarianism (the "decommunisation laws").

Addressing the coherence of these laws in shaping the country's collective memory of Communism, this study arrives at the right time because the ongoing events in Ukraine allow for institutional speculations concerning collective memory issues. M. Saryusz-Wolska *et al*. (2022) noted that by attributing enormous political powers to Ukrainian policymakers, the state of war facilitates procedures of adopting and amending laws, some of which might be particularly important for the politics of memory.

In terms of its academic relevance, this study aimed to address the gap at the intersection of legal, political, and memory studies. Since the dissolution of the USSR, many researchers have investigated decommunisation. A. Kuczabski & A. Boychuk (2020) studied the decommunisation of urban place names in Ukraine during the presidency of P. Poroshenko. The authors concluded that Ukraine's decommunisation policy in the field of toponymy had much in common with the countries of Central Europe. At the same time, there were significant differences, one of which concerned the timing and the other the content of decommunisation. For instance, most of the renaming in Ukraine took place during the wave of decommunisation in 2014-2016, rather than immediately after the fall of the communist regime, as was the case with its western neighbours. In addition, decommunisation in Ukraine also served to simultaneously de-Russify the country's symbolic space. This, according to J. Coulson (2021), was facilitated by the thesis of the Holodomor as genocide, which was intended to distance Ukraine from Russia, emphasising the consequences of Soviet colonialism and the value of Ukrainian collective memory as a matter of political sovereignty. However, in contrast to the Baltic states, despite these policies and the Russian invasion, most of the Ukrainian population continued to use Russian as their primary language, according to a study by H. Hentschel & O. Palinska (2022). G. Kasianov (2023) noted that this decommunisation policy lacked vital components, such as restitution and compensation for the victims of the communist regime.

Considering the above, the purpose of this study was to investigate the question of how law provides political elites with memory policy instruments to shape the population's collective memory. To answer this question, the study thoroughly examined the processes that preceded the signing of the "decommunisation laws" instead of taking them for granted.

## Literature Review

Apart from situating this study in a broader academic debate on decommunisation and politics of memory in Ukraine, this section introduces the concepts to which the study refers. Its main goal is to substantiate the findings' academic relevance by highlighting the existent research gap. Moreover, it provides a theoretical framework for the subsequent empirical analysis. Firstly, it is essential to conceptualise decommunisation since this process was the primary purpose of the "decommunisation laws". Two main approaches to decommunisation can be identified: institutional and inclusive. The former emphasises purges of staff and does not allow the discussion to include cultural and social aspects of decommunisation. From the institutional standpoint, decommunisation underlines technical and bureaucratic aspects of dealing with the Communist past (Czarnota, 2009). On the other hand, the inclusive approach provides space for incorporating low-politics aspects, among which memory politics find their place. Socio-cultural elements play an essential role in understanding decommunisation in this vision of the concept (Demska & Levchuk, 2020). Considering its flexibility, the inclusive approach is more suitable for addressing decommunisation practices in post-Maidan Ukraine. This is because, as M. Kovalov (2022) put forward, decommunisation carries within itself an important "symbolic" dimension, the one that "involves rethinking of the meaning of [Communist] events". This symbolism is the defining feature of post-revolutionary Ukrainian decommunisation, making it a *sui generis* concept. Moreover, in the Ukrainian context, it is theoretically distinguishable from de-Russification and de-Sovietisation – other observable trends in Ukrainian post-Maidan politics. This conceptual distinction is important because, further in this study, the readers will see that the "decommunisation laws" tried to expand the Ukrainian decommunisation's scope of application by incorporating practices of two other concepts.

As its name suggests, de-Russification focuses on distancing particularly from Russian cultural influence. According to V. Kulyk (2018), de-Russification embodies institutional actions aimed at diminishing the Russian language's role in the de-Russifying society. S. Bychkov Green (1997) mentioned that the Baltic States were pioneers of this approach to breaking away from the cultural influence of their bigger Eastern neighbour. The main feature of this social phenomenon is prioritising national language over Russian. Yet, V. Kulyk (2018) pointed out that de-Russification in Ukraine took a mild form that implied a transitionary period during which "Ukrainian identity is accepted as parallel to the Russian one". As one can see from this explanation, de-Russification occurs primarily in institutional settings where it aims at eliminating the Russian language (or, more generally, cultural influence) from everyday life, without bearing any symbolism that defines decommunisation in Ukrainian post-Maidan context.

De-Sovietisation, on the contrary, refers to actions that defined Soviet Union's legacy as *memory non grata* in Ukrainian society. According to A. Liubarets (2016), the de-Sovietisation of Ukraine started in 2014 when the spontaneous demolition of Lenin monuments occurred throughout the country without a prior governmental mandate. While its performance was mainly visual, i.e., emphasising the people's bottom-up actions (demolition of monuments or explicitly bringing to the political discussion events such as Holodomor), de-Sovietisation, just like de-Russification, has an institutional dimension since it involves structural changes in the form of, for instance, administrative reforms. However, what makes them distinct from decommunisation is that, while both focus on a definitive breaking away from an oppressive culture, their epitomes of evil are different. Furthermore, de-Sovietisation is distinct from decommunisation because the former lacks symbolic aspects. Instead of dealing with Ukraine's past by rethinking its meaning in a top-down manner, the de-Sovietisation of Ukraine mainly concerned spontaneous, grassroots initiatives in the immediate aftermath of the Revolution of Dignity.

In summary, de-Russification refers to practices of eradicating the Russian language from public space. On the other hand, de-Sovietisation has a precise bottom-up dimension and concerns distancing from purely Soviet – not necessarily Communist – practices. Both phenomena are primarily technical and highlight only one unwelcome social or historical trend. At the same time, decommunisation in the Ukrainian context is more inclusive and bears a symbolic dimension that implies rethinking its Communist past to develop a new vision of it. Thus, decommunisation is distinct from both de-Russification and de-Sovietisation in institutional (having an explicit top-down nature) and social (emphasising symbolic distancing from everything even remotely relevant to Communism) terms.

In Ukraine after 2014, decommunisation aims to uproot all totalitarian practices while stressing the Communist past as *memory non grata*. Furthermore, building on its symbolism, post-Maidan Ukrainian decommunisation implies political appeals to the nation's psyche. It exploits the collective memory's malleability by addressing people's emotions and aiming to erase any positive memories of the country's Communist past (Coulson, 2021). However, being distinct theoretically, in practice decommunisation does not exclude two other concepts. Furthermore, some observers even argued that decommunisation would not be complete without de-Russification and de-Sovietisation (Fedinec & Csernicskó, 2017).

While this essay understands decommunisation as an encompassing concept, its vision of memory is significantly narrower. It mainly revolves around political initiatives to shape collective memory, prioritising them over memory manifestation. This institutional perspective has long found its place in the academic debate about collective memory. Rather than understanding it in N. Hunt's (2010) terms as "the joint memories held by a community about the past", this study focused on R.N. Lebow's (2006) "politics of memory": "elite constructions of memory (that) shape the memories of groups and individuals". The choice of empirical data justifies prioritising a top-down approach to memory because this study puts political initiatives in the spotlight.

Most earlier studies in the field of the collective memory of post-revolutionary Ukraine examined regional differences in the formation of the national memory (Kutsenko, 2020), Russian influence on the country's memory politics (Kasianov, 2022), or the new Ukrainian memory narrative's clash with those of other countries (Wylegała, 2017). the "decommunisation laws", once published, also found their way to bookshelves, and sparked an academic debate. This discussion primarily concerned the relationship between the enforcement of the laws and Ukrainian nation-building.

D. Marples (2018), for instance, was among scholars who preferred the term "memory laws" over the "decommunisation laws", hence emphasising their significance in collective memory formation. In line with what this study argues later, he concluded that post-Maidan decommunisation practices in Ukraine followed the path of the country's neighbours from Eastern and Central Europe. "Memory laws", according to D. Marples (2018), were not utterly successful in replacing existing national memory since "the choices adopted [were] somewhat partisan in nature". Moreover, when it came to discussing the honouring of Ukrainian nationalist organisations of

the 20th century as "fighters for independence" in the package, D. Marples (2018) argued that that part of the package was "the most disruptive" and "highly selective", leaving influential nation builders of the Communist regime aside.

O. Shevel (2016), although basing her study on Ukrainian decommunisation practices as well, approached their contribution to nation-building differently. Reflecting on Ukrainian decommunisation, she considered the post-revolutionary political landscape as a battlefield for historical memory. Arguing that the Yatsenyuk government undertook "major steps to pivot more decisively from Russian (cultural) influence", she pointed out what she called "the fundamental dilemma in Ukraine's decommunisation". It was a puzzle, according to the researcher, of how to undo the legacy of the Communist era without following the Soviet approach of mandating the one and only 'correct' interpretation of the past. This vision of the situation refers to the issue of malleability from which Ukrainian collective memory, like any other, suffers. Resonating with earlier discussion of decommunisation as *sui generis*, O. Shevel (2016) was concerned with unavoidable political manipulations on memory matters. Legislating history for the purposes of nation building, in Shevel's opinion, could not occur without producing troubling consequences for society. N. Koposov (2020) summarised analogous concerns raised by multiple academics.

As the readers could have noted from the previous paragraphs, the ongoing debate on the relationship between the "decommunisation laws" and Ukrainian nation-building attracted the attention of multiple scholars. The formation of a national identity inextricably relates to the politics of memory since politicians always manipulate memories of historical events to build their narratives.

## Materials and Methods

This study explored the coherence in Ukrainian collective memory formation, using the adoption of the "decommunisation laws"[1,2,3,4] as a case study. Consequently, these laws represent its nucleus. The study traced the process of their adoption to examine memory policy tools that the "decommunisation laws" provided to the Ukrainian government to shape the collective memory of the country's Communist past in a coherent manner. This study found the following memory-shaping instruments in the decommunisation package: renaming of toponyms related to Communism, opening access to the archives of the Communist regime, demolition of monuments glorifying Communist "heroes", and recommendations to institutionalise a Remembrance Day for victims of totalitarian regimes.

This study put forward the central hypothesis that the decommunisation package contained powerful memory policy tools that enabled it to become an important steppingstone in the Ukrainian government's centralised top-down alteration of the country's collective memory about Communism. To test this claim, this paper examined the process of drafting and adopting these pieces of legislation through the lens of major internal political events in Ukraine in the aftermath of the Revolution of Dignity. Furthermore, it attempted to uncover implicit yet meaningful connections accompanying the adoption process of the laws, thereby stressing how significant the "decommunisation laws" are for Ukrainian politics of memory.

To analyse their contribution to Ukrainian politics of memory, this study focused on primary sources of qualitative nature consisting of transcripts of the Ukrainian Parliament's sessions where the decommunisation package was discussed and adopted. To narrow the focus of the study, only fragments where Members of Parliament (MPs) explicitly addressed the importance of centralisation for the politics of memory or discussed the "decommunisation laws" were analysed. Thus, data directly related to the central hypothesis were selected, since, as argued later herein, centralisation was a precondition for coherently shaping the population's collective memory of the Communist past.

This study employed the process tracing method to analyse its case study. This method provided a framework to establish causal relations between the case study and an observable social trend. In this study, the former was the adoption of the "decommunisation laws", while the latter was the shift in Ukraine's politics of memory concerning Ukraine's Communist past. By tracing the process of preparing and passing these laws in the Ukrainian Parliament, the study found how the "decommunisation laws" were intended to contribute to the formation of a coherent anti-

[1] Law of Ukraine No. 2540 "On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/316-19#Text.
[2] Law of Ukraine No. 2558 "On Condemning the Communist and National Socialist (Nazi) Totalitarian Regimes and Prohibiting the Propagation of their Symbols". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/en/317-19#Text.
[3] Law of Ukraine No. 2539 "On Remembering the Victory over Nazism in the Second World War". (2015, April). Retrieved from https://uinp.gov.ua/dokumenty/normatyvno-pravovi-akty-rozrobleni-v-instytuti/zakony/law-of-ukraine-on-perpetuation-of-the-victory-over-nazism-in-world-war-ii-of-1939-1945.
[4] Law of Ukraine No. 2538-1 "On the Legal Status and Honouring of the Memory of the Fighters for the Independence of Ukraine in the 20th Century". (2015, April). Retrieved from https://uinp.gov.ua/dokumenty/normatyvno-pravovi-akty-rozrobleni-v-instytuti/zakony/law-of-ukraine-on-the-legal-status-and-honoring-the-memory-of-fighters-for-ukraines-independence-in-the-twentieth-century.

Communist collective memory in Ukraine. This approach helped to present an alternative explanation of the shift in the Ukrainian institutional memory.

Among the strengths of process tracing are its suitability for small cases and its focus on detail (Fontaine, 2020). This quality of process tracing influenced the methodological choice because it helped examining each of the "decommunisation laws" to identify multiple memory policy tools presented in the package and to discuss the extent to which their enforcement involved centralised measures. Considering its "within case" nature, process tracing suited this study well because it helped to uncover the effects of actors' interactions on the final policy outcome and emphasise the significance of the laws for Ukrainian memory politics.

On the other hand, the said method lacks the tools for examining larger amounts of data, thus limiting the scope of this study to a very selective choice of empirical material (Bennett, 2010). Hence, it was necessary to select empirical materials cautiously, relying mainly on previous knowledge. Another challenge faced because of this method was that it generally makes provision for putting forward only one potential explanation of the social phenomenon of interest (Beach, 2023). Finally, choosing process tracing as the primary method for this study helped to contribute to a niche in the discussion of the "decommunisation laws". None of the researchers have attempted to investigate them by applying "within case" approaches and stressing how and under what circumstances the legislators passed the laws. Instead, academics assumed this process and studied mainly its outcomes.

By bringing together memory, legal, and political studies, this study attempted to enrich the existing literature on Ukrainian collective memory formation by providing a detailed overview of how the "decommunisation laws" were drafted and adopted, who were the main political actors involved, and what role did the political landscape play in this process. Rather than taking the "decommunisation laws" for granted, the study investigated their adoption process from the inside to examine the hypothesis that these laws awarded Ukrainian executives with comprehensive memory policy tools, thus playing an essential role in building a coherent approach to framing the country's collective memory of its Communist past. Having explained the methodological and empirical justifications, the study now zooms in on the drafting and adopting the "decommunisation laws".

## Results and Discussion

**Empirical data: Preparatory works.** To understand the complete picture of who, under what circumstances, and with what goals in mind prepared and adopted the "decommunisation laws", the Ukrainian political landscape in the aftermath of Euromaidan must first be considered. The Ukrainians democratically elected P. Poroshenko as President in 2014. His anti-Russian political agenda presented European integration as its primary purpose. Several months later, during the snap election for the 8th convocation of Verkhovna Rada, the Ukrainian nation confirmed its pro-European orientation by voting mostly for pro-European and anti-Russian politicians (Zheltovskyy, 2020). In these circumstances, two considerations are crucial to understanding the political situation that preceded the drafting and passing of the "decommunisation laws".

First, this marked the formation of the first Western-oriented coalition in the Ukrainian Parliament since the country gained independence. These drastic changes in the Ukrainian political climate enabled numerous openly anti-Russian discussions for the first time. Considering the Russia-backed war launched in Donbas and the annexation of Crimea, those discussions often took radical forms, even in the Parliament (Lytovchenko *et al.*, 2021). Anti-Russian rhetoric, hence, dominated Ukrainian public space and influenced multiple policy choices undertaken to bring Ukraine closer to Europe. Second, the lack of previous memory-shaping experience of the Ukrainian politicians could result in a clumsy top-down approach to the country's memory formation. All prior attempts of Ukrainian politicians to pursue coherent politics of memory initiatives failed to achieve significant public support or survive their successors' contrasting policies. These preceding efforts were selective in nature and mainly dealt with issues such as Holodomor, leaving blank spots in the country's politics of memory. Those spots allowed for propaganda and ambiguous interpretations of the past to fill them, making the population's collective memory vulnerable to spreading Russian values. Thus, Arseniy Yatseniuk's cabinet was the pioneer in addressing the country's collective memory of its Communist past in a consistent and encompassing manner.

In late 2014, the newly appointed A. Yatsenyuk's government framed the politics of memory as a matter of national security. Considering the war in Donbas, it was necessary to ensure that this issue would receive policymakers' attention. The first step in shaping Ukrainian collective memory was to review the legal status of the already existing agency regulating memory politics in Ukraine – the Ukrainian Institute of National Memory (UINM). Until this change happened in November 2014, this body was ineffective, and its activity focused solely on historical research.

With its Decree No. 684 of November 12, 2014[1], the Ukrainian government awarded the UINM with

[1] Decree of the Cabinet of Ministers of Ukraine No. 684 "On Amendments to the Decree of the Cabinet of Ministers of Ukraine of December 24, 2001 No. 1717". (2014, November). Retrieved from https://zakon.rada.gov.ua/laws/show/684-2014-%D0%BF?lang=en#Text.

new powers in the form of memory policy tools. According to its new status, the Institute became "the central body of (Ukrainian) executive branch of power… that regulates national policy in the area of renewal and preservation of the Ukrainian people's national memory". Furthermore, the decree endowed the UINM with executive powers in multiple areas that were particularly important for addressing Ukraine's collective memory. For instance, the body became able to govern the national policy regarding Ukrainian history popularisation, remembrance of the fighters for the country's independence, the memory of Holodomor, and other Communist-era events.

While this instrument was politically neutral in not explicitly referring to the Communist regime governing Ukraine in 1917-1991, several observations are worth mentioning. First, the decree arrived almost immediately after the formation of the cabinet. It explains the vital role that the new government attached to the politics of memory. It should not be surprising that after the devastating year of 2014, when Ukraine lost control over Crimea and two massive Eastern regions because of Russian aggression, the government considered the cultural departure from the Russian sphere of influence as a matter of paramount importance. Thus, the A. Yatsenyuk government was the first link in the chain of political interactions that resulted in the adoption of the "decommunisation laws".

Second, although without explicitly blaming the Communist regime for all the monstrosities that it organised in Ukraine, the instrument acknowledged them and awarded the Institute with important memory policy tools to reorganise the country's politics of memory. As this subsection demonstrates further, the UINM took the course on completely renewing the national memory. It would be impossible without being able to count on the government's support. For a government with no experience in dealing with collective memory issues, it was a serious step towards coherence in framing the understanding of Ukraine's past. By committing this act, Ukrainian executives influenced the course of the subsequent decommunisation process.

Under the new director Volodymyr Viatrovych, appointed in 2014, the UINM played the key role in preparing the "decommunisation laws". With the help of his colleagues, V. Viatrovych drafted the laws[1,2,3,4] with a special emphasis on building an independent Ukrainian identity. Himself an active participant in the Revolution of Dignity and *persona non grata* in Russia since 2008, V. Viatrovych dedicated his academic career to researching the Ukrainian collective memory and history and, on many occasions in his publications, blamed the Communist regime for attempting to wipe out Ukrainian national identity (Shaikan & Shaikan, 2020). This analysis cannot downplay his figure because V. Viatrovych's strong anti-Communist and anti-Russian views resulted in the final, radical version of the laws.

More importantly, he often emphasised the significance of pursuing a centralised approach to Ukrainian memory politics. V. Viatrovych mentioned that the Institute's main goal was to create "an inclusive Ukrainian political nation" through a politics of memory "subordinated to this goal" (Vus, 2017). Moreover, the UINM had to achieve this goal by overcoming previous Communist attempts to destroy Ukrainian national memory. However, succeeding in building the new collective memory of the Communist past through the "decommunisation laws" in the whole country was impossible without centralising their enforcement.

In this light, it can be argued that draft the "decommunisation laws" reflected V. Viatrovych's views on decommunisation. Following his ideas, the package attached extreme importance to the Revolution of Dignity as a forum where the Ukrainian population expressed its will. Moreover, it was hostile to Russia and its preceding forms of state and instantaneous in trying to distance the country from "Russkiy mir's" cultural influence. Flowing from their main drafter's beliefs, the "decommunisation laws" intended to put an end to the presence of Communism in Ukrainian collective memory once and for all. Thus, having received a carte blanche from the government, V. Viatrovych and the UINM became the most influential actors in the preparation of the laws. This subsection examined the preparation of the "decommunisation laws", addressing the main actors involved and emphasising how their personal views on decommunisation influenced the process of drafting the laws. At that point in the process, centralisation was a crucial part of the package. It is now necessary to turn attention to the 44th plenary session of the 8th convocation of the Ukrainian Parliament, where the country's

[1] Law of Ukraine No. 2540 "On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/316-19#Text.

[2] Law of Ukraine No. 2558 "On Condemning the Communist and National Socialist (Nazi) Totalitarian Regimes and Prohibiting the Propagation of their Symbols". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/en/317-19#Text.

[3] Law of Ukraine No. 2539 "On Remembering the Victory over Nazism in the Second World War". (2015, April). Retrieved from https://uinp.gov.ua/dokumenty/normatyvno-pravovi-akty-rozrobleni-v-instytuti/zakony/law-of-ukraine-on-perpetuation-of-the-victory-over-nazism-in-world-war-ii-of-1939-1945.

[4] Law of Ukraine No. 2538-1 "On the Legal Status and Honouring of the Memory of the Fighters for the Independence of Ukraine in the 20th Century". (2015, April). Retrieved from https://uinp.gov.ua/dokumenty/normatyvno-pravovi-akty-rozrobleni-v-instytuti/zakony/law-of-ukraine-on-the-legal-status-and-honoring-the-memory-of-fighters-for-ukraines-independence-in-the-twentieth-century.

legislative branch voted for the "decommunisation laws", to see whether the Ukrainian legislature favoured the drafters' centralised approach to their enforcement.

**April 9: The point of no return in Ukrainian decommunisation.** Verkhovna Rada addressed the "decommunisation laws" in its plenary session on April 9th, 2015. It was not an ordinary session and implied several connections that the following subsections uncover. To begin with, it took place between Catholic and Orthodox Easters. It was Thursday before the latter, known as "Clean Thursday" in Eastern Orthodox tradition. The choice of this date emphasises the social aspect of Ukrainian decommunisation because references to important religious days contrast with the anti-religious narrative of the Communist regime. Furthermore, considering the significance of religion for P. Poroshenko Ukraine's political image (Shestopalets, 2020), the choice of this day seems more deliberate than coincidental. Several MPs addressed this issue during the session. O. Liashko and A. Parubiy's comments that used this term in the political context are particularly relevant to understanding the attendees' perspective on Communism (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 25, 2015).

A. Parubiy, the head of the session, urged his colleagues to "purge (the country) from the Communist plague". In the same fashion, O. Liashko highlighted that "Clean Thursday" was a fantastic opportunity to "cut that umbilical cord of the Communism off" (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 25, 2015). These phrases of the MPs explain how most of the Parliament felt about Communism. In those circumstances, there was no other choice than adopting the "decommunisation laws". These comments confirm that Parliamentarians shared the drafters' opinion on the Ukrainian decommunisation's radical nature. Another prominent aspect distinguishing this Rada's session from any other concerned the visitors present there. Special international guests attended the session along with President P. Poroshenko and the entire A. Yatsenyuk cabinet. Polish President B. Komorowski opened the session by addressing MPs with a speech about their countries' long-lasting friendship. He emphasised the importance of the Revolution of Dignity for the "protection of values on which the European Union was built". Continued with the President's further discussion of Ukraine's European integration perspectives, this speech provides some insights about the atmosphere of the meeting (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 25, 2015).

First, it was a special Parliamentary session. Its embedded internationally-oriented political nature is difficult to overestimate. Poland, one of Ukraine's closest allies in the aftermath of the crisis in Russian-Ukrainian relations, was crucial for maintaining the P. Poroshenko regime's legitimacy internationally. The Polish state supported Ukraine with humanitarian, economic, and political aid. Furthermore, post-Communist Poland was a success story of decommunisation. Since its independence, Warsaw's radical and centralised approach to handling the Communist past was a landmark for Ukrainian anti-Communist nationalists. Thus, with such a prominent guest taking part in the Parliament's session, it was reasonable to expect sound political outcomes.

Considering that Poland already underwent a process of abruptly breaking away from its Communist past, the fact that its President attended the session where the "decommunisation laws" were adopted was a symbolic act. In this light, Ukrainian political elites set the scene for formally cutting ties with Communism. However, they did it in a way that would simultaneously send a clear message to the rest of the world. After years of inconsistent memory policies, the Ukrainian authorities finally committed to consistently following the decommunisation path of their Eastern and Central European neighbours. Moreover, the goal of this path was European integration. The adoption of the decommunisation package was a well-planned political act aimed at fostering Ukraine's European ambitions.

Second, most Parliamentarians acknowledged the importance of breaking away from Ukraine's Communist past by building a coherent national memory narrative about it. It can be understood, for instance, from the voting results (Nominal voting for the draft Law No. 2538-1, 2015). Out of the 320 MPs present at the session, not even one voted against any of the "decommunisation laws". Despite representing parties from different ends of the political spectrum and pursuing different memory politics agendas, Ukrainian MPs committed to leading their country towards consistent memory politics for the first time. The crucial importance that the executives attached to this event as a decisive moment in modern Ukrainian history largely influenced Parliamentarians' voting on the "decommunisation laws".

Unlike earlier selective attempts to institutionalise the memory of the Communist atrocities in Ukraine (Budrytė, 2023), this novel approach, created in the aftermath of the Revolution of Dignity, signified a radical departure from everything related to totalitarianism. To quote member of parliament (MP) O. Liashko once more, this breaking away from the Communist past was to take such an extreme form that it would almost be like "cutting that *totalitarian* umbilical cord off" (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 25, 2015). The combination of unity and utmost hostility towards totalitarian practices allowed, at least

on paper, for coherence in the country's politics of memory. Nevertheless, the views on how to enforce the package varied.

The discussion of the preceding two subsections suggests that the primary purpose of the "decommunisation laws" at the drafting stage was to form a coherent anti-Communist collective memory among Ukrainians. Centralisation in their enforcement was vital to achieving coherence because it would allow for consistent shaping of the population's collective memory nationwide. However, many MPs did not support the executives in striving for a centralised approach to memory politics. These opposing views arose from the fact that during the 2014 Parliamentary elections many candidates promised to achieve more policymaking freedom for regional governments. Having campaigned for decentralisation of power, multiple MPs viewed it as the only way to resolve the Donbas crisis and a precondition for European integration (Romanova & Umland, 2019). MP O. Bereziuk, for instance, was extremely critical of the draft package's centralised approach since he feared that "the transformation would ruin multiple things" (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 25, 2015).

Hence, during the discussion stage, Ukrainian Parliamentarians tried to redirect decommunisation towards less centralised enforcement because decentralisation of power was on their agenda. These different approaches could substantially hamper Ukrainian memory politics on their way to coherence. To tackle this challenge, memory policy tools of the "decommunisation laws" had to reconcile both visions under a common framework. This study shall now turn to examining these instruments individually.

**From theory to practice: Memory policy tools.** Since the package attributed a crucial role to memory politics, it was logical to expect that it would equip Ukrainian memory agents with effective policy tools in memory-related areas. Before this subsection proceeds to identify these instruments in the decommunisation package, it is important to consider their potential design and pitfalls. Memory policies can take various forms, such as changing school curricula, censoring specific topics in the media, or sponsoring historical research highlighting dominant events over those that should be downplayed. Whatever the memory entrepreneurs' choice is, the favoured tool should bring the unwanted memory down as effectively as possible and lead towards the development of a new, supportive of the government's narrative, collective memory (Neumayer, 2015). In this light, the most effective strategy for Ukrainian memory agents was to exploit the national memory's malleability by diminishing the place that the *memory non grata* occupied in the public discourse.

The intricacies of the Ukrainian context made the drafters carefully approach the memory policy choice. First, the cultural influence of the Communist era over Ukraine that the Russian Federation tried to prolong was strong, especially in Eastern Ukraine (Sazhniev & Sułkowska, 2020). No matter how well-suited it would be, not a single policy could eradicate at once more than seven decades of influencing the nation's psyche, forming traditions, and educating several generations in line with Communist values. The choice of wrong policy tools could aggravate the East-West conflict among the people, additionally impeding the achievement of cohesion in memory politics. Furthermore, since the government considered Eastern regions under the secessionist formations' control to be Ukrainian territory, the tools had to be at least in theory applicable to those territories. Second, Ukrainian politicians needed to formulate their memory policies exceptionally cautiously because some countries viewed the organisations that the "decommunisation laws" honoured as terrorist formations. For instance, Ukraine's glorification of Organisations of Ukrainian Nationalists (OUN) and the Ukrainian Insurgent Army (UPA) led to a memory narrative clash with Poland (Siddi, 2017). Considering the arguments of the preceding passages, Ukraine could not afford to lose Polish support as it would leave the country in an even more vulnerable position internationally. Thus, the drafters of the laws needed to invest significant time and effort in selecting domestically relevant and internationally neutral memory policy tools to facilitate the universally practical implementation of the package across the country. However, due to the haste with which these laws made their way to the official registry, the assumption that the legislators' resources were scarce seems reasonable. Engaging in such a challenging balancing exercise without sufficient temporal and human resources was risky. The following subsections delve into the substance of the "decommunisation laws" to examine what memory policy tools the package contained.

Despite receiving the least attention, the Law of Ukraine No. 2540[1] (the "archival law") included the first formally decommunising steps towards a coherent memory formation that its drafters desired. Its official objective was to "secure the openness of archival information" that the Communist regime's secret services accumulated. This law, furthermore, provided an explicit and exhaustive list of "repressive bodies" that oppressed the Ukrainian population. However, in a manner more relevant to the

[1] Law of Ukraine No. 2540 "On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/316-19#Text.

present study, the "archival law" awarded the UINM with additional, more decisive policy tools. For instance, its articles 7-10 delegated all the managerial functions relating to archival information to one of the Institute's departments. Therefore, the UINM was to receive all the previously confidential information about repressions, catastrophes, unlawful acts of Soviet administrations, violations of human rights, and other extremely sensitive issues that Communist regime concealed from the public.

Considering the extension of the Institute's powers that led to the adoption of the "decommunisation laws", this legal wording clarifies the Ukrainian government's approach to coherence in collective memory formation. While it may seem that the Institute that was actively involved in drafting the package tried to increase its policy powers, this law reflected a few well-formulated government's objectives. First, the unwritten objective of this piece of legislation, contrary to what Article 1(2) asserts, was to identify the scope of the post-Maidan decommunisation. By explicitly mentioning Communist agencies and labelling them "repressive bodies", the drafters intended to provide a point of reference for a future memory politics framework that would demonise Communism in the national memory. They achieved it by including in the preamble the idea that Communist bodies were evil and effectively recognising that the Communist practices became "one of the prerequisites" for the Russian aggression in Crimea and Eastern Ukraine. Thus, a crucial accomplishment of this law was to institutionalise the concept that the Russian Federation's aggression was a continuation of the Communist regime practices, meaning that the root of Ukraine's modern problems lies in its Communist past. All other laws of the package followed this approach. Second, the policymakers' emphasis on the archives' role in "keeping the people's memory" represented another memory policy tool. With more primary sources available now, it was an opportunity for researchers to investigate the Communist era in greater detail. The Ministry of Education could thus change historical education nationwide, basing its new dominant narrative on the latest findings. In the long term, combining historiography of Communist atrocities with an openly anti-Communist school curriculum could have resulted in prominent outcomes in altering the population's collective memory of Communism.

However, more importantly, this Law[1] confirmed Ukrainian policymakers' striving towards a centralised approach to framing the country's collective memory. Consistent delegation of policy tools to the UINM further stressed it, making this body the sole powerful memory agent in the country's politics. Considering that the appointment of the Institute's director was among the government's competencies[2], the system of checks and balances abandoned all questions about the potential consequences of this centralisation.

With the memory policy toolkit that the Institute already possessed, one should see this law's addition to it as the Ukrainian government's long-run plan to decommunise superficially less important fields of education and research. However, policymakers expected that over time these long-running practices would have a greater effect on the population's collective memory of Communism than those intended to play out immediately after the package's adoption. Eventually, it was meant to lead to a more coherent politics of memory across the country and, as a result, a stronger anti-Communist national memory. Nevertheless, the enforcement of other pieces of the decommunisation package did not align with the underlying logic of this Law[3].

Law of Ukraine No. 2558[4] (the "equating law") was the most discussed regulation of the decommunisation package. Unlike the "archival law", it aimed at governing immediate decommunisation practices. This importance of this law rests on the fact that it mandated an ultimate breaking away from Communism's role in Ukrainian memory politics by equating the Communist regime of the USSR and Nazi Germany. Ukrainian legislators did so intentionally, knowing how vital the antagonistic role of Nazism was for the Russian politics of memory. However, condemnation alone was insufficient to eradicate Communism from the country's collective memory, considering the hybrid war and Russian propaganda. Hence, besides signalling the conclusive departure from the Russian cultural influence, this law provided local and regional governments and the President's administration with several memory instruments for implementing the anti-Communist policy course in practice.

First, Article 7(6) of this Law[5] contributed to the country's collective memory formation by delegating the most important instant memory-shaping activities to local and regional administrations. Under this

[1] Law of Ukraine No. 2540 "On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/316-19#Text.
[2] Decree of the Cabinet of Ministers of Ukraine No. 684 "On Amendments to the Decree of the Cabinet of Ministers of Ukraine of December 24, 2001 № 1717". (2014, November). Retrieved from https://zakon.rada.gov.ua/laws/show/684-2014-%D0%BF?lang=en#Text.
[3] Law of Ukraine No. 2540 "On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/316-19#Text.
[4] Law of Ukraine No. 2558 "On Condemning the Communist and National Socialist (Nazi) Totalitarian Regimes and Prohibiting the Propagation of their Symbols". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/en/317-19#Text.
[5] Ibidem, 2015.

article, it was the task of the "organs of local self-governing" to "conduct demolition of monuments and memorial signs" dedicated to glorifying the Communist regime or its "heroes". One should see this mandate as an attempt to institutionalise the above-discussed practice of de-Sovietisation and to include it under the broader framework of decommunisation. This provision enriched the spectrum of memory policy tools available to Ukrainian executives by formalising grassroots de-Sovietisation initiatives of destroying the Soviet legacy in Ukraine. It redirected the focus of those practices to the country's Communist past, thereby changing their conceptual orientation and making them a policy tool for implementing the "decommunisation laws".

Second, the same article ordered regional and local administrations to rename "all objects of toponymy and… geographical objects whose names include symbolics of the totalitarian Communist regime"[1]. Considering that previous Ukrainian governments did not pay sufficient attention to memory politics, many Ukrainian localities, including big cities, still had Soviet-imposed names even after the breakup in political relations with the Russian Federation. On paper, this mandate addressed one of the main problems of the predecessors' piecemeal approach to dealing with Communism in Ukrainian national memory.

Rather than allowing them to continue using geographical names that glorified "heroes" of the Communist regime, this law offered the Ukrainian executive branch of power a different path to building a national identity. With this provision in place, Ukrainian policymakers could start shaping the population's collective memory across the country by paying tribute to authentic Ukrainian heroes, most of them being "fighters for Ukrainian independence" within the meaning of the Law No. 2538-1[2]. To support them in this process, the UINM later published a binding list of more than 500 individuals whose names could not be used in Ukrainian toponymy, meaning that any locality whose name contained a reference to them should be renamed.

Finally, in a soft law manner, Article 7(10) of this law suggested the President of Ukraine launched a "Remembrance Day for victims of Communist and National-Socialist (Nazi) totalitarian regimes". Highlighting the inherent similarities between the two political regimes, this provision offered a recommendation for a memory policy tool rather than mandated one as the Law[3] did in Article 7(6). Nevertheless, national celebrations, especially those dedicated to victims of atrocities of totalitarian regimes, are a powerful instrument to create or further develop new memory narratives. Considering the example of the Holocaust as the European Union's negative foundational myth and its success in consolidating Western European countries' memory narratives, the drafters of the "decommunisation laws" encouraged the Poroshenko administration to follow this approach.

While these practices represented powerful memory policy tools, they deviated from the memory politics centralisation course that both earlier governmental decrees and drafters pursued when preparing the ground for the "decommunisation laws". Rather than following the implementational approach of the "archival law"[4] that consisted in dealing with less acute policy issues in the long run, the "equating law"[5] pulled Ukrainian decommunisation towards handling crucial memory-related issues at once and radically. Its focus on empowering regional authorities and the decommunisation's radical nature aligned with the MPs' endeavours to achieve greater decentralisation. While the "archival law"[6] and the "heroes' law"[7] provided for no regional exceptions in their enforcement, the Law No. 2558[8] awarded a large margin of discretion to local authorities. It later resulted in several situations where the population of localities that fell under the scope of this provision objected to changing their places' names (Gnatiuk *et al.*, 2023).

Therefore, memory policy tools included in different laws of the decommunisation package were inconsistent, thus undermining perspectives of a centralised approach to Ukrainian politics of memory and further moving away from coherence in it.

[1] Law of Ukraine No. 2558 "On Condemning the Communist and National Socialist (Nazi) Totalitarian Regimes and Prohibiting the Propagation of their Symbols". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/en/317-19#Text.
[2] Law of Ukraine No. 2538-1 "On the Legal Status and Honouring of the Memory of the Fighters for the Independence of Ukraine in the 20th Century". (2015, April). Retrieved from https://uinp.gov.ua/dokumenty/normatyvno-pravovi-akty-rozrobleni-v-instytuti/zakony/law-of-ukraine-on-the-legal-status-and-honoring-the-memory-of-fighters-for-ukraines-independence-in-the-twentieth-century.
[3] Ibidem, 2015.
[4] Law of Ukraine No. 2540 "On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/316-19#Text.
[5] Law of Ukraine No. 2558 "On Condemning the Communist and National Socialist (Nazi) Totalitarian Regimes and Prohibiting the Propagation of their Symbols". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/en/317-19#Text.
[6] Law of Ukraine No. 2540 "On Access to the Archives of Repressive Bodies of the Communist Totalitarian Regime from 1917-1991". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/316-19#Text.
[7] Law of Ukraine No. 2538-1 "On the Legal Status and Honouring of the Memory of the Fighters for the Independence of Ukraine in the 20th Century". (2015, April). Retrieved from https://uinp.gov.ua/dokumenty/normatyvno-pravovi-akty-rozrobleni-v-instytuti/zakony/law-of-ukraine-on-the-legal-status-and-honoring-the-memory-of-fighters-for-ukraines-independence-in-the-twentieth-century.
[8] Law of Ukraine No. 2558 "On Condemning the Communist and National Socialist (Nazi) Totalitarian Regimes and Prohibiting the Propagation of their Symbols". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/en/317-19#Text.

This inconsistency stemmed from the opposing views of the Ukrainian executive and legislative branches on the form that Ukrainian decommunisation had to take. Nevertheless, as the following subsection demonstrates, the "decommunisation laws" stayed a prominent phenomenon of the country's remembrance policy. Although Rada adopted the "decommunisation laws" swiftly, they later sparked several parliamentary discussions regarding their enforcement and societal influence. The debate that took place during the plenary session on April 21, several weeks before Poroshenko signed them, is especially important for this analysis. Then, a heated discussion of the relation between the decommunisation package and centralisation of power involved representatives of almost all parliamentary fractions.

Yu. Boyko, leader of the "Opposition Bloc" fraction, initiated the discussion by encouraging his colleagues to vote for his party's draft laws that implied the decentralisation of power in Eastern Ukraine. Their adoption would result in factual recognition of Luhansk and Donetsk secessionists' sovereignty over occupied regions. Responding to other MPs' claims that his party's proposals intended to split Ukrainian society, Yu. Boyko rejected the "equating law" as "dividing the society" and called on the President to veto it (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 28, 2015).

O. Liashko, the first participant in the debate, categorically opposed Yu. Boyko's ideas. Drawing on Russian Minister for Foreign Affairs S. Lavrov's statement after adopting the "decommunisation laws" Ukraine "can forget about a unitary state" (Lavrov: How is it possible…, 2015), MP O. Liashko followed his line of argumentation of two weeks earlier. He condemned the Russian Federation's involvement in Ukrainian internal affairs, viewing S. Lavrov's comment as a continuation of Communist "totalitarian, expansionist politics aimed at depriving Ukraine of its independence". In O. Liashko's opinion, Yu. Boyko's proposals followed S. Lavrov's logic since their implementation would further deteriorate Ukrainian central power's position vis-á-vis the Donbas and Luhansk secessionists (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 28, 2015).

Yu. Lutsenko, the leader of the "Petro Poroshenko's Bloc" party, supported O. Liashko in his arguments by mentioning that the decommunisation package was "a serious step to push [the last] bits of totalitarianism away" from Ukraine (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 28, 2015). Finally, MP V. Nychyporenko mentioned that the decentralisation of power included in the "decommunisation laws" (in the form of memory policy tools) was one of the main goals of electoral campaigns of almost all political powers but did not have to spill over to all policy areas. Furthermore, every MP objecting to Yu. Boyko's speech blamed him and his party for betraying the nation (Transcript of the Plenary Session of the Verkhovna Rada of Ukraine No. 28, 2015). This heated debate is relevant to the problematic of this study because, first, it revealed the significance of the "decommunisation laws" in shaping the Ukrainian political landscape. Even during a session with entirely different issues on the agenda, MPs found time to argue about the decommunisation package. Furthermore, O. Liashko and Yu. Lutsenko's radical accusations of Yu. Boyko reflect the debate's intense nature and profound discrepancies within Ukrainian society regarding the implementation and implications of the "decommunisation laws".

Second, it suggested that they were not universally applicable throughout the country. This flaw stems from the radical nature of decommunisation that these laws pursued since the early drafting stage. The East of Ukraine, traditionally more sympathising with Russia, wanted mild to no decommunisation. "Opposition Bloc" received most of its votes from that region (D'Anieri, 2022), thus pursuing a similar memory policy agenda and strongly criticising the package in its capacity of an oppositional party. The apogee of this criticism occurred when in 2017 the "Opposition Bloc" collected 46 MPs' signatures and initiated a judicial review procedure of, among others, Article 7 of the "equating law" with the Ukrainian Constitutional Court (Nimchenko & Shpenov, 2017). This social and political opposition to the "decommunisation laws" became one of the major obstacles to their effective enforcement, thereby distancing Ukrainian memory politics further from coherence. The following paragraphs discuss other hindrances to Ukrainian decommunisation and its prospects in relation to the central hypothesis of this study.

**Ukrainian decommunisation at a crossroads.** This subsection interprets the empirical findings of the preceding three and provides several policy recommendations to Ukrainian policymakers. Considering that this study addressed the problem of coherence in forming the Ukrainian collective memory of Communism, one should perceive the "decommunisation laws" as a cause of the shift in the Ukrainian politics of memory paradigm rather than its outcome. Due to the utmost importance that the President and the A. Yatsenyuk government attached to the politics of memory, the process of drafting and adopting the laws was swift. This initiated an entire chain of political initiatives that later attempted to eliminate all positive aspects of Ukraine's collective memory of Communism. All these actions followed because the "decommunisation laws" provided the guidelines for the subsequent decommunisation policies.

Furthermore, the explicitly radical nature of post-Maidan decommunisation resulted in awarding

the country's executives with (in theory) powerful memory policy tools. However, despite the declared goal of building a consistent anti-Communist politics of memory across Ukraine, the "decommunisation laws" did not bring about desired coherence. They failed because multiple memory policy tools included in each of the package's laws served different goals, reflecting different views on the decommunisation that memory agents held.

The most potent instruments aimed to expand the scope of Ukrainian decommunisation by including practices of de-Sovietisation, thereby ensuring radical and immediate enforcement. Considering that the war in the East of Ukraine made a large part of the population hostile towards Russia and Communism, it was a reasonable decision that led to meaningful short-term results. For instance, in less than a year since P. Poroshenko signed the "decommunisation laws", more than 1,000 localities received "decommunised" names (Kudriavtseva, 2020). Furthermore, hundreds of Communist-era monuments were demolished (Rozenas & Vlasenko, 2022). However, this instantaneous enforcement of the "equating law" did not align with the long-run initiatives of the "archival law"[1].

Following the logic of E. Langenbacher & Y. Shain (2010), it should be agreed with for viewing the "decommunisation laws" as an attempt to create an intensified version of Ukraine's traumatic collective memory of the Communist regime that would later facilitate the country's European integration aspirations. Considering the current events, the European integration is slowly becoming a political goal rather than a dream for Ukraine. In this light, the coherent process of collective memory formation, to which the "decommunisation laws" contributed, should receive greater attention from the country's government. Framed this way, memory politics is a matter of national security because the lack of a unified approach may impede or even deny the country's integration into the European family. Ukrainian policymakers should perceive it as an issue of critical importance for the state's survival rather than an abstract political objective because it is the most effective way to stop Russian aggression quickly. Two aspects are crucial here.

First, Ukrainian executives should align dominant national memory narratives with those of European countries to clear the way on the country's European integration path. Departure from Communism is a first step towards integrating Ukrainian memory politics into the bigger cluster of Central and Eastern European memory narratives. Yet, achieving homogeneity with them will require more. Following the example of how Western European countries incorporated the Holocaust into their memory politics (Subotic, 2023), Ukrainian policymakers shall consider building a solid anti-Communist national identity using Holodomor as a negative foundational myth. It is an example of a simultaneously neutral to the region's memory and internally unifying event. Considering that previous administrations have already attempted to follow these guidelines (Coulson, 2021), new Ukrainian decommunisation should fill the gaps of its predecessors' piecemeal approach. Second, in an internally divergent country like Ukraine, memory entrepreneurs should put the unity in memory-related issues at the forefront. It was rational to expect that developing an anti-Communist collective memory would be more complicated for the population of the East of Ukraine than for those who were always more distant from and critical of the Communist regime. Nevertheless, there were cases of extreme outliers even in the Western-most parts of Ukraine (Press service of the Prosecutor's Office of Lviv region, 2017).

Ukrainian memory politics still lack centralisation and coherence. Russia's ongoing invasion of Ukraine and annexation of its territory further aggravates the situation because occupational authorities immediately start spreading Russian values across the population. Furthermore, incorporating people living under occupation for almost a decade into the country's collective memory paradigm will pose further challenges to the central government's politics of memory effectiveness. In this light, the legal framework of the Ukrainian decommunisation requires an amendment to finally achieve the long-desired consistency in the politics of memory nationwide. More than eight years passed since the "decommunisation laws" entered into force, but their results are still ambiguous, although their memory policy toolkit, as this study argued, was promising. Unlike a diplomat declared *persona non grata* who must leave the country at once, the memory of the Communist past, the Ukrainian *memory non grata*, does not think of leaving Ukraine yet. Better, more modern, and thoroughly designed political initiatives and legal solutions are necessary to address the issues that the "decommunisation laws" could not, considering the haste with which the cabinet and Rada drafted and adopted them. Before drafting further laws to enhance Ukrainian decommunisation, memory agents should align their political goals. Then, they must revisit the existing decommunisation package and adjust its memory policy tools to work harmoniously.

A novel approach reconciling short-term and long-term goals of Ukrainian decommunisation is necessary to adequately account for regional cultural

[1] Law of Ukraine No. 2558 "On Condemning the Communist and National Socialist (Nazi) Totalitarian Regimes and Prohibiting the Propagation of their Symbols". (2015, April). Retrieved from https://zakon.rada.gov.ua/laws/show/en/317-19#Text.

differences within Ukraine that result in different perceptions of the country's Communist past. Furthermore, it should address the position of the country's dominant memory narrative about its "fighters for independence" as opposed to the collective memories of its neighbours. Until these changes take place, Ukrainian policymakers can only dream about coherent politics of memory.

## Conclusions

This study argued that the existing academia on the Ukrainian politics of memory understudied the process of adopting the "decommunisation laws". By approaching these laws from a "within case" perspective under the process tracing method, this study provided an overview of memory policy tools with which the decommunisation package endowed the Ukrainian post-revolutionary policymakers. Furthermore, unlike previous studies in this field, the present one stressed that to understand the roots of the post-Maidan decommunisation, it is necessary to uncover a series of embedded political messages connected to the process of adoption of the "decommunisation laws" as opposed to taking the package for granted. However, a notable limitation of this study was that conclusions inferred from this process tracing are case-specific and with a small degree of certainty will hold for other decommunisation case studies due to contextual differences.

The purpose of this study was to address the issue of coherence in Ukrainian memory politics by using the adoption of the "decommunisation laws" as a case study. The main conclusion reached is that the decommunisation package failed to provide Ukrainian policymakers with universally applicable memory policy tools to shape the population's collective memory of Communism in a coherent manner. Despite the earlier centralisation of memory policy powers in the hands of the UINM and the government's attempts to unify the country around a common memory narrative, memory policy tools included in different laws of the package served clashing objectives.

These differences reflected contrasting approaches to centralisation that Ukrainian executives and legislators pursued at various stages of adoption of the package. The different nature of policy goals, combined with the laws' unsuitability for centralised enforcement, resulted in a continuation of the previously applied piecemeal approach to memory politics. Still, the preparatory work of the "decommunisation laws" and their adoption constituted a significant step towards a coherent approach to understanding Ukraine's Communist past. The laws stood out among preceding memory policies because they appealed to socially critical issues but failed to bring the desired coherence to Ukrainian memory politics.

Finally, it might be challenging for future researchers to dig a level deeper and investigate how the informal connections of memory agents involved in the adoption of the "decommunisation laws" affected the process. Although obtaining reliable data for such research would require conducting a series of high-profile interviews, its potential findings may substantially contribute to understanding how the broader political landscape of post-revolutionary Ukraine, with its informal pitfalls, influenced the country's politics of memory through the "decommunisation laws". Furthermore, future research might use the findings of this study to discuss other events of (recent) Ukrainian history, the collective memory of which is not without issues.

## Acknowledgements

None.

## Conflict of Interest

The author of this study declares no conflict of interest.

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# Закон як інструмент формування колективної пам'яті: дослідження українських «декомунізаційних законів»

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■ **Анотація.** Серед низки проблем, пов'язаних з українською колективною пам'яттю про комуністичний період, ця стаття присвячена проблемі відсутності узгодженого підходу до формування такої пам'яті. Мета цього дослідження – з'ясувати, чи надали «декомунізаційні закони», прийняті 2015 року, українським суб'єктам політики пам'яті достатньо надійних інструментів для формування політики пам'яті, яку однаково застосовували б у всій країні. З цією метою в дослідженні використано метод відстеження процесу, який висвітлює конкретний приклад розроблення та ухвалення «декомунізаційних законів» відповідними зацікавленими сторонами та Верховною Радою України. Дослідивши підготовчу роботу над цими законами та процес їх прийняття, було виявлено, що питання централізації відігравало важливу роль у створенні узгодженої колективної пам'яті про комуністичний період в Україні. Зокрема, той факт, що члени парламенту досягали мети децентралізації, став перешкодою для створення надійного підходу до української пам'яті про комунізм. Крім того, було встановлено, що декомунізаційний пакет надав українським політикам у сфері пам'яті декілька важливих інструментів для формування пам'яті населення про комунізм, таких як перейменування топонімів, пов'язаних з комунізмом, відкриття архівів комуністичного режиму, знесення пам'ятників, що прославляли комуністичних «героїв», та інституціоналізація Дня пам'яті жертв тоталітарних режимів. Попри такі наслідки, у статті сформульовано висновок, що українське «декомунізаційне законодавство» потребує реформування для досягнення гармонізації в контексті прагнень країни до європейської інтеграції. Висновки цього дослідження можуть слугувати основою для подальших рекомендаційних досліджень на тему узгодженості української політики пам'яті. Науковці можуть застосувати результати дослідження щодо інших подій, пов'язаних із проблемами внутрішньої пам'яті, або запропонувати потенційні реформи для узгодження української колективної пам'яті про комунізм із пам'яттю її європейських партнерів

■ **Ключові слова:** студії пам'яті; законодавство щодо історичної пам'яті; інструменти політики пам'яті; децентралізація; реформи

**SCIENTIFIC JOURNAL**
OF THE NATIONAL ACADEMY OF INTERNAL AFFAIRS

*Scientific Journal*

**Volume 29, No. 3. 2024**

Founded in 1996. Published four times per year

The original layout of the publication is made
in the Organization of Scientific Activity of National Academy of Internal Affairs

**Managing Editor:**
O. Korotkyi

**Editing English-language texts**:
S. Vorovsky, K. Kasianov

**Desktop publishing**:
O. Glinchenko

Signed for print August 27, 2024. Format 60*84/8
Conventional printed pages 11.2
Circulation 100 copies

**Editors office address**:
National Academy of Internal Affairs
03035, 1 Solomianska Sq., Kyiv, Ukraine
Tel.: +38 (044) 520-08-47
E-mail: info@lawscience.com.ua
https://lawscience.com.ua/uk

**НАУКОВИЙ ВІСНИК**
НАЦІОНАЛЬНОЇ АКАДЕМІЇ ВНУТРІШНІХ СПРАВ

*Науковий журнал*

**Том 29, № 3. 2024**

Заснований у 1996 р. Виходить чотири рази на рік

Оригінал-макет видання виготовлено у відділі організації наукової діяльності
Національної академії внутрішніх справ

**Відповідальний редактор:**
О. Короткий

**Редагування англомовних текстів**:
С. Воровський, К. Касьянов

**Комп'ютерна верстка**:
О. Глінченко

Підписано до друку 27 серпня 2024 р. Формат 60*84/8
Умов. друк. арк. 11,2
Наклад 100 прим.

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