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*Advocacy in Ukraine during martial law and post-war restoration conditions:  
legal organizational and operational issues*

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# Secção I

## Investigação Científica\*

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\* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review*.

## Advocacia da Ucrânia no período da lei marcial e restauração após a guerra: problemas de regulamentação legal da organização e atividades

### Advocacy in Ukraine during martial law and past-war restoration conditions: legal organizational and operational issues

Tetiana VILCHYK<sup>1</sup>

**RESUMO:** De acordo com normas geralmente reconhecidas, uma advocacia independente é uma condição necessária para o estabelecimento do Estado de direito e da democracia na sociedade, uma parte necessária do sistema de justiça. O direito à assistência jurídica não pode estar sujeito a quaisquer restrições no período da lei marcial. O objectivo da reforma pós-guerra é melhorar a organização e actividade da Ordem dos Advogados sob os melhores padrões internacionais, reforçar a protecção dos direitos e liberdades humanas e dos cidadãos, e a independência institucional da Ordem. O artigo faz uma breve análise da organização e actividades da Ordem dos Advogados ucraniana durante a condução de hostilidades no território da Ucrânia durante seis meses, mostra as acções reais da Ordem nessa altura, analisa as principais alterações na legislação, com base nas quais se tiram conclusões sobre a observância dos direitos dos advogados e o direito a assistência jurídica profissional durante a introdução da lei marcial na Ucrânia. O autor formulou propostas específicas destinadas a melhorar a organização e as actividades da Ordem dos Advogados, tanto no período moderno como no pós-guerra, no seguimento dos requisitos da integração europeia da Ucrânia.

**PALAVRAS-CHAVE:** advocacia durante a lei marcial na Ucrânia; protecção dos direitos e interesses legítimos dos cidadãos; assistência jurídica profissional; direitos humanos; agressão militar contra a Ucrânia.

**ABSTRACT:** According to generally recognized standards, an independent bar is a necessary condition for the establishment of the rule of law and democracy in society, a necessary part of the justice system. The right to legal aid cannot be subject to any restrictions in the martial law period. The objective of the post-war reform is to enhance the organization and activity of the Bar Association under the best international standards, strengthen the protection of human and citizen rights and freedoms, and the institutional independence of the Bar. The article makes a brief analysis of the organization and activities of the Ukrainian Bar Association during the conduct of hostilities in the territory of Ukraine for six months, shows the real actions of the Bar at that time, analyzes the main changes in legislation, based on which conclusions are drawn on the observance of advocates' rights and the right to professional legal assistance during the introduction of martial law in Ukraine. The author formulated specific proposals aimed at further improving the organization and activities of the Bar

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Association, both in the modern and post-war periods, following the requirements of Ukraine's European integration.

**KEYWORDS:** advocacy during martial law in Ukraine; protection of citizens' legitimate rights and interests; professional legal assistance; human rights, military aggression against Ukraine.

### Introductory Remarks

The purpose of our study is to draw attention of the public, the legal and scientific community, and colleagues to the features of Ukrainian Bar Association functioning under the martial law. We want to note that this publication will not be devoted to the scientific justification, argumentation, or scientific discussion. The reason for this is as follows. As scientists rightly point out, the conditions of war, as absolute and permanent destruction dimension, can hardly be attributed to the factors of the society development, although it is possible. Therefore, the vast majority of research is currently devoted to issues related to the analysis of legislative changes related to the introduction of martial law in Ukraine, in particular - criminal procedural law<sup>2</sup>, access to the legal profession<sup>3</sup>, his responsibility and other problems related to the legal regulation of the organization and activities of the advocacy institution<sup>4</sup>. However, current publications on the legal support problems for the organization of the work of the bar, the implementation of the constitutional human right to legal assistance, the observance of the advocates' rights, both now and during the renewal of the bar in the post-war period, are absent in wartime.

Our study is based on the chronological method, the method of analysis and synthesis, which gave us the appropriate arguments for drawing conclusions. We also used to statistics and empirical data based on our own scientific research and experience in the legal profession. The article systematically analyzed the laws adopted in Ukraine since the beginning of the war, as well as the norms of

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<sup>2</sup> Hlovyuk I.V., I., Drozdov O., Teteryatnik G., Fomina T., Rogalska V., Zavtur V. Special regime of pre-trial investigation, trial under martial law: scientific and practical commentary on Section IX-1 of the Criminal Procedure Code of Ukraine. Lviv-Odesa-Kharkiv, 2022. As of May 3, 2022. 58 p.

<sup>3</sup> Lidia Izovitova. The role of advocates during martial law in Ukraine cannot be exaggerated. [viewed date: 01 September 2022]. Available from: <https://advokatpost.com/rol-advokativ-u-zabezpechenni-prav-liudyny-pid-chas-voiennoho-stanu-v-ukraini-nemozhlyvo-perebilshyty-lidiia-izovitova-pid-chas-zasidannia-ssve/>

<sup>4</sup> Oleksiy Baranovskyi. Twice defenders. How Ukrainian advocates participate in the war. May 12, 2022. [viewed date: September 03, 2022]. Available from: <https://novynarnia.com/2022/05/12/dvichi-zahysnyky/?fbclid=IwAR12XI5KZbwaiUejvQnsIfPamtw0K9jNQ3V6djpbdtdBddj7tbXNGQ9aPRlo>

the current legislation of both Ukraine and international documents, decisions of the European Court of Human Rights, statistical data published by the Ukrainian National Bar Association (hereinafter - UNBA), decisions taken The Advocates Council of Ukraine (hereinafter ACU), as well as draft legislative acts that are under consideration by the Verkhovna Rada of Ukraine.

In the study of the cause-and-effect relationships of the war and its consequences for the activities of the legal profession, as well as the possibilities for the influence of the legal profession and advocates on the situation with the protection of the rights and legitimate interests of citizens, statistical, structural-logical, and analytical methods were used.

We hope that this publication will be useful for countries with a similar model of legal system that are threatened by military aggression, and the obvious need to develop and adopt legislation that ensures the organization and operation of human rights institutions, one of which is the institution of the bar.

Before proceeding directly to the topic of our work, let's pay attention to the circumstances faced by the judiciary in Ukraine during the period of martial law in Ukraine. Ukraine's justice is functioning according to the martial law rules. Several Ukrainian courts suspended their activities due to active hostilities and temporary occupation. Court hearings are adjourned, with the exception of those relating to preventive measures in criminal proceedings. In this regard, the legislator granted permission to change the territorial jurisdiction of the consideration of cases in such courts. In particular, the Chairman of the Supreme Court is empowered to change the territorial jurisdiction of cases. To date, territorial jurisdiction has been changed in more than 130 courts in Ukraine. At the same time, the courts in the territories liberated from occupation are starting to resume their work.<sup>5; 6</sup> It was also a great challenge for advocates and for all legal professions in Ukraine that the start of the military aggression coincided with one of the biggest judiciary institutional crises. The blocked work of the High Council of Justice led to the fact that the powers of this constitutional body were

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<sup>5</sup> The implementation of judicial proceedings in conditions of martial law. [viewed date: 04 September 2022]. Available from: [https://jurliga.ligazakon.net/news/211140\\_osoblivost-zdysnennya-sudochinstva-v-umovakh-vonnogo-stanu](https://jurliga.ligazakon.net/news/211140_osoblivost-zdysnennya-sudochinstva-v-umovakh-vonnogo-stanu)

<sup>6</sup> Justice in wartime: DSA report as of May 18, 2022. [viewed date: 04 September 2022]. Available from: <https://jur-gazeta.com/golovna/pravosuddya-v-umovah-viyni-zvit-dsa-stanom-na-18-travnja-2022-roku.html>

distributed among several other judiciary institutions. The consequences of justice authorities' uncoordinated actions in these difficult conditions were, in particular, the restriction of advocates' access to the Unified Register of Court Decisions.

The High Council of Justice activity was restored only in August 2022, and in June 2022 the access of advocates to the Unified Register of Court Decisions was restored.<sup>7</sup>

It should be noted that in recent years, in connection with the introduction of the so-called "Advocates monopoly", the number of Advocates in Ukraine has exceeded 60,000. Currently, 60,948 people are registered in the Unified Register of Advocates of Ukraine.<sup>8</sup>

### **1. Functions of the Bar of Ukraine**

The functions of advocates as persons' defenders and representatives during martial law arise from relevant restrictions that may be applied. That is, such functions of advocates directly depend on changes in the rights and obligations of citizens and other persons.

According to Article 20 of the Law of Ukraine "On the Legal Regime of Martial Law", the legal status and limitations of citizens' rights and freedoms and the rights and legal interests of legal entities under martial law conditions are determined in accordance with the Constitution of Ukraine and this Law. In any case, the rights and freedoms of a person and a citizen, provided for by the second part of Article 64 of the Constitution of Ukraine, namely, Articles 24 (equal constitutional rights), 25, 27, 28, 29, 40, 47, 51, 52, cannot be limited.

At the same time, Article 131-2 of the Constitution of Ukraine is of great importance for the advocates' activities, which stipulates that in order to provide professional legal assistance in Ukraine, there is a bar whose independence is guaranteed by the Constitution. The Constitution and the Law "On the Legal Regime of Martial Law" do not provide for any changes to the application of this Constitutional provision during martial law. Thus, in the conditions of the

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<sup>7</sup> General access to the unified register of court decisions has been restored. [viewed date: 01 September 2022]. Available <https://advokatpost.com/vidnovleno-zahalnyj-dostup-do-iedynoho-derzhavnoho-reiestru-sudovykh-rishen/>

<sup>8</sup> The unified register of advocates of Ukraine. [viewed date: 04 September 2022]. Available from: <https://eACU.unba.org.ua/>

introduction of martial law in Ukraine, everyone's constitutional right to professional legal assistance must be exercised without any restrictions, provided by the peculiarities of the law "On the legal regime of martial law". The right to legal aid is the possibility of an individual receiving legal (legal) services guaranteed by the Constitution of Ukraine. It is the function of providing professional legal assistance that is the main purpose of the bar, which determines its role in society. Other functions of the legal profession are characterized by the fact that they are of an auxiliary nature. Among them are such functions as rule-making, education, mediating, participation of the bar in the formation of judicial and prosecutorial governance bodies, functions, and others. In particular, the Bar Council of Ukraine is defined as the subject of the formation of the Ethical Council, which is formed for the purpose of assisting the bodies that elect (appoint) members of the High Council of Justice in establishing the compliance of a candidate for the position of a member of the Bar Council with the criteria of professional ethics and integrity.

It should be taken into account that in cases of martial law introduction, the state has the right to withdraw from certain international obligations in the field of ensuring human rights. In particular, in 1, 2 Art. 15 of the Convention on the Protection of Human Rights and Fundamental Freedoms provides that: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law."

A similar norm is contained in Art. 4 of the International Covenant on Civil and Political Rights. At the same time, the ECtHR adheres to the concept of proportionality of human rights' restriction to the purpose of such restriction in each specific case.<sup>9</sup>

## **2. Real actions of the legal profession under martial law in Ukraine**

The Ukrainian National Bar Association strongly opposes Ukraine and strongly condemns the military actions, as a result of which Ukrainian cities are

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<sup>9</sup> The right to a fair trial: the practice of the European Court of Human Rights. [viewed date: 04 September 2022]. Available from: [https://minjust.gov.ua/m/str\\_7474](https://minjust.gov.ua/m/str_7474)

burning, and people (including small children) are dying. Many advocates are mobilized to the Armed Forces of Ukraine and territorial defense formations and at the same time retain the status of an advocate with all professional rights and guarantees.

During the war, advocates effectively perform their professional duties, including on a pro bono basis, in particular, within the framework of the volunteer movement "Advocates for the Armed Forces of Ukraine", which is coordinated by the legal advisor to the Commander-in-Chief of the Armed Forces of Ukraine, lawyer Evgenia Ryabek "The issues that servicemen address are very diverse, including military contracts, payments, settlement of disputes with executive services and banks regarding loans, issues of social protection and treatment of servicemen, legal support for relatives of servicemen, issues of payments to relatives of the dead," the lawyer points out.<sup>10</sup>

Advocates can independently declare a note about providing pro bono services for military personnel to their profile in Unified Register of Advocates of Ukraine through a personal online cabinet. The new function was added based on the decision of the Bar Council of Ukraine dated April 29, 2022. Councils of regions provide free legal assistance to displaced persons, military personnel, and volunteers, working 24/7.

The Ukraine National Bar Association (hereinafter - UNBA) organized the activity of the Charitable Fund, created the Board of Trustees, which deals with the distribution of charitable aid to advocates and their families who need help. As the head of the secretariat of the National Bar Association of Ukraine notes, help is coming from lawyers all over the world, about \$300,000 of such aid has already been distributed, and support has been provided to more than 300 advocates in need.<sup>11</sup>

Stationary, on a rotating basis, advocates work for military administrations that deal with customs and accompanying clearance of humanitarian cargo. At

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<sup>10</sup> Oleksiy Baranovskyi. Twice defenders. How Ukrainian advocates participate in the war. May 12 2022 [viewed date: 04 September 2022]. Available from: <https://novynarnia.com/2022/05/12/dvichi-zahysnyky/?fbclid=IwAR12XI5KZbwaiUejvQnsIfPamtw0K9jNQ3V6djpbdtdBddj7tbXNGQ9aPRlo>

<sup>11</sup> NAAU created the Center for the Coordination of Volunteer Assistance of advocates to Military Personnel. [viewed date: 04 September 2022]. Available from: <https://novynarnia.com/2022/05/12/dvichi-zahysnyky/?fbclid=IwAR12XI5KZbwaiUejvQnsIfPamtw0K9jNQ3V6djpbdtdBddj7tbXNGQ9aPRlo>



the Ukraine National Bar Association, the Center for the Coordination of Voluntary Assistance to Servicemen was created, which was headed by the Head of the Committee on Military Law of the Ukrainian Academy of Sciences, Maria Ostrovska.<sup>12</sup>

A single national portal has been created to collect and process facts on human rights violations by the Russian Federation. Advocates of the free legal aid system, as well as lawyers, are involved in documenting war crimes. Working groups must document all the facts of these inhumane crimes for international courts, for example, the territorial defense unit received exclusive materials from the city of Bucha near Kyiv.

Military jurisprudence is another area in which “wartime” advocates are engaged. According to them, military legal specialties should be developed. There should be lawyers who work purely in matters of supporting the provision of the Armed Forces of Ukraine, lawyers who work as consultants to commanders (in particular, on issues of international humanitarian law), and military lawyers.

Taking into account the Geneva Conventions, which oblige states to protect people in wartime, the European Convention on Human Rights regarding the basic legal guarantees of behavior with people both in peacetime and in wartime, UNBA appealed to the Minister of Reintegration Iryna Vereshchuk and the Commissioner of the Supreme Human Rights Council with the initiative to involve advocates in the procedures for the exchange of prisoners of war to provide them with the necessary legal assistance, including representing their interests in courts<sup>13</sup>.

As of April 15, 2022, advocates’ self-governing bodies provided monetary assistance to the Armed Forces of Ukraine in the amount of over UAH 5 million.<sup>14</sup>

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<sup>12</sup> Oleksiy Baranovskyi. Twice defenders. How Ukrainian advocates participate in the war. May 12 2022 [viewed date: 04 September 2022]. Available from: <https://novynarnia.com/2022/05/12/dvichi-zahysnyky/?fbclid=IwAR12XI5KZbwaiUeivQnsIfPamtw0K9jNQ3V6djpbdtdBddj7tbXNGQ9aPRlo>

<sup>13</sup> NAAU suggests involving advocates in organizing the exchange of prisoners of war. [viewed date: 04 September 2022]. Available from: <https://unba.org.ua/news/7413-naau-proponue-doluchiti-advokativ-do-organizacii-obminu-vijs-kovopolonenih.html>

<sup>14</sup> The Bar condemns military actions against Ukrainian citizens - decision of the ACU dated March 4, 2022. [viewed date: 04 September 2022]. Available from: [https://unba.org.ua/news/7328-advokatura-zasudzhue-vijs-kovi-dii-proti-ukrains-kih-gromadyan-rishennya-ACU.html?fbclid=IwAR3NeumEI64PQ7WzgRoQBEeL-VkbFQJQ\\_BbbFU4123G8\\_8HI3OVFg78EqYo](https://unba.org.ua/news/7328-advokatura-zasudzhue-vijs-kovi-dii-proti-ukrains-kih-gromadyan-rishennya-ACU.html?fbclid=IwAR3NeumEI64PQ7WzgRoQBEeL-VkbFQJQ_BbbFU4123G8_8HI3OVFg78EqYo)

### 3. Legislative changes under the martial law in Ukraine

At the initiative of the Coordination Center for the provision of legal assistance, by Resolution of the Cabinet of Ministers of Ukraine No. 420 dated April 09, 2022, amendments were made to the Procedure for the exercise of powers by the State Treasury Service in a special regime under martial law. The costs of the services of advocates cooperating with the free legal aid system received the status of protected budget expenses.<sup>15</sup>

The Bar Council of Ukraine during March adopted decisions that simplified access to the advocate profession. Thus, the filing of documents and the passage of an internship by persons wishing to become advocates have been simplified.

Since, under the conditions of martial law and active hostilities in some regions, it became objectively impossible to obtain these documents, the Bar Council allowed those wishing to take the exams to certify the relevant information in the format of personal statements. Subsequently, after the lifting of martial law, these persons will have to provide the necessary documents.<sup>16</sup>

Undertaking military or alternative service during martial law will not be considered a violation of the incompatibility requirement with the status of an advocate. This is stated in the decision of the Bar Council of Ukraine No. 24 dated March 3, 2022.<sup>17</sup>

It should be noted that the Unified Register of Court Decisions became open to advocates only on June 20 this year. However, the resumption of access for judges and law enforcement officials was reported in early April. At the same time, long-lasting non-provision of such access to advocates does not correlate with the provisions of the Constitution of Ukraine, in particular, on exclusive representation in courts, the right to professional legal assistance, and protection

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<sup>15</sup> On the approval of the Procedure for the exercise of powers by the State Treasury Service in a special regime under martial law. Resolution of the Cabinet of Ministers of Ukraine dated June 9 2021 p. N 590. [viewed date: 04 September 2022]. Available from: <https://ips.ligazakon.net/document/view/Kp210590?an=1>

<sup>16</sup> During martial law, admission to qualifying exams is possible without criminal record certificates and certificates of knowledge of the Ukrainian language. [viewed date: 04 September 2022]. Available from: <https://unba.org.ua/news/7355-na-chas-voennogo-stanu-dopusk-do-kvalifisitiv-mozhlivij-bez-dovidok-pro-nesudimist-i-sertifikativ-pro-znannya-ukrains-koi-movi-rishennya-ACU.html>

<sup>17</sup> About the peculiarities of military or alternative (non-military) service by advocates during martial law. Decision of NAAU dated March 3, 2022. [viewed date: 03 September 2022]. Available from: [https://unba.org.ua/assets/uploads/legislation/rishennya/2022-03-24-r-shennya-ACU-24\\_6244383f5d80a.pdf](https://unba.org.ua/assets/uploads/legislation/rishennya/2022-03-24-r-shennya-ACU-24_6244383f5d80a.pdf)

from criminal charges (Articles 59, 131-2 of the Constitution of Ukraine). Thus, the implementation of the constitutional function of providing legal assistance by advocates was significantly complicated.

#### 4. Changes in the criminal procedural legislation of Ukraine

A number of amendments to the Criminal Procedure Code of Ukraine (CPC) have been adopted also:

“On Improving the Efficiency of Pre-trial Investigation “In Hot Pursuit” and Counteracting Cyber Attacks” dated March 15, 2022.<sup>18</sup>

On the procedure for canceling a measure of restraint for military service on conscription for a special period of March 15, 2022.<sup>19</sup>

On May 1, the Law of Ukraine “On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings under Martial Law” entered into force, signed by the Chairman of the Verkhovna Rada on April 14, 2022.<sup>20</sup>

The law provides for the expansion of the prosecutor’s powers by delegating to him certain powers of the investigating judge in cases where there is no objective possibility of exercising certain powers by the investigating judge within the time limits established by law, in particular, to resolve the issue of application of measures to ensure criminal proceedings, seizure of property, etc.

Also, the powers of the head of the prosecutor's office include the selection of a measure of restraint in the form of detention for up to 30 days in cases of grave or especially grave crimes, if a delay in choosing a measure of restraint can lead to the loss of traces of a criminal offense or the suspect's escape. (sec. 2 of article 615 of the Code of Criminal Procedure).

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<sup>18</sup> The Law of Ukraine on Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On Electronic Communications" on improving the effectiveness of pre-trial investigation on "hot leads" and countering cyberattacks. [viewed date: 01 September 2022]. Available from: <https://bit.ly/3M36TMB>

<sup>19</sup> Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings in Martial Law" [viewed date: 04 September 2022]. Available from: <https://bit.ly/3M36TMB>

<sup>20</sup> Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings in Martial Law". [viewed date: 04 September 2022]. Available from: [https://ips.ligazakon.net/document/view/T222201?utm\\_source=jurliga.ligazakon.net&utm\\_medium=news&utm\\_content=jl03](https://ips.ligazakon.net/document/view/T222201?utm_source=jurliga.ligazakon.net&utm_medium=news&utm_content=jl03)

It seems that the law should introduce a procedure for further confirmation by the investigating judge of such a decision legitimacy as soon as possible or after the termination or cancellation of martial law. In addition, the legislator regulated a new time limit for detention without a determination by an investigating judge, a court, or a decision by the head of the prosecutor's office during martial law, which cannot exceed 216 hours from the moment of detention. The new detention period is a little less than 11 days, which is quite a lot for a measure of restraint. In my opinion, such a term is disproportionate even under martial law.

Thus, at the moment, not only is it possible to extend the period of detention but also the procedure for detaining a person has been simplified - without any judicial control, which has been in effect so far. However, this period (216 hours) is not consistent with the provisions of Art. 211 of the Criminal Procedure Code of Ukraine and Art.29 of the Constitution of Ukraine, according to which the period of detention of a person without a decision of the investigating judge, the court cannot exceed 72 hours from the moment of detention,

In accordance with the Decision of the Constitutional Court of Ukraine N 17-rp / 2010 dated June 29, 2010, the detainee has the right to demand from court to check not only compliance with the procedural law on the basis of which the detention was carried out, but also the validity of the suspicion that served as the basis for the detention, the legality of the purpose, under which it was applied and whether it was necessary and justified in the particular circumstances.<sup>21</sup>

A similar position is supported by the European Court of Human Rights in its judgments of October 23, 2008, in the case of "Soldatenko v. Ukraine", of November 06, 2008, in the case of "Yeloev v. Ukraine", of February 19, 2009, in the case of "Nikolay Kucherenko v. Ukraine".<sup>22</sup>

According to the following short story, if it is impossible for the defense attorney to appear, the investigator, the prosecutor ensures his remote participation using technical means (video, audio communications). And the

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<sup>21</sup> Decision of the Constitutional Court of Ukraine N 17-rp/2010 dated June 29, 2010. [viewed date: 04 September 2022]. Available from: <https://zakon.rada.gov.ua/laws/show/v017p710-10#Text>

<sup>22</sup> The right to a fair trial: the practice of the European Court of Human Rights. [viewed date: 04 September 2022]. Available from: [https://minjust.gov.ua/m/str\\_7474](https://minjust.gov.ua/m/str_7474); Soldatenko v. Ukraine] (N 2440/07) [viewed date: 04 September 2022]. Available from: <http://www.echr.ru/documents/doc/2468137/2468137-002.htm>

decision to conduct a trial in this mode is taken by the court without taking into account the opinion and wishes of the accused. It should be recalled that in normal conditions, remote criminal proceedings were not possible if the accused objected to this.

Indeed, the conduct of a separate procedural action, including when it is impossible for the defense counsel to appear, using technical means, can be a measure that ensures the effective participation of the defense counsel in the proceedings. But, at the same time, in each case it is necessary to establish whether the relevant officials made necessary efforts to ensure such participation. After all, it is precisely the question that may subsequently delve into the ECtHR.

It seems that in this situation, the opinion of the advocate and his client on the possibility of implementing “distance protection” should be considered, taking into account the requirements of the Convention regarding the confidentiality of communication with an advocate, the absence of which during videoconferences is mentioned in the decisions of the ECtHR in the cases “Sakhnovsky v. Russia”, “Gorbunov and Gorbachev against Russia”.<sup>23</sup>

Thus, it is possible to identify several trends in changes to the criminal procedural legislation of Ukraine under the martial law: firstly, it is a limitation of the main procedural guarantees and a significant imbalance with a bias towards ensuring precisely the public interest and, secondly, the delegation of the powers of the investigating judge to the head of the prosecutor's office.

At the same time, there is also movement towards the restoration of procedural guarantees of judicial control of the right to human freedom, which should be supported.

Thus, the draft Law of Ukraine dated May 11, 2022, on amendments to the Criminal Procedure Code of Ukraine to improve certain provisions of the pre-trial investigation under martial law (up to 30 days to persons suspected of committing certain crimes. Accordingly, the rules on detention for a period of 216 hours without a decision of the investigating judge and a decision of the head of the prosecutor's office are excluded.<sup>24</sup>

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<sup>23</sup> Glowiyuk I., Drozdov O., Teteryatnik G., Fomina T., Rogalska V., Zavtur V. Special regime of pre-trial investigation, trial under martial law: scientific and practical commentary on Section IX-1 of the Criminal Procedure Code of Ukraine. Lviv-Odesa-Kharkiv, 2022. As of May 3, 2022. 58 p.

<sup>24</sup> Draft Law of Ukraine dated May 11, 2022, on amendments to the Criminal Procedure Code of Ukraine to improve certain provisions of the pre-trial investigation under martial law № 7370.

And the Law of Ukraine No. 2462-IX "On Amendments to the Criminal Procedure Code of Ukraine regarding the improvement of certain provisions of the pre-trial investigation under martial law", which entered into force on August 25, 2022, changed the list of powers granted to the head of the prosecutor's office instead of the investigating judge in conditions of martial law in accordance with paragraph 2 of part 1 of article 615 of the Criminal Procedure Code of Ukraine (it is proposed to limit to those provided for in articles 140, 163, 164, 170, 173, 206, 219, 232, 233, 234, 235, 245, 245, 248, 250 and 294 of the Code).

The procedure for detaining a person under martial law has been clarified (clause 6, part 1, article 615 of the Code of Criminal Procedure of Ukraine). So, if there are cases for detaining a person without a determination of an investigating judge, a court, as defined by Article 208 of the Code of Criminal Procedure of Ukraine, or there are reasonable circumstances that give reason to believe that a possible action of a person suspected of committing a crime in order to evade criminal liability could take place, an authorized official a person has the right to detain such a person without the determination of an investigating judge or court. The period of detention of a person without a decision of the investigating judge or court may exceed the period determined by Article 211 of the Code of Criminal Procedure of Ukraine. (72 hours from the moment of detention).

Thus, the main tendency is to improve the implementation order of criminal proceedings by limitation of criminal procedural guarantees of rights individuals and simplification of many formalized criminal procedural procedures in view of those conditions that may potentially arise in armed conflict conditions.<sup>25</sup>

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[viewed date: 04 September 2022]. Available from: [https://jurliga.ligazakon.net/ru/news/212293\\_rada-predvaritelno-odobrila-izmeneniya-v-zakonodatelstvo-otnositelno-ugolovnykh-i-administrativnykh-pravonarusheniy-v-usloviyakh-voennogo-polozheniya](https://jurliga.ligazakon.net/ru/news/212293_rada-predvaritelno-odobrila-izmeneniya-v-zakonodatelstvo-otnositelno-ugolovnykh-i-administrativnykh-pravonarusheniy-v-usloviyakh-voennogo-polozheniya)

<sup>25</sup> Hlovyuk I.V. Trends of changes in criminal justice in conditions of war and human rights / Glowiyuk I.V., Zavtur V.A. // The Russian-Ukrainian war (2014-2022): historical, political, cultural-educational, religious, economic, and legal aspects : Scientific monograph. - Riga, Latvia: "Baltija Publishing", 2022. - R. 1123-1129. [viewed date: 04 September 2022]. Available from: <https://doi.org/10.30525/978-9934-26-223-4-139>

## 5. Experience of countries affected by military aggression in terms of restoration and protection of human rights

The protection of human rights and freedoms remains the primary task of the bar, and the principles of its organization and activity must be observed as a condition for the proper performance of the bar's powers, ensuring the independence, autonomy, and professionalism of this unique human rights institution<sup>26</sup>. In the conditions of the post-war reconstruction of Ukraine, the legal profession is one of the important guarantees of ensuring the rights of citizens who suffered from the consequences of armed aggression. The experience of countries that have gone through military aggression in recent decades is of interest, from the point of view of the experience of restoring and protecting the rights of persons affected by military actions.

Peace processes and political negotiations aimed at ending violent conflict almost always have to address past human rights violations. In the peace processes that ended the wars in Guatemala, South Africa, El Salvador, Sierra Leone, and Colombia, and in the ongoing negotiations in countries such as Libya, South Sudan, Syria, Venezuela and Yemen, transitional justice has emerged as a critical issue<sup>27</sup>. Countries in the process of conceptualizing their transitional justice mechanisms should understand that there are no ready-made recipes for successful implementation of transitional justice mechanisms, and they are neither neutral nor apolitical. The mechanisms used had to be carefully and transparently planned, contextualized, and supported by a detailed gender analysis of pre-conflict and post-conflict processes. For example, in Bosnia and Herzegovina, the earliest measures in the field of transitional justice took place already during the war, although at that time this concept was unknown to Bosnian society. However, many of the war crimes cases in Bosnia and Herzegovina's courts during and immediately after the war were marked by

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<sup>26</sup> O Khotynska-Nor, N Bakaianova, 'Transformation of Bar in Wartime in Ukraine: on the Way to Sustainable Development of Justice (On the Example of Odesa Region)' 2022 3(15) Access to Justice in Eastern Europe 146–154. DOI: <https://doi.org/10.33327/AJEE-18-5.2-n000322>

<sup>27</sup> International Center for Transitional Justice. [viewed date: 31 September 2022]. Available from: <https://www.ictj.org/peace-processes>

allegations of illegal arrests and unfair trials<sup>28</sup>. However, given the mass of violations, not all war criminals were brought to justice.

Researchers of the problems of overcoming the military conflict in Bosnia and Herzegovina note that this country is one of the first to grant a special status to those who have survived sexual violence<sup>29</sup>. This special status allows these individuals (men and women) to be recognized as civilian victims of war without the need to prove 60% bodily injury. The corresponding changes were adopted in the legislation in 2006 after a campaign carried out by civil society organizations - mainly those working with victims of the relevant crimes. According to the terms of this law, some of the civilian victims of the war have the opportunity to obtain medical insurance or solve housing issues - within the framework of benefits directly tied to their status as civilian victims of the war. And although these measures are not systematic in nature, nor are they implemented throughout Bosnia and Herzegovina, the experience of this country is very important both for Ukraine and for representatives of the legal community, who have the opportunity to lobby for similar changes for their adoption in the legislation of Ukraine. In our opinion, the more than 60,000-strong army of lawyers of Ukraine, which is still active in the protection of human rights and legitimate interests, should be involved in the post-conflict peace process in general, and in the implementation of transitional justice mechanisms in particular. Along with lawyers, civil society organizations that work with the problems of observing and restoring human rights should play an important role in defining and creating the specified mechanism. By finding the connection between them and combining these two segments, it is possible to create opportunities for the proper passage of the process of restoration of these rights.

In addition, we believe that fully confronting the legacy of massive human rights violations requires a multifaceted strategy that involves intervention at the institutional, legislative, civil society, community, and individual levels. Reforming

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<sup>28</sup> War Crime Trials Before the Domestic Courts of Bosnia and Herzegovina: Progress and Obstacles, 2005, p. 4, [viewed date: 30 September 2022]. Available from: <http://www.oscebih.org/documents/1407-eng.pdf>

<sup>29</sup> Pravosuddya perehidnoho periodu v bosniji i hertsehovyni-vyklyky ta mozhlyvosti/Правосуддя перехідного періоду в Боснії і Герцеговині – виклики та можливості. Гельсінська спілка прав людини. 25.07.2016. [viewed date: 30 September 2022]. Available from: <https://helsinki.org.ua/articles/pravosuddya-perehidnoho-periodu-v-bosniji-i-hertsehovyni-vyklyky-ta-mozhlyvosti/>



state institutions to increase their legitimacy and integrity is a central element of such a strategy. This is extremely important for seeking redress, liability, and prevention.

## **6. Legal regulation issues in the organization and activity of the legal profession during the post-war reconstruction of Ukraine**

On June 23, 2022, the European Council adopted a historic decision to grant Ukraine the status of a candidate for membership in the European Union, which imposes additional obligations on the Ukrainian authorities to fulfill the requirements for the approximation of the legislation of Ukraine to the law of the European Union. To achieve the strategic goal of full membership in the European Union, Ukraine needs to take several important steps, in particular, to bring the legislation of Ukraine closer to the law of the European Union.

The goal of the post-war reform is to bring the organization and activity of the bar to the best international standards, strengthen the protection of human and citizen rights and freedoms, the institutional independence of the bar, the professional rights of the bar and guarantee of bar activity, the creation of favorable conditions for the provision of effective and high-quality legal assistance to persons affected by the war, ensuring completeness of their access to justice both in Ukraine and abroad.

The Law of Ukraine "On Advocacy and Advocates activity" dated July 5, 2012, contains significant shortcomings that have an obvious negative impact on the fulfillment of the special social role of advocacy. Since 2016, this Law has not been brought into line with the Constitution of Ukraine, after the amendments regarding justice.<sup>30</sup> In particular, in the part of determining the place of advocacy in the system of judicial power of Ukraine. It is also necessary to legislatively establish the place and role of this human rights institution, its functions, tasks, and significance to society.<sup>31</sup>

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<sup>30</sup> The project of the recovery plan of Ukraine. Materials of the working group "European integration". July 2022. [viewed date: 03 September 2022]. Available from: <https://www.kmu.gov.ua/storage/app/sites/1/recoveryrada/ua/european-integration.pdf>

<sup>31</sup> We have repeatedly drawn attention to the need to bring the Law on Advocacy and Advocacy into compliance with the Constitution of Ukraine and international standards in our works: Vilchuk T.B. (2022). Bar and judiciary: historical aspects of interaction. *Law Forum*, 72 (1), 50–61. [viewed date: 03 September 2022]. Available from: <http://doi.org/10.5281/zenodo.6783715> ; Vilchuk, T. (2018). Duties of an advocate to a court and to a client: foreign scientific doctrine and proposals

In general, we support the proposals made by the "European Integration" working group under the National Council for the Recovery of Ukraine from the Consequences of War, formed in July 2022. In particular, the need to bring the Law of Ukraine "On Advocacy and Advocates activity" into compliance with international standards, in particular, the basic principles of the legal profession of the European Union.

In addition, we consider it necessary to introduce certain measures regarding the post-war reform of the Ukrainian bar, including the expansion of professional rights of advocates and guarantees of advocacy practice; increasing the level of protection of advocates' confidentiality; ensuring the implementation of the principle of competition in judicial proceedings, equality of procedural rights of the parties, in particular providing advocates with identified access to state registers; bringing the order of keeping the Unified Register of Advocates of Ukraine in line with the requirements of the Law of Ukraine "On Public Electronic Registers"; providing access to the work of a advocate's assistant for persons who have acquired a higher legal education at the "Bachelor" educational level; regulate the issue of success fees in certain categories of cases, in particular, to facilitate access to legal aid for persons who have suffered damage as a result of war, etc.

At the same time, we believe that such proposals regarding the decentralization of the advocate profession contradict such international documents as the PACE Resolutions (Conclusion N.º 190 (1995) of the Parliamentary Assembly of the Council of Europe on Ukraine's application to join the Council of Europe), which was approved by the Venice Commission in 2011).

According to the opinion of the Bar Council of Ukraine, expressed in Decision N.º 49 of August 1, 2022 "On the Appeal of the Bar Council of Ukraine to International and Ukrainian Institutions on Reforming the Bar of Ukraine", there are devastating European integration risks for our country, which only recently received the status of a candidate for accession to the EU, as they essentially destroy the European integration gains in the field of advocacy.<sup>32</sup>

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<sup>32</sup> Decision No. 49 of August 1, 2022 "On the Appeal of the Bar Council of Ukraine to International and Ukrainian Institutions on Reforming the Bar of Ukraine." [viewed date: 03 September 2022].

## Conclusions

1. Taking into account the current situation with the administration of justice during wartime, the long-lasting lack of access for advocates to the Unified Register of Court Decisions, the provision of legal assistance by advocates during the introduction of martial law in Ukraine was and still significantly limited.

2. The bar was able to reorganize quite flexibly in terms of adopting acts regulating its organization and activities, in particular with regard to the access to the advocacy profession, disciplinary liability, etc.

3. Despite the positive trends in the development of criminal procedural legislation under the martial law towards the restoration of procedural guarantees of judicial control of the right to human freedom, some changes still provide for certain restrictions on the right to professional legal assistance provided for both by national legislation and international standards on protection of human rights.

4. The Law "On Advocacy and Advocates activity" must be harmonized with the Constitution of Ukraine, in particular, in terms of determining the place of advocacy in the judicial system of Ukraine, as well as determining the role of the advocacy, its functions, and tasks.

5. With regard to the restoration of Ukraine in the post-war period, the advocate's profession is one of the most important guarantees for ensuring the rights of citizens affected by the recent violent aggression. The task of reforming the bar in the post-war period is to comply with the organization and activities of the bar with the highest international standards, create the necessary conditions for providing practical legal assistance to war victims, and ensure full access to justice.

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