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ARTICLES

The Judiciary in Ukraine and Challenges of Wartime: The Protection of Human Rights in Extraordinary Conditions and Prospects of Restoring Military Courts

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Abstract

The purpose of this study is to discuss possible solutions to stated problems and to reflect on the prospects for the resumption of military justice in Ukraine. The research formulates solutions for overcoming the negative consequences for the judiciary of the armed aggression by Russia against Ukraine. With regard to the limited institutional and human resources of international tribunals such as the International Criminal Court, the main burden of the investigation and trial of cases arising from military legal relations will be placed on the Ukrainian judicial system. International tribunals play a more global role, which is imposing responsibility on the organisers of armed aggression against Ukraine and placing sanctions on the military and political leaders of the aggressor country. For the judiciary of Ukraine, the best way to resolve this significant problem is to restore the system of military courts, which were voluntarily liquidated in 2010. The restoration of military courts will make it possible to unload pressure from the system of courts of general jurisdiction, to ensure prompt resolution of hundreds of thousands of cases of compensation for damage caused to citizens and businesses as a result of the hostilities, as well as the just trial of criminal proceedings for military and war crimes.

Keywords: military courts; proceedings; war crimes; international tribunals; martial law

1. Introduction

In the modern international legal context, the term 'military justice' refers to a system of military courts and procedures that may exercise jurisdiction not only over criminal proceedings against military personnel for crimes committed on duty, but also over a wider range of cases, according to national law. In some jurisdictions,

such as the United States, military courts have jurisdiction over all criminal offences committed by military personnel (including military retirees) during peacetime. In addition, some military justice systems retain authority to prosecute enemy combatants for war crimes and violations of international humanitarian law committed during armed conflict or in detention. At the same time, the Russian–Ukrainian war has provoked the question of whether it is feasible to re-establish military courts in Ukraine with a broader jurisdiction than that usually provided for in peacetime. This includes not only cases of war crimes committed by Ukrainian service personnel but also crimes committed by the enemy, such as war crimes, crimes against humanity, violations of the laws and customs of war, and even some cases of compensation for damage to civilians.[1]

Issues relating to the consideration and resolution of certain cases became particularly relevant after 24 February 2022, when Russia launched an unprecedented armed aggression on the territory of Ukraine. These cases involved protection of the rights of military officers, compensation to civilians for damage caused to their property and infringement of their personal rights as a result of the hostilities, the investigation and trial of criminal proceedings for breach of the laws and customs of waging war, as well as crimes committed by military officers. On the same day, the President of Ukraine issued a decree, which was approved by the Parliament, on the introduction of martial law in Ukraine,[2] which would be repealed no earlier than the complete end of hostilities on the territory of Ukraine.

Since then, the attention of the entire international community has been focused on Ukraine. Allies provide Ukraine with military, humanitarian and other types of aid; global organisations responsible for the implementation of universally recognised norms of international humanitarian law issue resolutions and other legal texts aimed at overcoming the consequences of Russia's armed aggression against Ukraine and supporting the struggle of the Ukrainian people for their identity and independence.[3]

The international community not only provides the Ukrainian people with invaluable institutional and organisational support in overcoming the drastic consequences of Russia's armed aggression but also undertakes measures aimed at creating legal and judicial mechanisms to hold Russia's dictatorial regime accountable for the bloody war it unleashed in Ukraine at the international level. Despite this, there is a clear understanding among Ukrainian lawyers and government representatives that the main burden of the investigation and judicial hearing of military and international crimes committed on the territory of Ukraine should be borne by the national judicial system. Therefore, its resources and functional capacities in this sphere should be reinforced.

[1] Oksana Kaplina, 'Prisoner of War: Special Status in the Criminal Proceedings of Ukraine and the Right to Exchange' (2022) 4(2) *Access to Justice in Eastern Europe* 8.

[2] Decree of the President of Ukraine No 900/2010 on Liquidation of the Military Appellate and First Instance Courts (entered into force 16 September 2010), https://zakon.rada.gov.ua/laws/show/900/2010#Text (in Ukrainian).

[3] Khrystyna Burtnyk and Volodymyr Gryshko, 'Models of Consideration of War Crimes and Other Serious Violations of Human Rights within the National Judicial System', DeJuRe Foundation, July 2023, https://drive.google.com/file/d/1xuFIPkP2WS6Y_J6rVXcUsHIGZu46gPos/view (in Ukrainian).

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In the spring of 2022, the International Court of Justice of the United Nations in The Hague recognised its jurisdiction to investigate whether genocide is taking place in Ukraine, and issued an order requiring Russia to cease the aggressive military operations in Ukraine that began on 24 February 2022.[4] Numerous claims by Ukraine against Russia are being considered under the European Convention on Human Rights (ECHR or the Convention):[5] these include four interstate cases pending before the European Court of Human Rights (ECtHR) against Russia and over 7,400 individual applications concerning the events in Crimea, eastern Ukraine and the Sea of Azov, as well as Russia's military operations on the territory of Ukraine since 24 February 2022).[6]

At the European Parliament Briefing on 8 April 2022, it was declared that measures would be undertaken to help Ukrainians in playing a mostly political role, activating humanitarian initiatives and promoting 'the ground to ensure accountability for crimes committed in the context of the war'.[7] Institutions of the European Union (EU) provide Ukraine with constant financial, armed and humanitarian assistance in helping to overcome the consequences of Russian aggression. Numerous sanctions have been imposed on Russian businesses, government structures, high-ranking state officials and their relatives, and Axis affiliates. Hundreds of millions worth of Russian monetary assets have been frozen in the banks and financial institutions of Europe, Canada and the United States.

On 17 March 2023, the International Criminal Court issued arrest warrants for two individuals in connection with the events in Ukraine: Vladimir Vladimorovich Putin and Maria Alexeyevna Lvova-Belova. The Court ruled:

> There are reasonable grounds to believe that President Putin 'committed the acts directly, jointly with others and/or through others', or that he failed to properly control civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility.[8]

These measures are unprecedented, given that Russia does not recognise the Rome Statute of the International Criminal Court[9] in any way, and Ukraine has officially ratified the jurisdiction of this court only partially.

The purpose of this study is to review the problems encountered by the Ukrainian judicial system in connection with the Russian military aggression and to reflect on

[4] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Request for the Indication of Provisional Measures, Order of 16 March 2022.

[5] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 221.

[6] Council of Europe, 'The European Court of Human Rights is Holding a Grand Chamber Hearing in the Case of Ukraine v. Russia concerning Crimea', 13 December 2023, https://www.coe.int/en/web/portal/-/european-court-of-human-rights-hears-ukraine-v.-russia-case.

[7] ibid.

[8] Maria-Margarita Mentzelopoulou, 'Russia's war on Ukraine: Forcibly Displaced Ukrainian Children', 11 February 2025, European Parliament, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)747093.

[9] Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

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possible solutions and prospects for the resumption of military justice in Ukraine. In this study, military justice refers to a specialised subset of courts that in many democratic jurisdictions operate continuously, including in peacetime, to maintain military discipline, try offences committed by military personnel, and develop legal expertise in military cases. In the Ukrainian context, where military courts were abolished in 2010, the proposed re-establishment of these courts underscores the need to create a sustainable and professional institution that can function beyond the current conflict and ensure long-term legal capacity in military matters.

2. Literature review

In modern law, the concept of military justice is often interpreted narrowly as the system of legal rules, institutions and procedures governing the investigation, prosecution, trial and punishment of military personnel for criminal offences related directly to military service. However, in some legal systems, such as that of the United States, military justice encompasses a broader subject-matter jurisdiction covering all offences committed by members of the armed forces, including ordinary criminal acts, regardless of their connection with service. As VanLandingham emphasises,[10] military justice does not cover all aspects related to military conflicts, such as compensation for harm to civilians or prosecution of war criminals. However, it is a specific form of criminal justice for active military personnel, with an emphasis on discipline, functional efficiency and respect for human rights. In the international context, the principles of military justice are set out in the Yale Draft and the Decaux Principles, approved by the United Nations Commission on Human Rights, which emphasise the mandatory observance of standards of independence, impartiality and fair trial even within the military system.[11] Since the beginning of the full-scale armed aggression by the Russian Federation against Ukraine in February 2022, domestic and foreign research on military justice has intensified. Therefore, the need to create an effective national mechanism for investigating crimes committed by both the enemy and the national military personnel has led to increased scientific interest in models of military courts, their jurisdiction and their compatibility with international standards.

Kaplina notes that there is a crucial need to address fully the problem of prisoners of war by ensuring comprehensive protection of their property and individual rights, as well as proper investigation of crimes committed against prisoners of war.[12] The creation of a proper criminal procedure for the exchange of prisoners of war between Ukraine and Russia is currently being implemented by the Criminal Procedure Code of Ukraine. Berchenko, Slinko and Horai strongly emphasise the imperative need for strict observance of human rights,[13] guaranteed by the

[10] Rachel E VanLandingham, 'Military Justice and the Rule of Law in the Courtroom' (2024) 84 *Ohio State Law Journal* 1298.

[11] Commission on Human Rights, 'The Yale Draft: Draft Principles Governing the Administration of Justice Through Military Tribunals', 2006, https://www.court-martial-ucmj.com/files/2018/06/The-Yale-Draft.pdf.

[12] Kaplina (n 1) 8.

[13] Hryhorii Berchenko, Tetiana Slinko and Oleh Horai, 'Unamendable Provisions of the Constitution and the Territorial Integrity of Ukraine' (2022) 4(2) *Access to Justice in Eastern Europe* 113.

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Constitution of Ukraine,[14] according to the law of the martial era. Vapniarchuk and co-authors[15] present persuasive arguments that in criminal proceedings the rights of persons who cannot be interrogated should be as comprehensively protected in wartime procedures as those in peacetime.

Most of the Ukrainian scholars – such as Stefanchuk,[16] Prytyka, Izarova, Maliarchuk and Terekh,[17] and Kaplina[18] – are united in their position that the system of courts of Ukraine should accept the main challenge of adjudication of cases related to war, to include reimbursement of losses incurred by Ukrainian citizens, businesses and the government institutions, and criminal prosecution of persons who committed military and international crimes on the territory of Ukraine. As Kravchenko (Chairman of the Supreme Court) states,[19] the hearing and settlement of cases arising from military legal relations (both criminal and civil) is a primary task for the judiciary in times of war.

In the European Commission report regarding the achievements of Ukraine in the field of European integration, delivered in November 2023, it is stated that in Ukraine, for eighteen months of the war, the pre-trial investigation authorities opened 107,951 criminal proceedings for war crimes. In this category of cases, 267 indictments were filed and 63 court verdicts were delivered.[20] About 7,000 cases of criminal proceedings, the vast majority of them involving accusations of collaboration (work in favour of the enemy), have already been considered by the courts of first instance. Most of the verdicts for collaborators are guilty, despite the difficulties of processing the evidence base against them, and the number of accusations is constantly increasing. With regard to the advocacy of individuals' rights – primarily the property rights of citizens affected by shelling from the territory of Russia – by January 2024, more than 600,000 citizens had filed claims for compensation with the courts.[21]

Unfortunately, the main problem today facing Ukraine's criminal justice system is the prosecution of persons who have committed international crimes on the territory of Ukraine – namely, Russian soldiers who kill Ukrainian civilians and military citizens, illegally capture children and soldiers, destroy Ukrainian homes and businesses, and commit acts of unprecedented genocide and ecocide. Statistics

[14] Constitution of Ukraine, 28 June 1996, https://rm.coe.int/constitution-of-ukraine/168071f58b.

[15] Viacheslav Vapniarchuk and others, 'Witness Privileges as the Foundation of Their Immunity in Criminal Proceedings' (2023) 15(3) *Pakistan Journal of Criminology* 355.

[16] Maryna Stefanchuk, 'The Recovery of Ukraine in the Field of Justice: Challenges and Priority Goals' (2022) 4–2(17) Special Issue *Access to Justice in Eastern Europe* 186.

[17] Yuriy Prytyka and others, 'Legal Challenges for Ukraine under Martial Law: Protection of Civil, Property and Labour Rights, Right to a Fair Trial, and Enforcement of Decisions' (2022) 3(15) *Access to Justice in Eastern Europe* 1.

[18] Kaplina (n 1) 10.

[19] Stanislav Kravchenko, 'Functioning of the Judiciary During the War: An Open Interview of the Head of the Supreme Court', *Pravo.ua*, 13 July 2023, https://pravo.ua/funktsionuvannia-sudiv-v-umovakh-viiny-vidkryte-interv-iu-holovy-vs-stanislava-kravchenka (in Ukrainian).

[20] European Commission, Commission Staff Working Document, 'Ukraine Report Accompanying the Communication on EU Enlargement Policy', 8 November 2023, SWD(2023) 699 final, https://op.europa.eu/en/publication-detail/-/publication/a0f3eaa6-7eee-11ee-99ba-01aa75ed71a1/language-en.

[21] Tetiana Bodnya, 'Interview with the Chairman of the Supreme Court Stanislav Kravchenko', *Censor.net*, 12 January 2024, https://censor.net/ua/r3467241 (in Ukrainian).

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show that between 27 February 2014 and 1 May 2023 Ukrainian courts delivered 31 verdicts with legal qualifications under Article 438 of the Criminal Code of Ukraine, which provides for criminal liability for violation of the laws and customs of war. The total number of verdicts on international crimes handed down by the courts during this period amounted to 585, of which 514 concerned the punishment of collaborators.[22] These figures show that the real conviction of Russian criminals is a prospect for the future, both for the Ukrainian judiciary and for the entire international community committed to the ideals of international humanitarian law.

Nor do international experts stand aside from highlighting the problem of the unlawful aggression against Ukraine. Akande argues that Russia's invasion of the territory of Ukraine 'constitutes a violation of the prohibition on the use of force contained in the UN Charter and in customary international law'.[23] Winaldi and Setiyono specify the principles of international humanitarian law that had been blatantly violated by Russia's attack on Ukraine.[24] These are the principles of non-intervention into state sovereignty and humanitarianism, provided by Additional Protocol I[25] of the Geneva Conventions 1977,[26] which safeguards the protection of the civilian population and civilian objects.[27] We agree with those scholars on the point that rigorous international sanctions should be introduced for violations of international customary and codified law.

Regrettably, neither lawyers, politicians nor international organisations can offer a single and simple solution to the Ukrainian issues of accountability today. Given the above, our research will focus on the issues of Ukrainian legislation, customs and norms of international law, statistical data from the Ukrainian judiciary, as well as examples of judicial decisions in cases arising from legal relations related to the war. We will not ignore the doctrinal principles and concepts that raise problems of Russia's military aggression against Ukraine and overcome its negative consequences.

[22] Anna Kozmenko and others, 'Key Problems of Ukraine in Investigation of International Crimes. Results of Research', Ukrainian Helsinki Union for Human Rights, 20 September 2023, https://www.helsinki.org.ua/articles/kliuchovi-problemy-ukrainy-u-rozsliduvanni-voiennykh-zlochyniv-rezultaty-doslidzhennia/ (in Ukrainian).

[23] Dapo Akande, 'Use of Force under Public International Law: The Case of Ukraine', 62nd Meeting of the Committee of Legal Advisers on Public International Law (CAHDI), Strasbourg, 25 March 2022, https://rm.coe.int/cahdi-62-akande-use-of-force-under-pil-the-case-of-ukraine-25-march-20/1680a67f82.

[24] Yuanda Winaldi and Joko Setiyono, 'Russian Conflict on Ukraine based on Humanitarian Law Perspective' (2022) 18(2) *Law Reform* 252.

[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3.

[26] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV).

[27] UN General Assembly Resolution ES-11/1, 'Aggression against Ukraine', (2 March 2022), UN Doc A/RES/ES-11/1.

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3. Materials and methods

At the beginning of our research, it is worth defining several terms to which we refer, considering that currently there is no unified interpretation of many of the categories and legal constructions related to wartime. At the same time, national and international law have worked out different visions of the same aspects. With this in mind, we indicate the contexts in which we use key terms in this study.

Military justice systems are specialised legal mechanisms established to ensure discipline, accountability and due process in the armed forces. As defined by international doctrine, they are focused primarily on the investigation, prosecution and trial of criminal offences committed by active military personnel. Their jurisdiction is typically but not always limited to service-related misconduct, disciplinary offences and, in some systems, war crimes committed by military personnel. The Yale Draft Principles and the Decaux Principles also emphasise that military courts must operate within strict limits to ensure independence, impartiality and compliance with fair trial guarantees under international law. Therefore, military justice should not be confused with broader transitional justice mechanisms or systems for reparations and civilian claims arising from armed conflicts.

Martial law is the legal regime provided by national legislation that is declared in times of war and/or emergencies such as civil unrest and natural disasters.[28] As a rule, this regime, which involves significant restrictions on civil rights and freedom, is valid only for the period of military operations or extraordinary circumstances and is cancelled after their cessation. International crimes are the most rigorous violations of human rights, and include genocide, war crimes, acts of aggression and crimes against humanity (or 'atrocity crimes'). Liability for these acts is enshrined in the norms of the Rome Statute of the International Criminal Court and universally recognised customs of international law, including the Geneva Conventions that set the legal framework for the conduct of war.[29] Military crimes constitute the system of criminal offences provided for by national legislation, which are committed by military personnel and persons who have equivalent legal status during both peacetime and wartime.

During this research, general scientific and special legal methods have been used:

(1) The *dialectical method*, made it possible to trace clear structural and logical connections between the elements of the military justice system and the competencies of its institutions, as well as the evolutionary path of the development of military justice in Ukraine.
(2) The *historical method* assisted in reproducing the picture of the functioning of the military courts in Ukraine until 2010, in determining the reasons for their liquidation, and in assessing their achievements and consequences of the absence of the fully fledged military court system in Ukraine, starting from 2014.

[28] Legal Information Institute, 'Martial Law', Cornell Law School, 2022, https://www.law.cornell.edu/wex/martial_law.

[29] Rome Statute (n 9); GC 1 to GC IV (n 26).

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(3) The *comparative legal method* provided an opportunity to compare the operating conditions of the military courts in the EU countries, to analyse their staff and competence and to ascertain general features of military justice.
(4) The *system-structural method* was aimed at reflecting certain trends in the development of the system of courts of Ukraine in line with the challenges of wartime and determining ways to overcome existing challenges.
(5) The *method of legal modelling* made it possible to identify the future vision of what military justice in Ukraine should be, considering national and international security threats, as well as the urgent need to overcome the consequences of Russia's armed invasion of Ukraine.

The application of the above-mentioned methods and approaches ensured the reliability and validity of the results, and allowed systematic study of the challenges that appeared before the Ukrainian judicial branch of government in connection with the outbreak of the full-scale Russian aggression on the territory of Ukraine, as well as to outline possible prospects for their resolution.

4. Results and discussion

4.1. Historical insights for Ukraine

Until 2010, military courts functioned in Ukraine as part of the national judicial system inherited from the Soviet model. Although they operated formally within the framework of general courts and heard cases involving military personnel, their compliance with international standards of independence, fair trial and procedural rights remained poorly understood and were not subject to comprehensive legal assessment. Therefore, the assessment of their activities as successful requires a cautious approach and should be based on modern international criteria of justice. According to Article 19(1) of the Law of Ukraine 'On the Judiciary of Ukraine' of 2002, military courts belonged to courts of general jurisdiction and administered justice in the Ukrainian Military Forces and other militarised divisions established by law.[30] The system of military courts had a three-tier structure: (i) the first instance courts were the garrison courts; (ii) the appellate courts were the regional appellate courts; and (iii) the Military Judicial Panel performed in the Supreme Court of Ukraine.

Military courts considered the following categories of case:

- criminal proceedings of all crimes committed by officers of the Ukrainian Military Forces, the Border Troops, Security Service of Ukraine and militarised divisions created by the Parliament of Ukraine and the President of Ukraine, and also conscripts during their military training;
- all criminal cases involving espionage;
- crimes against the statutory order of service, committed by persons in charge of correctional and labour institutions;
- cases of crimes committed by certain categories of military personnel defined by the legislation of Ukraine;

[30] Law of Ukraine No 3018-III on the Judiciary of Ukraine (2002).

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- cases of administrative offences committed by military officers and other service personnel;
- cases of complaints by military service personnel against illegal actions of military officials and the military administration;
- claims for the protection of honour and dignity, the parties to which are military personnel or military organisations;
- other matters related to the protection of the rights and freedoms of military officers and other personnel and other citizens, when the rights and legitimate interests of military units, institutions and organisations are involved.[31]

Ukraine abolished military courts following the Decree of the President of Ukraine in 2010.[32] This decision was based on the view that military courts were expensive, inappropriate for a peaceful state, and violated the principle of judicial independence because of their links to the military command. The Venice Commission welcomed this decision as a departure from the Soviet legal heritage.[33] However, the absence of a long-term strategy to preserve military legal expertise or replace these courts with specialised civilian mechanisms has left Ukraine unprepared for large-scale war.

In retrospect, the liquidation seems paradoxical: it took place under President Yanukovych, who later undermined Ukraine's sovereignty and fled to Russia during the Revolution of Dignity of 2013–14. Against the backdrop of growing Russian aggression, the annexation of Crimea in 2014 and the armed aggression in Donbas, Ukraine faced the consequences of dismantling the military justice infrastructure. Proof of this is the reduction in the number of the Armed Forces of Ukraine, which reached its peak under Yanukovych's presidency. In 2013, the staffing of the Ukrainian Military Forces was reduced to 166,000. Following the annexation of Crimea and part of Donbas in 2014, the number of officers of the Armed Forces was increased to 250,000 and multiplied to 1,000,000 in 2022 with the outbreak of full-scale aggression.[34]

The liquidation of the military courts was preceded by a lengthy expert discussion, during which 'convincing' arguments were put forward regarding the inexpediency of this special branch of the judiciary. It was argued that military courts were too expensive for the small country of Ukraine, which is peaceful and does not intend to start a war. Military judges were perceived as dependent on their military commanders because they had been in military service, performing judicial

[31] Pavlo Gorinov and Khrystyna Mereniuk, 'Military Law in Ukraine: Future Prospects for Development' (2022) 2(3) *Futurity Economics and Law* 47.

[32] Decree of the President of Ukraine No 900/2010, 'On Liquidation of the Military Appellate and First Instance Courts' (2010), https://zakon.rada.gov.ua/laws/show/900/2010#Text (in Ukrainian).

[33] 'Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe', adopted by the Venice Commission at its 82nd Plenary Session, Venice (Italy), 12–13 March 2010, https://www.coe.int/en/web/venice-commission/-/cdl-ad-2010-003-e.

[34] Anna Adamska-Gallant and others, 'Analytical Report on the Functioning of the Judicial System of Ukraine in Conditions of Full-Scale War and Martial Law', 17 July 2023, https://www.pravojustice.eu/storage/app/uploads/public/658/2cb/82b/6582cb82b2505437243322.pdf.

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functions.[35] The unequal status of military court judges compared with other judges was explained similarly. Even though military courts were organically integrated into the judiciary of Ukraine, experts proved that they violated the principles of its construction. Finally, an important argument for the liquidation of military courts in Ukraine was the trend of their reduction in democratic countries. Opponents of military justice considered the most 'convincing' argument against it was its perceived belonging to specific and extraordinary justice, which was prohibited in all European countries after the end of the Second World War to effectively combat tyranny.[36]

Re-establishing military courts in Ukraine should be addressed following democratic principles, international legal standards and national security needs. In this context, appealing to examples of authoritarian states or systems is not admissible. The United States, the United Kingdom and Canada have military jurisdiction. However, this jurisdiction is limited to offences committed by military personnel in connection with their service (for the US, all crimes committed by service members are subject to its military jurisdiction); these systems provide due process and fair trial guarantees. In these countries, military courts do not try civilian claims or international crimes. Moreover, in many Latin American countries, military courts were limited or abolished on the grounds of concerns relating to their accountability and human rights.

Having compared Central and Eastern Europe in terms of military justice, it is possible to affirm that Ukraine's decision was not in line with regional trends. For example, Poland maintained a separate system of military courts and military prosecutors operating under civilian judicial supervision. These courts retained jurisdiction over all criminal cases involving military personnel on active duty and can be expanded to war crimes during hostilities. Moreover, Croatia, shaped by its own military experience in the 1990s, decided to integrate military justice into the civilian judiciary, but introduced judicial specialisation and appointed judges trained in military law. Meanwhile, Estonia abolished military courts in 2010; however, it strengthened its civilian court system with specialised training for judges and prosecutors in military law, ensuring preparedness for wartime scenarios. These examples highlight the following important points for Ukraine:

- the abolition of military courts without a reliable institutional replacement undermines legal preparedness for wartime;
- a hybrid model either through specialised panels in civilian courts or permanent military courts with strict safeguards is typical in the region;
- maintaining institutional memory and developing legal expertise in peacetime military matters is a key lesson learnt from the experience of neighbours in the region.

[35] Vasyl Topchiy, 'Models of Military Court Systems in the Countries of the European Union: A Comparative Legal Analysis' (2016) 2 *Actual Problems of Domestic Jurisprudence* 170, http://apnl.dnu.in.ua/2_2016/44.pdf (in Ukrainian).

[36] Serhii Overchuk, 'Military Courts Are a Necessary Component of Military Justice in Ukraine' (2015) 1(11) *Journal of the National University 'Ostroh Academy' Law Series* 1, http://lj.oa.edu.ua/articles/2015/n1/15osvyvu.pdf (in Ukrainian).

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Ukraine, therefore, should choose its path based on the rule of law, human rights standards and the European democratic justice model.[37]

With regard to reform of Ukraine's judicial system, restoring military courts has become especially important during the full-scale aggression of the Russian Federation. On 27 February 2025, the Verkhovna Rada of Ukraine registered Draft Law No. 13048 'On Amendments to Certain Legislative Acts of Ukraine on the Restoration of Military Courts'.[38] According to the explanatory note to this draft law, its adoption arises from the need to conduct proper judicial review of criminal offences committed by military personnel and to ensure guarantees of justice under martial law. The draft law proposes restoring the system of military courts as specialised institutions within the structure of general jurisdiction to increase the efficiency of justice in cases related to military service.

In addition, in 2025 the Verkhovna Rada considered Draft Law No. 10301 'On Amendments to the Law of Ukraine "On the Judicial System and Status of Judges" to introduce Specialisation of Judges in Consideration of Military Criminal Offences, Criminal Offences Against Peace, Human Security and International Law and Order'.[39] This law proposed the introduction of the specialisation of judges in cases of military criminal offences. This approach is intended to strengthen the professional competence of judges in cases involving compliance with the laws and customs of war, crimes against military service, and similar cases. At the same time, an important element of the legislative changes is the restoration of the military police, which is intended to ensure control over discipline and order in the Armed Forces of Ukraine and investigate administrative and disciplinary offences in the military environment.

The proposed legislative initiatives demonstrate the government's desire to improve the regulation of military justice in wartime. The re-establishment of military courts, the creation of judicial specialisation, and the strengthening of institutional control over law and order in the Armed Forces of Ukraine are all responses to the need for fair, prompt and professional judicial review of cases involving military personnel.

The well-known criminal case of General Nazarov is an illustrative example of how inefficient the courts of general jurisdiction are in considering military crimes. In 2014, General Nazarov served as head of the Anti-Terrorist Operation (ATO) in the East of Ukraine, where active hostilities had already begun. In June 2021, separatists shot down a plane belonging to the Armed Forces of Ukraine over the city of Luhansk, which was not yet occupied, but battles with separatists were taking place near the city. The general was criminally accused of service negligence, which led to the downing of the plane with an anti-aircraft missile and the death of 49 members of its crew. The case was heard in three civilian courts of general jurisdiction because of

[37] ibid.

[38] Draft Law No 13048 'On Amendments to Certain Legislative Acts of Ukraine on the Restoration of Military Courts', 27 February 2025, https://itd.rada.gov.ua/billinfo/Bills/Card/55903 (in Ukrainian).

[39] Draft Law No 10301 'On Amendments to the Law of Ukraine "On the Judicial System and Status of Judges" to Introduce Specialisation of Judges in Consideration of Military Criminal Offences, Criminal Offences Against Peace, Human Security and International Law and Order', 29 November 2023, https://itd.rada.gov.ua/billinfo/Bills/Card/43315 (in Ukrainian).

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the absence of specialised military courts in Ukraine from 2014 to 2021. The Supreme Court eventually declared Nazarov to be innocent after two guilty verdicts from the first instance and appellate courts.[40]

This case is discussed in the expert community, but it cannot indicate the systemic inefficiency of general jurisdiction courts in military cases. Rather, it reveals certain challenges, such as the excessive length of proceedings, the complexity of legal assessment of military decisions made in combat conditions, and the need to work with classified materials. Before Russia's full-scale invasion in 2022, Ukrainian society did not hold a consistently high level of trust in the Armed Forces, and the prestige of military service was relatively low.[41] Despite the marked increase in trust since the start of hostilities, case law may have influenced the institutional perceptions of military personnel. In jurisdictions where military legal systems are more pronounced, defendants may lack a comprehensive understanding of the particularities of their professional undertakings and the esteem demonstrated by tribunals. Court statistics prove these conclusions. During the period from 2014 to March 2023, 58 indictments were brought before the courts on charges of violating the laws and customs of war, 47 of them (81%) in 2022.[42] Therefore, the real trial of wartime crimes began only after the start of the full-scale aggression, even though the invasion of Eastern Ukraine took place eight years earlier.

Hence, the historical evolution of military justice in Ukraine demonstrates that the dismantling of specialised institutions without preserving capacity and continuity leads to long-term vulnerability. The proposed legislative initiatives, in particular Draft Laws 13048 and 10301, do not simply reflect the wartime response but rather indicate the government's intention to embark on a broader, long-term structural reform of the judiciary. By aiming to re-establish the military courts as permanent specialised institutions within the general system of courts of general jurisdiction and introduce military specialisation for judges, the aim of these reforms should address the immediate needs of justice during warfare and institutionalise military legal expertise within the national judiciary.

This approach aligns with regional practice in Central and Eastern Europe, where countries such as Poland and Croatia integrated military jurisdiction into the civilian judicial systems either through parallel structures or integrated specialisation. In this context, Ukraine's reforms should not be seen as a temporary wartime adjustment, but rather as a step towards building a sustainable military justice system capable of functioning in both wartime and peacetime. Therefore, future reforms should be based not only on Western models but also on regional experiences rooted in similar legal cultures and security concerns.

[40] Yuliia Ratsybarska, 'The Case of the Downed Il-76: The Supreme Court Found General Nazarov Innocent', *Radio Svoboda*, 21 May 2021, https://www.radiosvoboda.org/a/verhovnyi-sud-vypravdav-generala-nazarova/31267146.html (in Ukrainian).

[41] Anton Hrushetskyi, 'Dynamics of Trust in Social Institutions in 2021-2022', Kyiv International Institute of Sociology, January 2023, https://kiis.com.ua/?lang=eng&cat=reports&id=1174&page=1.

[42] United Nations, 'Report on the Human Rights Situation in Ukraine: 1 February – 31 July 2022', 27 September 2022, https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2022/10/report/auto-draft/ReportUkraine.pdf.

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4.2. Comparative legal overview

The European Court of Human Rights (ECtHR) does not assess the general legitimacy of military courts as state institutions. Instead, it assesses on a case-by-case basis whether the activities of such courts comply with the requirements of Article 6 of the ECHR concerning the right to a fair, independent and impartial trial. In particular, in the case of *Findlay v United Kingdom*[43] the Court found a violation of the right to a fair trial resulting from the excessive influence of the executive branch on the composition of the military court. In *Cooper v United Kingdom*[44] and *Grieves v United Kingdom*[45] the Court found a lack of due process guarantees with regard to the participation of commanders in disciplinary proceedings. These cases led to significant reforms in the UK military justice system. Thus, the Court's position is not directly contradictory; however, it creates uncertainty as to the permissible limits of the jurisdiction of military courts, especially in peacetime or situations involving civilians. At the same time, the general logic of the ECtHR case law is that military courts can comply with the Convention only if they offer the same procedural guarantees as courts of general jurisdiction.

Based on its case law, the ECtHR developed a set of indicators used to assess whether a military court meets the standards of the Convention. Such criteria include (i) the procedure for appointing judges of military courts; (ii) the terms of stay of military judges in their posts; (iii) instruments to ensure the discipline of military judges; (iv) the availability of effective guarantees against external pressure on military courts; (v) the demonstrated features of the independence and impartiality of such judges.[46]

The EU Member States strive to achieve these standards and implement them in their systems.[47] Most of the constitutions of European countries prohibit the creation of extraordinary ad hoc tribunals to consider court cases without observing the guarantees of a fair public trial enshrined in the judicial precedents of the ECtHR. In its memorandum 'Justice in Military Courts', the Steering Committee for Human Rights of the Council of Europe noted that, in many Member States, it has been a long-standing tradition for the function of courts that are fully or partially staffed by military personnel to deliver justice over members of the military forces. The ECtHR has clarified that a military court could, in principle, be an 'independent and impartial court' for the purposes of Article 6(1) of the ECHR.[48]

Researchers claim that in Europe war is understood to be an exception to the norm of peace, a situation for which the normal mechanisms of law and justice are not prepared to work.[49] Special military tribunals can be established in times

[43] ECtHR, *Findlay v United Kingdom*, App no 22107/93, 25 February 1997.

[44] ECtHR, *Cooper v United Kingdom*, App no 48843/99, 16 December 2003.

[45] ECtHR, *Grieves v United Kingdom*, App no 57067/00, 16 December 2003.

[46] Overchuk (n 36) 1.

[47] Daniela Cotelea and others, 'The Role of Military Courts Across Europe: A Comparative Understanding of Military Justice Systems', Finabel/European Army Interoperability Center, May 2021, 26, https://finabel.org/wp-content/uploads/2021/06/20.-The-role-of-Military-Courts-across-Europ.pdf.

[48] Anastasiia Volodenkova and others, 'Military Justice and Protection of the Rights of Military Personnel: Review of International Experience and Trends in Ukraine', Pryncyp, 2023, https://www.pryncyp.org/wp-content/uploads/2024/03/military-justice_online.pdf.

[49] ibid.

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of emergency, armed conflicts or martial law. In many countries, military courts are part of the judicial system, but they are not courts of law as they have limited special jurisdiction, covering only criminal offences committed by military personnel. According to Overchuk,[50] military courts can be compatible with international standards only if their activities are limited and they meet the requirements of independence, impartiality and fair trial. The structure, composition and procedural guarantees of military courts vary considerably from jurisdiction to jurisdiction. In some countries judges are commissioned officers, while in others they are civilian lawyers temporarily assigned to a military court. This diversity results from differences in the constitutional tradition, the model of civil–military relations, and the legal culture of the states.

There are 13 states in Europe in which military courts have been operating: Great Britain, Belgium, Bulgaria, Greece, Spain, Italy, Cyprus, Luxembourg, the Netherlands, Poland, Portugal, Türkiye, Hungary. Although the French Republic abolished military tribunals in the 1980s, it soon restored their functioning (albeit in a limited form).[51] Models of military justice in European countries vary significantly as a result of historical factors and the specifics of the relevant constitutional system. In general, the following three main approaches can be distinguished:

1. *Military courts that function permanently in both peacetime and wartime (such as Great Britain, Spain, Italy, Slovakia, Ukraine until 2010).*[52]

An example can be found in the case of *Morris v United Kingdom*, which influenced the structure of military justice in the UK.[53] This was a key decision of the ECtHR, which recognised violations of principles of fair trial in military tribunals. The plaintiff, who had fled from the army because of bullying by senior officers, was convicted by a tribunal in which most of the judges were military officers with no legal education and were dependent on the army hierarchy. The ECtHR ruled that such a court did not meet the requirements of independence and impartiality (Article 6 of the ECHR). Following this decision, the UK authorities made major changes to the military justice system to ensure that it complied with the standards of the Convention. The Armed Forces Act 2006 formed the basis of these reforms, which completely overhauled the old system of military tribunals. Cases are now heard by the Court Martial, with the participation of professional judges appointed by an independent panel of the Judge Advocate General. This eliminated the influence of the command on court decisions as previously the tribunals were composed of officers who were subordinate to the army hierarchy. Moreover, the right of appeal to the civilian Martial Appeal Court was introduced, which guarantees a re-examination of cases by independent judges. In addition, the changes emphasised the need to uphold the rule of law even in the military, including in cases of desertion or disciplinary offences.

[50] Overchuk (n 36) 1.

[51] Yurii Bobrov, 'A Specialist's View of the Military Justice System', *Ukrinform*, 6 February 2017, https://www.ukrinform.ua/rubric-polytics/2169428-ci-budut-vijskovi-sudi-vinositi-virok-okupantam.html (in Ukrainian).

[52] Yurii Polyansky, 'Military Justice in Ukraine: Problematic Issues' (2019) 3 *Legal Bulletin* 5, http://dspace.onua.edu.ua/handle/11300/15784 (in Ukrainian).

[53] ECtHR, *Morris v United Kingdom*, App no 38784/97, 26 February 2002.

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These reforms showed how international decisions could evoke reforms to protect the rights of military personnel.

2. *Military courts of hybrid jurisdiction that function within the system of courts of general jurisdiction and include both military and civilian judges (such as the Netherlands, Hungary, Belgium, Croatia).*[54]

This type of court consists of specialised divisions (chambers, panels) that consider and decide military cases and operate permanently in courts of general jurisdiction. The definite advantage of this model of military justice is the continuity of its functioning and the high level of professionalism of the court composition, which is achieved by involving representatives of the military forces. The functional independence of the court must be preserved. According to the legal position of the ECtHR, if outside observers and the accused have no faith in the independence of military judges, who are officers of military forces and must carry out the orders of commanders, then such a court cannot be considered impartial.[55]

Among European countries with a hybrid military justice system, where military courts operate within the general judicial system but include both civilian and military judges, the Danish model is particularly effective. In contrast to systems where military tribunals operate separately, Denmark integrates military justice into the regular judicial system, while ensuring specialised expertise and judicial independence. This system combines the professional knowledge of civilian judges with specialised military expertise while avoiding conflicts of interest. The Danish model is fully compliant with ECHR standards regarding the need for military judges to be independent of command influence. In contrast to Türkiye, where judges were effectively dependent on the army hierarchy, the Danish system ensures that military judges are not perceived as a tool of the armed forces. In addition, the transparency of the process and the existence of a full right of appeal increase the credibility of the system. Although countries such as the Netherlands and Belgium also use hybrid models, Denmark demonstrates the most balanced approach. In Belgium, for example, military courts operate under civilian courts, but their independence is sometimes questioned because of the possible influence of the military command. In Denmark, this problem is resolved by a clear separation between judicial and command functions.[56]

The Danish system avoids potential conflicts of interest by ensuring a clear institutional and functional separation between command structures and judicial proceedings. Judges are appointed and cases are assigned by an independent judiciary, rather than the Ministry of Defence. Meanwhile, cases of a military nature are subject to the same appeal procedures as civilian cases. This structure ensures that parties have access to the full right of appeal and that military justice is administered in accordance with the procedural safeguards of the general judicial system. In addition, Danish legislation emphasises transparency through public hearings,

[54] Polyanski (n 52) 6.

[55] ECtHR, *Şener v Turkey*, App no 26680/95, 18 July 2000.

[56] Danish Ministry of Defence, 'The Danish Military Justice System', August 2025, https://www.fauk.dk/globalassets/fauk/dokumenter/engelsk/-the-danish-military-justice-system-.pdf.

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publication of decisions and ministerial oversight mechanisms, which increases accountability and public trust.

(3) *Military courts that operate only in wartime and on the territory of military bases abroad (such as France, Germany, Portugal, the Czech Republic).*[57]

In Finland, for instance,[58]

> Military procedures are heard by ordinary tribunals in peaceful times. However, a special procedure is planned in times of war. Considering the good administration of justice and under the condition of an attack on a territory of the state, an ad hoc martial court can be instituted to afford the work that the classic tribunal cannot do anymore.

In France, the military tribunals function exclusively during the martial period. There are 'two types of courts that operate once the time of war has been declared: Territorial Military Courts of Justice of the Armed Forces and the High Court of Armed Forces'.[59] During the martial period no other courts except for the military are authorised to hear cases involving military officers or other service personnel.

In the Ukrainian context, full-scale armed aggression increases the burden on the law enforcement and judicial systems in terms of investigating and reviewing war crimes, crimes against military service, violations of discipline and other offences in the Armed Forces. At the same time, as a result of the absence of military courts since 2010, civilian courts consider cases related to military service without the appropriate professional training. The Ukrainian experience demonstrated the fallacy of the dissolution of the military courts, as evidenced by the overburdening of the conventional judicial system in 2022 with a substantial number of cases involving military affairs. Following the outbreak of the full-scale war in 2022, Ukraine's judicial system witnessed a considerable increase in its workload, attributable largely to a substantial surge in cases involving war crimes and crimes of aggression.[60]

According to the Supreme Court of Ukraine, in 2022 the courts of first instance received about 1,300 criminal proceedings for high treason, more than 1,800 for collaboration, and 850 for justifying Russia's armed aggression against Ukraine. According to the Office of the Prosecutor General, as at 11 December 2023, more than 115,894 such cases were registered. In addition, 6,532 servicemen were convicted in 2024 of various criminal offences, which is 22.3% more than in the previous year.[61] This data indicates a significant increase in the workload of the Ukrainian judicial system in cases related to war crimes, which emphasises the need to adapt judicial mechanisms to the new challenges of wartime.

[57] Polyanski (n 52) 6.

[58] Cotelea and others (n 47) 26.

[59] Edith Palmer, *France: Military Justice System* (The Law Library of Congress, Global Legal Research Center, 2013).

[60] Ukrainian Helsinki Human Rights Union, 'Monitoring of Ukrainian War Crimes Trials: Project Results', 12 December 2023, https://www.helsinki.org.ua/articles/monitorynh-sudovykh-provadzhen-ukrainy-shchodo-voiennykh-zlochyniv-rezultaty-proiektu/ (in Ukrainian).

[61] Supreme Court, 'Justice in Wartime: The Supreme Court Holds a Leadership Briefing', Ukrainian Judiciary, 7 July 2023, https://court.gov.ua/eng/supreme/pres-centr/news/1448134/?utm_source.

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While the ECtHR has considered several cases concerning military courts in Ukraine (such as *Mikhno v Ukraine*[62] and *Atamaniuk and Others v Ukraine*[63]) the decisions have been context-specific and have not confirmed systemic compliance or violations. However, in the case of *Miroshnyk v Ukraine*,[64] the Court established clearly that the Military Court of Appeal did not meet the standards of independence and impartiality set out in Article 6 of the Convention. The case concerned a military officer who challenged the objectivity of his trial on the ground of the close institutional and hierarchical links between the judges and the military command. The Court noted that military judges had not demonstrated sufficient institutional independence and identified a structural flaw in the Ukrainian military justice system at the time. Therefore, while the ECtHR does not prohibit the existence of military courts, it has consistently held that any military justice mechanism must offer the same level of procedural guarantees as in civilian courts. These include independence from military command, impartiality and full access to appeal. Hence, future reforms in Ukraine should be carefully designed to meet these conditions, ensure compliance with international standards, and build confidence in the justice system for military personnel and wartime crimes.

4.3. Perspective for Ukraine

The armed aggression of the Russian Federation against Ukraine has created unprecedented challenges for the functioning of the national judicial system. The destruction of infrastructure, the temporary occupation of some territories, risks to the lives of judges and litigants, and the growing number of cases related to war crimes and collaboration have stipulated a review of approaches to the administration of justice in times of war. In this context, the question arises as to whether it is advisable to restore military courts as one of the possible solutions to ensure specialised, effective and fair consideration of cases arising from the armed conflict.

4.3.1. Legal restrictions and challenges in wartime

The creation of extraordinary and special courts is prohibited by Article 124(6) of the Constitution of Ukraine. According to Article 10(1) of the Law of Ukraine 'On the Legal Regime of Martial Law',[65] during the period of martial law, the powers of courts cannot be terminated. Article 12(2) of the same Law provides for the continuity of judicial authority during the martial law period and the prohibition on limiting the powers of courts, agencies and institutions of the justice system. Such courts, agencies and institutions must exercise their powers exclusively within the scope of authority stipulated by the Constitution of Ukraine and the laws of Ukraine, which excludes the option of using abbreviated, distorted or limited court procedures. The real problem for the judicial system has become the demand for complete functioning, which is hindered by security threats such as air strikes, shelling of

[62] ECtHR, *Mikhno v Ukraine*, App no 32514/12, 26 January 2016.

[63] ECtHR, *Svitlana Atamanyuk and Others v Ukraine*, App nos 36314/06, 36285/06, 36290/06 and 36311/06, 12 October 2016.

[64] ECtHR, *Miroshnik v Ukraine*, App no 75804/01, 27 November 2008.

[65] Law of Ukraine 'On the Legal Regime of the Martial Law' (2015).

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civilian infrastructure from the territory of the Russian Federation, destruction of court premises, and large-scale enemy cyber-attacks aimed at obstructing the work of state authorities.

The legal prohibition on restricting the activities of courts during war faces harsh reality when courts lose the ability to administer justice because of the constant shelling or temporary occupation of territories. According to the Supreme Court,[66] by 2023 about 20% of courts ceased to operate as a result of hostilities or occupation and could resume their activities only after the territories ceased to be occupied. In some cases, it was impossible to remove court case files, which led to their loss or destruction during hostilities or looting of court premises.

The international community, in particular the International Legal Assistance Consortium,[67] also notes the devastating impact of armed aggression on the infrastructure of the judiciary and its human resources, which complicates the restoration of justice in the frontline and de-occupied areas. Although there is limited public data on the fact of judges defecting to the aggressor state, these risks are recognised in expert reviews and are subject to review by the relevant authorities. In frontline regions such as Kharkiv, Kherson and Zaporizhzhia, judges are forced to work under constant shelling and a real threat to their lives. Despite the urgent need for safe and flexible forms of justice, Ukrainian procedural law does not provide an effective mechanism for remote consideration of cases in criminal or administrative proceedings during martial law. While the courts in the rear regions are functioning under normal conditions except for frequent air raids, the judicial system on the front lines remains vulnerable. In this regard, the introduction of a clear mechanism for remote justice would ensure the continuity of legal proceedings while maintaining the safety of judges, parties and participants in the process.

According to the Council of Judges of Ukraine, in 2023 there were 587 courts that administered justice in Ukraine. Eighty-seven courts in the judicial system did not, and still do not function because of their location in territories with active hostilities or are temporarily occupied by Russia. Another 84 courts have not administered justice since 2014 – these are courts in Crimea, and in the occupied territories of Donetsk and Luhansk regions.[68] Given these security features, the process of delivering justice and its efficiency vary significantly depending on the proximity of the area to the front line.

4.3.2. Consideration and resolution of war-related cases

The criminal legislation of Ukraine does not contain a complete list of war crimes defined by international law, in particular by the Rome Statute of the International Criminal Court (ICC). Although Ukraine recognised the jurisdiction of the ICC,

[66] Supreme Court (n 61).

[67] William D Meyer, 'Under Assault: A Status Report on the Ukrainian Justice System in Wartime', International Legal Assistance Consortium Rule of Law Report, 2023, https://ilacnet.org/publications/under-assault-a-status-report-on-the-ukrainian-justice-system-in-wartime.

[68] Viktoriia Matola, 'About the Work of Courts during the War, the Competition for the Supreme Court of Appeals, Cases related to War Crimes and Judges at the Frontline', *Suspilne Novyny*, 5 May 2023, https://suspilne.media/466199-golova-radi-suddiv-pro-robotu-sudiv-pid-cas-vijni-konkurs-do-vkks-spravi-sodo-voennih-zlociniv-ta-suddiv-na-fronti/ (in Ukrainian).

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national legislation does not cover all types of war crime, crimes against humanity and genocide as provided for in Article 8 of the Statute. At the same time, in the US, war crimes are not always codified in the form of an exhaustive list; they are often qualified under general military law or customary international law. This demonstrates the systemic difficulty of adapting international standards to national legislation, which is not exclusive to Ukraine. Case law indicates that more than 80% of court verdicts are convictions of collaborators for war propaganda, as well as public justification of Russian aggression in various forms.[69]

Under the Criminal Code of Ukraine, criminal prosecution of Russian military personnel for crimes such as waging an illegal aggressive war, violation of the laws and customs of war, ill-treatment of prisoners of war and violence against civilians is complicated for several objective and systemic reasons. First and foremost, there are technical and procedural difficulties in collecting evidence in areas of active hostilities. Investigators often do not have safe access to the crime scene, which may be occupied or under constant shelling. There are problems with maintaining the proper condition of evidence, conducting forensic examinations, establishing a chain of custody, and obtaining testimony from witnesses who have been traumatised or forced to evacuate. A further problem is that the suspects may be physically absent, being in the occupied territories or the Russian Federation; as a result, it is impossible to detain, interrogate and bring them to trial. Although in some cases Ukraine issues arrest warrants and hold trials *in absentia*, enforcement and international cooperation remain limited as a result of the lack of extradition agreements and Russian disregard for Ukraine's jurisdiction.

Another significant issue is the low level of coordination between law enforcement agencies and the Armed Forces of Ukraine. Investigators often depend on the military for reporting incidents, access to the site and identification of witnesses, but there is no unified protocol for documenting war crimes on the battlefield. This leads to gaps and delays in the transfer of materials necessary for criminal proceedings. Overcoming these challenges requires both legislative changes (in particular, regarding the procedural status of evidence collected in combat) and organisational reforms, such as the creation of joint investigative teams of military and civilian representatives, the introduction of standards for recording violations, and the use of modern digital tools for storing and sharing evidence.

On 14 April 2022, the Civil Cassation Court of the Supreme Court gave a ruling in Case No. 308/9708/19, which caused a revolutionary strike in the judicial and legal system of Ukraine. The Court, considering a lawsuit against the Russian Federation for compensation for damage caused to an individual by actions of the aggressor country, declared it a legitimate right to ignore the immunity of this country. In justifying its position, the Supreme Court noted that Russia does not have judicial immunity because (i) maintaining the jurisdictional immunity of Russia will deprive the plaintiff of effective access to the court, which is incompatible with the provisions in Article 6(1) of the ECHR; (ii) Russia's judicial immunity does not apply under customary international law;[70] (iii) maintaining Russian immunity is

[69] Kozmenko and others (n 22) 2.

[70] Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force), 44 ILM 803.

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incompatible with Ukraine's international legal obligations of combating terrorism; (iv) the judicial immunity of Russia is not applicable because Russia had broken the state sovereignty of Ukraine.[71]

In contrast to the general rule of absolute immunity of the state, which is in force in Ukraine, the concept of limited immunity provides for the intervention of the courts of the state into the jurisdiction of the courts of another state, if exceptional circumstances require this, and the foreign state acts not as a public institution, but as a private person. In the ECtHR decision in *Alicija Cudak v Lithuania* of 23 March 2010,[72] the establishment of customary norms in matters of state immunity was recognised and the Court emphasised that the limitation of state immunity must correspond to the legitimate purpose and be proportional to it.[73] A similar approach is enshrined in the UN Convention on Jurisdictional Immunities of States and Their Property (2004).

Ukrainian researchers Adamska-Gallant, Brych, Senatorova, Sribniak and Stetsyk (2023) conclude:[74]

> Ukrainian courts require appropriate legal tools and methodologies for handling war crimes cases. Respecting the rights of victims and the accused is essential. Categorizing war crimes and standardizing prosecutorial methodologies in each category should be addressed at the prosecutorial level.

Agreeing with the stated theses, we consider it expedient to emphasise that, in addition to overcoming the negative effects of the war, the judicial system of Ukraine must also ensure its sustainable functioning. The level of protection of the individual's rights in cases not related to war must be maintained at an appropriate level. The priority is to protect human rights in a fully fledged trial that is not extraordinary or abbreviated. Otherwise, the legal system of Ukraine will begin to lose the foundations of its legitimacy, and objectionable restrictions on access to fair justice will lead to inevitable negative consequences for ordinary citizens.

With regard to simplified court procedures, they are provided for by national legislation except in war-related cases. For instance, cases of minor complexity in civil proceedings are processed in simplified legal proceedings, when the parties do not participate in trials, and the court considers the case based on evidence and the demands submitted by the parties in writing (Article 274 of the Civil Procedural Code).[75] Similar procedures are envisaged by the Commercial Procedural Code and the Administrative Procedural Code.

[71] Anna Vlasenko and Illia Ivanusa, 'Sovereign Immunity of the State: What Is the Opinion of the Supreme Court and the World?', *Yurydychna Gazeta*, 2023, https://www.yur-gazeta.com/publications/practice/sudova-praktika/suverenniy-imunitet-derzhavi-yaka-dumka-verhovnogo-sudu-i-svitu.html (in Ukrainian).

[72] ECtHR, *Alicija Cudak v Lithuania*, App no 77265/12, 12 March 2019.

[73] ibid 66.

[74] Anna Adamska-Gallant and others, 'Analytical Report on the Functioning of the Judicial System of Ukraine in Conditions of Full-Scale War and Martial Law', 26 May 2023, https://www.pravojustice.eu/storage/app/uploads/public/658/2cb/82b/6582cb82b2505437243322.pdf.

[75] Civil Procedural Code of Ukraine (2004).

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The Criminal Procedural Code of Ukraine of 2022 introduced special procedures for investigation and judicial hearing of criminal proceedings related to war.[76] This simplified procedure allows the criminal prosecution of collaborators and Russian aggressors in their physical absence (*in absentia*) when they are put on the international wanted list or are hiding in the temporarily occupied territory of Russia. According to the new amendments, there is no direct prohibition in the law on the application of this mechanism to the Ukrainian military. Theoretically, this legal conflict can be applied to the Ukrainian military if they have committed treason, desertion or other military crimes. In practice, to avoid political consequences, the mechanism will be applied to Ukrainian defenders cautiously, in exceptional cases only. It is worth noting that the purpose of the law is to punish the enemy, so the courts may avoid such an interpretation.

However, implementation of this procedure was aimed at ensuring the minimum package of procedural guarantees of fair trial provided for by Article 6 of the ECHR. The Criminal Cassation Court of the Supreme Court of Ukraine,[77] in its decision of 19 July 2022, emphasised:[78]

> In the course of consideration of cases in special court proceedings (in absentia), the court of first instance must undertake all necessary measures to help the defender exercise his procedural rights, provide the parties with equal conditions for exercise of their rights, including reasonable opportunities to present the case in such conditions, that do not place any party at a disadvantage relative to another.

In November 2023, the European Commission highly praised the effective efforts of Ukraine in ensuring the stable functioning of the judicial system and mechanisms for the protection of individuals' rights in extraordinary circumstances: 'Despite Russia's full-scale invasion in February 2022 and its brutal war of aggression, Ukraine has continued to progress on democratic and rule of law reforms'. Despite the war-related funding and staffing challenges, most courts in Ukraine maintained 100% or even higher clearance rates in 2022.[79]

Court statistics testify to Ukraine's commitment to establishing the priority of individuals' rights. After a sufficient reduction in the number of court claims in 2022, the courts of Ukraine received more than 4 million lawsuits and cases in 2023, which is equal to the pre-war figure.[80] When considering complaints during the war, the courts consider the extraordinary circumstances in which the rights of citizens are exercised and interpret the norms of laws in favour of the individual. For example, in the resolution dated 13 July 2023, in Case No. 560/10129/22, the

[76] Criminal Procedural Code of Ukraine (2012).

[77] Criminal Cassation Court of the Supreme Court of Ukraine, Resolution in Case No 727/13085/18, 19 July 2022, https://reyestr.court.gov.ua/Review/105359481 (in Ukrainian).

[78] ibid 70.

[79] European Commission, Staff Working Document, 'Ukraine 2023 Report: Communication on EU Enlargement Policy', 8 November 2023, SWD(2023) 699 final, https://op.europa.eu/en/publication-detail/-/publication/a0f3eaa6-7eee-11ee-99ba-01aa75ed71a1/language-en.

[80] Kravchenko (n 19).

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Administrative Cassation Court of the Supreme Court of Ukraine,[81] in renewing the term of submitting the appeal to the court, noted:[82]

> The main component of the right to fair trial is access to the court, regarding that a person must be provided with the possibility to go to court to resolve a certain issue, and that there should be no legal or practical obstacles for exercising this right. Given the introduction of martial law in Ukraine, the plaintiff's refusal to appeal against the court decision is unlawful. The Supreme Court proclaimed that in the current situation, the appellate court should have regarded the results of the armed aggression of Russia against Ukraine (including the blackouts in the winter period, which greatly complicated the work of advocates and state institutions, constant aerial alarms and rocket attacks) and should have renewed the deadline for filing the appeal.

The Constitutional Court of Ukraine, in its decision of 2 October 2022, No. 7-r (II)/2022, defended the social rights of the military, stating:[83]

> The content of Article 17 of the Constitution of Ukraine in its interrelation with Articles 46 and 65 of the Constitution of Ukraine implies the constitutional obligation of the government to provide a special legal status to citizens of Ukraine serving in the Armed Forces of Ukraine and other military organizations, their family members, as well as persons who are armed to defend the sovereignty, integrity and inviolability of Ukraine during the aggression of the Russian Federation against Ukraine, which began in February 2014, with the provision of high-level social guarantees in line with this status.

4.3.3. The feasibility of restoring the military courts

The restored military courts should be staffed by judges with experience in the Armed Forces of Ukraine and a proper understanding of the specifics of combat operations, the internal structure of the army and military discipline. However, this solution requires not only political will, but also proper regulation of qualification requirements for military judges. At the same time, an alternative approach involves strengthening the existing civilian judicial system, including providing additional resources, institutional support and training for judges, prosecutors and investigators who handle war-related cases. This model would avoid structural reform and focus on specialisation within existing courts (such as through specialised chambers or panels), improved cooperation between civilian and military institutions, and enhanced technical and logistical capacities. While this can be a more pragmatic

[81] Administrative Cassation Court of the Supreme Court of Ukraine, Case No 560/10129/22 (2023), https://verdictum.ligazakon.net/document/112184726 (in Ukrainian).

[82] ibid.

[83] Constitutional Court of Ukraine, Decision No 7-p(II)/2022, On the Constitutional Complaints of Zhydenko Volodymyr Viktorovych and Petrenko Viktor Oleksiiovych regarding Compliance with the Constitution of Ukraine (Constitutionality) of the Provisions of Article 2 of the Law of Ukraine 'On Measures for Legislative Support of the Reform of the Pension System', No. 3668-VI (regarding social guarantees for defenders of Ukraine), 12 October 2022, https://zakon.rada.gov.ua/laws/show/v007p710-22#Text (in Ukrainian).

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solution in the short term, it may also pose long-term challenges in terms of institutional expertise, consistency of practice, and public confidence in the fairness and professionalism of war-related trials.

According to European standards (including the ECtHR case law), military courts cannot be deprived of the following basic guarantees of judicial independence:

- appointment of judges based on clear and public criteria;
- procedural independence from the military command;
- guarantees of judges' security of tenure;
- functional separation of judicial powers from disciplinary or administrative structures in the Armed Forces of Ukraine.

These provisions should be enshrined in legislation on the judiciary, taking into account Article 6 of the Convention. Based on a comparative analysis, the most suitable model for Ukraine is the Danish hybrid military justice system, in which military justice functions as a specialised component of the general judiciary, operating continuously in both peacetime and wartime. In this system, judges are predominantly civilian lawyers with relevant experience, sometimes supported by military assessors, but not subordinate to the military hierarchy. Moreover, military prosecutors should remain part of the civilian prosecutorial structure with optional military specialisation (they are not uniformed military personnel). Their jurisdiction covers all criminal offences committed by military personnel, whether or not they are related to service. However, this jurisdiction does not extend to civilians except in exceptional circumstances, such as active combat zones or occupation. Such a system guarantees a full right of appeal to civilian appellate courts. Moreover, military courts do not operate independently of the general judiciary, which ensures better coherence and civilian oversight.

In the Ukrainian context, the proposed model could be adapted by establishing permanent military chambers within courts of general jurisdiction, in particular at the level of garrison and regional courts. Judges should be appointed to such chambers based on the results of an open public competition, with preference given to candidates with military service or relevant experience, though not as a prerequisite. Military prosecutors may remain within the structure of the Office of the Prosecutor General, with internal specialisation. A prerequisite for the functioning of such a model is the existence of a clear legal framework that would regulate both the substantive and personal jurisdiction of military chambers. Particular emphasis should be placed on cases involving war crimes, crimes against military service, serious offences committed by military personnel, and individual claims for compensation for damage caused under martial law. At the same time, the jurisdiction of military courts should not extend to civilians under normal circumstances, which is in line with the established practice of the ECtHR.

As the analysis shows, this option for overcoming the aftermath of the war would be an implementation of the concept of judicial specialisation, which is traditionally considered the best way to increase the level of competence of judges. The appointment of members of the Armed Forces of Ukraine as judges of military courts, based on open and fair competition, would increase the level of trust in the judiciary

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as, according to recent polls, citizens trust the military the most (support reaches 96%).[84] In addition, the re-establishment of military courts would have a long-term stabilising effect, as the experience of European countries (such as Croatia, Bosnia, Serbia, Kosovo) shows that courts consider war-related cases for decades after the war has ended.[85] The price that Ukraine pays in defending its sovereignty is so high that it is worth the significant financial and time commitment of state resources to create a subsystem of military courts headed by the High Military Specialised Court.

Thus, the re-establishment of military courts should be accompanied by a comprehensive personnel policy that includes specialised training, adaptation of veteran lawyers, competitive selection procedures, and adherence to the general principles of judicial independence. Without addressing these issues, even the most justified model risks losing public trust and fails to meet the standards of the rule of law. Furthermore, the re-establishment of military courts should not be based on copying the system, but on a reformed hybrid model with elements of civilian control, clear guarantees of independence, and specialised knowledge of military law. The majority would be civilian judges appointed through a standardised competitive selection process by the Council of Judges, with a minority of former military lawyers or veterans with legal education who passed the same competitive selection process. The prohibition of concurrent employment would be another important guarantee of independence – that is, military judges would not be able to be in active service.

A paradoxical conclusion from overcoming the consequences of armed conflicts in Europe is that the effectiveness of national judicial bodies in handling war crimes has proven to be higher than the effectiveness of hybrid tribunals and quasi-judicial reconciliation commissions. One reason for this is the personal motivation of judges and other officials of the state on whose territory hostilities were conducted to achieve the result of fair retribution from such procedural activities, which outweighs the motivation of foreign judges of hybrid tribunals. Therefore, it is the national justice system that will bear the entire burden of bringing Russian war criminals to justice for crimes committed on the sovereign territories of Ukraine. While recognising the enormous importance of international permanent and ad hoc war crimes tribunals, it is necessary to acknowledge the limitations of their resources and jurisdiction. Firstly, such tribunals usually operate outside the territory of the country in which the military conflict took place, so it is technically difficult to ensure the process of collecting and examining evidence in trials before international tribunals. Secondly, the jurisdiction of courts such as the ICC is limited to cases involving the military and political leadership of the aggressor country. Such tribunals are not organisationally capable of processing thousands of criminal

[84] Razumkov Center, 'Assessment of the Situation in the Country, Trust in Social Institutes, Politicians, Officials and Public Figures, Attitude to Elections, Belief in Victory', June 2024, https://razumkov.org.ua/napriamky/sotsiologichni-doslidzhennia/otsinka-sytuatsii-v-kraini-dovira-do-sotsialnykh-instytutiv-politykiv-posadovtsiv-ta-gromadskykh-diiachiv-stavlennia-do-vyboriv-vira-v-peremogu-cherven-2024r (in Ukrainian).

[85] Kozmenko and others (n 22) 2.

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proceedings against hundreds of aggressor combatants.[86] This is especially true for Ukraine, given the length of the front line, which is about 4,000 kilometres, and the enormous number of Russian soldiers who have invaded Ukraine.

It is worth mentioning that advocates should become active players in the mechanism of guaranteeing individual rights in martial law and overcoming its negative consequences. We agree with Vilchyk[87] as she proves the need for the existence of military advocates. Educational institutions in Ukraine should train specialised military lawyers. Such specialists should carry out their work directly in the units of the Armed Forces of Ukraine, providing advice to soldiers on the realisation of their rights and to commanders on complex issues of military law enforcement. Military advocates should play a key role in the military justice system of Ukraine and legislation should provide a mechanism for the work of lawyers in the structures of the Armed Forces, without requiring the elimination of the requirements for incompatibility of providing legal services with the performance of military duty.

The question of the extent to which military courts can be effective and objective in cases of war crimes committed by the Ukrainian military personnel and the enemy requires separate consideration. This dual perspective of judging 'ours' and 'others' creates several challenges with a legal and political dimension. Firstly, there is the risk of bias in military courts in cases against members of their army. In the context of an ongoing armed conflict, such courts may be subject to direct or indirect pressure from the military command or executive authorities, which contradicts the principles of independent justice.

Secondly, trials of cases involving enemy military personnel may be accompanied by accusations of selective justice or violations of international humanitarian standards. Such accusations can be avoided only by ensuring transparent prosecution procedures, access to defence counsel and impartial analysis of evidence by independent judges. The judicial interpretation of international public law norms and customs by national courts has enabled the creation of legal prerequisites for the consideration and satisfaction of claims by Ukrainians for compensation for property damage and moral harm caused by the actions of Russian aggressors in Ukraine. Between 2022 and 2023, the High Anti-Corruption Court of Ukraine adjudicated and managed over 30 lawsuits concerning the confiscation of assets of Russian citizens and corporations within the jurisdiction of Ukraine. These assets – encompassing mining enterprises, metallurgic facilities, banking institutions, corporate rights, real estate holdings and transportation infrastructure – were appropriated to accrue to state revenues.[88]

To overcome these risks, it is necessary to introduce a system of legal and institutional guarantees. This should include a clear delineation of the jurisdiction of military courts and civilian courts in cases involving international crimes, taking into account the powers of the Prosecutor General's Office of Ukraine and the potential role of specialised chambers of the court, the involvement of specialist judges

[86] Mykola Gnatovskyi and Arkadii Bushenko, 'Basic Research on the Application of Transitional Justice in Ukraine', Ukrainian Helsinki Human Rights Union, 2017, https://www.helsinki.org.ua/wp-content/uploads/2017/05/Tekst-monohrafiji-perehidne-pravosuddya.pdf (in Ukrainian).

[87] Tetyana Vilchyk, 'Advocacy of Ukraine in the Period of Martial Law and Restoration After the War: Problems of Legal Regulation of the Organization and Activities' (2022) 32 *Revista Jurídica Portucalense* 254.

[88] Kravchenko (n 19).

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with proven expertise in international humanitarian and criminal law in war crimes cases, the possibility of appeal to civilian courts, and the establishment of a system of judicial review. The existence of such guarantees is a key prerequisite for the legitimacy of military courts during hostilities, given the international cooperation with the ICC and public trust.

The subsystem of military courts should be complemented by specialised military criminal justice agencies. Since 2014, the structure of the Prosecutor's Offices has included specialised prosecutor's offices in the military and defence spheres, which manage criminal offences in the institutions of the Armed Forces of Ukraine and international and military crimes. Direct investigation of such offences is carried out by the Security Service of Ukraine and the State Bureau of Investigation, although all criminal justice agencies of Ukraine take part in the implementation of procedural actions in war-related cases. The Military Service of Law and Order has been functioning in the structure of the Armed Forces of Ukraine since 2002, ensuring compliance with law and discipline by military officers and employees. Considering the huge scale of the spread of the war and related to war crimes in Ukraine, we believe that every criminal justice agency should have internal specialist divisions that would take care of cases arising from military legal relations. This would be an effective way of strengthening their institutional capacity and would organically complement the integrated system of military justice along with the restored military courts and modern professional military lawyers.

5. Conclusions

The full-scale invasion of Ukraine by the Russian Federation in 2022 exposed significant vulnerabilities in the Ukrainian judicial system, which was ill-prepared for the extraordinary demands of wartime. These challenges encompassed the destruction and temporary closure of courts as a result of ongoing hostilities, an influx of war-related cases into the courts of general jurisdiction, procedural deficiencies in the prosecution of war crimes, and the absence of specialised legal mechanisms for addressing military legal relations. Notwithstanding these considerable challenges, Ukraine has succeeded in preserving the operational capacity of its judicial apparatus, thereby safeguarding individual rights and evidencing institutional fortitude within the context of martial law.

In this context, the re-establishment of military courts in Ukraine is not only a legal and historical necessity, but also a strategic imperative. Military courts, which were dissolved in 2010, formerly fulfilled a vital role in the adjudication of cases involving military personnel and national security. The restoration of these courts would facilitate more efficient adjudication of war crimes, military offences and compensation claims for war-affected civilians. Furthermore, this measure would assist in alleviating the substantial workload currently being experienced by civilian courts, which are inundated with a high volume of complex, war-related cases.

While international tribunals such as the ICC provide a symbolic manifestation of accountability for high-ranking political and military leadership figures within the aggressor state, it is the primary responsibility of the judicial system of Ukraine to deliver justice at the local level. However, the restoration of military courts must be undertaken in strict compliance with European human rights standards. This

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necessitates the establishment of safeguards to ensure judicial autonomy, transparent selection procedures for judges, a separation of military and judicial authorities, and the incorporation of civilian oversight mechanisms. The successful implementation of military courts in various European democracies, particularly hybrid models such as those observed in Denmark, offers invaluable examples that can be adapted by Ukraine.

Legislative initiatives to reinstate military courts and establish judicial specialisation are indicative of the government's acknowledgement of these requirements. Concurrently, the cultivation of a competent cadre of military legal professionals is imperative to ensure the safeguarding of individual rights within military structures. The involvement of military veterans who have received legal training within the judiciary, selected through open and competitive processes, has the potential to enhance public trust, particularly in the light of the societal esteem for the Armed Forces of Ukraine.

Ultimately, the re-establishment of military courts should not be regarded as a provisional wartime measure; rather, it should be regarded as a long-term investment in Ukraine's legal infrastructure and democratic consolidation. The adjudication of war-related crimes and damage can extend over several decades, as demonstrated by past European conflicts. By establishing a military justice system grounded in the rule of law, Ukraine demonstrates a profound dedication to upholding human rights, ensuring accountability, and safeguarding national sovereignty even in the most challenging circumstances.

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